

# The Law of Higher Education

*A Comprehensive Guide to  
Legal Implications of Administrative  
Decision Making*

VOLUME I

FOURTH EDITION

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*William A. Kaplin*

*Barbara A. Lee*

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# Contents

Notice to Instructors	vi
Notice of Web Site and Periodic Supplements	viii
Preface	xxiii
Acknowledgments	xxxiii
The Authors	xxxvii

## **VOLUME I**

### **PART ONE PERSPECTIVES AND FOUNDATIONS 1**

<b>1 Overview of Higher Education Law</b>	<b>3</b>
1.1 How Far the Law Reaches and How Loud It Speaks	3
1.2 Evolution of Higher Education Law	9
1.3 The Governance of Higher Education	22
1.3.1 <i>Basic concepts and distinctions</i>	22
1.3.2 <i>Internal governance</i>	24
1.3.3 <i>External governance</i>	25
1.4 Sources of Higher Education Law	29
1.4.1 <i>Overview</i>	29
1.4.2 <i>External sources of law</i>	30
1.4.2.1 <i>Federal and state constitutions</i>	30
1.4.2.2 <i>Statutes</i>	30
1.4.2.3 <i>Administrative rules and regulations</i>	31
1.4.2.4 <i>State common law</i>	32
1.4.2.5 <i>Foreign and international law</i>	32

1.4.3	<i>Internal sources of law</i>	35
1.4.3.1	<i>Institutional rules and regulations</i>	35
1.4.3.2	<i>Institutional contracts</i>	35
1.4.3.3	<i>Academic custom and usage</i>	35
1.4.4	<i>The role of case law</i>	37
1.5	<b>The Public-Private Dichotomy</b>	40
1.5.1	<i>Overview</i>	40
1.5.2	<i>The state action doctrine</i>	42
1.5.3	<i>Other bases for legal rights in private institutions</i>	54
1.6	<b>Religion and the Public-Private Dichotomy</b>	57
1.6.1	<i>Overview</i>	57
1.6.2	<i>Religious autonomy rights of religious institutions and their personnel</i>	59
1.6.3	<i>Governmental support for religious institutions</i>	61
1.6.4	<i>Religious autonomy rights of individuals in public postsecondary institutions</i>	71
1.7	<b>The Relationship Between Law and Policy</b>	75
	<b>Selected Annotated Bibliography</b>	81
<b>2</b>	<b>Legal Planning and Dispute Resolution</b>	<b>90</b>
2.1	<b>Legal Liability</b>	90
2.1.1	<i>Overview</i>	90
2.1.2	<i>Types of liability</i>	91
2.1.3	<i>Agency law</i>	91
2.1.4	<i>Enforcement mechanisms</i>	92
2.1.5	<i>Remedies for legal violations</i>	93
2.1.6	<i>Avoiding legal liability</i>	93
2.2	<b>Litigation in the Courts</b>	93
2.2.1	<i>Overview</i>	93
2.2.2	<i>Access to court</i>	95
2.2.2.1	<i>Jurisdiction</i>	95
2.2.2.2	<i>Other technical doctrines</i>	100
2.2.2.3	<i>Statutes of limitations</i>	102
2.2.2.4	<i>Exhaustion of remedies</i>	103
2.2.3	<i>Pretrial and trial issues</i>	105
2.2.3.1	<i>Class action suits</i>	105
2.2.3.2	<i>Pretrial discovery</i>	107
2.2.3.3	<i>Issues regarding evidence</i>	108
2.2.3.4	<i>Summary judgments and motions to dismiss</i>	113
2.2.3.5	<i>Standards of judicial review and burdens of proof</i>	114
2.2.3.6	<i>Final judgments</i>	118
2.2.4	<i>Judicial remedies</i>	121
2.2.4.1	<i>Overview</i>	121
2.2.4.2	<i>Money damages</i>	121
2.2.4.3	<i>Injunctions</i>	122
2.2.4.4	<i>Attorney's fees</i>	123
2.2.4.5	<i>Contempt of court</i>	125
2.2.5	<i>Judicial (academic) deference</i>	126
2.2.6	<i>Managing litigation and the threat of litigation</i>	132
2.3	<b>Alternative Dispute Resolution</b>	134
2.3.1	<i>Overview</i>	134
2.3.2	<i>Types of ADR</i>	135
2.3.3	<i>Applications to colleges and universities</i>	138

2.4	Legal Services	140
2.4.1	<i>Organizational arrangements for delivery of legal services</i>	140
2.4.2	<i>Treatment law and preventive law</i>	144
2.4.3	<i>Ethical issues</i>	150
2.5	Institutional Management of Liability Risk	150
2.5.1	<i>Overview and suggestions</i>	150
2.5.2	<i>Risk avoidance and risk control</i>	151
2.5.3	<i>Risk transfer</i>	152
2.5.3.1	<i>Liability insurance</i>	152
2.5.3.2	<i>Hold-harmless and indemnification agreements</i>	153
2.5.3.3	<i>Releases and waivers</i>	156
2.5.4	<i>Risk retention</i>	157
2.5.5	<i>Legal limits on authority to transfer risk</i>	157
	Selected Annotated Bibliography	160

## **PART TWO THE COLLEGE AND ITS GOVERNING BOARD, PERSONNEL, AND AGENTS 165**

<b>3</b>	<b>The College and Its Trustees and Officers</b>	<b>167</b>
3.1	The Question of Authority	167
3.2	Sources and Scope of Authority and Liability	171
3.2.1	<i>Trustees</i>	171
3.2.1.1	<i>Overview</i>	171
3.2.1.2	<i>Trustees of public colleges</i>	172
3.2.1.3	<i>Trustees of private colleges</i>	174
3.2.2	<i>Other officers and administrators</i>	181
3.2.3	<i>Campus organizations</i>	187
3.2.4	<i>Trustee liability</i>	188
3.3	Institutional Tort Liability	189
3.3.1	<i>Overview</i>	189
3.3.2	<i>Negligence</i>	195
3.3.2.1	<i>Premises liability</i>	198
3.3.2.2	<i>Liability for injuries related to on-campus instruction</i>	201
3.3.2.3	<i>Liability for injuries in off-campus courses</i>	203
3.3.2.4	<i>Liability for cocurricular and social activities</i>	206
3.3.2.5	<i>Student suicide</i>	210
3.3.2.6	<i>Liability for injuries related to outreach programs</i>	212
3.3.3	<i>Educational malpractice</i>	213
3.3.4	<i>Defamation</i>	217
3.3.5	<i>Other sources of tort liability</i>	222
3.4	Institutional Contract Liability	225
3.5	Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability)	230

3.6	Captive and Affiliated Organizations	241
3.6.1	Overview	241
3.6.2	Structural problems	242
3.6.3	Taxation issues	244
3.6.4	Application of regulatory laws	246
3.6.5	“State action” issues	248
3.6.6	Liability issues	249
	Selected Annotated Bibliography	250
<b>4</b>	<b>The College and Its Employees</b>	<b>255</b>
4.1	Overview of Employment Relationships	255
4.2	Defining the Employment Relationship	258
4.2.1	Employees versus independent contractors	258
4.2.2	Where is the workplace?	261
4.3	Employment Contracts	261
4.3.1	Defining the contract	261
4.3.2	The at-will doctrine	262
4.3.3	Sources, scope, and terms of the contract	263
4.3.3.1	Sources of the contract	263
4.3.3.2	Contract interpretation	263
4.3.3.3	Employee handbooks as contracts	265
4.3.3.4	Other contract claims	266
4.3.3.5	Contract rescission	267
4.3.3.6	Drug testing and medical screening	267
4.3.3.7	Executive contracts	270
4.3.4	Amendment of the contract	271
4.3.5	Waiver of contract rights	272
4.3.6	Legal planning with contracts	273
4.4	Civil Service Rules	275
4.5	Collective Bargaining	277
4.5.1	Overview	277
4.5.2	The public-private dichotomy in collective bargaining	278
4.5.2.1	Bargaining at private colleges	279
4.5.2.2	Collective bargaining in religiously affiliated institutions	282
4.5.2.3	Bargaining at public colleges	286
4.5.3	Organization, recognition, and certification	287
4.5.4	Bargainable subjects	293
4.5.5	Collective bargaining and antidiscrimination laws	298
4.5.6	Students and collective bargaining	301
4.6	Other Employee Protections	303
4.6.1	Occupational Safety and Health Act	303
4.6.2	Fair Labor Standards Act	305
4.6.3	Employee Retirement Income Security Act	311
4.6.4	Family and Medical Leave Act	313
4.6.5	Immigration laws	317
4.6.6	Workers’ compensation laws	320
4.6.7	Unemployment compensation laws	325
4.6.8	Whistleblower protections	327
4.6.9	Uniformed Services Employment and Reemployment Rights Act	330

4.7	Personal Liability of Employees	332
4.7.1	<i>Overview</i>	332
4.7.2	<i>Tort liability</i>	332
4.7.2.1	<i>Overview</i>	332
4.7.2.2	<i>Negligence</i>	334
4.7.2.3	<i>Defamation</i>	337
4.7.2.4	<i>Other tort claims</i>	342
4.7.3	<i>Contract liability</i>	344
4.7.4	<i>Constitutional liability (personal liability under Section 1983)</i>	346
4.7.4.1	<i>Qualified immunity</i>	346
4.7.4.2	<i>Issues on the merits: State-created dangers</i>	353
4.8	Performance Management Issues	357
4.8.1	<i>Pre-hire issues</i>	357
4.8.2	<i>Evaluation</i>	359
4.8.3	<i>Discipline</i>	360
4.8.4	<i>Promotion</i>	362
4.8.5	<i>Termination</i>	363
	Selected Annotated Bibliography	365
<b>5</b>	<b>Nondiscrimination and Affirmative Action in Employment</b>	<b>371</b>
5.1	The Interplay of Statutes, Regulations, and Constitutional Protections	371
5.2	Sources of Law	374
5.2.1	<i>Title VII</i>	374
5.2.2	<i>Equal Pay Act</i>	383
5.2.3	<i>Title IX</i>	386
5.2.4	<i>Section 1981</i>	389
5.2.5	<i>Americans With Disabilities Act and Rehabilitation Act of 1973</i>	391
5.2.6	<i>Age Discrimination in Employment Act</i>	399
5.2.7	<i>Constitutional prohibitions against employment discrimination</i>	403
5.2.8	<i>Executive Orders 11246 and 11375</i>	405
5.3	The Protected Classes	406
5.3.1	<i>Race</i>	406
5.3.2	<i>National origin and alienage</i>	408
5.3.3	<i>Sex</i>	411
5.3.3.1	<i>Overview</i>	412
5.3.3.2	<i>Pregnancy and health benefits discrimination</i>	412
5.3.3.3	<i>Sexual harassment</i>	414
5.3.3.4	<i>Application to athletics coaches</i>	420
5.3.4	<i>Disability</i>	425
5.3.5	<i>Age</i>	430
5.3.6	<i>Religion</i>	433
5.3.7	<i>Sexual orientation</i>	435
5.4	Affirmative Action	442
5.4.1	<i>Overview</i>	442
5.4.2	<i>Affirmative action under Title VII</i>	445
5.4.3	<i>Affirmative action under the equal protection clause</i>	449
5.4.4	<i>State regulation of affirmative action</i>	455
5.4.5	<i>Conclusions</i>	455
5.5	Application of Nondiscrimination Laws to Religious Institutions	456
	Selected Annotated Bibliography	462

## **PART THREE THE COLLEGE AND ITS FACULTY 467**

### **6 Faculty Employment Issues 469**

- 6.1 Overview 469
- 6.2 Faculty Contracts 469
  - 6.2.1 *Overview* 469
  - 6.2.2 *Statutory versus contract rights in public institutions* 476
  - 6.2.3 *Academic custom and usage* 479
  - 6.2.4 *Part-time faculty* 482
  - 6.2.5 *Contracts in religious institutions* 485
- 6.3 Faculty Collective Bargaining 490
  - 6.3.1 *Bargaining unit eligibility of faculty* 490
  - 6.3.2 *Coexistence of collective bargaining and traditional academic practices* 496
- 6.4 Application of Nondiscrimination Laws to Faculty Employment Decisions 501
  - 6.4.1 *Overview* 501
  - 6.4.2 *Judicial deference and remedies for tenure denial* 501
  - 6.4.3 *Challenges to employment decisions* 510
    - 6.4.3.1 *Race and national origin discrimination claims* 510
    - 6.4.3.2 *Sex discrimination* 513
    - 6.4.3.3 *Disability discrimination* 515
    - 6.4.3.4 *Age discrimination* 516
  - 6.4.4 *Challenges to salary decisions* 517
  - 6.4.5 *Other workplace issues* 521
- 6.5 Affirmative Action in Faculty Employment Decisions 522
- 6.6 Standards and Criteria for Faculty Personnel Decisions 528
  - 6.6.1 *General principles* 528
  - 6.6.2 *Termination of tenure for cause* 531
  - 6.6.3 *Denial of tenure* 536
  - 6.6.4 *Post-tenure review* 542
- 6.7 Procedures for Faculty Employment Decisions 544
  - 6.7.1 *General principles* 544
  - 6.7.2 *The public faculty member's right to constitutional due process* 547
    - 6.7.2.1 *Nonrenewal of contracts* 547
    - 6.7.2.2 *Denial of tenure* 552
    - 6.7.2.3 *Termination of tenure* 557
    - 6.7.2.4 *Other personnel decisions* 567
  - 6.7.3 *The private faculty member's procedural rights* 571
  - 6.7.4 *Implementing procedural requirements* 575
- 6.8 Closure, Merger, and Reduction in Force 579
  - 6.8.1 *Overview* 579
  - 6.8.2 *Contractual considerations* 579
  - 6.8.3 *Constitutional considerations* 587
  - 6.8.4 *Statutory considerations* 594
  - 6.8.5 *Preparing for closures and reductions in force* 596

### **Selected Annotated Bibliography 597**



<b>7</b>	<b>Faculty Academic Freedom and Freedom of Expression</b>	<b>605</b>
7.1	General Concepts and Principles	605
7.1.1	<i>Faculty freedom of expression in general</i>	605
7.1.2	<i>Academic freedom: Basic concepts and distinctions</i>	613
7.1.3	<i>Professional versus legal concepts of academic freedom</i>	615
7.1.4	<i>The foundational constitutional law cases</i>	617
7.1.5	<i>External versus internal restraints on academic freedom</i>	622
7.1.6	<i>“Institutional” academic freedom</i>	625
7.2	Academic Freedom in Teaching	627
7.2.1	<i>In general</i>	627
7.2.2	<i>The classroom</i>	628
7.2.3	<i>Grading</i>	644
7.2.4	<i>Methods of analyzing academic freedom in teaching claims</i>	648
7.2.5	<i>Private institutions</i>	653
7.3	Academic Freedom in Research and Publication	654
7.4	Academic Freedom in Institutional Affairs	665
7.4.1	<i>In general</i>	665
7.4.2	<i>Speech on governance matters</i>	667
7.4.3	<i>Intramural speech on extramural public affairs</i>	683
7.5	Academic Freedom in Private Life	685
7.5.1	<i>In general</i>	685
7.5.2	<i>Extramural speech</i>	688
7.6	Administrators’ Authority Regarding Faculty Academic Freedom and Freedom of Expression	693
7.7	Protection of Confidential Academic Information: The “Academic Freedom Privilege”	699
7.7.1	<i>Overview</i>	699
7.7.2	<i>Personnel issues</i>	700
7.7.3	<i>Research findings</i>	706
7.8	Academic Freedom in Religious Colleges and Universities	714
	Selected Annotated Bibliography	717

## **PART FOUR THE COLLEGE AND ITS STUDENTS 723**

### **8 The Student-Institution Relationship 725**

8.1	The Legal Status of Students	725
8.1.1	<i>Overview</i>	725
8.1.2	<i>The age of majority</i>	726
8.1.3	<i>The contractual rights of students</i>	727
8.1.4	<i>Student academic freedom</i>	737
8.1.5	<i>Students’ legal relationships with other students</i>	747
8.2	Admissions	752
8.2.1	<i>Basic legal requirements</i>	752
8.2.2	<i>Arbitrariness</i>	754

8.2.3	<i>The contract theory</i>	755
8.2.4	<i>The principle of nondiscrimination</i>	758
8.2.4.1	<i>Race</i>	758
8.2.4.2	<i>Sex</i>	762
8.2.4.3	<i>Disability</i>	768
8.2.4.4	<i>Age</i>	775
8.2.4.5	<i>Residence</i>	777
8.2.4.6	<i>Immigration status</i>	778
8.2.5	<i>Affirmative action programs</i>	781
8.2.6	<i>Readmission</i>	803
8.3	<b>Financial Aid</b>	808
8.3.1	<i>General principles</i>	808
8.3.2	<i>Federal programs</i>	812
8.3.3	<i>Nondiscrimination</i>	817
8.3.4	<i>Affirmative action in financial aid programs</i>	820
8.3.5	<i>Discrimination against nonresidents</i>	825
8.3.6	<i>Discrimination against aliens</i>	833
8.3.6.1	<i>Documented (immigrant and nonimmigrant) aliens</i>	833
8.3.6.2	<i>Undocumented aliens</i>	837
8.3.7	<i>Using government student aid funds at religious institutions</i>	840
8.3.8	<i>Collection of student debts</i>	842
8.3.8.1	<i>Federal bankruptcy law</i>	842
8.3.8.2	<i>Withholding certified transcripts</i>	846
8.3.8.3	<i>Debt collection requirements in federal student loan programs</i>	849
8.4	<b>Student Housing</b>	854
8.4.1	<i>Housing regulations</i>	854
8.4.2	<i>Searches and seizures</i>	861
8.5	<b>Campus Computer Networks</b>	866
8.5.1	<i>Freedom of speech</i>	866
8.5.2	<i>Liability issues</i>	873
8.6	<b>Campus Security</b>	876
8.6.1	<i>Security officers</i>	876
8.6.2	<i>Protecting students against violent crime</i>	880
8.6.3	<i>Federal statues and campus security</i>	885
8.7	<b>Other Support Services</b>	888
8.7.1	<i>Overview</i>	888
8.7.2	<i>Health services</i>	888
8.7.3	<i>Services for students with disabilities</i>	893
8.7.4	<i>Services for international students</i>	896
8.7.5	<i>Child care services</i>	899
8.7.6	<i>Legal services</i>	900
	<b>Selected Annotated Bibliography</b>	901

## **VOLUME II**

### **9 Rights and Responsibilities of Individual Students 910**

9.1	<b>Disciplinary and Grievance Systems</b>	910
9.1.1	<i>Overview</i>	910
9.1.2	<i>Establishment of systems</i>	911

9.1.3	<i>Codes of student conduct</i>	913
9.1.4	<i>Judicial systems</i>	917
9.2	<b>Disciplinary Rules and Regulations</b>	921
9.2.1	<i>Overview</i>	921
9.2.2	<i>Public institutions</i>	921
9.2.3	<i>Private institutions</i>	924
9.2.4	<i>Disciplining students with psychiatric illnesses</i>	924
9.3	<b>Grades, Credits, and Degrees</b>	927
9.3.1	<i>Overview</i>	927
9.3.2	<i>Awarding of grades and degrees</i>	927
9.3.3	<i>Degree revocation</i>	938
9.3.4	<i>Sexual harassment of students by faculty members</i>	941
9.3.5	<i>Evaluating students with disabilities</i>	959
9.3.5.1	<i>Overview</i>	959
9.3.5.2	<i>The concept of disability</i>	960
9.3.5.3	<i>Notice and documentation of disabilities</i>	962
9.3.5.4	<i>Requests for programmatic or instructional accommodations</i>	965
9.4	<b>Procedures for Suspension, Dismissal, and Other Sanctions</b>	972
9.4.1	<i>Overview</i>	972
9.4.2	<i>Public institutions: Disciplinary sanctions</i>	973
9.4.2.1	<i>Notice</i>	978
9.4.2.2	<i>Hearing</i>	978
9.4.3	<i>Public institutions: Academic sanctions</i>	982
9.4.4	<i>Private institutions</i>	988
9.5	<b>Student Protests and Freedom of Speech</b>	993
9.5.1	<i>Student free speech in general</i>	993
9.5.2	<i>The “public forum” concept</i>	996
9.5.3	<i>Regulation of student protest</i>	1001
9.5.4	<i>Prior approval of protest activities</i>	1008
9.5.5	<i>Court injunctions and criminal prosecutions</i>	1010
9.5.6	<i>Posters and leaflets</i>	1012
9.5.7	<i>Protests in the classroom</i>	1015
9.6	<b>Speech Codes and the Problem of Hate Speech</b>	1017
9.6.1	<i>Hate speech and the campus</i>	1017
9.6.2	<i>The case law on hate speech and speech codes</i>	1019
9.6.3	<i>Guidelines for dealing with hate speech on campus</i>	1026
9.7	<b>Student Files and Records</b>	1029
9.7.1	<i>Family Educational Rights and Privacy Act (FERPA)</i>	1029
9.7.2	<i>State law</i>	1035
9.7.3	<i>The Federal Privacy Act</i>	1040
	<b>Selected Annotated Bibliography</b>	1041
<b>10</b>	<b>Rights and Responsibilities of Student Organizations and Their Members</b>	<b>1050</b>
10.1	<b>Student Organizations</b>	1050
10.1.1	<i>The right to organize</i>	1050
10.1.2	<i>The right not to join, or associate, or subsidize</i>	1056

10.1.3	<i>Mandatory student activities fees</i>	1058
10.1.4	<i>Principle of nondiscrimination</i>	1065
10.1.5	<i>Religious activities</i>	1069
10.2	<b>Fraternities and Sororities</b>	1078
10.2.1	<i>Overview</i>	1078
10.2.2	<i>Institutional recognition and regulation of fraternal organizations</i>	1079
10.2.3	<i>Institutional liability for the acts of fraternal organizations</i>	1087
10.2.4	<i>Liability of fraternal organizations or their members</i>	1093
10.3	<b>The Student Press</b>	1096
10.3.1	<i>General principles</i>	1096
10.3.2	<i>Mandatory student fee allocations to student publications</i>	1098
10.3.3	<i>Permissible scope of institutional regulation</i>	1100
10.3.4	<i>Advertising in student publications</i>	1105
10.3.5	<i>Obscenity</i>	1107
10.3.6	<i>Libel</i>	1108
10.3.7	<i>Obscenity and libel in private institutions</i>	1114
10.4	<b>Athletics Teams and Clubs</b>	1114
10.4.1	<i>General principles</i>	1114
10.4.2	<i>Athletes' due process rights</i>	1115
10.4.3	<i>Athletes' freedom of speech</i>	1119
10.4.4	<i>Pertinent statutory law</i>	1121
10.4.5	<i>Athletic scholarships</i>	1123
10.4.6	<i>Sex discrimination</i>	1127
10.4.7	<i>Discrimination on the basis of disability</i>	1140
10.4.8	<i>Drug testing</i>	1142
10.4.9	<i>Tort liability for athletic injuries</i>	1147
	<b>Selected Annotated Bibliography</b>	1153

## **PART FIVE THE COLLEGE AND LOCAL, STATE, AND FEDERAL GOVERNMENTS 1159**

### **11 Local Governments and the Local Community 1161**

11.1	<b>General Principles</b>	1161
11.2	<b>Zoning and Land Use Regulation</b>	1167
11.2.1	<i>Overview</i>	1167
11.2.2	<i>Public institutions and zoning regulations</i>	1167
11.2.3	<i>Private institutions and zoning regulations</i>	1169
11.2.4	<i>Special exceptions and variances</i>	1173
11.2.5	<i>Amendment of zoning ordinances</i>	1177
11.2.6	<i>Rights of other property owners</i>	1178
11.2.7	<i>Zoning off-campus housing</i>	1180
11.3	<b>Local Government Taxation</b>	1183
11.3.1	<i>General tax concepts</i>	1183
11.3.2	<i>Property taxes</i>	1184
11.3.3	<i>Sales, admission, and amusement taxes</i>	1197
11.4	<b>Student Voting in the Community</b>	1199
11.4.1	<i>Registering to vote</i>	1199
11.4.2	<i>Scheduling elections</i>	1202

11.4.3	<i>Canvassing and registration on campus</i>	1203
11.4.4	<i>Reapportionment</i>	1205
11.5	Relations with Local Police	1206
11.6	Community Access to the College's Campus	1211
11.6.1	<i>Public versus private institutions</i>	1211
11.6.2	<i>Exclusion of speakers and events</i>	1213
11.6.3	<i>Trespass statutes and ordinances, and related campus regulations</i>	1217
11.6.4	<i>Soliciting and canvassing</i>	1229
11.6.4.1	<i>Overview</i>	1229
11.6.4.2	<i>Commercial solicitation</i>	1230
11.6.4.3	<i>Noncommercial solicitation</i>	1236
11.7	Community Activities of Faculty Members and Students	1239
	Selected Annotated Bibliography	1244
<b>12</b>	<b>The College and the State Government</b>	<b>1247</b>
12.1	Overview	1247
12.2	State Provision of Public Postsecondary Education	1250
12.2.1	<i>Overview</i>	1250
12.2.2	<i>Statutorily based institutions</i>	1253
12.2.3	<i>Constitutionally based institutions</i>	1255
12.3	State Chartering and Licensure of Private Postsecondary Institutions	1258
12.3.1	<i>Scope of state authority</i>	1258
12.3.2	<i>Chartering and licensure of religious institutions</i>	1264
12.4	State Regulation of Out-of-State Institutions and Programs	1267
12.5	Other State Regulatory Laws Affecting Postsecondary Education Programs	1273
12.5.1	<i>Overview</i>	1273
12.5.2	<i>Open meetings and public disclosure</i>	1276
12.5.3	<i>Open records laws</i>	1281
12.5.4	<i>State administrative procedure laws</i>	1286
12.5.5	<i>Laws regulating medical services and medical research</i>	1288
	Selected Annotated Bibliography	1292
<b>13</b>	<b>The College and the Federal Government</b>	<b>1297</b>
13.1	Federal Constitutional Powers over Education	1297
13.1.1	<i>Overview</i>	1297
13.1.2	<i>Spending power</i>	1299
13.1.3	<i>Taxing power</i>	1301
13.1.4	<i>Commerce power</i>	1301
13.1.5	<i>Civil rights enforcement powers</i>	1304
13.1.6	<i>State sovereign immunity from suit</i>	1307
13.2	Federal Regulation of Postsecondary Education	1313
13.2.1	<i>Overview</i>	1313
13.2.2	<i>Immigration laws</i>	1314
13.2.3	<i>Regulation of research</i>	1318
13.2.3.1	<i>Overview</i>	1318
13.2.3.2	<i>Laws governing research on human subjects</i>	1318

13.2.3.3	<i>Laws governing animal research</i>	1325
13.2.3.4	<i>Research misconduct</i>	1329
13.2.4	<i>USA PATRIOT Act and related laws</i>	1330
13.2.5	<i>Copyright law</i>	1334
13.2.5.1	<i>Overview</i>	1334
13.2.5.2	<i>The fair use doctrine</i>	1335
13.2.5.2.1	<i>Guidelines</i>	1336
13.2.5.2.2	<i>Coursepacks</i>	1337
13.2.5.2.3	<i>Research copies</i>	1338
13.2.5.2.4	<i>Use of author's own work</i>	1339
13.2.5.2.5	<i>Use of unpublished material</i>	1339
13.2.5.2.6	<i>Fair use of other types of expression</i>	1339
13.2.5.2.7	<i>Fair use summary</i>	1341
13.2.5.3	<i>Performance rights</i>	1342
13.2.5.4	<i>The "work made for hire" doctrine</i>	1344
13.2.5.4.1	<i>Copyright and coauthorship</i>	1346
13.2.5.5	<i>Liability for infringement</i>	1346
13.2.5.6	<i>Licensing</i>	1350
13.2.5.7	<i>Sovereign immunity</i>	1351
13.2.5.8	<i>Other copyright issues</i>	1352
13.2.5.8.1	<i>Scope of copyright protection</i>	1352
13.2.5.8.2	<i>Music</i>	1353
13.2.5.8.3	<i>Anti-circumvention</i>	1353
13.2.5.8.4	<i>Term extension</i>	1354
13.2.5.8.5	<i>Copyright and standardized tests</i>	1355
13.2.6	<i>Patent law</i>	1355
13.2.6.1	<i>Overview</i>	1355
13.2.6.2	<i>Patentability</i>	1356
13.2.6.3	<i>Ownership of patents</i>	1358
13.2.6.4	<i>Infringement lawsuits</i>	1360
13.2.6.5	<i>Sovereign immunity</i>	1360
13.2.7	<i>Trademark law</i>	1361
13.2.8	<i>Antitrust law</i>	1368
13.2.9	<i>Federal Trade Commission Act</i>	1375
13.2.10	<i>Environmental laws</i>	1376
13.2.11	<i>Americans With Disabilities Act</i>	1381
13.2.12	<i>Laws regulating computer network communications</i>	1384
13.2.12.1	<i>Overview</i>	1384
13.2.12.2	<i>Computer statutes</i>	1385
13.2.12.3	<i>General statutes</i>	1393
13.2.13	<i>Medicare</i>	1397
13.2.14	<i>Health Insurance Portability and Accountability Act</i>	1401
13.2.15	<i>False Claims Act and other fraud statutes</i>	1404
13.3	<i>Federal Taxation of Postsecondary Education</i>	1406
13.3.1	<i>Introduction and overview</i>	1406
13.3.2	<i>Tax-exempt status</i>	1408
13.3.3	<i>Tax-exempt status and intermediate sanctions</i>	1410
13.3.4	<i>Tax rules regarding students</i>	1412
13.3.5	<i>Gifts and contributions</i>	1415
13.3.6	<i>The unrelated business income tax</i>	1416
13.3.7	<i>Related entities and commercialization</i>	1419
13.3.8	<i>IRS audit guidelines</i>	1420

13.4	Federal Aid-to-Education Programs	1423
13.4.1	<i>Functions and history</i>	1423
13.4.2	<i>Distinction between federal aid and federal procurement</i>	1424
13.4.3	<i>Legal structure of aid programs</i>	1425
13.4.4	<i>“Cross-cutting” aid conditions</i>	1428
13.4.4.1	<i>Drug-Free Workplace Act of 1988</i>	1432
13.4.4.2	<i>Drug-Free Schools and Communities Act Amendments</i>	1434
13.4.4.3	<i>Student Right-to-Know Act</i>	1435
13.4.5	<i>Enforcing compliance with aid conditions</i>	1435
13.4.6	<i>Protecting institutional interests in disputes with funding agencies</i>	1438
13.5	Civil Rights Compliance	1449
13.5.1	<i>General considerations</i>	1449
13.5.2	<i>Title VI</i>	1450
13.5.3	<i>Title IX</i>	1462
13.5.4	<i>Section 504</i>	1464
13.5.5	<i>Age Discrimination Act</i>	1469
13.5.6	<i>Affirmative action</i>	1471
13.5.7	<i>Scope and coverage problems</i>	1472
13.5.7.1	<i>Coverage of employment discrimination</i>	1472
13.5.7.2	<i>Coverage of unintentional discriminatory acts</i>	1474
13.5.7.3	<i>Scope of the phrase “receiving federal financial assistance”</i>	1477
13.5.7.4	<i>Scope of the phrase “program or activity”</i>	1479
13.5.7.5	<i>Coverage of retaliatory acts</i>	1482
13.5.7.6	<i>Coverage of extraterritorial acts of discrimination</i>	1484
13.5.8	<i>Administrative enforcement</i>	1486
13.5.9	<i>Other enforcement remedies</i>	1493
13.6	Dealing with the Federal Government	1501
13.6.1	<i>Handling federal rule making and regulations</i>	1501
13.6.2	<i>Obtaining information</i>	1506
	Selected Annotated Bibliography	1507

## **PART SIX THE COLLEGE AND EXTERNAL PRIVATE ENTITIES 1523**

### **14 The College and the Education Associations 1525**

14.1	Overview of the Education Associations	1525
14.2	Applicable Legal Principles	1528
14.3	The College and the Accrediting Agencies	1530
14.3.1	<i>Overview of accrediting agencies</i>	1530
14.3.2	<i>Accreditation and the courts</i>	1534
14.3.2.1	<i>Formative developments</i>	1534
14.3.2.2	<i>State common law and “federal common law”</i>	1538
14.3.2.3	<i>The U.S. Constitution</i>	1543
14.3.2.4	<i>Antitrust law</i>	1546
14.3.2.5	<i>Defamation law and other tort theories</i>	1549
14.3.2.6	<i>Bankruptcy law</i>	1553
14.3.3	<i>Accreditation and the U.S. Department of Education</i>	1554
14.3.4	<i>Dealing with accrediting agencies</i>	1559

14.4 Athletic Associations and Conferences	1560
14.4.1 Overview	1560
14.4.2 Federal constitutional constraints	1561
14.4.3 State statutes regulating athletic associations' enforcement activities	1564
14.4.4 Antitrust laws	1566
14.4.5 Common law principles	1571
14.4.6 Federal civil rights statutes	1573
14.4.6.1 The civil rights spending statutes	1573
14.4.6.2 The Americans With Disabilities Act	1577
14.5 The American Association of University Professors	1581
14.6 Dealing with the Education Associations	1584
Selected Annotated Bibliography	1586
<b>15 The College and the Business/Industrial Community</b>	<b>1591</b>
15.1 The Contract Context for College Business Transactions	1591
15.1.1 Overview	1591
15.1.2 Types of contracts and contract terms	1591
15.1.3 Elements of the contract	1593
15.1.4 Breach of contract and remedies for breach	1595
15.1.5 Arbitration	1597
15.2 The College as Purchaser	1599
15.2.1 Purchase of goods	1599
15.2.2 Purchase of services	1603
15.2.3 Purchase of real estate	1610
15.2.4 The special case of design and construction contracts	1610
15.2.4.1 General principles	1610
15.2.4.2 Construction contracts in public institution	1612
15.2.4.3 Liability problems	1615
15.3 The College as Seller/Competitor	1618
15.3.1 Auxiliary enterprises	1618
15.3.1.1 Overview	1618
15.3.1.2 Institutional authority to operate auxiliary enterprises	1621
15.3.1.2.1 Public institutions	1621
15.3.1.2.2 Private institutions	1627
15.3.2 State noncompetition statutes	1628
15.3.3 Federal antitrust law	1632
15.3.4 Taxation of income from entrepreneurial activities	1634
15.3.4.1 Federal unrelated business income tax	1634
15.3.4.2 State and local taxation	1637
15.3.5 Administering auxiliary enterprises	1639
15.4 The College as Research Collaborator and Partner	1640
15.4.1 Potentials and problems	1640
15.4.2 The research agreement	1643
15.4.3 Application of patent law	1650
15.4.4 Federal tax exemptions for research	1652
15.4.5 Application of antitrust law	1654
15.4.6 Federal government incentives for research collaboration	1655
15.4.7 Conflicts of interest	1657
Selected Annotated Bibliography	1662
<b>Indexes</b>	<b>1667</b>



# Preface

## *Overview of the Fourth Edition*

Operating the colleges and universities of today presents a multitude of challenges for their leaders and personnel. Often the issues they face involve institutional policy, but with continually increasing frequency these issues have legal implications as well. For example, a staff member may decide to become a whistleblower and assert that another college employee is violating the law. If the complaining staff member's performance has been problematic, may the college discharge the staff member? A student religious organization may approach the dean of students seeking recognition or an allocation from the fund for student activities. If membership is limited to students of a particular faith, or if the student organization does not admit gays or lesbians, how should the administration respond? A faculty member may challenge a negative promotion or tenure decision. Will the college be required to disclose "confidential" letters and discussions of external evaluators or department faculty, and might the faculty member have any academic freedom rights to assert? A wealthy alumna may call the vice president for student affairs and offer to make a multimillion-dollar donation for scholarships on the condition that the scholarships be awarded only to African American students from disadvantaged families. Can and should the vice president accept the donation and follow the potential donor's wishes?

We have designed this book as a resource for college and university attorneys, officers and administrators, trustees, faculties, and staffs who may face issues such as these or innumerable others. The book provides foundational information, in-depth analysis, and practical suggestions on a wide array of legal issues faced by public and private institutions, and it recommends and describes

numerous resources for further research and information. The discussions draw upon pertinent court opinions, constitutional provisions, statutes, administrative regulations, and related developments, and also cite selected journal articles, books, reports, Web sites, and other resources. In selecting topics and cases for discussion, we have primarily considered their significance for higher education policy making or legal risk management, their currency or timelessness, and their usefulness as illustrative examples of particular problems or as practical applications of particular legal principles.

### ***Relationship Between the Fourth Edition and Earlier Editions***

This Fourth Edition of *The Law of Higher Education* is the successor to the Third Edition published in 1995 and the periodic supplements published in 1997 and 2000. The Fourth Edition features a major reorganization of materials and a thoroughly revised, updated, and expanded text. This edition is current to approximately March 2006.

In the decade since publication of the Third Edition and then its supplements, many new and newly complex legal concerns have arisen on America's campuses—from the implications of the USA PATRIOT Act, to affirmative action in admissions and financial aid, to the allocation of mandatory student activities fees, to the clash between faculty and “institutional” academic freedom, to the rights of intercollegiate athletes. Indeed, it is difficult to identify any other entities—including large corporations and government agencies—that are subject to as great an array of legal requirements as are colleges and universities. To serve the needs occasioned by this continual growth of the law, the Fourth Edition retains all material of continuing legal currency from the Third Edition and the 1997 and 2000 supplements, reorganized and reedited (and often reanalyzed) to accommodate the deletion and addition of materials, and to maximize clarity and accessibility. We have added considerable new material to this base: well over one-third of the material in the Fourth Edition did not appear in earlier editions or supplements. Specifically, we have extended the discussion of matters that (in hindsight) were given insufficient attention in earlier editions or have since acquired greater significance; integrated pertinent new developments and insights regarding topics in the earlier editions; and introduced numerous new topics and issues not covered in earlier editions.

Although considerable material from earlier editions has lost its legal currency as a result of later developments, we have nevertheless retained some of this material for its continuing historical significance. What has been retained, however, is often presented in a more compressed format than in earlier editions. Thus, readers desiring additional historical context for particular issues may wish to consult the First, Second, and Third Editions. Moreover, we have sometimes deleted or compressed material that still has legal currency, because later cases or developments provide more instructive illustrations. Thus, readers seeking additional examples of particular legal issues may also wish to consult the First, Second, and Third Editions.

Like the earlier editions, the Fourth Edition covers all of *postsecondary* education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institution, and from the traditional campus-based program to the innovative off-campus or multistate program, and now to distance learning as well. The Fourth Edition also reflects the same perspective on the intersection of law and education as described in the Preface to the First Edition:

The law has arrived on the campus. Sometimes it has been a beacon, at other times a blanket of ground fog. But even in its murkiness, the law has not come “on little cat feet,” like Carl Sandburg’s “Fog”; nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes has stumbled. And even in its imperfections, the law has spoken forcefully and meaningfully to the higher education community and will continue to do so.

### ***Audience***

*The Law of Higher Education* was originally written for administrative officers, trustees, and legal counsel who dealt with the many challenges and complexities that arise from the law’s presence on campus, and for students and observers of higher education and law who desired to explore the intersection of these two disciplines. Beginning with the Third Edition, and continuing in this Fourth Edition, we have expanded the book’s materials and scope to serve additional groups that regularly encounter legal conflicts and challenges in their professional lives: for example, directors of student judicial affairs offices; directors of equal opportunity offices; staff who work with disabled students or foreign students, and other student affairs staff; deans and department chairs; risk managers; business managers and grants and contracts managers; technology transfer, intellectual property, and sponsored research administrators; athletics directors; and directors of campus security. In addition, others outside the colleges and universities may find this Fourth Edition useful: for example, officers and staff at higher education associations, executives and project officers of foundations serving academia, education policy makers in state and federal governments, and attorneys representing clients who enter into transactions with or have disputes with postsecondary institutions.

To be equally usable by administrators and legal counsel, the text avoids legal jargon and technicalities whenever possible and explains them when they are used. Footnotes throughout the book are designed primarily to provide additional technical analysis and research resources for legal counsel.

In seeking to serve its various audiences, this book organizes and conceptualizes the entire range of legal considerations pertinent to the operation of colleges and universities. It analyzes legal developments, identifies trends, and tracks their implications for academic institutions—often pointing out how particular legal developments may clash with, or support, important academic practices or values. The book also explores relationships between law and policy, suggests preventive law measures for institutions to consider, and

includes other suggestions and perspectives that serve to facilitate effective working relationships between counsel and administrators who grapple with law's impact on their campuses.

## ***Organization***

We have organized this Fourth Edition into fifteen chapters, up from nine chapters in the Third Edition. These chapters are in turn organized into six parts: (1) Perspectives and Foundations; (2) The College and Its Governing Board, Personnel, and Agents; (3) The College and Its Faculty; (4) The College and Its Students; (5) The College and Local, State, and Federal Governments; and (6) The College and External Private Entities. Each of the fifteen chapters is divided into numerous Sections and subsections.

Chapter One provides a framework for understanding and integrating what is presented in subsequent chapters and a perspective for assimilating future legal developments. Chapter Two addresses foundational concepts concerning legal liability, preventive law, and the processes of litigation and alternative dispute resolution. Chapters Three through Ten discuss legal concepts and issues affecting the *internal* relationships among the various members of the campus community and address the law's impact on particular roles, functions, and responsibilities of trustees, administrators, faculty, and students. Chapters Eleven, Twelve, and Thirteen are concerned with the postsecondary institution's *external* relationships with government at the local, state, and federal levels. These chapters examine broad questions of governmental power and process that cut across all the *internal* relationships and administrative functions considered in Chapters Three through Ten; they also discuss particular legal issues arising from the institution's dealings with government and identify connections between these issues and those explored in the earlier chapters. Chapters Fourteen and Fifteen also deal with the institution's *external* relationships, but the relationships are those with the private sector rather than with government. Chapter Fourteen covers the various national and regional education associations with which the institution interacts; Chapter Fifteen covers the myriad relationships—many on the cutting edge—that institutions are increasingly forging with commercial and industrial enterprises.

## ***What Is New in This Edition***

In the light cast by recent developments, many new topics of concern have emerged on stage, and older topics that once were bit players have assumed major roles. To cover these topics, the Fourth Edition adds many entirely new Sections that did not appear in the 1997 or 2000 supplements or the earlier editions. These new Sections cover: the governance of higher education (Section 1.3); the relationship between law and policy (Section 1.7); the basics of legal liability (Section 2.1); judicial deference to institutional decision making (Section 2.2.5); alternative dispute resolution (Section 2.3); and various employment issues, such as employees versus independent contractors (Section 4.2.1),

executive contracts (Section 4.3.3.7), civil service rules (Section 4.4), state-created dangers and Section 1983 liability (Section 4.7.4.2), and performance management strategies (Section 4.8)—these five Sections being part of a new chapter (Chapter 4) that focuses especially on employment of administrators and staff. Other new Sections cover: external versus internal restraints on academic freedom (Section 7.1.5); “institutional” academic freedom (Section 7.1.6); methods of analyzing academic freedom in teaching claims (Section 7.2.4); academic freedom in religious institutions (Section 7.8); student academic freedom (Section 8.1.4); students’ legal relationships with other students (Section 8.1.5); discrimination by residence and immigration status in admissions (Sections 8.2.4.5 & 8.2.4.6); the use of government student aid funds at religious institutions (Section 8.3.7); student health services (Section 8.7.2); services for international students (Section 8.7.4); student speech via posters and fliers (Section 9.5.6); advertising in student publications (Section 10.3.4); and athletes’ freedom of speech rights (Section 10.4.3). Yet other new Sections cover: research misconduct (Section 13.2.3.4); the USA PATRIOT Act and its impact on privacy and research (Section 13.2.4); the Health Insurance Portability and Accountability Act (HIPAA) and its impact on student health centers and university-affiliated hospitals (Section 13.2.14); federal taxation issues such as intermediate sanctions (Section 13.3.3), taxation of related entities (Section 13.3.7), and IRS audit guidelines (Section 13.3.8); retaliation claims under the federal civil rights spending statutes (Section 13.5.7.5); extraterritorial application of the federal civil rights spending statutes (Section 13.5.7.6); and the application of “federal common law” to accrediting agencies (Section 14.3.2.2).

Other Sections from the Third Edition have been reconceptualized and reorganized in our process of updating them: Section 1.6 on religion and the public-private dichotomy; Section 3.3 on institutional tort liability, including new subsections on liability for off-campus instruction, social activities, and student suicide; Section 3.6 on captive and affiliated organizations; Sections 5.4 and 6.5 on affirmative action in employment; Sections 7.1 and 7.2 on aspects of faculty academic freedom; Section 8.7 on support services for students; Section 9.3.4 on sexual harassment by faculty; Section 9.5 on student protest and freedom of speech; Section 9.6 on speech codes and hate speech; Sections 13.2.5 and 13.2.6 on copyright law and patent law (reorganized and updated by Georgia Harper); Section 13.3 on federal taxation (reorganized and updated by Randolph Goodman and Patrick Gutierrez); and Section 13.4.6 on disputes with federal funding agencies.

Yet other Sections from the Third Edition or its supplements have been extensively expanded to account for important recent developments. Examples of such Sections and the major new cases they address are Section 3.3.2.3 on liability for injuries to students on internship assignments or study-abroad programs; Section 7.2.2 on classroom academic freedom (the *Bonnell* and *Hardy* cases); Section 7.3 on faculty research (the *Urofsky* case); Sections 8.2.5 and 8.3.4 on affirmative action in admissions and financial aid (*Grutter v. Bollinger* and *Gratz v. Bollinger*); Section 9.5.3 on regulation of student protest (the free speech zone cases); Section 9.7.1 on Family Educational Rights and Privacy Act (FERPA)

(*Gonzaga University v. Doe*); Section 9.7.2 on the interplay between FERPA and state public meetings and records laws (*United States of America v. The Miami University and The Ohio State University*); Section 10.1.3 on the allocation of mandatory student activities fees (*Board of Regents of University of Wisconsin v. Southworth*); Section 10.1.4 on religious organizations and sexual orientation discrimination; Section 10.3.3 on regulating student newspapers (*Kincaid v. Gibson and Hosty v. Carter*); Section 13.2.5.2 on recent developments in copyright and fair use with respect to file sharing; and Section 13.4.4 on the tension between on-campus military recruitment and institutional nondiscrimination policies (*Rumsfeld v. FAIR*).

### ***Citations and References***

Each chapter ends with a Selected Annotated Bibliography. We suggest that readers use the listed books, articles, reports, Web sites, and other sources to extend the discussion of particular issues presented in the chapter, to explore related issues not treated in the chapter, to obtain additional practical guidance in dealing with the chapter's issues, to keep abreast of later developments, or to identify resources for research. Other such sources pertaining to narrower issues are cited in the text, and footnotes contain additional legal resources primarily for lawyers. Court decisions, constitutional provisions, statutes, and administrative regulations are also cited throughout the text. In addition, the footnotes contain copious citations to *American Law Reports* (A.L.R.) annotations that collect additional court decisions on particular subjects and periodically update each collection.

The citation form for the various legal sources cited in the fourth edition generally follows *The Bluebook: A Uniform System of Citation* (18th ed., Columbia Law Review Association, Harvard Law Review Association, University of Pennsylvania Law Review, and Yale Law Journal, 2005). The legal sources that these citations refer to are described in Chapter One, Section 1.4, of this Fourth Edition.

### ***A Note on Nomenclature***

The Fourth Edition, like previous editions, uses the terms “higher education” and “postsecondary education” to refer to education that follows a high school (or K–12) education. Often these terms are used interchangeably; at other times “postsecondary education” is used as the broader of the two terms, encompassing formal post-high school education programs whether or not they build on academic subjects studied in high school or are considered to be “advanced” studies of academic subjects. Similarly, this book uses the terms “higher education institution,” “postsecondary institution,” “college,” and “university” to refer to the institutions and programs that provide post-high school (or post-K–12) education. These terms are also often used interchangeably; but occasionally “postsecondary institution” is used in the broader sense suggested above, and occasionally “college” is used to connote an academic unit within a university or an independent institution that emphasizes two-year or four-year

undergraduate programs. The context generally makes clear when we intend a more specific meaning and are not using these terms interchangeably.

The term “public institution” generally means an educational institution operated under the auspices of a state, county, or occasionally a city government. The term “private institution” means a nongovernmental, nonprofit or proprietary, educational institution. The term “religious institution” encompasses a private educational institution that is operated by a church or other sectarian organization (a “sectarian institution”), or that is otherwise formally affiliated with a church or sectarian organization (a “religiously affiliated institution”), or that otherwise proclaims a religious mission and is guided by religious values.

### ***Recommendations for Using the Book and Keeping Up to Date***

There are some precautions to keep in mind when using this book, as noted in the Prefaces for the first three editions. We reemphasize them here for the Fourth Edition. The legal analyses throughout this book, and the numerous practical suggestions, are not adapted to the law of any particular state or to the circumstances prevailing at any particular postsecondary institution. The book is not a substitute for the advice of legal counsel, nor a substitute for further research into the particular legal authorities and factual circumstances that pertain to each legal problem that an institution, government agency, educational association, or person may face. Nor is the book necessarily the latest word on the law. There is a saying among lawyers that “the law must be stable and yet it cannot stand still” (Roscoe Pound, *Interpretations of Legal History* (1923), 1), and the law moves especially fast in its applications to postsecondary education. Thus, we urge administrators and counsel to keep abreast of ongoing developments concerning the legal sources and issues in this book. Various aids (described below) are available for this purpose.

Although new resources for staying up to date appear periodically, the total volume of law to keep track of continues to grow. Thus, keeping abreast of developments is as much a challenge now as it was when the previous editions were published. To assist readers in this task, we plan to maintain a Web site, hosted by the National Association of College and University Attorneys (NACUA), Washington, D.C. (available at <http://www.nacua.org>), on which we will announce or post pertinent new developments and key them to the Fourth Edition. In addition, there is a very helpful Web site, the Campus Legal Information Clearinghouse (CLIC) (available at <http://counsel.cua.edu>), operated by the General Counsel’s Office at The Catholic University of America in conjunction with the American Council on Education, that includes information on recent developments, especially federal statutory and federal agency developments, and practical compliance suggestions. There is also a legal reporter that reprints new court opinions on higher education law and provides commentary on recent developments: *West’s Education Law Reporter*, published biweekly by Thomson West Publishing Company, St. Paul, Minnesota. (Entries for this reporter and for CLIC are in the Selected Annotated Bibliography for Chapter One, Section 1.1.)

Also helpful are various periodicals that provide information on current legal developments. *Synthesis: Law and Policy in Higher Education*, published five times a year by College Administration Publications, Asheville, North Carolina, provides in-depth analysis and commentary on major contemporary issues. *Syn-fax Weekly Report*, a fax newsletter that is a division of College Administration Publications, digests and critiques current legal and policy developments. (Entries for these two resources are also in the Chapter One bibliography, respectively in Sections 1.2 and 1.1.) *Campus Legal Monthly*, published by Magna Publications (available at <http://www.magnapubs.com>), provides analysis of recent cases and campus issues, along with preventive law suggestions. *Lex Collegii*, a newsletter published quarterly by College Legal Information, Nashville, Tennessee (available at <http://www.collegelegal.com/lexcolhp.htm>), analyzes selected legal issues and provides preventive law suggestions, especially for private institutions. And *Business Officer*, a monthly magazine published for its members by the National Association of College and University Business Officers (available at <http://www.nacubo.org>), emphasizes developments in Congress and the federal administrative agencies.

For news reporting of current events in higher education generally, but particularly for substantial coverage of legal developments, readers may wish to consult the *Chronicle of Higher Education*, published weekly in hard copy and daily online (available at <http://www.chronicle.com>) (see entry in Section 1.1 of the Chapter One bibliography); or *Education Daily*, published every weekday (available at <http://www.educationdaily.net/ED/splash.jsp>).

For keeping abreast of conference papers, journal articles, and pertinent government and association reports, *Higher Education Abstracts* is helpful; it is published quarterly by the Claremont Graduate School, Claremont, California (available at <http://highereducationabstracts.org>). The Educational Resources Information Center (ERIC) database (available at <http://www.eric.ed.gov>), sponsored by the U.S. Department of Education, performs a similar service encompassing books, monographs, research reports, conference papers and proceedings, bibliographies, legislative materials, dissertations, and journal articles on higher education. In addition, the IHELG monograph series published each year by the Institute for Higher Education Law and Governance, University of Houston Law Center, provides papers on a wide variety of research projects and timely topics.

For extended legal commentary on recent developments, we suggest these two journals: the *Journal of College and University Law*, published quarterly by NACUA and focusing exclusively on postsecondary education; and the *Journal of Law and Education*, which covers elementary and secondary as well as postsecondary education, published quarterly by Jefferson Lawbook Company, Cincinnati, Ohio.

A final resource may be of interest to those who wish to use the Fourth Edition as a classroom or workshop text. We have prepared, and will periodically update, a compilation of teaching materials that includes edited versions of leading court opinions, notes and discussion questions, large and small problems (some of which could be used as examination questions), outlines of suggested



answers, and other materials. This compilation, titled *Cases, Problems, and Materials for Use with The Law of Higher Education, Fourth Edition*, is available on the Web site of the National Association of College and University Attorneys; for further information, see pages vi–vii of this book.

### ***Endnote***

Overall, the goal for this Fourth Edition remains much the same as the goal for the First Edition, set out in its Preface. The hope of this book is to provide a base for the debate concerning law's role on campus; for improved understanding between attorneys and academics; and for effective relationships between administrators and their counsel. The challenge of our age is not to remove the law from the campus or to marginalize it. The law is here to stay, and it will continue to play a major role in campus affairs. The challenge of our age, rather, is to make law more a beacon and less a fog. The challenge is for law and higher education to accommodate one another, preserving the best values of each for the mutual benefit of both. Just as academia benefits from the understanding and respect of the legal community, so law benefits from the understanding and respect of academia.

April 2006  
William A. Kaplin  
Washington, D.C.  
Barbara A. Lee  
New Brunswick, N.J.



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The National Association of College and University Attorneys (NACUA) published the 1997 and 2000 supplements to the Third Edition of this book, as well as our supplementary teaching materials, *Cases, Problems, and Materials: An Instructional Supplement to The Law of Higher Education*. Linda Henderson at NACUA was primarily responsible for managing the smooth publication processes and designing the high-quality final products. Kathleen Curry Santora and Karl Brevitz at NACUA supported these publications, worked with Ms. Henderson to arrange for a Web site to support the Fourth Edition, and arranged a session on the Fourth Edition for NACUA's 2006 annual conference. NACUA publications also provided us with important information and guidance in the development of several sections of the Fourth Edition.

Robert Bickel, codirector of the Center for Excellence in Higher Education Law and Policy, Stetson University College of Law, encouraged our work by including us in the conference faculty for each of Stetson's Annual National Conferences on Law and Higher Education, from the Third Edition to the Fourth, and by devising a plenary session on the Fourth Edition for the 2006 Conference. Michael Olivas, director of the Institute for Higher Education Law and Governance, University of Houston, similarly supported this Fourth Edition by inviting Bill Kaplin to be a leader/mentor for the Institute's biannual Higher Education Law Roundtable, and by sharing information on new law and policy developments with us.

Barbara Kaplin accurately assisted with proofreading for the entire length of this project, and also typed manuscript inserts and assisted with verification of citations through the end of the project.

Bill Kaplin's mother, Joan Kaplin, wisely provided continual reminders (for us both) to "take a break" and "have some fun," even when the advice went unheeded.

Our spouses and families tolerated the years of intrusion that this Fourth Edition imposed on our personal lives; encouraged us when this project seemed too overwhelming to ever end; and looked forward with us (usually patiently) to the time when "the book" would finally be finished—at least for the time being.



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Professor Kaplin received the American Council on Education's Borden Award, in recognition of the First Edition of *The Law of Higher Education*, and the Association for Student Judicial Affairs' D. Parker Young Award for research contributions. He has also been named a Fellow of the National Association of College and University Attorneys.

In addition to the various editions and updates of *The Law of Higher Education*, and the derivative work *A Legal Guide for Student Affairs Professionals* (1997), Professor Kaplin also coauthored *State, School, and Family: Cases and Materials on Law and Education* (2d ed., 1979) and authored *The Concepts*

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Bill Kaplin received his B.A. degree (1964) in political science from the University of Rochester and his J.D. degree *with distinction* (1967) from Cornell University, where he was editor-in-chief of the *Cornell Law Review*. He then worked with a Washington, D.C., law firm, served as a judicial clerk at the U.S. Court of Appeals for the District of Columbia Circuit, and was an attorney in the education division of the U.S. Department of Health, Education and Welfare, before joining the Catholic University law faculty.

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In addition to coauthoring the Third and Fourth Editions of *The Law of Higher Education* and its supplements and updates, as well as *A Legal Guide for Student Affairs Professionals* (1997), Professor Lee also coauthored *Academics in Court* (1987, with George LaNoue), as well as numerous articles, chapters, and monographs on legal aspects of academic employment. She serves as an expert witness in tenure, discharge, and discrimination cases, and is a frequent lecturer and trainer for academic and corporate audiences.

Barbara Lee received her B.A. degree *summa cum laude* (1971) in English and French from the University of Vermont. She received an M.A. degree (1972) in English and a Ph.D. (1977) in higher education administration from The Ohio State University. She earned a J.D. *cum laude* (1982) from the Georgetown University Law Center. Prior to joining Rutgers University in 1982, she held professional positions with the U.S. Department of Education and the Carnegie Foundation for the Advancement of Teaching.



# Dedication

*Much as it takes a village to raise a child, it takes an “academical village” (Thomas Jefferson’s phrase) to raise a book—at least a book such as this that arises from and whose purpose is to serve a national (and now international) academic community. This book is dedicated to all those members of our academical village who in numerous and varied ways have helped to raise this book from its origins through this Fourth Edition, and to all those members who will face the great challenges of law and policy that will shape higher education’s future.*



# The Law of Higher Education



PART ONE

PERSPECTIVES  
AND FOUNDATIONS



# 1

## Overview of Higher Education Law

### *Sec. 1.1. How Far the Law Reaches and How Loud It Speaks*

Law's presence on the campus and its impact on the daily affairs of postsecondary institutions have grown continuously at least since the 1960s. From then until the present, the volume and complexity of litigation in our society generally, and involving higher education specifically, have increased dramatically. The growth of government regulations, especially at the federal level, has also been dramatic and pervasive. The potential for jury trials and large monetary damage awards, for court injunctions affecting institutions' internal affairs, for government agency compliance investigations, and even for criminal prosecutions against administrative officers, faculty members, and students, have all increased.

Many factors have contributed over the years to the development of this legalistic and litigious environment. The expectations of students and parents have increased, spurred in part by increases in tuition and fees, and in part by society's consumer orientation. The greater availability of data that measures and compares institutions, and greater political savvy among student and faculty populations, have led to more sophisticated demands on institutions. Advocacy groups have used litigation as the means to assert faculty and student claims against institutions—and applicant claims as well, in suits concerning affirmative action in admissions and employment. Satellite campuses, off-campus programs, and distance learning have extended the reach of the "campus," bringing into higher education's fold a diverse array of persons whose interests may conflict with those of more traditional populations. And an increasingly adversarial mindset, a decrease in civility, and a diminishing level of trust in societal institutions have made it more acceptable to assert legal claims at the drop of a hat.

Moreover, society has become more sensitized to civil rights; and Congress, state legislatures, and courts have focused more on their recognition and enforcement. Technological advances have raised a multitude of new legal issues regarding intellectual property, personal privacy, and freedom of speech. Study abroad programs, internships, and innovative field trips and off-campus assignments have created new exposures to legal risk. Federal, state, and local statutes and administrative regulations have raised difficult compliance challenges in many critical areas of campus life, such as confidentiality of records, worker safety, campus security, equal opportunity, computer network communications, and the status of foreign students. Since the beginning of the new century, terrorism and the “War on Terror” have enhanced many of these compliance challenges and created some new ones as well.

Financial pressures have led to competition for resources, which in turn has increased the likelihood of disputes about funding, salaries, and budgets. Financial pressures have also stimulated the growth of entrepreneurial activities as alternative sources of income. Faculty members’ entrepreneurial activities have strained their traditional relationships with their institutions, while institutions’ own entrepreneurial activities have drawn them increasingly into the commercial marketplace and exposed them to additional possibilities for legal disputes. In the face of all these pressures, institutions themselves have become better equipped to defend themselves vigorously when sued and are more willing to initiate lawsuits themselves when the institution’s mission, reputation, or financial resources have been threatened.

Thus, whether one is responding to campus disputes, planning to avoid future disputes, or crafting an institution’s policies and priorities, law is an indispensable consideration. Legal issues arising on campuses across America continue to be aired not only within the groves of academia but also in external forums. Students, faculty members, administrators and staff members, and their institutions have increasingly been litigants in the courts, for example, and outside parties (government agencies, corporations, and individuals) have increasingly been involved in such disputes. Institutions have responded by expanding their legal staffs and outside counsel relationships and by increasing the numbers of administrators in legally sensitive positions. As this trend has continued, more and more questions of educational policy have become converted into legal questions as well (see Section 1.7). Law and litigation have extended into every corner of campus activity.<sup>1</sup>

There are many striking examples of cutting-edge cases—or sometimes just wrong-headed cases—that have attracted considerable attention in, or had substantial impact on, higher education. Students, for example, have sued their institutions for damages after being accused of plagiarism; students have sued after being penalized for improper use of the campus computer network; objecting students have sued over mandatory student fee allocations; victims of

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<sup>1</sup>Much of the introductory content of this section is adapted from Kathleen Curry Santora and William Kaplin, “Preventive Law: How Colleges Can Avoid Legal Problems,” *Chron. Higher Educ.*, April 18, 2003, B20 (copyright © 2004 by Chronicles of Higher Education, Inc.).



harassment have sued their institutions and professors who are the alleged harassers; student athletes have sought injunctions ordering their institutions or athletic conferences to grant or reinstate eligibility for intercollegiate sports; disabled students have filed suits against their institutions or state rehabilitation agencies, seeking sign language interpreters or other auxiliary services to support their education; students who have been victims of violence have sued their institutions for alleged failures of campus security; hazing victims have sued fraternities, fraternity members, and institutions; parents have sued administrators and institutions after students have committed suicide; and former students involved in bankruptcy proceedings have sought judicial discharge of student loan debts owed to institutions. Disappointed students have sued over grades—and have even lodged challenges such as the remarkable 1980s lawsuit in which a student sued her institution for \$125,000 after an instructor gave her a B+ grade, which she claimed should have been an A–. Women and minority students have challenged the heavy reliance by scholarship selection panels and medical schools on standardized tests, and “truth-in-testing” proponents have sued testing agencies to force disclosure of standardized test questions and answers. Students and others supporting animal rights have used lawsuits (and civil disobedience as well) to pressure research laboratories to reduce or eliminate the use of animals. And rejected female applicants have sued military colleges, seeking increased opportunities for women.

Faculty members have been similarly active. Professors have sought legal redress after their institutions have changed their laboratory or office space, their teaching assignments, or the size of their classes. One group of faculty members in the 1980s challenged their institution’s plan to build a new basketball arena because they feared that construction costs would create a drain on funds available for academic programs; another group sued their institution and the state higher education commission, challenging a salary structure that allegedly benefited more recently hired faculty members; and another group challenged their institution’s decision to terminate several women’s studies courses, alleging sex discrimination and violation of free speech. Female faculty members have increasingly brought sexual harassment claims to the courts, and female coaches have sued over salaries and support for women’s teams. Across the country, suits brought by faculty members who have been denied tenure—once one of the most closely guarded and sacrosanct of all institutional judgments—have become commonplace.

Outside parties also have been increasingly involved in postsecondary education litigation. Athletic conferences were sometimes defendants in the student athlete cases above. State rehabilitation agencies were sometimes defendants in the disabled student cases; fraternities were sometimes defendants in the hazing cases; and testing organizations were defendants in the truth-in-testing litigation. Sporting goods companies have been sued by universities for trademark infringement because they allegedly appropriated university insignia and emblems for use on their products. Broadcasting companies and athletic conferences have been in litigation over rights to control television broadcasts of intercollegiate athletic contests, and athletic conferences have been in dispute concerning teams

leaving one conference to join another. Media organizations have brought suits and other complaints under open meetings and public records laws. Separate entities created by institutions, or with which institutions affiliate, have been involved in litigation with the institutions. Drug companies have sued and been sued in disputes over human subject research and patent rights to discoveries. And increasingly, other commercial and industrial entities of various types have engaged in litigation with institutions regarding purchases, sales, and research ventures. Community groups, environmental organizations, taxpayers, and other outsiders have also gotten into the act, suing institutions for a wide variety of reasons, from curriculum to land use. Recipients of university services have also resorted to the courts. In one late 1980s suit, a couple sued a state university veterinary hospital after their llama died while being examined by a veterinary student; and in another late 1980s suit, seed companies and potato farmers sued a state university for alleged negligence in certifying seed.

More recently, other societal developments have led to new types of lawsuits and new issues for legal planning. And, of course, myriad government agencies at federal, state, and local levels have frequently been involved in civil suits as well as criminal prosecutions concerning higher education. The spread of AIDS, for example, raised new legal issues from tort liability to privacy rights to nondiscrimination. Drug abuse problems have created other issues, especially those concerning mandatory drug testing of employees or student athletes and compliance with “drug-free campus” laws. Federal government regulation of Internet communications have led to new questions about liability for the spread of computer viruses, copyright infringement in cyberspace, transmission of sexually explicit materials, and defamation by cyberspeech. Outbreaks of racial, anti-Semitic, anti-Arabic, homophobic, and political/ideological tensions on campuses have led to speech codes, academic bills of rights, and a range of issues concerning student and faculty academic freedom. Alleged sexual inequities in intercollegiate athletics that prompted initiatives to strengthen women’s teams have led to suits by male athletes and coaches whose teams have been eliminated or downsized. Sexual harassment concerns have expanded to student peer harassment and harassment based on sexual orientation, and has also focused on date rape and sexual assault. Hazing, alcohol use, and behavioral problems, implicating fraternities and men’s athletic teams especially, have reemerged as major issues. New emphasis on conflicts between civil law and canon law, and between religious mission and governmental authority, has resulted in disputes concerning the legal rights of students and faculty at religiously affiliated institutions, and also concerning government funding for religious institutions and their students. In the realm of research, numerous issues concerning scientific misconduct, research on human subjects, bioterrorism research, patent rights, and conflicts of interest have emerged. New issues affecting student governments and extracurricular student activities arose in the wake of the U.S. Supreme Court’s ruling on mandatory student activity fees in the *Rosenberger* case. The growth in relationships between research universities and private industry has led to increasing legal issues concerning technology transfer. Raised sensitivities to alleged sexual harassment and political bias in academia have prompted academic

freedom disputes between faculty and students, manifested especially in student complaints about faculty members' classroom comments and course assignments. Increased attention to student learning disabilities, and the psychological and emotional conditions that may interfere with learning, have led to new types of disability discrimination claims and issues concerning the modification of academic standards. Renewed attention to affirmative action policies for admissions and financial aid have resulted in lawsuits, state legislation, and state referenda and initiative drives among voters. The contentious national debate on gay marriage has prompted renewed disputes on campus concerning gay rights student organizations, student religious organizations that exclude gay and lesbian students from membership or leadership, and domestic partnership benefits for employees.

As the numbers and types of disputes have expanded, along with litigation in the courts, the use of administrative agencies as alternative forums for airing disputes has also grown. In some circumstances, especially at the federal level, the courts (and particularly the U.S. Supreme Court) have imposed various technical limitations on access to courts, thus serving to channel various complainants to administrative agencies as an alternative to court. The increased presence of inspectors general for federal agencies and their state counterparts, and their use of investigatory powers, also appears to have helped stimulate an increased volume of disputes before administrative agencies. Administrative agency regulations at federal, state, and local levels may now routinely be enforced through agency compliance proceedings and private complaints filed with administrative agencies. Thus, postsecondary institutions may find themselves before the federal Equal Employment Opportunity Commission (EEOC) or an analogous state agency, the National Labor Relations Board (NLRB) or a state's public employee relations board, the administrative law judges of the U.S. Department of Education (ED), contract-dispute boards of federal and state contracting agencies, state workers' compensation and unemployment insurance boards, state licensing boards, state civil service commissions, the boards or officers of federal, state, and local taxing authorities, state or local human relations commissions, local zoning boards, or the mediators or arbitrators of various government agencies at all levels of government. Proceedings can be complex (with mediation usually being a notable exception), and the legal relief that agencies may provide to complainants or to institutions can be substantial.

Paralleling these administrative developments has been an increase in the internal forums created by postsecondary institutions for their own use in resolving disputes. Faculty and staff grievance committees, appeal processes for tenure denials, student judiciaries, honor boards, and grade appeals panels are common examples. In more recent years, mediation has also assumed a major role in some of these processes. In addition to such internal forums, private organizations and associations involved in postsecondary governance have given increased attention to their own dispute resolution mechanisms. Thus, besides appearing before courts and administrative agencies, postsecondary institutions may become involved in grievance procedures of faculty and staff unions, hearings of accrediting agencies on the accreditation status of institutional programs, probation hearings of athletic conferences, and censure proceedings of the American Association of University Professors (AAUP).

There are, of course, some counter-trends that have emerged over time and have served to ameliorate the more negative aspects of the growth in law and litigiousness in academia. The alternative dispute resolution (ADR) movement in society generally has led to the use of mediation and other constructive mechanisms for the internal resolution of campus disputes (see Section 2.3 of this book). Colleges and universities have increased their commitments to, and capabilities for, risk management and for preventive legal planning. On a broader scale, not only institutions but also their officers have increasingly banded together in associations through which they can maximize their influence on the development of legislation and agency regulations affecting postsecondary education. These associations also facilitate the sharing of strategies and resources for managing campus affairs in ways that minimize legal problems. Government agencies have developed processes for “notice” and “comment” prior to implementing regulations, for negotiated rulemaking, and for mediation of disputes. The trial courts have developed processes for pre-trial mediation, and the appellate courts, including the U.S. Supreme Court, have developed a concept of “judicial deference” or “academic deference” that is used by both trial and appellate courts to limit judicial intrusion into the genuinely academic decisions of postsecondary institutions.

At the same time, administrators, counsel, public policy makers, and scholars have increasingly reflected on law’s role on the campuses. Criticism of that role, while frequent, is becoming more perceptive and more balanced. It is still often asserted that the law reaches too far and speaks too loudly. Especially because of the courts’ and federal government’s involvement, it is said that legal proceedings and compliance with legal requirements are too costly, not only in monetary terms but also in terms of the talents and energies expended; that they divert higher education from its primary mission of teaching and scholarship; and that they erode the integrity of campus decision making by bending it to real or perceived legal technicalities that are not always in the academic community’s best interests. It is increasingly recognized, however, that such criticisms—although highlighting pressing issues for higher education’s future—do not reveal all sides of these issues. We cannot evaluate the role of law on campus by looking only at dollars expended, hours of time logged, pages of compliance reports completed, or numbers of legal proceedings participated in. We must also consider a number of less quantifiable questions: Are legal claims made against institutions, faculty, or staff usually frivolous or unimportant, or are they often justified? Are institutions providing effective mechanisms for dealing with claims and complaints internally, thus helping themselves avoid any negative effects of outside legal proceedings? Are courts and college counsel doing an adequate job of sorting out frivolous from justifiable claims, and of developing means for summary disposition of frivolous claims and settlement of justifiable ones? Have administrators and counsel ensured that their legal houses are in order by engaging in effective preventive planning? Are courts being sensitive to the mission of higher education when they apply legal rules to campuses and when they devise remedies in suits lost by institutions? Do government regulations for the campus implement worthy policy goals, and are

they adequately sensitive to higher education's mission? In situations where law's message has appeared to conflict with the best interests of academia, how has academia responded: Has the inclination been to kill the messenger, or to develop more positive remedies; to hide behind rhetoric, or to forthrightly document and defend its interests?

We still do not know all we should about these questions. But we know that they are clearly a critical counterpoint to questions about dollars, time, and energies expended. We must have insight into *both* sets of questions before we can fully judge law's impact on the campus—before we can know, in particular situations, whether law is more a beacon or a blanket of ground fog.

### ***Sec. 1.2. Evolution of Higher Education Law***

Throughout the nineteenth and much of the twentieth centuries, the law's relationship to higher education was very different from what it is now. There were few legal requirements relating to the educational administrator's functions, and they were not a major factor in most administrative decisions. The higher education world, moreover, tended to think of itself as removed from and perhaps above the world of law and lawyers. The roots of this traditional separation between academia and law are several.

Higher education (particularly private education) was often viewed as a unique enterprise that could regulate itself through reliance on tradition and consensual agreement. It operated best by operating autonomously, and it thrived on the privacy afforded by autonomy. Academia, in short, was like a Victorian gentlemen's club whose sacred precincts were not to be profaned by the involvement of outside agents in its internal governance.

Not only was the academic environment perceived as private; it was also thought to be delicate and complex. An outsider would, almost by definition, be ignorant of the special arrangements and sensitivities underpinning this environment. And lawyers as a group, at least in the early days, were clearly outsiders. Law schools did not become an established part of American higher education until the early twentieth century, and the older tradition of "reading law" (studying and working in a practitioner's office) persisted for many years afterward. Lawyers, moreover, were often perceived as representatives of the crass aspects of business and industry, or as products of the political world, or as "hired guns" ready to take on any cause for a fee. Interference by such "outsiders" would destroy the understanding and mutual trust that must prevail in academia.

The special higher education environment was also thought to support a special virtue and ability in its personnel. The faculties and administrators (often themselves respected scholars) had knowledge and training far beyond that of the general populace, and they were charged with the guardianship of knowledge for future generations. Theirs was a special mission pursued with special expertise and often at a considerable financial sacrifice. The combination spawned the perception that ill will and personal bias were strangers to academia and that outside monitoring of its affairs was therefore largely unnecessary.

The law to a remarkable extent reflected and reinforced such attitudes. Federal and state governments generally avoided any substantial regulation of higher education. Legislatures and administrative agencies imposed few legal obligations on institutions and provided few official channels through which their activities could be legally challenged. What legal oversight existed was generally centered in the courts. But the judiciary was also highly deferential to higher education. In matters concerning students, courts found refuge in the *in loco parentis* doctrine borrowed from early English common law. By placing the educational institution in the parents' shoes, the doctrine permitted the institution to exert almost untrammelled authority over students' lives:

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy [*Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913)].

Nor could students lay claim to constitutional rights in the higher education environment. In private education the U.S. Constitution had no application; and in the public realm—in cases such as *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), which upheld an order that student conscientious objectors must take military training as a condition of attending the institution—courts accepted the proposition that attendance at a public post-secondary institution was a privilege and not a right. Being a “privilege,” attendance could constitutionally be extended and was subject to termination on whatever conditions the institution determined were in its and the students' best interests. Occasionally courts did hold that students had some contract rights under an express or implied contractual relationship with the institution. But—as in *Anthony v. Syracuse University*, 231 N.Y.S. 435 (N.Y. App. Div. 1928), where the court upheld the university's dismissal of a student without assigning any reason other than that she was not “a typical Syracuse girl”—contract law provided little meaningful recourse for students. The institution was given virtually unlimited power to dictate the contract terms; and the contract, once made, was construed heavily in the institution's favor.

Similar judicial deference prevailed in the institution's relationship with faculty members. An employer-employee relationship substituted in this context for *in loco parentis*, but the relationship was based far more on judgments of senior faculty members and experienced administrators than on the formalities of written employment contracts. Courts considered academic judgments regarding appointment, promotion, and tenure to be expert judgments suitably governed by the complex traditions of the academic world. Judges did not possess the special skill needed to review such judgments, nor, without glaring evidence to the contrary, could they presume that nonacademic considerations

might play a part in such processes. Furthermore, faculty members in private institutions, like their students, could assert no constitutional rights against the institution, since these rights did not apply to private activity. And in public institutions the judicial view was that employment, somewhat like student attendance, was a privilege and not a right. Thus, as far as the Constitution was concerned, employment could also be extended or terminated on whatever grounds the institution considered appropriate.

As further support for these judicial hands-off attitudes, higher education institutions also enjoyed immunity from a broad range of lawsuits alleging negligence or other torts. For public institutions, this protection arose from the governmental immunity doctrine, which shielded state and local governments and their instrumentalities from legal liability for their sovereign acts. For private institutions, a comparable result was reached under the charitable immunity doctrine, which shielded charitable organizations from legal liability that would divert their funds from the purposes for which they were intended.

Traditionally, then, the immunity doctrines substantially limited the range of suits maintainable against higher education institutions and, even when immunity did not apply, the judicial attitudes described above made the chances of victory slim in suits against either the institution or its officers and employees. Reinforcing these legal limitations was a practical limitation on litigation: in the days before legal services were available from education associations with litigation offices or from governmentally supported legal services offices, few of the likely plaintiffs—faculty members, administrators, and students—had enough money to sue.

In the latter half of the twentieth century, however, events and changing circumstances worked a revolution in the relationship between academia and the law. The federal government and state governments became heavily involved in postsecondary education, creating many new legal requirements and new forums for raising legal challenges. (See generally Carnegie Foundation for the Advancement of Teaching, *The Control of the Campus: A Report on the Governance of Higher Education* (Princeton University Press, 1982).) Students, faculty, other employees, and outsiders became more willing and more able to sue postsecondary institutions and their officials (see Section 1.1). Courts became more willing to entertain such suits on their merits and to offer relief from certain institutional actions. (See generally Robert O’Neil, *The Courts, Government, and Higher Education*, Supplementary Paper no. 37 (Committee for Economic Development, 1972).)

The most obvious and perhaps most significant change to occur was the dramatic increase in the number, size, and diversity of postsecondary institutions and programs. Beyond the obvious point that more people and institutions would produce more litigation is the crucial fact of the changed character of the academic population itself (see, for example, K. P. Cross, *Beyond the Open Door: New Students to Higher Education* (Jossey-Bass, 1971)). The GI Bill expansions of the late 1940s and early 1950s, and the “Baby Boomer” expansion of the 1960s and 1970s, brought large numbers of new students into higher education, which in turn required the addition of new faculty members and

administrative personnel. Changes in immigration law and policy—in particular the passage in 1956 of the Immigration and Nationality Act—and a movement toward globalization in the aftermath of World War II, attracted increasing numbers of foreign students and scholars to the expanding opportunities for study and research in the United States. (See Gilbert Merkkx, “The Two Waves of Internationalization in U.S. Higher Education,” *International Educator*, Winter 2003, 13–21.) The stirrings of concern for equality of educational opportunity, and the advent of federal student aid programs, began to facilitate the increased presence of minority and low-income students on campus. Other new federal legislation (beginning with the Rehabilitation Act of 1973, Section 504) did the same for students with disabilities. In 1940 there were only about 1.5 million degree students enrolled in institutions of higher education; by 1955 the figure had grown to more than 2.5 million and by 1965 to nearly 6 million; and it has continued to rise, climbing to more than 15 million by 2001 (National Center for Education Statistics, *Digest of Education Statistics* (2003)). The expanding pool of persons seeking postsecondary education also prompted the establishment of new educational institutions and programs, and the development of new methods for delivering educational services. Great increases in federal aid for both students and institutions further stimulated these trends, and nondiscrimination requirements attached to these funds further broadened access to higher education.

As previously underrepresented social, economic, racial, and ethnic groups entered this wider world of postsecondary education, the traditional processes of selection, admission, and academic acculturation began to break down. Because of the pace of change occasioned by rapid growth, many of the new academics did not have sufficient time to internalize the old rules. Others were hostile to traditional attitudes and values because they perceived them as part of a process that had excluded their group or race or sex from educational opportunities in earlier days. For others in new settings—such as junior and community colleges, technical institutes, and experiential learning programs—the traditional trappings of academia simply did not fit. For many of the new students as well, older patterns of deference to tradition and authority became a relic of the past—perhaps an irrelevant or even consciously repudiated past.

Many factors combined to make the *in loco parentis* relationship between institution and student less and less tenable. The emergence of the student veteran, usually older and more experienced than the previous typical student, was one important factor; the loosening of the “lockstep” pattern of educational preparation that led students directly from high school to college to graduate work was another factor; and the lowered age of majority was a third (see Section 8.1.2 of this book). In addition, a students’ rights movement took root in the courts and in national education associations, serving to empower students with their own individual rights apart from their parents (see Section 8.1.1, and see the 1967 “Joint Statement on Rights and Freedoms of Students,” reprinted in *AAUP Documents and Reports* (9th ed., 2001), 261–67, drafted by five associations and endorsed by various others). The notion that, in such an environment, attendance was a privilege seemed an irrelevant nicety in an increasingly



credentialized society. To many students, higher education became an economic or professional necessity; and some, such as the GI Bill veterans, had cause to view it as an earned right.

The post-World War II movement toward diversity of the postsecondary student population continued in important ways through the rest of the twentieth century. Women students had become a majority by 1980 (see R. Cowan, "Higher Education Has Obligations to a New Majority," *Chron. Higher Educ.*, June 23, 1980, A48), although they were still underrepresented in some programs. The proportion of minority students had also increased, with minority enrollment increasing more rapidly than white student enrollment in the 1970s, especially in community colleges (see generally G. Thomas (ed.), *Black Students in Higher Education: Conditions and Experiences in the 1970s* (Greenwood Press, 1981); Michael Olivas (ed.), *Latino College Students* (Teachers College Press, 1986); and compare B. Wright & W. G. Tierny, "American Indians in Higher Education: A History of Cultural Conflict," *Change*, March/April 1991, 11–18). Despite gains in some areas, diversity and access to education continued to be significant issues on most campuses.

The proportion of postsecondary students who were "adult learners," beyond the traditional college-age group of eighteen- to twenty-four-year-olds, also increased markedly through the latter part of the century (see, for example, K. P. Cross, *Adults as Learners: Increasing Participation and Facilitating Learning* (Jossey-Bass, 1982)), as did the proportion of part-time students (many of whom were also women and/or adult learners). The increase in part-time students resulted in a lengthening of the average number of years taken to earn the baccalaureate degree (see M. C. Cage, "Fewer Students Get Bachelor's Degrees in 4 Years, Study Finds," *Chron. Higher Educ.*, July 15, 1992, A29). Military personnel also became a significant component of the burgeoning adult learner and part-time populations, not only in civilian institutions but also in institutions established by the military services (see Section 1.3 of this book).

One further category of students, standing apart from the interlocking categories mentioned, also continued to grow substantially through the latter part of the century: foreign students. These students made a particularly important contribution to campus diversity and to the globalization of higher education, and also had a direct impact on the law. The application of immigration law to foreign students became a major concern for federal officials, who balanced shifting political and educational concerns as they devised and enforced regulations; and for postsecondary administrators, who applied these complex regulations to their own campuses (see, for example, Committee on Foreign Students and Institutional Policy, *Foreign Students and Institutional Policy: Toward an Agenda for Action* (American Council on Education, 1982)).

These changes in the student population were reflected, as expected, in changes in the universe of postsecondary institutions and programs. Community colleges and private institutions awarding associate's degrees became more prominent, as increases in their enrollments and in the numbers of institutions exceeded increases for baccalaureate and graduate institutions (see, for example, S. Brint & J. Karabel, *The Diverted Dream: Community Colleges and the*

*Promise of Educational Opportunity in America, 1900–1985* (Oxford University Press, 1989)). Postsecondary education programs sponsored by private industry also increased, creating a new context for questions about state degree-granting authority, private accreditation, academic freedom, and other faculty/student rights and obligations (see, for example, Nell Eurich, *Corporate Classrooms: The Learning Business* (Princeton University Press, 1986); and Jack Bowsher, *Educating America: Lessons Learned in the Nation's Corporations* (Wiley, 1989)), as well as questions about academic credit and the transferability of industry-sponsored education (see Nancy Nash & Elizabeth Hawthorne, *Formal Recognition of Employer-Sponsored Instruction: Conflict and Collegiality in Postsecondary Education*, ASHE-ERIC Higher Education Report no. 3 (Association for the Study of Higher Education, 1987)). Work-study programs, internships, and other forms of experiential education also increased in numbers and importance (see, for example, M. T. Keeton & P. J. Tate (eds.), *Learning by Experience: What, Why, How*, New Directions for Experiential Learning no. 1 (Jossey-Bass, 1978), raising new questions about institutional liability for off-campus acts; the use of affiliation agreements with outside entities; and coverage of experiential learners under workers' compensation, unemployment compensation, and minimum wage laws. "Traditional" institutions of higher education, typically nonprofit entities, also faced competition from new forms of profit-making institutions that offered easily accessible classroom-based instruction. These offerings were particularly popular with adult learners who wished to earn a degree while working full time, alternative programs for professionals interested in developing "practical" expertise, and—later—distance learning. (See, for example, Kathleen Kelly, *Meeting Needs and Making Profits: The Rise of For-Profit Degree-Granting Institutions* (Education Commission of the States, 2001); Gordon C. Winston, "For-Profit Higher Education: Godzilla or Chicken Little?" *Change*, January/February 1999, 13–19.)

Other initiatives in the latter part of the century were fueled by the "lifelong learning" movement, which promoted diversity in delivery mechanisms and innovations in learning models and stimulated some of the corporate and experiential learning programs mentioned previously (see, for example, Chris Knapper & Arthur Cropley, *Lifelong Learning in Higher Education* (3d ed., Taylor & Francis Group, 1999)). First correspondence and television home-study courses, then off-campus and external degree programs, and later computer-based home-study courses and interactive distance learning programs all grew and significantly impacted postsecondary education (see, for example, Jonathan Alger & John Przymyszny (eds.), *Online Education: A Legal Compendium* (National Association of College and University Attorneys, 2002)).

Distance learning, in particular, has had substantial implications for colleges and universities, as public, private nonprofit, and profit-making institutions have developed Web-based degree programs and continuing education programs available online to students anywhere in the world. Many institutions scrambled to develop their own online programs out of concern that the market for traditional, campus-based programs would shrink as online degrees proliferated. Later, some institutions scaled back their involvement in the distance learning

market as the market, or their views of its importance or profitability, changed. The rapid development in distance learning raised concerns for faculties about educational quality, oversight of distance instruction, faculty ownership of Web-based instructional materials, and faculty control over the creation, delivery, and updating of their own online courses. (See, for example, *The Chronicle of Higher Education's* archive of stories on distance learning and for-profit ventures at <http://chronicle.com/weekly/indepth/forprofit.htm>.)

As broader and larger cross-sections of the world passed through postsecondary education's gates in the latter part of the twentieth century, institutions became increasingly tied to the outside world. Government allocations and foundation support accounted for a larger share of institutional revenues. Competition for money, students, and outstanding faculty members focused institutional attentions outward. Institutions engaged increasingly in government research projects; state universities grew larger, as did annual state legislative appropriations for higher education; and federal and state governments increasingly paid tuition bills through grant and loan programs. Social and political movements—beginning with the civil rights movement and then the Vietnam antiwar movement in the 1960s—became a more integral part of campus life. And with all of these outside influences, the law came also.

In addition, student consumerism hit America's campuses (see, for example, D. Riesman, *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (Jossey-Bass, 1980)). The competition for students, faculty members, and funds served to introduce marketing techniques and attitudes into postsecondary education. These developments helped turn institutional attentions toward competitor institutions, the business world and government agencies concerned about the education "marketplace." An increasing emphasis on students as consumers of education with attendant rights, to whom institutions owe corresponding responsibilities, further undermined the traditional concept of education as a privilege. Student litigation on matters such as tuition and financial aid, course offerings, awarding of degrees, campus security, and support services became more common, as did government consumer protection regulations, such as the required disclosure of graduation rates and campus crime statistics.

Institutional self-regulation, partly a response to student consumerism, was another important trend with continuing significance (see, for example, Carnegie Council on Policy Studies in Higher Education, *Fair Practices in Higher Education: Rights and Responsibilities of Students and Their Colleges in a Period of Intensified Competition for Enrollments* (Jossey-Bass, 1979)). This trend was not a movement back to the old days of "self-regulation," when institutions governed their cloistered worlds by tradition and consensus; but rather, a movement toward more and better institutional guidelines and regulations, and grievance processes, for students and faculty. On the one hand, by creating new rights and responsibilities or making existing ones explicit, institutions gave members of campus communities more claims to press against one another. But on the other hand, self-regulation facilitated the internal and more collegial resolution of claims and a greater capacity for full compliance with government

regulations, thus reducing the likelihood that courts, legislatures, and administrative agencies would intervene in campus matters. (For analysis of ethical issues relating to self-regulation, see John Wilcox & Susan Ebbs, *The Leadership Compass: Values and Ethics in Higher Education*, ASHE-ERIC Report no. 1 (Association for the Study of Higher Education, 1992).) Despite such institutional efforts, the federal government and state governments continued to increase the scope and pervasiveness of their regulation of postsecondary education. At the state level, demands for assessment and accountability persisted, and new pressures were placed on research universities to demonstrate their devotion to teaching and service. At the federal level, new initiatives and regulations resulted from each reauthorization of the Higher Education Act.

As the twentieth century drew to its close, the development of higher education law continued to reflect, and be reflected in, social movements on the campuses and in the outside world. The civil rights movement continued to expand, covering not only racial and gender equality but also rights for persons with disabilities, as highlighted particularly by the Americans With Disabilities Act (ADA) of 1990; rights for religious adherents; and rights for gays and lesbians. (See, for example, Laura Rothstein, "Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading," 63 *Maryland L. Rev.* 122 (2004).) Differences emerged regarding the extent of such rights, particularly for gays and lesbians. Abortion also remained an important issue, as pro-choice and pro-life movements continued to compete for predominance on many campuses.

Government financial support for higher education, having generally increased in the 1960s and 1970s, became problematic in the 1980s and 1990s. In the scramble for funds, postsecondary education was drawn even further into the political process. Issues emerged concerning equitable allocation of funds among institutions and among various categories of needy students. As the burden of diminishing support was perceived to fall on minority and low-income students, or on minority and women faculty newcomers who were most subject to layoffs prompted by budget cuts, new civil rights concerns arose. Moreover, as the resources available from government and traditional private sources failed to keep pace with institutional growth, and as economic conditions negatively affected institutions, financial belt tightening became a fact of life on most campuses. Legal questions arose concerning standards and procedures for faculty and staff layoffs, termination of tenured faculty, reduction and termination of programs, closures and mergers, and bankruptcies. (See, for example, James Martin, James Samels, & Associates, *Merging Colleges for Mutual Growth* (Johns Hopkins University Press, 2000).) Similarly, renewed attention was given to statewide planning for postsecondary education in financial hard times; and legal, political, and policy issues arose concerning program review and elimination in state systems, and concerning state authority to issue or refuse licenses for new programs of private (particularly out-of-state) institutions.

After mandatory retirement for faculty became unlawful in 1994, many institutions gave more attention to the performance of tenured faculty members. A

trend toward post-tenure review developed haltingly, with the debate slowly shifting from whether to have such review to what procedures to use. Financial pressures on postsecondary institutions and legislatures' demands for accountability led institutional leaders to focus on faculty productivity. Institutions gave more attention to phased retirement programs, and age discrimination became a more important issue. In addition, in related developments, the dialogue on the continued propriety of faculty tenure intensified. Many state legislators, some college presidents, a small minority of faculty members, and some commentators asserted that tenure is unnecessary, since other systems that do not guarantee lifetime job security can still protect academic freedom. (See, for example, Richard Chait, "Thawing the Cold War over Tenure: Why Academe Needs More Employment Options," *Chron. Higher Educ.*, February 7, 1997, B4; and compare Matthew Finkin, *The Case for Tenure* (Cornell University Press, 1996).) Some institutions, such as Bennington College, eliminated tenure without suffering a loss of student enrollment (see Robin Wilson, "Bennington After Eliminating Tenure, Attracts New Faculty Members and Students," *Chron. Higher Educ.*, January 10, 1997, A10). Other institutions considered modifying their tenure systems but encountered substantial faculty resistance (see, for example, William H. Honan, "University of Minnesota Regents Drop Effort to Modify Tenure," *New York Times*, November 17, 1996, p. 21).

While the debate continued on whether tenure should continue to exist and, if so, in what form, the proportion of tenured faculty decreased on many campuses in the 1990s, and the proportion of part-time faculty continued to increase. A study by the U.S. Department of Education found that 42.5 percent of all faculty working in 1997 were employed part time, compared with 22 percent in 1970 (Courtney Leatherman, "Part-Timers Continue to Replace Full-Timers on College Faculties," *Chron. Higher Educ.*, January 28, 2000, A18). As their numbers increased, part-time faculty members sought improvements in their pay and benefits. Some formed unions, while others turned to litigation (see "Part-Time Faculty Members Sue for Better Pay and Benefits," *Chron. Higher Educ.*, October 15, 1999, A16). Graduate teaching assistants also clashed with faculty and administrators on many campuses over work assignments, the right to unionize, and the right to strike (Courtney Leatherman & Denise K. Magner, "Faculty and Graduate-Student Strife over Job Issues Flares on Many Campuses," *Chron. Higher Educ.*, November 29, 1996, A12). In addition, institutions have also increased their number of full-time, non-tenure track faculty positions (Courtney Leatherman, "Growth in Positions off the Tenure Track Is a Trend That's Here to Stay, Study Finds," *Chron. Higher Educ.*, April 9, 1999, A14). Although the proportion of women faculty increased slowly, women still lagged behind men at the tenured and full professor ranks, and even senior women faced inequitable working conditions at some institutions (see, for example, Robin Wilson, "An MIT Professor's Suspicion of Bias Leads to a New Movement for Academic Women," *Chron. Higher Educ.*, December 3, 1999, A16).

The latter years of the twentieth century also witnessed increasing conflict on campus relating to diversity of ideas, racial and ethnic identities, sexual

orientation, gender concerns, and other matters concerning cultural diversity and lifestyle choices. These tensions were played out in clashes over “hate speech”; curriculum proposals placing greater emphasis on nonwhite, non-Western cultures and writers; issues regarding gender equity in the classroom and in college athletics; accommodation of students with disabilities; date rape, sexual assault, and sexual harassment; alcohol consumption and drug use; and issues regarding institutional ties with Greek organizations. Gays and lesbians became increasingly vocal as they sought parity with heterosexuals with respect to funding for student organizations, employment benefits, campus housing for same-sex couples, and equal access to careers in the military. Students with disabilities—particularly learning disabilities—challenged faculty and administrators’ judgments with respect to course requirements, evaluation formats, and assignments.

The technological revolution on campus continued to surge ahead in the ’90s, with critical ramifications for higher education. Biotechnological and biomedical research raised various sensitive issues (see below). Devising and enforcing specifications for the lease or purchase of technology for office support, laboratories, or innovative learning systems created complex problems involving contract and commercial law. The Internet and the World Wide Web opened virtually unlimited channels of communication and information for faculty, staff, and students. In turn, the mushrooming use of Web sites and e-mail by faculty and students for both pedagogical and personal purposes, and the continued growth of computer and telecommunications-assisted distance learning, spawned new challenges regarding intellectual property, free speech, harassment, invasion of privacy, defamation, plagiarism, and a multitude of other issues. These challenges have led institutions to review, and sometimes modify, campus policies on computer use, student conduct, academic integrity, and ownership of intellectual property, and have also led to changes in institutional methods, research methods, and dissemination of scholarly work.

Similarly, as a result of private industry’s continual interest in university research, and universities’ continual interest in private funding of research efforts, new alliances were forged between the campus and the corporate world. As new ties to the outside world were formed, questions arose concerning institutional autonomy, faculty academic freedom, and the specter of conflicts of interest (see, for example, Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton University Press, 2004); and Bernard Reams, Jr., *University-Industry Research Partnerships* (Quorum Books, 1986)). Federal government support for university-industrial cooperative research became an issue, as did federal regulation in sensitive areas such as genetic engineering.

Other new questions concerning research also arose. Research on both animals and human subjects became subject to control by institutional review boards. Stem cell research received considerable attention, and pertinent federal policies shifted with changes in the political party controlling federal research policy. Questions arose about the ownership of human tissue used in research, and about researchers’ obligations to disclose the use to be made

of the tissue and obtain informed consent. The patentability of living organisms and of human genes also raised complex legal and policy questions. And problems related to conflicts of interest and scientific misconduct plagued universities and the federal agencies that fund their research.

Universities' increasing ties to business and industry, and increasing pressures to become more efficient and cost-effective, led to demands from various quarters that universities be managed more like corporations. (See Ronald Ehrenberg (ed.), *Governing Academia* (Cornell University Press, 2004). In addition, outside the sphere of research, institutions increasingly engaged in entrepreneurial enterprises or outsourced entrepreneurial campus operations to commercial businesses. Big-time college athletics also increasingly became a profit-making "business" on some campuses. This "commercialization" of academia has had, and continues to have, enormous legal and policy implications for both public and private institutions. (See, for example, Stanley Aronowitz, *The Knowledge Factory: Dismantling the Corporate University and Creating True Higher Learning* (Beacon Press, 2001).)

The globalization of higher education also continued apace as the century moved to a close. The pervasive use of the Internet created the potential to involve institutions in legal problems on the other side of the globe, even if the institution had no physical presence there. U.S. institutions established branches and programs in other countries, and foreign entities established academic programs in the United States. The number of study abroad programs sponsored by U.S. universities continued to rise, as did the number of foreign students attending U.S. colleges and universities. These trends gave rise to issues concerning state coordination and control, and accrediting agency oversight, of programs in foreign countries; access to foreign-study programs for students with disabilities; the "extraterritorial" application of U.S. civil rights laws; compliance with foreign law requirements; and institutional liability for injuries to students and faculty participating in study abroad programs or overseas field trips. (See, for example, Note, "Foreign Educational Programs in Britain: Legal Issues Associated with the Establishment and Taxation of Programs Abroad," 16 *J. Coll. & Univ. Law* 521 (1990); and Richard Evans, Note, "'A Stranger in a Strange Land': Responsibility for Students Enrolled in Foreign-Study Programs," 18 *J. Coll. & Univ. Law* 299 (1991).) The numbers and types of questions concerning the immigration status of foreign students and scholars continued to grow.

Student and faculty demographics also continued to change in the late twentieth century, as did U.S. population demographics. The U.S. population was aging, and this change was reflected in college enrollments. The proportion of college students aged forty or older doubled between 1970 and 1993 (*Life After 40*, Institute for Higher Education Policy and Education Resources Institute, 1996). Faculties also reflected this aging of society. A 1999 survey found that nearly one-third of full-time faculty were age fifty-five or older (Denise K. Magner, "The Graying Professoriate," *Chron. of Higher Educ.*, September 3, 1999, A18). The U.S. population also became more diverse with respect to race and ethnicity. African Americans were 15 percent of the population under age eighteen in 1990, and Hispanics comprised 12.2 percent; these percentages

continued to rise in the 1990s and into the twenty-first century (see Janice Hamilton Outtz, "Higher Education and the New Demographic Reality," 76 *Educational Record* 65 (1995)). These demographic realities exacerbated tensions over college admissions, hiring issues, and affirmative action, and supported continuing concerns about the proportion of minority students and faculty members in both undergraduate and post-baccalaureate programs. (See generally Caroline Turner, Mildred Garcia, Amaury Nora, & Laura Rendon, *Racial and Ethnic Diversity in Higher Education* (Association for the Study of Higher Education, 1996).) As institutions struggled to enhance the diversity of their student bodies, they confronted a new challenge: increasing the enrollment of a new minority: men. Women comprised approximately 55 percent of all college students in the 1990s. Women tended to earn better grades in high school than did men, and a larger proportion of women were graduating from high school.

In the first decade of the twenty-first century, as this book is written, there does not appear to be any lessening of the pace of change or the impact of new societal developments on higher education. Remnants, or new incarnations, of most of the 1980s and 1990s trends (and some of the earlier trends) continue to occupy the attentions of institutional officers, counsel, and faculty; and new trends and developments continue to emerge. The globalization, commercialization, "technologization," and diversification of higher education continue to be predominant overarching trends that affect higher education in numerous ways. These trends are now joined by the newest overarching development: global terrorism, and terrorist threats to the United States, in a post-9/11 world.

There are many specific issues and concerns that have arisen from these trends early in the new century and will likely continue in importance well into the future. The growth of the foreign student population in U.S. institutions slowed, and enrollment then dropped, at least temporarily, largely due to tightened federal restrictions of the issuance of visas in the wake of 9/11; and institutions have had to shoulder substantial new legal responsibilities in enrolling and monitoring foreign students. (See Burton Bollag, "Enrollment of Foreign Students Drops in U.S.," *Chron. Higher Educ.*, November 19, 2004, A1.) Similar effects for institutions are being encountered in recruiting foreign faculty candidates and researchers, and in inviting foreign speakers to campus. There are new federal restrictions on university research, largely due to concerns about the dissemination of research and research products pertinent to bioterrorism, and to the disclosure of research secrets. Increased federal investigatory powers, arising largely from the USA PATRIOT Act, have raised new issues concerning the privacy of computer communications and have stimulated broad debate on the appropriate balance between national security powers and individual rights.

The prelude to and aftermath of the U.S. Supreme Court's decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the University of Michigan affirmative action cases, have further stimulated the already extensive debate on university affirmative action policies. In addition, these developments have led to various state referendum and initiative drives aimed at prohibiting racial preferences; have spurred new research on alternatives to race-conscious affirmative action plans; and have reinvigorated legal issues concerning racial and ethnic preferences in



financial aid, orientation programs, campus housing, and other institutional programming.

The hate speech phenomenon, the “political correctness” phenomenon, and concerns about ethnic, national origin, and religious discrimination have taken on new life, partly as a result of terrorism and its association with particular countries and religions. These developments, as well as recent court decisions, have prompted renewed attention to both faculty and student academic freedom, and to the relationship between these freedoms and institutional autonomy (sometimes called “institutional academic freedom”).

Debate and research on the diversity of the higher education student population has taken on a new dimension, focusing on socioeconomic status. See generally William Bowen, Martin Kurzweil, & Eugene Tobin, *Equity and Excellence in American Higher Education* (U.Va. 2005). Some of the pertinent factors concern institutional and governmental financial aid programs. (See generally “The Quest for Students” (articles by various authors), *Chron. Higher Educ.*, April 30, 2004, Sec. B.) Rises in tuition costs continue to outpace increases in government programs of student aid, making it more difficult for low-income and middle-income students to afford the costs of four-year institutions. (See generally Edward St. John, *Refinancing the College Dream* (Johns Hopkins University Press, 2003).) A movement by institutions toward more merit-based aid and less need-based aid is exacerbating this problem. Other factors concern financial and competitive advantages that students from wealthier families may have in preparing for college. Besides apparent subtle effects of being in a family of low socioeconomic status (see Bowen, Kurzweil, & Tobin, above), there are more obvious considerations, such as the proliferation of private tutors, private admissions counselors, private test preparation courses, special summer academic programs, and “gap year” strategies providing competitive advantages generally available only to persons of means (see, for example, Ben Gose, “If at First They Don’t Succeed . . .,” *Chron. Higher Educ.*, August 5, 2005, A30). Also, advanced placement (AP) courses and honors courses are generally more available to students in private high schools and wealthier public school districts.

Higher education governance is again becoming a major issue as many ideas have surfaced concerning the restructuring of state systems of higher education. Some state institutions, for instance, are seeking more autonomy from the state legislature and state agencies, and at the same time are building endowments and otherwise enhancing their capacities for fund-raising and innovation (see, for example, John Tagg, “Venture Colleges: Creating Charters for Change in Higher Education,” *Change*, January/February 2005, 35–43). Other state institutions are becoming regionally oriented under state plans to serve better the particular needs of the state’s various regions. As state institutions thus become more like private institutions, private institutions have become more like public institutions due to the ever-increasing federal regulations and federal aid conditions that generally treat private and public institutions the same. Within this mix of factors that is diminishing the distinction between public and private higher education, religious institutions seek to maintain their uniqueness and autonomy in light of increased government regulation and various financial and societal pressures.

In all, postsecondary education remains a dynamic enterprise in the new century, as it was in the old. Societal developments and technological breakthroughs continue to be mirrored in the issues, conflicts, and litigation that colleges and universities now face. The work of the university counsel has become even more challenging, the work of administrators even more demanding, and the work of scholars and students of higher education law even more fascinating, as recent trends and developments combine and are played out on the campuses of U.S. institutions. The challenge for the law is, as it has been, to keep pace with higher education by maintaining a dynamism of its own that is sensitive to institutions' evolving missions and the varying conflicts that institutions confront. And the challenge for higher education continues to be to understand and respond constructively to changes and growth in the law while maintaining its focus on its multiple purposes and constituencies.

### ***Sec. 1.3. The Governance of Higher Education***

***1.3.1. Basic concepts and distinctions.*** It will be helpful for students, practitioners, and scholars of higher education law and policy to cultivate an understanding of higher education governance. "Governance" refers to the structures and processes by which higher education institutions and systems are governed in their day-to-day operations as well as their longer-range policy-making. (See generally William Tierney (ed.), *Competing Conceptions of Governance: The Paradox of Scope* (John Hopkins University Press, 2004); Edwin Duryea & Donald T. Williams (eds.), *The Academic Corporation* (Falmer, 2000).) Specifically, governance encompasses: (1) the organizational structures of individual institutions and (in the public sector) of statewide systems of higher education; (2) the delineation and allocation of decision-making authority within these organizational structures; (3) the processes by which decisions are made; and (4) the processes by which, and forums within which, decisions may be challenged.

Higher education governance can be divided into two categories: internal governance and external governance. "Internal governance" refers to the structures and processes by which an institution governs itself. "External governance" refers to the structures and processes by which outside entities (that is, entities external to the institution itself) play a role in the governance of institutional affairs. Internal governance usually involves "internal" sources of law (see Section 1.4.3); and external governance generally involves "external" sources of law (see Section 1.4.2). In turn, external governance can be further divided into two subcategories: public external governance and private external governance. "Public external governance" refers to the structures and processes by which the federal government (see Section 13.1), state governments (see Section 12.1), and local governments (see Section 11.1) participate in the governance of higher education. "Private external governance" refers to the structures and processes by which private associations and organizations participate in the governance of higher education. Major examples of such external private entities include accrediting agencies (see Section 14.3), athletic associations and conferences (see Section 14.4), the American Association of University Professors (see Section 14.5), and other higher education associations

(see Section 14.1). Other examples include national employee unions with “locals” or chapters at individual institutions (see Sections 4.5 & 6.3); outside commercial, research, public service, or other entities with which institutions may affiliate (see Sections 3.6, 15.3.1, & 15.4.1); and public interest and lobbying organizations that support particular causes.

The governance structures and processes for higher education, both internal and external, differ markedly from those for elementary and secondary education. Similarly, the structures and processes for public higher education differ from those for private higher education. These variations between public and private institutions exist in part because they are created in different ways, have different missions, and draw their authority to operate from different sources (see generally Section 3.1); and in part because the federal Constitution’s and state constitutions’ rights clauses apply directly to public institutions and impose duties on them that these clauses do not impose on private institutions (see generally Section 1.5 below). Furthermore, the governance structures and processes for private secular institutions differ from those for private religious institutions. These variations exist in part because religious institutions have different origins and sponsorship, and different missions, than private secular institutions; and in part because the federal First Amendment, and comparable state constitutional provisions, afford religious institutions an extra measure of autonomy from government regulations, beyond that of private secular institutions, and also limit their eligibility to receive government support (see generally Section 1.6 below).

Governance structures and processes provide the legal and administrative framework within which higher education problems and disputes arise. They also provide the framework within which parties seek to resolve problems and disputes (see, for example, Section 2.3) and institutions seek to prevent or curtail problems and disputes by engaging in legal and policy planning (see Sections 1.7 & 2.4.2). In some circumstances, governance structures and processes may themselves create problems or become the focus of disputes. Internal disputes (often turf battles), for instance, may erupt between various constituencies within the institution—for example, a dispute over administrators’ authority to change faculty members’ grades. External governance disputes may erupt between an institution and an outside entity—for example, a dispute over a state board of education’s authority to approve or terminate certain academic programs at a state institution, or a dispute over an athletic association’s charges of irregularities in an institution’s intercollegiate basketball program. Such disputes may spawn major legal issues about governance structures and processes that are played out in the courts. (See Sections 7.2.3 and 7.4.2 for examples concerning internal governance and Sections 12.2 and 14.4 for examples concerning external governance.) Whether a problem or dispute centers on governance, or governance only provides the framework, a full appreciation of the problem or dispute, and the institution’s capacity for addressing it effectively, requires a firm grasp of the pertinent governance structures and processes.

Typically, when internal governance is the context, an institution’s governing board or officers are pitted against one or more faculty members, staff members, or students; or members of these constituencies are pitted against one another. Chapters Three through Ten of this book focus primarily on such

issues. When external governance is the context, typically a legislature, a government agency or board, a private association or other private organization, or sometimes an affiliated entity or outside contractor is pitted against a higher educational institution (or system) or against officers, faculty members, or students of an institution. Chapters Eleven through Fifteen of this book focus primarily on such issues.

The two categories of internal and external governance often overlap, especially in public institutions, and a problem in one category may often “cross over” to the other. An internal dispute about sexual harassment of a student by an employee, for instance, may be governed not only by the institution’s internal policies on harassment but also by the external nondiscrimination requirements of the federal Title IX statute (see Section 9.3.4 of this book). Similarly, such a sexual harassment dispute may be heard and resolved not only through the institution’s internal processes (such as a grievance mechanism), but also externally through the state or federal courts, the U.S. Department of Education, or a state civil rights agency. There are many examples of such crossovers throughout this book.

**1.3.2. *Internal governance.*** As a keystone of their internal governance systems, colleges and universities create “internal law” (see Section 1.4.3 below) that delineates the authority of the institution and delegates portions of it to various institutional officers, managers, and directors, to departmental and school faculties, to the student body, and sometimes to captive or affiliated organizations (see Sections 3.6.1 & 3.6.2). Equally important, internal law establishes the rights and responsibilities of individual members of the campus community and the processes by which these rights and responsibilities are enforced. Circumscribing this internal law is the “external law” (see Section 1.4.2 below) created by the federal government, state governments, and local governments through their own governance processes. Since the external law takes precedence over internal law when the two are in conflict, institutions’ internal law must be framed against the backdrop of applicable external law.

Internal governance structures and processes may differ among institutions depending on their status as public, private secular, or private religious (as indicated in subsection 1.3.1), and also depending on their size and the degree programs that they offer. The internal governance of a large research university, for instance, may differ from that of a small liberal arts college, which in turn may differ from that of a community college. Regardless of the type of institution, however, there is substantial commonality among the internal structures of American institutions of higher education. In general, every institution has, at its head, a governing board that is usually called a board of trustees or (for some public institutions) a board of regents. Below this board is a chief executive officer, usually called the president or (for some public institutions) the chancellor. Below the president or chancellor are various other executive officers, for example, a chief business officer, a chief information officer, and a general counsel. In addition, there are typically numerous academic officers, chief of whom is a provost or vice president for academic affairs.

Below the provost or vice president are the deans of the various schools, the department chairs, and the academic program directors (for instance, a director of distance learning, a director of internship programs, or a director of academic support programs). There are also managers and compliance officers, such as risk managers, facilities managers, affirmative action officers, and environmental or health and safety officers; and directors of particular functions, such as admissions, financial aid, and alumni affairs. These managers, officers, and directors may serve the entire institution or may serve only a particular school within the institution. In addition to these officers and administrators, there is usually a campuswide organization that represents the interests of faculty members (such as a faculty senate) and a campuswide organization that represents the interests of students (such as a student government association).

In addition to their involvement in a faculty senate or similar organization, faculty members are usually directly involved in the governance of individual departments and schools (see generally Section 7.4.1). Nationwide, faculty participation in governance has been sufficiently substantial that internal governance is often referred to as “shared governance” or “shared institutional governance” (see William Tierney & James Minor, *Challenges for Governance: A National Report* (Center for Higher Education Policy Analysis, University of Southern California (2003)). In recent times, as many institutions have been reconsidering their governance structures, usually under pressure to attain greater efficiency and cost-effectiveness, the concept and the actual operation of shared governance have become a subject of renewed attention.

**1.3.3. External governance.** The states are generally considered to be the primary external “governors” of higher education, at least in terms of legal theory. State governments are governments of general powers that typically have express authority over education built into their state constitutions. They have plenary authority to create, organize, support, and dissolve public higher educational institutions (see Section 12.2); and they have general police powers under which they charter and license private higher educational institutions and recognize their authority to grant degrees (see Section 12.3). The states also promulgate state administrative procedure acts, open meetings and open records laws, and ethics codes that guide the operations of most state institutions (see Sections 12.5.2–12.5.4 & 15.4.7). In addition, states have fiscal powers (especially taxation powers) and police powers regarding health and safety (including the power to create and enforce criminal law) that they apply to private institutions and that substantially affect their operations (see, for example, Sections 12.1, 12.5.1, & 12.5.5). And more generally, state courts establish and enforce the common law of contracts and torts that forms the foundation of the legal relationship between institutions and their faculty members, students, administrators, and staffs. (See Section 1.4.2.4 regarding common law and Section 1.4.4 regarding the role of the courts.)

The federal government, in contrast to the state governments, is a government of limited powers, and its constitutional powers, as enumerated in the

federal Constitution, do not include any express power over education (Section 13.1.1 of this book). Through other express powers, however, such as its spending power (Section 13.1.2), and through its implied powers,<sup>2</sup> the federal government exercises substantial governance authority over both public and private higher education. Under its express powers to raise and spend money (see Sections 13.1.2 & 13.1.3), for example, Congress provides various types of federal aid to most public and private institutions in the United States, and under its implied powers Congress establishes conditions on how institutions spend and account for these funds. Also under its implied powers, Congress provides for federal recognition of private accrediting agencies—among the primary external private “governors” of education—whose accreditation judgments federal agencies rely on in determining institutions’ eligibility for federal funds (see Section 14.3.3). The federal government also uses its spending power in other ways that directly affect the governance processes of public and private higher educational institutions. Examples include the federally required processes for accommodating students with disabilities (see Section 9.3.5.4); for keeping student records (see Section 9.7.1); for achieving racial and ethnic diversity through admissions and financial aid programs (see Sections 8.2.5 & 8.3.4); and for preventing and remedying sex discrimination and sexual harassment (see, for example, Sections 9.3.4 & 13.5.3).

Under other powers, and pursuing other priorities, the federal government also establishes processes for copyrighting works and patenting inventions of faculty members and others (see, for example, Section 13.2.5); for enrolling and monitoring foreign students (see Section 8.7.4); for resolving employment disputes involving unionized workers in private institutions (see Sections 4.5 & 6.3); and for resolving other employment disputes concerning health and safety, wages and hours, leaves of absence, unemployment compensation, retirement benefits, and discrimination (see, for example, Sections 4.6.1–4.6.4). In all these arenas, federal law is supreme over state and local law, and federal law will preempt state and local law that is incompatible with the federal law.

Furthermore, the federal courts are the primary forum for resolving disputes about the scope of federal powers over education (see, for example, Sections 13.1.4, 13.1.5, & 13.1.6), and for enforcing the federal constitutional rights of faculty members, students, and others (see, for example, Sections 7.4 & 9.5). Thus, federal court judgments upholding federal powers or individuals’ constitutional rights serve to alter, channel, and check the governance activities of higher education institutions, especially public institutions, in many important ways.

In addition to all these aspects of federal governance, the federal government establishes and supports its own public higher education institutions that serve particular federal constitutional purposes. The military academies, such as the Naval Academy, are the most obvious examples but by no means the

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<sup>2</sup>On implied powers, see William Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004), Chap. 6, Sec. B.3.

only ones. For example, the U.S. Department of Defense operates the Uniformed Services University of the Health Sciences under the direction of a board of regents. There is also the National Defense University (<http://www.ndu.edu>) and the Air University (<http://www.au.af.mil>)—both accredited, degree-granting institutions. The latter’s various colleges include the Community College of the Air Force, which received its degree-granting authority directly from Congress (Pub. L. 94-361, July 14, 1976, 10 U.S.C. § 9315) and now offers more than sixty degree programs for enlisted personnel, billing itself on its Web site (<http://www.au.af.mil/au/ccaf/>) as “the largest multi-campus community college in the world.” Together, the various colleges and universities of the military services serve not only commissioned officers and enlisted personnel, but also civilians who commit themselves to military careers, civilian officials of the U.S. government, and military personnel from other countries. In addition, the federal military services sponsor Reserve Officer Training Corps (ROTC) programs on the campuses of many civilian colleges and universities. And under the Senior Reserve Officers’ Training Corps Act (10 U.S.C. §§ 2101 *et seq.*), Congress has also designated six civilian colleges with military-style training as “senior military colleges” entitled to certain special benefits provided by the military services (10 U.S.C. § 2111 a(a)–(c), (e), & (f)).

In another area of federal power and interest, the federal government, through the U.S. Department of the Interior, operates several accredited post-secondary institutions primarily serving American Indians—for example, Haskell Indian Nations University located in Lawrence, Kansas (<http://www.haskell.edu>).<sup>3</sup> The federal government also provides grants to approximately twenty-five tribally controlled colleges under the Tribally Controlled College or University Assistance Act, 25 U.S.C. §§ 1801 *et seq.* (For further information on these various colleges and universities, see the Web site of the American Indian Higher Education Consortium (<http://www.aihec.org>).)

The federal government also has a special interest in, and authority over, the governance of higher educational institutions in the District of Columbia. Since the District is not within the boundaries of any state, Congress for many years has provided for the chartering of D.C. institutions under its constitutional power to exercise exclusive legislative jurisdiction over the Nation’s Capital (U.S. Const., Art. I, sec. 8, clause 17). In some cases, Congress itself has chartered D.C. institutions by enacting bills of incorporation (see, for example, Pub. L. 235, 70th Cong., Sess. 1 (1928)), confirming and expanding the Catholic University of America’s 1887 charter under the D.C. incorporation statute). In addition, the federal government has historically provided additional support to two institutions in the District of Columbia, Howard University and Gallaudet University, due to their special national missions. (See, for example, Act to

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<sup>3</sup>The other institutions operated by the Department of the Interior, as of this book’s press deadline, are the Southwestern Indian Polytechnic Institute (<http://www.sipi.bia.edu>), the Saginaw Chippewa Tribal College, and the Tohoro O’odhem Community College.

Incorporate Howard University, 14 Stat. 428 (39th Cong. 2d Sess. 1866), and the act of June 16, 1882, for the relief of Howard University, 22 Stat. 104.)<sup>4</sup>

Local governments, in general, have much less involvement in the governance of higher education than either state governments or the federal government. The most important and pertinent aspect of local governance is the authority to establish, or to exercise control over, community colleges. But this local authority does not exist in all states, since state legislatures and state boards may have primary governance authority in some states. Local governments may also have some effect on institutions' internal governance—and may superimpose their own structures and processes upon institutions—in certain areas such as law enforcement, public health, zoning, and local taxation (see Sections 11.2, 11.3, & 11.5). But local governments' authority in such areas is usually delegated to it by the states, and is thus dependent on, and subject to being preempted by, state law (see Section 11.1).

External public governance structures and processes are more varied than those for internal governance—especially with regard to public institutions whose governance depends on the particular law of the state in which the institution is located (see Section 12.2). The statewide structures for higher education, public and private, also differ from state to state (see Section 12.1). What is common to most states is a state board (such as a state board of higher education) or state officer (such as a commissioner) that is responsible for public higher education statewide. This board or officer may also be responsible for private higher education statewide, or some other board or officer may have that responsibility. If a state has more than one statewide system of higher education, there may also be separate boards for each system (for example, the University of California system and the California State University system). In all of these variations, states are typically much more involved in external governance for public institutions than they are for private institutions.

At the federal level, there are also a variety of structures pertinent to the external governance of higher education, but they tend to encompass all post-secondary institutions, public or private, in much the same way. The most obvious and well known part of the federal structure is the U.S. Department of Education. In addition, there are numerous other cabinet-level departments and administrative agencies that have either spending authority or regulatory authority over higher education. The Department of Homeland Security (DHS), for instance, monitors foreign students while they are in the country to study (see Section 8.7.4); the Department of Health and Human Services (HHS) administers the Medicare program, which is important to institutions with medical

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<sup>4</sup>At various points in U.S. history, presidents and congressional committees have proposed the creation of a national university in the District of Columbia under the auspices of the federal government. Although the idea was floated during the Constitutional Convention of 1787 and subsequently during George Washington's presidency, the high point of such considerations seems to have been during the late 1800s and early 1900s. See John W. Hoyt, "Memorial in Regard to a National University," Misc. Doc. No. 222, 52nd Cong., 1st Sess., August 3, 1892 (50 Cong. 1, vol. 5); and "University of the United States," Rpt. 945, 57th Cong., 1st Sess., April 1, 1902 (57 Cong. 1, vol. 6).



centers (see Section 13.2.13); the Department of Labor administers various laws concerning wages, hours, and working conditions (see Sections 4.5.1 & 4.6.2); the Occupational Safety and Health Administration (OSHA) administers workplace health and safety laws (see Section 4.6.1); several agencies have authority over certain research conducted by colleges and universities (see Section 13.2.3); and various other agencies, such as the National Institutes of Health (NIH) and the Department of Defense (DoD), provide research grants to institutions of higher education and grants or fellowships to faculty members and students (see generally Section 13.4.3).

At the local level, there is less public external governance than at the state and federal levels. The primary local structures are community college districts that have the status of local governments and community college boards of trustees that are appointed by or have some particular relationship with a county or city government. In some states, issues may arise concerning the respective authority of the community college board and the county legislative body (see Section 11.1). Some local administrative agencies, such as a human relations commission or an agency that issues permits for new construction, will also have influence over certain aspects of governance, as will local police forces (see Section 11.5).

Private external governance, like public external governance, also varies from institution to institution. Most postsecondary institutions, for example, are within the jurisdiction of several, often many, accrediting agencies. The agencies to which an institution is subject will depend on the region of the country in which the institution is located and the types of academic and professional programs that the institution offers (see Section 14.3.1). There are also various athletic conferences to which institutions may belong, depending on the level of competition, the status of athletics within the institution, and the region of the country; and there are several different national athletic associations that may govern an institution's intercollegiate competitions, as well as several different divisions with the primary association, the National Collegiate Athletic Association (NCAA) (see Section 14.4). Whether there is an outside sponsoring entity (especially a religious sponsor) with some role in governance will also depend on the particular institution, as will the existence and identity of labor unions that have established bargaining units. The influence that affiliated entities or grant-making foundations may have on institutional governance will also depend on the institution. One relative constant is the American Association of University Professors, which is concerned with all types of degree-granting postsecondary institutions nationwide (see Section 14.5).

## ***Sec. 1.4. Sources of Higher Education Law***

***1.4.1. Overview.*** The modern law of postsecondary education is not simply a product of what the courts say, or refuse to say, about educational problems. The modern law comes from a variety of sources, some “external” to the postsecondary institution and some “internal.” The internal law, as described in Section 1.4.3 below, is at the core of the institution's operations. It is the law

the institution creates for itself in its own exercise of institutional governance. The external law, as described in Section 1.4.2 below, is created and enforced by bodies external to the institution. It circumscribes the internal law, thus limiting the institution's options in the creation of internal law.

### ***1.4.2. External sources of law***

***1.4.2.1. Federal and state constitutions.*** Constitutions are the fundamental source for determining the nature and extent of governmental powers. Constitutions are also the fundamental source of the individual rights guarantees that limit the powers of governments and protect citizens generally, including members of the academic community. The federal Constitution is by far the most prominent and important source of individual liberties. The First Amendment protections for speech, press, and religion are often litigated in major court cases involving postsecondary institutions, as are the Fourteenth Amendment guarantees of due process and equal protection. As explained in Section 1.5, these federal constitutional provisions apply differently to public and to private institutions.

The federal Constitution has no provision that specifically refers to education. State constitutions, however, often have specific provisions establishing state colleges and universities or state college and university systems, and occasionally community college systems (see Section 12.2.3). State constitutions may also have provisions establishing a state department of education or other governing authority with some responsibility for postsecondary education.

The federal Constitution is the highest legal authority that exists. No other law, either state or federal, may conflict with its provisions. Thus, although a state constitution is the highest state law authority, and all state statutes and other state laws must be consistent with it, any of its provisions that conflict with the federal Constitution will be subject to invalidation by the courts. It is not considered a conflict, however, if state constitutions establish more expansive individual rights than those guaranteed by parallel provisions of the federal Constitution (see the discussion of state constitutions in Section 1.5.3).

***1.4.2.2. Statutes.*** Statutes are enacted both by states and by the federal government. Ordinances, which are in effect local statutes, are enacted by local legislative bodies, such as county and city councils. While laws at all three levels may refer specifically to postsecondary education or postsecondary institutions, the greatest amount of such specific legislation is written by the states. Examples include laws establishing and regulating state postsecondary institutions or systems, laws creating statewide coordinating councils for postsecondary education, and laws providing for the licensure of postsecondary institutions (see Sections 12.3.1 & 12.4). At the federal level, the major examples of such specific legislation are the federal grant-in-aid statutes, such as the Higher Education Act of 1965 (see Section 13.4). At all three levels, there is also a considerable amount of legislation that applies to postsecondary institutions in common with other entities in the jurisdiction. Examples are the federal tax laws and civil rights laws (see Sections 13.3 & 13.5), state unemployment compensation and workers'

compensation laws (see Sections 4.6.7 & 4.6.6), and local zoning and tax laws (see Sections 11.2 & 11.3). All of these state and federal statutes and local ordinances are subject to the higher constitutional authorities.

Federal statutes, for the most part, are collected and codified in the *United States Code* (U.S.C.) or *United States Code Annotated* (U.S.C.A.). State statutes are similarly gathered in state codifications, such as the *Minnesota Statutes Annotated* (Minn. Stat. Ann.) or the *Annotated Code of Maryland* (Md. Code Ann.). These codifications are available in many law libraries or online. Local ordinances are usually collected in local ordinance books, but those may be difficult to find and may not be organized as systematically as state and federal codifications are. Moreover, local ordinance books—and state codes as well—may be considerably out of date. In order to be sure that the statutory law on a particular point is up to date, one must check what are called the “session” or “slip” laws of the jurisdiction for the current year or sometimes the preceding year. These laws are usually issued by a designated state or local office in the order in which the laws are passed; many law libraries maintain current session laws of individual states in loose-leaf volumes and may maintain similar collections of current local ordinances for area jurisdictions.

**1.4.2.3. Administrative rules and regulations.** The most rapidly expanding sources of postsecondary education law are the directives of state and federal administrative agencies. The number and size of these bodies are increasing, and the number and complexity of their directives are easily keeping pace. In recent years the rules applicable to postsecondary institutions, especially those issued at the federal level, have often generated controversy in the education world, which must negotiate a substantial regulatory maze in order to receive federal grants or contracts or to comply with federal employment laws and other requirements in areas of federal concern (these regulations are discussed in Sections 13.2–13.5).

Administrative agency directives are often published as regulations that have the status of law and are as binding as a statute would be. But agency directives do not always have such status. Thus, in order to determine their exact status, administrators must check with legal counsel when problems arise. Every rule or regulation issued by an administrative agency, whether state or federal, must be within the scope of the authority delegated to that agency by its enabling statutes. Any rule or regulation that is not authorized by the relevant statutes is subject to invalidation by a court. And, like the statutes and ordinances referred to earlier, administrative rules and regulations must also comply with and be consistent with applicable state and federal constitutional provisions.

Federal administrative agencies publish both *proposed regulations*, which are issued to elicit public comment, and *final regulations*, which have the status of law. These agencies also publish other types of documents, such as policy interpretations of statutes or regulations, notices of meetings, and invitations to submit grant proposals. Such regulations and documents appear upon issuance in the *Federal Register* (Fed. Reg.), a daily government publication. Final regulations appearing in the *Federal Register* are eventually republished—without

the agency's explanatory commentary, which sometimes accompanies the *Federal Register* version—in the *Code of Federal Regulations* (C.F.R.).

State administrative agencies have various ways of publicizing their rules and regulations, sometimes in government publications comparable to the *Federal Register* or the *Code of Federal Regulations*. Generally speaking, however, administrative rules and regulations are harder to find and are less likely to be codified at the state level than at the federal level.

Besides promulgating rules and regulations (called “rule making”), administrative agencies often also have the authority to enforce their rules by applying them to particular parties and issuing decisions regarding these parties' compliance with the rules (called “adjudication”). The extent of an administrative agency's adjudicatory authority, as well as its rule-making powers, depends on the relevant statutes that establish and empower the agency. An agency's adjudicatory decisions must be consistent with its own rules and regulations and with any applicable statutory or constitutional provisions. Legal questions concerning the validity of an adjudicatory decision are usually reviewable in the courts. Examples of such decisions at the federal level include a National Labor Relations Board decision on an unfair labor practice charge or, in another area, a Department of Education decision on whether to terminate funds to a federal grantee for noncompliance with statutory or administrative requirements. Examples at the state level include the determination of a state human relations commission on a complaint charging violation of individual rights, or the decision of a state workers' compensation board in a case involving workers' compensation benefits. Administrative agencies may or may not officially publish compilations of their adjudicatory decisions. Agencies without official compilations may informally compile and issue their opinions; other agencies may simply file opinions in their internal files or distribute them in a limited way. It can often be a difficult problem for counsel to determine what all the relevant adjudicatory precedents are within an agency. Examples of the interaction between administrative and judicial review are discussed in Section 6.7.1 of this book.

**1.4.2.4. State common law.** Sometimes courts issue opinions that interpret neither a statute, nor an administrative rule or regulation, nor a constitutional provision. In breach of contract disputes, for instance, the applicable precedents are typically those the courts have created themselves. These decisions create what is called American “common law.” Common law, in short, is judge-made law rather than law that originates from constitutions or from legislatures or administrative agencies. Contract law (see, for example, Sections 6.2, 8.1.3, & 15.1) is a critical component of this common law. Tort law (Sections 3.3 & 4.7.2) and agency law (Sections 3.1 & 3.2) are comparably important. Such common law is developed primarily by the state courts and thus varies somewhat from state to state.

**1.4.2.5. Foreign and international law.** In addition to all the American or domestic sources of law noted, the laws of other countries (foreign laws) and international law have become increasingly important to postsecondary

education. This source of law may come into play, for instance, when the institution sends faculty members or students on trips to foreign countries, or engages in business transactions with companies or institutions in foreign countries (see Section 15.4.2), or seeks to establish educational programs in other countries. (For a discussion of potential liability for issues that may arise in study abroad programs, see Section 3.3.2.)

Just as business is now global, so, in many respects, is higher education. For example, U.S. institutions of higher education are entering business partnerships with for-profit or nonprofit entities in other countries. If the institution enters into contracts with local suppliers, other educational institutions, or financial institutions, the law of the country in which the services are provided will very likely control unless the parties specify otherwise. Such partnerships may raise choice-of-law issues if a dispute arises. If the contract between the U.S. institution and its foreign business partner does not specify that the contract will be interpreted under U.S. law, the institution may find itself subject to litigation in another country, under the requirements of laws that may be very different from those in the United States. (For an example of such litigation taking place in the courts of Beijing, see Paul Mooney, “A Harvard Press and a Chinese Distributor Sue Each Other,” *Chron. Higher Educ.*, September 10, 2004, A40.) Institutions planning business activities outside the borders of the United States should consult experienced counsel to ascertain what legal requirements will need to be met. This is particularly true for institutions that are founding or acquiring colleges in other countries (see, for example, Goldie Blumenstyk, “Spanning the Globe: Higher-Education Companies Take Their Turf Battles Overseas,” *Chron. Higher Educ.*, June 27, 2003, A21).

If the institution operates an academic program in another country and hires local nationals to manage the program, or to provide other services, the institution must comply with the employment and other relevant laws of that country (as well as, in many cases, U.S. employment law). Employment laws of other nations may differ in important respects from U.S. law. For example, some European countries sharply limit an employer’s ability to use independent contractors, and terminating an employee may be far more complicated than in the United States. Pension and other social security taxes are higher in many nations than in the United States, and penalties for noncompliance may be substantial. Tax treaties between the United States and foreign nations may exempt some compensation paid to faculty, students, or others from taxation. Definitions of fellowships or scholarships may differ outside the borders of the United States, which could affect their taxability. There is no substitute for competent local counsel to ensure that the institution is complying with all requirements pertaining to employees.

International agreements and treaties (between and among countries) are an increasingly important aspect of higher education law. Agreements on intellectual property protection and on sharing and regulating of technology are, and are likely to remain, leading examples. For example, the United States is a signatory to the World Trade Organization’s Agreement on Trade-Related Aspects of

Intellectual Property Rights. Although this agreement prohibits the unauthorized copying of copyrighted material (such as textbooks), it can be difficult to enforce. (For an example of the problems in enforcing international copyright protections, see Martha Ann Overland, "Publishers Battle Pirates in India with Little Success," *Chron. Higher Educ.*, April 2, 2004, A40.) Other international copyright conventions to which the United States is a signatory are the Berne Convention and the Universal Copyright Convention.

Another important example of international agreements with implications for U.S. higher education is the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, signed by fifty countries, including the United States, in 1997. The agreement creates a unified system for evaluating and recognizing foreign academic credentials. The convention may be found at [http://www.bologna-berlin2003.de/pdf/Lisbon\\_convention.pdf](http://www.bologna-berlin2003.de/pdf/Lisbon_convention.pdf).

The European Union's (EU) Directive on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data has implications for institutions doing business with universities or businesses in the EU. The directive provides that data may be transferred to a non-EU country only if that country has subscribed to the standards of data privacy articulated in the directive. (For a discussion of this directive and its requirements, see Michael W. Heydrich, Note, "A Brave New World: Complying with the European Union Directive on Personal Privacy Through the Power of Contract," 25 *Brooklyn J. Int'l L.* 407 (1999).) Another EU directive may make U.S. institutions vulnerable to litigation in EU countries if they "pursue commercial or professional activities in a Member State" [of the EU]; it is unclear whether solely Internet-based activities would fall under the purview of this directive.

The General Agreement on Trade in Services (GATS), to which the United States is a signatory, may have important implications for institutions of higher education. The agreement, whose purpose is to expand free trade, requires the removal of barriers to access to markets and to competition. While the specific impact of GATS is not yet clear, it has the potential to increase federal regulation of higher education and, perhaps, international regulation of postsecondary education in those nations that participate in GATS. The American Council on Education maintains a Web site (<http://www.acenet.edu/programs/international/gats/overview.cfm>) on GATS and its activities with respect to the GATS negotiations. (For a review of the potential challenges and benefits of GATS from the perspective of a faculty union, see *Higher Education & International Trade Agreements: An Examination of the Threats and Promises of Globalization* (National Education Association, 2003), available at <http://www2.nea.org/he/global/index.html>.)

In addition to the possible application of international law to U.S. colleges and universities, U.S. institutions with programs, students, or employees living and working in other countries may still be required to follow U.S. law, particularly in the area of discrimination. (For a discussion of the extraterritorial application of U.S. law, see Section 5.2.1 (Title VII) and Section 13.5.7.6 (Titles VI and IX, Section 504, and the Age Discrimination Act).)

### **1.4.3. Internal sources of law**

**1.4.3.1. Institutional rules and regulations.** The rules and regulations promulgated by individual institutions are also a source of postsecondary education law. These rules and regulations are subject to all the external sources of law listed in Section 1.4.2 and must be consistent with all the legal requirements of those sources that apply to the particular institution and to the subject matter of the internal rule or regulation. Courts may consider some institutional rules and regulations to be part of the faculty-institution contract or the student-institution contract (see Section 1.4.3.2), in which case these rules and regulations are enforceable by contract actions in the courts. Some rules and regulations of public institutions may also be legally enforceable as administrative regulations (see Section 1.4.2.3) of a government agency. Even where such rules are not legally enforceable by courts or outside agencies, a postsecondary institution will likely want to follow and enforce them internally, to achieve fairness and consistency in its dealings with the campus community.

Institutions may establish adjudicatory bodies with authority to interpret and enforce institutional rules and regulations (see, for example, Section 9.1). When such decision-making bodies operate within the scope of their authority under institutional rules and regulations, their decisions also become part of the governing law in the institution; and courts may regard these decisions as part of the faculty-institution or student-institution contract, at least in the sense that they become part of the applicable custom and usage (see Section 1.4.3.3) in the institution.

**1.4.3.2. Institutional contracts.** Postsecondary institutions have contractual relationships of various kinds with faculties (see Section 6.2); staff (see Section 4.3); students (see Section 8.1.3); government agencies (see Section 13.4.1); and outside parties such as construction firms, suppliers, research sponsors from private industry, and other institutions (see Section 15.1). These contracts create binding legal arrangements between the contracting parties, enforceable by either party in case of the other's breach. In this sense a contract is a source of law governing a particular subject matter and relationship. When a question arises concerning a subject matter or relationship covered by a contract, the first legal source to consult is usually the contract terms.

Contracts, especially with faculty members and students, may incorporate some institutional rules and regulations (see Section 1.4.3.1), so that they become part of the contract terms. Contracts are interpreted and enforced according to the common law of contracts (Section 1.4.2.4) and any applicable statute or administrative rule or regulation (Sections 1.4.2.2 & 1.4.2.3). They may also be interpreted with reference to academic custom and usage.

**1.4.3.3. Academic custom and usage.** By far the most amorphous source of postsecondary education law, academic custom and usage comprises the particular established practices and understandings within particular institutions. It differs from institutional rules and regulations (Section 1.4.3.1) in that it is not necessarily a written source of law and, even if written, is far more informal; custom and usage may be found, for instance, in policy statements from

speeches, internal memoranda, and other such documentation within the institution.

This source of postsecondary education law, sometimes called “campus common law,” is important in particular institutions because it helps define what the various members of the academic community expect of each other as well as of the institution itself. Whenever the institution has internal decision-making processes, such as a faculty grievance process or a student disciplinary procedure, campus common law can be an important guide for decision making. In this sense, campus common law does not displace formal institutional rules and regulations but supplements them, helping the decision maker and the parties in situations where rules and regulations are ambiguous or do not exist for the particular point at issue. Academic custom and usage is also important in another, and broader, sense: it can supplement contractual understandings between the institution and its faculty and between the institution and its students. Whenever the terms of such a contractual relationship are unclear, courts may look to academic custom and usage in order to interpret the terms of the contract. In *Perry v. Sindermann*, 408 U.S. 593 (1972), the U.S. Supreme Court placed its imprimatur on this concept of academic custom and usage when it analyzed a professor’s claim that he was entitled to tenure at Odessa College:

The law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be “implied” (3 *Corbin on Contracts*, §§ 561–672A). Explicit contractual provisions may be supplemented by other agreements implied from “the promisor’s words and conduct in the light of the surrounding circumstances” (§ 562). And “the meaning of [the promisor’s] words and acts is found by relating them to the usage of the past” (§ 562).

A teacher, like the respondent, who has held his position for a number of years might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a “common law of a particular industry or of a particular plant” that may supplement a collective bargaining agreement (*United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579 . . . (1960)), so there may be an unwritten “common law” in a particular university that certain employees shall have the equivalent of tenure [408 U.S. at 602].

*Sindermann* was a constitutional due process case, and academic custom and usage was relevant to determining whether the professor had a “property interest” in continued employment that would entitle him to a hearing prior to non-renewal (see Section 6.7.2). Academic custom and usage is also important in contract cases where courts, arbitrators, or grievance committees must interpret provisions of the faculty-institution contract (see Sections 6.2 & 6.3) or the student-institution contract (see Section 8.1). In *Strank v. Mercy Hospital of Johnstown*, 117 A.2d 697 (Pa. 1955), a student nurse who had been dismissed from nursing school sought to require the school to award her transfer credits for the two years’ work she had successfully completed. The student alleged



that she had “oral arrangements with the school at the time she entered, later confirmed in part by writing and carried out by both parties for a period of two years, . . . [and] that these arrangements and understandings imposed upon defendant the legal duty to give her proper credits for work completed.” When the school argued that the court had no jurisdiction over such a claim, the court responded: “[Courts] have jurisdiction . . . for the enforcement of obligations whether arising under express contracts, written or oral, or implied contracts, including those in which a duty may have resulted from long recognized and established customs and usages, as in this case, perhaps, between an educational institution and its students” (117 A.2d at 698).

Faculty members may make similar contract claims relying on academic custom and usage. For example, in *Lewis v. Salem Academy and College*, 208 S.E.2d 404 (N.C. Ct. App. 1974), the court considered but rejected the plaintiff’s claim that, by campus custom and usage, the college’s retirement age of sixty-five had been raised to seventy, thus entitling him to teach to that age. And in *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978) (discussed in Section 6.8.2 of this book), the court rejected another professor’s claim that “national” academic custom and usage protected her from termination of tenure due to financial exigency. Custom and usage is also relevant in implementing faculty collective bargaining agreements (see the *Sindermann* quotation above), and such agreements may explicitly provide that they are not intended to override “past practices” of the institution.

Asserting that academic custom and usage is relevant to a faculty member’s contract claim may help the faculty member survive a motion for summary judgment. In *Bason v. American University*, 414 A.2d 522 (D.C. 1980), a law professor denied tenure asserted that he had a contractual right to be informed of his progress toward tenure, which had not occurred. The court reversed a trial court’s summary judgment ruling for the employer, stating that “resolution of the matter involves not only a consideration of the *Faculty Manual*, but of the University’s ‘customs and practices.’ . . . The existence of an issue of custom and practice also precludes summary judgment” (414 A.2d at 525). The same court stated, in *Howard University v. Best*, 547 A.2d 144 (D.C. 1988), “[i]n order for a custom and practice to be binding on the parties to a transaction, it must be proved that the custom is definite, uniform, and well known, and it must be established by ‘clear and satisfactory evidence.’” Plaintiffs are rarely successful, however, in attempting to argue that academic custom and usage supplants written institutional rules or reasonable or consistent interpretation of institutional policies (see, for example, *Brown v. George Washington University*, 802 A.2d 382 (D.C. App. 2002)).

**1.4.4. The role of case law.** Every year, the state and federal courts reach decisions in hundreds of cases involving postsecondary education. Opinions are issued and published for many of these decisions. Many more decisions are reached and opinions rendered each year in cases that do not involve postsecondary education but do elucidate important established legal principles with potential application to postsecondary education. Judicial opinions (case

law) may interpret federal, state, or local statutes. They may also interpret the rules and regulations of administrative agencies. Therefore, in order to understand the meaning of statutes, rules, and regulations, one must understand the case law that has construed them. Judicial opinions may also interpret federal or state constitutional provisions, and may sometimes determine the constitutionality of particular statutes or rules and regulations. A statute, rule, or regulation that is found to be unconstitutional because it conflicts with a particular provision of the federal or a state constitution is void and no longer enforceable by the courts. In addition to these functions, judicial opinions also frequently develop and apply the “common law” of the jurisdiction in which the court sits. And judicial opinions may interpret postsecondary institutions’ “internal law” (Section 1.4.3) and measure its validity against the backdrop of the constitutional provisions, statutes, and regulations (the “external law”; Section 1.4.2) that binds institutions.

Besides their opinions in postsecondary education cases, courts issue numerous opinions each year in cases concerning elementary and secondary education (see, for example, the *Wood v. Strickland* case in Section 4.7.4.1 and the *Goss v. Lopez* case in Section 9.4.2). Insights and principles from these cases are often transferable to postsecondary education. But elementary or secondary precedents cannot be applied routinely or uncritically to postsecondary education. Differences in the structures, missions, and clienteles of these levels of education may make precedents from one level inapplicable to the other or may require that the precedent’s application be modified to account for the differences. In *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), for instance, the court considered the applicability to postsecondary education of a prior precedent permitting high schools to regulate the length of students’ hair. The court refused to extend the precedent. As one judge explained:

The college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of . . . [hair length] is reasonably related to the fostering or encouraging of education. . . .

There are a number of factors which support the proposition that the point between high school and college is the place where the line should be drawn. . . . That place is the point in the student’s process of maturity where he usually comes within the ambit of the Twenty-Sixth Amendment and the Selective Service Act, where he often leaves home for dormitory life, and where the educational institution ceases to deal with him through parents and guardians. . . . The majority holds today that as a matter of law the college campus is the line of demarcation where the weight of the student’s maturity, as compared with the institution’s modified role in his education, tips the scales in favor of the individual and marks the boundary of the area within which a student’s hirsute adornment becomes constitutionally irrelevant to the pursuit of educational activities [470 F.2d at 662–64].

More recently, courts in various cases have debated whether secondary education precedents permitting regulation of vulgar and offensive speech would apply to faculty or student speech in postsecondary institutions (see, for example,

*Martin v. Parrish*, 805 F.2d 583 at 585–86 (majority opin.) and 586–89 (concurring opin.) (5th Cir. 1986)). The U.S. Supreme Court’s ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a secondary education case involving the student press, has been a particular focus of attention. In this case, the Court affirmed a high school principal’s editorial control over “school-sponsored speech” in the form of a student newspaper. The Court’s opinion identified but did not address the question “whether the same degree of deference [to administrators’ judgments] is appropriate with respect to school-sponsored expressive activities at the college and university level” (484 U.S. at 273 fn. 7). Lower courts in later cases have differed in their answers to this question. In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*), for example, the Sixth Circuit declined to apply *Hazelwood* in a university setting. But in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (*en banc*), reversing 325 F.3d 945 (7th Cir. 2003), the court determined, by a vote of 7 to 4, that the *Hazelwood* framework “applies to subsidized student newspapers” in the university setting. (*Kincaid* and *Hosty* are discussed in Section 10.3.3.) In other cases, other U.S. Courts of Appeals have also adopted *Hazelwood* for use in higher education cases concerning student speech in the classroom (*Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)), speech in course assignments (*Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)), and even problems concerning faculty classroom speech (*Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991)). (*Axson-Flynn* and *Brown v. Li* are discussed in Section 8.1.4; *Bishop* is discussed in Section 7.2.2; compare Section 7.2.4 under “Pedagogical Concerns Analysis.”)

Similar issues arise for lower courts when they seek to determine whether their own elementary/secondary precedents should apply to higher education cases as well (and vice versa).<sup>5</sup> In *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1988) (discussed in Section 7.2.2), and in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (*en banc*) (discussed in Section 7.3), for example, the courts applied their own elementary/secondary education precedents to higher education in the course of rejecting faculty members’ academic freedom claims. These courts, like some other courts that have applied elementary/secondary precedents to higher education, were somewhat uncritical in their transmutation of precedents from one level of education to the other. The courts’ opinions in these cases generally do not meaningfully engage the questions concerning the differences in higher education’s mission, structure, and clientele that must be confronted in any such transmutation, nor do they develop clear or helpful guidance for determining the extent to which precedents from one level of education should be applicable to the other.

A court’s decision has the effect of binding precedent only within its own jurisdiction. Thus, at the state level, a particular decision may be binding either on the entire state or only on a subdivision of the state, depending on the court’s

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<sup>5</sup>For an example of a “vice versa” case, in which the court considers whether academic freedom precedents from postsecondary education are applicable to secondary education, see *Cary v. Adams Arapahoe School Board*, 427 F. Supp. 945 (D. Colo. 1977), *affirmed on other grounds*, 598 F.2d 535 (10th Cir. 1979).

jurisdiction. At the federal level, decisions by district courts and appellate courts are binding within a particular district or region of the country, while decisions of the U.S. Supreme Court are binding precedent throughout the country. Since the Supreme Court's decisions are the supreme law of the land, they bind all lower federal courts as well as all state courts, even the highest court of the state.

The important opinions of state and federal courts are published periodically and collected in bound volumes that are available in most law libraries. For state court decisions, besides each state's official reports, there is the National Reporter System, a series of regional case reports comprising the (1) *Atlantic Reporter* (cited A. or A.2d), (2) *Northeastern Reporter* (N.E. or N.E.2d), (3) *Northwestern Reporter* (N.W. or N.W.2d), (4) *Pacific Reporter* (P. or P.2d), (5) *Southeastern Reporter* (S.E. or S.E.2d), (6) *Southwestern Reporter* (S.W. or S.W.2d), and (7) *Southern Reporter* (So. or So.2d). Each regional reporter publishes opinions of the courts in that particular region. There are also special reporters in the National Reporter System for the states of New York (*New York Supplement*, cited N.Y.S. or N.Y.S.2d) and California (*California Reporter*, cited Cal. Rptr.).

In the federal system, U.S. Supreme Court opinions are published in the *United States Supreme Court Reports* (U.S.), the official reporter, as well as in two unofficial reporters, the *Supreme Court Reporter* (S. Ct.) and the *United States Supreme Court Reports—Lawyers' Edition* (L. Ed. or L. Ed. 2d). Supreme Court opinions are also available, shortly after issuance, in the loose-leaf format of *United States Law Week* (U.S.L.W.), which also contains digests of other recent selected opinions from federal and state courts. Opinions of the U.S. Courts of Appeals are published in the *Federal Reporter* (F., F.2d, or F.3d). U.S. District Court opinions are published in the *Federal Supplement* (F. Supp.) or, for decisions regarding federal rules of judicial procedure, in *Federal Rules Decisions* (F.R.D.). All of these sources, as well as those for state court decisions, are online in both the Westlaw and LEXIS legal research databases. Opinions are also available online, in most cases, from the courts themselves. For example, opinions of the U.S. Supreme Court are available from the Court's Web site at <http://www.supremecourtus.gov/opinions/opinions.html>.

## **Sec. 1.5. The Public-Private Dichotomy**

**1.5.1. Overview.** Historically, higher education has roots in both the public and the private sectors, although the strength of each one's influence has varied over time (see generally F. Rudolph, *The American College and University: A History* (University of Georgia Press, 1990)). Sometimes following and sometimes leading this historical development, the law has tended to support and reflect the fundamental dichotomy between public and private education.

A forerunner of the present university was the Christian seminary. Yale was an early example. Dartmouth began as a school to teach Christianity to the Indians. Similar schools sprang up throughout the American colonies. Though often established through private charitable trusts, they were also chartered by the colony, received some financial support from the colony, and were subject to

its regulation. Thus, colonial colleges were often a mixture of public and private activity. The nineteenth century witnessed a gradual decline in governmental involvement with sectarian schools. As states began to establish their own institutions, the public-private dichotomy emerged. (See D. Tewksbury, *The Founding of American Colleges and Universities Before the Civil War* (Anchor Books, 1965).) In recent years this dichotomy has again faded, as state and federal governments have provided larger amounts of financial support to private institutions, many of which are now secular.

Although private institutions have always been more expensive to attend than public institutions, private higher education has been a vital and influential force in American intellectual history. The private school can cater to special interests that a public one often cannot serve because of legal or political constraints. Private education thus draws strength from “the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law” (H. Friendly, *The Dartmouth College Case and the Public-Private Penumbra* (Humanities Research Center, University of Texas, 1969), 30).

Though modern-day private institutions are not always free from examination “in a court of law,” the law often does treat public and private institutions differently. These differences underlie much of the discussion in this book. They are critically important in assessing the law’s impact on the roles of particular institutions and the duties of their administrators.

Whereas public institutions are usually subject to the plenary authority of the government that creates them, the law protects private institutions from such extensive governmental control. Government can usually alter, enlarge, or completely abolish its public institutions (see Section 12.2); private institutions, however, can obtain their own perpetual charters of incorporation, and, since the famous *Dartmouth College* case (*Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)), government has been prohibited from impairing such charters. In that case, the U.S. Supreme Court turned back New Hampshire’s attempt to assume control of Dartmouth by finding that such action would violate the Constitution’s contracts clause (see B. Campbell, “*Dartmouth College* as a Civil Liberties Case: The Formation of Constitutional Policy,” 70 *Ky. L.J.* 643 (1981–82)). Subsequently, in three other landmark cases—*Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Farrington v. Tokushige*, 273 U.S. 284 (1927)—the Supreme Court used the due process clause to strike down unreasonable governmental interference with teaching and learning in private schools.

Nonetheless, government does retain substantial authority to regulate private education. But—whether for legal, political, or policy reasons—state governments usually regulate private institutions less than they regulate public institutions. The federal government, on the other hand, has tended to apply its regulations comparably to both public and private institutions, or, bowing to considerations of federalism, has regulated private institutions while leaving public institutions to the states.

In addition to these differences in regulatory patterns, the law makes a second and more pervasive distinction between public and private institutions: public institutions and their officers are fully subject to the constraints of the federal Constitution, whereas private institutions and their officers are not. Because the Constitution was designed to limit only the exercise of government power, it does not prohibit private individuals or corporations from impinging on such freedoms as free speech, equal protection, and due process. Thus, *insofar as the federal Constitution is concerned*, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.

Indeed, this distinction can be crucial even within a single university. In *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), seven Alfred University students had been suspended for engaging in protest activities that disrupted an ROTC ceremony. Four of the students attended Alfred's liberal arts college, while the remaining three were students at the ceramics college. The State of New York had contracted with Alfred to establish the ceramics college, and a New York statute specifically stated that the university's disciplinary acts with respect to students at the ceramics college were considered to be taken on behalf of the state. The court found that the dean's action in suspending the ceramics students was "state action," but the suspension of the liberal arts students was not. Thus, the court ruled that the dean was required to afford the ceramics students due process but was not required to follow any constitutional dictates in suspending the liberal arts students, even though both groups of students had engaged in the same course of conduct.

**1.5.2. The state action doctrine.** As *Powe v. Miles* in subsection 1.5.1 above illustrates, before a court will require that a postsecondary institution comply with the individual rights requirements in the federal Constitution, it must first determine that the institution's challenged action is "state action."<sup>6</sup> When suit is filed under the Section 1983 statute (see Sections 3.5 & 4.7.4 of this book), the question is rephrased as whether the challenged action was taken "under color of" state law, an inquiry that is the functional equivalent of the state action inquiry (see, for example, *West v. Atkins*, 487 U.S. 42 (1988)). Although the state action (or color of law) determination is essentially a matter of distinguishing public institutions from private institutions, and the public parts of an institution from the private parts—or more generally, distinguishing public "actors" from private "actors"—these distinctions do not necessarily depend on traditional notions of public or private. Due to varying patterns of government assistance and involvement, a continuum exists, ranging from the obvious public institution (such as a tax-supported state university) to the

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<sup>6</sup>Although this inquiry has arisen mainly with regard to the federal Constitution, it may also arise in applying state constitutional guarantees. See, for example, *Stone by Stone v. Cornell University*, 510 N.Y.S.2d 313 (N.Y. 1987) (no state action).

obvious private institution (such as a religious seminary). The gray area between these poles is a subject of continuing debate about how much the government must be involved in the affairs of a “private” institution or one of its programs before it will be considered “public” for purposes of the “state action” doctrine. As the U.S. Supreme Court noted in the landmark case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), “Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.”

Since the early 1970s, the trend of the U.S. Supreme Court’s opinions has been to trim back the state action concept, making it less likely that courts will find state action to exist in particular cases. The leading education case in this line of cases is *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Another leading case, *Blum v. Yaretsky*, 457 U.S. 991 (1982), was decided the same day as *Rendell-Baker* and reinforces its narrowing effect on the law.<sup>7</sup>

*Rendell-Baker* was a suit brought by teachers at a private high school who had been discharged as a result of their opposition to school policies. They sued the school and its director, Kohn, alleging that the discharges violated their federal constitutional rights to free speech and due process. The issue before the Court was whether the private school’s discharge of the teachers was “state action” and thus subject to the federal Constitution’s individual rights requirements.

The defendant school specialized in education for students who had drug, alcohol, or behavioral problems or other special needs. Nearly all students were referred by local public schools or by the drug rehabilitation division of the state’s department of health. The school received funds for student tuition from the local public school systems from which the student came and were reimbursed by the state department of health for services provided to students referred by the department. The school also received funds from other state and federal agencies. Virtually all the school’s income, therefore, was derived from government funding. The school was also subject to state regulations on various matters, such as record keeping and student-teacher ratios, and requirements concerning services provided under its contracts with the local school boards and the state health department. Few of these regulations and requirements, however, related to personnel policy.

The teachers argued that the school had sufficient contacts with the state and local governments so that the school’s discharge decision should be considered state action. The Court disagreed, holding that neither the government funding nor the government regulation was sufficient to make the school’s discharge of the teachers state action. As to the funding, the Court analogized the school’s situation to that of a private corporation whose business depends heavily on government contracts to build “roads, bridges, dams, ships, or submarines” for

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<sup>7</sup>The beginning of this narrowing trend may be attributed to *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

the government thereby, but is not considered to be engaged in state action. And as to the regulation:

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge made by private management, state action [*Blum*, 457 U.S. at 841–42].

The Court also rejected two other arguments of the teachers: that the school was engaged in state action because it performs a “public function” and that the school had a “symbiotic relationship” with—that is, was engaged in a “joint venture” with—government, which constitutes state action under the Court's earlier case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), (discussed above). As to the former argument, the Court reasoned in *Rendell-Baker*:

[T]he relevant question is not simply whether a private group is serving a “public function.” We have held that the question is whether the function performed has been “traditionally the *exclusive* prerogative of the state” (*Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353). There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. [Massachusetts law] demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools (*Rendell-Baker v. Kohn*, 641 F.2d at 26). That a private entity performs a function which serves the public does not make its acts state action [457 U.S. at 842].

As to the latter argument, the Court concluded simply that “the school's fiscal relationship with the state is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.”

Having rejected all the teachers' arguments, the Court, by a 7-to-2 vote, concluded that the school's discharge decisions did not constitute state action. It therefore affirmed the lower court's dismissal of the teachers' lawsuit.

As a key component of the narrowing trend evident in the Court's state action opinions since the early 1970s, *Rendell-Baker* well illustrates the trend's application to private education. The case serves to confirm the validity of various earlier cases in which lower courts had refused to find state action respecting the activities of postsecondary institutions (see, for example, *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir. 1975); *Wahba v. New York University*, 492 F.2d 96 (2d Cir. 1974)). It also serves to cast doubt on some other earlier cases in which courts had found state action. (For an example, compare



*Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), decided prior to *Rendell-Baker*, with 553 F. Supp. 675 (N.D.N.Y. 1982), the same case on remand just after the Supreme Court’s ruling in *Rendell-Baker*.<sup>8</sup>)

In the years preceding *Rendell-Baker*, courts and commentators had dissected the state action concept in various ways. At the core, however, three main approaches to making state action determinations had emerged: the “nexus” approach, the “symbiotic relationship” approach, and the “public function” approach.<sup>9</sup> The first approach, *nexus*, focuses on the state’s involvement in the particular action being challenged, and whether there is a sufficient “nexus” between that action and the state. According to the foundational case for this approach, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), “[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself” (419 U.S. at 351 (1974)). Generally, courts will find such a nexus only when the state has compelled or directed, or fostered or encouraged, the challenged action. In *Jackson*, for example, the U.S. Supreme Court rejected the petitioner’s state action argument because “there was no . . . [state] imprimatur placed on the practice of . . . [the private entity] about which petitioner complains,” and the state “has not put its own weight on the side of the . . . practice by ordering it” (419 U.S. at 357).<sup>10</sup>

The second approach, usually called the “symbiotic relationship” or “joint venturer” approach, has a broader focus than the nexus approach, encompassing the full range of contacts between the state and the private entity. According to the foundational case for this approach, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the inquiry is whether “the State has so far insinuated itself into a position of interdependence with [the institution] that it must be recognized as a joint participant in the challenged activity” (365 U.S. at 725). When the state is so substantially involved in the whole of the private entity’s activities, it is not necessary to prove that the state was specifically involved in (or had a “nexus” with) the particular activity challenged in the lawsuit.

The third approach, “public function,” focuses on the particular function being performed by the private entity. The Court has very narrowly defined the type of function that will give rise to a state action finding. It is not sufficient that the private entity provide services to the public, or that the services are considered essential, or that government also provides such services. Rather, according to the *Jackson* case (preceding), the function must be one that is “traditionally exclusively reserved to the State . . . [and] traditionally associated with sovereignty” (419 U.S. at 352–53) in order to support a state action finding.

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<sup>8</sup>The cases and authorities are collected in Annot., “Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C. § 1983,” 37 A.L.R. Fed. 601.

<sup>9</sup>Subsequent to *Rendell-Baker*, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, discussed below, a fourth approach emerged: the “entwinement” approach.

<sup>10</sup>Such a showing of state involvement in the precise activity challenged may be eased, however, in some race discrimination cases (see *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Williams v. Howard University*, 528 F.2d 658 (D.C. Cir. 1976)).

In *Rendell-Baker*, the Court considered all three of these approaches, specifically finding that the high school's termination of the teachers did not constitute state action under any of the approaches. In its analysis, as set out above, the Court first rejected a nexus argument; then rejected a public function argument; and finally rejected a symbiotic relationship argument. The Court narrowly defined all three approaches, consistent with other cases it had decided since the early 1970s. Lower courts following *Rendell-Baker* and other cases in this line have continued to recognize the same three approaches, but only two of them—the nexus approach and the symbiotic relationship approach—have had meaningful application to postsecondary education. The other approach, public function, has essentially dropped out of the picture in light of the Court's sweeping declaration that education programs cannot meet the restrictive definition of public function in the *Jackson* case.<sup>11</sup> Various lower court cases subsequent to *Rendell-Baker* illustrate the application of the nexus and symbiotic relationship approaches to higher education, and also illustrate how *Rendell-Baker*, *Blum v. Yaretsky* (*Rendell-Baker's* companion case; (see above), and other Supreme Court cases such as *Jackson v. Metropolitan Edison* (see above) have served to insulate postsecondary institutions from state action findings and the resultant application of federal constitutional constraints to their activities. The following cases are instructive examples.

In *Albert v. Carovano*, 824 F.2d 1333, *modified on rehearing*, 839 F.2d 871 (2d Cir. 1987), *panel opin. vacated*, 851 F.2d 561 (2d Cir. 1988) (*en banc*), a federal appellate court, after protracted litigation, refused to extend the state action doctrine to the disciplinary actions of Hamilton College, a private institution. The suit was brought by students whom the college had disciplined under authority of its policy guide on freedom of expression and maintenance of public order. The college had promulgated this guide in compliance with the New York Education Law, Section 6450 (the Henderson Act), which requires colleges to adopt rules for maintaining public order on campus and file them with the state. The trial court dismissed the students' complaint on the grounds that they could not prove that the college's disciplinary action was state action. After an appellate court panel reversed, the full appellate court affirmed the pertinent part of the trial court's dismissal. The court (*en banc*) concluded that:

[A]ppellants' theory of state action suffers from a fatal flaw. That theory assumes that either Section 6450 or the rules Hamilton filed pursuant to that statute constitute "a rule of conduct imposed by the state" [citing *Blum v. Yaretsky*, 457 U.S. at 1009]. Yet nothing in either the legislation or those rules required that these appellants be suspended for occupying Buttrick Hall. Moreover, it is undisputed that the state's role under the Henderson Act has

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<sup>11</sup>This recognition that education, having a history of strong roots in the private sector, does not fit within the public function category, was evident well before *Rendell-Baker*; see, for example, *Greenya v. George Washington University*, 512 F.2d 556, 561 (D.C. Cir. 1975). For the most extensive work-up of this issue in the case law, see *State v. Schmid*, 423 A.2d 615, 622-24 (majority), 633-36 (Pashman, J., concurring and dissenting), 639-40 (Schreiber, J., concurring in result) (N.J. 1980). For another substantial and more recent work-up, see *Mentavlos v. Anderson*, 249 F.3d 301, 314-18 (4th Cir. 2001), discussed below in this subsection.

been merely to keep on file rules submitted by colleges and universities. The state has never sought to compel schools to enforce these rules and has never even inquired about such enforcement [851 F.2d at 568].

Finding that the state had not undertaken to regulate the disciplinary policies of private colleges in the state, and that the administrators of Hamilton College did not believe that the Henderson Act required them to take particular disciplinary actions, the court refused to find state action.

In *Smith v. Duquesne University*, 612 F. Supp. 72 (W.D. Pa. 1985), *affirmed without opin.*, 787 F.2d 583 (3d Cir. 1986), a graduate student challenged his expulsion on due process and equal protection grounds, asserting that Duquesne's action constituted state action. The court used both the symbiotic relationship and the nexus approaches to determine that Duquesne was not a state actor. Regarding the former, the court distinguished Duquesne's relationship with the state of Pennsylvania from that of Temple University and the University of Pittsburgh, which were determined to be state actors in *Krynicky v. University of Pittsburgh* and *Schier v. Temple University*, 742 F.2d 94 (3d Cir. 1984). There was no statutory relationship between the state and the university, the state did not review the university's expenditures, and the university was not required to submit the types of financial reports to the state that state-related institutions, such as Temple and Pitt, were required to submit. Thus the state's relationship with Duquesne was "so tenuous as to lead to no other conclusion but that Duquesne is a private institution and not a state actor" (612 F. Supp. at 77-78). Regarding the latter approach (the nexus test), the court determined that the state could not "be deemed responsible for the specific act" complained of by the plaintiff:

[T]his case requires no protracted analysis to determine that Duquesne's decision to dismiss Smith cannot fairly be attributable to the Commonwealth. . . . The decision to expel Smith, like the decision to matriculate him, turned on an academic judgment made by a purely private institution according to its official university policy. If indirect involvement is insufficient to establish state action, then certainly the lack of any involvement cannot suffice [612 F. Supp. at 78].

In *Imperiale v. Hahnemann University*, 966 F.2d 125 (3d Cir. 1992), a federal appellate court held that the university had not engaged in state action when it revoked the plaintiff's medical degree. Considering both the joint venturer and the nexus tests, the court rejected the plaintiff's contention that the state action doctrine should apply because the university was "state-aided."

In *Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995), a tenured professor of drama at a private college was dismissed from his position after a college committee found that he had sexually harassed a student. The college had recently adopted a new sexual harassment policy and complaint procedure in response to a conciliation agreement resolving an earlier, unrelated sexual harassment complaint against the college. In that proceeding, the Vermont Human Rights Commission had found the previous version of the college's harassment policy to be ineffective. The new policy provided for a hearing

before a committee comprised of faculty, staff, and one student. The professor asserted that, because of the Vermont Human Rights Commission's involvement in requiring the college to adopt the new policy and complaint process, the college's action in holding the hearing and dismissing him was "state action" subject to constitutional due process requirements. The court rejected the professor's argument, stating that the Human Rights Commission played no role in the proceedings against him, and that the new harassment policy did not require the college to dismiss him. The policy provided for a variety of sanctions, one of which was dismissal. Potential state action would have occurred only if the college had dismissed the professor because it believed that state law required it to do so. Even though the college had changed its policy to comply with state law, "its action in terminating [the professor] was in no way dictated by state law or state actors" (72 F.3d at 1028). The court therefore upheld the district court's grant of summary judgment for the college.

*Rendell-Baker* and later cases, however, do not create an impenetrable protective barrier for ostensibly private postsecondary institutions. In particular, there may be situations in which government is directly involved in the challenged activity—in contrast to the absence of government involvement in the actions challenged in *Rendell-Baker* and the four lower court cases above. Such involvement may supply the "nexus" that was missing in these cases. In *Doe v. Gonzaga University*, 24 P.3d 390 (Wash. 2001), for example, the court upheld a jury verdict that a private university and its teacher certification specialist were engaged in action "under color of state law" (that is, state action) when completing state certification forms for students applying to be certified as teachers. The private institution and the state certification office, said the court, were cooperating in "joint action" regarding the certification process.<sup>12</sup> Moreover, there may be situations, unlike *Rendell-Baker* and the four cases above, in which government officials by virtue of their offices sit on or nominate others for an institution's board of trustees. Such involvement, perhaps in combination with other "contacts" between the state and the institution, may create a "symbiotic relationship" that constitutes state action, as the court held in *Krynicky v. University of Pittsburgh* and *Schier v. Temple University*, above.

*Craft v. Vanderbilt University*, 940 F. Supp. 1185 (M.D. Tenn. 1996), provides another instructive example of how the symbiotic relationship approach might still be used to find state action. A federal district court ruled that Vanderbilt University's participation with the state government in experiments using radiation in the 1940s might constitute state action for purposes of a civil rights action against the university. The plaintiffs were individuals who, without their knowledge or consent, were involved in these experiments, which were conducted at a Vanderbilt clinic in conjunction with the Rockefeller Foundation and the Tennessee Department of Public Health. The plaintiffs alleged that the university and its codefendants infringed their due process liberty interests by withholding information regarding the experiment from them. Using the

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<sup>12</sup>The Washington Supreme Court's decision was reversed, on other grounds, by the U.S. Supreme Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The Supreme Court's decision is discussed in Section 9.7.1.

symbiotic relationship approach, the court determined that the project was funded by the state, and that state officials were closely involved in approving research projects and making day-to-day management decisions. Since a jury could find on these facts that the university's participation with the state in these experiments created a symbiotic relationship, summary judgment for the university was inappropriate. Further proceedings were required to determine whether Vanderbilt and the state were sufficiently "intertwined" with respect to the research project to hold Vanderbilt to constitutional standards under the state action doctrine.

Because these and other such circumstances continue to pose complex issues, administrators in private institutions should keep the state action concept in mind in any major dealings with government. They should also rely heavily on legal counsel for guidance in this technical area. And, most important, administrators should confront the question that the state action cases leave squarely on their doorsteps: When the law does *not* impose constitutional constraints on your institution's actions, to what extent and in what manner will your institution nevertheless undertake on its own initiative to protect freedom of speech and press, equality of opportunity, due process, and other such values on your campus?

Over the years since *Rendell-Baker*, the U.S. Supreme Court has, of course, also considered various other state action cases. One of its major decisions was in another education case, *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). *Brentwood* is particularly important because the Court advanced a new test—a fourth approach—for determining when a private entity may be found to be a state actor. The defendant Association, a private nonprofit membership organization composed of public and private high schools, regulated interscholastic sports throughout the state. Brentwood Academy, a private parochial high school and a member of the Association, had mailed athletic information to the homes of prospective student athletes. The Association's board of control, comprised primarily of public school district officials and Tennessee State Board of Education officials, determined that the mailing violated the Association's recruitment rules; it therefore placed Brentwood on probation. Brentwood claimed that this action violated its equal protection and free speech rights under the federal Constitution. As a predicate to its constitutional claims, Brentwood argued that, because of the significant involvement of state officials and public school officials in the Association's operations, the Association was engaged in state action when it enforced its rules.

By a 5-to-4 vote, the U.S. Supreme Court agreed that the Association was engaged in state action. But the Court did not rely on *Rendell-Baker* or on any of the three analytical approaches sketched above. Instead Justice Souter, writing for the majority, articulated a "pervasive entwinement" test under which a private entity will be found to be engaged in state action when "the relevant facts show pervasive entwinement to the point of largely overlapping identity" between the state and the private entity (531 U.S. at 303). The majority grounded this entwinement theory in *Evans v. Newton*, 382 U.S. 296 (1966), where the Court had "treated a nominally private entity as a state actor . . . when

it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control’” (531 U.S. at 296, quoting *Evans*, 382 U.S. at 299, 301). Following this approach, the Court held that “[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . .” (531 U.S. at 298).

The entwinement identified by the Court was of two types: “entwinement . . . from the bottom up” and “entwinement from the top down” (531 U.S. at 300). The former focused on the relationship between the public school members of the Association (the bottom) and the Association itself; the latter focused on the relationship between the State Board of Education (the top) and the Association. As for “entwinement . . . up,” 84 percent of the Association’s members are public schools, and the Association is “overwhelmingly composed of public school officials who select representatives . . . , who in turn adopt and enforce the rules that make the system work” (531 U.S. at 299). “There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms” (531 U.S. at 300). As for “entwinement . . . down,” Tennessee State Board of Education members “are assigned ex officio to serve as members” of the Association’s two governing boards (531 U.S. at 300). In addition, the Association’s paid employees “are treated as state employees to the extent of being eligible for membership in the state retirement system” (531 U.S. at 300). The Court concluded that “[t]he entwinement down from the State Board is . . . unmistakable, just as the entwinement up from the member public schools is overwhelming.” Entwinement “to the degree shown here” required that the Association be “charged with a public character” as a state actor, and that its adoption and enforcement of athletics rules be “judged by constitutional standards” (531 U.S. at 302).

The most obvious application of *Brentwood* is to situations where state action issues arise with respect to an association of postsecondary institutions rather than an individual institution. (For other examples of this type of state action case, all decided before *Brentwood*, see Section 14.3.2.3, regarding accrediting associations, and Section 14.4.1, regarding athletic associations.) But the *Brentwood* entwinement approach would also be pertinent in situations in which a state system of higher education is bringing a formerly private institution into the system, and an “entwinement up” analysis might be used to determine whether the private institution would become a state actor for purposes of the federal Constitution.<sup>13</sup> Similarly, the entwinement approach might be useful in circumstances in which a postsecondary institution has created a captive organization, or affiliated with another organization outside the university, and the question is whether the captive or the affiliate would be considered a state

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<sup>13</sup>For pre-*Brentwood* examples of this problem and its analysis, see *Krynicky v. University of Pittsburgh* and *Schier v. Temple University*, above in this subsection.

actor. (The U.S. Supreme Court’s decision in *Lebron v. National Railroad Passenger Corporation* (Amtrak), 513 U.S. 374 (1995), is also pertinent to this question; see Section 3.6.5 of this book.)

In addition to all the cases above, in which the question is whether a post-secondary *institution* was engaged in state action, there have also been cases on whether a particular *employee, student, or student organization*—at a private or a public institution—was engaged in state action; as well as cases on whether a *private individual or organization* that cooperates with a public institution for some particular purpose was engaged in state action. While the cases focusing on the institution, as discussed previously, are primarily of interest to ostensibly private institutions, the state action cases focusing on individuals and organizations are particularly pertinent to public institutions.

In a case involving students, *Leeds v. Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *affirmed*, 85 F.3d 51 (2d Cir. 1996), Leeds, a graduate of the City University of New York (CUNY) School of Law (a public law school) submitted an advertisement for printing in the law school’s newspaper. The student editors rejected the advertisement because they believed it could subject them to a defamation lawsuit. Leeds sued the student editors and the acting dean of the law school, asserting that the rejection of his advertisement violated his free speech rights. The federal district court, relying on *Rendell-Baker v. Kohn*, held that neither the student editors nor the dean were state actors. Law school employees exercised little or no control over the publication or activities of the editors. Although the student paper was funded in part with mandatory student activity fees, this did not make the student editors’ actions attributable to the CUNY administration or to the state. (For other student newspaper cases on this point, see Section 10.3.3.) The court granted the defendants’ motion to dismiss, stating that the plaintiff’s allegations failed to support any plausible inference of state action. The appellate court affirmed the district court’s dismissal of the case, emphasizing that the CUNY administration had issued a memo prior to the litigation disclaiming any right to control student publications, even those financed through student activity fees.

In another case involving students, *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001), the court considered whether two cadets at the Citadel, a state military college, were engaged in state action when they disciplined a first-year (or “fourth-class”) cadet. The first-year cadet, a female who subsequently withdrew from the college, alleged that the two male, upper-class cadets had sexually harassed, insulted, and assaulted her using their authority under the “fourth-class system,” as described in the school’s Cadet Regulations (the Blue Book), and thereby violated her right to equal protection under the Fourteenth Amendment. The regulations grant upper-class students limited authority to correct and report violations of school rules by first-year students. While hazing and discrimination based on gender as means of punishment for rules violations are expressly prohibited, punishments meted out by upper-class cadets may include mild verbal abuse or assignment to compete undesirable maintenance tasks. Ultimately, authority for observing the Citadel’s rules rests with the college administration, not the upper-class cadets.

The appellate court affirmed the federal district court's decision that the upper-class students were not state actors and were not engaged in state action. Using the nexus approach,<sup>14</sup> the court emphasized that the upperclassmen enjoyed only limited disciplinary authority over students, authority that was not analogous to the broad discretionary powers of law enforcement officers. Moreover, the upperclassmen's actions were not authorized by the school and were in violation of the Blue Book rules, violations for which the cadets were disciplined. "Because the cadets' decision to engage in unauthorized harassment of [the plaintiff] was not coerced, compelled, or encouraged by any law, regulation or custom" of the state or the college, there was no "close nexus" between the cadets' action and the state, and the cadets were not state actors when they disciplined the plaintiff.<sup>15</sup>

Although the facts of the *Mentavlos* case are somewhat unique, involving a military-style discipline system at a military college, the court made clear that its analysis could have some application to honor code systems and other disciplinary systems at other public colleges:

The Citadel may operate under a stricter form of student self-government, and one unique to military-style colleges, but the concept of student self-governance at public and private institutions of higher education, including the use of honor codes and the limited delegation of disciplinary authority to certain members of the student body, is hardly a novel concept. A public school or college student is not fairly transformed into a state official or state actor merely because the school has delegated to that student or otherwise allowed the student some limited authority to act [249 F.3d at 322].

*Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. 1978), concerns a private entity's relationship with a public institution. The question was whether the public institution, the University of Missouri at Kansas City, was so entwined with the administration of a private scholarship trust fund that the fund's activities became state action. The plaintiff, a female student, sued the university and the bank that was the fund's trustee. The fund had been established as a trust by a private individual, who had stipulated that all scholarship recipients be male. The student alleged that, although the Columbia Union National Bank was named as trustee, the university in fact administered the scholarship fund; that she was ineligible for the scholarship solely because of her sex; and that the university's conduct in administering the trust therefore was unconstitutional. She further claimed that the trust constituted three-fourths of the scholarship money available at the university and that the school's entire scholarship program was thereby discriminatory.

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<sup>14</sup>The court also used public function analysis (see 249 F.3d at 314–18), rejecting the plaintiff's arguments based on this approach because the Citadel was not analogous to the federal military academies, and the institution and the cadets therefore were not performing the traditional sovereign function of training men and women for service in the U.S. Armed Forces.

<sup>15</sup>As *Mentavlos* suggests, if the harassers had been employees of a public institution rather than students, the employees would likely have been found to be engaged in state action. For a case reaching this result, see *Hayut v. State University of New York*, 352 F.3d 733, 743–45 (2d Cir. 2003).



The trial court twice dismissed the complaint for failure to state a cause of action, reasoning that the trust was private and the plaintiff had not stated facts sufficient to demonstrate state action. On appeal, the Supreme Court of Missouri reviewed the university's involvement in the administration of the trust:

[We] cannot conclude that by sifting all the facts and circumstances there was state action involved here. Mr. Victor Wilson established a private trust for the benefit of deserving Kansas City "boys." He was a private individual; he established a trust with his private funds; he appointed a bank as trustee; he established a procedure by which recipients of the trust fund would be selected. The trustee was to approve the selections. Under the terms of the will, no public agency or state action is involved. Discrimination on the basis of sex results from Mr. Wilson's personal predilection. That is clearly not unlawful. . . . The dissemination of information by the university in a catalogue and by other means, the accepting and processing of applications by the financial aid office, the determining of academic standards and financial needs, the making of a tentative award or nomination and forwarding the names of qualified male students to the private trustee . . . does not in our opinion rise to the level of state action [576 S.W.2d at 320].

Disagreeing with this conclusion, one member of the appellate court wrote a strong dissent:

The University accepts the applications, makes a tentative award, and in effect "selects" the male applicants who are to receive the benefits of the scholarship fund. The acts of the University are more than ministerial. The trust as it has been administered has shed its purely private character and has become a public one. The involvement of the public University is . . . of such a prevailing nature that there is governmental entwinement constituting state action [576 S.W.2d at 323].

The appellate court's majority, however, having declined to find state action and thus denying the plaintiff a basis for asserting constitutional rights against the trust fund, affirmed the dismissal of the case. (For a discussion of the treatment of sex-restricted scholarships under the federal Title IX statute, see Section 13.5.3 of this book.)

*DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999), concerns private actors who cooperated with officials of a public institution. The court considered whether the outside defendants were engaged in state action when they used the public university's facilities for a program that was assisted and promoted by the university. The plaintiff, a minor party gubernatorial candidate who had been excluded from a campaign debate held at, and broadcast from, the Virginia Commonwealth University (VCU), challenged the exclusion as a violation of her First Amendment rights. (See Section 11.6.2 for discussion of the free speech aspects of the case.) She sued not only the university and its president (Trani) but also the radio personality who had organized the debate (Wilder) and the two television stations that had broadcast the debate. The university and its president were clearly engaged in state action when they supported this debate, and the plaintiff argued that the other parties were as well, since they had solicited the university's funding and other assistance and had acted jointly with

the university and its president in organizing and promoting the debate. The court rejected the plaintiff's argument and her reliance on the symbiotic relationship test as articulated in the U.S. Supreme Court's opinion in *Burton v. Wilmington Parking Authority* (above). The *Burton* case "certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment" and, since *Burton*, the U.S. Supreme Court has "articulate[d] numerous limits" to *Burton's* "joint participation test." Moreover:

As distinguished from *Burton*, DeBauche's . . . complaint does not describe facts that suggest interdependence such that VCU relied on the private defendants for its continued viability. While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, their conduct cannot be thought to have controlled his conduct to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate [191 F.3d at 508].

**1.5.3. Other bases for legal rights in private institutions.** The inapplicability of the federal Constitution to private schools does not necessarily mean that students, faculty members, and other members of the private school community have no legal rights assertable against the school. There are other sources for individual rights, and these sources may sometimes resemble those found in the Constitution.

The federal government and, to a lesser extent, state governments have increasingly created statutory rights enforceable against private institutions, particularly in the discrimination area. The federal Title VII prohibition on employment discrimination (42 U.S.C. § 2000e *et seq.*, discussed in Section 5.2.1), applicable generally to public and private employment relationships, is a prominent example. Other major examples are the Title VI race discrimination law (42 U.S.C. § 2000d *et seq.*) and the Title IX sex discrimination law (20 U.S.C. § 1681 *et seq.*) (see Sections 13.5.2 & 13.5.3 of this book), applicable to institutions receiving federal aid. Such sources provide a large body of nondiscrimination law, which parallels and in some ways is more protective than the equal protection principles derived from the Fourteenth Amendment.

Beyond such statutory rights, several common law theories for protecting individual rights in private postsecondary institutions have been advanced. Most prominent by far is the contract theory, under which students and faculty members are said to have a contractual relationship with the private school. Express or implied contract terms establish legal rights that can be enforced in court if the contract is breached. Although the theory is a useful one that is often referred to in the cases (see Sections 6.2.1 & 8.1.3), most courts agree that the contract law of the commercial world cannot be imported wholesale into the academic environment. The theory must thus be applied with sensitivity to academic customs and usages. Moreover, the theory's usefulness is somewhat limited. The "terms" of the "contract" may be difficult to identify, particularly in the case of students. (To what extent, for instance, is the college catalog a source of contract terms?) Some of the terms, once identified, may be too vague or ambiguous to

enforce. Or the contract may be so barren of content or so one-sided in favor of the institution that it is an insignificant source of individual rights.

Despite its shortcomings, the contract theory has gained in importance. As it has become clear that the bulk of private institutions can escape the tentacles of the state action doctrine, students, faculty, and staff have increasingly had to rely on alternative theories for protecting individual rights. (See, for example, *Gorman v. St. Raphael Academy*, 853 A.2d 28 (R.I. 2004).) Since the lowering of the age of majority, postsecondary students have had a capacity to contract under state law—a capacity that many previously did not have. In what has become the age of the consumer, students have been encouraged to import consumer rights into postsecondary education. And, in an age of collective negotiation, faculties and staff have often sought to rely on a contract model for ordering employment relationships on campus (see Section 4.5).

Such developments can affect both public and private institutions, although state law may place additional restrictions on contract authority in the public sphere. While contract concepts can of course limit the authority of the institution, they should not be seen only as a burr in the administrator's side. They can also be used creatively to provide order and fairness in institutional affairs and to create internal grievance procedures that encourage in-house rather than judicial resolution of problems. Administrators thus should be sensitive to both the problems and the potentials of contract concepts in the postsecondary environment.

State constitutions have also assumed critical importance as a source of legal rights for individuals to assert against private institutions. The key case is *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), *affirmed*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In this case a group of high school students who were distributing political material and soliciting petition signatures had been excluded from a private shopping center. The students sought an injunction in state court to prevent further exclusions. The California Supreme Court sided with the students, holding that they had a state constitutional right of access to the shopping center to engage in expressive activity. In the U.S. Supreme Court, the shopping center argued that the California court's ruling was inconsistent with an earlier U.S. Supreme Court precedent, *Lloyd v. Tanner*, 407 U.S. 551 (1972), which held that the First Amendment of the federal Constitution does not guarantee individuals a right to free expression on the premises of a private shopping center. The Court rejected the argument, emphasizing that the state had a "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution."

The shopping center also argued that the California court's decision, in denying it the right to exclude others from its premises, violated its property rights under the Fifth and Fourteenth Amendments of the federal Constitution. The Supreme Court rejected this argument as well:

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others (*Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)). And here there has literally been a "taking" of that right to the extent that the California Supreme Court has interpreted the state constitution to entitle its citizens to exercise free expression and petition rights on shopping center

property. But it is well established that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense” (*Armstrong v. United States*, 364 U.S. 40, 48 (1960)). . . .

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have “physically invaded” appellants’ property cannot be viewed as determinative [447 U.S. at 82–84].

*PruneYard* has gained significance in educational settings with the New Jersey Supreme Court’s decision in *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (this volume, Section 11.6.3). The defendant, who was not a student, had been charged with criminal trespass for distributing political material on the Princeton University campus in violation of Princeton regulations. The New Jersey court declined to rely on the federal First Amendment, instead deciding the case on state constitutional grounds. It held that, even without a finding of state action (a prerequisite to applying the federal First Amendment), Princeton had a state constitutional obligation to protect Schmid’s expressional rights (N.J. Const. (1947), Art. I, para. 6 & para. 18). In justifying its authority to construe the state constitution in this expansive manner, the court relied on *PruneYard*. A subsequent case involving Muhlenberg College, *Pennsylvania v. Tate*, 432 A.2d 1382 (Pa. 1981), follows the *Schmid* reasoning in holding that the Pennsylvania state constitution protected the defendant’s rights.

In contrast, a New York court refused to permit a student to rely on the state constitution in a challenge to her expulsion from a summer program for high school students at Cornell. In *Stone v. Cornell University*, 510 N.Y.S.2d 313 (N.Y. App. Div. 1987), the sixteen-year-old student was expelled after she admitted smoking marijuana and drinking alcohol while enrolled in the program and living on campus. No hearing was held. The student argued that the lack of a hearing violated her rights under New York’s constitution (Art. I, § 6). Disagreeing, the court invoked a “state action” doctrine similar to that used for the federal Constitution (see Section 1.5.2 in this book) and concluded that there was insufficient state involvement in Cornell’s summer program to warrant constitutional due process protections.

Additional problems may arise when rights are asserted against a private *religious* (rather than a private *secular*) institution (see generally Sections 1.6.1 & 1.6.2 below). Federal and state statutes may provide exemptions for certain actions of religious institutions (see, for example, Section 5.5 of this book).

Furthermore, courts may refuse to assert jurisdiction over certain statutory and common law claims against religious institutions, or may refuse to grant certain discovery requests of plaintiffs or to order certain remedies proposed by plaintiffs, due to concern for the institution's establishment and free exercise rights under the First Amendment or parallel state constitutional provisions (see, for example, Section 6.2.5). These types of defenses by religious institutions will not always succeed, however, even when the institution is a seminary. In *McKelvey v. Pierce*, 800 A.2d 840 (2002), for instance, the New Jersey Supreme Court reversed the lower courts' dismissal of various contract and tort claims brought by a former student and seminarian against his diocese and several priests, emphasizing that "[t]he First Amendment does not immunize every legal claim against a religious institution or its members." The plaintiff had taken a leave of absence from his seminary training shortly before ordination time, allegedly because he had been subjected to repetitive unwanted homosexual advances. After he did not return from his leave, the diocese billed him for the costs of his seminary education and terminated his candidacy for the priesthood. The appellate court determined that the trial court must "engage in [a] painstaking analysis" of each of the plaintiff's claims "to determine, on an issue-by-issue basis, whether any of [them] may be adjudicated consistent with First Amendment principles." The court also indicated that the plaintiff was not precluded from using "evidence . . . contained in documents with religious overtones . . . to establish the existence of a contractual relationship" with the diocese; that he "may argue that, like all similar secular contracts, his agreement with the Diocese carried with it a covenant of good faith and fair dealing"; that "it is also possible" that he could, "without implicating dogma, ecclesiastical policy or choice, . . . satisfy the elements of a breach of fiduciary duty"; and that "these claims, and others lurking in the margins of [the plaintiff's] complaint, could give rise to monetary damages . . ." (800 A.2d at 858–60). Moreover, the court suggested that, had the plaintiff filed a complaint under the federal Title VII statute (which he did not), "there would have been no First Amendment prohibition against [his] proving a Title VII case of sexual harassment."

## ***Sec. 1.6. Religion and the Public-Private Dichotomy***

**1.6.1. Overview.** Under the establishment clause of the First Amendment, public institutions must maintain a neutral stance regarding religious beliefs and activities; they must, in other words, maintain religious neutrality. Public institutions cannot favor or support one religion over another, and they cannot favor or support religion over nonreligion. Thus, for instance, public schools have been prohibited from using an official nondenominational prayer (*Engel v. Vitale*, 370 U.S. 421 (1962)) and from prescribing the reading of verses from the Bible at the opening of each school day (*School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)).

The First Amendment contains two "religion" clauses. The first prohibits government from "establishing" religion; the second protects individuals' "free

exercise” of religion from governmental interference. Although the two clauses have a common objective of ensuring governmental “neutrality,” they pursue it in different ways. As the U.S. Supreme Court explained in *School District of Abington Township v. Schempp*:

The wholesome “neutrality” of which this Court’s cases speak thus stems from a recognition of the teaching of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the state or federal government would be placed behind the tenets of one or of all orthodoxies. This the establishment clause prohibits. And a further reason for neutrality is found in the free exercise clause, which recognizes the value of religious training, teaching, and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the free exercise clause guarantees. . . . The distinction between the two clauses is apparent—a violation of the free exercise clause is predicated on coercion, whereas the establishment clause violation need not be so attended [374 U.S. at 222–23].

Neutrality, however, does not necessarily require a public institution to prohibit all religious activity on its campus or at off-campus events it sponsors. In some circumstances the institution may have discretion to permit noncoercive religious activities (see *Lee v. Weisman*, 505 U.S. 577 (1992) (finding indirect coercion in context of religious invocation at *high school* graduation)). Moreover, if a rigidly observed policy of neutrality would discriminate against campus organizations with religious purposes or impinge on an individual’s right to freedom of speech or free exercise of religion, the institution may be required to allow some religion on campus.

In a case that has now become a landmark decision, *Widmar v. Vincent*, 454 U.S. 263 (1981) (see Section 10.1.5 of this book), the U.S. Supreme Court determined that student religious activities on public campuses are protected by the First Amendment’s free speech clause. The Court indicated a preference for using this clause, rather than the free exercise of religion clause, whenever the institution has created a “public forum” generally open for student use. The Court also concluded that the First Amendment’s establishment clause would not be violated by an “open-forum” or “equal-access” policy permitting student use of campus facilities for both nonreligious and religious purposes.<sup>16</sup>

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<sup>16</sup>For later cases (involving elementary and secondary education) that affirm and extend these principles, see *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). A similar result could also be reached using the free exercise clause. In a pre-*Widmar* case, *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), for example, a public university had banned all religious worship services in campus facilities. The plaintiffs contended that this policy was unconstitutional as applied to students’ religious services in the commons areas of campus dormitories. After determining that the university could permit religious worship in the commons area without violating the establishment clause, the court then held that the university was constitutionally required by the free exercise clause to make the commons area available for students’ religious worship.

**1.6.2. Religious autonomy rights of religious institutions and their personnel.** A private institution's position under the establishment and free exercise clauses differs markedly from that of a public institution. Private institutions have no obligation of neutrality under these clauses. Moreover, these clauses affirmatively protect the religious beliefs and practices of private religious institutions from government interference. For example, establishment and free exercise considerations may restrict the judiciary's capacity to entertain lawsuits against religious institutions.<sup>17</sup> Such litigation may involve the court in the interpretation of religious doctrine or in the process of church governance, thus creating a danger that the court—an arm of government—would entangle itself in religious affairs in violation of the establishment clause. Or such litigation may invite the court to enforce discovery requests (such as subpoenas) or award injunctive relief that would interfere with the religious practices of the institution or its sponsoring body, thus creating dangers that the court's orders would violate the institution's rights under the free exercise clause. Sometimes such litigation may present both types of federal constitutional problems or, alternatively, may present parallel problems under the state constitution. When the judicial involvement requested by the plaintiff(s) would cause the court to intrude upon establishment or free exercise values, the court must decline to enforce certain discovery requests, or must modify the terms of any remedy or relief it orders, or must decline to exercise any jurisdiction over the dispute, thus protecting the institution against governmental incursions into its religious beliefs and practices. These issues are addressed with respect to suits by faculty members in Section 6.2.5 of this book; for a parallel example regarding a suit by a student, see *McKelvey v. Pierce*, discussed in Section 1.5.3.

A private institution's constitutional protection under the establishment and free exercise clauses is by no means absolute. Its limits are illustrated by *Bob Jones University v. United States*, 461 U.S. 574 (1983) (see Section 13.3.2, footnote 38). Because the university maintained racially restrictive policies on dating and marriage, the Internal Revenue Service had denied it tax-exempt status under federal tax laws. The university argued that its racial practices were religiously based and that the denial abridged its right to free exercise of religion. The U.S. Supreme Court, rejecting this argument, emphasized that the federal government has a "compelling" interest in "eradicating racial discrimination in education" and that interest "substantially outweighs whatever burden denial of tax benefits places on [the university's] exercise of . . . religious beliefs" (461 U.S. at 575).

Although the institution did not prevail in *Bob Jones*, the "compelling interest" test that the Court used to evaluate free exercise claims does provide substantial protection for religiously affiliated institutions. The Court severely restricted the use of this "strict scrutiny" test, however, in *Employment Division*

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<sup>17</sup>The federal constitutional principles are developed in *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral* 344 U.S. 94 (1952); and *Watson v. Jones*, 80 U.S. 679 (1871).

*v. Smith*, 494 U.S. 872 (1990), and thus severely limited the protection against governmental burdens on religious practice that are available under the free exercise clause. Congress sought to legislatively overrule *Employment Division v. Smith* and restore broad use of the compelling interest test in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, but the U.S. Supreme Court invalidated this legislation. Congress had passed RFRA pursuant to its power under Section 5 of the Fourteenth Amendment (see Section 13.1.5 of this book), to enforce that amendment and the Bill of Rights against the states and their political subdivisions. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA is beyond the scope of Congress's Section 5 enforcement power. Although the Court addressed only RFRA's validity as it applies to the states, the statute by its express terms also applies to the federal government (§§ 2000bb-2(1), 2000bb-3(a)). RFRA thus may still be constitutional as to these latter applications. (See, for example, *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), in which the court acknowledged that *City of Boerne* did not invalidate RFRA as to the federal government and assumed, without deciding, that RFRA is constitutional in this regard.) There is a contrary view, however. According to this view, the critical portions of the *Boerne* opinion that rely on *Marbury v. Madison* and the concept of judicial supremacy, and conclude that "RFRA contradicts vital principles necessary to maintain separation of powers" [between Congress and the Court] (521 U.S. at 508), apply just as fully to the federal government as to the states.<sup>18</sup>

The invalidation of RFRA has serious consequences for the free exercise rights of both religious institutions and the members of their academic communities. The earlier case of *Employment Division v. Smith* (above) is reinstated as the controlling authority on the right to free exercise of religion. Whereas RFRA provided protection against generally applicable, religiously neutral laws that substantially burden religious practice, *Smith* provides no such protection. Thus, religiously affiliated institutions no longer have federal religious freedom rights that guard them from general and neutral government regulations interfering with their religious mission. Moreover, individual students, faculty, and staff—whether at religious institutions, private secular institutions, or public institutions—no longer have federal religious freedom rights to guard them from general and neutral government regulations that interfere with their personal religious practices. And individuals at *public* institutions no longer have federal religious freedom rights to guard them from general and neutral *institutional* regulations that interfere with their personal religious practices.

There are at least three avenues that an individual religious adherent or a religiously affiliated institution might now pursue to reclaim some of the protection taken away first by *Smith* and then by *Boerne*. The first avenue is to seek maximum advantage from an important post-*Smith* case, *Church of the Lukumi*

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<sup>18</sup>A successor statute to RFRA, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* provides some additional protections for religious institutions regarding zoning and other land use issues. See, for example, *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004); but see *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003).



*Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), that limits the impact of *Smith*. Under *Lukumi Babalu Aye*, challengers may look beyond the face of a regulation to discern its “object” from the background and context of its passage and enforcement. If this investigation reveals an object of “animosity” to religion or a particular religious practice, then the court will not view the regulation as religiously neutral and will, instead, subject the regulation to a strict “compelling interest” test. (For an example of a recent case addressing a student’s First Amendment free exercise claim and utilizing *Lukumi Babalu Aye*, see *Axon-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), discussed in Section 8.1.4.)

The second avenue is to seek protection under some other clause of the federal Constitution. The best bet is probably the free speech and press clauses of the First Amendment, which cover religious activity that is expressive (communicative). The U.S. Supreme Court’s decisions in *Widmar v. Vincent* (Section 10.1.5) and *Rosenberger v. Rectors and Visitors of the University of Virginia* (Sections 10.1.5 & 10.3.2) provide good examples of protecting religious activity under these clauses. Another possibility is the due process clauses of the Fifth and Fourteenth Amendments, which protect certain privacy interests regarding personal, intimate matters. The *Smith* case itself includes a discussion of this due process privacy protection for religious activity (494 U.S. at 881–82). Yet another possibility is the freedom of association that is implicit in the First Amendment and that the courts usually call the “freedom of expressive association” to distinguish it from a “freedom of intimate association” protected by the Fifth and Fourteenth Amendment due process clauses (see *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18, 622–23 (1984)). The leading case is *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Court, by a 5-to-4 vote, upheld the Boy Scouts’ action revoking the membership of a homosexual scoutmaster. In its reasoning, the Court indicated that the “freedom of expressive association” protects private organizations from government action that “affects in a significant way the [organization’s] ability to advocate public or private viewpoints” (530 U.S. at 648).

The third avenue is to look beyond the U.S. Constitution for some other source of law (see Section 1.4 of this book) that protects religious freedom. Some state constitutions, for instance, may have protections that are stronger than what is now provided by the federal free exercise clause (see subsection 1.6.3 below). Similarly, federal and state statutes will sometimes protect religious freedom. The federal Title VII statute on employment discrimination, for example, protects religious institutions from federal government intrusions into some religiously based employment policies (see Section 5.5 of this book), and protects employees from intrusions by employers into some religious practices (see Section 5.3.6 of this book).

**1.6.3. Government support for religious institutions.** Although the establishment clause itself imposes no neutrality obligation on private institutions, this clause does have another kind of importance for private institutions that are religious. When government—federal, state, or local—undertakes to

provide financial or other support for private postsecondary education, the question arises whether this support, insofar as it benefits religious institutions, constitutes government support for religion. If it does, such support would violate the establishment clause because government would have departed from its position of neutrality.

Two 1971 cases decided by the Supreme Court provide the foundation for the modern law on government support for church-related schools. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), invalidated two state programs providing aid for church-related elementary and secondary schools. *Tilton v. Richardson*, 403 U.S. 672 (1971), held constitutional a federal aid program providing construction grants to higher education institutions, including those that are church related. In deciding the cases, the Court developed a three-pronged test for determining when a government support program passes muster under the establishment clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster “an excessive government entanglement with religion” [403 U.S. at 612–13, quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)].

All three prongs have proved to be very difficult to apply in particular cases. The Court has provided guidance in *Lemon* and in later cases, however, that has been of some help. In *Lemon*, for instance, the Court explained the entanglement prong as follows:

In order to determine whether the government entanglement with religion is excessive, we must examine (1) the character and purposes of the institutions which are benefitted, (2) the nature of the aid that the state provides, and (3) the resulting relationship between the government and the religious authority [403 U.S. at 615].

In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court gave this explanation of the effect prong:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting [413 U.S. at 743].

But in *Agostini v. Felton*, 521 U.S. 203 (1997), the U.S. Supreme Court refined the three-prong *Lemon* test, specifically affirming that the first prong (purpose) has become a significant part of the test and determining that the second prong (effect) and third prong (entanglement) have, in essence, become combined into a single broad inquiry into effect. (See 521 U.S. at 222, 232–33.) And in *Mitchell v. Helms*, 530 U.S. 793 (2000), four Justices in a plurality opinion and two Justices in a concurring opinion criticized the “pervasively sectarian” test that

had been developed in *Hunt v. McNair* (above) as part of the effects prong of *Lemon*, and overruled two earlier U.S. Supreme Court cases on elementary and secondary education that had relied on this test. These Justices also gave much stronger emphasis to the neutrality principle that is a foundation of establishment clause analysis.

Four U.S. Supreme Court cases have applied the complex *Lemon* test to religious postsecondary institutions. In each case the aid program passed the test. In *Tilton v. Richardson* (above), the Court approved the federal construction grant program, and the grants to the particular colleges involved in that case, by a narrow 5-to-4 vote. In *Hunt v. McNair* (above) the Court, by a 6-to-3 vote, sustained the issuance of revenue bonds on behalf of a religious college, under a South Carolina program designed to help private nonprofit colleges finance construction projects. Applying the primary effect test quoted previously, the court determined that the college receiving the bond proceeds was not “pervasively sectarian” (413 U.S. at 743) and would not use the financial facilities for specifically religious activities. In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), by a 5-to-4 vote, the Court upheld the award of annual support grants to four Catholic colleges under a Maryland grant program for private postsecondary institutions. As in *Hunt*, the Court majority (in a plurality opinion and concurring opinion) determined that the colleges at issue were not “pervasively sectarian” (426 U.S. at 752, 755), and that, had they been so, the establishment clause may have prohibited the state from awarding the grants. And in the fourth case, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court rejected an establishment clause challenge to a state vocational rehabilitation program for the blind that provided assistance directly to a student enrolled in a religious ministry program at a private Christian college. Distinguishing between *institution-based aid* and *student-based aid*, the unanimous Court concluded that the aid plan did not violate the second prong of the *Lemon* test, since any state payments that were ultimately channeled to the educational institution were based solely on the “genuinely independent and private choices of the aid recipients.” (For a discussion of *Witters* against the backdrop of the earlier Supreme Court cases, and of the aftermath of *Witters* in the Washington Supreme Court, see Note, “The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education,” 17 *J. Coll. & Univ. Law* 381, 398–409 (1991).) Taken together, these U.S. Supreme Court cases suggest that a wide range of postsecondary support programs can be devised compatibly with the establishment clause and that a wide range of church-related institutions can be eligible to receive government support.

Of the four Supreme Court cases, only *Witters* focuses on student-based aid. Its distinction between institutional-based aid (as in the other three Supreme Court cases) and student-based aid has become a critical component of establishment clause analysis. In a later case, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (an elementary/secondary education case), the Court broadly affirmed the vitality of this distinction and its role in upholding government aid programs that benefit religious schools. Of the other three Supreme Court cases—*Tilton*, *Hunt*, and *Roemer*—*Roemer* is the most revealing. There the Court refused to find that the grants given a group of Catholic colleges

constituted support for religion—even though the funds were granted annually and could be put to a wide range of uses, and even though the schools had church representatives on their governing boards, employed Roman Catholic chaplains, held Roman Catholic religious exercises, required students to take religion or theology classes taught primarily by Roman Catholic clerics, made some hiring decisions for theology departments partly on the basis of religious considerations, and began some classes with prayers.

The current status of the U.S. Supreme Court’s 1976 decision in *Roemer v. Board of Public Works* was the focus of extensive litigation in the Fourth Circuit involving Columbia Union College, a small Seventh-Day Adventist college in Maryland. *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998) (hereafter, *Columbia Union College I*), involved the same Maryland grant program that was at issue in *Roemer*. The questions for the court were whether, under then-current U.S. Supreme Court law on the establishment clause, a “pervasively sectarian” institution could ever be eligible for direct government funding of its core educational functions; and whether the institution seeking the funds here (Columbia Union College) was “pervasively sectarian.” In a 2-to-1 decision, the court answered “No” to the first question, asserting that *Roemer* has not been implicitly overruled by subsequent Supreme Court cases (such as *Agostini*, above), and remanded the second question to the district court for further fact findings. The debate between the majority and dissent illustrates the two contending perspectives on the continuing validity of *Roemer* and that case’s criteria and for determining if an institution is “pervasively sectarian.” In addition, the court in *Columbia Union College I* considered a new issue that was not evident in *Roemer*, but was interjected into this area of law by the U.S. Supreme Court’s 1995 decision in *Rosenberger v. Rector & Visitors of the University of Virginia* (see Section 10.1.5 of this book). The issue is whether a decision to deny funds to Columbia Union would violate its free speech rights under the First Amendment. The court answered “Yes” to this question because Maryland had denied the funding “solely because of [Columbia Union’s] alleged pervasively partisan religious viewpoint” (159 F.3d at 156). That ruling did not dispose of the case, however, because the court determined that the need to avoid an establishment clause violation would provide a justification for this infringement of free speech.

On remand, and after extensive discovery and a lengthy trial, the federal district court ruled that Columbia Union was not pervasively sectarian and was therefore entitled to participate in the state grant program. Maryland then appealed, and the U.S. Fourth Circuit Court of Appeals reviewed the case for a second time in *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001) (hereafter, *Columbia Union College II*). In its opinion in *Columbia Union College II*, the appellate court emphasized that, since its decision in *Columbia Union College I*, the U.S. Supreme Court had “significantly altered the Establishment Clause landscape” (254 F.3d at 501) by its decision in *Mitchell v. Helms*, 530 U.S. 793 (2000). In *Mitchell*, as the Fourth Circuit explained, the Supreme Court upheld an aid program for elementary and secondary schools in which the federal government distributed funds to local school districts, which then purchased educational materials and equipment, a portion of which were loaned to private, including religious, schools. In the school district whose lending

program was challenged, “approximately 30% of the funds” went to forty-six private schools, forty-one of which were religiously affiliated (254 F.3d at 501).

Applying *Mitchell*, the Fourth Circuit noted that Justice O’Connor’s concurring opinion, “which is the controlling opinion in *Mitchell*,” replaced the pervasively sectarian test with a “neutrality-plus” test (254 F.3d at 504). The Fourth Circuit summarized this “neutrality-plus” test and its “three fundamental guideposts for Establishment Clause cases” as follows:

First, the neutrality of aid criteria is an important factor, even if it is not the only factor, in assessing a public assistance program. Second, the actual diversion of government aid to religious purposes is prohibited. Third, and relatedly, “presumptions of religious indoctrination” inherent in the pervasively sectarian analysis “are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause” [254 F.3d at 505, quoting *Mitchell*, 530 U.S. at 858 (O’Connor, J., concurring)].

Using this “neutrality-plus” analysis derived from *Mitchell*, instead of *Roemer*’s pervasively sectarian analysis, the Fourth Circuit found that Maryland’s grant program had a secular purpose and used neutral criteria to dispense aid, that there was no evidence “of actual diversion of government aid for religious purposes,” and that safeguards were in place to protect against future diversion of funds for sectarian purposes. The appellate court therefore affirmed the district court’s ruling that the state’s funding of Columbia Union College would not violate the establishment clause. Since a grant of funds would not violate the establishment clause, “the State cannot advance a compelling interest for refusing the college its [grant] funds.” Such a refusal would therefore, as the appellate court had already held in *Columbia Union I*, violate the college’s free speech rights. The court’s opinion concluded with this observation:

We recognize the sensitivity of this issue, and respect the constitutional imperative for government not to impermissibly advance religious interests. Nevertheless, by refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief [254 F.3d at 510].

Alternatively, the Fourth Circuit concluded that the college would prevail even if the pervasively sectarian test were still the controlling law. Reviewing the district court’s findings and the factors set out in the U.S. Supreme Court’s decision in *Roemer*, the appellate court also affirmed the district court’s ruling that the college is not pervasively sectarian and, on that ground as well, is eligible to receive the state grant funds.

Other post-*Roemer* cases in the lower courts have involved the state’s issuance of revenue bonds<sup>19</sup> to finance the building projects of private religious

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<sup>19</sup>Revenue bonds, in contrast to general obligation bonds, are not backed by the full faith and credit of the government issuing the bonds. The bond holders may look only to the entity receiving the bond proceeds for payment.

institutions. In *Virginia College Building Authority v. Lynn*, 538 S.E.2d 682 (Va. 2000), the Authority had issued tax-exempt revenue bonds on behalf of Regent University, a private religious institution, to finance several of its building projects. Virginia's highest court rejected challenges to the bond issue based both on the First Amendment's establishment clause and the Virginia Constitution's establishment clause. In *Steel v. Industrial Development Board of Metropolitan Government of Nashville*, 301 F.3d 401 (6th Cir. 2002), a local government's industrial development board issued tax-exempt industrial development bonds (a type of revenue bond) on behalf of David Lipscomb University, a private religious institution. The U.S. Court of Appeals for the Sixth Circuit rejected a First Amendment establishment clause challenge to the bond issue. In both cases the courts declined to rely on the "pervasively sectarian" test from *Hunt* (above) and *Roemer* (above), instead following *Agostini* (above) and *Mitchell v. Helms* (above) much as the Fourth Circuit did in *Columbia Union College II* (above). Under *Agostini* and (especially) *Mitchell*, the nature of the aid program, and its "neutrality," is a more important consideration than the nature of the institution receiving the aid. In the Virginia case, therefore, the court determined that the bond issue on behalf of Regent University was valid even if Regent is a "pervasively sectarian" institution; and in the *Steele* case the court declined to determine whether David Lipscomb University is "pervasively sectarian," saying it is an irrelevant question. Both courts did note, however, that the statute authorizing the bond program prohibited the bond proceeds from being used to finance facilities to be used for "sectarian instruction or as a place of religious worship" or to be used "primarily [for] the program of a school or department of divinity" (in the words of the Virginia statute); or to finance facilities to be used for "sectarian instruction," for "the program of a school or department of divinity," or for "the training of ministers, priests, rabbis, or other similar persons in the field of religion" (in the words of the Metro Nashville legislation); and both courts suggested that these statutory limitations on government assistance were required by the establishment clause. In *California Statewide Communities Development Authority v. All Persons Interested in Matter of Validity of Purchase Agreement* (Cal. App., 3d Dist. 2004, 92 P.3d 311 (Cal. 2004)), the court reached the opposite result from *Virginia Building Authority* and *Steele*, invalidating a bond issue for several religious institutions under the state constitution because the institutions were "pervasively sectarian" and the financing therefore would have "the direct and substantial effect of aiding religion." On further appeal, however, the California Supreme Court superseded this opinion and set the case for review (92 P.3d 311 (2004)); the appeal was pending as this book went to press.

When issues arise concerning governmental support for religious institutions, or their students or faculty members, the federal Constitution (as in the cases above) is not the only source of law that may apply. In some states, for instance, the state constitution will also play an important role independent of the federal Constitution. A line of cases concerning various student aid programs of the State of Washington provides an instructive example of the role of state constitutions and the complex interrelationships between the federal establishment and free

exercise clauses and the parallel provisions in state constitutions. The first case in the line was the U.S. Supreme Court's decision in *Witters v. Washington Department of Services for the Blind*, above (hereinafter, *Witters I*), in which the Court remanded the case to the Supreme Court of Washington (whose decision the U.S. Supreme Court had reversed), observing that the state court was free to consider the "far stricter" church-state provision of the state constitution. On remand, the state court concluded that the state constitutional provision—prohibiting use of public moneys to pay for any religious instruction—precluded the grant of state funds to the student enrolled in the religious ministry program (*Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash. 1989) (hereinafter, *Witters II*)). First the court held that providing vocational rehabilitation funds to the student would violate the state constitution because the funds would pay for "a religious course of study at a religious school, with a religious career as [the student's] goal" (771 P.2d at 1121). Distinguishing the establishment clause of the U.S. Constitution from the state constitution's provision, the court noted that the latter provision "prohibits not only the *appropriation* of public money for religious instruction, but also the *application of* public funds to religious instruction" (771 P.2d at 1122). Then the court held that the student's federal constitutional right to free exercise of religion was not infringed by denial of the funds, because he is "not being asked to violate any tenet of his religious beliefs nor is he being denied benefits 'because of conduct mandated by religious belief'" (771 P.2d at 1123). Third, the court held that denial of the funds did not violate the student's equal protection rights under the Fourteenth Amendment, because the state has a "compelling interest in maintaining the strict separation of church and state set forth" in its constitution, and the student's "individual interest in receiving a religious education must . . . give way to the state's greater need to uphold its constitution" (771 P.2d at 1123).

Almost twenty years after *Witters I* and *II*, establishment clause issues arose again in the context of another State of Washington student aid program. This time, in *State ex rel. Mary Gallwey v. Grimm*, 48 P.3d 274 (Wash. 2002), the Supreme Court of Washington declared that the state program did not violate the state constitution's establishment clause, nor did it violate the federal establishment clause. At issue was the Educational Opportunity Grant (EOG) Program, which provided aid to "place-bound" students who lived in disadvantaged counties and were unable to travel to distant state universities and colleges. Qualifying students were awarded vouchers that they could use at a select number of participating public and private institutions in the state. Some of the private institutions were religiously affiliated, and a state taxpayer challenged their inclusion in the program as a violation of Article I, section 11 of the state constitution (the same provision that was at issue in *Witters II*, above, and *Locke v. Davey*, below), as well as the federal Constitution's establishment clause.

The Washington Supreme Court rejected the challenges, determining that it was permissible for the state to include religious colleges in the program. The court relied on a provision in the statute creating the EOG Program requiring that "no student will be enrolled in any program that includes religious worship, exercise, or instruction" (48 P.3d at 285, citing Rev. Code Wash. 28B.101.040). Under this provision, according to the court, a student could use

an EOG voucher to pay educational costs at a “religious [college] with a religious mission,” so long as the student is pursuing a “general, non-religious, four-year college degree.” Such use of the vouchers, the court concluded, would not violate Article I, section 11.

Similarly, applying the three-pronged *Lemon* test (see above, this subsection), the Washington court determined that such inclusion of religiously affiliated schools in the EOG program did not violate the federal establishment clause. It was important, in this regard, that the EOG funds were awarded to the student directly, rather than to the school itself—a factor that the U.S. Supreme Court had emphasized in *Witters I*. The EOG Program was a “neutrally administered” program, said the Washington court, that represented an even more distant relationship between government and religion than the program upheld in *Witters I*.

The federal free exercise clause, which had been considered in the *Witters II* litigation, was not at issue in *Gallwey*. Had the State of Washington prohibited students from using EOG vouchers at religiously affiliated schools, even to pursue “non-religious” studies, then the prohibition could have been challenged as a violation of the excluded students’ free exercise rights—much as the student in *Witters II* had challenged his exclusion from using state vocational rehabilitation funds. The specific issue would be different from that in *Witters II*, however, since *Witters II* concerned only a prohibition on using student aid funds for religious studies preparing the student for a religious vocation, and not a more general prohibition on using state funds for any studies at a religiously affiliated school. Students’ challenges to such prohibitions, broad or narrow, in Washington or in other states, are now governed by a 2004 decision of the U.S. Supreme Court in *Locke v. Davey*, discussed below. In addition, challenges to such prohibitions may be brought by the religiously affiliated institutions that are excluded from the student aid program. An institution’s challenge could also be based on *Locke v. Davey* (below), at least if the institution offered “nonreligious” studies; but could just as likely be based on an equal protection claim of discrimination against religious organizations or an establishment clause claim of hostility toward religion (see Section 1.6.2 above).

*Locke v. Davey*, 540 U.S. 712 (2004), involved a free exercise clause challenge to yet another student financial aid program of the State of Washington. In its opinion rejecting the challenge, the U.S. Supreme Court probed the relationship between the federal Constitution’s two religion clauses and the relationship between these clauses and the religion clauses in state constitutions.

At issue was the State of Washington’s Promise Scholarship Program, which provided scholarships to academically gifted students for use at either public or private institutions—including religiously affiliated institutions—in the state. Consistent with Article I, section 11 of the state constitution as interpreted by the Washington Supreme Court in *Witters II* (see above), however, the state stipulated that aid may not be awarded to “any student who is pursuing a degree in theology” (see Rev. Code Wash. § 28B.10.814). The plaintiff, Joshua Davey, had been awarded a Promise Scholarship and decided to attend a Christian college in the state to pursue a double major in pastoral ministries and business administration. When he subsequently learned that the pastoral ministries



degree would be considered a degree in theology and that he could not use his Promise Scholarship for this purpose, Davey declined the scholarship. He then sued the state, alleging violations of his First Amendment speech, establishment, and free exercise rights as well as a violation of his equal protection rights under the Fourteenth Amendment.

In the federal district court, Davey lost on all counts. On appeal, however, the U.S. Court of Appeals for the Ninth Circuit upheld Davey's free exercise claim, concluding that the "State had singled out religion for unfavorable treatment" and that such facial discrimination "based on religious pursuit" was contrary to the U.S. Supreme Court's decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Applying that decision, the Ninth Circuit determined that "the State's exclusion of theology majors" was subject to strict judicial scrutiny, and the exclusion failed this test because it was not "narrowly tailored to achieve a compelling state interest" (*Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002)).

By a 7-to-2 vote, the U.S. Supreme Court reversed the Ninth Circuit and upheld the state's exclusion of theology degrees from the Promise Scholarship Program. In the majority opinion by Chief Justice Rehnquist, the Court declined to apply the strict scrutiny analysis of *Lukumi Babalu Aye*. Characterizing the dispute as one that implicated both the free exercise clause and the establishment clause of the federal Constitution, the Court recognized that "these two clauses . . . are frequently in tension" but that there is "play in the joints" (540 U.S. at 718, quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)) that provides states some discretion to work out the tensions between the two clauses. In particular, a state may sometimes give precedence to the antiestablishment values embedded in its own state constitution rather than the federal free exercise interests of particular individuals. To implement this "play-in-the-joints" principle, the Court applied a standard of review that was less strict than the standard it had usually applied to cases of religious discrimination.

Under the Court's prior decision in *Witters I* (above), "the State could . . . permit Promise Scholars to pursue a degree in devotional theology" (emphasis added). It did not necessarily follow, however, that the federal free exercise clause would *require* the state to cover students pursuing theology degrees. The question therefore was "whether Washington, pursuant to its own constitution, which has been authoritatively interpreted [by the state courts] as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, . . . can deny them such funding without violating the [federal] Free Exercise Clause" (540 U.S. at 719).

The Court found that "[t]he State has merely chosen not to fund a distinct category of instruction"—an action that "places a relatively minor burden on Promise Scholars" (540 U.S. at 721, 725). Moreover, the state's different treatment of theology majors was not based on "hostility toward religion," nor did the "history or text of Article I, § 11 of the Washington Constitution . . . [suggest] animus towards religion." The difference instead reflects the state's "historic and substantial state interest," reflected in Article I, section 11, in declining to

support religion by funding the religious training of the clergy. Based on these considerations, and applying its lesser scrutiny standard, the Court held that the State of Washington’s exclusion of theology majors from the Promise Scholarship program did not violate the free exercise clause.

The Court has thus created, in *Locke v. Davey*, a kind of balancing test for certain free exercise cases in which a state’s different treatment of religion does not evince “hostility” or “animus.” Under the balancing test, the extent of the burden the state has placed on religious practice is weighed against the substantiality of the state’s interest in promoting antiestablishment values. The lesser scrutiny, or intermediate scrutiny, that this balancing test produces stands in marked contrast to both the “strict scrutiny” required in cases like *Lukumi Babalu Aye* and the minimal scrutiny used in cases, like *Employment Division v. Smith* (subsection 1.6.2 above), that involve religiously neutral statutes of general applicability. Some of the Court’s reasoning supporting this balancing test and its application to the Promise Scholarships seems questionable,<sup>20</sup> as Justice Scalia pointed out in a dissent (540 U.S. at 731–32). Moreover, the circumstances in which the balancing test should be used—beyond the specific circumstance of a government aid program such as that in *Davey*—are unclear. But the 7-to-2 vote upholding Washington’s action nevertheless indicates strong support for a flexible and somewhat deferential approach to free exercise issues arising in programs of government support for higher education and, more specifically, strong support for the exclusion (if the state so chooses) of theological and ministerial education from state student aid programs—at least when the applicable state constitution has a strong antiestablishment clause.

Taken together, the *Locke v. Davey* case and the earlier *Witters I* case serve to accord a substantial range of discretion to the states (and presumably the federal government as well) to determine whether or not to include students pursuing religious studies in their student aid programs. The range of discretion may be less when a state is determining whether to include students studying secular subjects at a religiously affiliated institution, since the free exercise clause may have greater force in this context. And when a state determines whether to provide aid directly to religiously affiliated institutions rather than to students, the range of discretion will be slim because the federal establishment clause, and many state constitutional clauses, would apply with added force, as discussed earlier in this Section.

Though the federal cases have been quite hospitable to the inclusion of church-related institutions in government support programs for postsecondary education, administrators of religious institutions should still be most sensitive to establishment clause issues. As *Witters* indicates, state constitutions may contain clauses that restrict government support for church-related institutions more vigorously

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<sup>20</sup>For instance, the Court emphasized that the state’s scholarship program “does not require students to choose between their religious beliefs and receiving a government benefit” (540 U.S. at 721–22); and yet it later acknowledged that “majoring in devotional theology is akin to a religious calling” and that Davey’s “religious beliefs” were the sole motivation for pursuing such studies (540 U.S. at 721). It thus seems that, for Davey, the state did indeed put him in the position of choosing between his religious calling and his Promise Scholarship.

than the federal establishment clause does.<sup>21</sup> The statutes creating funding programs may also contain provisions that restrict the programs' application to religious institutions or activities. Moreover, even the federal establishment clause cases have historically been decided by close votes, with considerable disagreement among the Justices and continuing questions about the current status of the *Lemon* test and spin-off tests such as the "pervasively sectarian" test. Thus, administrators should exercise great care in using government funds and should keep in mind that, at some point, religious influences within the institution can still jeopardize government funding, especially institution-based funding.

**1.6.4. Religious autonomy rights of individuals in public post-secondary institutions.** While subsections 1.6.2 and 1.6.3 focused on church-state problems involving private institutions, this subsection focuses on church-state problems in public institutions. As explained in subsection 1.6.1, public institutions are subject to the strictures of the First Amendment's establishment and free exercise clauses, and parallel clauses in state constitutions, which are the source of rights that faculty members, students, and staff members may assert against their institutions. The most visible and contentious of these disputes involve situations in which a public institution has incorporated prayer or some other religious activity into an institutional activity or event.

In *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), for example, the U.S. Court of Appeals for the Seventh Circuit addressed the issue of prayer as part of the commencement exercises at a state university. A law school professor, law students, and an undergraduate student brought suit, challenging Indiana University's 155-year-old tradition of nonsectarian invocations and benedictions during commencement. The plaintiffs claimed that such a use of prayer, nonsectarian or not, violated the First Amendment's establishment clause and was equivalent to state endorsement of religion. The court disagreed:

[T]he University's practice of having an invocation and benediction at its commencements has prevailed for 155 years and is widespread throughout the nation. Rather than being a violation of the Establishment Clause, it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). As we held in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), Illinois public schools may lead the Pledge of Allegiance, including its reference to God, without violating the Establishment Clause of the First Amendment. Similarly here, the invocation and benediction serve legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs (*Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). Finally, as the district court correctly determined, the University's inclusion of a brief nonsectarian invocation and benediction does not have a primary effect of endorsing or disapproving religion, and there is no excessive entanglement of church and state by virtue of the University's selection of a cleric or its instruction to

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<sup>21</sup>Some of the cases are collected in Wayne F. Foster, Annot., "Validity, Under State Constitution and Laws, of Insurance by State or State Agency of Revenue Bonds to Finance or Refinance Construction Projects at Private Religiously Affiliated Colleges or Universities," 95 A.L.R.3d 1000.

the cleric that his or her remarks should be unifying and uplifting. Insofar as there is any advancement of religion or governmental entanglement, it is *de minimis* at best [104 F.3d at 986].

The plaintiffs also argued that the invocation and benediction violated the establishment clause because they were coercive (see *Lee v. Weisman*, 505 U.S. 577 (1992)). The court again disagreed. According to the court, nearly 2,500 of the 7,400 graduating students voluntarily elected not to attend commencement; those that did attend were free to exit before both the invocation and benediction, and return after each was completed; and those choosing not to exit were free to sit, as did most in attendance, during both ceremonies. These factors significantly undermined the suggestion that those attending graduation were coerced into participating in the nonsectarian invocation and benediction.

In *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), the court endorsed and extended the holding in *Tanford*. The plaintiff, a practicing Hindu originally from India and a tenured professor at Tennessee State University (TSU), claimed that the use of prayers at university functions violated the First Amendment's establishment clause. The functions at issue were not only graduation ceremonies as in *Tanford*, but also "faculty meetings, dedication ceremonies, and guest lectures." After the suit was filed, TSU discontinued the prayers and instead adopted a "moment-of-silence" policy. The professor then challenged the moment of silence as well, alleging that the policy had been adopted in order to allow continued use of prayers. The appellate court determined that neither the prayers nor the moments of silence violated the establishment clause.

The *Chaudhuri* court used the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (subsection 1.6.3), to resolve both the prayer claim and the moment-of-silence claim. Under the first prong of the *Lemon* test, the court found, as in *Tanford*, that a prayer may "serve to dignify or to memorialize a public occasion" and therefore has a legitimate secular purpose. Moreover, "if the verbal prayers had a legitimate secular purpose . . . it follows almost fortiori that the moments of silence have such a purpose." Under the second prong, the court found that the principal or primary effect of the nonsectarian prayers was not "to indoctrinate the audience," but rather "to solemnize the events and to encourage reflection." As to the moment of silence, it was "even clearer" that the practice did not significantly advance or inhibit religion:

A moment of silence is not inherently religious; a participant may use the time to pray, to stare absently ahead, or to think thoughts of a purely secular nature. The choice is left to the individual, and no one's beliefs are compromised by what may or may not be going through the mind of any other participant [130 F.3d at 238].

And, under the final prong of the *Lemon* test, the court found that "any entanglement resulting from the inclusion of nonsectarian prayers at public university functions is, at most, *de minimis*" and that the "entanglement created by a moment of silence is nil."

As in *Tanford*, the *Chaudhuri* court also concluded that the “coercion” test established in *Lee v. Weisman*, 505 U.S. 577 (1992), was not controlling. At Tennessee State University (in contrast to the secondary school in *Lee*), according to the court, there was no coercion to participate in the prayers. It was not mandatory for Professor Chaudhuri or any other faculty member to attend the TSU functions at issue, and there was no penalty for nonattendance. Moreover, there was no “peer pressure” to attend the functions or to participate in the prayers (as there had been in *Lee*), and there was “absolutely no risk” that any adult member present at a TSU function would be indoctrinated by the prayers.

The plaintiff also argued that the prayers and moments of silence at TSU functions constrained his practice of Hinduism and, therefore, violated the First Amendment’s free exercise clause. The court disagreed: “Having found that Dr. Chaudhuri was not required to participate in any religious exercise he found objectionable, we conclude that his Free Exercise claim is without merit” (130 F.3d at 239).

Although both courts resolved the establishment clause issues in the same way, these issues may have been more difficult in *Chaudhuri* than in *Tanford*; and the *Chaudhuri* court may have given inadequate consideration to some pertinent factors that were present in that case but apparently not in *Tanford*. As a dissenting opinion in *Chaudhuri* points out, the court may have discounted “the strength of the prayer tradition” at TSU, the strength of the “community expectations” regarding prayer, and the significant Christian elements in the prayers that had been used. Moreover, the court lumped the graduation exercises together with other university functions as if the relevant facts and considerations were the same for all functions. Instead, each type of function deserves its own distinct analysis, because the context of a graduation ceremony, for instance, may be quite different from the context of a faculty meeting or a guest lecture.

The reasoning and the result in *Tanford* and *Chaudhuri* may be further subject to question in the wake of the U.S. Supreme Court’s ruling in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In considering the validity, under the establishment clause, of a school district policy providing for student-led invocations before high school football games, the Court placed little reliance on factors emphasized by the *Tanford* and *Chaudhuri* courts, and instead focused on factors to which these courts gave little attention—for example, the “perceived” endorsement of religion implicit in the policy itself, the “history” of prayer practices in the district and the intention to “preserve” them, and the possible “sham secular purposes” underlying the student-led invocation policy. In effect, the arguments that worked in *Tanford* and *Chaudhuri* did not work in *Santa Fe*, and factors touched upon only lightly in *Tanford* and *Chaudhuri* were considered in depth in *Santa Fe*, thus leading to the Court’s invalidation of the Santa Fe School District’s invocation policy.

A later case, *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), involved state-sponsored prayer before supper at Virginia Military Institute (VMI), a state institution. Two student cadets at VMI asserted that a daily prayer recited by cadets during supper violated the establishment clause of the First Amendment. At VMI, students lead very structured lives with minimal freedom or privacy. As

part of the daily routine during the time that the plaintiffs were cadets, all first-year cadets attended the first seating of supper together and traveled to supper in formation. (A second seating for supper was held for those excused from the first seating for participation in sports and for other reasons.) After the first year, upper-class cadets had the option of “falling out” of formation and not attending the first seating of supper. At the start of each day’s first-seating supper, the Post Chaplain recited a prayer beginning with “Almighty God,” “O God,” “Father God,” “Heavenly Father,” or “Sovereign God.” According to the court, “[t]he Corps must remain standing and silent while the supper prayer is read, but cadets are not obligated to recite the prayer, close their eyes, or bow their heads.”

The defendant, General Bunting, former Superintendent of VMI, instituted the daily supper prayer as a way to “bring a stronger sense of unity to the Corps.” General Bunting argued that the prayer should be upheld because it is a “uniquely historical practice.” This argument is similar to the one employed in *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the U.S. Supreme Court upheld the Nebraska legislature’s use of prayer opening its sessions because the practice of legislative prayers had a “unique history” stretching back to the early years of the country. The court rejected the argument based on *Marsh* stating that a supper prayer does not share the unique history of legislative prayers. General Bunting also asserted various reasons why the prayer should be considered constitutional under the establishment clause—for example, because it serves “an academic function by aiding VMI’s mission of developing cadets into military and civilian leaders” and “provid[es] an occasion for American’s tradition of expressing thanksgiving and requesting divine guidance.”

To determine whether these justifications were sufficient under the establishment clause, the court used the “coercion” test from *Lee v. Weisman* and *Santa Fe Independent School District v. Doe* (see preceding) and the *Lemon* test (see preceding). The court held that the supper prayer failed both tests. As to the coercion, the court reasoned:

Although VMI’s cadets are not children, in VMI’s educational system they are uniquely susceptible to coercion. VMI’s adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code. Entering students exposed to the “rat line,” in which upperclassmen torment and berate new students, bonding “new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors.” *United States v. Virginia*, 518 U.S. 515, 522 (1996). At VMI, even upperclassmen must submit to mandatory and ritualized activities, as obedience and conformity remain central tenets of the school’s educational philosophy. In this atmosphere, General Bunting reinstated the supper prayer in 1995 to build solidarity and bring the Corps together as a family. In this context, VMI’s cadets are plainly coerced into participating in a religious exercise. Because of VMI’s coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults [327 F.3d at 371–72].

As to the *Lemon* test, the court gave General Bunting the “benefit of all doubt” and “assume[ed] the supper prayer to be motivated by secular goals.”

Nevertheless, the court held that the supper prayer failed the second prong of the *Lemon* test because the “primary effect” of the prayer was to promote religion, “send[ing] the unequivocal message that VMI, as an institution, *endorses* the religious expressions embodied in the prayer” (327 F.3d at 374; emphasis added); and that the prayer failed the third prong of the *Lemon* test because the daily recitation of the prayer demonstrated that “VMI has taken a position on what constitutes appropriate religious worship—an entanglement with religious activity that is forbidden by the Establishment Clause” (327 F.3d at 375).

### ***Sec. 1.7. The Relationship Between Law and Policy***

There is an overarching distinction between law and policy, and thus between legal issues and policy issues, that informs the work of administrators and policymakers in higher education, as well as the work of lawyers.<sup>22</sup> In brief, legal issues are stated and analyzed using the norms and principles of the legal system, resulting in conclusions and advice on what the law *requires* or *permits* in a given circumstance. Policy issues, in comparison, are stated and analyzed using norms and principles of administration and management, the social sciences (including the psychology of teaching and learning), the physical sciences (especially the health sciences), ethics, and other relevant disciplines; the resulting conclusions and advice focus on the best policy options available in a particular circumstance. Or, to put it another way, law focuses primarily on the *legality* of a particular course of action, while policy focuses primarily on the *efficacy* of a particular course of action. Legality is determined using the various sources of law set out in Section 1.4; efficacy is determined by using sources drawn from the various disciplines just mentioned. The work of ascertaining legality is primarily for the attorneys, while the work of ascertaining efficacy is primarily for the policy makers and administrators.

Just as legal issues may arise from sources both internal and external to the institution (Section 1.4), policy issues may arise, and policy may be made, both within and outside the institution. Internally, the educators and administrators, including the trustees or regents, make policy decisions that create what we may think of as “institutional policy” or “internal policy.” Externally, legislatures,

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<sup>22</sup>The discussion in this section—especially the middle portions that differentiate particular policy makers’ functions from those of attorneys, identify alternative policy-making processes, set out the steps of the policy-making process and the characteristics of good policy, and review structural arrangements for facilitating policy making—draws substantially upon these very helpful materials: Linda Langford & Miriam McKendall, “Assessing Legal Initiatives” (February 2004), a conference paper delivered at the 25th Annual Law and Higher Education Conference sponsored by Stetson University College of Law; Kathryn Bender, “Making and Modifying Policy on Campus: The ‘When and Why’ of Policymaking” (June 2004), a conference paper delivered at the 2004 Annual Conference of the National Association of College and University Attorneys; Tracy Smith, “Making and Modifying Policy on Campus” (June 2004), a conference paper delivered at the 2004 Annual Conference of the National Association of College and University Attorneys; and “Policy Development Process With Best Practices,” a document of the Association of College and University Policy Administrators, and published on the Association’s Web site (<http://www.inform.umd.edu/acupa>).

governors, and executive branch officials make policy decisions that create what we may think of as “public policy” or “external policy.” In either case, policy must be made and policy issues must be resolved within the constraints of the law.

It is critically important for institutional administrators and counsel to focus on this vital interrelationship between law and policy whenever they are addressing particular problems, reviewing existing institutional policies, or creating new policies. In these settings, with most problems and policies, the two foundational questions to ask are, “What are the institutional policy or public policy issues presented?” and “What are the legal issues presented?” The two sets of issues often overlap and intertwine. Administrators and counsel may study both sets of issues; neither area is reserved exclusively for the cognitive processes of one profession to the exclusion of the other. Yet lawyers may appropriately think about and react to legal issues differently than administrators do; and administrators may appropriately think about and react to policy issues differently than do attorneys. These matters of role and expertise are central to the process of problem solving as well as the process of policy making. While policy aspects of a task are more the bailiwick of the administrator and the legal aspects more the bailiwick of the lawyer, the professional expertise of each comes together in the policy-making process. In this sense, policy making is a joint project, a teamwork effort. The policy choices suggested by the administrators may implicate legal issues, and different policy choices may implicate different legal issues; legal requirements, in turn, will affect the viability of various policy choices.<sup>23</sup>

The administrators’ and attorneys’ roles in policy making can be described and differentiated in the following way. Administrators identify actual and potential problems that are interfering or may interfere with the furtherance of institutional goals or the accomplishment of the institutional mission, or that are creating or may create threats to the health or safety of the campus community; they identify the causes of these problems; they identify other contributing factors pertinent to understanding each problem and its scope; they assess the likelihood and gravity of the risks that these problems create for the institution; they generate options for resolving the identified problems; and they accommodate, balance, and prioritize the interests of the various constituencies that would be affected by the various options proposed. In addition, administrators identify opportunities and challenges that may entail new policy-making initiatives; assess compliance with current institutional policies and identify needs for change; and assess the efficacy of existing policies (How well *do* they

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<sup>23</sup>The focus on administrators and counsel, here and elsewhere in this Section, does not mean that faculties (the educators) are, or should be, cut out of the policy-making process. This Section is based on the assumptions that administrators are sometimes faculty members or educators themselves; that administrators will regularly provide for faculty participation in policy-making committees and task forces; that administrators who oversee academic functions will regularly consult with pertinent faculties of the institution, directly and/or through their deans; and that administrators will respect whatever policy-making and decision-making roles are assigned to faculties under the institution’s internal governance documents.



work?) and of proposed policies (How well *will* they work?). Attorneys, on the other hand, identify existing problems that create, and potential problems that may create, legal risk exposure for the institution or raise legal compliance issues; they analyze the legal aspects of these problems using the applicable sources of law (Section 1.4); they generate legally sound options for resolving these problems and present them to the responsible administrators; they assess the legal risk exposure (if any) to which the institution would be subject (see Section 2.5) under policy options that the policy makers have proposed either in response to the attorneys' advice or on their own initiative; they participate in—and often take the lead in—drafting new policies and revising existing policies; and they suggest legally sound procedures for implementing and enforcing the policy choices of the policy makers. In addition, attorneys review existing institutional policies to ascertain whether they are in compliance with applicable legal requirements and whether there are any conflicts between or among existing policies; they make suggestions for enhancing the legal soundness of existing policies and reducing or eliminating any risk of legal liability that they may pose; and they identify other legal consequences or by-products of particular policy choices (for example, that a choice may invite a governmental investigation, subject the institution to some new governmental regulatory regime, expose institutional employees to potential liability, or necessitate changes in the institution's relationships with its contractors).

The processes by which institutional policy is made and changed should be carefully considered by key administrators and attorneys, as well as by the institution's governing board. It may be appropriate to have different types of policy-making processes for different types of policies. Institutional bylaws or other policies promulgated by the board, for example, may involve a different policy-making process than administrative regulations promulgated under the authority of the president or chancellor; and institution-wide administrative regulations may entail a different policy-making process than the regulations or policies of particular schools, departments, or programs within the institution. Similarly, academic policies may proceed through a different policy-making process than, say, facility use policies or student conduct policies.

Regardless of the type of policy that is being made or reviewed, there are various phases and steps that, as a matter of good practice, should be common to most policy-making processes.<sup>24</sup> These phases and steps, very briefly stated, should include:

1. An *identification* phase. This phase involves: (a) identifying the specifics of the problem or challenge that provides the impetus for the policy making; and (b) collecting data and research (including research

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<sup>24</sup>One notable exception would be policy-making processes for use in crisis situations, which must usually be expedited and whose character may be shaped by the exigencies of the crisis. Policy making regarding technology may also involve some unique challenges; see Howard Bell & Nancy Tribbensee, "Technology Policy on Campus" (February 2005), a conference paper delivered at the 26th Annual Conference on Law and Higher Education sponsored by Stetson University College of Law.

into pertinent institutional records and policies) that is useful for understanding the character and scope of the problem or challenge and its consequences for the institution.

2. A *design* phase. This phase involves: (a) generating proposals for resolving the identified problem—for example, proposals for a new program, a new service, a new process, a new strategy or initiative, or a new policy statement; (b) assessing the viability of the various proposals and their relative merits; (c) involving pertinent constituencies, on campus—and sometimes off campus—that may be affected by the problem or the proposals or may otherwise have helpful expertise or perspective regarding them; (d) selecting (at least tentatively) a particular proposal or combination of proposals to pursue; (e) stating (at least tentatively) the goals to be achieved by the new proposal—short range and long range, academic and nonacademic; and (f) recommending means for administering, overseeing, or enforcing the new policy, as appropriate.
3. A *drafting* phase. This phase involves committing the new policy and other supporting documents to writing. The writing should incorporate all of the components of the policy, using language that is clear, pertinent, specific, and accessible. If the new policy would require amending or repealing other existing institutional policies, these amendments or repeals should be provided for as well.
4. An *approval* phase. This phase involves the consideration and approval of the new policy, or amendments to existing policies, and any supporting documents. Approval should usually be obtained from the drafters, other participants in the policy-making process, and institutional officials or bodies with review authority. Sometimes approval of the governing board will be required (or advisable) as well.
5. An *implementation* phase. This phase involves: (a) disseminating the written policy and other information that will help persons understand the policy, its purpose, and its justification; (b) pursuing initiatives to gain acceptance and support for the new policy, including leadership support; and (c) providing training, guidance, and resources, as appropriate, for the persons who will administer, monitor, and enforce the policy.
6. An *evaluation* phase. This phase involves the use of institutional personnel or outside consultants with expertise in evaluation, working with selected personnel who were involved in proposing or implementing the new policy, to evaluate the policy's success in resolving the identified problem (see phase 1) and achieving the goals established for the policy (see phases 2 and 3).

Depending on the policy being created and the policy makers involved in the process, these phases and steps may overlap one another at particular points, and some steps may be followed in a different order or repeated.

The policies that may result from following these phases and steps may differ markedly in their purposes, content, and format, but in general a good policy will share these characteristics: (1) it will clearly state who is covered under the policy, that is, who is protected or receives benefits and who is assigned responsibilities; (2) it will be carefully drafted so that it is clear, specific wherever it needs to be specific, and accessible to those who are affected by the policy; (3) it will describe the problem or need to which the policy is directed; (4) it will state the goals it is designed to achieve; (5) it will describe the activities to be undertaken, services to be provided, and/or processes to be effectuated in pursuit of the policy; (6) it will (or supporting documents will) provide for coordination with other institutional policies and policy makers as needed; (7) it will (or supporting documents will) explicitly provide for its implementation, perhaps including a timetable by which the steps in implementation will be completed; (8) it will (or supporting documents will) provide for training and funding as needed to implement and maintain the policy; (9) it will establish or provide for enforcement strategies and mechanisms where enforcement is needed as part of the policy; (10) it will specify who is responsible for implementation, who is responsible for enforcement, and who is the person to contact when anyone has questions about the policy, its implementation, or its enforcement; (11) it will provide for the maintenance of records that will be generated during the course of implementing and enforcing the policy, and provide for confidentiality of records where appropriate; (12) it will (or supporting documents will) provide for building awareness of its existence and for educating pertinent constituencies on the purpose and application of the policy; (13) it will (or supporting documents will) provide for dissemination of its content (at least the portions of the content that are pertinent to the constituencies that will be affected by the policy); and (14) it will (or supporting documents will) provide for codifying or organizing the policy within pertinent collections of institutional policies so that the policy will be easily identified and obtained by interested persons (perhaps preferably including online access to the pertinent policy).

There are various structural and organizational arrangements that colleges and universities may make to facilitate use of the policy-making phases and steps suggested and to enhance the likelihood that policies will contain the various characteristics suggested. For example, an institution can create an office of policy or policy management to oversee institutional efforts in preparing new policies and reviewing existing policies. An institution can adopt a program of periodic policy audits, similar or parallel to the legal audits that are suggested in Section 2.4.2. An institution can periodically review its job descriptions, delegations of authority, and contracts with employees or outside agents, to ensure that they are clear concerning individuals' and offices' authority to lead, participate in, and support particular policy-making initiatives. An institution can also develop what is sometimes called a "policy library" or a "policy codification" that organizes together all of the pertinent existing policies at each level of policy making—the governing board level, the president and officers level, and the levels of individual schools, departments, and programs of the institution. And, as has been suggested by the Association of College and University Policy

Administrators (see fn. 21 above) and others, an institution can create and periodically review a “policy on policies” that will inform the processes of policy making and assure that they adhere to particular criteria and procedures.

Yet other connections between law and policy are important for administrators and attorneys to understand, as well as faculty and student leaders. One of the most important points about the relationship between the two, concerning which there is a growing consensus, is that policy should transcend law. In other words, legal considerations should not drive policy making, and policy making should not be limited to that which is necessary to fulfill legal requirements. Institutions that are serious about their institutional missions and the education of students, including their health and safety, will often choose to do more than the law would require that they do. As an example, under Title IX of the Education Amendments of 1972, the courts have created lenient liability standards for institutions with regard to faculty members’ harassment of students (see Section 9.3.4). An institution will be liable to the victim only when it had “actual notice” of the faculty harassment, and only when its response is so insufficient that it amounts to “deliberate indifference.” It is usually easy to avoid liability under these standards, and doing so would not come close to ensuring the safety and health of students on campus. Nor would it ensure that there would be no hostile learning environment on campus. Institutions, therefore, would be unwise to limit their activities and policies regarding sexual harassment to only that which the courts require under Title IX.

Policy, moreover, can become law—a particularly important interrelationship between the two. In the external realm of public policy, legislatures customarily write their policy choices into law, as do administrative agencies responsible for implementing legislation. There are also instances where courts have leeway to analyze public policy and make policy choices in the course of deciding cases. They may do so, for instance, when considering duties of care under negligence law (see, for example, *Eiseman v. State of New York*, 511 N.E.2d 1128 (N.Y. 1987)); when determining whether certain contracts or contract provisions are contrary to public policy (see, for example, *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992)); and when making decisions, in various fields of law, based on a general standard of “reasonableness.” In the internal realm of institutional policy, institutions as well sometimes write their policy choices into law. They do so primarily by incorporating these choices into the institution’s contracts with faculty members; students, administrators, and staff; and agents of the institution. They may do so either by creating contract language that parallels the language in a particular policy or by “incorporating by reference,” that is, by identifying particular policies by name in the contract and indicating that the policy’s terms are to be considered terms of the contract. In such situations, the policy choices become law because they then may be enforced under the common law of contract whenever it can be shown that the institution has breached one or more of the policy’s terms.

Finally, regarding the interrelationship between law and policy, it is important to emphasize that good policy should encourage “judicial deference” or “academic deference” by the courts in situations when the policy, or a particular

application of it, is challenged in court. Under this doctrine of deference, courts often defer to particular decisions or judgments of the institution when they are genuinely based upon the academic expertise of the institution and its faculty (see Section 2.2.5). It is therefore both good policy and good law for institutions to follow suggestions such as those outlined here, relying to the fullest extent feasible upon the academic expertise of administrators and faculty members, so as to maximize the likelihood that institutional policies, on their face and in their application, will be upheld by the courts if these policies are challenged.

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emphasizes the rewards and challenges of the faculty role, addressing the significance of the “postmodern” academic role.

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- Finkin, Matthew. “On ‘Institutional’ Academic Freedom,” 61 *Tex. L. Rev.* 817 (1983). Explores the history and theoretical basis of academic freedom and analyzes the constitutional basis for academic freedom claims. Throughout, author distinguishes between the freedom of private institutions from government interference (institutional autonomy) and the freedom of individual members of the academic community from interference by government or by the institution. Includes analysis of leading U.S. Supreme Court precedents from 1819 (the *Dartmouth College* case) through the 1970s, as well as copious citations to legal and nonlegal sources.
- Fishbein, Estelle A. “New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities,” 12 *J. Coll. & Univ. Law* 381 (1985). Examines the impact of external forces on the management of colleges and universities. Focusing primarily on the effect of federal regulation (including that by federal courts), the author discusses the significance of internal accountability in responding to external regulation.
- Gallin, Alice. *Negotiating Identity: Catholic Higher Education Since 1960* (University of Notre Dame Press, 2001). Examines how Catholic higher education institutions have been working to maintain and redefine their “Catholic identity” in the face of events such as Vatican Council II, changes in curricula during the 1960s and ’70s, and the growing need for public funds.
- Gooden, Norma A., & Blechman, Rachel S. *Higher Education Administration: A Guide to Legal, Ethical, and Practical Issues* (Greenwood, 1999). Provides legal background and practical advice for administrators on hiring, compensation, promotion and tenure, terminations, academic freedom, student disputes on academic matters, and transcript and degree issues. Appendices include a “values audit” process and several pertinent AAUP Statements.
- Helms, Lelia B. “Patterns of Litigation in Postsecondary Education: A Case Law Study,” 14 *J. Coll. & Univ. Law* 99 (1987). Analyzes reported cases in one state (Iowa) from 1850 to 1985. Categorizes cases in a variety of ways and develops findings that provide “perspective on patterns of litigation and possible trends.”
- Kaplin, William A. “Law on the Campus, 1960–1985: Years of Growth and Challenge,” 12 *J. Coll. & Univ. Law* 269 (1985). Discusses the legal implications of social and political changes for colleges and universities. Issues addressed in historical context include the concepts of “public” and “private,” the distinctions between secular and religious institutions, and preventive legal planning.
- Kerr, Clark. *The Great Transformation in Higher Education, 1960–1980* (State University of New York Press, 1991). A collection of essays written over three decades by an eminent participant in and observer of American higher education’s era of greatest expansion, development, and change. The essays are collected under four broad rubrics: “The American System in Perspective”; “The Unfolding of the Great



- Transformation: 1960–1980”; “Governance and Leadership Under Pressure”; and “Academic Innovation and Reform: Much Innovation, Little Reform.”
- Kerr, Clark. *Troubled Times for American Higher Education: The 1990s and Beyond* (State University of New York Press, 1994). Also a collection of essays, this book addresses contemporary issues that face colleges and universities. Part I examines “possible contours of the future and . . . choices to be made by higher education”; Part II concerns the relationship between higher education and the American economy; Part III examines specific issues, such as quality in undergraduate education, teaching about ethics, the “racial crisis” in American higher education, and elitism in higher education.
- Levine, Arthur (ed.). *Higher Learning in America, 1980–2000* (Johns Hopkins University Press, 1994). Examines the political, economic, and demographic shifts that are affecting higher education. A variety of issues critical to various sectors of postsecondary education (research universities, community colleges, and liberal arts colleges) are discussed.
- Martin, Randy (ed.). *Chalk Lines: The Politics of Work in the Managed University* (Duke University Press, 1998). Includes twelve essays on the restructuring of higher education and the restructuring of faculty work and careers. The book emphasizes the shift from public to private support of higher education, even in “public” institutions, and argues that political action is necessary to counter the forces of capitalism in academe.
- Metzger, Walter, et al. *Dimensions of Academic Freedom* (University of Illinois Press, 1969). A series of papers presenting historical, legal, and administrative perspectives on academic freedom. Considers how the concept has evolved in light of changes in the character of faculties and student bodies and in the university’s internal and external commitments.
- Pavela, Gary (ed.). *Synthesis: Law and Policy in Higher Education* (College Administration Publications). A five-times-yearly periodical primarily for administrators. Each issue focuses on a single topic or perspective of contemporary concern. Includes practical analysis, commentary from and interviews with experts, case studies, samples of documents, and bibliographies and case citations.
- Reidhaar, Donald L. “The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationship Between the Student and the University,” 12 *J. Coll. & Univ. Law* 343 (1985). Reviews changes in the legal relationships between students and institutions, with particular emphasis on student protest and equal opportunity challenges.
- Stallworth, Stanley B. “Higher Education in America: Where Are Blacks Thirty-Five Years After *Brown*?” 1991 *Wis. Multi-Cultural Law J.* 36 (1991). Reviews the history of historically black colleges, discusses the effect of *Brown v. Board of Education*, analyzes the effect of federal attempts to desegregate public systems of higher education, and reviews the attitudes of alumni of black colleges toward the quality of their educational experience.
- Stark, Joan S., et al. *The Many Faces of Education Consumerism* (Lexington Books, 1977). A collection of essays on the history and status of the educational consumerism movement. Discusses the roles of the federal government, state government, accrediting agencies, and the courts in protecting the consumers of education; the place of institutional self-regulation; and suggestions for the future. Provides a broad perspective on the impact of consumerism on postsecondary education.

Terrell, Melvin C. (ed.). *Diversity, Disunity, and Campus Community* (National Association of Student Personnel Administrators, 1992). Describes problems related to an increasingly diverse student body and recommends ways in which the campus climate can be improved. Discusses cultural diversity in residence halls, relationships with campus law enforcement staff, student and faculty perspectives on diversity and racism, and strategies for reducing or preventing hate crimes.

Van Alstyne, William. "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harvard L. Rev.* 1439 (1968). Provides a historical and analytical review of the rise and fall of the right-privilege distinction; includes discussion of several postsecondary education cases to demonstrate that the pursuit of educational opportunities and jobs at public colleges is no longer a "privilege" to which constitutional rights do not attach.

Wright, Thomas W. "Faculty and the Law Explosion: Assessing the Impact—A Twenty-Five-Year Perspective (1960–85) for College and University Lawyers," 12 *J. Coll. & Univ. Law* 363 (1985). Assesses developments in the law with regard to college faculty. Issues addressed include the impact of the law on teaching (for example, FERPA and student challenges to grading decisions), research (federal regulations, academic misconduct), and faculty-administration relationships (for example, in collective bargaining).

See the Bickel and Lake entry for Chapter Three, Section 3.3.

### ***Sec. 1.3 (The Governance of Higher Education)***

McGuinness, Aims C. (ed.). *State Postsecondary Education Structures Sourcebook* (National Center for Higher Education Management Systems, 1997, and periodic Web site updates). A reference guide that includes the history, current structure, and emerging trends in governance of public and private higher education. Provides information on the governance structures in each state, including contact information for each state's higher education executive officers.

See also the Bess entry for Chapter Three, Section 3.1.

### ***Sec. 1.4 (Sources of Higher Education Law)***

Bakken, Gordon M. "Campus Common Law," 5 *J. Law & Educ.* 201 (1976). A theoretical overview of custom and usage as a source of postsecondary education law. Emphasizes the impact of custom and usage on faculty rights and responsibilities.

Brennan, William J. "State Constitutions and the Protection of Individual Rights," 90 *Harvard L. Rev.* 489 (1977). Discusses the trend, in some states, toward expansive construction of state constitutional provisions protecting individual rights. The author, then an Associate Justice of the U.S. Supreme Court, finds that "the very premise of the [U.S. Supreme Court] cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." For a sequel, see William J. Brennan, "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," 61 *N.Y.U. L. Rev.* 535 (1986).

Edwards, Harry T., & Nordin, Virginia D. *An Introduction to the American Legal System: A Supplement to Higher Education and the Law* (Institute for Educational

- Management, Harvard University, 1980). Provides “a brief description of the American legal system for scholars, students, and administrators in the field of higher education who have had little or no legal training.” Chapters include summary overviews of “The United States Courts,” “The Process of Judicial Review,” “Reading and Understanding Judicial Opinions, State Court Systems,” “Legislative and Statutory Sources of Law,” and “Administrative Rules and Regulations as Sources of Law.”
- Evans, G. R., & Gill, Jaswinder. *Universities and Students* (Kogan Page, 2001). Discusses a variety of issues related to the rights of students in the United Kingdom, including the contractual rights of students, the rights of students with disabilities, student discipline and academic misconduct issues, and the treatment of “whistle-blowing” students.
- Farnsworth, E. Allan. *An Introduction to the Legal System of the United States* (3d ed., Oceana, 1996). An introductory text emphasizing the fundamentals of the American legal system. Written for the layperson.
- Farrington, Dennis J., & Palfreyman, David. *The Law of Higher Education* (2d ed., Oxford University Press, 2006). Reviews the structure and governance of higher education in the United Kingdom, discusses areas in which courts have jurisdiction over higher education disputes, reviews funding issues, student and faculty issues, technology problems, and future challenges to higher education in the United Kingdom.
- Gifis, Steven. *Law Dictionary* (5th ed., Barron’s Educational Series, 2003). A paperback study aid for students or laypersons who seek a basic understanding of unfamiliar legal words and phrases. Also includes a table of abbreviations used in legal citations, a map and chart of the federal judicial system, and the texts of the U.S. Constitution and the American Bar Association *Model Rules of Professional Conduct*.
- Robinson, John H. “The Extraterritorial Application of American Law: Preliminary Reflections,” 27 *J. Coll. & Univ. L.* 187 (2000). Explores the shift in judicial attitudes from a policy of rejecting the extraterritorial application of U.S. law to a great tendency to apply U.S. law to institutional activities beyond the U.S. borders, particularly with respect to study abroad programs.
- Sorenson, Gail, & LaManque, Andrew S. “The Application of *Hazelwood v. Kuhlmeier* in College Litigation,” 22 *J. Coll. & Univ. Law* 971 (1996). Addresses the effect of the “cross application of judicial standards” from secondary to postsecondary settings and the detrimental effect this practice may have in cases involving collegiate classrooms. Suggests that minimizing salient differences between K–12 and postsecondary education settings is potentially a threat to the delicate academic freedom concerns at the postsecondary level.

### ***Sec. 1.5 (The Public-Private Dichotomy)***

- Lewis, Harold, Jr., & Norman, Elizabeth. *Civil Rights Law and Practice* (2nd ed., Thomson/West, 2004). Sections 2.11–2.15 of this text address the state action doctrine and the related “color-of-law” requirement, sorting out the approaches to analysis and collecting the major cases from the U.S. Supreme Court as well as lower courts.

- Matasor, Richard. "Private Publics, Public Privates: An Essay on Convergence in Higher Education," 10 *J. of Law & Pub. Pol'y* 5 (1998). Identifies "the distinctions that remain between public and private higher education as the lines between the two blur and differences disappear" (p. 6). Author explores the "economic and social factors" that "characterize" public and private education, argues that these factors are "converging," and addresses "the remaining essential attributes of public education" that give it a special role "in a privatizing world."
- Phillips, Michael J. "The Inevitable Incoherence of Modern State Action Doctrine," 28 *St. Louis U. L.J.* 683 (1984). Traces the historical development of the state action doctrine through the U.S. Supreme Court's 1982 decision in *Rendell-Baker v. Kohn* and analyzes the political and social forces that have contributed to the doctrine's current condition.
- Sedler, Robert A. "The State Constitutions and the Supplemental Protection of Individual Rights," 16 *U. Toledo L. Rev.* 465 (1985). Analyzes the use of the "individual rights" clauses of state constitutions to protect individual rights.
- Thigpen, Richard. "The Application of Fourteenth Amendment Norms to Private Colleges and Universities," 11 *J. Law & Educ.* 171 (1982). Reviews the development of various theories of state action, particularly the public function and government contacts theories, and their applications to private postsecondary institutions. Also examines theories other than traditional state action for subjecting private institutions to requirements comparable to those that the Constitution places on public institutions. Author concludes: "It seems desirable to have a public policy of protecting basic norms of fair and equal treatment in nonpublic institutions of higher learning."
- See Finkin entry for Section 1.2.

### ***Sec. 1.6 (Religion and the Public-Private Dichotomy)***

- Kaplin, William A. *American Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004). Chapter 13 covers the U.S. Constitution's establishment clause and free exercise clause, as well as religious speech and religious association under the free speech clause, and includes discussion of leading U.S. Supreme Court cases. Chapter 12, Section G covers the freedom of expressive association, including discussion of the *Roberts* and *Dale* cases. Chapter 14, Section E introduces state constitutional rights regarding religion and the relationship between state constitutional rights and federal constitutional rights.
- Moots, Philip R., & Gaffney, Edward M. *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* (University of Notre Dame Press, 1979). Directed primarily to administrators and other leaders of religiously affiliated colleges and universities. Chapters deal with the legal relationship between colleges and affiliated religious bodies, conditions under which liability might be imposed on an affiliated religious group, the effect that the relationship between a college and a religious group may have on the college's eligibility for governmental financial assistance, the "exercise of religious preference in employment policies," questions of academic freedom, the influence of religion on student admissions and discipline, the use of federally funded buildings by religiously affiliated colleges, and the determination of property relationships when a college and a religious

body alter their affiliation. Ends with a set of conclusions and recommendations and three appendices discussing the relationships between three religious denominations and their affiliated colleges.

### ***Sec. 1.7 (The Relationship Between Law and Policy)***

Brown, Walter, & Gamber, Cayo. *Cost Containment in Higher Education: Issues and Recommendations* (Jossey-Bass/ERIC, 2002). Analyzes financial issues and strategies in various areas of institutional operations, for example, instruction, libraries, technology, facilities, research, and student services.

# 2

## Legal Planning and Dispute Resolution

### *Sec. 2.1. Legal Liability*

**2.1.1. Overview.** Postsecondary institutions and their agents—the officers, administrators, faculty members, staff members, and others through whom the institution acts—may encounter various forms of legal liability. The type and extent of liability depends on the source of the legal responsibility that the institution or its agents have failed to meet, and also on the power of the tribunal that determines whether the institution or its agents have violated some legal responsibility.

The three sources of law that typically create legal liabilities are the federal Constitution and state constitutions, statutes and regulations (at federal, state and local levels), and state common law (see Section 1.4.2). Constitutions typically govern actions by public institutions and their agents, although state constitutions may also be applied, under certain circumstances, to the conduct of private institutions and individuals. Statutes typically address who is subject to the law, the conduct prohibited or required by the law, and the consequences of failing to comply with the law. For example, employment discrimination laws specify what entities (employers, labor unions, employment agencies) are subject to the law's requirements, specify the types of discrimination that are prohibited by the law (race discrimination, disability discrimination, and so on), and address the penalties for violating the law (back pay, injunctions, and so on). For many statutes, administrative agency regulations elaborate on the actions required or prohibited by the statute, the criteria for determining that an institution or individual has violated the statute or regulation, and the methods of enforcement. On the other hand, the common law, particularly contract

and tort law, has developed standards of conduct (for example, tort law's concept of legal duty and its various "reasonable person" standards) that, if violated, lead to legal liability.

**2.1.2. Types of liability.** Liability may be institutional (corporate) liability on the one hand, or personal (individual) liability on the other. Depending on who is sued, both types of liability may be involved in the same case. Constitutional claims brought by faculty, students, or others against public institutions may create institutional liability (unless the institution enjoys sovereign immunity, as discussed in Section 3.5) as well as individual liability, if individuals are also sued and their acts constitute "state action" or action under "color of law" (see Section 4.7.4). Statutory claims often (especially under federal nondiscrimination statutes) create only institutional liability, but sometimes also provide for individual liability. Contract claims usually involve institutional liability, but occasionally may involve individual liability as well. Tort claims frequently involve both institutional and individual liability, except for situations in which the institution enjoys sovereign or charitable immunity. Institutional liability for tort, contract, and constitutional claims is discussed in Sections 3.3, 3.4, and 3.5; personal liability for these claims is discussed in Section 4.7.

**2.1.3. Agency law.** Since postsecondary institutions act through their officers, employees, and other agents, the law of agency plays an important role in assessing liability, particularly in the area of tort law. Agency law provides that the employer (called the "principal" or the "master") must assume legal responsibility for the actions of its employees (called "agents" or "servants") and other "agents" under certain circumstances. Under the general rules of the law of agency, as applied to tort claims, the master may be liable for torts committed by its employees while they are acting in the scope of their employment. But the employer will not be liable for its employees' torts if they are acting outside the scope of their employment, unless one of four exceptions can be proven: for example, (1) if the employer intended that the tort or its consequences be committed; (2) if the master was negligent or reckless; (3) if the master had delegated a duty to the employee that was not delegable and the tort was committed as a result; or (4) if the employee relied on "apparent authority" by purporting to act or speak on behalf of the master (*Restatement (Second) of Agency*, American Law Institute, 1956, sec. 219). Generally speaking, it is difficult for an employer (master) to avoid liability for the unlawful acts of an employee (servant) unless the allegedly unlawful act is taken to further a personal interest of the employee or is so distant from the employee's work-related responsibilities as to suggest that holding the employer legally responsible for the act would be unjust. The institution's liability for the acts of its agents is discussed in Section 3.1 of this book and in various places in Sections 3.3 through 3.5. Sections 5.2 and 9.3.4 discuss institutional liability for its agents' acts under federal civil rights statutes.

**2.1.4. Enforcement mechanisms.** Postsecondary institutions may incur legal liability in a variety of proceedings. Students, employees, or others who believe that the institution has wronged them may often be able to sue the institution in court. Section 2.2 discusses the various requirements that a plaintiff must meet to maintain a claim in state or federal court. Cases are usually (but not always) tried before a jury when the plaintiff claims monetary damages, but are tried before a judge when the plaintiff seeks only equitable remedies such as an injunction.

Some federal statutes permit an individual to sue for alleged statutory violations in federal court, but if the statute does not contain explicit language authorizing a private cause of action, an individual may be limited to seeking enforcement by a federal agency. (See, for example, the discussion in Section 13.5.9 concerning a plaintiff's ability to sue an institution under the federal civil rights laws, and Section 9.7.1 for a discussion of private lawsuits under the Family Educational Rights and Privacy Act (FERPA).)

Various federal laws are enforced through administrative mechanisms established by the administrative agency (or agencies) responsible for that law. For example, the U.S. Education Department enforces nondiscrimination requirements under federal spending statutes such as Title VI, Title IX, and Section 504 (see Sections 13.5.2–13.5.4 of this book). Similarly, the federal Occupational Safety and Health Administration (OSHA) enforces the Occupational Safety and Health Act (see Section 4.6.1), and the U.S. Department of Labor enforces the Fair Labor Standards Act and the Family and Medical Leave Act (see Sections 4.6.2 & 4.6.4). Administrative enforcement may involve a compliance review of institutional programs, facilities, and records; negotiations and conciliation agreements; hearings before an administrative law judge; and appeals through the agency prior to resort to the courts (see generally Sections 13.4.5 & 13.5.8). Many states have their own counterparts to the federal administrative agency enforcement system for similar state laws.

Several federal statutes provide for lawsuits to be brought by either an individual or a federal agency. In other cases, a federal agency may bring constitutional claims on behalf of one plaintiff or a class of plaintiffs. The U.S. Department of Justice, on occasion, acts as a plaintiff in civil cases against postsecondary institutions. For example, the Department of Justice sued Virginia Military Institute (VMI) under the U.S. Constitution's Fourteenth Amendment for VMI's refusal to admit women (see Section 8.2.4.2). It also sued the State of Mississippi under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, seeking to desegregate the state's dual system of higher education (see *United States v. Fordice*, discussed in Section 8.2.4.1), and acts as a plaintiff in antitrust cases as well (see, for example, *United States v. Brown University*, discussed in Section 13.2.8). The Justice Department also plays a role in cases brought under the False Claims Act (see Section 13.2.15). Other federal or state agencies may also sue postsecondary institutions in court. Such litigation may follow years of enforcement actions by the agency, and may result in fines or court orders to comply with the law.

Some institutions are turning to alternate methods of resolving disputes in order to avoid the time, expense, and public nature of litigation. Section 2.3



discusses the use of mediation, arbitration, and other methods of resolving disputes on campus.

**2.1.5. Remedies for legal violations.** The source of legal responsibility determines the type of remedy that may be ordered if an institution or its agent is judged liable. For example, violation of statutes and administrative agency regulations may lead to the termination of federal or state funding for institutional programs, debarment from future contracts or grants from the government agency, audit exceptions, or fines. Violation of statutes (and sometimes regulations) may also lead to an order that money damages be paid to the prevailing party. Equitable remedies may also be ordered, such as reinstatement of a terminated employee, cessation of the practice judged to be unlawful, or an injunction requiring the institution to perform particular acts (such as abating an environmental violation). Occasionally, criminal penalties may be imposed. For example, the Occupational Safety and Health Act provides for imprisonment for individuals who willfully violate the Act (see Section 4.6.1 of this book). Criminal penalties may also be imposed for violations of certain computer fraud and crime statutes (see Section 13.2.12).

**2.1.6. Avoiding legal liability.** Techniques for managing the risk of legal liability are discussed in Section 2.5. Although avoiding legal liability should always be a consideration when a postsecondary institution makes decisions or takes actions, it should usually not be the first or the only consideration. Legal compliance should be thought of as the minimum that the institution must do, and not as the maximum that it should do. Policy considerations may often lead institutional decision makers to do more than the law actually requires (see Section 1.7). The culture of the institution, its mission, the prevailing academic norms and customs, and particular institutional priorities, as well as the law, may help shape the institution's legal and policy responses to potential legal liability. To capture this dynamic, discussions of legal liability throughout this book are interwoven with discussions of policy concerns; administrators and counsel are often encouraged (explicitly and implicitly) to base decisions on this law/policy dynamic.

## **Sec. 2.2. Litigation in the Courts**

**2.2.1. Overview.** Of all the forums available for the resolution of higher education disputes (see Sections 1.1 & 2.3), administrators are usually most concerned about court litigation. There is good reason for the concern. Courts are the most public and thus most visible of the various dispute resolution forums. Courts are also the most formal, involving numerous technical matters that require extensive involvement of attorneys. In addition, courts may order the strongest and the widest range of remedies, including both compensatory and punitive money damages and both prohibitive and mandatory (affirmative) injunctive relief. Court decrees and opinions also have the highest level of authoritativeness; not only do a court's judgments and orders bind the parties for the future regarding the issues litigated, subject to enforcement through

judicial contempt powers and other mechanisms, but a court's written opinions may also create precedents binding other litigants in future disputes as well (see Section 1.4.4).

For these reasons and others, court litigation is the costliest means of dispute resolution that institutions engage in—costly in time and emotional effort as well as in money—and the most risky. Thus, although lawsuits have become a regular occurrence in the lives of postsecondary institutions, involving a broad array of parties and situations (see Section 1.1), administrators should never trivialize the prospect of litigation. Involvement in a lawsuit is serious and often complex business that can create internal campus friction, drain institutional resources, and affect an institution's public image, even if the institution eventually emerges as the “winner.” The following history of a protracted university case illustrates the problem.

In *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979) and 662 F.2d 439 (6th Cir. 1981), the defendant had denied the plaintiff tenure in 1968 and officially ended his employment in 1969. Initiating the first of a series of intrauniversity appeals, Hildebrand addressed the full faculty and presented reasons why he should be tenured, but he did not persuade the faculty to change its mind. He then pled his case to the Departmental Advisory Committee (DAC), an elected committee to which he himself had recently been elected, and which contained a majority of nontenured members for the first time in its history; although the DAC issued a resolution that there was no basis for denying Professor Hildebrand tenure, this resolution was ineffectual. Finally, Hildebrand appealed to the University Faculty Tenure Committee, which denied his appeal.

Professor Hildebrand then began seeking forums outside the university. He complained to the American Association of University Professors (AAUP) (see Section 14.5). He filed two unfair labor practice charges (see generally Section 4.5) with the Michigan Employment Relations Commission, both of which failed. He petitioned the Michigan state courts, which denied him leave to appeal.

In 1971, Professor Hildebrand filed suit in federal court, requesting back pay and reinstatement. He claimed that the university had denied tenure in retaliation for his exercise of First Amendment rights (see Sections 6.6.1 & 7.1.1), and also that the university had violated his procedural due process rights (see Section 6.7.2.2). A five-day jury trial was held in 1974, but, literally moments before he was to instruct the jury, the judge belatedly decided that the plaintiff's claims were equitable in nature and should be decided by the judge rather than a jury. In 1977, the trial judge finally dismissed the professor's complaint. On appeal in 1979, the U.S. Court of Appeals held that the district judge had erred in taking the case from the jury and that “[t]he only fair solution to this tangled and protracted case is to reverse and remand for a prompt jury trial on all issues” (607 F.2d 705). The subsequent trial resulted in a jury verdict for the professor that included back pay, compensatory and punitive damages, and a directive that the university reinstate him as a professor. Ironically, however, the trial judge then entertained and granted the university's motion for a “judgment

notwithstanding the verdict.” This ruling, of course, precipitated yet another appeal by the professor. In 1981, the U.S. Court of Appeals upheld the trial court’s decision in favor of the university (662 F.2d 439). At that point, thirteen years after the tenure denial, the case finally ended.

While the *Hildebrand* case is by no means the norm, even garden-variety litigation can become complex. It can involve extensive formal pretrial activities, such as depositions, interrogatories, subpoenas, pretrial conferences, and motion hearings, as well as various informal pretrial activities such as attorney-administrator conferences, witness interviews, document searches and document reviews, and negotiation sessions with opposing parties. If the case proceeds to trial, there are all the difficulties associated with presenting a case before a judge or jury: further preparatory meetings with the attorneys; preparation of trial exhibits; scheduling, travel, and preparation of witnesses; the actual trial time; and the possibility of appeals. In order for the institution to present its best case, administrators will need to be intimately involved with most stages of the process. Litigation, including the garden variety, is also monetarily expensive, since a large amount of employee time must be committed to it and various fees must be paid for outside attorneys, court reporters, perhaps expert witnesses, and so forth. Federal litigation is generally more costly than state litigation. (See generally D. M. Trubek et al., “The Cost of Ordinary Litigation,” 31 *UCLA L. Rev.* 73 (1983).) Fortunately, lawsuits proceed to trial and judgment less often than most laypeople believe. The vast majority of disputes are resolved through settlement negotiations (see M. Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,” 31 *UCLA L. Rev.* 4 (1983)). Although administrators must also be involved in such negotiations, the process is less protracted, more informal, and more private than a trial.

Despite the potential costs and complexities, administrators should avoid overreacting to the threat of litigation and, instead, develop a balanced view of the litigation process. Lawsuits can usually be made manageable with careful litigation planning, resulting from good working relationships between the institution’s lawyers and its administrators. Often lawsuits can be avoided entirely with careful preventive planning (see Sections 2.2.6 & 2.4). And preventive planning, even when it does not deflect the lawsuit, will likely strengthen the institution’s litigation position, narrow the range of viable issues in the case, and help ensure that the institution retains control of its institutional resources and maintains focus on its institutional mission. Particularly for administrators, sound understanding of the litigation process is predicate to both constructive litigation planning and constructive preventive planning.

## **2.2.2. Access to court**

**2.2.2.1. Jurisdiction.** Courts will not hear every dispute that litigants seek to bring before them. Rather, under the constitutional provisions and statutes that apply to it, a court must have jurisdiction over both the subject matter of the

suit (“subject matter jurisdiction”) and the persons who are parties to the suit (personal, or *in personam*, jurisdiction), and various other technical requirements must also be met. The jurisdictional and technical requirements for access to federal court differ from those for state courts, and variances exist among the state court systems as well. Skillful use of these requirements may enable institutions to stay out of court in certain circumstances when they are threatened with suit and also to gain access to courts when they seek to use them offensively.

The federal courts have only limited jurisdiction; they may hear only the types of cases listed in Article III of the federal Constitution, most especially cases that present issues of federal statutory or constitutional law (“federal question jurisdiction”) or cases in which the plaintiff(s) and defendant(s) are citizens of different states (“diversity jurisdiction”). State courts, on the other hand, are courts of general jurisdiction and may, under the relevant state constitutional provisions, hear all or most types of disputes brought to them. (Often, however, there is more than one type of state trial-level court for the same geographical area—for example, a trial court for cases seeking damages below a certain amount and another for cases seeking damages above that amount.) State courts may also hear cases presenting federal law claims, except for certain federal statutory claims for which the statute gives the federal courts exclusive jurisdiction. It is the plaintiff’s responsibility to meet these requirements of subject matter jurisdiction; if the plaintiff does not do so, the defendant may be able to escape from the suit altogether, especially in a federal court.

Jurisdiction must be established for both the subject matter of the dispute and for the individual parties to the dispute. Since the plaintiff initiates the lawsuit, it is assumed that the plaintiff voluntarily submits to the jurisdiction of the court. But the defendant does not, and the court may lack personal jurisdiction over the defendant if the defendant does not have ties to the state through business dealings, a physical presence, or committing unlawful acts in the state.

With respect to subject matter jurisdiction, the plaintiff must allege sufficient facts in his or her complaint to persuade the court that there is a dispute that is cognizable under federal or state law. For example, in *King v. Riverside Regional Medical Center*, 211 F. Supp. 2d 779 (E.D. Va. 2002), the court ruled that the plaintiff, a student who was dismissed from a nursing program, had not alleged the requisite facts to provide the court with jurisdiction under the law that the student was claiming had been violated.

Jurisdictional issues are further complicated when a lawsuit filed in federal court also presents state law claims, or when a lawsuit filed in state court also presents federal law claims. As a means of determining whether a federal court is a proper forum for the state law claim as well, the doctrines of “pendant” and “ancillary” jurisdiction are applied. The principles of “concurrent jurisdiction” and “removal” are invoked to support a claim that the state court is not a proper forum for the federal law claims.

A foundational case concerning suits filed in federal court but also containing state claims is *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In this case the U.S. Supreme Court determined that a federal court may in its discretion exercise jurisdiction over an entire case, including its state law claims, whenever

the federal and state law claims “derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them all in one proceeding.” In 1990, building on *Gibbs* and later cases interpreting the scope of pendant and ancillary jurisdiction, Congress enacted a statute that codified the two judicial doctrines and renamed them “supplemental jurisdiction” (28 U.S.C. § 1367). The statute establishes a uniform standard for determining whether a federal court has jurisdiction to hear a state claim attached to a federal claim and provides guidance to the trial court in determining whether to assert that jurisdiction or decline it. The court may decline jurisdiction over the state claim if it raises a novel or complex issue of state law; if it substantially predominates over the federal claim; if the federal claim has been dismissed; or if there are other compelling reasons for declining jurisdiction.

Where the plaintiff files an action in state court containing both federal and state claims, the state court generally may hear the federal claims as well as the state claims, because the state courts have concurrent jurisdiction with the federal courts over federal claims. Sometimes, however (as noted above), a state court will not have jurisdiction over the federal claim because the federal statute under which the claim arises gives the federal courts exclusive jurisdiction. Moreover, a state court may be deprived of jurisdiction if a defendant files a removal petition to remove the federal claim (and attached state claims) to federal court. The defendant has the option of removing most claims that would fall within the federal court’s subject matter jurisdiction (28 U.S.C. § 1441). However, the decision by a public institution to remove a federal claim from state to federal court will act as a waiver of Eleventh Amendment immunity, according to the U.S. Supreme Court’s decision in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

To entertain a lawsuit, a court must have jurisdiction not only over the subject matter but also over the parties involved (personal or *in personam* jurisdiction). This type of jurisdictional question may arise, for instance, when an institution is a defendant in a lawsuit in a state other than its home state. Generally, a court has jurisdiction over defendants who consent to being sued in the state, are physically present in the state, reside in the state, or commit torts or conduct business within the state. Most challenges to jurisdiction arise in the last of these categories. Typically, a state’s “long-arm” statute determines whether a court can exercise personal jurisdiction over an out-of-state defendant who commits a tort or conducts business within the state. In addition, the federal Constitution’s Fourteenth Amendment, through its due process clause, has been found to limit the ability of state courts to exercise personal jurisdiction, since it prescribes the “minimum contacts” that a defendant must have with a state before that state’s courts may exercise personal jurisdiction under a long-arm statute. If the contacts are both purposeful and substantial, so that maintenance of the suit would not offend traditional notions of fair play and substantial justice, the state may assert jurisdiction (see *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). In other words, an institution will not be compelled to bear the costs and inconvenience of a lawsuit out of state unless its activities in that state satisfy the state’s long-arm statute

and the statute is consistent with the Constitution's "minimum contacts" standard.

Jurisdictional issues also may arise when a lawsuit is filed in federal court. The popularity of the Internet as a recruiting tool for colleges and universities has led to attempts by out-of-state plaintiffs to argue that the institution may be sued in federal court in another state because the Web site may be accessed from that other state. For example, in *Scherer v. Curators of the University of Missouri*, 152 F. Supp. 2d 1278 (D. Kan. 2001), a rejected law school applicant attempted to sue the University of Missouri in federal district court in Kansas, arguing that the university recruited Kansas students through its Web site, and also had a large number of employees who were Kansas residents. The court ruled that neither of these facts was sufficient to justify personal jurisdiction over the university in Kansas. Similarly, a federal appellate court in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) affirmed a Texas federal district court's refusal to assert jurisdiction over faculty members employed by Harvard University, despite the fact that Harvard hosted the Web site on which the defendants had posted an article that allegedly defamed the plaintiff.

*Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257 (9th Cir. 1989), illustrates the assertion of jurisdiction based on the commission of a tort within the state. The court held that Arizona could exercise personal jurisdiction over the vice president of a Canadian university who received two telephone calls from and responded to one letter from a University of Arizona administrator. The calls and letter were employment inquiries concerning the plaintiff, a former professor at the Canadian university, who was applying for an appointment at the University of Arizona. The plaintiff claimed that the vice president's remarks defamed him. The court found that the vice president intentionally directed his communications to Arizona, that the alleged defamation (a tort) would have taken place in the state (the communications were themselves the defamation), and that Arizona had a strong interest in protecting its citizens from torts that cause injury within the state. The court therefore could assert personal jurisdiction over the vice president under the state's long-arm statute. In *Wagner v. Miskin*, 660 N.W.2d 593 (N.D. 2003), the Supreme Court of North Dakota rejected a defendant's claim that North Dakota courts lacked jurisdiction over a defamation claim brought against her by a professor. The defendant, a student who had used the Internet to post allegedly defamatory messages concerning the professor, claimed that North Dakota courts "have no jurisdiction over the Internet." The court disagreed, noting that her messages were targeted specifically at the state of North Dakota, thus giving the requisite contacts for North Dakota courts to assert jurisdiction.

*Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983), illustrates how personal jurisdiction may be obtained over a defendant who conducts business within the state. A Massachusetts resident sued his law school and one of his professors for breach of contract in a Massachusetts federal court. The student claimed that the law school breached its contract with him by hiring and not supervising the professor who gave Hahn an F on an examination. The court held that Massachusetts had personal jurisdiction over the law school

because it had mailed application materials and an acceptance letter to the student in Massachusetts, and had done so as part of an overall effort “to serve the market for legal education in Massachusetts.” According to the court, these were purposeful activities that satisfied the conducting-business requirement of the Massachusetts long-arm statute. The court could not exercise personal jurisdiction over the law professor, a citizen of Vermont, however, since the professor taught his courses in Vermont and did not participate in any recruiting activities in Massachusetts.

Despite the minimal nature of the contacts with the state that these cases require, it does not follow that all states and courts would be as permissive in accepting jurisdiction, or that any contact with the state will do. In *Gehling v. St. George’s School of Medicine*, 773 F.2d 539 (3d Cir. 1985), for instance, parents sued in Pennsylvania for the wrongful death of their son, a Pennsylvania resident, who had attended the defendant school in the West Indies and had died after running in a school-sponsored race in Grenada. The court held that, even though the school placed recruiting information in New York newspapers that were circulated throughout Pennsylvania, sent officials to visit Pennsylvania and appear on talk shows there to gain exposure for the school, and was involved in a joint international program with a Pennsylvania university, it did not have sufficient contacts with the state to be subject to jurisdiction under the Pennsylvania long-arm statute for its alleged negligence and breach of contract in Grenada. None of the school’s activities in Pennsylvania were continuous, or geared to recruiting students. Nor did the mere mailing of an acceptance letter and other information to the student in Pennsylvania constitute a contact sufficient to create jurisdiction. (However, the parents of the deceased student also claimed that, when school officials brought their son’s body to Pennsylvania, they misrepresented the cause of his death. Since the misrepresentation constituted a tort actually committed within the state, the court did assert jurisdiction over the university for purposes of litigating the misrepresentation claim.)

In the state courts, there will sometimes be an added complexity when the claim is against a public institution. Such cases cannot always be brought in the state’s court of general jurisdiction; sometimes a special state court, usually called the court of claims, will have exclusive subject matter jurisdiction. In *Miller v. Washington State Community College*, 698 N.E.2d 1058 (Ohio 1997), for instance, an appellate court affirmed the dismissal of a claim in the Common Pleas Court for Washington County, brought against a “state community college” by an employee whose appointment the college had not renewed. The state community college, said the court, was “an arm of the state of Ohio,” like the Ohio state colleges and universities, and therefore was subject to suit only in the Ohio Court of Claims. If the defendant had been a “political subdivision” that is “autonomous from the state,” however, as were certain other community colleges organized under Ohio law, it could have been sued in the Common Pleas Court.

The practical effect of a ruling like that in *Miller* is that all higher educational institutions that are “arms of the state” share in the state’s sovereign immunity from suit in the state’s own courts. The state, however, can waive this immunity and consent to certain suits, as Ohio had done in *Miller* by establishing the

Court of Claims. Courts in other states have relied more directly on this sovereign immunity concept than did the *Miller* court. In *Grine v. Board of Trustees, University of Arkansas*, 2 S.W.3d 54 (Ark. 1999), for example, a doctoral student had sued the University of Arkansas in a state trial court of general jurisdiction, alleging breach of contract, fraud, and other claims, after he did not receive his doctorate within the required seven-year period. The Supreme Court of Arkansas affirmed the trial court's dismissal of the case because it was barred by a provision of the Arkansas constitution establishing state sovereign immunity. According to the court, "sovereign immunity is jurisdictional immunity from suit, and where the pleadings show the action is one against the state, the trial court acquires no jurisdiction" (2 S.W.3d at 58). The court did note one difference, however, between sovereign immunity and subject matter jurisdiction: the former can usually be waived but the latter cannot. This difference was irrelevant in *Grine* because the state had not consented to such suits and, under the Arkansas constitution, "such consent is expressly withheld" (2 S.W.3d at 58, quoting *Pitcock v. State*, 121 S.W. 742 (1909)).

**2.2.2.2. Other technical doctrines.** Even when a court has subject matter jurisdiction, other technical access doctrines may keep the court from hearing the case. Such doctrines—primarily the doctrines of abstention, mootness, and standing—work together to ensure that the case involves proper parties, is brought at a proper time, and presents issues appropriate for resolution by the court in which the case is filed. These considerations tend to pose greater problems in federal than in state courts.

In *Ivy Club v. Edwards*, 943 F.2d 270 (3d Cir. 1991), for instance, "eating clubs" at Princeton had sued New Jersey officials in federal court after the state civil rights agency had asserted authority over the clubs. Determining that there were relevant, unresolved issues of *state* law regarding the civil rights agency's authority, and invoking one of the "abstention" doctrines, the federal district court abstained from hearing the case so that the New Jersey state courts could themselves resolve the state law issues (*Tiger Inn v. Edwards*, 636 F. Supp. 787 (D.N.J. 1986)).<sup>1</sup> After extended state court proceedings, resulting in an order that the eating clubs admit women as members (this book, Section 10.1.4), the clubs sought to revive their earlier federal court action, in order to assert that the order violated their federal constitutional rights. The federal appellate court ruled that the federal district court had improperly invoked *Pullman* abstention in the earlier federal action, that the clubs had explicitly reserved the right to return to federal court, and that the state courts had not litigated the federal constitutional issues. The clubs could therefore proceed in federal court with their federal claims.

In *People for the Ethical Treatment of Animals v. Institutional Animal Care and Use Committee of the University of Oregon*, 817 P.2d 1299 (Or. 1991), the

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<sup>1</sup>The abstention doctrine invoked by the court was "*Pullman* abstention," named after the case of *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), to be contrasted with "*Younger* abstention," a doctrine named after *Younger v. Harris*, 401 U.S. 37 (1971). See *Ivy Club v. Edwards*, 943 F.2d at 276–84.



question was whether the plaintiff (PETA) had “standing” to challenge (that is, was a proper party to challenge) the defendant’s approval of a professor’s proposal for research involving barn owls. The applicable requirements for obtaining state court standing were in a state statute governing challenges to state administrative agency actions (Or. Rev. Stat. § 183.480(1) (1993)). The court held that PETA was not “aggrieved,” as required by this statute, because it had not suffered any injury to any substantial personal interest, did not seek to vindicate any interest that the state legislature had sought to protect, and did not have a “personal stake” in the outcome of the litigation. The court therefore dismissed the suit because PETA had no standing to bring it.

An association of wrestling coaches sued the U.S. Department of Education, asserting that its guidelines for compliance with Title IX by collegiate athletics programs were, in fact, a violation of Title IX because they motivated institutions to cut men’s sports teams (such as wrestling) in order to comply with the guidelines’ requirement of proportionality (see Section 10.4.6). In *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), *petition for en banc hearing denied*, 363 F.3d 239 (D.C. Cir. October 8, 2004), the panel reiterated its earlier holding that the coaches’ association lacked standing to sue the Department of Education because the guidelines did not have the force of law. The proper defendant, said the panel, was the institutions who dropped men’s sports in order to comply with Title IX. The U.S. Supreme Court declined to hear the appeal (125 S. Ct. 2537 (2005)). For further discussion of this case, see Section 10.4.6.

In *Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993), the problem was “mootness,” a problem concerning the timing of the lawsuit. Mootness doctrines generally require dismissal of a case if the controversy between the parties has expired as a result of the passage of time or changes in events. In the *Cook* case, this doctrine effectively negated a victory for the student plaintiffs, all of whom were members of the women’s ice hockey club team of Colgate. They had sued in federal district court under Title IX, alleging that Colgate had failed to provide comparable programs for men’s and women’s ice hockey (see this book, Section 10.4.6). The court issued an order requiring Colgate to upgrade the women’s club team to varsity status, starting with the 1993–94 season. However, three of the five plaintiffs had already graduated, and, by the time of the appeal, the other two had completed their college hockey careers and were scheduled to graduate in May 1993. The appellate court held that, because “none of the plaintiffs [could] benefit from an order requiring equal athletic opportunities for women ice hockey players,” the case must be dismissed as moot. Although the appellate court noted that “situations ‘capable of repetition, yet evading review’” (*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)), are an exception to the mootness doctrine, it reasoned that this exception applies only if the same plaintiffs might reasonably be expected to be involved again with the same type of suit. Because the plaintiffs here had graduated or were graduating, they did not fall within the exception. Moreover, the plaintiffs might have avoided the mootness doctrine had they sued “in a ‘representational capacity’ as the leader of a student

organization” (see generally Section 2.2.3.1), but this argument was not open to them because they had sued “individually, not as representatives of the women’s ice hockey club team or other ‘similarly situated’ individuals.”

**2.2.2.3. Statutes of limitations.** Another type of timing problem arises from the application of statutes of limitations. In order to maintain a lawsuit, a plaintiff must file the claim within a restricted time period. This time period is defined by the “statute of limitations” applicable to the particular type of claim being asserted. If it is a state law claim, the court will apply a state statute of limitations; if it is a federal law claim, the court will apply a federal statute of limitations. Federal laws, however, sometimes do not stipulate a time period for bringing particular claims. In such circumstances the court may “borrow” a state statute of limitations applicable to state claims most similar to the federal claim at issue.

Postsecondary institutions may confront two types of issues when complying with or challenging a particular statute of limitations. The first issue concerns which state statute to borrow when a federal limitations statute does not exist. This problem frequently arises, for example, in Section 1983 litigation (see Section 3.5 in this book). In *Braden v. Texas A&M University System*, 636 F.2d 90 (5th Cir. 1981), a professor used Section 1983 to challenge his termination, claiming that the university had violated his property and reputational interests protected by the federal Constitution. Since the Section 1983 statute does not stipulate any period of limitation, the court had to borrow the state statute of limitations governing state claims most analogous to the federal claim at issue, as the U.S. Supreme Court had directed in *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980) (see also *Wilson v. Garcia*, 471 U.S. 261 (1985)). In compliance with *Tomanio*, the court considered the essential nature of the plaintiff’s claim and compared it to similar state law claims. The court rejected the professor’s suggestion that state contract claims were most analogous to his claim and instead analogized his claims to tort actions for trespass, conversion of property, and injury done to the person of another. The court thus borrowed the state statute of limitations for tort actions, providing that such claims must be filed within two years of the date upon which the claim arose, rather than the statute of limitations for contract actions, which was three years. Since the professor’s claim had arisen more than two (but less than three) years before he filed his case, the court dismissed the lawsuit, thus releasing the university from all liability, simply because the professor had filed the case too late. (For another example of a similar borrowing problem regarding a claim of disability discrimination under the federal Section 504 statute (this book, Section 13.5.4), see *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993).)

The second type of issue concerns the determination of when the statute of limitations time period begins to “run.” Generally that period begins when the plaintiff’s claim first accrued, a technical question of some difficulty. *Pauk v. Board of Trustees of the City University of New York*, 654 F.2d 856 (2d Cir. 1981), another case in which the court dismissed a professor’s Section 1983 claim against a university, is illustrative. The university had declined to reappoint the

professor. The professor claimed that university officials had taken this action in retaliation for his active participation in the faculty union, thus violating his First Amendment rights. The federal court borrowed and applied a state statute of limitations of three years. The question before the court was whether that three-year time period commenced running in 1975, when the professor received final notification that he would not be reappointed, or in 1976, when his term appointment expired. Relying on the U.S. Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the court determined that federal law defines when a claim accrues under Section 1983, and that the professor's claim had accrued when he received the notice in 1975. Because the professor had not filed his lawsuit within three years of the date he received notice, his claim was dismissed.

Other types of accrual issues arise in situations where a plaintiff attacks a general university policy, such as a retirement or seniority plan. In *Equal Employment Opportunity Commission v. City Colleges of Chicago*, 944 F.2d 339 (7th Cir. 1991), for example, the EEOC brought a claim based on the Age Discrimination in Employment Act (ADEA) of 1967 (this book, Section 5.2.6), which has a two-year statute of limitations. The EEOC challenged the colleges' retirement plan on grounds that it had been adopted with an intent to discriminate against older workers. The question was whether the EEOC's claim accrued when the colleges first adopted the early retirement plan rather than when the plan was later applied to harm particular older professors. Relying on the U.S. Supreme Court's decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the court determined that "assessing when a statute of limitations begins to run" depends on a precise identification of the discriminatory act at issue and that, under the EEOC's complaint and the pertinent ADEA provisions and interpretive case law, "the relevant discriminatory act in this case . . . was the plan's adoption." The court thus held the claim to be time barred because it was not filed until 1988, six years after the plan's adoption in 1982. Had the court instead held that the EEOC's claim accrued anew each time a faculty member was injured by the application of the plan, the suit would not have been time-barred, since the claim then would have accrued within two years of filing the suit.

**2.2.2.4. Exhaustion of remedies.** A prospective plaintiff may sometimes be prevented (or at least delayed) from bringing a court suit by the "exhaustion-of-remedies" doctrine. Simply put, the doctrine requires that a court not hear a plaintiff's claim until the plaintiff has exhausted any and all administrative remedies that may be available—for example, a hearing before an administrative agency or a grievance board. The doctrine is particularly important to a post-secondary institution that is threatened with suit but has an internal process available for resolving the problem. Thus, in *Florida Board of Regents v. Armesto*, 563 So. 2d 1080 (Fla. 1990), the court refused to consider a student's request to enjoin Florida State University Law School from formally charging her with cheating on her final exams. The school had adopted internal procedures for challenging such charges, but the student had not exercised her right to use them (including the availability of a full hearing on the charges). Although the court recognized that an exception to the exhaustion-of-remedies

doctrine exists in situations where the available procedures would not provide an adequate or timely remedy, it found no basis for applying the exception in this instance. Further, the court rejected the student's argument that she could bypass the administrative remedies because the school's investigation of the charges violated her due process rights. The exhaustion doctrine applies even when a suit is based on constitutional deficiencies in the application of the administrative process to the plaintiff. Quoting the trial judge's opinion, the Florida Supreme Court held that in such instances the doctrine ensures that "the responsible agency 'has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue'" (563 So. 2d at 1081).<sup>2</sup>

Similarly, in *Pfaff v. Columbia-Greene Community College*, 472 N.Y.S.2d 480 (N.Y. App. Div. 1984), the court dismissed the complaint of a student who had sued her college, contesting a C grade entered in a course, because the college had an internal appeal process and the student "failed to show that pursuit of the available administrative appeal would have been fruitless." And in *Beck v. Board of Trustees of State Colleges*, 344 A.2d 273 (Conn. 1975), where faculty members sought to enjoin the defendant board from implementing proposed new personnel policies that allegedly threatened tenured faculty rights, the court dismissed the suit under the exhaustion doctrine because the state's administrative procedure act "provides a comprehensive, potentially inexpensive, and completely adequate method of resolving the issues raised in the present . . . [suit]."

Failure to use an internal grievance process created by a collective bargaining agreement resulted in the dismissal of a wrongful discharge claim by two former faculty members at Montana State University's College of Technology. In *MacKay v. State*, 79 P.3d 236 (Mont. 2003), the state's supreme court, interpreting the language of the collective bargaining agreement, ruled that the grievance procedure was mandatory, and that exhaustion of that remedy was required by state legal precedent prior to litigation.

The case of *Long v. Samson*, 568 N.W.2d 602 (N.D. 1997), provides another good example of using the exhaustion-of-remedies doctrine to keep a case out of court. The plaintiff was a nontenured professor who brought tort and breach of contract claims after his appointment at the University of North Dakota (UND) was not renewed. The North Dakota Supreme Court affirmed the trial court's dismissal of the case because the plaintiff failed to exhaust the remedies available to him under the University of North Dakota's Faculty Handbook:

Section II-8.1.3(C)(3) [of the Faculty Handbook] authorizes review of decisions based upon "inadequate consideration," which, by definition, is confined to procedural and not substantive issues. Section II-8.1.3(C)(4), however, authorizes substantive review of academic freedoms, constitutional rights, or contractual

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<sup>2</sup>Plaintiffs filing civil rights claims under Section 1983, the federal civil rights statute, need not exhaust state administrative remedies; see *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), discussed in Section 2.3.3.

rights. A remedy is not inadequate simply because it may not result in the exact relief requested. Administrative resolution of Long’s nonrenewal may have eliminated or mitigated damages and developed a record to sharpen issues and avoid judicial proceedings. . . . We reject Long’s argument that resort to UND’s administrative procedures would have been futile, or the remedies at UND would have been inadequate [568 N.W.2d at 606].

In contrast, in *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998), the court declined (with one exception) to require exhaustion. The plaintiff, a faculty member who had been denied tenure, brought various federal and state claims against the university and university officials—including federal and state discrimination claims, state tort claims, and a breach of contract claim. All of the claims arose from the plaintiff’s central contention “that he was denied tenure because of his sexual orientation and his HIV-positive status.”

Although the faculty member had bypassed all internal review processes, the court (with one exception) nevertheless permitted the case to proceed in court. As to the plaintiff’s discrimination claims, the federal and state antidiscrimination laws that he invoked do not require exhaustion of a university’s (or other employer’s) internal remedies. Although these laws do require exhaustion of the federal and state government’s own administrative remedies for discrimination (for example, filing a claim with the federal EEOC or comparable state agency), the plaintiff had “fully pursued” his claims in these arenas. As to the plaintiff’s state tort claims, the court reached the same result, saying it found “nothing peculiar to these claims that would require exhaustion” of internal remedies provided by the employment contract.

The exception was the breach of contract claim. Here, as in *Long v. Samson*, above, the court required the faculty member to exhaust remedies provided by a contractual grievance process. The distinction between the contract claim and the other claims resulted from a particular principle of Massachusetts employment law: “[O]ne who alleges wrongful termination based upon a contract of employment which includes a grievance procedure cannot seek vindication of the claim in court without first invoking the contractual grievance procedure” (citing *O’Brien v. New England Telephone & Telegraph Co.*, 664 N.E.2d 843 (Mass. 1996)).

Key to all these cases, as administrators and counsel should carefully note, is the court’s determination that available administrative remedies could provide adequate relief to the complaining party, in a timely fashion, and would thus not be fruitless to pursue.

### **2.2.3. Pretrial and trial issues**

**2.2.3.1. Class action suits.** After access to court has clearly been established, attention shifts to the numerous technical and strategic matters regarding the pretrial phase and the trial itself. One of these matters arises when defendants are sued by a group or class of plaintiffs, using the mechanism of the “class action suit,” rather than by a single person. Such suits may involve extensive financial costs, time-absorbing procedures, complex legal issues, and potentially vast

liability for the defendants. The plaintiffs must obtain a judicial ruling certifying the class, however, before such a suit may proceed. For state courts, certification requirements are set out in state civil procedure statutes or rules, and for federal courts they are in Rule 23 of the Federal Rules of Civil Procedure (28 U.S.C. Appendix). Rule 23(a) sets out four prerequisites for certification:

1. *Numerosity*. There must be a large enough number of plaintiffs that individual suits are impracticable.
2. *Commonality*. The members of the class must have claims that include common questions of fact or law.
3. *Typicality*. The claims of the class representatives who are named plaintiffs must be typical of the claims of other class members.
4. *Adequacy of representation*. The class representatives must fairly and adequately protect the interests of the entire class.

Once the plaintiff has satisfied these four requirements, Rule 23(b) then imposes certain other requirements, under which the lawsuit is classified into one of three types of permissible class actions. The federal trial judge has discretion to grant or deny certification and to modify the class certification during the course of the proceedings.

*Lamphere v. Brown*, 553 F.2d 714 (1st Cir. 1977), illustrates the application of Federal Rule 23. The federal appellate court refused to review the trial judge's decision to certify a class of women for a class action suit against Brown University alleging gender discrimination (71 F.R.D. 641 (D.R.I. 1976)). The certified class consisted of

[a]ll women who have been employed in faculty positions by Brown University at any time after March 24, 1972, or who have applied for but were denied employment by Brown in such positions after said date; all women who are now so employed; all women who may in the future be so employed or who may in the future apply for but be denied such employment"—a class that would cover an estimated 20,100 persons. The university argued that its academic decision making is decentralized into numerous departments and divisions, thus making a university-wide class and "broadside" approach to class actions inappropriate. Although the appellate court "decline[d] to intervene in what is essentially an exercise of discretion by the district court," it did caution the district court to "follow closely the developing evidence as to class-wide decision making" by the university, to consider "the implications of class-wide defense" on the university's pursuit of its institutional mission, and to "take seriously its power under [Federal Rule] 23(c)(1) to alter or amend its certification order before the decision on the merits."<sup>3</sup>

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<sup>3</sup>There is an exception to Rule 23 applicable to the Equal Employment Opportunity Commission (EEOC). If the EEOC brings an employment discrimination suit on behalf of a group of employees, those employees need not be certified as a class under Rule 23. In *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318 (1980), the U.S. Supreme Court concluded that, under the powers conferred on the EEOC by Section 706 of Title VII (see this book, Section 5.2.1), the EEOC may bring a suit without satisfying Rule 23.

In contrast to *Lamphere*, in *Samuel v. University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976), the trial judge had refused to certify the plaintiff's proposed class (375 F. Supp. 1119 (W.D. Pa. 1974)), and the appellate court reviewed and reversed the trial judge's order. The class was defined as married female students at the university who were Pennsylvania residents but had been denied the lower tuition rate for state residents. The university had denied such rates because it assumed that the students' residences were the same as their husbands', and the husbands lived out of state. In reversing the trial court, the appellate court determined that the class's damages could be calculated easily and that the trial judge's decision had been based on sympathy for the university's financial constraints rather than on legal precedent.

Although both *Lamphere* and *Samuel* illustrate the institution's plight as defendant in a class action suit, institutions can also use the class action mechanism to their own benefit as prospective plaintiffs in litigation. In *Central Wesleyan College v. W. R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992), for example, a federal district judge certified a class of virtually all colleges and universities in the nation in a property damage suit against asbestos companies. In certifying the class under Federal Rule 23(b)(3), the court noted that (1) there was little interest among the nation's colleges in individually suing asbestos companies; (2) there was little preexisting litigation between colleges and the asbestos companies; (3) the South Carolina district court was a desirable forum and not unfair to the defendants; and (4) if the issues certified were limited to discrete, factual inquiries, the large size of the class would not pose undue problems. The appellate court affirmed (6 F.3d 177 (4th Cir. 1993)). Under this ruling, the individual colleges can save many thousands of dollars in legal fees and still have their claims adequately heard.

**2.2.3.2. Pretrial discovery.** One of the most important aspects of the pretrial process is "discovery." A prescribed period of discovery—which may include depositions, interrogatories, and requests for the production of documents, among other things—affords all parties the opportunity to request information to clarify the facts and legal issues in the case. Although the discovery process may be time-consuming, expensive, and sometimes anxiety-provoking, it is essential to the trial as well as to prospects for pretrial settlement. Many tactical issues will arise as the parties seek to confine the scope of discovery in order to protect confidential records or sensitive information, or to save money and time, or to broaden the scope of discovery in order to obtain more information from the opposing party.

The Federal Rules of Civil Procedure, generally Rules 26–37 (28 U.S.C. Appendix), define the permissible scope and methods of discovery in the federal courts. Most states have similar rules. The trial judge usually has broad discretion in applying such rules. In general, under the Federal Rules, the "[parties] may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action" (Rule 26(b)(1)). In making decisions concerning the propriety of particular discovery requests, the trial judge may consider whether the discovery is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive" and may also consider other matters, such as undue expense

and burden of filling the request (Rule 26(b)(1)). A party seeking to confine the scope of discovery may make any of these objections or may contend that the information sought is irrelevant or privileged.

The opinion in *Zahorik v. Cornell University*, 98 F.R.D. 27 (N.D.N.Y. 1983), illustrates the federal courts' preference for full disclosure of information within the scope of Rule 26. The plaintiffs filed an employment discrimination suit against Cornell University. When the plaintiffs requested a class certification (see Section 2.2.3.1 above), the district court denied the request but suggested that the plaintiffs consider reapplying at a later date if they obtained proof that they fulfilled the class certification requirements under Rule 23(a) of the Federal Rules. In an effort to meet the numerosity requirement, the plaintiffs sought broad discovery of university records, requesting information on past internal complaints of sex discrimination and the results of investigations of those complaints, copies of university affirmative action plans, copies of university reports on various aspects of campus life, information about the capabilities of and data stored in university computers, and biographical and statistical data on tenure-track employees. The university opposed these discovery requests on grounds that they were oppressive, burdensome, and irrelevant to the lawsuit. Although the court disagreed, it did refine the scope and method of discovery. It determined that the discovery requests for reports on university campus life and for computer information were too broad and denied these requests subject to their reformulation and narrowing by the plaintiffs. It then approved all of the plaintiffs' other requests. As to the method of discovery, the court ruled that the university must either give the plaintiffs and their attorneys access to the records for review and copying, or produce the specific records requested on a college-by-college list that the plaintiffs would develop.<sup>4</sup>

**2.2.3.3. Issues regarding evidence.** During pretrial discovery as well as the trial itself, various issues concerning evidence are likely to arise. During discovery, for instance, each party may object to various discovery requests of the other party on grounds that the information sought is privileged or irrelevant (see Section 2.2.3.2 above); in pretrial motions, each party may seek to limit the evidence to be admitted at trial; and during presentation of each party's case at trial, one party may object on a variety of grounds to the introduction of information that the other party seeks to present.<sup>5</sup> In addition, parties may seek and courts may issue summonses and subpoenas directly to the other party or to witnesses. Such matters are governed by the rules of civil procedure, the rules of evidence, and the common law of the jurisdiction in which suit is brought.

Although the parties to the litigation are entitled to information that is relevant to the lawsuit, occasionally a party may object to disclosing otherwise

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<sup>4</sup>At times a discovery request may include student educational records. Typically, an educational institution must receive consent from either a parent or a student prior to disclosing the records. According to FERPA, 34 C.F.R. § 99.31(9) (see this book, Section 9.7.1), an institution may disclose the information without consent if it does so in compliance with a judicial order or subpoena, but it must make a reasonable effort to notify the parent or student before disclosure.

<sup>5</sup>See, for example, Boyd J. Peterson, Annot., "Admissibility of School Records Under Hearsay Exceptions," 57 A.L.R.4th 1111.



relevant information on the grounds that it is privileged. A privilege is created by a court when the court views the maintenance of confidentiality to be a greater social good than disclosure of the information to the party. A privilege may be either absolute or qualified (sometimes called “conditional”). An absolute privilege is created by a court to protect a socially important relationship that requires confidentiality in order to foster trust in the relationship (attorney-client, doctor-patient, religious counselor-penitent, husband-wife). A qualified or conditional privilege is created only after the court balances the litigant’s interest in obtaining relevant information with the social good of keeping the information confidential.

Questions about obtaining and using privileged information are among the most important and difficult of these pretrial and trial issues (see, for example, the attempts to create new privileges, discussed in Section 7.7.1). All jurisdictions apparently agree that a party cannot obtain privileged information through discovery. Rule 26(b)(1) of the Federal Rules of Civil Procedure, for instance, states that the scope of discovery is confined to information that is “not privileged” (28 U.S.C. Appendix). Privileged matter is information that is protected under the formal evidentiary privileges recognized under the rules of evidence of each particular jurisdiction. For federal courts, Section 501 of the Federal Rules of Evidence leaves the definition and implementation of privileges entirely to the “principles of common law.” (See generally 8 *Wigmore on Evidence* § 2196 (McNaughton rev.) (4th ed., Little, Brown, 1961).) Section 501 also provides that, in federal court actions based on state law (diversity actions), state law will determine whether a privilege applies.

The privilege that postsecondary institutions are most likely to struggle with in litigation is the attorney-client privilege. Confidential communications between an attorney and the attorney’s client may be both immune from discovery and inadmissible at trial (see *Wigmore*, above, at § 2290). As the U.S. Supreme Court explained in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the purpose of this attorney-client privilege is

to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.

. . . [T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound informed advice [449 U.S. at 389, 390].

In *Upjohn*, the Court reaffirmed that the attorney-client privilege applies to corporations as clients as well as to individuals, and may extend in certain situations to communications between a corporation’s in-house general counsel and the corporation’s employees. Corporate officers had sought legal advice from in-house counsel concerning the corporation’s compliance with federal securities and tax laws. To gather information about compliance issues, counsel had interviewed corporate employees (not officers). In determining that counsel’s

communications with the employees were protected from disclosure, the Court considered that counsel had interviewed the employees about matters that were within their corporate duties and that the employees were aware that the interviews would assist the corporation in obtaining legal advice from its counsel. Under these circumstances, said the Court, the application of the privilege in this case would serve the purpose of the privilege. The result is thus broadly hospitable to the assertion of privilege by corporations (including private postsecondary institutions) for their attorneys' confidential communications with managers, staff, and other employees. Similar protection would apparently be available to public institutions as well.

An important corollary to the attorney-client privilege is the attorney work-product doctrine, established (at least for the federal courts) in *Hickman v. Taylor*, 329 U.S. 495 (1947), and subsequently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The doctrine protects from disclosure memos, notes, and other materials prepared by an attorney "in anticipation of litigation or for trial," subject to some exceptions where the other party can make a strong showing of need and unavailability of equivalent information from any other source (Rule 26(b)(3)). In *Upjohn*, the Court, relying on both *Hickman* and Rule 26, used the work-product doctrine as a supplement to the attorney-client privilege so that counsel's notes and memos, which "reveal[ed] the attorneys' mental processes in evaluating" their interviews with corporate employees, would be protected.

Higher education cases addressing the attorney-client privilege are increasing in frequency and importance. (See generally Robert Burgoyne, Stephen McNabb, & Frederick Robinson, *Understanding Attorney-Client Privilege Issues in the College and University Setting* (National Association of College and University Attorneys, 1998).) Courts generally have been supportive of the privilege. In *State ex. rel. Oregon Health Sciences University v. Haas*, 942 P.2d 261 (Ore. 1997), for instance, the Oregon Supreme Court held that a university department head and members of the departmental faculty were "representatives" of the university and that legal advice communicated to them was therefore covered by the attorney-client privilege. In *Osborne v. Johnson*, 954 S.W.2d 180 (Texas 1997), another court similarly held that a department chair was the university's representative, for purposes of an investigation into charges against a professor, so that the chair's communications with university counsel were covered by attorney-client privilege. And in *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Minn. 1998), the Supreme Court of Minnesota held that the privilege attached to two preliminary drafts that passed between the provost and the university counsel in the course of composing a tenure denial letter. The drafts were part of a process of requesting and rendering legal advice, reasoned the court, and the provost and the counsel had maintained the confidentiality of the drafts.

In contrast, in the important case of *Ross v. Medical University of South Carolina*, 453 S.E.2d 880 (S.C. 1994), the South Carolina Supreme Court addressed the scope of the attorney-client privilege as it applies in college and university grievance proceedings. The court's opinion rejecting the privilege claim, and holding the university in contempt, serves as fair warning that administrators

and counsel should carefully define their roles and interrelationships in the grievance process context.

The plaintiff, Dr. Ross, had been terminated from his position as tenured professor and chairman of the radiology department at the Medical University of South Carolina (MUSC). He filed suit alleging various causes of action, including a claim under the state's administrative procedure act, that MUSC had denied him a fair hearing. The basis for this claim was several alleged procedural irregularities, especially: (1) that the vice president had acted as both prosecutor and judge during the grievance proceeding; and (2) that the vice president had had *ex parte* communications with MUSC's general counsel concerning the recommendation the faculty hearing committee had issued at the first step in the grievance process. The plaintiff sought information from MUSC about these alleged procedural irregularities, and the trial court found MUSC to be in contempt for not complying with the plaintiff's requests. The state Court of Appeals vacated the trial court's order and the state Supreme Court granted certiorari to determine if the information requested by the plaintiff was protected by the attorney-client privilege.

MUSC had a three-step faculty grievance process. At the first stage, the vice president referred the complaint to a Faculty Hearing Committee for a hearing and recommendation; at the second stage, the vice president reviewed the hearing record and made his own recommendation. No further action was taken on the matter if both recommendations were favorable to the faculty member. If the vice president's recommendation was unfavorable, the faculty member could, as a third step, appeal to the board of trustees. The plaintiff contended that, at step two, the vice president had conferred with the general counsel prior to his concurrence in the faculty committee's recommendation to terminate, and that the general counsel prepared the written concurrence for the vice president. In attempting to support these charges of procedural irregularity, the plaintiff served Requests for Admissions, which MUSC refused to answer, asserting that these alleged communications were covered by the attorney-client privilege and, thus, are not discoverable. In rejecting MUSC's privilege claim, the Court relied on Section 1-23-360 of the South Carolina Code, part of the state administrative procedure act:

Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly in connection with any issue of fact, with any person or party, nor in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

The court determined: (1) that the vice president had acted as "an intermediate judge" during step two of the grievance process and was therefore "assigned to render a decision" in the case at hand, and (2) that the general counsel had "represented MUSC in prosecuting the case before the Faculty committee," and thus acted as a "representative" of a "party" rather than as personal counsel to the vice president. The *ex parte* communications between the

vice president and general counsel were therefore in violation of Section 1-23-360, and the court refused to extend the attorney-client privilege to communications that violated a state law under which (as was the case with Section 1-23-360) the violator could be subject to criminal sanctions.

The court's reasoning seems broad enough to jeopardize privilege claims even if the state had not had an administrative procedure statute such as Section 1-23-360, and even if the defendant had been a private institution and thus not subject to such statutes (which usually cover only public institutions). The crux of this broader reasoning is that the vice president, in the particular circumstances of this case, was not a "client" of the general counsel and the general counsel was not an "attorney" for the vice president, but rather for another "client" (the university itself). Thus, the necessary preconditions for assertion of the privilege did not exist. As the court stated at the conclusion of its opinion:

[The] General Counsel was acting in a representative capacity for MUSC, and not as counsel for [the] Vice President. [The] Vice President, acting in a judicial capacity in the administrative process, was not entitled to confer with General Counsel, who was acting as a prosecutor against Ross [453 S.E.2d at 884-85].

A 1996 U.S. Supreme Court case addresses another evidentiary privilege of particular importance to postsecondary institutions. In the case of *Jaffee v. Redmond*, 518 U.S. 1 (1996), the issue was "whether it is appropriate for federal courts to recognize a 'psychotherapist privilege' under Rule 501 of the Federal Rules of Evidence" and, more specifically, "whether statements . . . made to [a licensed clinical social worker] during . . . counseling sessions are protected from compelled disclosure in a federal civil action. . . ." The court answered both questions in the affirmative. Regarding the psychotherapist's privilege in general, the court reasoned that "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust'" (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Such a privilege serves the important private interest of promoting development of the relationship between therapist and patient necessary for successful treatment, and the important public interest of "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." In addition, the court confirmed "that all 50 States and the District of Columbia have enacted into law some form of the psychotherapist privilege" and reasoned that "the existence of a consensus among the States . . . support[s] recognition of the privilege."

Regarding the second, more particular question, the Court determined that "[w]e have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." According to the Court:

The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker. . . . Today, social workers provide a significant amount of mental health

treatment. . . . Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist . . . , but whose counseling sessions serve the same public goals [518 U.S. at 16].

While the Court’s opinion in *Jaffee* gives strong support to a broad psychotherapist privilege, it is also important to note that this privilege, like others, is not absolute. In a concluding comment in *Jaffee*, the Court cautioned that “there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist” (518 U.S. at 18, n.19). (For a famous and graphic illustration of this limit, see the *Tarasoff* case, discussed in Section 4.7.2.2. For another helpful reminder of this limit, and an excellent overview of the implications of the *Jaffee* decision for postsecondary administrators, see Gary Pavela (ed.), “The Benefits and Limits of Confidentiality,” *Synfax Weekly Report*, June 24, 1996, 500–501.)

Another type of privilege issue arose in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), in which the U.S. Supreme Court rejected the university’s claim that confidential evaluations of candidates for tenure were protected by an “academic freedom privilege.” The Court’s opinion made it clear that any “confidential” evaluations on which the university relied in a tenure decision were relevant to a claim of sex discrimination in the denial of tenure and must be disclosed. The case is discussed in Section 7.7.1.

**2.2.3.4. Summary judgments and motions to dismiss.** Both federal courts and the state courts have procedures for streamlining litigation by summarily disposing of lawsuits on the merits—that is, for a judicial determination prior to trial as to whether the plaintiff’s legal claim is valid and sustainable by the facts. The most basic procedure is the defendant’s motion to dismiss. Although this type of motion is frequently used to raise jurisdictional and other access issues (Section 2.2.2), it may also be used to dismiss a case on the merits if the defendant can demonstrate that the facts pleaded in the plaintiff’s complaint, even if true, do not state a valid claim that would entitle the plaintiff to relief. In the federal courts, this motion is provided for by Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Another procedure, potentially more important and usually utilized at a later stage of the pretrial proceedings than the motion to dismiss, is the summary judgment. In the federal courts, motions for summary judgment are governed by Federal Rule 56. Under this rule and similar state laws, either the plaintiff or the defendant may make such a motion. The moving party must demonstrate that no genuine issue of material fact remains in the lawsuit and that the governing law, as applied to the undisputed facts, indicates that the moving party is entitled to judgment as a matter of law. If the party makes such a showing, the court will enter a judgment (a “summary judgment”) in that party’s favor. Successfully employed, then, this procedure can allow either party to avoid many of the costs of litigation (see Section 2.2.1 above) while still obtaining the benefits of a judgment that is binding on the parties (see Section 2.2.3.6) and may fully resolve the dispute.

**2.2.3.5. Standards of judicial review and burdens of proof.** Postsecondary institutions have numerous processes for making internal decisions regarding the status of faculty, students, and staff, and for internally resolving disputes among members of the campus community. Whenever a disappointed party seeks judicial review of an institution's internal decision, the reviewing court must determine what "standard of review" it will apply in deciding the case. This standard of review establishes the degree of scrutiny the court will give to the institution's decision, the reasons behind it, and the evidence supporting it. Put another way, the standard of review helps establish the extent to which the court will defer to the institution's decision and the value and fact judgments undergirding it. The more deference the court is willing to accord the decision (see subsection 2.2.5 below on deference), the less scrutiny it will give to the decision and the greater is the likelihood that the court will uphold it. Issues regarding standards of review are thus crucial in most litigation.

In turn, standards of review are related to the "burdens of proof" for the litigation. After a court determines which party is responsible for demonstrating that the institution's decision does or does not meet the standard of review, the court allocates the burden of proof to that party. This burden can shift during the course of the litigation (see, for example, Section 5.2.1). Burdens of proof also elucidate the elements or type of proof each party must submit to meet its burden on each claim or defense presented. Such issues are also critical to the outcome of litigation and can become very complicated (see, for example, Section 5.2.1).

There are many possible standards of judicial review (and likewise many variations of burdens of proof). The standard that applies in any particular litigation will depend on numerous factors: the type of institution subject to the review (whether public or private); the type of claim that the plaintiff makes; the institution's internal rules for reviewing decisions of the type being challenged; the character of the contractual relationship between the institution and the party seeking court review; and the common law and statutory administrative law of the particular state (see Section 1.4.2), insofar as it prescribes standards of review for particular situations. At a subtler level, the court's selection of a standard of review may also depend on comparative competence—the court's sense of its own competence, compared with that of the institution, to explore and resolve the types of issues presented by the case.

If a court is reviewing the *substance* of a decision (that is, whether the institution is right or wrong on the merits), it may be more deferential than it would be if it were reviewing the adequacy of the *procedures* the institution followed in making its decision—the difference being attributable to the court's expertise regarding procedural matters and relative lack of expertise regarding substantive judgments (for example, whether a faculty member's credentials are sufficient to warrant a grant of tenure).

There are three basic types of standards of judicial review. "Substantial evidence" standards are gauges of whether the institution's decision-making body carefully considered the evidence and had a substantial body of evidence on which to base its decision. A more demanding version of this type of standard is called the "clear and convincing evidence" standard. "Arbitrary

and capricious” standards gauge whether the deciding body acted without reason or irrationally. “*De novo*” standards authorize the court to consider the case from scratch, giving virtually no deference to the decision-making body’s decision, and requiring all evidence to be submitted and considered anew.

Of the three types, *de novo* standards provide for the highest level of judicial scrutiny of, and the least amount of deference to, the institution’s decision; arbitrary and capricious standards call for the least scrutiny and the greatest deference; and substantial evidence standards are somewhere in between. In constitutional rights litigation, there is also sometimes a fourth type of standard, associated with *de novo* review, called “strict scrutiny” standards, which are the most stringent of all review standards.

The following two cases illustrate the operation of standards of review in the context of court challenges to institutional decisions to deny tenure and also illustrate the controversy that such issues may create.

In *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. 1986), the defendant, a public institution, had discharged a tenured professor, for cause. At an internal hearing, the university adduced evidence that the professor had attended virtually no faculty meetings, rescheduled and canceled a large number of classes, wasted a great deal of class time with irrelevant films and discussions, failed to cover the course material, and produced no research, among other things. The board of trustees affirmed the hearing committee’s recommendation to terminate. In reviewing the professor’s claim that the board of trustees’ decision constituted a breach of contract, the trial court applied an “arbitrary and capricious” standard of review and upheld the board’s decision. The appellate court affirmed both the trial court’s decision and its selection of a standard of review. As a state institution, the university was considered to be an administrative agency under Indiana law and subject to the standard of review applicable to court review of agency decisions:

[A] court of review will not interfere with the acts of an administrative agency which are within the agency’s allowable scope of responsible discretion unless it found that the administrative act was arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence. . . . The court may not substitute its own opinions for that of the Board of Trustees, but must give deference to its expertise. . . . A court may not reweigh the evidence or determine the credibility of witnesses. . . . The burden of proving that the administrative action was arbitrary and capricious or an abuse of discretion falls on the party attempting to vacate the administrative order. . . . An arbitrary and capricious act is one that is willful and unreasonable and done without regard to the facts and circumstances of the case; an act without some basis which would lead a reasonable and honest person to the same conclusion. . . .

The court’s review of the decisions of the committee and the Board of Trustees was not a hearing *de novo*. Rather, its sole function was to determine whether the action was illegal, or arbitrary and capricious. In doing so it must accept the evidence most favorable to support the administrative decision [489 N.E.2d at 625].

Because the court adopted this deferential standard of review, and because the university had foresight to present extensive evidence to the ad hoc hearing committee, the university easily prevailed in court.

An altogether different approach was taken by the court in *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) (also discussed in Section 6.6.2). Again the defendant had discharged a tenured professor who thereupon sued for breach of contract. But in this case the university was a private institution, and the contract issues presented were different from those in *Riggin*. The professor refused to continue teaching one of his courses after a student had called him a racist and refused to apologize. The professor continued to teach his other courses and otherwise perform his professorial duties. After exhausting his internal university appeals, the professor went to federal court, and the court entered summary judgment for the university. The U.S. Court of Appeals then vacated the district court's ruling, noting that the district court had erred in using a lenient "arbitrary and capricious" standard to review the university's actions. The appellate court viewed the case as a standard contract claim and found no reason to accord the university any special deference in such a situation. Rejecting the trial court's choice of standard, the appellate court noted:

In other words, according to the trial court, any Trustees' decision to fire a tenured faculty member is largely unreviewable, with judicial scrutiny limited to a modest inquiry as to whether the Trustees' decision was "arbitrary," "irrational" or infected by improper motivation. Such a reading of the contract renders tenure a virtual nullity. Faculty members like Dr. McConnell would have no real *substantive* right to continued employment, but only certain *procedural* rights that must be followed before their appointment may be terminated. We find this to be an astonishing concept, and one not compelled by a literal reading of the Faculty Handbook [818 F.2d at 67].

Thus, the court determined that "[o]n remand, the trial court must consider *de novo* the appellant's breach of contract claims; no special deference is due the Board of Trustees once the case is properly before the court for resolution of the contract dispute." The court also rejected an administrative agency model such as the *Riggin* court had used:

[T]he theory of deference to administrative action flows from prudential concepts of separation of powers, as well as statutory proscriptions on the scope of judicial review. Obviously, none of those factors apply here. The notion of treating a private university as if it were a state or federal administrative agency is simply unsupported where a contract claim is involved [818 F.2d at 69; footnote omitted].

Further, the court explained:

[W]e do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many areas of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the



use of expert testimony. Moreover, even if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them [818 F.2d at 69].

One additional circumstance will influence a court's standard of review: if the institution's decision was subject to arbitration before the filing of the court suit, the court will accord great deference to the arbitrator's decision, because the parties have usually agreed ahead of time to abide by it. In *Samaan v. Trustees of California State University and Colleges*, 197 Cal. Rptr. 856 (Cal. 1983), the plaintiff, another terminated tenured professor, had lost his case in arbitration. When he proceeded to court, the court indicated that his only remedy was a motion to vacate the arbitrator's award. An applicable statute set out five narrow grounds—each essentially a standard of review—for vacating an arbitration award (Cal. Civ. Proc. Code § 1286.2). The professor had not alleged or demonstrated any of these grounds but instead sought a more stringent standard of review. In response, the court conducted an independent review of the record and determined that the professor could not prevail even if a more stringent standard of review were available. It therefore upheld the university's dismissal decision, and the appellate court affirmed.

Besides the standards of judicial review that courts use in cases challenging particular institutional decisions, there are other standards of review that institutions themselves use in internal dispute-resolution proceedings. Institutions may make their own determinations of what these "internal" standards of review (and accompanying burdens of proof) will be; or standards of review for particular types of disputes may be imposed upon institutions by courts or legislatures.

The court's opinion in *Reilly v. Daly*, 666 N.E.2d 439 (Ind. 1996), illustrates the distinction between internal standards of review and the standards of judicial review for court proceedings.

In *Reilly*, a medical student had been accused of cheating on a final examination and, after internal proceedings that included a hearing before the Student Promotions Committee, the student was dismissed. She then sued, alleging various violations of her due process rights under the Fourteenth Amendment. One of the plaintiff's claims was that due process required the university to judge her using a "clear and convincing" standard of review. The court rejected this claim, holding that due process required only that universities use a "substantial evidence" standard of review for suspension or expulsion decisions, and that the "record [in this case] amply supports the [Student Promotions] Committee's adherence to this burden." The student then argued that the university "lacked substantial evidence that she cheated" and that the court should overrule the university's decision for that reason. In response, the court asserted that the standard of review *in court* is different from the standard of review for a university tribunal: "Although due process requires schools and colleges to base their suspension and dismissal decisions on substantial evidence, the standard of review on appeal is whether there is some evidence to support the decision of the school or college. . . ." The court called this an "arbitrary or capricious" standard. Since there was "at least some evidence in support of the Committee's conclusion that [the student] had cheated," the court held that the student had not established that the university's decision was arbitrary and capricious.

The distinction that the court developed between internal and external (judicial) standards of review is a slippery one. If the court itself applies only an “arbitrary and capricious” standard of review, how can it know that the university actually adhered to a “substantial evidence” standard? The answer is that the court cannot know for sure. In effect, the court is saying that, as long as the record in the case reasonably supports a conclusion that the university followed a substantial evidence standard, the court will not itself reevaluate the substantiality of the evidence or otherwise make sure that the university “got it right” when it made its decision. Instead, the court will defer to the university and its internal processes.

**2.2.3.6. Final judgments.** If a court proceeds to the merits of a plaintiff’s claim, and if the parties do not in the meantime enter a voluntary settlement or consent decree disposing of the litigation, the court will decide the dispute and enter judgment for one of the parties. Judgment may be entered either after trial; before (or during) trial, by way of a motion for summary judgment or a motion to dismiss (Section 2.2.3.4 above); or—if the defendant does not contest the plaintiff’s claim—by “default judgment.” When the losing party’s rights to appeal have been exhausted, the court’s judgment becomes final.

After entry of judgment, issues may still arise concerning the judgment’s enforcement, the award of attorney’s fees, and related matters, which are discussed in Section 2.2.4. Other issues may arise concerning the binding effect of the judgment in later litigation, as discussed below.

In general, the law forbids relitigation of claims disposed of in prior litigation, even if that litigation was in a different court system. The technical rules that preclude relitigation of claims are often cumulatively referred to as the doctrine of *res judicata* (a Latin term meaning “things which have been decided”) or as “claim preclusion.”<sup>6</sup> These rules become important when a party is involved in multiple lawsuits against the same party or related parties, either simultaneously or seriatim. A postsecondary institution, for example, may successfully defend itself against a lawsuit in state court, only to find itself sued again by the same plaintiff in federal court; or it may successfully defend itself against a suit seeking damages, only to find itself again in the same court in a second suit by the same plaintiff seeking a different remedy. In such circumstances the institution will generally be able to use *res judicata* to preclude the second suit if it challenges any part of the same institutional action that was challenged and fully litigated to final judgment in the first suit. The doctrine thus promotes defendants’ interests in finality and society’s interests in judicial economy while still according plaintiffs a full opportunity to press their claims.

*Pauk v. Board of Trustees of the City University of New York*, 488 N.Y.S.2d 685 (N.Y. App. Div. 1985), *affirmed*, 497 N.E.2d 675 (N.Y. 1986), illustrates the *res judicata* doctrine at work, in particular the manner in which a court analyzes the scope of the initial claim and determines whether the same transactions are challenged in the second claim and thus barred. The plaintiff, a professor at Queens College, challenged a denial of reappointment and tenure. He alleged

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<sup>6</sup>Related rules, called “issue preclusion” or “collateral estoppel,” also preclude relitigation of particular issues of fact or law. They are beyond the scope of this discussion.

that he had already acquired tenure de facto as an assistant professor because he had been employed for five years and reappointed for a sixth year. In 1976, in a state court proceeding, he had sought to compel the defendant to rescind the letter of termination and to declare him a tenured assistant professor. A dismissal of his claim on the merits was affirmed by the highest state court (401 N.E.2d 214 (N.Y. 1979)). The professor was persistent, however, and in 1981 brought another suit against the defendant, alleging three different claims. (In 1979, between this suit and the first suit, the professor had filed yet another lawsuit against the defendant in federal court. That suit was dismissed because it was filed after the statute of limitations had expired; see Section 2.2.2.3.) In the first claim in the 1981 suit, the professor alleged that the refusal to renew his employment contract violated the implied terms of that contract; in the second claim, he separately alleged that the defendant had violated his rights under an article of the state constitution and a section of the state education law; and in the third claim, he alleged that the defendant's policy of maintaining the secrecy of the personnel committee's votes was unconstitutional. The defendant argued that the court should dismiss the first two claims because they were based on transactions already challenged in the claim that was adjudicated and dismissed in the earlier state court proceeding. (The court dismissed the third claim on other unrelated grounds.) The trial court held that the second claim, but not the first, was barred under the *res judicata* doctrine. The appellate court affirmed as to the second claim and reversed as to the first, concluding that it, like the second claim, arose from the same transactions as the earlier claim adjudicated in the earlier state court proceeding. Although the second claim relied on a different legal theory of recovery than the earlier state court claim, the plaintiff could have used that legal theory in the earlier proceeding to obtain relief comparable to that sought in the later proceeding. *Res judicata* therefore applied.

The result in *Pauk* should be no different if the second action had been filed in a different jurisdiction—that is, in the courts of another state or in federal rather than state court. Generally, the Full Faith and Credit Clause of the federal Constitution (Art. IV, § 1) compels the courts in every state to give a judgment rendered in a different state the same full faith and credit as a judgment rendered in its own state; and a federal statute, 28 U.S.C. § 1738, compels the federal courts to give full faith and credit to the judgments of state courts in state matters. Additional complications arise, however, when the initial claim is not filed in a state court but rather with a state administrative agency. Neither the Full Faith and Credit Clause nor the federal statute applies to this situation, and the binding effect of an administrative determination will depend on the rules of the particular state or, in the federal courts, on federal common law. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), illustrates the problem in the federal courts, where the difficulties concern “issue preclusion” rather than *res judicata* as such (see footnote 6).

In *Elliott*, a black employee of the university's Agricultural Extension Service challenged his termination on grounds that it was racially motivated. He first petitioned for administrative review of his termination under the state administrative procedure act. While his administrative proceeding was pending, he

filed suit in federal court, alleging employment discrimination violative of both Title VII (this book, Section 5.2.1) and Section 1983 (this book, Section 3.5). Subsequently, the state administrative law judge ruled that the employee's termination was not racially motivated. Instead of appealing this decision to the state courts, he persevered with the federal court suit. The federal courts then had to determine whether they were bound by the administrative law judge's *fact finding* that the termination was not racially motivated—that is, “whether this finding is entitled to preclusive effect in federal court.” In a complicated analysis set against the backdrop of the federal common law of preclusion, the U.S. Supreme Court concluded that in passing Title VII, Congress expressed an intent to allow plaintiffs to relitigate the fact determinations of state agencies in federal court but that, in passing Section 1983, Congress expressed no such intent. Thus, the state administrative fact-findings had a preclusive effect as to the Section 1983 claim but not as to the Title VII claim.

A particularly interesting and important “preclusion” issue arose in *Smith v. Alabama Aviation and Technical College*, 683 So. 2d 431 (Ala. 1996). The problem was similar to that in *University of Tennessee v. Elliott*, except that the second claim was filed in state rather than federal court, and state law rules on preclusion therefore applied. The specific issue, according to the *Smith* court, was “the preclusive effect of an administrative determination of a constitutional claim when the aggrieved person does not seek judicial review of the administrative decision as authorized by law.” The plaintiff was a tenured professor of avionics at the Alabama Aviation and Technical College who had been dismissed by the college. Contending that he was fired for criticizing the college's administration and curriculum, he charged the college with violating his free speech and due process rights. He presented these charges in a hearing before an employee review panel constituted pursuant to State Board of Education regulations. When the panel upheld his termination, the faculty member then filed a separate suit against the college in court.

In affirming the lower court's entry of summary judgment for the defendants, the Supreme Court of Alabama held that “an aggrieved person, such as Smith, who believes that the decision of a review panel did not adequately or correctly adjudicate his or her constitutional claim, can appeal that decision to the appropriate circuit court as provided for in the Alabama Code.” But Smith had not done so; instead, he had sued the college in a separate suit independent of the administrative proceeding. “[T]o allow a plaintiff to raise the same issue in a subsequent lawsuit after having elected not to appeal from the administrative ruling would frustrate efforts to provide an orderly administration of justice, and could encourage one to relitigate issues rather than have those issues finally resolved.” Therefore, since Smith had not pursued his statutory remedy by appealing the administrative ruling to the appropriate circuit court, which could have adequately reviewed his constitutional issues in such an appeal, he had forfeited his right to litigate those issues in an independent suit.

The U.S. Court of Appeals for the Tenth Circuit used claim preclusion (*res judicata*) to dismiss an Americans With Disabilities Act (ADA) and Section 504 (Rehabilitation Act) suit brought by a former medical student against a board

of regents. *McGuinness v. Regents of the University of New Mexico*, 183 F.3d 1172 (10th Cir. 1999). The student had previously filed an ADA suit against the University of New Mexico (UNM) Medical School, and the court had entered judgment for the medical school. Since the causes of action and the parties were essentially the same in both suits, the final judgment in the first suit precluded litigation of the second suit.

## 2.2.4. Judicial remedies

**2.2.4.1. Overview.** If the defendant prevails in a lawsuit, the only needed remedy is dismissal of the action and perhaps an award of attorney's fees or court costs. If the plaintiff prevails, however, that party is entitled to one or more types of affirmative remedies, most prominent of which are money damages and injunctive relief, and may be entitled to attorney's fees and costs as well. If the defendant does not comply with the court's remedial orders, the court may also use its contempt powers to enforce compliance.

**2.2.4.2. Money damages.** Depending on the character of the plaintiff's claim and proof, a court may award compensatory damages and, less often, punitive damages as well (see, for example, Sections 3.5 and 4.7.4 regarding damages under Section 1983). Occasionally, even treble damages may be available (see, for example, Section 13.2.8 regarding federal antitrust laws). Money damages, however, are not necessarily a permissible remedy in all types of cases where the plaintiff sustains quantifiable injury. For example, in cases under the federal Age Discrimination Act, plaintiffs are entitled only to injunctive relief (see Section 13.5.9). But the trend appears to be to permit the award of money damages in an increasing range of cases. In Section 102 of the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991)), for example, Congress amended Title VII so that it expressly authorizes the award of money damages in intentional discrimination actions under that statute (see this book, Section 5.2.1); and in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the U.S. Supreme Court construed Title IX to permit money damage awards in private causes of action under that statute (see Section 13.5.9).

When money damage awards are available, there may be caps on the amount of damages the court may award, or there may be questions about the measurement of the amount of damages. In *Memphis School District v. Stachura*, 477 U.S. 299 (1986), for example, the U.S. Supreme Court held that money damages based on the abstract "value" of the constitutional rights that had been infringed was not a proper component of compensatory damages in a Section 1983 suit. The plaintiff, a public school teacher, was fired because of certain teaching techniques he used for a course on human reproduction. The trial judge instructed the jury that, in addition to any other compensatory and punitive damages they might award to the plaintiff, they could also award damages based on the importance of the constitutional rights that were violated. The jury returned with a verdict for the plaintiff resulting in compensatory damages of \$266,750 and punitive damages of \$36,000, allocated among the

school board and various individual defendants. The Supreme Court held that compensatory money damages are awarded on the basis of actual, provable injury, not on the basis of subjective valuation. If the jury were permitted to consider the “value” of the rights involved in determining the amount of compensatory damages, juries might “use their unbounded discretion to punish unpopular defendants.” The court therefore remanded the case for a new trial on the issue of compensatory damages.

**2.2.4.3. Injunctions.** Injunctions are a type of specific nonmonetary, or equitable, relief. An injunction may be either permanent or temporary and may be either prohibitory (prohibiting the defendant from taking certain actions) or mandatory (requiring the defendant to take certain specified actions). A court may issue an injunction as a final remedy after adjudication of the merits of the lawsuit, or it may issue a “preliminary injunction” prior to trial in order to preserve the status quo or otherwise protect the plaintiff’s rights during the pendency of the lawsuit.

Preliminary injunctions raise a host of important tactical questions for both plaintiffs and defendants. In determining whether to grant a motion for such an injunction, the court will commonly balance the plaintiff’s likelihood of success on the merits of the lawsuit, the likelihood that the plaintiff will suffer irreparable harm absent the injunction, the injury that the defendant would sustain as a result of the injunction, and the general public interest in the matter. In *Jones v. University of North Carolina*, 704 F.2d 713 (4th Cir. 1983), the court applied such a balancing test and granted the plaintiff’s request for a preliminary injunction. The plaintiff was a nursing student who had been accused of cheating on an examination, found guilty after somewhat contorted proceedings on campus, and barred from taking courses during the spring semester. She then filed a Section 1983 suit (this book, Section 3.5), alleging that the university’s disciplinary action violated her procedural due process rights. She requested and the court granted a preliminary injunction ordering the university to reinstate her as a student in good standing pending resolution of the suit. The university appealed the court’s order, claiming it was an abuse of the court’s discretion. The appellate court considered the hardships to both parties and the seriousness of the issues the plaintiff had raised. Regarding hardships, the court noted that, without the injunction, the plaintiff would have been barred from taking courses and delayed from graduating, denied the opportunity to graduate with her classmates, and forced to explain this educational gap throughout her professional career. On the other hand, according to the court, issuance of the injunction would not significantly harm the university’s asserted interests:

While we recognize the University’s institutional interest in speedy resolution of disciplinary charges and in maintaining public confidence in the integrity of its processes, Jones will suffer far more substantial, concrete injury if the injunction is dissolved and she is ultimately vindicated than will the University if the injunction stands and its position is finally upheld [704 F.2d at 716].

Similarly, in *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), a U.S. Court of Appeals upheld a district court's preliminary injunction ordering Brown University to reinstate its women's gymnastics and women's volleyball programs to full varsity status pending the trial of a Title IX claim. Both programs had been reduced to club status as a result of budget constraints. Although men's programs were also cut back, the plaintiffs alleged that the cuts discriminated against women at the school. The appellate court approved the district judge's determination that the plaintiffs would most likely prevail on the merits when the case was finally resolved. Further, the court observed that if the volleyball and gymnastics teams continued in their demoted state for any length of time, they would suffer irreparably because they would lose recruitment opportunities and coaches. The court found that these harms outweighed the small financial loss the university would sustain in keeping the teams at a varsity level until final resolution of the suit. (The *Cohen* case is further discussed in Section 10.4.6.)

**2.2.4.4. Attorney's fees.** Either the plaintiff or the defendant may recover the reasonable costs of attorney's fees in certain situations where they are the prevailing party. For instance, under the Civil Rights Attorney's Fees Awards Act of 1976 (90 Stat. 2641 (1976), 42 U.S.C. § 1988), the federal courts may grant the prevailing parties in certain federal civil rights suits reasonable attorney's fees as part of the costs of litigation (see this book, Section 13.5.9). The U.S. Supreme Court has held that this Act applies to state governments and officials who are sued in their official capacities. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court held that Congress intended to set aside the states' Eleventh Amendment immunity in these cases in order to enforce the protection of individual rights under the Fourteenth Amendment of the Constitution, and that attorney's fees are therefore not barred. Attorney's fees are also sometimes available under the Equal Access to Justice Act, to parties who prevail in litigation involving the federal government (see this book, Section 13.6.1). More generally, Rule 11 of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) permits federal courts to award attorney's fees in certain situations where a party files with the court a document that is not grounded in fact; is not based on existing law or a non-frivolous argument for its modification; or is filed for an improper purpose, such as harassment or delay. In such circumstances the court may impose "a variety of sanctions, including attorney's fees and other expenses incurred as a direct result of the violation." Moreover, under Rule 38 of the Federal Rules for Appellate Procedure (28 U.S.C. Appendix), if a party's request for an appeal is frivolous, the court may award costs to the prevailing party, and such an award will typically include attorney's fees.

*Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987), illustrates how a higher education institution may recover attorney's fees if forced to defend itself against a frivolous lawsuit. The appellate court relied on its authority under Rule 38 of the Federal Rules for Appellate Procedure to order the plaintiff professor to pay attorney's fees even though the university had not requested such an award. The professor, who was nontenured, challenged the refusal to renew his contract, claiming a violation of procedural due process. The court held that the claim was frivolous and may not have been brought in good faith,

because it ignored the established rule that a nontenured faculty member has no property interest in continued employment (see Section 6.7.2.1). In fact, as the court emphasized, a prior case before the same court (*McElearney v. University of Illinois*, 612 F.2d 285, 289–91 (7th Cir. 1979)) “holds that a nontenured professor at the same university, employed under the same contract, lacked a property interest.” Thus, according to the court, the plaintiff was “litigating a defunct claim. He hasn’t a chance; he never did; but he has put the University to some expense. This is frivolous litigation.”

Even when the court has authority to award attorney’s fees and does so, the parties may challenge the reasonableness of the amount awarded. The case of *Craik v. Minnesota State University Board*, 738 F.2d 348 (8th Cir. 1984), illustrates several of the issues that may arise and suggests the various grounds on which a higher education institution may seek to diminish an award against it or enhance an award in its favor. The plaintiff in *Craik* prevailed in an employment discrimination suit against Minnesota State University and was awarded \$126,127.40 in reasonable attorney’s fees under 42 U.S.C. § 1988.

In order to reach this figure, and in reviewing the university’s challenge to it, the court considered the nature and quality of the legal services rendered to the plaintiff for the appeal, the reasonableness of the rates charged by the plaintiff’s out-of-state counsel, the inclusion of ten hours of travel time charged at the out-of-state counsel’s normal office hourly rate, and the extent of the plaintiff’s success on the appeal. The court rejected the university’s arguments for reduction on the first three grounds but accepted its argument on the fourth ground. Because the plaintiff did not prevail on all issues raised on appeal, and because the relief awarded could be further narrowed on remand to the trial court, the appellate court reduced the attorney’s fees award by 20 percent. In turn, however, in response to the plaintiff’s argument, the court considered the degree of risk to their law practices that the plaintiff’s attorneys assumed by taking the case and, on this ground, enhanced the fees of two of the four attorneys by 25 percent, thus leaving the amount awarded almost the same as it was before being challenged.

*Tanner v. Oregon Health Sciences University*, 980 P.2d 186 (Or. 1999), illustrates how attorney’s fee awards may work in state (versus federal) courts. Three employees of the university who are lesbians, along with their domestic partners, had sued the university, claiming that they were denied health insurance benefits based on sexual orientation, in violation of the Oregon state constitution. At the appellate court level, in *Tanner v. Oregon Health Sciences University*, 971 P. 2d 435 (1998), the plaintiffs prevailed on this claim. They thereupon petitioned for an award of attorney’s fees for their attorney, asserting that they were entitled to such an award both under Oregon statutes (Ore. Rev. Stat. 20. 107) and under Oregon case law (*Deras v. Myers*, 535 P.2d 541 (Ore. 1975)). The court did not address the statutory claim, but held for the plaintiffs under Oregon case law:

In *Deras*, the Oregon Supreme Court held:

[A]s a general rule American courts will not award attorney’s fees to the prevailing party absent authorization of statute or contract. . . . [However,] courts of



equity have the inherent power to award attorney’s fees. This power frequently has been exercised in cases where the plaintiff brings suit in a representative capacity and succeeds in protecting the rights of others as much as his own [980 P.2d at 188, citing 535 P.2d at 549].

Holding that the plaintiffs met all the requirements of *Deras*, the court determined that a rate of “\$200 per hour reasonably reflects the complexity, controversy, and novelty of the issues as well as the experience of counsel,” and awarded attorney’s fees of \$77,340. As to the requirement that the plaintiffs must have protected rights beyond their own, the court reasoned that:

In this case, plaintiffs complained about an unconstitutional violation of their civil rights as citizens of this state. The pecuniary benefits they obtained are not peculiar to themselves. The fact that, as defendants suggest, our decision on the merits of their claims will directly benefit “only a relatively small class of persons” is not controlling. How small or large the directly benefited class may be is not the point. . . . What controls is the extent to which the constitutional issue resolved is a matter of primary concern to the public at large. Vindicating the civil rights of a group of citizens who have been subject to disparate treatment in employment on the basis of a suspect classification in violation of the Oregon Constitution is a matter of primary concern to all Oregonians [980 P.2d at 189].

This case is discussed further in Section 5.3.7.

(For a discussion of the appropriate process for determining attorney’s fees in the thirty-year litigation to desegregate the Tennessee system of public higher education (discussed in Section 13.5.2), see *Geier v. Sundquist*, 372 F.3d 784 (6th Cir. 2004).)

**2.2.4.5. Contempt of court.** When a defendant does not comply with the court’s award of relief to the plaintiff, or when either party or their witnesses do not comply with some other court order (for example, a subpoena to testify), the court may enforce its own orders by various means. Primary and most powerful is the imposition of criminal or civil contempt. In *United States v. United Mine Workers*, 330 U.S. 258 (1947), the U.S. Supreme Court distinguished the two sanctions. A civil contempt judgment may be used to coerce the contemnor into compliance with a court order or to award compensation to the complaining party for incurred losses. On the other hand, a criminal contempt judgment is used not simply to coerce but rather to punish the contemnor or vindicate the authority of the court. Commonly, the court may impose a monetary fine or imprisonment for either type of judgment. In a civil contempt case, the amount of the fine or term of the imprisonment may be indefinite, since the purpose is to coerce the contemnor into compliance. Thus, a judge may imprison someone until that person is willing to comply, or fine him a certain sum per day until compliance. Further, once it becomes clear that no amount of coercion will work, the fine or imprisonment must stop. Conversely, in criminal contempt, there must be a definite fine or term of imprisonment set at the outset.

*Dinnan v. Regents of the University System of Georgia*, 625 F.2d 1146 (5th Cir. 1980), illustrates the reach of the contempt power as well as the potential

difficulty in determining whether a judge has imposed criminal or civil contempt. The plaintiff was a University of Georgia professor challenging a contempt order against him. He was a member of a committee that had denied a promotion to a female faculty applicant who subsequently sued the university for sex discrimination (see Section 5.3.3). When he refused to testify at the trial (see this book, Section 7.7.1), the court ordered him to pay \$1,100 for every day (up to thirty days) he refused to testify. If he continued in contempt of the order after that time, he would be sentenced to ninety days' imprisonment subject to being released earlier any time he agreed to testify. Dinnan argued that the court's orders constituted criminal contempt and were unlawful because fines and imprisonment cannot be combined as punishment for criminal contempt. Both the trial court and the appellate court rejected his challenge, holding that these were coercive, not punitive, measures and that both sanctions were appropriate components of a civil order of contempt.

An opposite result obtained in *Martin v. Guillot*, 875 F.2d 839 (11th Cir. 1989). There, a university that had dismissed an administrator without affording him due process protections disobeyed a court order to afford the administrator (the plaintiff) an appropriate hearing and appeal. Although university officials (the defendants) eventually complied, the plaintiff requested that the court hold the university in contempt for its earlier delay in doing so. The trial court granted the request and, as a sanction, ordered the defendants to purge themselves of their contempt by giving the plaintiff back pay for the time from his unlawful dismissal to the eventual provision of full due process rights. The appellate court reversed the trial court's order, however, because the order was in the nature of a criminal contempt, and the trial court had not met the procedural requirements of the Federal Rules of Criminal Procedure (Rule 42) for imposing criminal contempt:

[T]he sanction was not imposed either to coerce or compensate and therefore is not a civil contempt sanction. The defendants had already complied with the court orders and afforded Martin due process; there remained nothing to coerce them to do. The continued contempt could be construed as being compensatory in character because the sanction, approximately equal to back pay, was to be paid to the appellant rather than to the court. However, in its order specifying the amount of the sanction to be imposed, the district court explicitly stated its "object was and is to sanction defendants rather than to compensate Martin." Because the sanction levied by the district court was clearly designed predominately to punish defendants for their initial failings to comply with court orders, it is a criminal contempt sanction [875 F.2d at 845].

**2.2.5. Judicial (academic) deference.** Another consideration that should play a role in the management of litigation, and in an institution's presentation of its case, is "judicial deference" or "academic deference." At trial as well as on appeal, issues may arise concerning the extent to which the court should defer to, or give "deference" to, the institution whose decision or other action is at issue. As one commentator has explained:

[A] concept of academic deference justifies treating many university processes and decisions differently from off-campus matters. This formulation is hardly novel. In fact, . . . many university cases recognize in this way the distinctive nature of the academic environment. Illustrations come from many areas. [Examples] that seem especially apt [include] university based research, personnel decisions, admissions of students, evaluation of student performance, and use of university facilities. [Robert O’Neil, “Academic Freedom and the Constitution,” 11 *J. Coll. & Univ. Law* 275, 283 (1984).]

This concept of academic deference is a branch of a more general concept of judicial deference that encompasses a variety of circumstances in which, and reasons for which, a court should defer to the expertise of some decision maker other than itself.<sup>7</sup> Issues regarding academic deference can play a vital, sometimes even dispositive, role in litigation involving higher educational institutions. Institutions may therefore seek to claim deference at various points in the litigation process. (See generally O’Neil, *supra*, at 283–89.) Deference issues may arise, for example, with regard to whether a court should recognize an implied private cause of action (see, for example, *Cannon v. University of Chicago*, 441 U.S. 677, 709–10 (1979), discussed in Section 13.5.9 of this book); with regard to the issuance of subpoenas and other aspects of the discovery process (see, for example, *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), discussed in Section 7.7); with regard to standards of review and burdens of proof (see subsection 2.2.3.5 above);<sup>8</sup> and with regard to the remedies to be imposed against a losing defendant (see, for example, *Kunda v. Muhlenberg College*, 621 F.2d 532, 547–51 (3d Cir. 1980)), discussed in Section 6.4.2). Sometimes requests for deference are framed as claims to institutional autonomy; sometimes as “institutional academic freedom” claims (see Section 7.1.6) or faculty academic freedom claims (see Section 7.2); and sometimes as “relative institutional competence” claims, asserting that the institution’s or the faculty’s competence over the matter at issue overshadows that of the court. Sometimes institutions may contend that their claim to deference is constitutionally based—especially when they rely on the academic freedom rationale for deference and seek to ground academic freedom in the First Amendment. At other times, in statutory cases, the deference claim may be based on statutory interpretation; in effect, the institution contends that, under the statute that is at issue, Congress was deferential to higher educational institutions and intended that courts should be deferential as well. And in yet other

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<sup>7</sup>Another branch of judicial deference that is highly important to higher education arises when an institution, or an association of institutions, challenges a rule or decision of a federal or state administrative agency in court. Questions may then arise concerning the extent to which the court should defer to the expertise or authority of the administrative agency. This type of deference issue is discussed in Sections 13.4.6 and 13.6.1.

<sup>8</sup>Standards of review and burdens of proof may also be important issues in hearings before colleges’ and universities’ own decision-making bodies (for example, a student disciplinary board). For a case that illustrates the distinction between standards of review in court and standards of review in internal proceedings, see *Reilly v. Daly*, 666 N.E.2d 439 (Ind. 1996), discussed in subsection 2.2.3.5 above.

situations, especially in common law contract or tort cases, the deference claim may be based on public policy or legal policy considerations—for instance, that any court intervention would unduly interfere with the institution’s internal affairs, or that vigorous enforcement of legal principles against higher education institutions would not be an effective use of the court’s limited resources (see, for example, the discussions of deference in Sections 8.1.3 and 9.3.1).

When plaintiffs assert constitutional claims against an institution of higher education, deference issues may work out differently than when statutory claims are asserted. In a statutory case—for example, a case asserting that the institution has violated a federal civil rights law—the court will first be concerned with interpreting and applying the law consistent with Congress’s intentions, and in this regard will generally defer to Congress’s own judgments about the law’s application (see, for example, *Eldred v. Ashcroft*, 537 U.S. 186 (2003)). Thus the court will take its cue on deference from Congress rather than developing its own independent judgment on the matter. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (discussed in Section 13.5.9 of this book), for example, the plaintiff sought to subject admissions decisions to the nondiscrimination requirements of Title IX of the Education Amendments of 1972. The defendant argued that it would be “unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants” because “this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.” Responding, the Court asserted that “[t]his argument is not new to this litigation. It was forcefully advanced in both 1964 and 1972 by congressional opponents of Title VI and Title IX, and squarely rejected by the congressional majorities that passed the two statutes.” The Court followed suit, rejecting the defendant’s claim to deference. In other cases, involving other statutes, however, courts may discern that Congress intended to be deferential to postsecondary institutions in some circumstances and the courts should do the same. (See, for example, James Leonard, “Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act,” 75 *Nebraska L. Rev.* 27 (1996).)

In contrast, when plaintiffs assert constitutional claims, and institutions ask the court for deference, the court is on its own; its response is shaped by consideration of applicable prior precedents and the applicable standard of judicial review. *Grutter v. Bollinger*, 539 U.S. 306 (2003), a constitutional challenge to the University of Michigan Law School’s race-conscious admission policy, is a leading example of this type of case. The plaintiffs, rejected applicants, sought a rigorous, nondeferential application of the equal protection clause; the university sought deference for the academic judgments it had made in designing and implementing its diversity plan for admissions. The Court applied strict scrutiny review, requiring the university to show that maintaining the diversity of its student body is a compelling state interest. But in applying this standard, the Court emphasized that:

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest

asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits [539 U.S. at 328].

This deference was a critical aspect of the Court's reasoning that led it, in a landmark decision, to uphold the law school's admissions policy. (See generally Edward Stoner & J. Michael Showalter, "Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in *Grutter* Reapplies Longstanding Principles, As Shown by Rulings Involving College Students in the Eighteen Months Before *Grutter*," 30 *J. Coll. & Univ. Law* 583 (2004).)

In other constitutional cases, courts may reach the opposite result. In the VMI case, *United States v. Virginia*, 518 U.S. 515 (1996) (discussed in Section 8.2.4.2), for instance, the U.S. Supreme Court bypassed the defendant institution's expert evidence and declined to defer to its judgment that maintaining VMI as an all-male institution was essential to the institution's educational mission. The Court's apparent reason for refusing to defer, and the apparent distinction between *Grutter* and *United States v. Virginia*, is that the Court did not view the state's judgments over the years about VMI's all-male character to be genuinely academic judgments, but rather viewed them as judgments based on other factors and later dressed up with educational research for purposes of the litigation. The state's proffered educational reasons for the all-male policy were "rationalizations for actions in fact differently grounded," said the Court, and were based on "overbroad generalizations" about the abilities and interests of the sexes.

The paradigmatic setting for institutions invoking academic deference, and courts granting it, is the setting of faculty tenure, promotion, and termination decisions. The deference issues arising in this setting, and the key cases, are discussed in Section 6.4.2, as is the evolving tendency of courts to subject these decisions to thorough scrutiny for fairness, while deferring to the academic standards used to evaluate the candidate for promotion or tenure.

When faculty members challenge adverse personnel decisions, they may assert statutory claims (such as a Title VII sex discrimination claim), or constitutional claims (such as a First Amendment free speech or academic freedom claim), or sometimes common law claims (such as a breach of contract claim). In response, institutions typically argue that courts should not involve themselves in institutional personnel judgments concerning faculty members, since these are expert and evaluative (often subjective) academic judgments to which courts should defer.<sup>9</sup> Institutions have had considerable success with

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<sup>9</sup>Some personnel disputes will have gone to arbitration before landing in court. When an institution prevails in arbitration and the faculty member then files suit in court, the institution has an additional argument for deference: that the court should accord deference not only to the institution's judgment but also to the arbitrator's decision. See, for example, *Samoan v. Trustees of California State University and Colleges*, 197 Cal. Rptr. 856 (Cal. 1983).

such arguments in this setting. They have also achieved similar success in cases concerning their academic evaluations of students; indeed a student case, *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) (discussed below), is one of the primary authorities on academic deference.

In a constitutional case, *Feldman v. Ho*, 171 F.3d 494 (7th Cir. 1999), for example, a professor claimed that Southern Illinois University did not renew his contract because he had accused a colleague of academic misconduct. The court rejected his First Amendment free speech claim by emphasizing the university's own academic freedom to make its own personnel decisions:

A university seeks to accumulate and disseminate knowledge; for a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not (or, worse, are distracting those who are). . . .

If the University erred in telling [Professor] Feldman to seek employment elsewhere that is unfortunate, but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw [171 F.3d at 495-97].

At the same time, the court in *Feldman* issued a strong statement on the need for courts to defer to the academic judgments of colleges and universities:

[A]n unsubstantiated charge of academic misconduct not only squanders the time of other faculty members (who must analyze the charge, or defend against it) but also reflects poorly on the judgment of the accuser. A university is entitled to decide for itself whether the charge is sound; transferring that decision to the jury in the name of the first amendment would undermine the university's mission—not only by committing an academic decision to amateurs (is a jury really the best institution to determine who should receive credit for a paper in mathematics?) but also by creating the possibility of substantial damages when jurors disagree with the faculty's resolution, a possibility that could discourage universities from acting to improve their faculty. . . . If the kind of decision Southern Illinois University made about Feldman is mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech [171 F.3d at 497].

Like the *Feldman* court, most contemporary courts will recognize that they should accord deference to the academic decisions of academic institutions with regard to faculty personnel matters. But seldom are courts as outspoken on this point as was the court in *Feldman*. Other courts, moreover, may (and should) give more attention than the *Feldman* court to whether the decision being challenged was a genuinely academic decision, based on expert review of professional qualifications and performance.

There are also many statutory employment discrimination cases in which courts defer substantially to the faculty personnel judgments of colleges and universities (see generally Section 6.4), sometimes with language as striking as that in the *Feldman* opinion (see, for example, *Kyriakopoulos v. George Washington University*, 657 F. Supp. 1525, 1529 (1987)). But this does not mean that courts will, or should, defer broadly in all or most cases challenging faculty personnel

decisions. There have been and will continue to be cases where countervailing considerations counsel against deference—for example, cases where there is evidence that an institution has relied on race, ethnicity, or gender in making an adverse personnel judgment; or where an institution has relied on personal animosity or bias, internal politics, or other nonacademic factors; or where an institution has declined to afford the faculty member procedural safeguards; or where a decision for the plaintiff would not significantly intrude on university decision makers’ ability to apply their expertise and discretion in making personnel decisions. The court in *Kunda v. Muhlenberg College*, above, strikes the right note about such situations:

The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility. . . . Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands [621 F.2d at 550].

(See also Harry Tepker, “Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference,” 16 *U. Cal. Davis L. Rev.* 1047 (1983).)

As the preceding discussion suggests, several interrelated factors are key in determining when a court should defer to the judgments of a postsecondary institution. First and foremost, the judgment must be a genuine academic judgment. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court stated this requirement well: “When judges are asked to review the substance of a *genuinely academic decision* . . . , they should show great respect for the faculty’s professional judgment” (474 U.S. at 225 (emphasis added)). The demonstrated exercise of “professional judgment” is a hallmark of an academic decision. Generally, as *Ewing* indicates, such judgments must be made in large part by faculty members based on their expertise as scholars and teachers. Such judgments usually require “an expert evaluation of cumulative information” and, for that reason, are not readily amenable to being reviewed using “the procedural tools of judicial or administrative decisionmaking” (*Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978)). Such judgments are also usually “discretionary” and “subjective,” and thus even less amenable to reasoned review on their merits by the courts.

A second key factor, related to the first, concerns relative institutional competence. Courts are more likely to defer when the judgment or decision being reviewed, even if not academic in character, involves considerations regarding which the postsecondary institution’s competence is superior to that of the courts. The *Kunda* court, for instance, spoke of inquiries whose substance is “beyond the competence of individual judges” (621 F.2d at 548). Another court has advised that “courts must be ever-mindful of relative institutional competencies” (*Powell v. Syracuse University*, 580 F.2d 1150, 1153 (2d Cir. 1978)).

Third, courts are more likely to defer to the institution when a judicial decision against it would create undue burdens that would unduly interfere with its ability to perform its educational functions—or when similar judgments to follow, against other institutions, would subject them to similar burdens. The *Kunda* court (above), for instance, suggested that deference may be appropriate when a court decision would “necessarily intrude upon the nature of the educational process itself” (621 F.2d at 547). The U.S. Supreme Court in the *Cannon* case (above) suggested that deference may be appropriate if litigating issues of the type before the court would be “so costly or voluminous that . . . the academic community [would be] unduly burdened” (441 U.S. at 710). And the court in *Feldman* warned of judicial decisions that would interfere with the institution’s ability to fulfill its educational mission.

By developing the converse of the reasons for according deference, one can discern various reasons why a court would or should *not* defer to a college or university. Again, there are three overlapping categories of reasons. First, if the judgment to be reviewed by the court is not a “genuinely academic decision,” courts are less likely to defer. As the Court in *Ewing* notes, if “the person or committee responsible did not actually exercise professional judgment” (474 U.S. at 225), there is little reason to defer. This is particularly so if the nonacademic reason for the decision may be an illegitimate reason, such as racial or gender bias (see *Gray v. Board of Higher Education*, 692 F.2d 901, 909 (2d Cir. 1982), and *Williams v. Lindenwood*, 288 F.3d 349, 356 (8th Cir. 2002)). Second, if the judgment being reviewed is a disciplinary rather than an academic judgment, the court’s competence is relatively greater and the university’s is relatively less; the factor of relative institutional competence may therefore become a wash or weigh more heavily in the court’s (and thus the challenger’s) favor. Similarly, when the challenge to the institution’s decision concerns the procedures it used rather than the substance or merits of the decision itself, the court’s competence is greater than the institution’s, and there is usually little or no room for deference. The case of *Board of Curators v. Horowitz*, above, explores these two distinctions at length. Third, when reviewing and overturning an institutional decision would not intrude upon the institution’s core functions, or would not likely burden other institutions with a flood of litigation, these reasons for deference diminish as well. The U.S. Supreme Court used this point in *University of Pennsylvania v. EEOC*, above, when it declined to defer to the university because upholding the plaintiff’s request would have only an “extremely attenuated” effect on academic freedom.

**2.2.6. Managing litigation and the threat of litigation.** Managing, settling, and conducting litigation, like planning to avoid it, requires at all stages the in-depth involvement of attorneys.<sup>10</sup> Institutions should place heavy

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<sup>10</sup>The suggestions in this section apply not only to litigation against the institution but also to suits against officers or employees of the institution when the institution is providing them, or considering providing them, legal representation or related assistance. In suits in which both the institution and one or more named institutional officers or employees are defendants, questions may arise concerning possible conflicts of interest that could preclude the institution’s legal staff from representing all or some of the officers or employees (see Section 2.4.3).



emphasis on this aspect of institutional operations. Both administrators and counsel should cultivate conditions in which they can work together as a team in a treatment law (see Section 2.4.2) mode. The administrator's basic understanding of the tactical and technical matters concerning jurisdiction, procedure, evidence, and remedies (see subsections 2.2.2–2.2.4 above), and counsel's mastery of these technicalities and the tactical options and difficulties they present, will greatly enhance the institution's capacity to engage in treatment law that successfully protects the institution's mission as well as its reputation and financial resources. Counsel's understanding of judicial deference (see subsection 2.2.5 above) and its tactical role in litigation is also of critical importance.

Litigation management is a two-way street. It may be employed either in a defensive posture when the institution or its employees are sued or threatened with suit, or in an offensive posture when the institution seeks access to the courts as the best means of protecting its interests with respect to a particular dispute. Administrators, like counsel, will thus do well to consider treatment law from both perspectives and to view courts and litigation as, in some circumstances, a potential benefit rather than only as a hindrance.

Although administrators and counsel must accord great attention and energy to lawsuits when they arise, and thus must emphasize the expert practice of treatment law, their primary and broader objective should be to avoid lawsuits or limit their scope whenever that can be accomplished consistent with the institutional mission. Once a lawsuit has been filed, administrators and counsel sometimes can achieve this objective by using summary judgment motions or (if the institution is a defendant) motions to dismiss, or by encouraging pretrial negotiation and settlement. Moreover, by agreement of the parties, the dispute may be diverted from the courts to a mediator or an arbitrator. Even better, administrators and counsel may be able to derail disputes from the litigation track before any suit is filed by providing for a suitable alternative mechanism for resolving the dispute. Mediation and arbitration are common and increasingly important examples of such alternative dispute resolution (ADR) mechanisms (see Section 2.3 below), which are usable whether the institution is a defendant or a plaintiff, and whether the dispute is an internal campus dispute or an external dispute with a commercial vendor, construction contractor, or other outside entity. For internal campus disputes, internal grievance processes and hearing panels (see, for example, Section 9.1) are also important ADR mechanisms and may frequently constitute remedies that, under the "exhaustion-of-remedies" doctrine (see subsection 2.2.2.4 above), disputants must utilize before resorting to court.

Even before disputes arise, administrators and counsel should be actively engaging in preventive law (Section 2.4.2) as the most comprehensive and forward-looking means of avoiding and limiting lawsuits. Preventive law also has a useful role to play in the wake of a lawsuit, especially a major one in which the institution is sued and loses. In such a circumstance, administrators may engage in a "post-litigation audit" of the institutional offices and functions involved in the lawsuit—using the audit as a lens through which to view

institutional shortcomings of the type that led to the judgment against the institution, and to rectify such shortcomings in a way that serves to avoid future lawsuits in that area of concern.

### ***Sec. 2.3. Alternate Dispute Resolution***

**2.3.1. Overview.** The substantial cost of litigation, in terms of both time and money, and the law's limited capacity to fully resolve some types of disputes, have encouraged businesses, other organizations, and even courts to turn to alternate dispute resolution (ADR). ADR encompasses a variety of approaches to resolving disputes, from informal consultation with an ombuds who is vested with the authority to resolve some disputes and to seek resolution of others, to more formal processes such as grievance procedures, mediation, or arbitration. Commercial disputes and disputes in the financial services industry have been resolved through arbitration for decades. Academe has been slow to accept ADR, but it is becoming more common for certain kinds of disputes, and more institutions are turning to ADR in an attempt to reduce litigation costs and to resolve disputes, if possible, in a less adversarial manner.

Many employers embrace ADR because of its promise of quicker, less expensive resolution of disputes, and this is often the case. Discovery is not used in mediation, and is limited in arbitration as well. Arbitrators typically do not use judicial rules of evidence, may admit evidence that a court would not (such as hearsay evidence), and generally issue a ruling (called an "award") a month or two after the hearing, unless they issue an oral award on the spot. The parties select the mediator or arbitrator jointly, rather than being assigned a judge, which may give them more confidence in the process. Indeed, the parties design the process in order to meet their needs, and can change the process if it needs improvement.

ADR has some disadvantages, however. ADR is a private process, and there is typically no public record made of the outcome. This characteristic of ADR tends to benefit employers, who resist public inquiry into personnel decisions, and may make it difficult for an employee who must help to select a mediator or arbitrator to evaluate that individual's record or previous rulings. The lack of public accountability is viewed as problematic because many of these claims have a statutory basis, yet they are resolved without judicial or regulatory agency scrutiny. As discussed below, the decisions of arbitrators are difficult to appeal and are usually considered final. Furthermore, there may be a substantial difference in skill and knowledge between the employee who is challenging an employment decision and the individual who is representing the institution before the mediator or arbitrator. Many ADR systems prohibit attorneys for either party, and even if attorneys are permitted, the employee may not be able to afford to retain one.

Despite these concerns, ADR is becoming more popular on campus as a strategy for dispute resolution. (For an overview of the use of ADR in employment decisions, see Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, "Specialized ADR to Settle Faculty Employment Disputes," 28 *J. Coll. & Univ. Law* 129 (2001).)

**2.3.2. Types of ADR.** ADR may use internal processes, external third parties, or both. Internal processes include grievance procedures, in which a student or employee may challenge a decision by invoking a right, usually created by the employee's contract, state law, or a student code of conduct, to have the decision reviewed by an individual or small group who were not involved in the challenged decision. Grievance procedures, particularly those included in collective bargaining agreements, may have multiple steps, and may culminate either in a final decision by a high-level administrator or a neutral individual who is not an employee of the institution. (For a helpful discussion of how to draft grievance procedures that may serve as an alternative to litigation, see Ann H. Franke, "Grievance Procedures: Solving Campus Employment Problems Out of Court," *Employment Issues* (United Educators Insurance Risk Retention Group, Inc., February 1998).

Depending upon the language of any contracts with employees or relevant state law, the fact finding of a grievance panel may be viewed by a reviewing court as binding on the institution and the grievant. For example, in *Murphy v. Duquesne University of the Holy Ghost*, 777 A.2d 418 (Pa. 2001), a tenure revocation case discussed in Section 6.7.3, the court ruled that a faculty panel's fact finding was binding on the plaintiff, and he could not relitigate the issue of whether the institution had demonstrated that the misconduct met the contractual grounds for termination. On the other hand, if a faculty grievance panel recommends a resolution to the dispute that involves compromise or other ADR mechanisms, a court may not allow the plaintiff to argue that this finding has preclusive effect in a breach of contract claim, as in *Breiner-Sanders v. Georgetown University*, 118 F. Supp. 2d 1 (D.D.C. 1999). In that case, the court ruled that the grievance panel had not applied contract law principles in its hearing of her grievance, and thus the panel's decision, which was favorable to the faculty member, did not have preclusive effect and did not support a motion for summary judgment on behalf of the faculty member.

The inclusion of a grievance procedure in a faculty or staff employee handbook may convince a court that a plaintiff who has not exhausted his internal remedies may not pursue contractual remedies in court. For example, in *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998), an assistant professor who was denied tenure by Northeastern University brought breach of contract and discrimination claims against the university. With respect to Brennan's contract claims, the court ruled that Massachusetts law required him to exhaust his contractual remedies before bringing suit. However, the court allowed his discrimination claims to go forward because the handbook did not provide a remedy for the denial of tenure.

Even if there is no formal grievance process, in situations where faculty are challenging negative employment decisions (such as discipline or termination), a panel of peers may be convened to consider whether there are sufficient grounds for the challenged employment decision. (See, for example, the AAUP's "Recommended Institutional Regulations on Academic Freedom and Tenure," available at <http://www.aaup.org>.) The outcome of the peer panel's deliberations is usually considered a recommendation, which the administration may

accept, modify, or reject. In addition, student judicial boards are a form of peer review of student charges of misconduct, although appeals are usually ultimately decided by a high-level administrator. Finally, ombudspersons, who are neutral employees of the institution who have the responsibility to try to resolve disputes informally and confidentially,<sup>11</sup> are appearing with more frequency on campus.<sup>12</sup>

ADR processes involving individuals external to the institution include mediation, in which a neutral third party is engaged to work with the parties to the dispute in an effort to resolve the conflict. The mediator may meet with the parties together to attempt to resolve the dispute, or may meet with each party separately, hearing their concerns and helping to craft a resolution. The mediator has no authority to decide the outcome, but may provide suggestions to the parties after listening to each party's concerns. All parties to the dispute must agree with the outcome in order for the process to be final.

Although mediation can be very successful in resolving disputes between employees or even between students (such as roommate disputes), there is one area in which mediation may not be a wise choice. The Office of Civil Rights (OCR), in its Title IX enforcement guidance for the sexual harassment of students, states that the Title IX regulations require schools and colleges to adopt grievance procedures. The Guidance goes on to say, however:

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis . . . (*Sexual Harassment Guidance* 1977, revised in 1997, available at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html>).

In addition to concerns about the alleged victim's right to pursue a more formal grievance process, mediation of harassment or assault claims may mean that no formal record is made of the harassment or assault claim or its resolution, which could pose a problem if an alleged victim subsequently filed a

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<sup>11</sup>For a case protecting confidential information given to a campus ombudsperson from discovery during related litigation, see *Garstang v. Superior Court of Los Angeles County*, 46 Cal. Rptr. 2d 84 (Cal. Ct. App. 1995), decided on state constitutional grounds. In *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), the court created a privilege protecting communications in an informal mediation session held by an ombudsperson. See also Jeffrey Sun, "University Officials as Administrators and Mediators: The Dual Role Conflict and Confidentiality Problems," 1999 *B.Y.U. Educ. & L.J.* 19 (1999).

<sup>12</sup>For information about ombuds at colleges and universities, see the Web site of the University and College Ombuds Association (UCOA) at <http://www.ucoa.org>.

lawsuit against the college or its staff. (For a thorough discussion of the use of mediation at institutions of higher education, see Melinda W. Grier, “A Legal Perspective of Mediation,” Annual Conference of the National Association of College and University Attorneys, available at <http://www.nacua.org>.)

Another form of ADR, used frequently at campuses where employees are represented by unions, is arbitration. An arbitrator, a third-party neutral with experience in employment issues, is brought in to act as a “private judge.” The parties present their concerns to the arbitrator at a hearing, in which the employer has the burden of proving that the termination or discipline was justified. Arbitration is also used to resolve disputes over the meaning of contract language; in that case, the party disputing the application of the contract language to a problem (usually, but not always, the union), has the burden of demonstrating that the contract has been breached. Under a trio of U.S. Supreme Court cases called the “Steelworkers Trilogy,”<sup>13</sup> arbitration decisions are not reviewable by courts unless the arbitrator has exceeded the authority given to him or her by the contract, the arbitrator has engaged in misconduct, or the outcome of the arbitration violates some important principle of public policy.

ADR systems in collective bargaining agreements are subject to the negotiation process, and typically state that all claims arising under the contract will be subject to a grievance procedure that culminates in arbitration. Arbitration may be advisory to the parties, or they may agree to be bound by the decision of the arbitrator (called “binding arbitration”). At some colleges and universities, nonunionized employees may be asked to sign agreements to arbitrate all employment-related disputes, rather than filing lawsuits. These “mandatory arbitration agreements” have sustained vigorous court challenges, particularly by plaintiffs attempting to litigate employment discrimination claims. The legal standards for enforcing an arbitration agreement when employment discrimination claims are brought by unionized employees are discussed in Section 4.5.5 of this book.

If the employees are not unionized, however, the standards for enforcing arbitration clauses are somewhat less strict. Beginning with a decision by the U.S. Supreme Court in *Gilmer v. Interstate-Johnson Lane*, 500 U.S. 20 (1991), courts have agreed to enforce arbitration clauses in individual employment contracts. *Gilmer*, a registered securities representative, had signed a contract that required him to submit all employment disputes to compulsory arbitration. When he challenged his discharge by filing an age discrimination claim, his employer filed a motion to compel arbitration, which the trial court upheld. The appellate court reversed, but the U.S. Supreme Court sided with the trial court, ruling that the language of the contract must be enforced.

In several cases decided after *Gilmer*, trial courts have enforced arbitration clauses in situations where plaintiffs have filed employment discrimination claims with an administrative agency or in court. Although the Federal

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<sup>13</sup>*Steelworkers v American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); and *Steelworkers v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960).

Arbitration Act (9 U.S.C. § 1 *et seq.*) requires courts, in general, to enforce private arbitration agreements, language in the Act has been interpreted to preclude arbitration of employment contracts. Section I of the Act exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The U.S. Supreme Court has not interpreted the meaning of “class of workers engaged in foreign or interstate commerce,” and the conclusions of federal appellate courts regarding the reach of this language have been inconsistent. Some courts have interpreted the exclusion narrowly and applied it only to those workers actually engaged in the movement of goods in interstate commerce (see, for example, *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985)); others have defined the exemption to include all employment contracts (see, for example, *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991)).<sup>14</sup> While the Supreme Court in *Gilmer* did not expressly address this language, it did state that the Federal Arbitration Act favors arbitration agreements and that they should be upheld whenever appropriate.

Courts typically use contract law principles to determine whether an employee’s agreement to use arbitration rather than to litigate is binding. In *Futrelle v. Duke University*, 488 S.E.2d 635 (N.C. App. 1997), a state appellate court dismissed a medical librarian’s breach of contract, wrongful discharge, and defamation claims because she had used the university’s internal grievance procedure, which culminated in arbitration. The plaintiff had prevailed at arbitration and Duke gave her a check for the damages the university had been ordered to pay by the arbitrator. The court ruled that, because the plaintiff had cashed the check, which was in satisfaction of the arbitration award, she was precluded from initiating litigation about the same issues that had been determined through arbitration.

**2.3.3. Applications to colleges and universities.** Litigation involving ADR in colleges and universities has focused primarily on arbitration and on these two issues: What issues may the arbitrator decide, and under what circumstances may the arbitration award be overturned by a court?

Although faculty at a number of unionized colleges and universities are covered by collective bargaining agreements that provide for arbitral review of most employment decisions, many agreements do not permit the arbitrator to grant or deny tenure, although they may allow the arbitrator to determine the procedural compliance or fairness of the tenure decision. If, for example, the agreement does not permit the arbitrator to substitute his or her judgment concerning the merits of the tenure decision, a court will overturn an award in which the arbitrator does his or her own review of the grievant’s qualifications. For example, in *California Faculty Association v. Superior Court of Santa Clara County*, 75 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998), a state appellate court affirmed a trial

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<sup>14</sup>Cases related to the enforcement of arbitration clauses are collected in William G. Phelps, Annot., “Preemption by Federal Arbitration Act (9 U.S.C.S. § 1 *et seq.*) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements,” 108 A.L.R. Fed. 179.

court's decision vacating an arbitration award and remanding the case for another hearing before a different arbitrator. The arbitrator whose decision was challenged had conducted his own review of the scholarly achievements of a grievant who had been denied tenure, and had awarded her tenure. The trial court ruled that the arbitrator had exceeded his authority under the collective bargaining agreement, because the standard in the collective bargaining agreement for overturning a negative tenure decision required the arbitrator to find that the president could not have made a "reasoned judgment" in making the negative decision, and that the arbitrator could state with certainty that the grievant would have been granted tenure otherwise. In this case, the grievant had not gotten positive recommendations at various stages of the tenure decision process, and the arbitrator based his decision on testimony from witnesses who supported the grievant's quest for tenure, rather than on a review of the record that the president had used to reach his decision. Finding that the arbitrator had substituted his judgment for the president's, the court affirmed the trial court's remedy.

Grievants challenging a tenure denial may attempt to state claims of procedural noncompliance that actually attack the substance of the tenure decision. For example, in *AAUP, University of Toledo Chapter v. University of Toledo*, 797 N.E.2d 583 (Oh. Ct. Cmn. Pleas 2003), an assistant professor denied tenure challenged the negative decision as a procedural violation, stating that the determinations of the department chair and the dean that the professor had produced an insufficient number of publications violated the contract's procedural requirements. The arbitrator ruled that the agreement had not been violated and found for the university, and the plaintiff appealed the award to a state trial court. The court upheld the arbitrator's award, stating that the contract's procedural requirements afforded the chair and the dean the latitude to determine what weight to give a tenure candidate's publications compared with teaching and service, and that the arbitrator did not exceed his authority by interpreting the contract in the university's favor.

The decision of an institution to limit arbitration of employment decisions to procedural issues rather than to the merits of the decision may persuade a court to allow a plaintiff to litigate the merits of the decision in court—at least when discrimination is alleged. In *Brennan v. King*, cited above, a faculty handbook provided for arbitration of procedural issues in tenure disputes, but specifically provided that the arbitrator was without the power to grant or deny tenure. Because the arbitration procedure did not provide "a forum for the entire resolution" of the candidate's tenure dispute, said the court, the plaintiff did not have to exhaust his arbitral remedies prior to bring a lawsuit alleging discrimination.

With respect to judicial review of an arbitration award by a state court, Pennsylvania's highest court has established a two-part test for such review. First, the issues as defined by the parties and the arbitrator must be within the terms of the collective bargaining agreement. Second, the arbitrator's award must be rationally derived from the collective bargaining agreement (*State System of Higher Education v. State College and University Professional Association*, 743 A.2d 405 (Pa. 1999)).

If an arbitration award is challenged on public policy grounds, the party seeking to overturn the award must demonstrate that the award is contrary to law or some recognized source of public policy. For example, in *Illinois Nurses Association v. Board of Trustees of the University of Illinois*, 741 N.E.2d 1014 (Ct. App. Ill. 2000), an arbitrator had reinstated a nurse who had been fired for actions that endangered patient safety. An arbitrator reinstated her because he ruled that the hospital had not proven one of the charges, and that her long seniority and otherwise good work record mitigated the severity of her misconduct. The court refused to enforce the arbitrator's award, ruling that the nurse's actions had threatened patient safety and thus her reinstatement violated public policy with respect to patient care.

Faculty and administrators should carefully weigh the benefits and challenges of ADR systems when considering whether to implement such innovations as mediation, arbitration, or the creation of a campus ombuds. Entries in the Selected Annotated Bibliography for this section provide additional information and guidelines on ADR systems in general and their applications to institutions of higher education.

## **Sec. 2.4. Legal Services**

**2.4.1. Organizational arrangements for delivery of legal services.** There are numerous organizational arrangements by which postsecondary institutions can obtain legal counsel. (See generally F. B. Manley & Co., *Provision of Legal Services: A Survey of NACUA Primary Representatives* (National Association of College and University Attorneys, 1992).) Debate continues in the academic community concerning what arrangements are most effective and cost-efficient. The issues, which are especially visible in private institutions, range from escalating legal costs, to the appropriate balance between in-house and outside counsel, to new roles and fee schedules for outside counsel, to the use of legal consultants for staff training and other special projects. (See generally G. Blumentstyk, "Shake-Ups in Campus Law Offices," *Chron. Higher Educ.*, June 8, 1994, A27.)

The arrangements for public postsecondary institutions often differ from those for private institutions. The latter have a relatively free hand in deciding whom to employ or retain as counsel and how to utilize their services, and will frequently have in-house counsel and campus-based services. Public institutions, on the other hand, may be served by the state attorney general's office or, for some community colleges, by a county or city attorney's office, rather than or in addition to in-house counsel. Other public institutions that are part of a statewide system may be served by system attorneys appointed by the system's governing authority. In either case, working relationships may vary with the state and the campus, and legal counsel may be located at an off-campus site and may serve other campuses as well. In general, administrators in such situations should seek to have services centralized in one or a small number of assistant attorneys general or other government counsel who devote a considerable portion of their time to the particular campus and become thoroughly familiar with its operations.



A public postsecondary institution's authority to obtain other counsel to supplement or displace that furnished by the state attorney general's office may be limited by the state constitution or state statutes. Where such restrictions have existed by law or tradition, public institutions have sometimes challenged the existing arrangements by hiring their own counsel to represent the institution. Most courts that have ruled on such challenges acknowledged public institutions' authority to hire counsel, usually implying this authority from the express authority to manage and operate the institution.<sup>15</sup>

In *Board of Trustees of the University of Illinois v. Barrett*, 46 N.E.2d 951 (Ill. 1943), for example, the board of trustees and two employees it had hired as legal counsel (Hodges and Johnson) sued the state attorney general and the state auditor of public accounts. The plaintiffs sought a judicial affirmation of the board's authority to employ independent legal counsel, as well as an order precluding the attorney general from interfering with Hodges and Johnson and an order compelling the state to pay the compensation due them. In defense, the attorney general asserted that, by virtue of his office, he was sole legal counsel for the university and its board of trustees, and that the board must obtain the attorney general's approval before hiring additional counsel. Since he did not approve of the decision to hire Hodges or Johnson, he had sought their resignations and directed the auditor of public accounts to refrain from paying their salaries.

The Supreme Court of Illinois decided that the board, a "statutory" institution (see Section 12.2.2), had authority to employ independent legal counsel without the attorney general's approval as long as the arrangement complied with the provisions of the statute creating the university and with the legislature's appropriations for its operation and management. Regarding the attorney general's powers, the court concluded that neither the state constitution nor state statutes granted the attorney general express authority to represent public institutions. Thus, the university had

the undoubted right to employ its own counsel or engage the services of any other employees it may deem necessary or proper. . . . This power is, however, always subject to the restriction that when such faculty members or other employees are to be paid from State funds, they must be within the classifications for which funds have been appropriated and are available [46 N.E.2d at 963].

Since the legislature had not appropriated funds for Hodges and Johnson, the court refused to compel the auditor to pay their salaries. Thus, although the court recognized the board's authority to hire legal counsel, the court also recognized that the legislature had not provided them the financial means to do so.

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<sup>15</sup>Questions may also arise on occasion concerning the discharge of, rather than the initial employment of, institutional counsel. For illustrative cases on a private employer's discharge of in-house counsel, see Damien Edward Okasinski, Annot., "Attorneys—Wrongful Discharge of the In-House Counsel," 16 A.L.R.5th 239; and for a good example of limitations on the employer's authority to discharge an attorney employee, see *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. Supreme Ct. 1994).

Following the *Barrett* decision, three other state courts determined that other public institutions had authority to hire independent legal counsel. Cases from Oklahoma and New Jersey concerned statutory institutions; a case from South Dakota concerned a “constitutional” governing board (see Section 12.2.3). In the Oklahoma case, a public institution was granted authority to hire independent counsel to secure an injunction to prevent individuals from fishing on a college-owned lake (*Blair v. Board of Regents for the Oklahoma Agricultural and Mechanical Colleges*, 421 P.2d 228 (Okla. 1966)). In the New Jersey case, *Frank Briscoe Co., Inc. v. Rutgers, the State University*, 327 A.2d 687 (N.J. Super Ct. Law Div. 1974), a breach of contract case defended by the state attorney general, the court determined (despite the attorney general’s suggestions to the contrary) that Rutgers had a right to sue and be sued. For purposes of this issue, the court permitted Rutgers’s own counsel to participate in the litigation “because the interests of a public university may be different from those of a state and thus need separate representation from the Attorney General.”

In the South Dakota case, concerning a constitutional board, *Board of Regents v. Carter*, 228 N.W.2d 621 (S.D. 1975), the court reached a similar result. It authorized the board to hire independent counsel to represent its interests in a lawsuit challenging its definition of a proper employee bargaining unit. The attorney general had challenged the board of regents’ authority to do so. He contended that he was the sole legal counsel for the state and that the state constitution did not grant the regents power to institute its own lawsuits or hire its own counsel. Accordingly, he claimed that any legislative attempt to grant the regents this power violated the provisions of the state constitution creating the board and granting the attorney general executive powers. In disagreeing, the court relied on the language of the state constitution granting the regents authority to control South Dakota’s public educational institutions, subject to rules and restrictions promulgated by the legislature. (This right of control and the legislature’s power to pass rules and restrictions was reaffirmed and explicated in *South Dakota Board of Regents v. Meierhenry*, 351 N.W.2d 450 (S.D. 1984).) Here the legislature had promulgated a statute granting the regents power “to sue and to be sued.” The court held that this statute was constitutional and that, in order for the regents to exercise their right “to sue and to be sued,” the regents needed the authority to hire independent counsel free from the control of the attorney general.

A later case, *State of West Virginia ex rel. Darrell V. McGraw v. Burton*, 569 S.E.2d 99 (W. Va. 2002), addresses these issues about employing counsel on a broader scale, with a somewhat better result for the state’s attorney general. In this case, West Virginia’s attorney general challenged the authority of all executive branch agencies and related state entities to employ independent counsel without the attorney general’s approval, and he asserted that all state statutes permitting such employment of counsel were unconstitutional infringements on the attorney general’s constitutional powers. The state’s institutions of higher education were included in this challenge. In opposition, the state legislature asserted its constitutional authority to prescribe duties for the executive branch and to allocate funds for executive agencies, including the attorney general’s

office. The executive agencies and related entities asserted their need for specialized counsel to assist them with their particular areas of concern.

The court acknowledged the attorney general's broad constitutional powers and sought to balance them against the legislature's powers and the executive agencies' need for diverse and specialized legal services. Interpreting the state constitution, the court determined that the attorney general, as chief legal officer of the state, was required to address legal issues facing the state and its agencies while overseeing and maintaining consistent legal policies across agencies and governing bodies. Under separation-of-powers principles, the legislature could not interfere with the "inherent duties" of the attorney general's office and was obligated to fund the office appropriately. However, "in light of long-established statutes, practice and precedent, and the evolving needs of modern state governments," the executive agencies and related entities—including the state's higher education institutions—could continue to employ their own attorneys on certain conditions. The attorney general must be the attorney-of-record whenever a state agency is in litigation in order to uphold the constitutional duties of the office. In addition, the attorney general must continue to have the authority to intervene in litigation on behalf of the state and state's interests in order to uphold state interests and maintain consistent legal positions statewide.

Many colleges and universities now employ their own in-house staff counsel. Such an arrangement has the advantage of providing daily coordinated services of resident counsel acclimated to the particular needs and problems of the institution. Though staff attorneys can become specialists in postsecondary education law, they normally will not have the time or exposure to become expert in all the specialty areas (such as labor law, tax law, patent law, or litigation) with which institutions must deal. Thus, these institutions may sometimes retain private law firms for special problems. Other institutions, large and small, may arrange for all their legal services to be provided by one or more private law firms. This arrangement has the advantage of increasing the number of attorneys with particular expertise available for the variety of problems that confront institutions. A potential disadvantage is that no one attorney will be conversant with the full range of the institution's needs and problems or be on call daily for early participation in administrative decision making. Administrators of institutions depending on private firms may thus want to ensure that at least one lawyer is generally familiar with and involved in the institution's affairs and regularly available for consultation even on routine matters.

Whatever the organizational arrangement, and regardless of whether the institution is public or private, counsel and administrators should have clear understandings of who is the "client" to whom counsel is responsible. Generally the client is the institution's board of trustees or, for some public institutions, the state system's board of trustees or regents—the entity in which operating authority is vested (see Section 3.2.1). Counsel generally advises or represents the president, chancellor, or other officers or administrators only insofar as they are exercising authority that derives from the board of trustees. If in certain circumstances institutional personnel or institutional committees have personal interests or legal needs that may be inconsistent with those of the institution,

they may have to obtain their own separate legal assistance. Depending on the situation and on institutional policy, the institution and its counsel may or may not arrange for or help them obtain such separate legal representation.

**2.4.2. *Treatment law and preventive law.*** With each of the organizational arrangements mentioned, serious consideration must be given to the particular functions that counsel will perform and to the relationships that will be fostered between counsel and administrators. Broadly stated, counsel's role is to identify and define actual or potential legal problems and provide options for resolving or preventing them. There are two basic, and different, ways to fulfill this role: through treatment law or through preventive law. To analogize to another profession, the goal of treatment law is to cure legal diseases, while the goal of preventive law is to maintain legal health. Under either approach, counsel will be guided not only by legal considerations and institutional goals and policies, but also by the ethical standards of the legal profession that shape the responsibilities of individual practitioners to their clients and the public (see subsection 2.4.3 below; and see generally G. Hazard, Jr., "Perspective: Ethical Dilemmas of Corporate Counsel," 46 *Emory L.J.* 1011 (1997); and S. Weaver, "Perspective: Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis," 46 *Emory L.J.* 1023 (1997).)

Treatment law is the more traditional of the two practice approaches. It focuses on actual challenges to institutional practices and on affirmative legal steps by the institution to protect its interests when they are threatened. When suit is filed against the institution or litigation is threatened; when a government agency cites the institution for noncompliance with its regulations; when the institution needs formal permission of a government agency to undertake a proposed course of action; when the institution wishes to sue some other party—then treatment law operates. Counsel seeks to resolve the specific legal problem at hand. Treatment law today is indispensable to the functioning of a postsecondary institution, and virtually all institutions have such legal service.

Preventive law, in contrast, focuses on initiatives that the institution can take before actual legal disputes arise. Preventive law involves administrators and counsel in a continual cooperative process of setting the legal and policy parameters within which the institution will operate to forestall or minimize legal disputes. Counsel identifies the legal consequences of proposed actions; pinpoints the range of alternatives for avoiding problems and the legal risks of each alternative; sensitizes administrators and the campus community to legal issues and the importance of recognizing them early; determines the impact of new or proposed laws and regulations, and new court decisions, on institutional operations; and helps devise internal processes that support constructive relationships among members of the campus community. Prior to the 1980s, preventive law was not a general practice of postsecondary institutions. But this approach became increasingly valuable as the presence of law on the campus increased, and acceptance of preventive law within postsecondary education grew substantially. Today preventive law is as indispensable as treatment law and provides the more constructive overall posture from which to conduct institutional legal affairs.

Institutions using or considering the use of preventive law face some difficult questions. To what extent will administrators and counsel give priority to the practice of preventive law? Which institutional administrators will have direct access to counsel? Will counsel advise only administrators, or will he or she also be available to recognized faculty or student organizations or committees, or perhaps to other members of the university community on certain matters? What working arrangements will ensure that administrators are alert to incipient legal problems and that counsel is involved in institutional decision making at an early stage? What degree of autonomy will counsel have to influence institutional decision making, and what authority will counsel have to halt legally unwise institutional action?

The following eight steps are suggested for administrators and counsel seeking to implement a preventive law system:<sup>16</sup>

1. *Review the institution's current organizational arrangements for obtaining legal counsel and implementing legal advice, seeking to maximize their effectiveness.* Evaluate the legal needs of the various campus officers, administrators, and committees. Determine whether the needs are best met by in-house counsel, outside counsel, or some combination of the two. If there is in-house counsel, seek to assure that the office has adequate staff and resources to practice effective treatment law, *as well as to initiate and maintain preventive law measures* such as those discussed following. Be sure that counsel has access to key officers, administrators, and faculty leaders who will serve as legal planning partners. Such a review can be effective, of course, only if key institutional leaders understand the role and value of legal counsel. A portion of the review process should therefore be devoted to discussions designed to promote such understanding and a widely shared commitment to provide suitable resources for legal planning.

For small institutions that may not now have an institutional legal counsel, the focus should be on evaluating the institutional need for counsel and for preventive legal planning; and then on developing a strategy employing in-house counsel (at least part time) or executing a retainer agreement with a law firm.

2. *Encourage strong working relationships among the institution's attorneys, administrators, and faculty, cultivating conditions within which they can cooperate with one another in preventive planning.* Preventive law will be effective only if the leadership is committed to its practice, starting with the president or chancellor and his or her top executive officers, including the general counsel. The institution's leadership team thus should not only react to crisis situations and other pressing concerns, but also should work cooperatively and creatively on strategic and preventive planning. Shared responsibility and accountability

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<sup>16</sup>These eight steps are adapted from Kathleen Curry Santora & William Kaplin, "Preventive Law: How Colleges Can Avoid Legal Problems," *Chron. Higher Educ.*, April 18, 2003, B20 (copyright ©2004 by Chronicle of Higher Education, Inc.), which in turn was adapted in part from a set of seven steps published in Section 1.7.2 of the 1995 third edition of this book.

among the members of the leadership team, as well as other institutional officers and committees, is essential to preventive planning.

Since the dividing line between the administrator's and the lawyer's functions is not always self-evident, roles should be developed through mutual interchange between the two sets of professionals. While considerable flexibility is possible, institutions should be careful to maintain a distinction between the two roles. The purpose of preventive law is not to make the administrator into a lawyer or the lawyer into an administrator. It is the lawyer's job to resolve doubts about the interpretation of statutes, regulations, and court decisions; to stay informed of legal developments and predict the directions in which law is evolving; and to suggest legal options and advise on their relative effectiveness in achieving the institution's goals. In contrast, it is the administrator's job (and that of the board of trustees) to stay informed of developments in the theory and practice of administration; to devise policy options within the constraints imposed by law and determine their relative effectiveness in achieving institutional goals; and ultimately, at the appropriate level of the institutional hierarchy, to make the policy decisions that give life to the institution.

Alleviating administrators' and faculty members' concerns about *personal* legal liability will also further cooperative and creative working relationships. Indemnity arrangements and suitable insurance coverages are key strategies here, requiring close cooperation between counsel and the institution's risk manager. Appropriate training (discussed in points 3 and 4 following) can also contribute substantially to alleviating concerns.

**3.** *Arrange training for administrators, staff, and faculty members that focuses on the legal aspects of their professional responsibilities and the legal implications of their actions; be prepared to commit adequate resources to support such training; and also provide similar training for student leaders.* Regular and consistent training is a critical aspect of preventive planning. Many counsel at prevention-oriented institutions now hold campus workshops for administrators, faculty, and staff on issues such as sexual harassment, disabilities, records management, public safety, or entrepreneurial activities. They also provide timely legal information through Web sites, newsletters, and memos to clients.

Management workshops for new deans and department chairs, or periodic workshops for middle managers, or counseling sessions for the staff of a particular office would be examples of such training. The institution's legal staff may conduct training sessions, or they may be provided on or off site by third parties. In conjunction with such training, the institution should ensure the availability of relevant and up-to-date legal information for administrators, through distribution of one or more of the newsletters and periodicals available from outside sources, or through legal counsel memos crafted to the particular circumstances of the institution.

Many institutions also provide training for student groups, such as student resident advisors in residence halls, student members of judicial boards, editors of student newspapers and journals, students who conduct freshman and parent

orientation, and students who run summer conference programs and summer camps.

Remember that such training and information dissemination requires resources. These activities are not likely to occur if, due to inadequate resources, the institutional counsel is barely keeping pace with curing legal problems. An additional allocation of resources may therefore be necessary. In addition, seek to conserve resources by taking advantage of opportunities to disseminate information expeditiously through the use of technology. Also take advantage of the various continuing education programs in higher education law and policy that are held each year in locations throughout the nation.

*4. Provide additional training for the institution's various compliance officers, who are partners in identifying early warning signs of litigation, and empower them in their relationships with counsel.* Additional training should be available periodically for compliance officers, focusing on the legal aspects of their particular areas of responsibility. Counsel should also work closely with compliance officers to help them to identify early warning signs of litigation or compliance complaints from government agencies. The relationship between compliance officers and counsel should be one that encourages cooperation and coordination in the preventive law process.

Compliance officers have traditionally included those who ensure legal compliance in areas such as equal employment opportunity, environmental safety, employee health and safety standards, and human subjects research. But many other managers also have substantial responsibility for measuring compliance with federal, state, or local regulations—the disability services office, the campus security office, the registrar, the financial aid office, and human resources officers, among others. All should be included.

Training for compliance officers can help instill high levels of ethical commitment to compliance, assist compliance officers in understanding the technical and specialized legal aspects of their work, and help develop arrangements for obtaining specialized legal interpretations from outside counsel.

*5. Perform regular audits of the legal health of the institution and develop an early warning system to identify legal risks.* A legal audit is a legal “checkup” to determine the legal “health” of the institution. A complete audit would include a survey of every office and function in the institution. For each office and function, the lawyer-administrator team would develop the information and analysis necessary to determine whether that office or function is in compliance with the full range of legal constraints to which it is subject.

Attorneys should work closely with the institution's compliance officers, the institution's risk manager and risk management teams or committees (see Section 2.5.1 below), and other administrators and committees, to assess the institution's legal health by analyzing whether key campus offices are in compliance with legal requirements. While this can be a daunting task due to the myriad statutory, regulatory, and court-imposed requirements that now apply to higher

education institutions, and the ever-increasing complexity of relationships with third parties, the exercise is an essential first step to preventive planning. For public institutions in states with strong open-records laws, this function must be undertaken with care, since such audits could be subject to disclosure to regulatory or law enforcement authorities.

To supplement legal audits, develop an early warning system that will apprise counsel and administrators of potential legal problems in their incipency. The early warning system should be based on a list of situations that are likely to create significant legal risk for the institution. Such a list might include the following: an administrator is revising a standard form contract used by the institution or creating a new standard form contract to cover a type of transaction for which the institution has not previously used such a contract; administrators are reviewing the institution's code of student conduct, student bill of rights, or similar documents; a school or department is seeking to terminate a faculty member's tenure; a committee is drafting or modifying an affirmative action plan; administrators are preparing policies to implement a new set of federal administrative regulations; or administrators are proposing a new security system for the campus or temporary security measures for a particular emergency. Under an early warning system, all such circumstances, or others that the institution may specify, would trigger a consultative process between administrator and counsel aimed at resolving legal problems before they erupt into disputes.

Whenever the institution is sued, or administrators or faculty members are sued for matters concerning their institutional responsibilities, the institution should also perform a "post-litigation audit" after the lawsuit is resolved, seeking to determine how similar suits could be prevented in the future. Similarly, whenever there is a crisis or tragedy on campus, the institution should perform a "post-crisis audit" after the crisis ends, seeking to determine how such a crisis and its attendant legal risks could be prevented in the future.

6. *Use the information gathered through the legal compliance audits, the early warning system, and the post-litigation and post-crisis audits to engage the campus community in a continuing course of legal planning.* Legal planning is the process by which the institution determines the extent of legal risk exposure it is willing to assume in particular situations, and develops strategies for avoiding or resolving legal risks it is not willing to assume. In addition to legal considerations, legal planning encompasses ethical, administrative, and financial considerations, as well as the institution's policy preferences and priorities. Sometimes the law may be in tension with institutional policy; legal planners then may seek to devise alternative means for achieving a particular policy objective consistent with the law. Often, however, the law will be consistent with institutional policy; legal planners then may use the law to support and strengthen the institution's policy choices and may, indeed, implement initiatives more extensive than the law would require. Successful legal planning thus depends on a careful sorting out and interrelating of legal and policy issues, which in turn depends upon teamwork between administrators and counsel. (Regarding the relationship between law and policy, see Section 1.7.) Teamwork



between administrator and lawyer is therefore a critical ingredient in legal planning. Sensitivity to the authority structure of the institution (see Section 3.1) and its established decision-making processes are also critical ingredients, so that legal planning decisions are made at the appropriate levels of authority and according to the prescribed processes.

*7. For the inevitable percentage of potential legal problems that do develop into actual disputes, establish internal grievance mechanisms, including nonadversarial processes such as mediation, to help forestall formal legal action.* The goal is to have accessible internal mechanisms for the collegial and constructive resolution of disputes among members of the campus community. Such mechanisms may also forestall resort to litigation and provide a potential alternative avenue for settlement even after litigation is under way. Such mechanisms—ranging from informal consultations to mediation to formal hearing panels—may be adapted to the particular characteristics and needs of academic institutions. In addition, institutions themselves must set a good example in the way they handle their own claims, and should seek alternative means of resolving disputes so as to avoid lawsuits when feasible and maintain rather than disrupt relationships when possible.

Whatever techniques are adopted should be generally available to students, faculty, and staff members who have complaints concerning actions taken against them by other members of the academic community. Some summary procedure should be devised for dismissing complaints that are frivolous or that contest general academic policy rather than a particular action that has harmed the complainant. Not every dispute, of course, is amenable to internal solution, since many disputes involve outside parties (such as business firms, government agencies, or professional associations). But for disputes among members of the campus community, grievance mechanisms provide an on-campus forum that can be attuned to the particular characteristics of academic institutions.

*8. Encourage campus leaders to work together to develop a campus culture that encourages, values, and takes particular satisfaction in the constructive resolution of conflict.* Such a campus culture is built on the basic values of fairness, respect, collegiality, inclusiveness, and civility. Promoting such values through community building is thus a critical element of any plan for constructive dispute resolution and a critical adjunct to preventive law planning. When we build community, we naturally have a less litigious and legalistic environment. We enable members of the campus community to resolve disputes in a manner that maintains rather than destroys relationships. The campus leadership team, including the institution's legal counsel, sets the tone and helps to create this type of environment. Everyone has a stake in the success of the community.

Legal disputes are expensive, not only in terms of dollars and cents, but also in terms of the amount of time spent and the emotional costs to all those involved. Lawsuits can divert higher education from its primary mission of teaching, research, and service. But by following the steps outlined above, institutions can avoid such negative consequences and achieve positive outcomes

instead. The resources that college and university leaders invest in preventive legal planning and in community building will be well worth the price if the result is an institution that can focus constructively on fulfilling its mission and preserving its values.

**2.4.3. Ethical issues.** In their professional dealings with clients, attorneys are subject not only to legal but also to ethical standards. Ethical standards are embodied in the ethics (or “professional responsibility”) codes and the rules of court of the various states. There are ethical rules, for instance, concerning attorney conflicts of interest. These rules have particular applicability in situations where counsel represents more than one party and these parties’ legal claims or objectives may be opposed to one another. For example, a university and several of its administrators may be joined as defendants in the same lawsuit, or may all be likely defendants in a potential lawsuit, and the defenses that one administrator may seek to assert are in conflict with those of another. Counsel for the university then must decide whether the situation presents an actual or a potential conflict of interest, requiring that other attorneys not associated with the original counsel represent one or more of the individual defendants.

Another example of ethical standards concerns the confidentiality of communications between attorneys and their clients. (For a discussion of the attorney-client privilege, see Section 2.2.3.3.) But this privilege does not apply to all communications between university counsel and university employees. In *Ross v. Medical University of South Carolina*, 453 S.E.2d 880 (S.C. 1994), for example, the South Carolina Supreme Court refused to apply the privilege to certain *ex parte* communications between the university’s general counsel and a university vice president in the context of an internal grievance proceeding. The court determined that the vice president, in the particular circumstances of the grievance proceeding, was not a “client” of the general counsel, and that the general counsel was not an “attorney” for the vice president but rather for another “client” (the university itself). Thus, the necessary preconditions for assertion of the privilege did not exist, and the university was required to divulge relevant information concerning the communications between the counsel and the vice president.

## **Sec. 2.5. Institutional Management of Liability Risk**

**2.5.1. Overview and suggestions.** The risk of financial liability for injury to another party remains a major concern for postsecondary institutions as well as their officers, faculties, and other personnel. This section examines various methods for managing such risk exposure and thus minimizing the detrimental effects of liability on the institution and members of the campus community. Risk management may be advisable not only because it helps stabilize the institution’s financial condition over time but also because it can improve the morale and performance of institutional personnel by alleviating their concerns about potential personal liability. In addition, risk management can implement the institution’s humanistic concern for minimizing the potential

for injuries to innocent third parties resulting from its operations, and for compensating any such injuries that do occur.

The major methods of risk management may be called risk avoidance, risk control, risk transfer, and risk retention. (See generally J. Adams & J. Hall, “Legal Liabilities in Higher Education: Their Scope and Management” (Part II), 3 *J. Coll. & Univ. Law* 335, 360–69 (1976).) For risk transfer, there are three sub-categories of methods: liability insurance, indemnity (or “hold-harmless”) agreements, and releases (or waivers).

Institutions should find it helpful to develop these various methods of risk management, and strategies for their implementation, into a campus risk management plan. A key component of any such plan is a professional risk manager or an office of risk management that provides a focal point for the institution’s risk management efforts. The institution’s legal counsel should also be involved in all phases of risk management. Another helpful organizational device would be an institution-wide risk management team or committee, which may also include school-level or division-level coordinators or teams. Risk assessment should be an essential aspect of any risk management plan. For some institutions, external consultants may be an important source of assistance in undertaking a comprehensive assessment of institutional risks or periodically updating this assessment. Risk assessment teams from within various sectors of the institution may also be helpful. (For additional guidance and resources, see the Web site of the University Risk Management and Insurance Association, at <http://www.URMIA.org>.)

**2.5.2. Risk avoidance and risk control.** The most certain method for managing a known exposure to liability is risk avoidance—the elimination of conditions, activities, or programs that are the sources of the risks. This method is often not realistic, however, since it could require institutions to forgo activities important to their educational missions. It might also require greater knowledge of the details of myriad campus activities than administrators typically can acquire and greater certainty about the legal principles of liability (see Sections 3.3–3.5 & 4.7) than the law typically affords.

Risk control is less drastic than risk avoidance. The goal is to reduce, rather than eliminate entirely, the frequency or severity of potential exposures to liability—mainly by improving the physical environment or by modifying hazardous behavior or activities in ways that reduce the recognized risks. Although this method may have less impact on an institution’s educational mission than would risk avoidance, it may similarly require considerable detailed knowledge of campus facilities and functions and of legal liability principles.

Risk assessments (see subsection 2.5.1 above) are critical to the implementation of risk avoidance and control strategies. Risk assessment teams would therefore be an important organizational device to use with these methods of risk management. Another important organizational device is a crisis management team to manage institution-wide crises, along with other smaller teams to deal with particular crises affecting an individual or a small number of individuals (for example, a mental health crisis).

### 2.5.3. Risk transfer

**2.5.3.1. Liability insurance.** Purchasing commercial liability insurance is the first way in which institutions can transfer the risk of liability to others. An institution can insure against liability for its own acts, as well as liability transferred to it by a “hold-harmless” agreement with its personnel (see Section 2.5.3.2). With the advice of insurance experts, the institution can determine the kinds and amounts of liability protection it needs and provide for the necessary premium expenditures in its budgeting process.

There are two basic types of insurance policies important to higher education institutions. The first and primary type is general liability insurance; it provides broad coverage of bodily injury and property damage claims, such as would arise in the case of a negligently caused injury to a student or staff member. The second type is directors and officers insurance (“D & O” coverage, or sometimes “errors and omissions” coverage). It typically covers claims for wrongful acts without bodily injury, such as employment claims, student discipline, and due process violations.

General liability insurance policies usually exclude from their coverage both intentionally or maliciously caused damage and damage caused by acts that violate penal laws. In *Brooklyn Law School v. Aetna Casualty and Surety Co.*, 849 F.2d 788 (2d Cir. 1988), for example, the school had incurred numerous costs in defending itself against a lawsuit in which a former professor alleged that the school, its trustees, and faculty members had intentionally conspired to violate his constitutional rights. The school sued its insurer—which insured the school under an umbrella policy—to recover its costs in defending against the professor’s suit. The appellate court held that, under New York law, the insurer was not required to defend the insured against such a suit, which alleged intentional harm, when the policy terms expressly excluded from coverage injuries caused by the insured’s intentional acts.

Liability arising from the violation of an individual’s constitutional or civil rights is also commonly excluded from general liability insurance coverage—an exclusion that can pose considerable problems for administrators and institutions, whose exposure to such liability has escalated greatly since the 1960s. In specific cases, questions about this exclusion may become entwined with questions concerning intent or malice. In *Andover Newton Theological School, Inc. v. Continental Casualty Company*, 930 F.2d 89 (1st Cir. 1991), the defendant insurance company had refused to pay on the school’s claim after a court had found that the school violated the Age Discrimination in Employment Act (ADEA) (this volume, Section 5.2.6) when it dismissed a tenured, sixty-two-year-old professor. The jury in the professor’s case found that the school had impermissibly considered the professor’s age in deciding to dismiss him, but the evidence did not clearly establish that the school’s administrators had acted deliberately. Under the ADEA, behavior by the school that showed “reckless disregard” for the law was enough to sustain the verdict against it. When the school sought to have its insurance carrier pay the judgment, the insurer objected on grounds that it is against Massachusetts public policy (and that of most other states) to insure against intentional or

deliberate conduct of the insured. The district court agreed and held the school's loss to be uninsurable.

On appeal, the appellate court reasoned that the school's suit against the insurer revolved around the following question:

Does a finding of willfulness under the Age Discrimination in Employment Act (ADEA), if based on a finding of “reckless disregard as to whether [defendant’s] conduct is prohibited by federal law,” constitute “deliberate or intentional . . . wrongdoing” such as to preclude indemnification by an insurer under the public policy of Massachusetts as codified at Mass. Gen. L. ch. 175, section 47 Sixth (b)? [930 F.2d at 91.]

The appellate court certified this question to the Massachusetts Supreme Judicial Court, which answered in the negative. The federal appellate court then reversed the federal district court's decision and remanded the case to that court for further proceedings. The appellate court reasoned that, since the jury verdict did not necessitate a conclusion that the school had acted intentionally or deliberately, the losses incurred by the school were insurable and payment would not contravene public policy.<sup>17</sup>

Exclusions from coverage, as in the previous examples, may exist either because state law requires the exclusion (see subsection 2.5.5 below) or because the insurer has made its own business decision to exclude certain actions from its standard coverages. When the exclusion is of the latter type, institutions may nevertheless be able to cover such risks by combining a standard policy with one or more specialty endorsements or companion policies, such as a directors and officers policy. If this arrangement still does not provide all the coverage the institution desires, and if the institution can afford the substantial expense, it may request a “manuscript” policy tailored to its specific needs.

**2.5.3.2. Hold-harmless and indemnification agreements.** A second method of risk transfer is a “hold-harmless” or indemnification agreement, by which institutions can transfer their liability risks to other parties or transfer to themselves the liability risks of their officers or employees or other parties. In a broad sense, the term “indemnification” refers to any compensation for loss or damage. Insurance is thus one method of indemnifying someone. But in the narrower sense used here, indemnification refers to an arrangement whereby one party (for example, the institution) agrees to hold another party (for example, an individual officer or employee) harmless from financial liability for certain acts or omissions of that party that cause damage to another:

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<sup>17</sup>On remand, the district court decided for the school, and the insurance company appealed (*Andover Newton Theological School, Inc. v. Continental Casualty Co.*, 964 F.2d 1237 (1st Cir. 1992)). The company challenged a number of the district court's actions: holding a hearing to determine whether the school had deliberately violated federal law in dismissing the professor; placing the burden of proving deliberateness on the insurance company; and finding that the officers of the school did not act with knowledge that their conduct was illegal. The appellate court rejected all these challenges and upheld the district court.

In brief synopsis, the mechanism of a typical indemnification will shift to the institution the responsibility for defense and discharge of claims asserted against institutional personnel individually by reason of their acts or omissions on behalf of the institution, if the individual believed in good faith that his actions were lawful and within his institutional authority and responsibility. That standard of conduct is, of course, very broadly stated; and the question of whether or not it is satisfied must be determined on a case-by-case basis [R. Aiken, "Legal Liabilities in Higher Education: Their Scope and Management" (Part I), 3 *J. Coll. & Univ. Law* 121, 313 (1976)].

Institutions may also hold outside parties harmless from liability in certain circumstances, or be asked to do so. This matter is most likely to arise with parties that have some kind of professional affiliation (for example, for internship placements) or ongoing business relationship with the institution. Administrators and legal counsel should carefully review any indemnification clauses that outside parties place in proposed contracts with the institution. In particular, institutional personnel should be wary of signing vendor form contracts containing "boilerplate" clauses that would require the institution to indemnify the vendor.

Besides being an "indemnitor"—that is, the party with ultimate financial liability—the institution can sometimes also be an "indemnitee," the party protected from liability loss. The institution could negotiate for "hold-harmless" protection for itself, for instance, in contracts it enters with outside contractors or lessees. In an illustrative case, *Bridston v. Dover Corp. and University of North Dakota v. Young Men's Christian Association*, 352 N.W.2d 194 (N.D. 1984), the university had leased a campus auditorium to a dance group. One of the group's members was injured during practice, allegedly because of the negligence of a university employee, and sued the university for damages. The university invoked an indemnity clause in the lease agreement and successfully avoided liability by arguing that the clause required the lessee to hold the university harmless even for negligent acts of the university's own employees.

Like insurance policies, indemnification agreements often do not cover liability resulting from intentional or malicious action or from action violating the state's penal laws. Just as public policy may limit the types of acts or omissions that may be insured against, it may also limit those for which indemnification may be received.

Both public and private institutions may enter indemnification agreements. A public institution, however, may need specific authorizing legislation (see, for example, Mich. Comp. Laws § 691.1408), while private institutions usually can rely on the general laws of their states for sufficient authority. Some states also provide for indemnification of state employees for injuries caused by their acts or omissions on behalf of the state (see, for example, Cal. Govt. Code § 995 *et seq.*) or for torts committed within the scope of their employment (see, for example, Ill. Code, 5 ILCS 350(2)(d)).

In *Chasin v. Montclair State University*, 732 A.2d 457 (N.J. 1999), the New Jersey Supreme Court addressed the extent of the state's obligation to defend and indemnify state university professors (and other state employees) who have been sued. The dispute in this case began in fall 1990 at the onset of the United States'

involvement in the Persian Gulf in Operation Desert Storm. In order to provide academic relief for college students called to active duty in that war, the New Jersey legislature enacted the “Desert Storm Law,” 1991 N.J. Sess. Law Serv. Ch. 167 (3196) (W). The law entitled New Jersey students who were called to active duty “to receive a grade in each course for which the student has completed a minimum of 8 weeks’ attendance and all other academic requirements during that period.” These grades were “to be based on the work completed up to the time when the student was called to active service.” At Montclair State University, a student called to active duty as a reservist sought to utilize the statute to receive a grade in Professor Chasin’s course in “Sociology of Rich and Poor Nations.” The student had achieved an A average at the point in the semester at which he was called away. Prior to the legislature’s enactment of the statute, however, the student and the professor had entered into an “Incomplete Contract,” by which the student agreed to complete the course through either a make-up final exam or an additional paper. When the student attempted to assert his right under the legislation, the professor refused to give the student a grade, despite advice from the deputy state attorney general and the provost of the university. When the student then took legal action against the professor, the attorney general refused to defend the professor. After the suit was settled, the professor demanded indemnification from the attorney general for her legal expenses.

The court first analyzed the professor’s claim in relation to the attorney general’s duty to defend an employee of the state, as set out in the New Jersey Tort Claims Act (NJTCA), N.J. Stat. Ann., tit. 59, Chap. 10A-1&2:

Except as [otherwise] provided, the Attorney General shall, upon request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment.

The Attorney General may refuse to defend an employee, however, when:

- a. the act or omission was not within the scope of employment; or
- b. the act or failure to act was because of actual fraud, willful misconduct or actual malice; or
- c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

Looking at the statute’s history and purpose, the court determined that the statute only required the attorney general to defend suits seeking tort damages. Since the claim against the professor was one for injunctive relief, the court determined that the attorney general’s obligation to defend the suit was discretionary rather than mandatory. The court further concluded that, because the professor was not entitled to legal assistance, she also was not entitled to indemnification. In the alternative, the court also held that the professor had disregarded advice of the attorney general when she refused to award the grade.

The NJTCA requires that the state employee “cooperate fully with the Attorney General’s defense” (N.J. Stat. Ann., tit. 59, Chap. 10A-4). Since the provost and the attorney general had advised the professor to grant the student the grade in accordance with the Desert Storm Law and had provided her copies of the law, she had surrendered her right to indemnification. Two judges dissented.

State laws on defense and indemnification are often general, like the New Jersey law interpreted in the *Chasin* case, and may vary considerably from state to state. To have a sound and clear institutional policy, adapted to the academic environment, public institutions may need to expand upon applicable state law. (For one view of what such an institutional policy should provide, see the AAUP statement on “Institutional Responsibility for Legal Demands on Faculty,” in *AAUP Policy Documents and Reports* (9th ed., 2001), 130.)

**2.5.3.3. Releases and waivers.** A third method of risk transfer is the release or waiver agreement. This type of arrangement releases one party from liability to another for injuries arising from some particular undertaking in which both parties are involved. In postsecondary education, this mechanism is most likely to be used for student activities and services, such as intercollegiate athletics, provision of medical services, study abroad programs, and student field trips, which involve acknowledged risks. In such circumstances, the institution may require the student to execute a release or waiver as a precondition to participation in the activity or receipt of the service. The *Porubiansky*, *Tunkl*, and *Wagenblast* cases, as well as *Kyriazis*—all discussed in Section 2.5.5—illustrate both the uses of releases and other substantial legal limitations on their use. For such a release to be valid, as the court emphasized in *Kyriazis v. West Virginia University*, 450 S.E.2d 649 (W. Va. 1994) (discussed further below), the student must have voluntarily exposed himself to the danger “with full knowledge and appreciation of its existence.” The student in that case had signed a release as a condition of playing rugby. In the litigation, he asserted that he had no previous experience with the sport and had signed the release before “participating in a scrimmage” or observing a match, and that “the risks of injury were not explained to him.” It was therefore unlikely that he “fully appreciated the attendant risks of club rugby,” thus casting doubt on the validity of the release.

Postsecondary institutions may also use “consent forms” for certain activities or services, for example, a form securing a consent to a particular medical treatment, or consent for the institution to authorize medical treatment on the participant’s or recipient’s behalf. Consent forms are not the same as releases and will not have the legal effect of a release unless clear exculpatory language, like that used in releases, is added to the consent form. Absent such exculpatory clauses, use of a consent form may actually increase, rather than decrease, an institution’s potential liability. In *Fay v. Thiel College*, 2001 WL 1910037 (Pa. 2001), for example, the college had had students sign medical consent forms before participating in a study abroad trip. The form authorized the college’s representatives to secure medical treatment in case of emergency. The plaintiff, a student who became ill on the trip and was left behind for medical treatment at a medical clinic, alleged that she had received unnecessary surgery and been sexually assaulted at the clinic. The court held that the consent form created a



“special relationship” between the college and the student and that, due to this relationship, the college owed the student a “special duty of care” regarding medical treatment while she was on the trip. The court therefore denied the college’s motion for summary judgment and ordered a jury trial on whether the college had breached this duty.

**2.5.4. Risk retention.** The most practical option for the institution in some circumstances may be to retain the risk of financial liability. Risk retention may be appropriate, for instance, in situations where commercial insurance is unavailable or too costly, the expected losses are so small that they can be considered normal operating expenses, or the probability of loss is so remote that it does not justify any insurance expense (see Adams & Hall, “Legal Liabilities in Higher Education,” subsection 2.5.1 above, at 361–63). Both insurance policy deductibles and methods of self-insurance are examples of risk retention. The deductible amounts in an insurance policy allocate the first dollar coverage of liability, up to the amount of the deductible, to the institution. The institution becomes a self-insurer by maintaining a separate bank account to pay appropriate claims. The institution’s risk managers must determine the amount to be available in the account and the frequency and amount of regular payments to the account. This approach is distinguished from simple noninsurance by the planning and actuarial calculations that it involves.

**2.5.5. Legal limits on authority to transfer risk.** An institution’s ability to transfer risk is generally limited under state law to situations that do not contravene “public policy.” When financial liability is incurred as a result of willful wrongdoing, it is usually considered contrary to public policy to protect the institution or individual from responsibility for such behavior through insurance, indemnity agreements, or releases. Wrongdoing that is malicious, fraudulent, immoral, or criminal will generally fall within this category. Thus, insurance companies may decline to cover such behavior, and if they do cover it, courts may declare such coverage to be void and unenforceable. If protection against willful wrongdoing is provided by an indemnity agreement or release, courts may invalidate such provisions as well. Behaviors to which this public policy usually will apply include assault and battery, abuse of process, defamation, and invasion of privacy. This public policy may also apply to intentional deprivations of constitutional or civil rights; when the deprivation is unintentional, however, a transfer of risk may not violate public policy (see, for example, *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir. 1980)).

Public policy may also prohibit agreements insuring against financial loss from punitive damage awards. Jurisdictions differ on whether such insurance coverage is proscribed. Some courts have prohibited coverage because it would defeat the two purposes served by punitive damages: punishment for egregious wrongdoing and deterrence of future misconduct (see, for example, *Hartford Accident and Indemnity Co. v. Village of Hempstead*, 397 N.E.2d 737 (N.Y. 1979)). Other courts have permitted coverage at least when punitive damages are awarded as the result of gross negligence or wanton and reckless conduct

rather than intentional wrongdoing (see, for example, *Hensley v. Erie Insurance Co.*, 283 S.E.2d 227 (W. Va. 1981)).<sup>18</sup>

Depending on their state's public policy, institutions may also be prohibited in some circumstances from using releases, waivers, or similar contractual agreements to transfer the risk of *ordinary negligence* (as opposed to willful wrongdoing) to the parties who would be harmed by the negligent acts. In *Emory University v. Porubiansky*, 282 S.E.2d 903 (Ga. 1981), for example, the Emory University School of Dentistry Clinic sought to insulate itself from negligence suits by inserting into its consent form a clause indicating that the patient waived all claims against the university or its agents. The Georgia Supreme Court voided the agreement as offensive to public policy because it purported to relieve state-licensed professional practitioners of a duty to exercise reasonable care in dealing with patients. Sometimes it may be difficult to determine what the state's public policy is and in what circumstances it will be deemed to be contravened by a risk transfer arrangement. The case of *Wagenblast v. Odessa School District*, 758 P.2d 968 (Wash. 1988), provides useful guidelines for making these determinations. In this case, the Supreme Court of Washington invalidated school district policies requiring that, as a condition of participating in interscholastic athletics, students and their parents sign standardized forms releasing the school district from liability for negligence. The court based its decision on the earlier case of *Tunkl v. Regents of University of California*, 383 P.2d 441 (Cal. 1963), thus suggesting that the legal principles from *Wagenblast* apply to higher education as well. *Tunkl* involved an action by a hospital patient against a charitable hospital operated by the defendant university. Upon his admission to the hospital, Tunkl signed a document releasing the regents and the hospital from any and all liability for negligent or wrongful acts or omissions of its employees. The California Supreme Court invalidated this release agreement, relying on a state statute that prohibited certain agreements exempting a person from his own fraud, willful injury to another, or violation of law. Such agreements were invalid if they were contrary to the public interest, which the *Tunkl* court determined by considering six factors that it had consolidated from previous cases: (1) whether the agreement concerned an endeavor suitable for public regulation; (2) whether the party seeking exculpation offered a service of public importance or necessity; (3) whether that party held itself out as willing to perform the service for any member of the public, or anyone who met predetermined standards; (4) whether that party possessed a bargaining advantage over members of the public desiring the service; (5) whether the release provision was in the nature of an adhesion contract (see Section 8.1.3, and see also *Fay v. Thiel College*, 2001 WL 1910037 (Pa. 2001)) that did not contain any option for the other party to obtain protection against negligence by paying an extra fee; and (6) whether the party seeking exculpation would be able to exert control over persons seeking its services, thus subjecting these persons to risk. The more these factors are implicated in a

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<sup>18</sup>The cases are collected in Michael A. Rosenhouse, Annot., "Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages," 16 A.L.R.4th 11.

release agreement, the more likely it is that a court will declare the agreement invalid on public policy grounds.

Even though the Washington court in *Wagenblast* had no statute similar to California's to rely on, it nevertheless used a public policy approach similar to that of the California court and adopted the six *Tunkl* factors. Noting that all six factors applied to the releases being challenged, the court invalidated the releases.

The court in *Kyriazis v. West Virginia University*, 450 S.E.2d 649 (W. Va. 1994), also relied heavily on the *Tunkl* case (above), which the court called "the leading case on the issue whether an anticipatory release violates public policy under the 'public service' exception." In *Kyriazis*, the West Virginia Supreme Court of Appeals invalidated an "anticipatory release" that the university required students to sign before playing rugby, a club sport. The court's opinion provides useful explication of criteria 2, 4, and 5 from *Tunkl*. Applying criterion 2, the court determined that "[w]hen a state university provides recreational activities to its students, it fulfills its educational mission, and performs a public service. As an enterprise charged with a duty of public service here, the university owes a duty of due care to its students when it encourages them to participate in any sport" (450 S.E.2d at 654–55). Applying criteria 4 and 5 (450 S.E.2d at 655), the court examined whether the release was "an agreement that was freely and fairly made between parties who are in an equal bargaining position" and determined that it was not (450 S.E.2d at 655). The court therefore concluded that "[b]ecause . . . the university qualifies as a 'public service,' and [because] it possessed a decisive bargaining advantage over the [student] when he executed the Release, we find the anticipatory Release void as a matter of West Virginia public policy."<sup>19</sup>

This common law/public policy approach to releases, encapsulated in the six factors borrowed from *Tunkl*, as further refined in *Wagenblast* and *Kyriazis*, provides an analytical framework for determining whether and when higher education institutions may use releases or waivers of liability to transfer risk to the potential victims of the institution's negligence. Some states' public policy, however, will be more supportive of the use of releases than that of other states. (See, for example, *Sharon v. City of Newton*, 769 N.E.2d 738 (Mass. 2002).) The emphasis placed on various *Tunkl* factors, and the use of supplementary factors, may therefore vary from state to state, depending on the development of each state's statutory and common law. The specific results reached when the *Tunkl/Wagenblast* framework is applied may also vary with the particular circumstances, including the activity for which the release is to be used; the persons for whom the release is sought (students, institutional employees, or outside third parties); and perhaps the type of institution using the release (whether it is a public or a private institution).

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<sup>19</sup>In another portion of its opinion (450 S.E.2d at 655–57), the court also held that the release "violates the equal protection guarantee under the West Virginia Constitution" because the university required club sports participants to sign the release but did not require intramural sports participants to do the same.

A different kind of legal problem may exist for postsecondary institutions that enjoy some degree of sovereign or charitable immunity from financial liability (see Section 3.3.1). Public institutions may not have authority to purchase liability insurance covering acts within the scope of their immunity. Where such authority does exist, however, and the institution does purchase insurance, its sovereign or charitable immunity may thereby be affected. Sometimes a statute authorizing insurance coverage may itself waive sovereign immunity to the extent of coverage. When such a waiver is lacking, in most states the purchase of insurance appears not to affect immunity, and the insurance protection is operable only for acts found to be outside the scope of immunity. In some states, however, courts appear to treat the authorized purchase of insurance as a waiver or narrowing of the institution's immunity, to the extent of the insurance coverage.<sup>20</sup>

## Selected Annotated Bibliography

### *Sec. 2.1 (Legal Liability)*

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Discusses principles of agency law, including principal-agent relationships, agency law as applied to boards of directors, duties of principals and agents to each other, vicarious tort liability, and the contractual powers of agents, among others.

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### *Sec. 2.2 (Litigation in the Courts)*

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<sup>20</sup>Relevant cases are collected in R. D. Hursh, Annot., "Liability or Indemnity Insurance Carried by Governmental Unit as Affecting Immunity from Tort Liability," 68 A.L.R.2d 1438; and Allan E. Korpela, Annot., "Immunity of Private Schools and Institutions of Higher Learning from Liability in Tort," 38 A.L.R.3d 480, 501-2.

attorney-client and work-product protections, waivers to and exceptions to these protections, choice of law issues, and ethical considerations. Primarily for attorneys.

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### ***Sec. 2.3 (Alternative Dispute Resolution)***

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Campus Mediation Resources. Available at <http://www.mtds.wayne.edu/campus.htm>. Lists and provides links to several Web sites that provide information on mediation in higher education.

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### Sec. 2.4 (Legal Services)

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See also the Burgoyne, McNabb, & Robinson entry, and the Epstein entry, in Sec. 2.2 above.

### ***Sec. 2.5 (Institutional Management of Liability Risk)***

Aiken, Ray, Adams, John F., & Hall, John W. *Legal Liabilities in Higher Education: Their Scope and Management* (Association of American Colleges, 1976), printed simultaneously in 3 *J. Coll. & Univ. Law* 127 (1976). Provides an in-depth examination of legal and policy issues of institutional liability and the problems of protecting institutions and their personnel against liability through insurance and risk management.

Burling, Philip, & United Educators Risk Retention Group. “Managing Athletic Liability: An Assessment Guide,” 72 *West’s Educ. Law Rptr.* 503 (1993). A practical guide for developing and implementing risk management programs for athletics. Covers institutional duties to supervise; to provide safe facilities, adequate equipment, safe transportation, and medical treatment; and to protect spectators. Includes basic requirements and suggestions for risk management programs, “risk management action steps” for effectuating the institution’s various duties, and a list of case citations.

Connell, Mary Ann, & Savage, Frederick G. “Releases: Is There Still a Place for Their Use by Colleges and Universities?” 29 *J. Coll. & Univ. Law* 525 (2003). Examines the factors that have led courts to uphold and enforce written releases obtained by universities from students participating in a variety of activities. Also provides advice for universities and lawyers for drafting and using releases.

Ende, Howard, Anderson, Eugene, & Crego, Susannah. “Liability Insurance: A Primer for College and University Counsel,” 23 *J. Coll. & Univ. Law* 609 (1997). A comprehensive explanation and analysis of liability insurance and its role in college and university risk management.

Hollander, Patricia. *Computers in Education: Legal Liabilities and Ethical Issues Concerning Their Use and Misuse* (College Administration Publications, 1986). A monograph cataloging negligence, contract, criminal, and other problems in this area of potential liability. Provides practical guidance for identifying potential liabilities and avoiding or resolving the problems.

Moots, Philip R. *Ascending Liability: Planning Memorandum* (Center for Constitutional Studies, Mercer University (now at Baylor University), 1987). Discusses planning issues such as risk management, contract drafting, and restructuring of certain activities of the organization. Also discusses the role of the governing board and the institution’s role vis-à-vis related organizations.

See also the Hoyer entry for Chapter 3, Section 3.3.



PART TWO

THE COLLEGE AND ITS  
GOVERNING BOARD,  
PERSONNEL, AND AGENTS



# 3

## The College and Its Trustees and Officers

### *Sec. 3.1. The Question of Authority*

Trustees, officers, and administrators of postsecondary institutions—public or private—may take only those actions and make only those decisions that they have authority to take or make. Acting or deciding without authority to do so can have legal consequences, both for the responsible individual and for the institution. It is thus critical, from a legal standpoint, for trustees, officers, and other administrators to understand and adhere to the scope and limits of their authority and that of other institutional functionaries with whom they deal. Such sensitivity to authority questions will also normally be good administrative practice, since it can contribute order and structure to institutional governance and make the internal governance system more understandable, accessible, and accountable to those who deal with it (see Section 1.3.2).

Authority generally originates from some fundamental legal source that establishes the institution as a legal entity. For public institutions, the source is usually a state constitution or state authorizing legislation (see Section 12.2); for private institutions, it is usually articles of incorporation, sometimes in combination with some form of state license (see Section 12.3). These sources, though fundamental, are only the starting point for legal analysis of authority questions. To be fully understood and utilized, an institution's authority must be construed and implemented in light of all the sources of law described in Section 1.4. For public institutions, state administrative law (administrative procedure acts and similar statutes, plus court decisions) and agency law (court decisions) provide the backdrop against which authority is construed and implemented; for private institutions, state corporation law or trust law (statutes and court decisions) plus agency law (court decisions) are the bases. Authority is particularized and

dispersed (delegated) to institutional officers, employees, committees and boards, and internal organizations such as a faculty senate or a student government. The vehicles for such delegations are usually the governing board bylaws, institutional rules and regulations, the institution's employment contracts, and, for public institutions, the administrative regulations of state education boards or agencies. Authority may also be delegated to outside entities such as an athletic booster club, a university research foundation, or a private business performing services for the institution. Vehicles for such delegations include separate corporate charters for "captive" organizations, memoranda of understanding with affiliated entities, and service contracts (for contracting out of services). Gaps in internal delegations may be filled by resort to the institution's customs and usages (see Section 1.4.3.3), and vagueness or ambiguity may be clarified in the same way. For some external delegations, the custom and usage of the business or trade involved may be used in such circumstances rather than that of the institution.

There are several generic types of authority. As explained in *Brown v. Wichita State University* (Section 3.4), authority may be express, implied, or apparent. "Express authority" is that which is found within the plain meaning of a written grant of authority. "Implied authority" is that which is necessary or appropriate for exercising express authority and can therefore be inferred from the express authority. "Apparent authority" is not actual authority at all; the term is used to describe the situation where someone acting for the institution induces a belief in other persons that authority exists when in fact it does not. Administrators should avoid this appearance of authority and should not rely on apparent authority as a basis for acting, because the institution may be held liable, under the doctrine of "estoppel," for resultant harm to persons who rely to their detriment on an appearance of authority (see Section 3.4). When an institutional officer or employee does mistakenly act without authority, the action can sometimes be corrected through "ratification" by the board of trustees or other officer or employee who does have authority to undertake the act in question (Section 3.4).

One other type of authority is occasionally referred to in the postsecondary context: inherent authority. In *Morris v. Nowotny*, 323 S.W.2d 301 (Tex. 1959), for instance, the court remarked that the statutes establishing the University of Texas "imply the power, and, if they do not so imply, then that power is inherent in University officials to maintain proper order and decorum on the premises of the University." In *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), the court held that the college had "inherent authority to maintain order and to discipline students." And in *Waliga v. Board of Trustees of Kent State University*, 488 N.E.2d 850 (Ohio 1986), it found inherent authority in the university's trustees to revoke an academic degree that had been obtained by fraud. (For the facts and reasoning of this case, see Section 9.3.3.) The inherent authority concept is often loosely used in judicial opinions and has no clear definition. Sometimes courts appear to apply the phrase to what is really a very broad construction of the institution's implied powers. In *Goldberg v. Regents of the University of California*, 57 Cal. Rptr. 463 (Cal. Ct. App. 1967), the court held

that broad disciplinary authority over students was implicit in the state constitution's grant of power to the university, but then it called that authority "inherent." At other times the inherent authority concept is more clearly distinguished from implied authority; inherent authority then is said to exist not because of any written words but because it would not be sensible, as measured by the norms of postsecondary education, for an institution to be without authority over the particular matter at issue. In all, inherent authority is an elusive concept of uncertain stature and questionable value, and it is a slender reed to rely on to justify actions and decisions. If administrators need broader authority, they should, with counsel's help, seek to expand their express authority or to justify a broader construction of their implied authority.

The law is not clear on how broadly or narrowly authority should be construed in the postsecondary context. To some extent, the answer will vary from state to state and, within a state, may depend on whether the institution is established by the state constitution, by state statutes, or by articles of incorporation (see Sections 12.2 & 12.3). Although authority issues have been addressed in judicial opinions, such as those discussed in Section 3.2 below, the analysis is sometimes cursory. There has been debate among courts and commentators on whether postsecondary institutions should be subject to traditional legal principles for construing authority or whether such principles should be applied in a more flexible, less demanding way that takes into account the unique characteristics of postsecondary education. Given the uncertainty, administrators should rely when possible on express rather than implied or inherent authority and should seek clarity in statements of express authority, in order to avoid leaving authority questions to the vagaries of judicial interpretation. If institutional needs require greater flexibility and generality in statements of authority, administrators should consult legal counsel to determine how much breadth and flexibility the courts of the state would permit in construing the various types of authority.

Miscalculations of the institution's authority, or the authority of particular officers or employees, can have various adverse legal consequences. For public institutions, unauthorized acts may be invalidated by courts or administrative agencies under the *ultra vires* doctrine in the state's administrative law (a doctrine applied to acts that are beyond the delegated authority of a public body or official). For private institutions, a similar result occasionally can be reached under state corporation law.

When the unauthorized act is a failure to follow institutional regulations and the institution is public (see Section 1.5.2), courts will sometimes hold that the act violated procedural due process. In *Escobar v. State University of New York/College at Old Westbury*, 427 F. Supp. 850 (E.D.N.Y. 1977), a student sought to enjoin the college from suspending him or taking any further disciplinary action against him. The student had been disciplined by the judicial review committee, acting under the college's "Code of Community Conduct." After the college president learned of the disciplinary action, he rejected it and imposed more severe penalties on the student. The president purported to act under the "Rules of Public Order" adopted by the Board of Trustees of the State University of New York rather than under the college code. The court found

that the president had violated the Rules, and it enjoined enforcement of his decision:

[E]ven if we assume the President had power to belatedly invoke the Rules, it is clear that he did not properly exercise that power, since he did not follow the requirements of the Rules themselves. The charges he made against the plaintiff were included in the same document which set forth the plaintiff's suspension and the terms for his possible readmission. Contrary to the Rules, the President did not convene the Hearing Committee, did not give notice of any hearing, and received no report from the Hearing Committee. There is no authority in either the Rules or the Code for substituting the hearing before the Code's Judicial Review Committee for the one required to be held before the Rules' hearing committee. . . .

Of course, not every deviation from a university's regulations constitutes a deprivation of due process. . . . But where, as here, an offending student has been formally charged under the college's disciplinary code, has been subjected to a hearing, has been officially sentenced, and has commenced compliance with that sentence, it is a denial of due process of law for the chief administrative officer to step in, conduct his own in camera review of the student's record, and impose a different punishment without complying with any of the procedures which have been formally established for the college. Here the President simply brushed aside the college's formal regulations and procedures and, without specific authority, imposed a punishment of greater severity than determined by the hearing panel, a result directly contrary to the Code's appeal provisions [427 F. Supp. at 858].

For both public and private institutions, an unauthorized act violating institutional regulations may also be invalidated as a breach of an express or implied contract with students or the faculty. *Lyons v. Salve Regina College*, 422 F. Supp. 1354 (D.R.I. 1976), *reversed*, 565 F.2d 200 (1st Cir. 1977), involved a student who had received an F grade in a required nursing course because she had been absent from several classes and clinical sessions. After the student appealed the grade under the college's published "Grade Appeal Process," the grade appeal committee voted that the student receive an Incomplete rather than an F. Characterizing the committee's action as a recommendation rather than a final decision, the associate dean overruled the committee, and the student was dismissed from the nursing program.

The parties agreed that the Grade Appeal Process was part of the terms of a contract between them. Though the grade appeal committee's determination was termed a "recommendation" in the college's publications, the lower court found that, as the parties understood the process, the recommendation was to be binding on the associate dean. The associate dean's overruling of the committee was therefore unauthorized and constituted a breach of contract. The lower court ordered the college to change the student's grade to an Incomplete and reinstate her in the nursing program. The appellate court reversed but did not disavow the contract theory of authority. Instead, it found that the committee's determination was not intended to be binding on the associate dean and that the dean therefore had not exceeded his authority in overruling the committee.

Authority questions are also central to a determination of various questions concerning liability for harm to third parties. The institution's tort liability may depend on whether the officer or employee committing the tort was acting within the scope of his or her authority (see Section 3.3). The institution's contract liability may depend on whether the officer or employee entering the contract was authorized to do so (Section 3.4). And, under the estoppel doctrine, both the institution and the individual may be liable where the institution or individual had apparent authority to act (Section 3.2.2).

Because of these various legal ramifications, a postsecondary institution should carefully organize and document its various delegations of authority. Delegations and subdelegations of authority among institutional officers, employees, and organizations should be considered, as well as delegations to outside captive or affiliated entities. Counsel should be involved in this process. Organizational statements or charts should be generally available to the campus community, so that persons with questions or grievances can know where to turn for assistance. Delegations should be reviewed periodically, to determine whether they accurately reflect actual practice within the institution and maintain an appropriate balance of specificity and flexibility. Where a gap in authority is found, or an unnecessary overlap or ambiguity, it should be corrected. Where questions concerning the permissible scope of authority are uncovered, they should be resolved.

Similarly, administrators should understand the scope of their own authority and that of the officers, employees, and organizations with whom they deal. They should understand where their authority comes from and which higher-level administrators may review or modify their acts and decisions. They should understand whether, and when and how, they have authority to act in the name of the institution. They should attempt to resolve unnecessary gaps or ambiguities in their authority. They should consider what part of their authority may and should be subdelegated to lower-level administrators or to faculty and what checks or limitations should be placed on those delegations. And they should attempt to ensure that their authority is adequately understood by the members of the campus community with whom they deal.

The discussion in the following subsections illustrates particular kinds of legal challenges that may be made to the authority of various functionaries in postsecondary institutions. Although the discussion reflects general concepts and issues critical to an understanding of authority in the postsecondary context, the specific legal principles that courts apply to particular challenges to authority may vary from state to state.

## ***Sec. 3.2. Sources and Scope of Authority and Liability***

### ***3.2.1. Trustees***

**3.2.1.1. Overview.** Questions of trustee authority may be resolved differently depending on whether the college is public or private. In public institutions, the authority of trustees is defined and limited by the state statutes, and

sometimes by constitutional provisions, which create trustee boards for individual institutions. Such laws generally confer power on the board itself as an entity separate from its individual members. Individual trustees generally have authority to act only on behalf of the board, pursuant to some board bylaw, resolution, or other delegation of authority from the board. Other state laws, such as conflict-of-interest laws or ethics codes, may place obligations on individual board members as well as on the board itself. In private colleges, trustee authority typically emanates from the college's charter or articles of incorporation, but state regulatory or licensing laws may limit or dictate trustee action under certain circumstances.

**3.2.1.2. Trustees of public colleges.** For public colleges, disputes over the authority of trustees are resolved by the interpretation of state constitutions and state laws. For this reason, the resolution of any particular dispute may differ by state and may depend on the type of institution involved and on what other entities share authority with the institution's trustees. For example, decision-making authority for municipal or county community colleges may be shared among a municipal or county government, the college's board of trustees, and the state. *Warren County Community College v. Warren County Board of Chosen Freeholders*, 824 A.2d 1073 (N.J. 2003), for instance, concerned a conflict between a community college's trustees and the county board of freeholders regarding approval of a property tax assessment for capital projects at the college. The court held that the trustees could not compel the county board to approve the tax because the county's citizens had not agreed to subject themselves to such assessments. Similarly, the structure of state-level governance of higher education may lead to conflicts between boards of trustees of different sectors when, for example, the decisions of a university board of trustees have consequences for the viability of community colleges. (For an example of a conflict between two state boards, one for community colleges and one for public universities, see *Board of Trustees of State Institutions of Higher Learning v. Ray*, 809 So. 2d 627 (Miss. 2002).)

Despite the considerable influence of state law and governance structures, certain governance principles are standard. The college's trustees may not exercise authority beyond that which they have been delegated, either by the state (for a public college) or the college's charter (for a private college). In *First Equity Corp. of Florida v. Utah State University*, 544 P.2d 887 (Utah 1975), the plaintiff, a stock brokerage company, sued the university over its failure to pay for common stocks ordered by the university's assistant vice president of finance. The university defended itself by asserting that its board of trustees lacked the power to authorize the assistant vice president to invest in common stocks. The board had general control and supervision "of all appropriations made by the territory [state] for the support" of the school (Comp. Laws of Utah § 1855 (1888)), and the university had authority to handle its own financial affairs under the supervision of the board (Higher Education Act of 1969, Utah Code Ann. § 53-48-10(5)). After reviewing the provisions of the Utah constitution that specified the mechanisms for funding the university, the court held that these provisions did not



give the university unlimited authority to encumber public funds. The court concluded:

It is inconceivable that the framers of the constitution, in light of the provisions of Sections 1, 5, and 7 of Article X and the provisions as to debt limitations, intended to place the university above the only controls available for the people of this state as to the property, management, and government of the university. We are unable to reconcile respondent's position that the university has a blank check as to all its funds with no preaudit and no restraint under the provisions of the constitution requiring the state to safely invest and hold the dedicated funds and making the state guarantor of the public school funds against loss or diversion. To hold that respondent has free and uncontrolled custody and use of its property and funds while making the state guarantee said funds against loss or diversion is inconceivable. We believe the framers of the constitution intended no such result [544 P.2d at 890].

Because of this state constitutional limitation regarding finances, and the absence of any "specific authorizing grant" of investment power under the state statutes, the court held that the board did not have authority to purchase the particular type of stock involved. The board therefore could not authorize the assistant vice president or any other agent to make the purchases.

In *Feldman v. Regents of the University of New Mexico*, 540 P.2d 872 (N.M. 1975), the head football coach at the university sued the regents for discharging him during the term of his contract. According to New Mexico law, the regents have "power to remove any officer connected with the university when in their judgment the interests require it" (N.M. Stat. Ann. § 73-25-9). The regents relied on the statute as sufficient authority for dismissing the coach. In ruling on the regents' motion for summary judgment, the state courts refused to approve the dismissal under this statute. The courts reasoned that additional information was needed to determine whether the coach was an "officer" or an "employee" of the institution, since the statute would not authorize his discharge if he were an employee.

In *Baker v. Southern University*, 604 So. 2d 699 (La. Ct. App. 1992), a custodian who had civil service protections charged that the chancellor did not have the authority to dismiss him. The court was required to determine whether the Board of Supervisors of Southern University was legally authorized to delegate appointing and discharge authority to the university's chancellor. The court had to reconcile the provisions of the state's civil service statute as well as the statute that controls the organization of the state's colleges and universities. These statutes, said the court, give broad powers to the board of supervisors to "supervise and manage the university system . . . to exercise all power to direct, control, supervise and manage the university" (604 So. 2d at 701). This power, said the court, included the power to delegate appointing authority to the chancellor.

The outcome is different, however, if statutes provide that the board itself must act. In *Blanchard v. Lansing Community College*, 370 N.W.2d 23 (Mich. Ct. App. 1985), a faculty member challenged his discharge because the board of trustees had not voted on the matter. The board argued that it had delegated

the power to hire and discharge to certain administrators. Turning to the relevant Michigan statute, the court noted that the statute specifies that the faculty employment contract is between the faculty member and the board, and ruled that the power to discharge was expressly committed to the discretion of the board and thus was not delegable.

Authority not delegated to a board by the state legislature, however, may not be assumed by that board. For example, in *Board of Regents v. Board of Trustees for State Colleges and Universities*, 491 So. 2d 399 (La. Ct. App. 1986), the court ruled that the board of trustees for the state's public colleges and universities did not have the authority to change the name of the state university; that was the prerogative of the legislature. Since neither the state constitution nor any statute gave the board of trustees the authority to change the university's name, the court ruled that the legislature had retained that authority.

Similarly, an attempt by a public university to affiliate with a private law school without state approval was quashed by a state supreme court. In *In re South Texas College of Law and Texas A&M University*, 4 S.W.3d 219 (Tex. 1999), the Supreme Court of Texas refused to suspend the trial court's injunction, pending resolution of the appeal on the merits. In an unpublished opinion, the trial court had ruled that Texas A&M lacked the authority to enter the affiliation agreement without the approval of the Texas Higher Education Coordinating Board, and that the agreement would violate the state constitution's prohibition against the use of public money for individuals or corporations. Despite the fact that the law school would remain private, said the trial court, officials of the Coordinating Board were concerned that the law school would eventually seek to be publicly funded (Katherine S. Mangan, "Texas Judge Rejects Campus Affiliation Plan," *Chron. Higher Educ.*, April 23, 1999, A48).

**3.2.1.3. Trustees of private colleges.** In private institutions the authority of institutional trustees is defined and limited by the institution's corporate charter (articles of incorporation) and the state corporation laws under which charters are issued. As in public institutions, the power generally lodges in the board of trustees as an entity separate from its individual members. But charter provisions, corporate bylaws, or board resolutions may delegate authority to individual trustees or trustee committees to act for the board in certain situations. Moreover, general state corporate law or trust law may place affirmative obligations on individual board members to act fairly and responsibly in protecting the institution's resources and interests.

The Missouri case of *Burnett v. Barnes*, 546 S.W.2d 744 (Mo. 1977), illustrates how the authority of a private institution's board of trustees may be limited by the institution's articles of incorporation. The institution in this case, the Kansas City College of Osteopathic Medicine, was a "membership" corporation; graduates of the college had the status of members of the corporation. When the college's board of trustees sought to amend the corporate bylaws to eliminate this membership status, the Missouri state courts determined that the trustees had no authority to make such a change. The Missouri General Not-for-Profit Corporation Law gave the trustees power "to make and alter bylaws not inconsistent with its articles of incorporation or with the laws of this state" (Mo. Rev.

Stat. § 355.090). The institution's original articles of agreement and its subsequent articles of acceptance each referred to the admission of new members to the corporation. On the basis of these two references, the courts concluded that the board's power to amend the bylaws was limited by the institution's articles of incorporation to matters that did not eliminate membership.

Even if a board acts within the parameters of its corporate charter, the authority of trustees of private colleges may be limited by the state if the state entity regulating (and licensing) private colleges believes that the board has abused its authority. New York's Education Law § 236(4) gives the state board of regents the authority to remove the trustees of any college or university in the state, whether it is a public or a private institution. After several years of litigation and publicity, a New York appellate court upheld the decision of the state's board of regents to initiate removal proceedings against most of Adelphi University's trustees and officers.

In *In re Adelphi University v. Board of Regents of the State of New York*, 652 N.Y.S.2d 837 (Sup. Ct., App. Div. 1997), the trustees sought to enjoin the proceeding, asserting that the board of regents could not initiate removal proceedings at the request of other parties (faculty, students, alumni, and former trustees of the University). The court ruled that the board of regents had the authority to establish its own procedures for initiating removal actions, that the petition seeking the trustees' removal was verified and sufficiently detailed, and that the board had reviewed the petition for legal sufficiency before accepting the petition. The board also had the authority to determine the process for prosecution of trustee removal petitions. According to the court, the only statutory provisions applicable to the board were adjudicatory; it had full authority to delegate both the investigatory and prosecutorial functions to third parties.

Trustees at both public and private colleges have a fiduciary duty to act in the best interest of the college. The scope of that fiduciary duty for private college trustees was examined and explicated in *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974) (the *Sibley Hospital* case), the first reported opinion to comprehensively review the obligations of the trustees of private charitable corporations and to set out guidelines for trustee involvement in financial dealings. Although the case concerns a hospital, the court's analysis is clearly transferable to private educational institutions. The court's decision to analyze the trustees' standard of duty in terms of corporate law, rather than trust law, apparently reflects the evolving trend in the law.

The plaintiffs represented patients of Sibley Hospital, a nonprofit charitable corporation in the District of Columbia and the principal concern of the Lucy Webb Hayes National Training School. Nine members of the hospital's board of trustees were among the named defendants. The plaintiffs charged that the defendant trustees had "conspired to enrich themselves and certain financial institutions with which they were affiliated [and which were also named as defendants] by favoring those institutions in financial dealings with the hospital" and that "they breached their fiduciary duties of care and loyalty in

the management of Sibley's funds." The court examined evidence of the relationships between the defendant trustees and the defendant institutions. Although most of the hospital's funds were deposited in the defendant institutions, the funds were controlled and managed almost exclusively from the early 1950s until 1972 by a deceased trustee, without the active involvement of any of the defendant trustees.

The court concluded that the plaintiffs had not established a conspiracy but had established serious breaches of duty by the trustees. According to the court, the trustees owed a duty to the institution comparable to, and in some cases greater than, that owed by the directors of a business corporation.

### ***1. Mismanagement***

Both trustees and corporate directors are liable for losses occasioned by their negligent mismanagement of investments. However, the degree of care required appears to differ in many jurisdictions. A trustee is uniformly held to a high standard of care and will be held liable for simple negligence, while a director must often have committed "gross negligence" or otherwise be guilty of more than mere mistakes of judgment.

This distinction may amount to little more than a recognition of the fact that corporate directors have many areas of responsibility, while the traditional trustee is often charged only with the management of the trust funds and can therefore be expected to devote more time and expertise to that task. Since the board members of most large charitable corporations fall within the corporate rather than the trust model, being charged with the operation of ongoing businesses, it has been said that they should only be held to the less stringent corporate standard of care. More specifically, directors of charitable corporations are required to exercise ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith.

### ***2. Nonmanagement***

Plaintiffs allege that the individual defendants failed to supervise the management of hospital investments or even to attend meetings of the committees charged with such supervision. Trustees are particularly vulnerable to such a charge, because they not only have an affirmative duty to "maximize the trust income by prudent investment," but they may not delegate that duty, even to a committee of their fellow trustees. A corporate director, on the other hand, may delegate his investment responsibility to fellow directors, corporate officers, or even outsiders, but he must continue to exercise general supervision over the activities of his delegates. Once again, the rule for charitable corporations is closer to the traditional corporate rule: directors should at least be permitted to delegate investment decisions to a committee of board members, so long as all directors assume the responsibility for supervising such committees by periodically scrutinizing their work.

Total abdication of the supervisory role, however, is improper even under traditional corporate principles. A director who fails to acquire the information necessary to supervise investment policy or consistently fails even to attend the meetings at which such policies are considered has violated his fiduciary duty to the corporation. . . .

### 3. *Self-Dealing*

Under District of Columbia law, neither trustees nor corporate directors are absolutely barred from placing funds under their control into a bank having an interlocking directorship with their own institution. In both cases, however, such transactions will be subjected to the closest scrutiny to determine whether or not the duty of loyalty has been violated. A deliberate conspiracy among trustees or board members to enrich the interlocking bank at the expense of the trust or corporation would, for example, constitute such a breach and render the conspirators liable for any losses. In the absence of clear evidence of wrongdoing, however, the courts appear to have used different standards to determine whether or not relief is appropriate, depending again on the legal relationship involved. Trustees may be found guilty of a breach of trust even for mere negligence in the maintenance of accounts in banks with which they are associated, while corporate directors are generally only required to show “entire fairness” to the corporation and “full disclosure” of the potential conflict of interest to the board.

Most courts apply the less stringent corporate rule to charitable corporations in this area as well [381 F. Supp. at 1013–15; footnotes omitted].

On the basis of these principles, the court created explicit guidelines for the future conduct of trustees in financial matters:

The court holds that a director or so-called trustee of a charitable hospital organized under the Non-Profit Corporation Act of the District of Columbia (D.C. Code § 29-1001 et seq.) is in default of his fiduciary duty to manage the fiscal and investment affairs of the hospital if it has been shown by a preponderance of the evidence that:

- (1) While assigned to a particular committee of the board having general financial or investment responsibility under the bylaws of the corporation, he has failed to use due diligence in supervising the actions of those officers, employees, or outside experts to whom the responsibility for making day-to-day financial or investment decisions has been delegated; or
- (2) he knowingly permitted the hospital to enter into a business transaction with himself or with any corporation, partnership, or association in which he then had a substantial interest or held a position as trustee, director, general manager, or principal officer without having previously informed the persons charged with approving that transaction of his interest or position and of any significant reasons, unknown to or not fully appreciated by such persons, why the transaction might not be in the best interests of the hospital; or
- (3) except as required by the preceding paragraph, he actively participated in or voted in favor of a decision by the board or any committee or subcommittee thereof to transact business with himself or with any corporation, partnership, or association in which he then had a substantial interest or held a position as trustee, director, general manager, or principal officer; or
- (4) he otherwise failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care [381 F. Supp. at 1015].

In *Incorporation of Mercer University v. Smith*, 371 S.E.2d 858 (Ga. 1988), the Georgia Supreme Court echoed the D.C. court in the *Sibley Hospital* case when it considered whether trust law or corporate law would apply to trustees' merger and closure decisions; it also considered the scope of private institutional autonomy under state law. At issue was a challenge to a decision made by Mercer University's trustees to close Tift College in Atlanta, with which the university had recently merged. The merger agreement provided that Mercer would make a good-faith effort to continue operating Tift College at its original location. Plaintiffs—who included a district attorney, several alumni, and three former trustees—sued to set aside the merger and to keep the college open. The parties differed as to whether trust law or corporate law would apply to Mercer's actions. The plaintiffs wanted the court to apply the stricter fiduciary duty requirements of trust law; the college argued that trustees were bound only by the dictates of corporate law. Siding with the college, the court applied corporate law, rather than trust law, and concluded that under corporate law the trustees had the power to merge the college and then close it:

[F]ormalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses. . . . [T]hose persons responsible for the operation of the universities need the administrative flexibility to make the many day-to-day decisions affecting the operation of the institution, including those decisions involving the acquisition of and sale of assets [371 S.E.2d at 860–61].

But the Supreme Court of New Hampshire appears to have used trust law to determine whether Dartmouth College had a fiduciary duty to its alumni who had made donations to the college's capital campaign. In *Brzica v. Trustees of Dartmouth College*, 791 A.2d 990 (N.H. 2002), several alumni were angered by Dartmouth's announcement that it would eliminate fraternities and sororities. The alumni sued Dartmouth under New Hampshire's Consumer Protection Act (N.H. Rev. Stat. Ann. § 358-A:2), and also sought a declaration that the trustees had breached their fiduciary duties. The court, referring to previous New Hampshire cases involving fiduciary duty under trust law, denied that the college had a fiduciary duty to alumni. It also found no evidence that the trustees had made misrepresentations to the alumni about how their donations would be used. The court affirmed the trial court's dismissal of the cause of action.

*In re Antioch University*, 418 A.2d 105 (D.C. 1980), illustrates the delineation of authority between the board of trustees and the institution's constituent units. The case arose as a dispute between the university, located in Ohio, and a law school that it operated in Washington, D.C. The dispute concerned the extent to which the law school could operate autonomously from the university, particularly with respect to oversight of its financial affairs. While the law school insisted that, for accreditation purposes, its finances should be managed locally and not commingled with the university's funds, the university officials argued that their fiduciary duty required them to have unilateral control of all institutional funds. The law deans countered that the university was contractually

obligated to delegate financial authority to the law school and that its refusal to do so was a breach of its fiduciary duty to the law school and its students.

The law school officials sought a preliminary injunction that would enable the law school to administer its funds independently. When the trial court denied this relief, the officials appealed. The appellate court considered the officials' contract claim in the context of the law governing private boards of trustees, and affirmed the trial court's finding that the university trustees' resolution creating the law school did not limit the trustees' authority to control its operations and finances:

The university is a not-for-profit corporation organized under the law of the state of Ohio. The university, [like] any corporation, is governed by the statutes of the state of its incorporation, its articles of incorporation, and its bylaws. The law school "is not organized as a corporation or other judicial entity." Concededly, it "was established pursuant to a resolution of the board of trustees of Antioch College (the predecessor in name to Antioch University) dated December 3 and 4, 1971." Resolutions adopted by the university in accordance with its articles of incorporation and bylaws effectuate the will of the corporation (see generally *Brown v. National Loan & Investment Co.*, 139 S.W.2d 364 (Tex. Civ. App. 1940)). However, the plain meaning of this resolution bespeaks a delegation of power for the establishment of an "interim governing structure" of the law school as it relates to the university. It cannot be concluded that such a delegation deprived the board of trustees of the power given to them in Article III of the university's Articles of Incorporation, to wit: "All of the rights and powers of the corporation and the entire control and management of its college, property, and affairs shall be vested in and exercised by a board of trustees composed of twenty-five (25) persons." In fact, a contract conveying such plenary power vested by corporation charter in the trustees would be void [418 A.2d at 111-12].

In thus affirming the denial of preliminary relief, the court determined that the board of trustees had acted in accordance with its fiduciary obligations under Ohio law and its charter and bylaws.<sup>1</sup> The court further cautioned that, had the board granted to the law school the administrative power it sought, the board's action would have been void. This conclusion is supported by the university's charter, which apparently precludes the trustees from delegating their management powers. It may also find support in the legal principle, recognized in varying degrees by the corporation laws of the states, that excessive delegation of management powers by a corporate board violates state law even if it is not precluded by the charter.

With a little muscle, a framework for analyzing the power relationship between private universities and their constituent units can be squeezed from the opinion in *In re: Antioch University*. First, the university is the legal entity that derives power from the state; the constituent unit usually has no separate

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<sup>1</sup>A later case between the same parties, *Cahn v. Antioch University*, 482 A.2d 120 (D.C. 1984), dealt with the law school officials' fiduciary obligations to the university. See also *In re Antioch University*, 482 A.2d 133 (D.C. 1984), which rejected the law school officials' request that the university pay their attorney's fees for the litigation.

corporate status and thus derives its authority exclusively from the university. Second, the extent to which the board of trustees may delegate authority to a constituent unit is determined initially by the relevant provisions of the corporate charter; the trustees may delegate management powers only to the extent, and in the manner, authorized by the charter. Third, charter provisions, in turn, may authorize delegation of management powers only to the extent, and in the manner, that the state's corporation statutes and case law permit; charter provisions that conflict with state law on excessive delegation are invalid. Fourth, the extent to which the university has actually delegated authority to a constituent unit is determined by construing the trustees' resolutions, the university's bylaws, and other official acts of the university. Any claimed authority that is not found in these sources, construed consistently with the charter and state law, does not exist.

Even if trustees have the authority to make certain decisions, their decisions are subject to challenges that they were made arbitrarily or in bad faith. For example, in *In re Polishook v. City University of New York*, 651 N.Y.S.2d 459 (N.Y. App. Div. 1996), the faculty union at City University of New York (CUNY) challenged several decisions of the trustees when they declared the university to be facing a state of financial exigency. The court reviewed the trustees' actions to determine whether they were arbitrary and capricious, or whether they were made in good faith. The court determined that the declaration of financial exigency, and the decision to terminate tenured faculty as a result, were made in good faith. Because the CUNY bylaws did not require the trustees to consult with the faculty prior to implementing faculty layoffs, the failure to consult was not evidence of bad faith. But the court agreed with the plaintiffs that the trustees' decision to reduce the number of credits required for both the associate and baccalaureate degrees had no rational basis, was arbitrary and capricious, and lowered the value of a CUNY diploma. It vacated that decision, while upholding the rest of the challenged actions.

Another issue related to the authority of trustees involves their role in monitoring the management of assets over which they have no legal control, but which may benefit the institution in the future. In *Shriners Hospitals for Crippled Children v. First Security Bank of Utah*, 835 P.2d 350 (Wyo. 1992), the Wyoming Supreme Court addressed the concerns of two beneficiaries of a trust: the hospital and the University of Utah. A donor had established a "charitable remainder trust" in her will that provided income for her sister during the sister's lifetime and then reverted to the hospital and the university upon the sister's death. The trustee, a bank, had sold some land that was part of the trust's assets without notifying the contingent beneficiaries (the hospital and the university), and at a price allegedly below its market value. The Wyoming court rejected the challenge to the sale of the land, ruling that the trustee had no duty to notify the contingent beneficiaries of the sale of trust assets. The U.S. Supreme Court declined to review the case. The outcome of this case is troubling for colleges, because donors often use charitable remainder trusts to make gifts to colleges and universities. Although colleges may ask the trustee of the trust to notify them before selling assets, there may not be a legal obligation for the trustee to do so.



In a development that is somewhat similar to the outcome of the *Shriners Hospital* case, a pair of state court cases in Connecticut appears to have broadened the ability of colleges in that state to use donations for purposes other than those specified by the donor. In *Herzog Foundation v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997), the state's highest court ruled that a state law did not confer standing on a donor to challenge the institution's use of donated funds. The plaintiff, a charitable foundation, had made gifts to the university to provide scholarships for nursing students. When the university decided to close its nursing school, the foundation sought a court order to require the university to either use the funds for their original purpose or return them to the foundation to be used for other charitable purposes. The university argued that the foundation lacked standing to sue under Connecticut law (the Connecticut Uniform Management of Institutional Funds Act, General Statutes §§ 45a-526 through 43a-534). The court ruled that, although the state law permitted the attorney general to bring an action against the recipient of a donation in order to enforce the donor's restrictions on the gift, the law did not authorize lawsuits by donors or other private parties. Nor did the foundation have standing to sue under common law, said the court, unless it had specifically reserved to itself the right to bring such an action as part of the terms of the gift.

Another Connecticut appellate court relied on the outcome in *Herzog Foundation* in a case brought against the trustees of Yale University. In *Russell v. Yale University*, 737 A.2d. 941 (Conn. App. 1999), heirs of the creator of a trust, alumni, and other donors challenged the decision of the trustees to reorganize the Yale Divinity School and to demolish portions of the buildings in which the school was housed. Funds from the trust had been used to construct the buildings. Using *Herzog* as authority, the court ruled that, because neither the trust instrument nor the other donations had specifically reserved to the donor the right to control the use of the donated funds, none of the donors, the donors' heirs, or the alumni had standing to challenge the decision of the trustees. Furthermore, the student plaintiffs lacked standing because they had alleged no injuries to themselves implicating fundamental rights.

Early in the new century, public disclosures of questionable business practices by large corporations have raised ethical and legal issues that are also pertinent to trustees of colleges and universities. These issues are thoughtfully and provocatively discussed by The Hon. Jose A. Cabranes in "University Trusteeship in the Enron Era" (2002), available at <http://www.nacua.org>.

**3.2.2. Other officers and administrators.** The authority of the highest-ranking officers and administrators of postsecondary institutions may occasionally be set out in statutes or state board regulations (for public institutions) or in corporate charters (for private institutions). But more often even the highest-ranking officers and employees, and almost always the lower-ranking ones, derive their authority not directly from statute, state board regulation, or charter but rather from subdelegation by the institution's board of trustees. The lower the administrator in the administrative hierarchy, the greater the likelihood of sub-subdelegation—that is, subdelegation of authority from the board of trustees to an officer or

administrator who in turn subdelegates part of this authority to some other administrator or employee.

Although delegation of authority to officers and administrators is necessary to allow the institution to function, there are limitations to the amount of authority, and the type of authority, that should be subdelegated. A review of cases and authorities on board delegations to administrators suggests five principles that boards should consider in balancing the need for administrators to make day-to-day operational decisions with the board's overall responsibility for setting policy and ensuring that the college operates properly:

1. The board's delegations must be consistent with the corporate articles and bylaws and other applicable law.
2. Proper guidelines should be provided to those who exercise delegated authority.
3. Power should only be delegated to competent persons or bodies.
4. Power should only be delegated to persons or bodies who will exercise the power properly and consistent with the governing board's intention.
5. The governing board should adopt appropriate procedures to review the actions taken under delegated authority (James F. Shekleton, "Delegation of Board Decision-Making Authority to Administrative Officers" (2002), available at <http://www.nacua.org>).

*Silverman v. University of Colorado*, 555 P.2d 1155 (Colo. 1976), illustrates the subdelegation of authority. A terminated assistant professor claimed that her termination constituted a breach of contract. In December 1972 the associate dean of the professor's school wrote the professor that she would be reappointed for 1973-74 if certain federal funding was renewed and if the professor's peers recommended reappointment. The professor claimed that, although both conditions were fulfilled, the school did not renew her contract, thus violating the terms of the December 1972 letter. The trial court held for the university, reasoning that the associate dean's letter could not create a contract because, by statute, only the board of regents had authority to appoint faculty members. The intermediate appellate court reversed, reasoning that the associate dean could have created a contract because he could have been acting under authority subdelegated to him by the board. The Supreme Court of Colorado then reversed the intermediate court and reinstated the trial court's decision, holding that hiring authority is not delegable unless "expressly authorized by the legislature."

In *People v. Ware*, 368 N.Y.S.2d 797 (N.Y. App. Div. 1975), however, an appellate court upheld a delegation of power from a systemwide board of trustees to the president of an individual institution and thence to campus police officers employed by that institution. The trial court had dismissed a prosecution against an illegal trespasser at the State University of New York (SUNY) at Buffalo because the officer making the arrest did not have authority to do so. According

to this court, the New York Education Law (§ 355(2)(m)) designated the SUNY Board of Trustees to appoint peace officers, whereas the arresting officer had been appointed by the president of the university. In reversing, the appellate court reasoned that the board had authority under the Education Law to promulgate rules and regulations, and the rules and regulations promulgated by the board provided for the delegation of power to SUNY's executive and administrative officers. By resolution passed under these rules and regulations, the board had authorized administrative officers of each state institution to appoint peace officers for their campuses. Since the SUNY president had properly appointed the arresting officer pursuant to this resolution, the officer had authority to make the arrest.

The question of delegation from trustees to one or more administrators may arise in issues relating to contracts. In *FDIC v. Providence College*, 115 F.3d 136 (2d Cir. 1997), officials of the college had entered a contract with two construction companies as part of an asbestos abatement project for the campus. The companies applied for loans from a bank in order to obtain the capital necessary to begin work on the project. As a condition of making the loans, the bank required the companies to obtain from the college a written guaranty of the loans. The vice president for business affairs, who was a personal friend of the principal officer of both companies, signed the form, which obligated the college to repay the \$621,000 loan if the borrowers could not. When the construction companies defaulted on the loans, the bank brought an action against the borrowers and the college. The college asserted that the vice president lacked the actual and the apparent authority to guaranty the loans. A trial judge granted summary judgment to the college on the issue of actual authority, but ruled that the issue of apparent authority must be determined at trial. Following a bench trial, the judge ruled that the vice president had apparent authority to guaranty the loan.

The appellate court reversed. The vice president was a personal friend of the borrowers, and his title did not appear on the loan document. There was no evidence to indicate that bank employees knew that the individual providing the guaranty was a college employee. Furthermore, a second loan obtained by the construction company had been guaranteed by the director of physical plant, and those amounts exceeded \$1 million. In both cases, the bank had made no attempt to determine whether the individuals acting as guarantors had the authority to commit the college to liability that equaled the college's entire endowment and the value of its land and buildings. The court ruled that, in order for the bank to hold the college liable for the loan amount guaranteed by the vice president, it would have to prove that (1) the college itself was responsible for the appearance of authority in the vice president to sign the guaranty and (2) the bank's reliance on the appearance of authority in the vice president was reasonable. The court ruled for the bank on the first issue, but ruled that the bank should have inquired as to whether the trustees had delegated the authority to the vice president to guaranty a loan on the college's behalf. The bank's failure to do so was unreasonable, and therefore it could not hold the college responsible for repaying the loan.

(For a discussion of apparent authority and a university's liability when a department chair promises new faculty members that they will be tenured, see *The Johns Hopkins University v. Ritter* in Section 6.7.1.)

In some situations, a board is not permitted to delegate its authority to a president. In *Faculty of City University of New York Law School at Queens College v. Murphy*, 539 N.Y.S.2d 367 (N.Y. App. Div. 1989), the university chancellor had declined to forward to the board of trustees the applications of two candidates for tenure who had not received unanimous approval from a joint law school-college review committee. The court held that the chancellor did not have authority to withhold the applications and that the board of trustees had the exclusive, nondelegable power to award tenure.

Similarly, an Ohio appellate court ruled that the president of Central State University did not have the authority to promise at-will employees that their employment would be extended indefinitely. In *Marbury v. Central State University*, 2000 Ohio App. LEXIS 5815 (Ct. App. Ohio, December 14, 2000), the former registrar of Central State University sued for breach of contract after being terminated from her position. She asserted that the president had orally promised her and other employees that, despite the university's financial problems, they would eventually receive contracts and salary increases, despite their at-will status. The court, interpreting Ohio law (Ohio Rev. Code Ann. § 3343.06), ruled that the law gave all authority for hiring and termination to the board of trustees, and that the president lacked the authority to bind the university when he made the promises to at-will employees.

Other problems may occur when administrators assume authority that the board has not delegated. In *Mendez v. Reynolds*, 681 N.Y.S.2d 494 (N.Y. App. Div. 1998) students at Hostos Community College, one of six community colleges in the CUNY system, challenged the CUNY trustees' decision to require students to pass a test of written English in order to graduate. The written test, which had previously been required as a condition for graduation, had been suspended several months earlier by the dean of academic affairs without trustee action. The trustees' resolution reinstating it as a graduation requirement was passed five days prior to graduation. The appellate court overturned the trial court's issuance of a preliminary injunction requiring the trustees to allow the students to graduate without having taken the test. The CUNY Board of Trustees had the "sole and exclusive authority to impose graduation and course requirements for all CUNY colleges," and the administrators did not have the authority to revoke the test requirement. Because the administrators lacked this authority, said the court, their notice to the students that the examination was no longer required had no legal effect. Furthermore, it would be unfair to bind the trustees to misstatements made by the Hostos administrators, even though the students justifiably relied on those misstatements. Quoting from *Olsson v. Board of Higher Education of the City of New York* (discussed in Section 9.3.2), the court expressed strong deference to the academic judgments of those with the authority to make those judgments. Nor did the doctrine of equitable estoppel apply in these circumstances, according to the court, because the board was acting in a governmental capacity, not a ministerial one. Finally,

the court noted that forcing a college to award degrees when the students had not demonstrated the requisite level of academic achievement would be a “disservice to society.”

In some circumstances, boards of trustees may avoid problems arising when an institutional officer or administrator acts beyond the scope of his delegated power by “ratifying” the unauthorized act. That act must have been within the scope of the board’s own authority. “Ratification” converts the initially unauthorized act into an authorized act. In *Silverman v. University of Colorado* (above), for instance, the intermediate appellate court held that, even if the associate dean did not have authority to reappoint the professor, the professor was entitled to prove that the offer of reappointment had been ratified by the board of regents (541 P.2d 93, 96 (1975)). Similarly, in *Tuskegee Institute v. May Refrigeration Co.*, 344 So. 2d 156 (Ala. 1977), two employees of a special program operated by Tuskegee had ordered an air conditioning unit from the May Company. May delivered and installed the unit but was not paid the agreed-upon price. An intermediate appellate court reversed a damages award for May on the theory that the Tuskegee employees who ordered the unit had no authority to do so. The highest state court then reversed the intermediate court. It reasoned that, even though the employees had no actual or apparent authority, Tuskegee had kept and used the unit that the employees ordered and therefore could have ratified their unauthorized acts.

Even when the board of trustees (or a higher level) officer or administrator with authority has not ratified the unauthorized act of an officer or administrator, a court will occasionally stop the institution from denying the validity of the act. Under this doctrine of estoppel, courts may—in order to prevent injustice to persons who had justifiably relied on an unauthorized act—treat the unauthorized act as if it had been authorized. In the *Silverman* case, the plaintiff professor argued that various officials of the school had “advised her that her position was secure for the coming academic year” and that she had “reasonably relied on these representations to her detriment in that she did not seek other employment.” The intermediate appellate court ruled that, if the plaintiff’s allegations regarding the assurances, the reasonableness of her reliance, and the detriment were true, then “the doctrine of estoppel may be invoked if necessary to prevent manifest injustice.” The Colorado Supreme Court reversed, recognizing the estoppel doctrine but holding that the facts did not justify its application in this case. The court reasoned that, since the professor had received adequate notice of nonrenewal, there was no “manifest injustice” necessitating estoppel and that, since the faculty handbook clearly stated that the board of regents makes all faculty appointments, the professor’s “reliance on statements made by university officials was misplaced.”

Another illustration of estoppel is provided by *Blank v. Board of Higher Education of the City of New York*, 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966). The plaintiff student sought to compel the defendant board to award him a Bachelor of Arts degree. The question about the student’s degree developed after he was advised that he could take advantage of a Professional Option Plan allowing him to complete a certain minimum amount of coursework without attending any classes. This arrangement enabled him to begin law school in Syracuse

before he had finished all his coursework at Brooklyn College. The student had been advised by faculty members, the head of the department of psychology, and a member of the counseling and guidance staff, and the arrangement had been approved by the professors of the psychology courses involved, each of whom gave him the necessary assignments. At the time of his expected graduation, however, the student was denied his degree because he had not completed the courses “in attendance.”

In defending its refusal to grant the degree, the college argued that only the dean of the faculty had the authority to determine a student’s eligibility for the Professional Option Plan and that the dean had not exercised such authority regarding the plaintiff. The college further argued that the dean had devised regulations concerning the Professional Option Plan and that these regulations contained residence requirements that the student had not met. While the court did not dispute these facts, it emphasized, as a contrary consideration, that the plaintiff had “acted in obvious reliance upon the counsel and advice of members of the staff of the college administration to whom he was referred and who were authorized to give him such counsel and advice.” Thus, “all of the elements of an estoppel exist” and the “doctrine should be invoked” against the college. The court ordered the college to award the plaintiff the A.B. degree.

In cases involving apparent authority, plaintiffs must convince a court that reliance on that apparent authority was reasonable. In *Sipfle v. Board of Governors of the University of North Carolina*, 318 S.E.2d 256 (N.C. Ct. App. 1984), the plaintiff had signed up for a trip to China organized by a university faculty member and had paid him \$52,000 for the cost of the trip. When the travel agency arranging the tour went bankrupt and did not provide the trip or return the plaintiff’s money, she sued the university, claiming that the faculty member was its agent and thus the university was responsible for refunding her money. Although the faculty member had used university stationery to advertise the trip, the university escaped liability for his actions because the court ruled that the plaintiff’s belief that the university was the sponsor was unreasonable.

Another institution also escaped contract liability on the theory that the defendant could not properly rely on the representations of a college employee. In *Student House, Inc. v. Board of Regents of Regency Universities*, 254 N.E.2d 496 (Ill. 1969), also discussed in Section 3.2.4, a corporation that owned and operated a private student housing facility at Northern Illinois University sued the university for building additional residence halls. The plaintiffs stated that several years earlier, the university’s director of housing had told them that the university would not build additional residence halls; and in reliance on that representation, the plaintiffs formed the corporation and built a private residence hall. The court found that the board of regents had the authority to decide to build residence halls and that the board had not delegated such authority to the housing director. The plaintiffs had relied on the representations of the director without discussing the matter with the president or any board member, said the court; and such reliance on the statements of “lower echelon members of the University staff” (254 N.E.2d at 499) was not reasonable.

Given the complexities of authority and delegation issues, particularly for trustees and administrators of public colleges, it is important that administrators keep trustees informed of important decisions, such as those involving large expenditures, major changes in academic policy, or major investment decisions. Obtaining ratification by the board of administrative decisions will help protect the college against claims of unauthorized actions by administrators. And, as always, seeking the advice of experienced counsel with respect to the authority of either trustees or administrators to take certain actions is a wise litigation avoidance strategy.

**3.2.3. Campus organizations.** Authority in postsecondary institutions may be delegated not only to individual officers or administrators but also to various campus organizations that are accorded some role in governance. Common examples include academic senates, faculty assemblies, department faculties, and student or university judicial systems. (See Section 9.1.4 for a discussion of judicial systems.)

*Searle v. Regents of the University of California*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972), is a leading case. By a standing order of the regents, the academic senate was given authority to “authorize and supervise all courses and curricula.” Pursuant to this authority, the senate approved a course in which 50 percent of the lectures would be taught by a nonfaculty member (Eldridge Cleaver). Subsequent to the senate’s approval of the course, the regents adopted two pertinent resolutions. One resolution provided that a person without an appropriate faculty appointment could not lecture more than once during a university quarter in a course offering university credit; the other provided that the course to be taught by Cleaver could not be offered for credit if it could not be restructured.

The course was taught as originally planned. When the regents resolved that the course not be given academic credit, sixteen students who took the course and six faculty members sued to compel the regents to grant the credit and to rescind the two resolutions. The plaintiffs argued that the standing order granting the academic senate authority over courses and curricula deprived the regents of power to act. The court, however, found that the regents had specifically retained the power to appoint faculty members and concluded that this case involved an appointment to the faculty rather than just the supervisory power over courses provided by the standing order: “To designate a lecturer for a university course is to name the person to conduct the course, at least to the extent of the lectures to be given by him. When the designation is of one to conduct a full half of the course, it appears to be a matter of appointment to the faculty, which is clearly reserved to the regents.” Moreover, the court indicated that the authority of the academic senate was subject to further diminishment by the regents:

In any event, the power granted to the senate is neither exclusive nor irrevocable. The bylaws specifically provide that neither they nor the standing orders

“shall be construed, operate as, or have the effect of an abridgment or limitation of any rights, powers, or privileges of the regents.” This limitation not only is authorized but seems required by the overriding constitutional mandate which vests the regents with “full powers of organization and government” of the university, and grants to them as a corporation “all the powers necessary or convenient for the effective administration of its trust” (Cal. Const. Art. IX, § 9). To accept appellants’ argument would be to hold that a delegation of authority, even though specifically limited, amounts to a surrender of authority [100 Cal. Rptr. at 195–96].

The court therefore determined that the regents, and not the senate, had authority over the structuring of the course in question.

Another case illustrating delegation of authority to a campus organization—this time a student rather than a faculty group—is *Student Association of the University of Wisconsin-Milwaukee v. Baum*, 246 N.W.2d 622 (Wis. 1976). The Wisconsin legislature had passed a statute that accorded specific organizational and governance rights to students in the University of Wisconsin system, including the allocation of student fees to student organizations and the creation of student governance committees. The chancellor of the Milwaukee campus asserted that, despite the statute’s passage, he retained the right to make student appointments to the Physical Environment Committee and the Segregated Fee Advisory Committee. The Student Association, the campuswide student government, argued that the chancellor no longer had this authority because the statute had delegated it to the association. Applying traditional techniques of statutory interpretation, the court agreed with the students. Concerning both disputed issues, the court held that the statute’s enactment removed the chancellor’s authority to make the appointments.

If campus organizations have the authority to recommend or to make decisions or appointments, questions have arisen as to whether such organizations at public colleges and universities are subject to state open meetings acts. (For a review of this issue, see the discussion in Section 12.5.2 of *Perez v. City University of New York* (finding that the community college senate and its executive committee were subject to New York’s Open Meetings Law), and *Board of Regents of the Regency University System v. Reynard* (finding that the athletic council of Illinois State University was subject to the state’s Open Meetings Act).)

**3.2.4. Trustee liability.** Even though trustees are not employed by the college or university, they may incur personal liability for tort, contract, or civil rights claims. The rationale for imposing individual liability on trustees is similar to that for imposing liability on individual employees: they were acting on behalf of the institution as its agent, and, unless some defense such as sovereign immunity or state law immunity applies, they may be found personally liable for violations of the law. (For a discussion of immunity theories that may shield trustees from individual liability, see Sections 4.7.2 & 4.7.4.)

A case brought against individual members of a community college board of trustees by a former president illustrates the potential liability that trustees may incur. In *Bakalis v. Board of Trustees of Community College District No. 504*, 886



F. Supp. 644 (N.D. Ill. 1995), a former president of Triton College sued several individual members of the board of trustees. For interfering with his employment contract. He claimed that he was ousted so that the board members could hire a president who would allow them to hire their political allies. In this case, the court characterized the “third party” as an “unbiased Board of Trustees,” stating that “it can be argued that a Board of Trustees composed of individuals acting to further their personal interests and not the interests of the college could be found to have interfered with Dr. Bakalis’s contract with Triton College” [886 F. Supp. at 645]. In other words, the clique of allegedly unethical board members interfered with the ability of an otherwise “unbiased” board of trustees to fulfill its contractual obligation to the former president.

“Quasi-contractual” theories, such as estoppel, may be used to assert personal liability against trustees. In *Student House, Inc. v. Board of Regents of Regency Universities*, 254 N.E.2d 496 (Ill. 1969), also discussed in Section 3.2.2, a private housing developer sought to enjoin the trustees of Northern Illinois University from building additional student housing. The developer claimed that several administrators, such as the director of student housing and the director of research, had promised that the university would not build housing if private housing met the university’s needs. The Illinois Supreme Court ruled that, as a matter of law, the developer’s reliance on these oral representations of lower-level administrators was unreasonable, and refused to apply the plaintiff’s agency law and estoppel theories.

Trustees of public institutions may be protected by constitutional immunity theories, which are discussed in Section 4.7.4. Trustees of private institutions may be protected by charitable immunity in states that recognize such immunity (discussed in Section 3.3.1). Most institutions agree to indemnify their trustees, officers and employees if they are found personally liable, as long as these individuals are acting within the scope of their official responsibilities and have acted in good faith. For a discussion of indemnification agreements, see Section 2.5.3.2.

(For a discussion of potential personal liability of trustees and administrators for decisions with environmental consequences, see Comment, “Whistling Past the Waste Site: Directors’ and Officers’ Personal Liability for Environmental Decisions and the Role of Liability Insurance Coverage,” 140 *U. Pa. L. Rev.* 241 (1991); see also Section 13.2.10.)

## **Sec. 3.3. Institutional Tort Liability**

**3.3.1. Overview.** Several common law doctrines provide remedies to individuals who are injured through the action (or, on occasion, the inaction) of others. Colleges are subject to common law liability as well as to statutory liability. (See Section 2.1 for a general discussion of the sources of liability for colleges.) Although the college is usually named as a defendant when common law claims are brought, claims may also be brought against faculty and staff in their personal capacities; these theories of liability are discussed in Section 4.7.

The most frequent source of potential common law liability is tort law, which requires a college and its agents to refrain from injuring any individual to

which the college owes a duty. Negligence or defamation claims may be brought against the institution itself or against faculty or staff (or, occasionally, against students). And contract law (discussed in Section 3.4) is increasingly being used by employees, students, and others to seek redress from the college for alleged wrongdoing.

Because these are common law claims, state law governs the legal analysis and the outcome. The cases discussed in this section provide a representative selection of issues and resolutions. Administrators and faculty should use caution, however, in assuming that the analysis or the outcome of any particular case in another state would be replicated in the state in which the college is located. As always, there is no substitute for experienced legal counsel in responding to actual or threatened litigation involving common law liability issues.

A tort is broadly defined as a civil wrong, other than a breach of contract, for which the courts will allow a remedy. A tort claim involves a claim that the institution, or its agents, owed a duty to one or more individuals to behave according to a defined standard of care, that the duty was breached, and that the breach of that duty was the cause of the injury.

While there is a broad range of actions that may expose an institution to tort liability, and any act fitting this definition may be considered a tort, there are certain classic torts for which the essential elements of the plaintiff's *prima facie* case and the defendant's acceptable defenses are already established. The two classic torts that most frequently arise in the setting of postsecondary education are negligence<sup>2</sup> and defamation, both of which are discussed in this section; but other tort theories, such as common law fraud, are also appearing in lawsuits against colleges and universities. Various techniques are available to colleges for managing the risks of tort liability, as discussed in Section 2.5.

A college is not subject to liability for every tortious act of its trustees, administrators, or other agents. But the institution will generally be liable, lacking immunity or some other recognized defense, for tortious acts committed within the scope of the actor's employment or otherwise authorized by the institution or subject to its control. For example, if a student, employee, or other "invitee"

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<sup>2</sup>The relevant cases and authorities are collected at Tracey A. Bateman, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Associated with Transportation of Students," 23 A.L.R.5th 1; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Education for Accidents Occurring During School Athletic Event," 35 A.L.R.3d 725; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Associated with Chemistry Experiments, Shopwork, and Manual or Vocational Training," 35 A.L.R.3d 758; Allan E. Korpela, Annot., "Tort Liability of Private Schools and Institutions of Higher Learning for Accidents Due to Condition of Buildings, Equipment, or Outside Premises," 35 A.L.R.3d 975; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Students," 36 A.L.R.3d 330; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring During the Use of Premises and Equipment for Other Than School Purposes," 37 A.L.R.3d 712; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Due to Condition of Grounds, Walks, and Playgrounds," 37 A.L.R.3d 738; Robin Cheryl Miller, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring in Physical Education Classes," 66 A.L.R.5th 1.

(an individual who is entitled or permitted to be on college property) is injured as a result of a careless or wrongful act of a college employee, the college may be liable for that injury, just as any landlord or business owner would be under similar circumstances (see, for example, *Lombard v. Fireman's Fund Insurance Co.*, 302 So. 2d 394 (La. Ct. App. 1974)) (university was liable to student injured when she fell in hallway of classroom building because janitors had applied excessive oil to floor, rendering it slippery. The duty to keep the premises in a safe condition was breached). A similar duty may exist in classroom, residence hall, athletics, or other settings—even, on occasion, if the activity is performed off-campus or abroad.

Whether or not a college may be held liable for torts committed by student organizations may depend upon whether a supervisory relationship exists between the college and the organization. Although dated, the case of *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981) contains a valuable analysis of an institution's liability for the tortious acts of its student organizations. The case concerned a libelous letter to the editor, published by the student newspaper at SUNY-Binghamton. The court's opinion noted two possible theories for holding postsecondary institutions liable: (1) that the student organization was acting as an agent of the institution, and this institution, its principal, is vicariously liable for its agents' torts (the *respondet superior* doctrine); and (2) that the institution had a legal duty to supervise the student organization, even if it was not acting as the institution's agent, because the institution supported or provided the environment for the organization's operation. In a lengthy analysis, the court refused to apply either theory against the institution, holding that (1) the institution did not exercise sufficient control over the newspaper to establish an agency relationship; and (2) given the relative maturity of college students and the rudimentary need and generally understood procedure for verifying information, the institution had no legal duty to supervise the newspaper's editorial process. (For more contemporary cases that followed *Mazart*, see *McEvaddy v. City University of New York*, 633 N.Y.S.2d 4 (Sup. Ct. N.Y., App. Div. 1995), and *Lewis v. St. Cloud State University*, 693 N.W.2d 466 (Minn. Ct. App. 2005).)

The second theory articulated in *Mazart*, the institution's purported "duty to control," became an issue in a case that, although it did not involve a tort claim, addressed issues similar to those addressed in tort actions against colleges. An attempt to hold a university responsible for acts of individual students and a faculty member was rejected by the Supreme Court of Vermont. In *Doria v. University of Vermont*, 589 A.2d 317 (Vt. 1991), an unsuccessful political candidate sued the University of Vermont under several sections of the state constitution, arguing that the university had a duty to supervise and control its students and faculty members in order to preserve his constitutional right to a fair election. The students had worked as telephone pollers for a faculty member and two newspapers; and, the plaintiff alleged, the questions and the ensuing poll results had given other candidates an unfair advantage.

The court rejected the plaintiff's "duty to control" theory, stating that "requiring defendant to strictly regulate and control the activity involved here, or any other student and faculty activity that might have an impact on the electoral process,

would be basically inconsistent with the academic environment” (589 A.2d at 321). The result in *Doria* is deferential to the activities of faculty members and their students, particularly in matters related to curriculum or faculty research.

Colleges may be able to escape tort liability under various immunity theories. Public colleges may assert sovereign or governmental immunity, while in some states, the charitable immunity doctrine protects nonprofit educational organizations. Each is discussed below.

Sovereign immunity is a common law doctrine that protects the state as an entity, and its agencies, from litigation concerning common law or certain statutory claims. (Immunity of a state and its agencies from suit in federal courts is also guaranteed by the Eleventh Amendment to the U.S. Constitution, and is discussed in Section 3.5.) The availability of the sovereign immunity defense varies greatly from state to state. While the doctrine was generally recognized in early American common law, it has been abrogated or modified in many states by judicial decisions, state legislation, or a combination of the two.<sup>3</sup> When a public institution raises a defense of sovereign immunity, the court must first determine whether the institution is an arm of the state. Because the doctrine does not protect the state’s political subdivisions, entities that are separate and distinct from the state are not protected by sovereign immunity. If the court finds that the institution is a state entity, then the court must determine whether the state has taken some action that would divest the institution of sovereign immunity, at least for purposes of the lawsuit. Some states, for example, have passed tort claims acts, which define the types of lawsuits that may be brought against the state and the procedures that must be followed (see, for example, Florida’s Tort Claims Act, Fla. Stat. § 768.28 (2001)). Other exceptions have been created by decisions of state supreme courts.

In *Brown v. Wichita State University*, 540 P.2d 66 (Kan. 1975), *vacated in part*, 547 P.2d 1015 (Kan. 1976), the university faced both tort and contract claims for damages arising from the crash of an airplane carrying the university’s football team. In Kansas, the university’s home state, the common law doctrine of immunity had been partly abrogated by judicial decision in 1969, the court holding that the state and its agencies could be liable for negligence in the conduct of “proprietary” (as opposed to “governmental”) activities. But in 1970 the Kansas legislature had passed a statute reinstating the immunity abrogated by the court. The university in *Brown* relied on this statute to assert immunity to the tort claim. The court, after reconsidering the issue, vacated its prior judgment to the contrary and rejected plaintiffs’ arguments that the statute was unconstitutional, thus allowing the university’s immunity defense.

A case decided by a Texas appellate court illustrates the substantial protection afforded a public university—but not one of its employees—by a state tort claims act. In *Prairie View A&M University of Texas v. Mitchell*, 27 S.W.3d 323 (Ct. App. Tex., 1st Dist. 2000), a former student sued the university when it would not provide verification of his engineering degree. Despite the fact that

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<sup>3</sup>The cases and authorities are collected in Allen E. Korpela, Annot., “Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning,” 33 A.L.R.3d 703.

the student produced a valid transcript and a diploma issued to him earlier by the university, the university registrar's office would not confirm that he had earned a degree, and the former student's employer required him to take a leave of absence without pay because his degree could not be confirmed by the university. The university defended the negligence lawsuit by claiming that it was protected by sovereign immunity under the Texas Tort Claims Act (Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (1997)).

Although the trial court rejected the university's defense, the appellate court sided with the university. The student cited an exception in the state's Tort Claims Act that abrogated immunity if a "personal injury" had resulted from "a condition or use of tangible personal or real property." Arguing that it was the university's misuse of its computers or other equipment that caused his injury, the student asserted that the university's actions should fall within this exception to immunity. The court disagreed. It was actions of university employees, rather than the "defective property," that caused the alleged injury to the plaintiff, according to the court. Although the university was immune from liability in this case, the court noted that the registrar, who had been sued individually, was not.

A public institution does not necessarily lose its immunity defense even if it subsumes—and then must answer for the actions of—an entity that, when independent, did not enjoy such immunity. In *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904 (7th Cir. 1991), a former employee of an athletics association sued the trustees for wrongful discharge. Although the athletics association had been a nonprofit corporation independent of the university, the state legislature had merged the association into the university through special legislation. The court ruled that the board had not waived its immunity when it absorbed the association, nor had the legislature so provided. Therefore, the university's immunity extended to acts of the former association, and the case was dismissed.

A college may not be able to take advantage of the sovereign immunity defense in a situation where the complained-of action is not a "governmental function," but is one that a private entity could perform. For example, in *Brown v. Florida State Board of Regents*, 513 So. 2d 184 (Fla. Dist. Ct. App. 1987), a student at the University of Florida drowned in a lake owned and maintained by the university. In response to the university's defense of sovereign immunity in the ensuing wrongful death claim, the appellate court ruled that since the type of activity was not a governmental one, the university could not assert the immunity defense; once the university decided to operate a lake, it then assumed the common law duty of care to those who used it.

But the definition of a "governmental function" is inconsistent across states. A New York appellate court determined that when a state university provides security at a university-sponsored concert, it is performing a governmental function and is thus immune from tort liability. In *Rashed v. State of New York*, 648 N.Y.S.2d 131 (Sup. Ct., App. Div. 1996), the plaintiff had been stabbed by another individual in the audience at a "rap" concert sponsored by City University. The plaintiff claimed that the university failed to provide adequate security, despite the fact that audience members were screened with a metal

detector and a pat-down search. The court ruled that, unless the plaintiff could show that the university had assumed a “special duty of protection,” a showing that the plaintiff had not made, no liability could arise for this government function.

Although private institutions can make no claim to sovereign immunity, non-profit schools may sometimes be able to assert a limited “charitable” immunity defense to certain tort actions.<sup>4</sup> The availability of this defense varies from state to state. For example, a federal appellate court roundly criticized the charitable immunity doctrine in *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942), refusing to apply it to a tort suit brought by a special nurse injured on the premises of the college’s hospital. And in *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983), the Supreme Court of Massachusetts, noting that the state legislature had abrogated charitable immunity for torts committed in the course of activity that was primarily commercial (Mass. Gen. Laws Ch. 231, § 85K (2002)), rejected the college’s charitable immunity defense. The court also refused the college president’s request to apply a good-faith standard, rather than a negligence standard, to his actions. (A good-faith standard would absolve the president of liability even if he were found negligent, as long as he had acted in good faith.) The *Mullins* case is discussed further in Section 8.6.2.

Despite these attacks on the charitable immunity doctrine, the New Jersey Supreme Court has upheld the doctrine, and has applied it to public as well as private colleges. In *O’Connell v. State of New Jersey*, 795 A.2d 857 (N.J. 2002), the court interpreted the state’s Charitable Immunity Act (N.J.S.A. § 2A:53A-7–11), which applies to any “nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes.” The plaintiff, injured when he fell down a stairway on campus, had claimed that, as a recipient of public funds, Montclair State University should not be protected under this doctrine from its alleged negligence. The court disagreed, stating that the public university was a nonprofit entity organized exclusively for educational purposes, and found no legislative intent to exclude public colleges from the protections of the Charitable Immunity Act. Because the student was a beneficiary of the university’s educational purposes, said the court, the plain meaning of the statute gave the university immunity from liability. An institution’s charitable immunity may also protect it from liability if one of its students is injured as a result of a school-sponsored event in another state (*Gilbert v. Seton Hall University*, 332 F.3d 105 (2d Cir. 2003)).

Under Massachusetts law, a charitable organization, even if found liable for negligence, can be required to pay no more than \$20,000 in damages if the tort was committed in an activity that is in furtherance of the organization’s charitable purposes. In *Goldberg v. Northeastern University*, 805 N.E.2d 517 (Mass. App. Ct. 2004), the parents of a student who died after visiting the university’s

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<sup>4</sup>The cases and authorities are collected in Allan E. Korpela, Annot., “Immunity of Private Schools and Institutions of Higher Learning from Liability in Tort,” 38 A.L.R.3d 480; and Janet Fairchild, Annot., “Tort Immunity of Nongovernmental Charities—Modern Status,” 25 A.L.R.4th 517. See also Allan Manley, Annot., “Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer,” 82 A.L.R.3d 1213.

health center sued the university, arguing that the negligence of its staff caused their daughter's death. A state appellate court ruled that the operation of a student health center was not a commercial activity, and thus was within the charitable purposes of the university, so the statutory cap on damages applied to the lawsuit. The court went on to rule, however, that the university had not been negligent in operating the health center, and found for the university.

The remainder of this section discusses the most frequently occurring subjects of tort litigation faced by colleges. Although negligence claims outnumber other types of tort claims, defamation claims (discussed in Section 3.3.4 below) are increasing, as are claims of educational malpractice (a hybrid of tort and contract claims, discussed in Section 3.3.3 below). The complexity and variety of a college's activities are matched by the complexity and variety of the legal claims brought by individuals who claim to have been injured by the actions—or inaction—of a college or its agents.

**3.3.2. Negligence.** Higher education institutions are facing a growing array of negligence lawsuits, often related to students or others injured on campus or at off-campus functions. Although most college students have reached the age of majority and, theoretically, are responsible for their own behavior, injured students and their parents are increasingly asserting that the institution has a duty of supervision or a duty based on its “special relationship” with the student that goes beyond the institution's ordinary duty to invitees, tenants, or trespassers. Courts have rejected this “special relationship” argument for most tort claims, but they have imposed a duty on colleges of protecting students from foreseeable harm, such as in cases of hazing or the presence of dangerous persons on campus.

When the postsecondary institution is not immune from negligence suits under either sovereign or charitable immunity, liability depends, first, on whether the institution's actions fit the legal definition of the tort with which it is charged; and, second, on whether the institution's actions are covered by one of the recognized defenses that protect against liability for the tort with which it is charged. For the tort of negligence, the legal definition will be met if the institution owed a duty to the injured party but failed to exercise due care to avoid the injury. Whether or not a duty exists is a matter of state common law. Typical defenses to tort claims include the plaintiff's own negligence or the assumption of risk doctrine.

Negligence claims against colleges are typically a result of injury to a student or other invitee (an individual who is lawfully on campus or participating in a college activity) as a result of allegedly defective buildings or grounds (premises liability), accidents or other events occurring either on or off campus as a result of instructional activities, cocurricular activities, or outreach activities, or alleged educational malpractice. Cases involving claims in each of these areas are discussed below.

Although courts were historically reluctant to hold colleges to the same standard of care applied to business organizations, landlords, or other noneducational organizations, that attitude has changed markedly in the last decade.

While courts in the early and mid-twentieth century applied the doctrine of *in loco parentis* to shield colleges from liability in tort claims brought by students or their parents, that doctrine fell out of favor when the age of majority for students was lowered to eighteen, making virtually all college students “adults” in the eyes of the law. Following the demise of *in loco parentis*, a few courts issued influential rulings that characterized colleges as “bystanders” with respect to the activities of “adult” students.

The seminal case involving the college as “bystander” is *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980), in which the court refused to impose liability on a college for injuries suffered by a student. The student, a sophomore at Delaware Valley College in Doylestown, Pennsylvania, was seriously injured in an automobile accident following the annual sophomore class picnic, which had been held off campus. The injured student was a passenger in a car driven by another student, who had become intoxicated at the picnic. Flyers announcing the picnic were mimeographed by the college duplicating facility. They featured drawings of beer mugs and were prominently displayed across the campus. The sophomore class’s faculty adviser, who did not attend the picnic, cosigned the check that was used to purchase beer. The injured student brought his action against the college, as well as the beer distributor and the municipality, alleging that the college owed him a duty of care to protect him from harm resulting from the beer drinking at the picnic. The jury in the trial court awarded the student, who was rendered quadriplegic, damages in the amount of \$1,108,067 against all defendants, and each appealed on separate grounds.

The college argued on appeal that the plaintiff had failed to establish that the college owed him a legal duty of care. The appellate court agreed with this argument. Its opinion began with a discussion of the custodial character of post-secondary institutions. The court noted that changes have taken place on college campuses in recent decades that lessen the duty of protection that institutions once owed to their students. Assertions by students of their legal rights as adults reduced the colleges’ duty to protect them, according to the court.

The student had the burden of proving the existence of a legal duty by identifying specific interests that arose from his relationship with the college. Concentrating on the college’s regulation prohibiting the possession or consumption of alcoholic beverages on campus or at off-campus college-sponsored functions, he argued that this regulation created a custodial relationship between the college and its students. A basic principle of law holds that one who voluntarily takes custody of another is under a duty to protect that person. The plaintiff reasoned that he was entitled to the protection voluntarily assumed by the college when it promulgated the regulation. The court dismissed this argument on the ground that the college regulation merely tracks state law, which prohibits persons under the age of twenty-one from drinking intoxicants.<sup>5</sup> By promulgating the regulation,

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<sup>5</sup>In actuality the regulation went beyond the statute because it applied to every student regardless of age—a point that could have favored the plaintiff had the court been sensitive to it. Lawyers will thus want to exercise caution in relying on the court’s analysis of this particular issue.



then, the college did not voluntarily assume a custodial relationship but only reaffirmed the necessity of student compliance with Pennsylvania law.

*Bradshaw* influenced the rulings of other courts throughout the 1980s, the most frequently cited of which are *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986), and *Rabel v. Illinois Wesleyan University*, 514 N.E.2d 552 (Ct. App. Ill. 1987). The student in *Beach* was injured after falling off a cliff while participating in a university-sponsored field trip. The student, who was under the legal age for drinking alcohol, had consumed alcohol in full view of the faculty advisor shortly before wandering off and falling. Despite the fact that the university had promulgated regulations against drinking, and the faculty member had failed to enforce those regulations, the court refused to impose liability on the university. The student in *Rabel* was abducted from her residence hall by a fellow student engaged in a fraternity initiation; the court found no duty, even with respect to the university's role as landlord of the residence hall.

This "bystander" approach appears to be falling out of favor with courts, who, in cases decided over the past decade, are now imposing the same duty on colleges and universities that has traditionally been required of business organizations, landlords, and other nonacademic entities. (For a discussion of the movement from the *in loco parentis* standard through the "bystander" approach to the present trend to treat colleges like another business or landlord, see the Bickel & Lake entry in the Selected Annotated Bibliography for this section.)

Institutions may be liable for the negligence of their employees, and, under certain circumstances, may even be found liable for the negligence of nonemployees. For example, in *Foster v. Board of Trustees of Butler County Community College*, 771 F. Supp. 1122 (D. Kan. 1991), a basketball coach had asked a student to pick up a potential recruit at the airport and drive him to a nearby motel. On his return from the airport, the student ran a red light and hit a truck, resulting in his death and injuries to the recruit and the truck driver. Both injured parties sued the college.

A jury awarded the injured recruit \$2.26 million against the college and the estate of the driver. On appeal, the college argued that it was not responsible for the actions of the student driver. The court, noting that the student's car was uninsured and unregistered and that the student had no valid driver's license, ruled that "the Butler Community College defendants could have discovered [the driver's] unfitness for the task had any investigation been conducted" (771 F. Supp. at 1128). The college had policies requiring students driving on the college's behalf to be licensed; the college's failure to follow its policies and its failure to ascertain whether the student was qualified to undertake the responsibility it assigned him resulted in the court's determination that, for purposes of *respondeat superior* liability, the student was a "gratuitous employee" of the college. (See Section 2.2 for a discussion of *respondeat superior* liability.)

Despite the outcome in the Butler Community College case, colleges are usually not responsible for the torts of students. For example, in *Gehling v. St. George's University School of Medicine*, 705 F. Supp. 761 (E.D.N.Y. 1989),

*affirmed without opinion*, 891 F.2d 277 (2d Cir. 1989), medical students who treated a colleague after he collapsed in a road race did not expose the medical school to malpractice liability; the court ruled that they had not acted as agents of the school. The outcome might have been different, however, if the medical students had been involved in an athletic event sponsored by the medical school. (For a discussion of institutional tort liability related to athletic events, see Section 10.4.9.)

Even if the individual causing the injury is acting in a volunteer capacity rather than within the scope of employment, a college may be liable for injury caused by that person. In *Smith v. University of Texas*, 664 S.W.2d 180 (Tex. Ct. App. 1984), the court refused to award summary judgment to the university on its theory that the tortfeasor (the individual whose actions resulted in injury) was acting as a volunteer referee at a sporting event. Questions about the university's duty to supervise the event, the fact that these "volunteers" were also employees of the university, and unresolved questions of fact dictated that the matter go to trial.

An emerging area of potential negligence liability for colleges and their staffs is computer security. For example, in addition to potential liability for computer usages that violate federal statutes (see Sections 13.2.5 & 13.2.12 of this book) or the First Amendment (see Section 8.5.1), institutions may become liable for negligent loss or disclosure of confidential electronic records, negligent supervision of employees who use electronic information for unlawful purposes, negligent failures to keep networks secure from outsiders who gain access for unlawful purposes, or negligent transmission of data that intrudes upon privacy interests of students, faculty, staff, or outsiders. (For discussion of federal law immunity from some negligence liability related to campus computer systems, see Section 8.5.2.)

**3.3.2.1. Premises liability.** These claims involve injuries to students or other invitees who allege that a college breached its duty as a landlord or landowner to maintain reasonably safe buildings (classrooms, residence halls, sports facilities, performing arts centers) or land (parking lots, athletics field, pathway, sidewalks). If the "dangerous" condition is obvious, there is no duty to warn an invitee of potential danger. For example, in *Shimer v. Bowling Green State University*, 708 N.E.2d 305 (Ct. Cl. Ohio 1999), a student who fell into an open orchestra pit sued the college for the injuries she sustained. The court found for the college, stating that the plaintiff, who had been working on a theater production and was familiar with the stage and the orchestra pit's location, was negligent in not using care to avoid falling into the pit.

The majority rule that landowners are liable only for those injuries on their property that are foreseeable remains intact, but courts are differing sharply on what injuries they view as foreseeable. For example, in *Pitre v. Louisiana Tech University*, 655 So. 2d 659 (La. Ct. App. 1995), *reversed*, 673 So. 2d 585 (La. 1996), the intermediate appellate court had found the university liable for injuries to a student who was paralyzed during a sledding accident. When a rare snowstorm blanketed the university's campus, the administration issued a written warning to its students, placing it on each student's bed, urging them

to use good judgment and to avoid sledding in dangerous areas. Pitre and two classmates used a trash can lid as a sled, rode down a long hill, and Pitre struck the base of a light pole in a university parking lot. The appellate court ruled that the university had a duty to prevent unreasonably unsafe student activities, and viewed the written warning as an encouragement to engage in sledding. Although the court acknowledged that Pitre's own behavior contributed to his injuries, it found the university 25 percent liable.

The Supreme Court of Louisiana reversed, reasoning that the danger encountered by Pitre and his friends was obvious to a reasonably careful invitee. The court stated that, since sledding is not inherently dangerous, the university could not foresee that Pitre would select a location unsuitable for sledding; furthermore, said the court, it was reasonable for the university to install light poles as a safety mechanism. The court ruled that the university bore no liability for the plaintiff's injuries.

Premises liability claims may also arise when an invitee misuses a college building or other college property, but that misuse is claimed to be foreseeable. For example, in *Robertson v. State of Louisiana*, 747 So. 2d 1276 (Ct. App. La. 1999), *writ denied*, 755 So. 2d 882 (La. 2000), the parents sued Louisiana Tech University for negligence after their son died from falling from the roof of a campus building. The university had built a roof over its swimming pool; the roof, whose apex was 56 feet high, extended to within several feet of the ground. The son, a twenty-three-year-old senior, had climbed onto the roof after spending the evening drinking with friends. There had been several earlier incidents of students climbing on the roof; in all cases the students were intoxicated, and in two cases the students had been seriously injured. The parents of the student who died claimed that, because of these earlier climbing incidents, the injury to their son was foreseeable, and the university should have erected some form of barrier to prevent students from climbing onto the roof. Despite the university's knowledge of the earlier climbing incidents, and testimony that a modest investment in shrubbery would likely have prevented future climbing expeditions, the court ruled that the roof was not unreasonably dangerous, that the danger of falling off the roof was obvious, and therefore that the university owed no duty to prevent the student from climbing onto the roof.

The outcome in *Robertson* has been echoed by courts in cases where a student's misconduct was judged to be the proximate cause of his or her injury. For example, in *Nicholson v. Northeast Louisiana University*, 729 So. 2d 733 (La. Ct. App.), *writ denied*, 744 So. 2d 633 (La. 1999), a student fell over the railing in a residence hall during horseplay. The court ruled that it was his own actions, rather than the design of the building or the failure of residence hall staff to supervise the student, that caused the injury. Again, the injury occurred after the student had been drinking.

Colleges in Florida have gained some protection from liability in cases such as *Nicholson*. The legislature of Florida has enacted a law creating a potential bar to recovery in a negligence lawsuit if the plaintiff is voluntarily intoxicated and the court determines that the plaintiff is the primary cause of his or her injuries (Fla. Stat. Ann. § 768.075 (2001)).

Invitees have attempted to impose tort liability on a college when some form of criminal activity on campus results in injury.<sup>6</sup> Again, the majority rule is that the criminal activity must have been foreseeable. For example, in *Nero v. Kansas State University*, 861 P.2d 768 (Kan. 1993) (discussed in Section 8.6.2), the Kansas Supreme Court reversed a summary judgment award for the university and ordered the case to be tried, ruling that a jury would need to decide whether the rape of a student by a fellow student in a residence hall was foreseeable because the alleged rapist had been accused of an earlier sexual assault on campus, and university officials were aware of that fact when they assigned him to live during summer session in a coed residence hall. But in *L. W. v. Western Golf Association*, 712 N.E.2d 983 (Ind. 1999), the Indiana Supreme Court ruled that the owners of a “scholarship house” at Purdue University were not liable to a student who became intoxicated and later was raped in her room by a fellow scholarship house resident. Finding that there was no record of similar incidents that would have made such a criminal act foreseeable, the court refused to impose liability.

The legal analysis is similar when plaintiffs allege that an injury occurring at a recreational event sponsored by the college was foreseeable. The Supreme Court of Kansas ruled that Wichita State University (WSU) was not liable for the death of an invitee who was shot by a gang member after a fireworks celebration on campus. In *Gragg v. Wichita State University*, 934 P.2d 121 (Kan. 1997), the children of Ms. Gragg claimed that the university and several corporate sponsors of the fireworks program failed to provide adequate security, that the lighting was inadequate, and that the defendants had failed to warn the victim that there had been criminal incidents near the WSU campus. The court ruled that the university and other defendants did not owe Gragg a legal duty to protect her from the criminal act of a third party. Since the WSU police did not know that the assailant was on campus, or that he intended to shoot a rival gang member, the shooting was not foreseeable. The court distinguished *Nero* because, in *Nero*, the university was aware of the assailant’s previous criminal record. No such knowledge was present in this case. Furthermore, similar celebrations had been held on campus for the prior seventeen years; no shootings or other violent crime had taken place.

But in *Hayden v. University of Notre Dame*, 716 N.E.2d 603 (Ct. App. Ind. 1999), a state appellate court reversed a summary judgment award for the university. A football fan with season tickets was injured when a football was kicked into the stands and spectators lunged for it. The plaintiff argued that the university should have protected its spectators from being injured, and that lunging fans were a common occurrence at Notre Dame football games. The court ruled that, because there were many prior incidents of fans lunging for footballs, Notre Dame should have foreseen the type of injury sustained by the plaintiff. Given the foreseeability of this behavior, the court ruled that Notre Dame owed the plaintiff a duty to protect her from injury. (For a discussion of

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<sup>6</sup>Cases and authorities are collected in Joel E. Smith, Annot., “Liability of University, College or Other School for Failure to Protect Student from Crime,” 1 A.L.R.4th 1099.

risk management issues in campus sporting events, see William P. Hoye, “Legal Liability Arising out of Major Sporting and Other Events on Campus,” Outline for Annual Conference of National Association of College and University Attorneys, 2004, available at <http://www.nacua.org>.)

**3.3.2.2. Liability for injuries related to on-campus instruction.** Students or other invitees injured while involved in on-campus instructional activities may file negligence claims against the institution and/or the instructor. For example, in *McDonald v. University of West Virginia Board of Trustees*, 444 S.E.2d 57 (W. Va. 1994), a student enrolled in a theater course sued the university for negligence, seeking damages for a broken leg and ankle. The professor was teaching a class in “stage movement” and had taken the class outdoors, where the students were asked to run across a lawn simulating fear. Several students performed the exercise before the plaintiff took her turn. As she was running, she encountered a small depression in the lawn, stumbled and fell, and was injured.

Although the jury had found for the plaintiff, the trial judge had entered judgment for the university, which the Supreme Court of West Virginia affirmed. The student had sought to demonstrate that the professor’s supervision of the class was negligent, but the court disagreed. The professor had inspected the lawn area before the class and had not noticed the small depression. Furthermore, evidence showed that theater students at the university were given safety instructions, and that the professor had discussed safety issues in that class. The syllabus included information on safety, including what clothing to wear, layering of clothing, and body positioning. The faculty member required students to wear high-top tennis shoes as a further safety precaution. The faculty member was present at the time of the student’s injury, and the court found that no amount of supervision or scrutiny would have discovered the “small depression” that caused the student to fall. Therefore, said the court, the faculty member’s actions were not a proximate cause of the injury, and the university itself was not required to maintain a lawn completely free of “small depressions.”

This case is notable because of the relatively high level of caution apparently displayed by the faculty member. Clearly, the safety instructions (which, since they were on the course syllabus, were easily proven) and the faculty member’s statement that she inspected the lawn area prior to the class were important to the defense of this lawsuit. A similar degree of care could not be demonstrated in another case in New York, and this difference appears to have caused a very different result. In *Loder v. State of New York*, 607 N.Y.S.2d 151 (N.Y. App. Div. 1994), Alda Loder was enrolled in an equine studies course at the State University of New York at Cobleskill. It was her first such course. Each student was required to perform two weeks of “barn duty,” which included grooming a horse assigned to the student. When Ms. Loder approached the stall of the mare to which she was assigned and attempted to enter the stall, the mare kicked her in the face, causing serious injuries. The student sued, alleging that the university was negligent both in the way that the horse was tethered in the stall and in its failure to properly instruct the student with respect to how to enter the stall of a fractious horse.

The trial court had found the university 60 percent liable for the student's injury. The university appealed, but the appellate court sided with the student. First, said the appellate court, there was sufficient evidence of the horse's propensity to kick to suggest that the university was negligent in its method of tethering the horse. Furthermore, there were no written instructions on how to enter the horse's stall. The university employee who had shown the student how to enter the stall had used the incorrect procedure, according to an expert witness called by the university. Therefore, the court concluded, although the owner of a domestic animal normally is not responsible for injuries caused by that animal, unless the animal is known to be "abnormally dangerous," in these circumstances, the university was negligent in both failing to instruct the student regarding safety and in its method of securing the horse.

The student in *Loder* was a beginning student, and her lack of familiarity or experience with horses was a significant factor. If the student is experienced, however, the court may be less sympathetic. In *Niles v. Board of Regents of the University System of Georgia*, 473 S.E.2d 173 (Ga. App. 1996), the plaintiff, a doctoral student in physics at Georgia Tech, was injured in a laboratory accident. The student had been working in the laboratory on a project related to a course in superconducting crystals, and had been cleaning some equipment with a mixture of acetone, ethanol, and nitric acid, a highly explosive combination. A more senior doctoral student had suggested that "recipe" as a cleaning solution. Following the accident, the student asserted that the university, through his professor, was negligent in its failure to instruct him that this combination of substances was volatile.

The court was not sympathetic to the student's claim that he needed instruction. He had graduated *summa cum laude* with a major in chemistry, and had obtained a master's degree in physics with a 4.0 average. He had spent "hundreds of hours" in laboratories, according to the court, and had previously worked with all three of the substances. Therefore, said the court, the professor had the right to assume that the student either would know of the dangers of these substances, or would "perform the research necessary to determine those dangers and take the necessary precautions" (473 S.E.2d at 175). Therefore, the faculty member had no duty to warn the student about the dangers of mixing "common chemicals," said the court. (For a similar case with the same result, see *Fu v. University of Nebraska*, 643 N.W.2d 659 (Neb. 2002).)

The defense of "assumption of risk" is routinely used in negligence claims in which the defendant argues that the plaintiff was fully aware of the risks of a particular course of action and thus the defendant had no duty to warn the plaintiff of those dangers. In cases involving classroom instruction, however, this defense may have limited success. For example, in *Drogaris v. Trustees of Columbia University*, 743 N.Y.S.2d 115 (N.Y. App. Div., 2d Dept., 2002) the court denied the university's motion for summary judgment. A student enrolled in a graduate course in kinesiology (the study of movement) was injured after the course instructor used her for a physical demonstration of a clinical test. The student alleged that the instructor hyperextended her leg, resulting in a muscle tear.

The court rejected the university's argument that the student assumed the risk of injury by participating in the class.

In physical injury claims related to classroom activities, courts seemingly will consider the student's knowledge level. If the student is a novice, as in *Loder* and *Drogaris*, there is likely to be a duty to instruct and supervise. If the student is experienced, however, and has knowledge that is similar to the knowledge of the professor, then the court may not find a duty to supervise or instruct. And, of course, the more the institution can demonstrate that safety precautions and safety training were carried out, the more likely the institution is to prevail.

**3.3.2.3. Liability for injuries in off-campus courses.** An increasing number of lawsuits seek to impose liability on the college and its staff for injuries occurring during off-campus courses. Many graduate, and an increasing number of undergraduate, programs require some form of off-campus internship experience for students. Student teaching is required for students seeking degrees or licenses in education; social work students are typically required to complete a practicum in a social service agency; and students enrolled in health care-related programs may also have off-campus educational requirements. These experiences provide valuable opportunities for student learning, but may create liability for the college or university, even if it has no real control over what the student encounters in the off-campus placement.

Liability for activities at the off-campus site can occur in several ways. For example, the institution may be responsible for maintaining the safety of premises it does not own if it schedules a course there. In *Delbridge v. Maricopa County Community College District*, 893 P.2d 55 (Ariz. App. 1994), the college offered a course in plant mechanics to the employees of the Salt River Project (SRP) on the site of that organization. Although SRP employees performed the instruction, they were considered adjunct faculty of the college, and they were paid by the college. Individuals participating in the course were considered students of the college. As part of the course, the students were required to learn to climb a utility pole. The plaintiff, a student in the class, climbed the pole, lost his grip, fell, and was seriously injured. His lawsuit alleged negligence on the part of the college in not providing him with a safe environment.

The trial court awarded summary judgment to the college, but the appellate court reversed, ruling that there was a special relationship between the college and the student. Despite the fact that the premises were also under the control of SRP, said the court, the college also had a duty not to expose its students to an unreasonable risk of harm. Furthermore, the student was acting under the supervision of a college instructor. The case was remanded for a trial court's determination as to whether the college breached its duty to the plaintiff.

A significant decision by a Florida appellate court addressed the liability of a college to a student injured at the site of an off-campus internship. In *Gross v. Family Services Agency and Nova Southeastern University, Inc.*, 716 So. 2d 337 (Fla. App. 1998), the plaintiff had enrolled in the doctoral program in psychology at Nova Southeastern University. The program required her to complete an eleven-month practicum at an off-campus organization. Nova gave each student a list of preapproved practicum sites, and students selected six possible sites.

Nova controlled the placement of students at the sites. Gross was placed at Family Services Agency, approximately 15 miles from the university. One evening, while leaving the agency, Gross was assaulted by a man in the agency's parking lot and was injured. Previous assaults had occurred in the parking lot, a fact of which the university was aware, but the student was not. The student sued the university for negligence in assigning her to an unreasonably dangerous internship site without adequate warning. She also sued the agency, which settled her claim.

Although the trial court awarded summary judgment to the university, stating that it had no duty to control the agency's parking lot, the appellate court reversed. The court rejected the trial court's determination that this was a premises liability case, characterizing the college's duty as one of exercising "reasonable care in assigning [the student] to an internship site, including the duty to warn her of foreseeable and unreasonable risks of injury" (716 So. 2d at 337). The court characterized the relationship between the student and the university as "an adult who pays a fee for services [the student] and the provider of those services [the university]." Therefore, said the court, the university had a duty to use ordinary care in providing educational services and programs.<sup>7</sup> If the student was injured by the acts of a third party, then the university would only be liable if a special relationship existed. The court ruled that a special relationship did exist in this situation, relying upon a case involving litigation by a British tourist who sued a car rental company for failure to warn customers about the risk of crime in certain areas of Miami. The car agency's knowledge of the risk of crime, and the fact that the tourist was not from the United States, created a special duty, said that court, to warn the foreign tourist of "foreseeable criminal conduct" (*Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. App. 1996)). So, too, the university had a duty to warn the student of the risk of assault, given its knowledge that previous assaults had occurred in the vicinity.

The Supreme Court of Florida affirmed the appellate court's ruling on the issue of the university's duty to warn the student (*Nova Southeastern University v. Gross*, 758 So. 2d 86 (Fla. 2000)). In addition to agreeing with the appellate court's reasoning that the university had assumed a duty of "acting reasonably in making [those] assignments" to a specific location, the court declared: "There is no reason why a university may act without regard to the consequences of its

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<sup>7</sup>The court cited the ruling of a Massachusetts trial court, which refused to grant summary judgment in a negligence claim by a student who was sexually assaulted by an employer to whom she had been referred by the college's placement office. In *Silvers v. Associated Technical Institute, Inc.*, 1994 Mass. Super. LEXIS 506 (Mass. Superior Ct. 1994), the court did not rule on the negligence claim, but merely rejected the college's attempt to have the case determined in its favor prior to trial. The court noted that the employer accused by the former student of assault had specifically asked the college's placement office to send him only résumés for female graduates. The placement staff did not inquire as to the reason for the gender restriction; the court viewed that omission as possible evidence of negligence. Although the court stated that the college only had a duty to exercise ordinary care in the placement of its students, it stated that the female-only request should have stimulated some sort of inquiry from the placement office. Its failure to do so, said the court, was fatal to its motion for summary judgment.



actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances” (758 So. 2d at 90). The court stated that the college’s duty was one of reasonableness in assigning students to practicum locations, a duty that required the university to warn students of potential dangers posed by that location.

For negligence liability purposes, then, whether the location at which a student or staff member is injured is on or off campus is not the controlling issue. What is more important, according to these cases, is whether the college took adequate precautions to ensure the safety of its students, even if it did not have total physical control of the site. (For further information about potential tort liability related to internship programs, see Lori Chamberlain, “The Perils of Internship Programs,” 26 *College Law Digest* 171–74 (1996). Guidelines for drafting agreements between colleges and students involved in off-campus internships can be found in “Internships and Service Learning Agreements: Issues Checklist and Sample Language,” by Leslie Myles-Sanders & Dan Sharphorn (Outline for Annual Conference of National Association of College and University Attorneys, June 20–23, 2001).)

Simply because a student has an off-campus assignment, however, does not mean that the college assumes a duty to ensure that the student arrives at the off-campus location safely. In *Stockinger v. Feather River Community College*, 4 Cal. Rptr. 3d 385 (Cal. Ct. App. 2003), a student who was injured when she was riding to an off-campus assignment in the back of a classmate’s pickup truck sued the college and the course instructor for negligence in planning and supervising the class assignment. The court rejected her claim, ruling that “a college must be able to give its students off-campus assignments, without specifying the mode of transportation, and without being saddled with liability for accidents that occur in the process of transportation” (4 Cal. Rptr. at 401).

Study abroad programs may present liability issues for colleges as well. Since the mid-1990s, several colleges have been sued by students, or their families, for injuries or deaths to students participating in study abroad programs. Although the courts have rejected claims that a college that sponsors a study abroad program is the insurer of students’ safety, the courts are imposing a duty of reasonable care on colleges that requires them to take steps to protect students, faculty, and staff from reasonably foreseeable harm. Particularly if the program takes place in a country, or in a portion of a country, that is deemed unsafe or prone to criminal activity, considerable precautions will need to be taken by the college.

For example, St. Mary’s College (a public college in Maryland) settled a lawsuit filed by three students who were injured during a study abroad trip to Guatemala. While a group of thirteen students, two faculty members, and the study abroad director were returning by bus to Guatemala City from a trip to a rural area, the bus was stopped by armed bandits and robbed. Five of the students were raped. Three of the students sued the college, arguing that insufficient precautions were taken for their safety, and that additional precautions, such as an armed guard, a convoy of several vehicles, and the selection of a safer route would have prevented the injuries. The college argued that sufficient

precautions had been taken and that, because previous study abroad trips to Guatemala had been uneventful, the injuries were not foreseeable. However, the college settled with the plaintiffs in order to avoid prolonging the dispute (Beth McMurtrie, “College Settles Suit by 3 Students Over ’98 Attack in Guatemala,” *Chron. Higher Educ.*, July 5, 2002, available at <http://chronicle.com/daily/2002/07/2002070502n.htm>).

A student was unsuccessful in persuading a Minnesota court to impose liability on the University of Minnesota for an assault by a taxi driver in Cuernavaca, Mexico, where the student was participating in a study-abroad program. In *Bloss v. University of Minnesota*, 590 N.W.2d 661 (Ct. App. Minn. 1999), the student asserted that the university was negligent in not obtaining housing closer to the location of the classes, in not providing safe transportation to and from campus, and in not warning the students about the possibility of assault. The court ruled that governmental immunity protected the university from liability for its decision to use host families to house the students. But with respect to the student’s allegations concerning safety issues, immunity would not protect the university if it had breached its duty in that regard. In this case, however, the court ruled that the university had behaved reasonably. There was no history of assaults on students or tourists in the eighteen years that the program had operated in Cuernavaca. Students had been given a mandatory orientation session on safety, and had been told not to hail a taxi on the street (which the student had done), but to call a taxi company. The assault occurred when the student took a taxi to meet friends—not to attend class. Given the university’s efforts to warn students and the lack of foreseeability of the assault, the court refused to impose liability on the university.

Because of the potential for substantial liability, it is important that an audit of an international site be conducted prior to making a decision to commence a study abroad program. For those colleges with study abroad programs in place, a similar audit should be conducted to ascertain whether the studying and living accommodations are reasonably safe and what foreseeable risks, if any, students and employees will be exposed to. (Articles from a Symposium on International Programs provide useful guidance for administrators, faculty, and counsel in addressing risk analysis and developing policies and practices that will protect students and employees from harm and colleges from liability: John T. Hall & Rowan Ferguson, “Case Study: University of Anyplace: Strategic Legal Risk Review,” 27 *J. Coll. & Univ. Law* 119 (2000); and William P. Hoye & Gary M. Rhodes, “An Ounce of Prevention Is Worth . . . the Life of a Student: Reducing Risk in International Programs,” 27 *J. Coll. & Univ. Law* 151 (2000). For additional recommendations on reducing liability for international programs, see the NACUA conference outline by William P. Hoye and Rebecca Hovey, “Reducing Liability for International Programs Post September 11th,” June 2002 (available at <http://www.nacua.org>.)

**3.3.2.4. Liability for cocurricular and social activities.** In addition to potential premises liability claims, discussed in Section 3.3.2.1 above, an individual injured as the result of a college-sponsored event, or as a result of activity that is allegedly related to college activities, may attempt to hold the college liable for negligence.

For example, in *Bishop v. Texas A&M University*, 35 S.W.3d 605 (Tex. 2000), a student participating in a university-sponsored play was stabbed accidentally during a performance of *Dracula*. The play was directed by a nonemployee, but two faculty members served as advisors to the student production. Although the state appellate court found the university immune from liability under the state's tort claims act because the faculty members were not acting within their job responsibilities of teaching, the Texas Supreme Court reversed. The court said that, although the faculty advisors were volunteers, their participation as advisors was considered when salary increase decisions were made, the drama club was required to have a faculty advisor as a condition of receiving university recognition, and university policies required the faculty advisors to enforce its rules and regulations. The high court ruled that a jury could potentially find that the faculty advisors were negligent, and thus that the university was liable to the injured student. On remand, the trial court found that the advisors were not protected by governmental immunity, and that they were negligent in supervising the students. A state appellate court affirmed in *Texas A&M University v. Bishop*, 105 S.W.3d 646 (Tex. App. 2002). However, the Texas Supreme Court reversed, ruling that the university had not waived its sovereign immunity because the conduct of the faculty advisors did not fall within a statutory exception to immunity, and the director was not an employee of the university (156 S.W.2d 580 (Tex. 2005)). In a case with very similar facts, however, a Kansas appellate court ruled that the state's tort claims act shielded Pittsburg State University from liability for the student's injury (*Tullis v. Pittsburg State University*, 16 P.3d 971 (Ct. App. Kan. 2000)).

In several cases involving injuries to students who were participating in cocurricular events, the court imposed a "special duty" on the college beyond that owed to invitees or to the general public. For example, when the institution sponsors an activity such as intercollegiate sports, a court may find that the institution owes a duty to student athletes on the basis of a special relationship. In *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993) (discussed in Section 10.4.9), a federal appellate court applying Pennsylvania law held that a special relationship existed between the college and a student who collapsed as a result of cardiac arrest and died during lacrosse practice, and that because of this special relationship the college had a duty to provide treatment to the student in the event of such a medical emergency. On the other hand, if the student is pursuing private social activities that the institution has not undertaken to supervise or control, a court may find that no duty exists. In *University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987), for example, the Supreme Court of Colorado reversed a \$5.26 million judgment against the University of Denver for a student rendered a quadriplegic in a trampoline accident.

The accident in *Whitlock* occurred in the front yard of a fraternity house on the university campus. The university had leased the land to the fraternity. Whitlock asserted that the university had a duty, based on a "special relationship," to make sure that the fraternity's trampoline was used only under supervised conditions. The special relationship, Whitlock asserted, arose either from his status as a student or the university's status as landowner and lessor to the fraternity. But the court held that the university's power to regulate student conduct on campus did

not give rise to a duty to regulate student conduct or to monitor the conduct of every student on campus. Citing earlier cases in which no duty to supervise social activity was found (including *Bradshaw v. Rawlings*, discussed in Section 3.3.2 above), the court concluded that the university did not have a special relationship based merely on the fact that Whitlock was a student. Inspection of the lease between the university and the fraternity disclosed no right to direct or control the activities of the fraternity members, and the fire inspections and drills conducted by the university did not create a special relationship.

In determining whether a duty exists, the court will consider whether the harm that befell the individual was foreseeable. For example, in *Kleinknecht v. Gettysburg College*, discussed above, the court noted that the specific event need not be foreseeable, but that the risk of harm must be both foreseeable and unreasonable. In analyzing the standard of care required, the court noted that the potential for life-threatening injuries occurring during practice or an athletic event was clearly foreseeable, and thus the college's failure to provide facilities for emergency medical attention was unreasonable.

On the other hand, when the institution attempts to prohibit, or to control, inherently dangerous activities in which its students participate, a court may find that it has a duty to those students. In *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), the Supreme Court of Delaware ruled that the university's pervasive regulation of hazing during fraternity rush created a duty to protect students from injuries suffered as a result of that hazing. Furek, who had pledged the local chapter of Sigma Phi Epsilon, was seriously burned and permanently scarred when a fraternity member poured a lye-based liquid oven cleaner over his back and neck as part of a hazing ritual. After he withdrew from the university and lost his football scholarship, he sued the university and was awarded \$30,000 by a jury, 93 percent of which was to be paid by the university and the remainder by the student who poured the liquid on Furek.<sup>8</sup>

The university asserted on appeal that it had no duty to Furek. While agreeing that "the university's duty is a limited one," the court was "not persuaded that none exists" (594 A.2d at 517). Rejecting the rationales of *Bradshaw* (discussed in Section 3.3.2 above) and its progeny, the court used a public policy argument to find that the university did have a duty:

It seems . . . reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision advances the health and safety of at least some students [594 A.2d at 518].

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<sup>8</sup>Subsequent to the ruling of the trial court, the university moved for judgment notwithstanding the verdict, which the trial court awarded. While that ruling was on appeal, the student who had poured the substance on Furek agreed to pay all but \$100 of the \$30,000 compensatory damages award. Although the Delaware Supreme Court subsequently overturned the judgment for the university, and ordered a new trial on the apportionment of liability between the student and the university, it does not appear that Furek availed himself of the opportunity for a new trial, leaving the university responsible for only \$100 of the damage award.

Although it refused to find a special duty based on the dangerous activities of fraternities and their members, the court held that:

Certain established principles of tort law provide a sufficient basis for the imposition of a duty on the [u]niversity to use reasonable care to protect resident students against the dangerous acts of third parties. . . . [W]here there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control [594 A.2d at 519–20].

The court determined that the university’s own policy against hazing, and its repeated warnings to students against the hazards of hazing, “constituted an assumed duty” (594 A.2d at 520). Relying on Section 314A of the *Restatement (Second) of Torts*, the court determined that the “pervasive” regulation of hazing by the university amounted to an undertaking by the university to protect students from the dangers related to hazing and created a duty to do so.

Because the outcomes in cases involving injuries related to cocurricular or social events are particularly fact sensitive, it is difficult to formulate concrete suggestions for avoiding or limiting legal liability. The cases seem to turn on whether the court believes that the injury was foreseeable. For example, in *Knoll v. Board of Regents of the University of Nebraska* (discussed in Section 10.2.3), the court refused to award summary judgment to the university when the student attempted to hold the university responsible for the injuries he sustained during hazing in a fraternity house, which, under university policy, was considered student housing controlled by the university. The court ruled that the kidnapping and hazing of a student by a fraternity known to have engaged in prior acts of hazing could have been foreseen by the university. A Louisiana court reacted similarly in *Morrison v. Kappa Alpha Psi Fraternity* (also discussed in Section 10.2.3).

On the other hand, a federal district court refused to find institutional liability for the death of a first-year student who fell from a cliff during a social event sponsored by a student organization. In *Apfel v. Huddleston*, 50 F. Supp. 2d 1129 (D. Utah 1999), the court reaffirmed the teachings of *Beach*, and dismissed the complaint, stating that institutions generally will not be held liable for injuries that occur off campus and that are not part of the academic program. Particularly when the injury is alleged to have resulted, at least in part, from the intoxication of the injured student or other individual, the court will examine closely the degree to which the college supervised the social or cocurricular event (or had undertaken the responsibility to do so), the reasonableness of the injured individual’s behavior, and the relationship between acts or omissions of the college and the subsequent injury. This is particularly true of litigation involving injuries that are a result of hazing related to fraternity or other social organizations, which is discussed in Sections 10.2.3 and 10.2.4.

A case decided by the U.S. Court of Appeals for the Eighth Circuit illustrates the continuing influence of *Bradshaw* and *Beach* (see Section 3.3.2), and some courts’ continuing reluctance to find a special relationship that would create a duty on the college’s part to protect students from their own risky behavior. In

*Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003), a female student was sexually assaulted after consuming alcohol at a private party in a college dorm room. She sought to hold the college and the resident advisor liable for negligence because the resident advisor, who had been told that she was intoxicated and unconscious, did nothing to assist her. The court refused to find that a college has a “custodial duty” to protect an adult college student, and affirmed the trial court’s summary judgment ruling for the college and the resident advisor.

Additional sources of liability may arise in states where case or statutory law establishes civil liability for private hosts who furnish intoxicating beverages (see *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984), and *Bauer v. Dann*, 428 N.W.2d 658 (Iowa 1988)) or for retail establishments that sell alcohol to minors. Sponsors of parties at which intoxicants are served, particularly to minors, could be found negligent under the social host doctrine. (See also G. Rinden, “Judicial Prohibition? Erosion of the Common Law Rule of Non-Liability for Those Who Dispense Alcohol,” 34 *Drake L. Rev.* 937 (1985–86).) A court in such a jurisdiction could rely on this law to impose a legal duty on the institution when alcohol is served at college-sponsored activities. Many states also have Dram Shop Acts, which strictly regulate licensed establishments engaged in the sale of intoxicants and impose civil liability for dispensing intoxicants to an intoxicated patron. A college or university that holds a liquor license, or contracts with a concessionaire who holds one, may wish to enlist the aid of legal counsel to assess its legal obligations as a license holder.

**3.3.2.5. Student suicide.** According to the National Center for Health Statistics, suicide is the third-leading cause of death among college students between the ages of fifteen and twenty-four.<sup>9</sup> Several high-profile lawsuits, some of which have been resolved against the interests of institutions of higher education, make it clear that faculty and administrators must take this issue very seriously, become educated about the warning signs of a potential suicide, and ensure that proper actions are taken if a student exhibits those signs. Although courts historically have refused to create a duty to prevent suicide, holding that it was the act of the suicide victim that was the proximate cause of the death, more recently courts are beginning to find, under certain circumstances, a duty to prevent the suicide, or a duty to warn appropriate individuals that a student is a suicide risk.<sup>10</sup>

Plaintiffs in a series of lawsuits concerning the potential liability of a college for students who commit suicide have attempted to persuade courts to find a “duty to warn” parents or others of potential dangers to students. In *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000), the state supreme court rejected the claims of the parents of a student who committed suicide that a “special relationship” between the university and the student required the university to notify the parents of a student’s “self-destructive” behavior. Unlike the outcome of the

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<sup>9</sup>Robert N. Anderson & Betty L. Smith, *Deaths: Leading Causes for 2001* (National Center for Health Statistics, 2002), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_09.pdf).

<sup>10</sup>Cases and authorities are collected at Sonja Larsen, Annot., “Liability of School or School Personnel in Connection with Suicide of Student,” 17 A.L.R.5th 179.

*Tarasoff* case (discussed in Section 4.7.2.2), the Iowa court ruled that the failure of university staff to warn the student's parents did not increase the risk of his committing suicide; university staff had encouraged him to seek counseling and had asked him for permission to contact his parents, which he had refused.

More recently, however, a court has found that, under certain circumstances, there may be a duty to take "affirmative action" to prevent a student from harming himself. In *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002), the aunt of a college student, Michael Frentzel, sued the college, the dean of student affairs, and a resident assistant for wrongful death after the student committed suicide by hanging himself. Frentzel had a history of disciplinary problems during his freshman year, and the college had required him to enroll in anger management counseling. After completing the counseling, Frentzel had an argument with his girlfriend, and the campus police and Frentzel's resident assistant were called. At the same time, Frentzel sent the girlfriend a note indicating that he planned to hang himself. The campus police and resident assistant were shown the note. Frentzel wrote several notes over the next few days, but the police and residence hall advisor took no action, except to forbid the girlfriend to see Frentzel. Frentzel hanged himself three days after the initial altercation.

The plaintiff claimed that a special relationship existed between Frentzel and the college that created a duty to protect him from harm about which the college had knowledge. The defendants asked the court to dismiss the claim, stating that there was no duty to prevent Frentzel from harming himself. The court concluded that, because college employees knew of Frentzel's threats to kill himself, the self-inflicted injuries, and his history of emotional problems, the plaintiff had alleged sufficient facts to support a claim that a special relationship existed, which created a duty to protect Frentzel from "the foreseeable danger that he would hurt himself." The court also ruled that the plaintiff had alleged sufficient facts to support her claim that the defendants breached their duty to Frentzel. Although the court dismissed the claim against the resident assistant, it ruled that a wrongful death action could be maintained against the college and the dean. The college later settled the case (Eric Hoover, "Ferrum College Concedes 'Shared Responsibility' in a Student's Suicide," *Chron. Higher Educ.*, July 29, 2003, available at <http://chronicle.com/daily/2003/07/2003072902n.htm>).

The outcome in the Ferrum College case may have influenced a preliminary ruling in another lawsuit. The lawsuit asserted breach of contract and negligence claims against the Massachusetts Institute of Technology (MIT) for allegedly providing ineffective psychiatric care to a student who committed suicide in an MIT residence hall (*Shin v. MIT*). A state trial judge dismissed the claims of the student's parents against MIT itself, but allowed some of the claims against administrators and staff to go forward (Marcella Bombardieri, "Lawsuit Allowed in MIT Suicide," *Boston Globe*, July 30, 2005, available at [http://www.boston.com/news/education/higher/articles/2005/07/30/lawsuit\\_allowed\\_in\\_mit-suicide/](http://www.boston.com/news/education/higher/articles/2005/07/30/lawsuit_allowed_in_mit-suicide/)). The judge cited the Ferrum College case and its finding that administrators and staff had a "special relationship" with the student that created a duty to protect her from reasonably foreseeable harm to herself. In April of 2006, the parties settled the case, agreeing that the student's death was probably accidental, and not a suicide.

The visibility of the incident at MIT and the growing concern among student affairs and health professionals about student suicide has resulted in attempts to create programs to prevent student suicide. (See, for example, Paul Joffe, "An Empirically Supported Program to Prevent Suicide Among a College Population," presented at the 24th Annual National Conference on Law and Higher Education, Stetson University Law School, February 2003.)

A widespread misconception among college administrators is that the Family Educational Rights and Privacy Act (FERPA, discussed in Section 9.7.1) prevents college administrators from contacting parents or other relatives if a student is threatening suicide. FERPA contains an exception for emergencies, including those involving health and safety. Furthermore, there is no private right of action under FERPA since the decision of the U.S. Supreme Court in *Doe v. Gonzaga University* (discussed in Section 9.7.1). Therefore, a proactive stance could both save the lives of students and protect the institution against legal liability.

(For further discussion of law and policy issues, as well as suggestions for drafting institutional policies to respond to mental health emergencies, see Peter Lake & Nancy Tribbensee, "The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury," 32 *Stetson L. Rev.* 125 (2003); and Ann H. Franke, "Before and After Student Suicide: Preventing Tragedies and Mitigating Liability," presented at the 25th Annual National Conference on Law and Higher Education, Stetson University Law School, February 2004.)

**3.3.2.6. Liability for injuries related to outreach programs.** Programs open to the community or to certain nonstudent groups may involve litigation over the college's supervision of its own students or of invitees to the campus (such as children or high school students enrolled in precollege programs). Children may be on campus for at least three reasons: they are enrolled in campus educational, athletic, or social programs (such as summer camps); they are attending an event or using a campus facility, such as a library or day care center; or they are trespassers. Potential claims may involve liability for injuries sustained in sporting events, assault or other crimes, vehicular accidents, or allegedly defective premises. The fact that children are below the age of majority makes it difficult for a college defendant to argue that a particular danger was "open and obvious," or that the child assumed the risk of the danger. A case against the State University of New York at Binghamton is instructive. In *Carol "WW" v. Stala*, 627 N.Y.S.2d 136 (N.Y. App. Div. 1995), a mother alleged that a university student, participating in a "Big Buddy" program sponsored by the student association, had sexually assaulted her children. These children were not participants in the program, but had encountered the student while he was in the neighborhood because of the Big Buddy program. Although the court ruled that the program sponsors had a duty to supervise program participants and to provide for the safety of the children participating in the program, that duty did not extend to other children who were not program participants.

Another case illustrative of the college's potential liability when minors are involved in campus programs is *Dismuke v. Quaynor*, 637 So. 2d 555 (La. App. 1994), *review denied*, 639 So.2d 1164 (La. 1994). Dismuke, a fifteen-year-old, was



a participant in a summer camp sponsored by Grambling State University. The university hired college students as counselors. Dismuke alleged that Quaynor, a Grambling student and counselor, had sexually assaulted her in the student union building after the campers had been dismissed early because of inclement weather. She sued both Quaynor and the university. Quaynor did not respond, and the court entered a default judgment against him. In ruling against the university, the trial court found that Quaynor was acting within the scope of his employment when the alleged assault took place because he had gone to the student union to supervise boys attending the summer camp. This finding provided the basis for the court's ruling that the university was vicariously liable for the injury.

A college may also face liability for negligent supervision of children, even if the injury is not caused by the act of a staff member. For example, in *Traficenti v. Morre Catholic High School*, 724 N.Y.S.2d 24 (N.Y. App. Div. 2001), the appellate court rejected Fordham University's claim that a student spotter's failure to catch a high school cheerleader participating in a cheerleading competition was not foreseeable. The court ruled that the case must proceed to trial, stating that the university and the high school that the student attended may have had a duty to supervise the competition more closely.

(For analysis of potential risks and recommendations for reducing those risks when the college sponsors or provides the facilities for activities involving children, see Laura A. Kumin & Linda A. Sharp, *Camps on Campus* (United Educators Insurance Risk Retention Group, Inc., 1997, available at <http://www.nacua.org>). See also Angela Alkire & Ann Franke, "Children on Campus," Presentation at the 24th Annual National Conference on Law and Higher Education, Stetson University College of Law, February 2003.)

**3.3.3. Educational malpractice.** Another potential source of negligence liability, albeit a generally unsuccessful one for plaintiffs, is the doctrine of "educational malpractice."<sup>11</sup> The claim (which may also be based on contract law, as discussed in Sections 3.4 and 8.1.3) arises from the duty assumed by a professional not to harm the individuals relying on the professional's expertise. An individual who performs "one of the professions, or a trade, calling or business, . . . [is] required to exercise that degree of skill (a special form of competence) and knowledge usually had by members of such profession or such trade in good standing" (S. Speiser, *The American Law of Torts* (Clark Boardman Callaghan, 1985), 319).

Although they often sympathize with students who claim that they have not learned what they should have learned, or that their professors were negligent in teaching or supervising them, courts have been reluctant to create a cause of action for educational malpractice. In *Ross v. Creighton University*, 740 F. Supp. 1319 (N.D. Ill. 1990), discussed in Section 10.4.5, a trial judge dismissed the

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<sup>11</sup>Cases and authorities are collected in David P. Chapus, Annot., "Liability of School Authorities for Hiring or Retaining Incompetent or Otherwise Unsuitable Teacher," 60 A.L.R.4th 260; and Joel E. Smith, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice," 1 A.L.R.4th 1139.

claim by a former athlete that the university had negligently failed to educate him, although it did allow a contract claim to survive dismissal. Asserting that the university's curriculum was too difficult for him, the former basketball player argued that Creighton had a duty to educate him and not simply allow him to attend while maintaining his athletic eligibility. The judge disagreed, ruling that the student was ultimately responsible for his academic success. The appellate court affirmed (957 F.2d 410 (7th Cir. 1992)).

A similar result was reached in *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986), although the plaintiff in this case was a patient injured by a chiropractor trained at Palmer College of Chiropractic. The patient sued the college, claiming that the injuries were a result of the chiropractor's inadequate training. After reviewing cases from other jurisdictions, the Iowa Supreme Court decided against permitting a cause of action for educational malpractice.

The court gave four reasons for its decision:

1. There is no satisfactory standard of care by which to measure an educator's conduct.
2. The cause of the student's failure to learn is inherently uncertain, as is the nature of damages.
3. Permitting such claims would flood the courts with litigation and would thus place a substantial burden on educational institutions.
4. The courts are not equipped to oversee the day-to-day operation of educational institutions.

The Supreme Court of Kansas reached a similar conclusion in *Finstand v. Washburn University of Topeka*, 845 P.2d 685 (Kan. 1993). Several students in the university's court-reporting program sued the university for consumer fraud (since, they alleged, it had falsely claimed that its program was accredited) and for malpractice (since, they alleged, the performance of students in the program on the state's certification test was worse than that of other students). Although the court found that the students' latter allegation was true, there was no evidence that the students' failure rate was caused by poor instruction. Citing *Ross* and a case in which New York's highest court rejected a malpractice claim against a school system (*Donohue v. Copiague Unified Free School District*, 391 N.E.2d 1352 (N.Y. 1979)), the Kansas Supreme Court refused to recognize such a claim for essentially the same reasons cited in *Moore*.

More recently, plaintiffs raising educational malpractice claims have found the same judicial hostility exhibited in *Ross v. Creighton University*. A Colorado appellate court relied on *Ross* to reject the educational malpractice claims of nineteen students in *Tolman v. CenCor Career Colleges, Inc.*, 851 P.2d 203 (Colo. App. Ct. 1992), *affirmed*, 868 P.2d 396 (Colo. 1994), stating that "there is no workable standard of care here and defendant would face an undue burden if forced to litigate its selection of curriculum and teaching methods" (851 P.2d at 205). As did the appellate court in *Ross*, however, the Colorado court refused to dismiss the plaintiffs' contract claims against the college, ruling

that if plaintiffs could prove that the college breached an express warranty to the students, or that they relied on misrepresentations by college personnel, their contract claims might succeed. A similar result occurred in *Ansari v. New York University*, 1997 U.S. Dist. LEXIS 6863 (S.D.N.Y. 1997); the court dismissed the plaintiff's negligent misrepresentation claim, but refused to either dismiss or award summary judgment to the university on his contract claim.

Although a municipal court—the City Court of Yonkers, New York—afforded plaintiffs relief under an educational malpractice theory, that result was reversed on appeal. In *Andre v. Pace University*, 618 N.Y.S.2d 975 (City Ct. Yonkers 1994), *reversed*, 655 N.Y.S.2d 777 (N.Y. App. Div. 1996), the plaintiffs sought assistance from the Small Claims Court, asserting contract and tort claims stemming from their dissatisfaction with a computer programming course offered by Pace University. The plaintiffs asserted that the course instructor selected an unsuitable text (breach of contract), that the course description was false and misleading (contract rescission), that the wrong advice given to the plaintiffs by the department chair constituted a breach of fiduciary duty, that the selection of an unqualified instructor was educational malpractice, and several other claims. The court found the university liable on the breach of contract, breach of fiduciary duty, and educational malpractice (negligence) claims, as well as finding a violation of the New York law prohibiting deceptive business practices. With respect to the malpractice claim, the court found that the professor's selection of an inappropriate text and her refusal to teach the course at a beginning level (as both the catalog and the department chair had promised) constituted sufficient evidence of proximate cause for the students' inability to learn anything from the course. The court awarded compensatory damages in the amount of \$1,000 for each of the two plaintiffs and, finding the university's behavior "morally culpable," awarded each plaintiff \$1,000 in punitive damages as well.

On appeal, however, in *Andre v. Pace University*, 655 N.Y.S.2d 777 (Sup. Ct., App. Div. 1996), the state's intermediate appeals court reversed, rejecting every ruling of the municipal court. The appellate court noted that "the courts of this State have consistently declined to entertain actions sounding in 'educational malpractice,' although quite possibly cognizable under traditional notions of tort law, as a matter of public policy." Furthermore, said the appellate court, the breach of contract claim would require the court to insert itself into educational judgments about the quality of the texts, the effectiveness of the instructor's pedagogical method, and other matters "best left to the educational community." Similarly, another New York appellate court rejected the claim of a student that Columbia University had failed to provide the promised quality of educational environment and had made false representations concerning the university's disciplinary process (*Sirohi v. Lee*, 634 N.Y.S.2d 119 (Sup. Ct., App. Div. 1995)).

In addition to attempting to state claims of educational malpractice, students have turned to other tort theories in an attempt to recover for injuries allegedly incurred by relying on incorrect advice of academic advisors. In *Hendricks v. Clemson University*, 578 S.E. 2d 711 (S.C. 2003), the South Carolina Supreme

Court reversed the ruling of a state appellate court that would have allowed the plaintiff, a student-athlete who lost eligibility to play baseball because of the incorrect advice he received from an academic advisor, to state claims of negligence, breach of contract, and breach of fiduciary duty. The court rejected the student's argument that the university had affirmatively assumed a duty of care when it undertook to advise him on the courses necessary to obtain NCAA eligibility, finding no state law precedents that recognized such a duty. The court also refused to recognize a fiduciary relationship between the student and the advisor, and similarly rejected the breach of contract claim, finding no written promise by the university to ensure the student's athletic eligibility.

But another case demonstrates a court's willingness to entertain student negligence claims for specific acts of alleged misfeasance or nonfeasance. In *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (D. Conn. 2000), a doctoral student sued Yale University and several faculty members, alleging that the chair of his dissertation committee had misappropriated the student's idea for his dissertation research and took credit for it himself. The student filed claims of negligence, breach of contract, breach of a fiduciary duty, and defamation. The breach of contract claim was premised on the argument that Yale had made both express and implied promises to "safeguard students from academic misconduct" (119 F. Supp. 2d at 96), and is discussed in Section 8.1.3. The court refused to dismiss the negligence claim, stating that because the student was alleging intentional misconduct by the faculty members, it was not an educational malpractice claim. The court ruled that the student should be given an opportunity to demonstrate that Yale had a duty to protect him against faculty misconduct, and that such misconduct was foreseeable. Similarly, the court refused to dismiss the claim that Yale had a fiduciary duty to the student, stating: "Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student" (119 F. Supp. 2d at 97-98).

Another student claim related to educational malpractice is negligent misrepresentation or fraud. These claims tend to be brought by students claiming that the institution misled applicants or current students about the quality of its programs or its accreditation status. For example, in *Troknya v. Cleveland Chiropractic Clinic*, 280 F.3d 1200 (8th Cir. 2002), a federal appellate court upheld a jury verdict that the institution was liable to students for negligent misrepresentation. The plaintiffs, graduates of the chiropractic school, claimed that the school had failed to provide the quality and quantity of clinical training that it had promised; they filed claims of breach of contract, fraud, and negligent misrepresentation. The plaintiffs had graduated, passed the licensing exam, and had received licenses.

The jury found for the college on the breach of contract and fraud claims, but found for the plaintiffs on the negligent misrepresentation claims, awarding each plaintiff \$1 in compensatory damages and \$15,000 each in punitive damages. Although the court upheld the compensatory damages award, it reversed

the punitive damages award, stating that there was no evidence that the school knew that the false information it provided would have injured the students.

In an earlier case, *Nigro v. Research College of Nursing*, 876 S.W.2d 681 (Ct. App. Mo. 1994), the court rejected students' claims that the college's failure to inform them that its accreditation had been delayed was grounds for a fraud claim. The court ruled that the students could not prove that they had relied on this representation in enrolling in the nursing program, and thus could not maintain a fraud claim. The court did not rule as to whether the college had a duty to disclose to applicants and students that the printed information concerning its accreditation status was incorrect.

The Alabama Supreme Court refused to dismiss a claim of promissory fraud against a dean and vice president of academic affairs brought by a student who alleged that he had been fraudulently advised about the music media curriculum at Alabama State University. In *Byrd v. Lamar*, 846 So. 2d 334 (Ala. 2003), the plaintiff alleged that, despite descriptions of such a program in institutional publications and the representations of the dean that he could complete the program within four years, no such program existed at the university. Finding that the student had sufficiently alleged facts to preclude summary judgment, the court ordered that the promissory fraud claim be tried.

A state appellate court refused to hear a former law student's claim that Loyola University of New Orleans had been unjustly enriched by accepting the student's tuition for a course whose instructor the law school later determined was incompetent. In *Miller v. Loyola University of New Orleans*, 829 So. 2d 1057 (La. App. 2002), the court ruled that, because the student had passed the course and received credit for it, and had retaken the course at his own expense voluntarily (despite the fact that the law school offered him the opportunity to audit the course at no charge), the university had not been unjustly enriched. The court also dismissed Miller's educational malpractice claim for the reasons discussed earlier in this section.

Lawsuits against accrediting associations for fraud or misrepresentation have typically been unsuccessful. These cases are discussed in Section 14.3.

**3.3.4. Defamation.** Another tort asserted against postsecondary institutions, defamation, is committed by the oral or written publication of matter that tends to injure a person's reputation. The matter must have been published to some third person and must have been capable of defamatory meaning and understood as referring to the plaintiff in a defamatory sense.<sup>12</sup> (See Sections 10.3.6 and 10.3.7 for a further discussion of defamation.) Defamation claims are also asserted against officials of the institution, such as deans or department chairs. These claims are discussed in Section 4.7.2.3.

One of the most important defenses against a defamation action is the conditional or qualified privilege of fair comment and criticism. An application of

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<sup>12</sup>Cases and authorities are collected at Theresa Ludwig Kruk, Annot., "Libel and Slander: Privileged Nature of Statements or Utterances by Members of Governing Body of Public Institution of Higher Learning in Course of Official Proceedings," 33 A.L.R.4th 632.

this privilege occurred in *Olsson v. Indiana University Board of Trustees*, 571 N.E.2d 585 (Ind. Ct. App. 1991). A prospective teacher, who had graduated from the university and had performed her student teaching under the supervision of one of its faculty, sued the university, claiming that a letter of reference written by a faculty member was libelous. The faculty member had described both the plaintiff's strengths and weaknesses with apparent candor.

The court ruled that the faculty member and the university were protected by a qualified privilege that may be asserted "if a need exists for full and unrestricted communication regarding matters on which the parties have a common interest or duty" (571 N.E.2d at 587). Such a privilege would cover any communication "if made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, whether legal or moral, or social, if made to a person having a corresponding interest or duty" (571 N.E.2d at 587). Noting that the university had a responsibility to prepare teachers, the court ruled that this letter of recommendation was an appropriate occasion for the use of the qualified privilege.

The scope of the qualified privilege is a matter of state law, and may differ by state. A case decided by a federal trial court, applying District of Columbia law, examined that jurisdiction's case law regarding the qualified privilege in a defamation claim. In *Tacka v. Georgetown University*, 193 F. Supp. 2d 43 (D.D.C. 2001), a faculty member, Tacka, sued the university for breach of contract and defamation. His defamation claim was based on the use of an allegedly defamatory evaluation of Tacka's scholarly work by a faculty rank and tenure committee considering whether to recommend that Tacka receive tenure. The evaluation, written by an untenured professor at a university in another state, accused Tacka of plagiarizing portions of a journal article. Without determining whether the plagiarism claim was true, the rank and tenure committee recommended against tenure for Professor Tacka. Later, the University's Research Integrity Committee exonerated Tacka of plagiarism, and he was granted tenure the following year.

In its motion for summary judgment, the university claimed that the department chair's "publication" of the allegedly defamatory external evaluation to the rank and tenure committee was protected by a qualified privilege. The trial court ruled that the qualified privilege may be lost if the plaintiff can demonstrate that the publisher acts with malice, or published the evaluation beyond those who have a business reason for receiving the information. Tacka had alleged that the department chair's decision to solicit the sole external evaluation of his work from an individual who held a personal bias against him, and who was allegedly unqualified to perform the evaluation, demonstrated that the chair had acted with malice. The court ruled that Tacka should have the opportunity to have a jury decide whether the privilege was lost.

Another conditional privilege that is important for administrators in state institutions is the privilege afforded to executive and administrative officers of government. In *Shearer v. Lambert*, 547 P.2d 98 (Or. 1976), an assistant professor at Oregon State University brought a libel action against the head of her

department. While admitting that the statement was defamatory, the defendant argued that the privilege of government officers should be extended to lesser executive or administrative officers, such as the head of a department. The court agreed, reasoning that, since “the privilege is designed to free public officials from intimidation in the discharge of their duties, we are unable to explain why this policy would not apply equally to inferior as well as to high-ranking officers.” This qualified privilege is available, however, only where the defendant “publishes the defamatory matter in the performance of his official duties.”

If a defamation lawsuit is brought against the institution by a prominent administrator, trustee, or faculty member, a constitutional privilege may come into play. If the plaintiff is a “public figure,” he or she must prove that the defendant acted with “actual malice,” and the privilege to defame is thus broader than it would be if the plaintiff were a “private figure.” If a person is a public figure, another person may not be held liable for defaming him unless that other person’s comment “was made with knowledge of its falsity or in reckless disregard of whether it was false or true” (*Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Thus, to the extent that members of the academic community can be characterized as public figures, the institution’s potential liability for defamation is reduced. It is unlikely on any given campus at any particular time, however, that many administrators, staff, or faculty would be considered public figures.

But athletics coaches, or even certain student athletes, may be considered to be public figures because of extensive press coverage or college-sponsored promotional activities. Furthermore, statements made concerning coaches or athletes are typically considered to be statements of opinion. For example, in two illustrative cases, coaches’ defamation claims were unsuccessful because the courts ruled that the statements made about them were opinion, rather than fact, and thus did not meet the legal standard for defamation. In the first, *Moore v. University of Notre Dame*, 968 F. Supp. 1330 (N.D. Ind. 1997), a former offensive line football coach was terminated, according to the university, because he had behaved abusively toward the players. In the second, *Campanelli v. The Regents of the University of California*, 51 Cal. Rptr. 2d 891 (Cal. Ct. App. 1996), university officials stated that the coach was fired because parents felt that he was placing their children under so much pressure that the children were becoming ill. In both cases, the courts ruled that neither statement was a factual assertion and, therefore, could not form the basis for a defamation claim.

Charges of sexual misconduct against students have provided multiple opportunities for defamation litigation against colleges. One of the more famous cases is *Doe v. Gonzaga University*, 24 P.3d 390 (Wash. 2001), reversed on other grounds, *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Doe*, a university administrator overheard a student office assistant tell another student that John Doe, an education student in his senior year, had raped a female student. At the time, John Doe was doing his student teaching. The administrator and a fellow staff member, both involved in placement for student teachers, met with the

student whose conversation they had overheard, but the alleged victim had not reported any assault and refused to meet with the administrators to discuss the alleged incident. Despite the fact that the alleged victim would not provide information or corroborate the assault claim, the administrators decided not to recommend Doe for teacher certification because of these allegations. They gave Doe a letter to that effect; when Doe and his parents asked about his appeal rights, they were told there were none.

John Doe sued Gonzaga and several administrators for defamation, negligence, and breach of contract. At trial, Doe testified that his sexual relationship with the female student was consensual; in a videotaped deposition, the alleged student victim denied that Doe had assaulted her and denied that she had made any accusatory statements to university staff. A jury awarded Doe \$500,000 for defamation and an additional \$655,000 in compensatory and punitive damages for other claims, including a claim brought under FERPA that the Supreme Court dismissed (the FERPA claims in *Gonzaga v. Doe* are discussed in Section 9.7.1).

Although the appellate court reversed the jury's defamation verdict, the Washington Supreme Court reinstated it, but affirmed the appellate court's dismissal of the negligence claim, stating that the university had no duty to investigate the allegations of sexual assault. With respect to the defamation claim, the court ruled that the administrators were not protected by a qualified privilege because they were not acting "in the ordinary course of their work" when they involved themselves in the allegations of the student whose conversation they listed to secretly.

The result in *Doe* is instructive in many respects. First, the university's apparent refusal to provide Doe with an opportunity to tell his side of the story appears arbitrary and unfair, even though, as a private institution, Gonzaga was not required to provide due process protections to Doe. This refusal very likely influenced the jury's decision on the defamation claim and affected the size of the damage award. Second, the fact that the alleged victim was unwilling to make even an informal complaint is troubling. Although it is not unusual for victims of sexual assault to refuse to cooperate with either police or student affairs staff, proceeding to sanction a student without corroboration from the alleged victim or some other evidence (a witness, medical evidence, and so on) may create subsequent legal liability for the college.

(For a case with similar facts and ensuing liability for the institution, see *Mallory v. Ohio University*, 2001 Ohio App. LEXIS 5720 (Ct. App. Ohio, 10th Dist., 2001), *appeal denied*, 767 N.E.2d 272 (Ohio 2002). For suggestions on avoiding liability for defamation when investigating sexual harassment claims, see Ellen M. Babbitt & Zachary Silverstein, "Avoiding Defamation Claims Arising Out of Sexual Harassment Investigations," *Employment Action*, Vol. 4, no. 1 (Winter 2001), published by United Educators Risk Retention Group, Inc. (available at <http://www.ue.org>).)

Academic freedom may not protect a faculty member from potential defamation liability when research findings are communicated, or even during the



research process. In *164 Mulberry Street Corp. v. Columbia University*, 771 N.Y.S. 2d 16 (N.Y. App. Div. 2004), a professor of business at Columbia University conducted a research project to study the responses of approximately fifteen restaurants when they received letters falsely accusing them of serving food that resulted in food poisoning of the letter writer's wife. The letters did not threaten to report the alleged food poisoning to the department of health. The restaurants responded by throwing away large quantities of food, subjecting their employees to scrutiny for mishandling food, attempting to send flowers to the fictitious address on the letter, and the New York City Department of Health became involved, subjecting the restaurants that received the letters to inspections. Some of the restaurant owners alleged that they suffered physical and psychiatric problems as a result of the "research." When the professor notified the restaurants that the letters were false, they responded by suing Columbia University and the professor for twenty-four counts of action involving libel, negligent and intentional infliction of emotional distress, and negligent misrepresentation. They sought compensatory and punitive damages.

The appellate court affirmed the trial court's refusal to dismiss the plaintiffs' claims of emotional distress, libel per se, and fraudulent and negligent misrepresentation claims, stating that the professor "recklessly disregarded the potential consequences of [his] conduct," and determining that there was a sufficient basis for allowing a jury to determine whether the professor's conduct met the standard of outrageousness necessary to find liability. The court dismissed the claim for punitive damages, however, stating that the professor did not act maliciously, even though his research project was "misguided." The court mentions in passing that there was apparently no system in the business school to review faculty research projects, which might have prevented such a project from taking place. (For a discussion of procedures for reviewing research involving human subjects, see Section 13.2.3.2.)

Institutions that operate computer networks may be sued for transmitted libelous statements that injure those mentioned in such statements. Service providers will often be immune from such liability, however, under 47 U.S.C. § 230 (see Section 8.5.1).

Institutions may incur liability to third parties who are injured because a letter of reference concerning a former employee does not disclose unsafe or illegal acts by that employee. The California Supreme Court ruled in *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997), that school districts and their employees could be found liable for fraud and negligent misrepresentation. The case is discussed in Section 4.7.2.2.

**3.3.5. Other sources of tort liability.** Colleges as employers may incur liability for the torts of their employees or agents. Liability for employee torts may be incurred under the *respondeat superior* doctrine, which makes the employer responsible for the tortious acts of its employees. If, however, the tortfeasor is acting outside the scope of his or her employment, the court may shield the employer from liability. Typical claims brought by plaintiffs include

negligent hiring, negligent supervision, and negligent retention of the offending employee or agent.<sup>13</sup>

In *Forester v. State of New York*, 645 N.Y.S.2d 971 (Ct. Cl. 1996), the court rejected the claim of an individual allegedly assaulted by a karate instructor employed by the State University of New York (SUNY). Despite the fact that the assault occurred while the plaintiff was a full-time student, on school property, and during school hours, the court ruled that the instructor's conduct did not further SUNY's business, SUNY did not authorize the violence, and the use of violence was not within the discretion afforded the instructor by the university.

A similar outcome occurred in *Smith v. Gardner and Board of Regents, San Jacinto College District*, 998 F. Supp. 708 (S.D. Miss. 1998). The plaintiff was involved in a two-car accident with Gardner, who was an assistant baseball coach employed by the college. The baseball team had traveled to Meridian, Mississippi, to participate in two baseball games; three college vans were used to make the trip. Gardner had the keys to one of the vans, and took it, without the knowledge or permission of the coach, to make two personal trips. One trip was to purchase beer for himself, which he then drank. The second trip was to purchase chewing tobacco and to engage in a sightseeing trip at 3:00 a.m. During this sightseeing trip, Gardner's van struck Smith. Gardner's blood alcohol content was well over the legal limit, and he was arrested for driving under the influence of alcohol.

The court rejected the plaintiff's claim that the College should bear responsibility for Gardner's actions. It noted that Gardner's supervisor had no knowledge of the trip, that Gardner was not engaging in activity that benefited the team, and that the excursion was for Gardner's personal benefit. To the plaintiff's argument that Gardner was on an officially sanctioned college trip, the court replied that simply being away "on business" did not mean that every action that Gardner took was related to his job. The court awarded summary judgment for the college.

In *Clement v. Delgado Community College*, 634 So. 2d 412 (La. App. 1994), nine members of the college's baseball team sued both the student coach, who had been driving a college van, and the college for injuries sustained when a tire blew out suddenly and a serious accident ensued. A jury had found the tire manufacturer 60 percent liable and the college 40 percent liable, primarily because

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<sup>13</sup>Cases and authorities are collected in Reuben I. Friedman, Annot., "When Is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor," 78 A.L.R.3d 910; John H. Derrick, Annot., "Landlord's Tort Liability to Tenant for Personal Injury or Property Damage Resulting from Criminal Conduct of Employee," 38 A.L.R.4th 240; and Erwin S. Barbre, Annot., "Workmen's Compensation Provision as Precluding Employee's Action Against Employer for Fraud, False Imprisonment, Defamation, or the Like," 46 A.L.R.3d 1279; Allan E. Korpela, Annot., "Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision," 38 A.L.R.3d 830; Allan E. Korpela, Annot., "Liability of Private Schools and Institutions of Higher Learning for Negligence of, or Lack of Supervision by, Teachers and Other Employees or Agents," 38 A.L.R.3d 908; David P. Chapus, Annot., "Liability of School Authorities for Hiring or Retaining Incompetent or Otherwise Unsuitable Teacher," 60 A.L.R.4th 260.

it was established that the driver acted negligently in his reaction to the blowout by hitting the brakes and had not been trained. The court stated that the college had three duties to the baseball players: to properly maintain the vehicle, to select a qualified driver, and to train the driver properly. The appellate court affirmed the finding of the jury that the college had not properly maintained the vehicle, that the college was negligent in allowing a student to drive the van when its own policies required that all van drivers have a commercial driver's license (which the student did not possess), and that the college was negligent in not training the driver how to respond to a tire blowout, even though a similar incident had happened the previous year. It also reversed the liability finding against the tire manufacturer, resulting in a multimillion-dollar damage award to the nine plaintiffs to be paid in full by the college.

The outcome in the *Delgado Community College* case underscores the importance of serious attention to both vehicle maintenance and the training and supervision of drivers. The court noted that faculty and staff were never transported in these vans, and that the team's coaches used other forms of transportation and simply met the team wherever the games were held. These facts were very damaging to the college because they suggested a lack of concern on the college's part for student safety.

A state court has rejected a student's attempt to state a claim against a state university for "negligent investigation" of an alleged infraction of the student code of conduct. In *Weitz v. State* (discussed in Section 9.1.2), the student sued the college after being found not guilty of the infraction. The court stated that, because no cause of action exists under state law for negligent prosecution of a crime, such a theory could not be applied to investigation and "prosecution" of a disciplinary charge.

But the Supreme Court of Nebraska was more sympathetic to a student's claim that the University of Nebraska had failed to properly supervise a professor who uploaded two class papers written by the student on the Internet. The papers allegedly contained "intimate details" of the student's life, and she had not given the professor permission to post them on the Internet. In *Shlien v. Board of Regents of University of Nebraska*, 640 N.W.2d 643 (Neb. 2002), the student claimed that she did not discover that her papers had been posted to the Internet until her parents discovered them on a Web site two years after they had been posted by the professor. Although the university claimed that the lawsuit was time barred, the court refused to award summary judgment to the university, ruling that a trial was required to determine when the plaintiff could reasonably have been expected to discover that her papers had been posted to the Internet.

In addition to claims of negligent hiring or supervision, colleges may face invasion of privacy claims from students or staff. For example, in *Nemani v. St. Louis University*, 33 S.W.3d 184 (Mo. 2000), a faculty member filed an invasion of privacy claim against the university for using his name in a grant application without his express permission. The court rejected the claim, noting that the professor had executed an agreement with the university that required him to collaborate on research projects with other faculty members, thus impliedly

consenting to the use of his name on grant applications. And in *Green v. Trinity International University*, 801 N.E.2d 1208 (Ill. App. Ct. 2003), a state appellate court found that the university had not invaded a professor's privacy by interviewing randomly selected students of his to collect information about his behavior in the classroom, or by releasing a statement that he had been relieved of his teaching duties. Because no reason had been given in the statement, said the court, the statement was not capable of being interpreted to imply that the plaintiff had been dismissed for reasons of moral turpitude.

Claims of negligent or intentional infliction of emotional distress are often added to other claims brought by former employees or students. Emotional distress claims do not challenge the outcome of the college's decision (although other claims in the lawsuit may make these charges), but the manner in which the decision was made or the information communicated. For example, in *Mason v. State ex rel. Board of Regents of the University of Oklahoma*, 23 P.3d 964 (Okla. Civ. App. Div. 1, 2001), a state appellate court ruled that a law student who had been expelled and was seeking readmission could not maintain a claim for negligent or intentional infliction of emotional distress. Citing Section 46 of the *Restatement (Second) of Torts*, the court ruled that the plaintiff had not proved that the university's decision not to readmit him was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (23 P.3d at 970).

Although many colleges have offices of risk management whose goal is to reduce potential institutional liability for premises liability or other tort claims related to the college's status as a landowner or landlord, it is obvious that the college's academic programs, its social, cocurricular and outreach activities, and its employment decisions are also sources of potential tort actions. For that reason, colleges should develop processes for risk managers to collaborate with academic and student affairs administrators and faculty when considering programs or activities that could lead to injuries. For example, including risk management staff and university counsel in planning for study abroad programs, internship programs, or summer camps for children may help the college avoid the type of problems discussed in this section. While a certain number of tort claims may be inevitable, responsible planning and assessment of risks, and efforts to reduce foreseeable risks, will be important components of the college's ability to defend against tort claims or to avoid them.

### ***Sec. 3.4. Institutional Contract Liability***

Institutions of higher education face potential breach of contract claims from employees (see Sections 4.3 & 6.2), students (see Sections 8.1.3, 8.2.3, & 9.4.4), and vendors, purchasers, or business partners (see Section 15.1). In this section, the institution's potential liability for contracts entered into by its employees or other agents is discussed.

The institution may be characterized as a "principal" and its trustees, administrators, and other employees as "agents" for purposes of discussing

the potential liability of each on contracts transacted by an agent for, or on behalf of, the institution. The fact that an agent acts with the principal in mind does not necessarily excuse the agent from personal liability (see Section 4.7.3), nor does it automatically make the principal liable. The key to the institution's liability is authorization; that is, the institution may be held liable if it authorized the agent's action before it occurred or if it subsequently ratified the action. However, even when an agent's acts were properly authorized, an institution may be able to escape liability by raising a legally recognized defense, such as sovereign immunity. As mentioned in Section 3.3, this defense is available in some states to public institutions but not to private institutions.

The existence and scope of sovereign immunity from contract liability vary from state to state. In *Charles E. Brohawn & Bros., Inc. v. Board of Trustees of Chesapeake College*, 304 A.2d 819 (Md. 1973), the court recognized a very broad immunity defense. The plaintiffs had sued the trustees to compel them to pay the agreed-upon price for work and materials provided under the contract, including the construction of buildings for the college. In considering the college's defense, the court reasoned:

The doctrine of sovereign immunity exists under the common law of Maryland. By this doctrine, a litigant is precluded from asserting an otherwise meritorious cause of action against this sovereign state or one of its agencies which has inherited its sovereign attributes, unless [sovereign immunity has been] expressly waived by statute or by a necessary inference from such a legislative enactment. . . . The doctrine of sovereign immunity or, as it is often alternatively referred to, governmental immunity was before this court in *University of Maryland v. Maas*, 173 Md. 554, 197 A. 123 (1938), where our predecessors reversed a judgment recovered against the university for breach of contract in connection with the construction of a dormitory at College Park. That opinion, after extensively reviewing the prior decisions of this court, succinctly summed up [our predecessors'] holdings: "So it is established that neither in contract nor tort can a suit be maintained against a governmental agency, first, where specific legislative authority has not been given, second, even though such authority is given, if there are no funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it" (173 Md. at 559, 197 A. at 125) [304 A.2d at 820; notes and citations omitted].

Finding that the cloak of the sovereign's immunity was inherited by the community college and had not been waived, the court rejected the plaintiff's contract claim.

A U.S. Supreme Court case demonstrates that sovereign immunity from contract liability will occasionally also be available to public institutions under federal (rather than state) law. In *Regents of the University of California v. Doe* (discussed in Section 3.5), the Court upheld the university's assertion of Eleventh Amendment immunity as a defense to a federal court breach of contract suit brought by a disappointed applicant for employment. Such a federal

immunity claim applies only in those limited circumstances in which a federal district court could obtain jurisdiction over a breach of contract claim.

Regarding contract liability, there is little distinction to be made among trustees, administrators, employees, and other agents of the institution. Whether the actor is a member of the board of trustees or its equivalent—the president, the athletic director, the dean of arts and sciences, or some other functionary—the critical question is whether the action was authorized by the institution.

The issue of authorization can become very complex. In *Brown v. Wichita State University*, 540 P.2d 66 (Kan. 1975),<sup>14</sup> the court discussed the issue at length:

To determine whether the record establishes an agency by agreement, it must be examined to ascertain if the party sought to be charged as principal had delegated authority to the alleged agent by words which expressly authorize the agent to do the delegated act. If there is evidence of that character, the authority of the agent is express. If no express authorization is found, then the evidence must be considered to determine whether the alleged agent possesses implied powers. The test utilized by this court to determine if the alleged agent possesses implied powers is whether, from the facts and circumstances of the particular case, it appears there was an implied intention to create an agency, in which event the relation may be held to exist, notwithstanding either a denial by the alleged principal, or whether the parties understood it to be an agency.

“On the question of implied agency, it is the manifestation of the alleged principal and agent as between themselves that is decisive, and not the appearance to a third party or what the third party should have known. An agency will not be inferred because a third person assumed that it existed, or because the alleged agent assumed to act as such, or because the conditions and circumstances were such as to make such an agency seem natural and probable and to the advantage of the supposed principal, or from facts which show that the alleged agent was a mere instrumentality” [quoting *Corpus Juris Secundum*, a leading legal encyclopedia]. . . . The doctrine of apparent or ostensible authority is predicated upon the theory of estoppel. An ostensible or apparent agent is one whom the principal has intentionally or by want of ordinary care induced and permitted third persons to believe to be his agent even though no authority, either express or implied, has been conferred upon him.

Ratification is the adoption or confirmation by a principal of an act performed on his behalf by an agent, which act was performed without authority. The doctrine of ratification is based upon the assumption there has been no prior authority, and ratification by the principal of the agent’s unauthorized act is equivalent to an original grant of authority. Upon acquiring knowledge of his agent’s unauthorized act, the principal should promptly repudiate the act; otherwise it will be presumed he has ratified and affirmed the act [540 P.2d at 74–75].

As mentioned in Section 3.3, the *Brown* case arose after the crash of a plane carrying the Wichita State football team. The survivors and personal representatives

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<sup>14</sup>This decision reverses and remands a summary judgment in favor of the university by the trial court. In a second opinion in this case, 547 P.2d 1015 (1976), the court reaffirmed (without discussion) the portion of its first opinion dealing with authorization. The tort liability aspects of these two opinions are discussed in Section 3.3.

of the deceased passengers sued Wichita State University (WSU) and the Physical Education Corporation (PEC) at the school for breaching their Aviation Service Agreement by failing to provide passenger liability insurance for the football team and other passengers. The plaintiffs claimed that they were third-party beneficiaries of the service agreement entered into by WSU, the PEC, and the aviation company. The service agreement was signed by the athletic director of WSU and by an agent of the aviation company. The university asserted that it did not have the authority to enter the agreement without the board of regents' approval, which it did not have; that it did not grant the athletic director the authority to enter the agreement on its behalf; that the athletic director only had authority to act as the agent of the PEC; that WSU could not ratify the agreement because it lacked authority to enter it initially; and that, as a state agency, it could not be estopped from denying the validity of the agreement.

The court held that the PEC was the agent of the university and that the athletic director, "as an officer of the corporate agent [PEC], had the implied power and authority to bind the principal—Wichita State University." The court further held that failure to obtain the board of regents' approval did not invalidate the contract because the legislature had "delegated to the board of regents the authority to control, operate, manage, and supervise the universities and colleges of this state" (540 P.2d at 76),<sup>15</sup> and the board had created no policy, rule, or regulation that limited the authority of its agents to enter into contracts. The fact that the agreement had been partly performed was particularly persuasive to the court.

In a case involving both apparent authority and ratification doctrines, the Supreme Court of Massachusetts ruled that Boston University must pay a technical training company more than \$5.7 million for its "willful and knowing" breach of contract (*Linkage Corporation v. Trustees of Boston University*, 679 N.E.2d 191 (Mass. 1997), *cert. denied*, 522 U.S. 1015 (1997)). (The facts of the case are set out in Section 15.2.2.) One important issue in the case was whether an earlier contract between Boston University and Linkage for the provision of educational services by Linkage had been renewed; Linkage asserted that it had, but the university, on the other hand, stated that the contract had not been renewed, but had been lawfully terminated. A jury had found that the university's vice president for external programs had apparent authority to enter a renewal contract with Linkage, and also found that the university had ratified that agreement.

With respect to the apparent authority issue, the court noted that the vice president had "virtual autonomy" in supervising the relationship between Linkage and the university. He had been the university's representative in the negotiation of the earlier contract, and was named in the contractual documents as the university's primary representative for all legal notices. Boston University

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<sup>15</sup>Not all courts will be so willing to find institutional authority in cases concerning public institutions. Other courts in other circumstances may assert that a person who deals with a public institution "does so at his peril," as in *First Equity Corp. of Florida v. Utah State University*, 544 P.2d 887 (Utah 1975), where the court upheld the university's refusal to pay for stocks ordered by one of its employees. (This case is discussed in Section 3.2.1.)

argued that the vice president lacked authority to enter the agreement because, at the same time that negotiations for the contract renewal were taking place, the university had issued a directive that required all payments greater than \$5,000 to be authorized by the senior vice president. The court, however, ruled that, because the vice president for external programs had direct access to the president, and because the contractual relationship predated the directive, it was reasonable for Linkage's president to conclude that the directive would not be enforced with respect to its contract with the university.

With respect to the ratification issue, the court agreed with the jury that the conduct of university officials subsequent to the execution of the renewal contract supported the ratification argument. The vice president had asked his superiors, in writing, if additional review was necessary after he executed the renewal contract. Neither the senior vice president nor the president advised Linkage's president or their own vice president that they did not approve of the renewal contract. Characterizing the conduct of university officials as "informed acquiescence," the court endorsed the jury's finding that the university had ratified the agreement.

Although the behavior of university officials was sufficient to establish ratification, the court added that, because the university benefited financially from the execution of the renewal contract, this benefit was additional evidence of its ratification of the agreement.

A Texas appellate court addressed the question of whether ratification of a board of trustees' decision not to renew the contract of a college president could postdate the contractual date for notice of nonrenewal. In *Swain v. Wiley College*, 74 S.W.2d 143 (Ct. App. Tex. 2002), the plaintiff, the former president of Wiley College, challenged the decision by the board of trustees not to renew his contract. The contract provided that any nonrenewal decision must be made prior to May 30. The board of trustees met on May 13 and voted not to renew President Swain's contract. However, the meeting had been called in a manner that did not comply with the college's bylaws. The board next met in July (at a meeting that had been called properly), and ratified its earlier decision not to renew the president's contract. Swain argued that the ratification was too late, and thus his contract with the college was still in effect. The court disagreed. Ratification, said the court, refers back to the original transaction (the vote not to renew his contract), and is retroactive to the date of the transaction. Until the vote was ratified by the board, it could have been voided by the board. Once it was ratified, however, it was no longer voidable. The procedural irregularities in calling the May meeting, said the court, did not affect the validity of the decision, and Swain had received timely notice (prior to May 30) of the nonrenewal decision.

Colleges are increasingly being sued for breach of contract by current or former employees. These issues are discussed in Section 4.3. Even colleges controlled by religious organizations may be subject to breach of contract claims. For example, the Supreme Court of New Jersey ruled, in *McKelvy v. Diocese of Camden*, 800 A.2d 840 (N.J. 2002), that a former seminarian could sue the Diocese of Camden, New Jersey, for breach of contract. The plaintiff alleged that he had been sexually harassed while a student at the seminary, and sued for



reimbursement of his tuition and loans, and for compensatory damages. Despite the argument by the diocese that such a lawsuit violated the First Amendment's free exercise clause, the state court ruled unanimously that the case could proceed. Jurisprudence on the liability of religiously affiliated colleges for discrimination lawsuits is discussed in Section 5.5.

Although students attempting to assert claims for educational malpractice are finding their tort claims dismissed (discussed in Section 3.3.3), their contract claims sometimes survive summary judgment or dismissal, as long as the contract claim is not an attempt to state a claim for educational malpractice. In *Swartley v. Hoffner*, 734 A.2d 915 (Pa. Super. 1999), *appeal denied*, 747 A.2d 902 (Pa. 1999), a doctoral student who was denied a degree brought a breach of contract claim against her dissertation committee members, claiming that they had failed to carry out their duties as required by university policies. The court ruled that "the relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against said institution for breach of contract where the institution ignores or violates portions of the written contract" (734 A.2d at 919). But the court nevertheless affirmed the trial court's award of summary judgment to the defendants, finding no evidence that university policies required dissertation committee members to give the student a passing grade once her dissertation defense had been scheduled. But in *Gally v. Columbia University*, 22 F. Supp. 2d 199 (S.D.N.Y. 1998), a trial judge dismissed the student's contract claim, ruling that it was a disguised attempt to state a claim for educational malpractice.

Although most claims involving injury to students or other invitees are brought under negligence theories, one court allowed a contract claim to be brought against a public university as a result of injuries to a camper at a university-based program. In *Quinn v. Mississippi State University*, 720 So. 2d 843 (Miss. 1998), parents of a child injured at a baseball camp sponsored by the university filed both tort and contract claims against the university. The Supreme Court of Mississippi determined that their tort claim was barred by the university's sovereign immunity, but found that an implied contract existed between the plaintiffs and the defendants to provide baseball instruction safely at the baseball camp:

The Quinns paid an "admission fee" to have their son, Brandon, attend the baseball camp at Mississippi State University. By doing so, they entered into an implied contract with the university. This contract carried with it the implied promise that the university would provide a safe instructional environment for the campers attending the baseball camp. This Court holds that when Brandon was hit in the mouth with the bat, the university breached its contract with the Quinns. Therefore, the suit against the university was not barred and was not ripe for summary judgment [720 So. 2d at 850].

The university argued that the plaintiffs had signed a waiver that released the university from liability. Because it was not clear from the language of the waiver whether the plaintiffs had waived liability for acts committed by the coach, the court remanded the matter for a jury's determination.

An institution sued for breach of contract can raise defenses arising from the contract itself or from some circumstance unique to the institution. Defenses that arise from the contract include the other party's fraud, the other party's breach of the contract, and the absence of one of the requisite elements (offer, acceptance, consideration) in the formation of a contract (see generally Section 15.1). Defenses unique to the institution may include a counterclaim against the other party, the other party's previous collection of damages from the agent, or, for public institutions, the sovereign immunity defense discussed earlier. Even if one of these defenses—for instance, that the agent or institution lacked authority or that a contract element was absent—is successfully asserted, a private institution may be held liable for any benefit it received as a result of the other party's performance. But public institutions may sometimes not even be required to pay for benefits received under such circumstances.

The variety of contract and agency law principles that may bear on contract liability makes the area a complex one, calling for frequent involvement of legal counsel. The postsecondary institution's main concern in managing liability should be the delineation of the contracting authority of each of its agents. By carefully defining such authority, and by repudiating any unauthorized contracts of which they become aware, postsecondary administrators can protect the institution from unwanted liability. While protection may also be found in other defenses to contract actions, such as sovereign immunity, advance planning of authority is the surest way to limit contract liability and the fairest to the parties with whom the institution's agents may deal.

### ***Sec. 3.5. Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability)***

The tort and contract liabilities of postsecondary institutions (discussed in Sections 3.3 & 3.4) are based in state law and, for the most part, are relatively well settled. The institution's federal constitutional rights liability, in contrast, is primarily a matter of federal law, which has undergone a complex evolutionary development. The key statute governing the enforcement of constitutional rights,<sup>16</sup> commonly known as "Section 1983" and codified at 42 U.S.C. § 1983,<sup>17</sup> reads in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

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<sup>16</sup>In addition to federal constitutional rights, there are numerous federal statutes that create statutory civil rights, violation of which will also subject institutions to liability. (See, for example, Sections 5.2.1 through 5.2.4 and 13.5.2 through 13.5.5 of this book.) These statutory rights are enforced under the statutes that create them, rather than under Section 1983. Institutions may also be liable for violations of state constitutional rights, which are enforced under state law rather than Section 1983.

<sup>17</sup>Legal analyses of the various federal civil rights laws and extensive citations to important cases can be found in Sheldon Nahmod, Michael Wells, & Thomas Eaton, *Constitutional Torts* (2d ed., LexisNexis, 2004); and M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* (Wiley Law Publications, 1986, and periodic supp.).

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983's coverage is limited in two major ways. First, it imposes liability only for actions carried out "under color of" state law, custom, or usage. Under this language the statute applies only to actions attributable to the state, in much the same way that, under the state action doctrine (see Section 1.5.2), the U.S. Constitution applies only to actions attributable to the state. While public institutions clearly meet this statutory test, private postsecondary institutions cannot be subjected to Section 1983 liability unless the action complained of was so connected with the state that it can be said to have been done under color of state law, custom, or usage.

Second, Section 1983 imposes liability only on a "person"—a term not defined in the statute. Thus, Section 1983's application to postsecondary education also depends on whether the particular institution or system being sued is considered to be a person, as the courts construe that term.<sup>18</sup> Although private institutions would usually meet this test because they are corporations, which are considered to be legal persons under state law, most private institutions would be excluded from Section 1983 anyway under the color-of-law test. Thus, the crucial coverage issue under Section 1983 is one that primarily concerns public institutions: whether a public postsecondary institution is a person for purposes of Section 1983 and thus subject to civil rights liability under that statute.

A related issue, which also helps shape a public institution's liability for violations of federal constitutional rights, is the extent to which Article III and the Eleventh Amendment of the U.S. Constitution immunize public institutions from suit. While the "person" issue is a matter of statutory interpretation, the immunity issue is a matter of constitutional interpretation. In general, if the suit is against the state itself or against a state official or employee sued in his or her "official capacity," and the plaintiff seeks money damages that would come from the state treasury,<sup>19</sup> the immunity from federal court suit will apply. As discussed below, in Section 1983 litigation, the immunity issue usually parallels the person issue, and the courts have used Eleventh Amendment immunity law as a backdrop against which to fashion and apply a definition of "person" under Section 1983.

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<sup>18</sup>Cases are collected in Kevin W. Brown, Annot., "Public Institutions of Higher Learning as 'Persons' Subject to Suit under 42 U.S.C.A. § 1983," 65 A.L.R. Fed. 490.

<sup>19</sup>State employees and officials may be sued in either their "official" capacities or their "personal" (or "individual") capacities under Section 1983. For a distinction between the two capacities, see *Hafer v. Melo*, 502 U.S. 21, 25–31 (1991). Since suits seeking money damages against employees or officers in their "official" capacities are generally considered to be covered by the state's Eleventh Amendment immunity, they are included in the discussion in this Section of the book. Suits against employees or officials in their "personal" capacities are discussed in Section 4.7.4 of this book.

In a series of cases beginning in 1978, the U.S. Supreme Court dramatically expanded the potential Section 1983 liability of various government entities. As a result of these cases, it is now clear that any political subdivision of a state may be sued under this statute; that such governmental defendants may not assert a “qualified immunity” from liability based on the reasonableness or good faith of their actions; that the officers and employers of political subdivisions, as well as officers and employers of state agencies, may sometimes be sued under Section 1983; and that Section 1983 plaintiffs may not be required to resort to state administrative forums before seeking redress in court.

The first, and key, case in this series is the U.S. Supreme Court’s decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Overruling prior precedents that had held the contrary, the Court decided that local government units, such as school boards and municipal corporations, are “persons” under Section 1983 and thus subject to liability for violating civil rights protected by that statute. Since the definition of “person” is central to Section 1983’s applicability, the question is whether the Court’s definition in *Monell* is broad enough to encompass postsecondary institutions: Are some public postsecondary institutions sufficiently like local government units that they will be considered “persons” subject to Section 1983 liability?

The answer depends not only on a close analysis of *Monell* but also on an analysis of the particular institution’s organization and structure under state law (see Section 12.2). Locally based institutions, such as community colleges established as an arm of a county or a community college district, are the most likely candidates for “person” status. At the other end of the spectrum, state universities established and operated by the state itself are apparently the least likely candidates. This distinction between local entities and state entities is appropriate because the Eleventh Amendment immunizes the states, but not local governments, from federal court suits on federal constitutional claims. Consequently, the Court in *Monell* limited its “person” definition “to local government units which are not considered part of the state for Eleventh Amendment purposes.” And in a subsequent case, *Quern v. Jordan*, 440 U.S. 332 (1979), the Court emphasized this limitation in *Monell* and asserted that neither the language nor the history of Section 1983 evidences any congressional intention to abrogate the states’ Eleventh Amendment immunity (440 U.S. at 341–45).

The clear implication, reading *Monell* and *Quern* together, is that local governments—such as school boards, cities, and counties—are persons suable under Section 1983 and are not immune from suit under the Eleventh Amendment, whereas state governments and state agencies controlled by the state are not persons under Section 1983 and are immune under the Eleventh Amendment. The issue in any particular case, then, as phrased by the Court in another case decided the same day as *Quern*, is whether the entity in question “is to be regarded as a political subdivision” of the state (and thus not immune) or as “an arm of the state subject to its control” (and thus immune) (*Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401–02 (1979)).

This case law added clarity to what had been the confusing and uncertain status of postsecondary institutions under Section 1983 and the Eleventh Amendment. But courts continued to have difficulty determining whether to place particular institutions on the person (not immune) or nonperson (immune) side of the liability line. A 1982 U.S. Court of Appeals case, *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 665 F.2d 553 (5th Cir. 1982), provides an instructive illustration of the problem and surveys a range of considerations pertinent to its resolution. The plaintiff in this case was a professor who had been dismissed from his position. He brought a Section 1983 suit against the board of regents, the president of the university, and four university administrators, alleging violations of his First Amendment free speech and Fourteenth Amendment due process rights. (When the professor died during the course of the action, the bank, as administrator of his estate, became the plaintiff.) In approaching the threshold question of Eleventh Amendment immunity, the court sorted out the Section 1983 claims against the university itself from the claims against the president and administrators sued in their individual capacities (see Section 4.7.4 of this book). Regarding the institution's immunity, the court had to "decide whether the Board of Regents of SFA [Stephen F. Austin] is to be treated as an arm of the State, partaking of the State's eleventh amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the eleventh amendment does not extend."

The appellate court accepted the former characterization:

Our analysis will first examine the status of the Board of Regents of SFA under Texas law. . . . Texas law provides: "'state agency' means a university system or an institution of higher education as defined in section 61.003 Texas Education Code, other than a public junior college." Tex. Rev. Civ. Stat. Ann. art. 62529b(8)(B) (Vernon). By contrast, Texas statutory definitions of "political subdivision" typically exclude universities in the category of SFA. . . .

[W]e next examine the state's degree of control over SFA, and SFA's fiscal autonomy. SFA was created by the legislature in 1921, and in 1969 was placed under the control of its own Board of Regents. Texas' statutes . . . provide that members of the Board of Regents are to be appointed by the Governor with the advice and consent of the Senate. Tex. Educ. Code Ann. § 101.11. Texas also subjects SFA to some control by the Coordinating Board, Texas College and University System, which exercises broad managerial powers over all of the public institutions of higher learning in Texas. . . .

SFA's Board has the power of eminent domain, but "the taking of the land is for the use of the state." Tex. Educ. Code Ann. § 95.30. The University's real property is state property, Tex. Rev. Civ. Stat. Ann. art. 601b § 1.02; . . . and the funds used to purchase it were appropriated by the legislature from the general revenues of the state. . . . State law is the source of the University's authority to purchase, sell, or lease real and personal property. See Tex. Rev. Civ. Stat. Ann. art. 601b. The University's operating expenses come largely through legislative appropriation. 1981 Tex. Sess. Law Serv. ch. 875 at 3695. Even those public funds which do not originate with the state are reappropriated to the University, *id.* ch. 875 at 3720, and become subject to rigid control by the state when

received. *Id.* ch. 875 at 3719–21. . . . [A]ll funds are subject to extensive reporting requirements and state audits. *E.g., id.* ch. 875 at 3721.

In addition to the functions cited above, because SFA is a state agency it is subject to state regulation in every other substantial aspect of its existence such as employee conduct standards, promotions, disclosure of information, liability for tort claims, [workers'] compensation, inventory reports, meetings, posting of state job opportunities, private consultants, travel rules and legal proceedings. *See generally*, 1981 Tex. Sess. Law Serv. ch. 875 at 3790–3824. . . . In short, under Texas law SFA is more an arm of the state than a political subdivision [665 F.2d at 557–58].

The court carefully noted that its conclusion concerning Stephen F. Austin University would not necessarily apply to state universities in other states, or to all other postsecondary institutions in Texas: “Each situation must be addressed individually because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning.” As an example, the court noted the distinction between Texas institutions such as SFA, on the one hand, and Texas junior colleges, on the other (see below).

Eleventh Amendment and Section 1983 case law after the *Stephen F. Austin State University* case developed along similar lines, with courts frequently equating the Eleventh Amendment immunity analysis with the “person” analysis under Section 1983 (see, for example, *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), upholding dismissal of a claim against the board of regents of the University of California at Los Angeles).<sup>20</sup> In the process, the law has become clearer and more refined. In *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987), for example, the court reaffirmed the proposition that the Eleventh Amendment shields most state universities from damages liability in Section 1983 actions.<sup>21</sup> The plaintiff, an Iranian graduate student, asserted that his termination from a doctoral program during the Iranian hostage crisis was based on his national origin. In dismissing his claim for monetary relief, the court suggested that, although the states have structured their educational systems in many ways and courts review each case on its facts, “it would be an unusual state university that would not receive immunity” (813 F.2d at 845). The court also reaffirmed, however, that under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar claims against university officers in their official capacities for the injunctive relief of reinstatement. In determining whether the defendant, Purdue University, was entitled to Eleventh Amendment immunity, the court placed primary importance

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<sup>20</sup>State institutions that are immune under the Eleventh Amendment may waive their immunity, as discussed in Section 13.1.5. But such a waiver may not be effective in Section 1983 litigation. An institution entitled to Eleventh Amendment immunity is an “arm of the state” and is therefore not a “person” under Section 1983. The statutory requirement that a government entity must be a “person” in order to be sued under Section 1983 is apparently not waivable.

<sup>21</sup>For one example to the contrary, see the *Kovats* case concerning Rutgers University, discussed below in this Section. For another such example, see *Honadle v. University of Vermont & State Agricultural College*, 115 F. Supp. 2d 468 (D. Vt. 2000).

on the “extent of the entity’s financial autonomy from the state,” the relevant considerations being “the extent of state funding, the state’s oversight and control of the university’s fiscal affairs, the university’s ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university.” Applying these considerations, the court concluded that Purdue was entitled to immunity because it “is dependent upon and functionally integrated with the state treasury.”

Other courts have applied a more expansive set of nine factors to resolve Eleventh Amendment immunity questions. These factors, known variously as the “*Urbano* factors” or “*Blake* factors” to credit the cases from which they derived, gained increasing popularity in sovereign immunity cases. In the case that first articulated these factors, *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3d Cir. 1969), the court explained:

(1) [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps that most important is (2) whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is (3) whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency’s operations [415 F.2d at 250–51; numbering added].

This nine-factor test was applied to higher education in *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), a case in which a student who had been dismissed from medical school alleged racial discrimination in violation of Section 1983. The district court, looking generally to the extent of the school’s functional autonomy and fiscal independence, had held that the school was an “arm of the state” entitled to Eleventh Amendment immunity. Although the appellate court affirmed the district court’s judgment, it emphasized that the nine-part *Urbano/Blake* test “is the better approach for examining the ‘peculiar circumstances’ of the different colleges and universities.”

Similarly, the court in *Skehan v. State System of Higher Education*, 815 F.2d 244 (3d Cir. 1987), used the *Urbano/Blake* test to determine that the defendant State System “is, effectively, a state agency and therefore entitled to the protection of the eleventh amendment.” In contrast, however, the court in *Kovats v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987), determined that Rutgers is not an arm of the state of New Jersey and thus is not entitled to Eleventh Amendment immunity. The case involved Section 1983 claims of faculty members who had been dismissed. Focusing on

*Urbano/Blake* factors 2 and 3, the court considered whether a judgment against Rutgers would be paid by Rutgers or by the state and determined that Rutgers in its discretion could pay the judgment either with segregated non-state funds or with nonstate funds that were commingled with state funds. Rutgers argued that, if it paid the judgment, the state would have to increase its appropriations to the university, thus affecting the state treasury. The court held that such an appropriations increase following a judgment would be in the legislature's discretion, and that "[i]f the state structures an entity in such a way that the other relevant criteria indicate it to be an arm of the state, then immunity may be retained even where damage awards are funded by the state at the state's discretion." Then, considering the other *Urbano/Blake* factors, the court determined that, although Rutgers "is now, at least in part, a state-created entity which serves a state purpose with a large degree of state financing, it remains under state law an independent entity able to direct its own actions and responsible on its own for judgments resulting from those actions."

More recent cases on the Eleventh Amendment immunity of state universities continue to uphold the universities' immunity claims, relying on a variety of factors to reach this result.<sup>22</sup> In *Sherman v. Curators of the University of Missouri*, 16 F.3d 860 (8th Cir. 1994), *on remand*, 871 F. Supp. 344 (W.D. Mo. 1994), for instance, the appellate court focused on two factors: the university's degree of autonomy from the state, and the university's fiscal dependence on state funds as the source for payments of damage awards against the university. Applying these factors on remand, the district court ruled that the university was immune from suit under the Eleventh Amendment. Similarly, in *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999), the court focused on two primary factors in granting immunity to the University of Oregon. The factors differed somewhat, however, from those in *Sherman*. The *Rounds* court looked first to the university's "nature as created by state law," especially the extent to which the university is subject to the supervision of state officials or a state board of higher education; and second, the court looked to the university's functions, particularly whether the university "performs central governmental functions."

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<sup>22</sup>A 1997 U.S. Supreme Court case also adds an important (though technical) clarification of Eleventh Amendment immunity analysis in situations where a third party has agreed to indemnify the state agency from liability. In *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), the university's contract to operate the Livermore National Laboratory provided that the federal government (and not the state) would assume liability for any money damages judgment against the university arising from its performance of the contract. The Court rejected the plaintiff's argument that any judgment in his favor would not come from the state treasury and, therefore, the university was not immune from suit. The relevant inquiry, according to the Court, was whether the state was potentially liable for money judgments against the university, not whether the state would be able to shift its liability to a third party in the particular case at hand. Since the state did have potential liability for university money judgments, and since the university otherwise qualified as an "arm of the state," the university had an Eleventh Amendment immunity from the plaintiff's suit.



When the Eleventh Amendment immunity of a community college or junior college is at issue, the various factors that courts consider may suggest greater institutional autonomy from the state government, and courts are therefore less likely to grant immunity. In *Board of Regents of Stephen F. Austin State University* (above), for example, the court distinguished Texas junior colleges from the Texas state universities. Reaffirming its earlier decisions in *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), and *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), the court concluded that Texas junior colleges are not arms of the state and are thus suable under Section 1983:

Junior colleges, rather than being established by the legislature, are created by local initiative. Tex. Educ. Code Ann. § 130.031. Their governing bodies are elected by local voters rather than being appointed by the Governor with the advice and consent of the Senate. *Id.* § 130.083(e). Most telling is the power of junior colleges to levy *ad valorem* taxes, *id.* § 130.122, a power which the Board of SFA lacks. Under Texas law, political subdivisions are sometimes defined as entities authorized to levy taxes. Tex. Rev. Civ. Stat. Ann. art. 2351b-3. *See generally, Hander*, 519 F.2d at 279 [665 F.2d at 558].

Similarly, the court denied immunity to a New Mexico junior college in *Leach v. New Mexico Jr. College*, 45 P.3d 46 (N.M. 2002), relying especially on the fact that the college had its own powers to levy taxes and to issue bonds, and its board members were not appointed by the governor.

On the other hand, in *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996), by a 2-to-1 split vote, the court upheld the Eleventh Amendment immunity of a community college. The case also flags some unresolved issues concerning Eleventh Amendment immunity for community colleges (and for state institutions as well) and reemphasizes the important role played by fiscal factors in determining an institution's Eleventh Amendment status.

In *Hadley*, a vocational instructor filed a Section 1983 claim in federal court, alleging that the defendant's decision to terminate him violated his due process rights. The issue before the court was whether North Arkansas Community Technical College (NACTC) should be classified as an arm of the state, entitled to Eleventh Amendment immunity from damages, or a state political subdivision or municipal corporation which is not immune. According to the court:

State universities and colleges almost always enjoy Eleventh Amendment immunity. On the other hand, community and technical colleges often have deep roots in a local community. When those roots include local political and financial involvement, the resulting Eleventh Amendment immunity questions tend to be difficult and very fact specific (citing cases) [76 F.3d at 1438-39].

Examining the structure and authority of NACTC under state law, the court determined "that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley [the instructor] would inevitably

be paid from the state treasury.” Weighed against these factors, however, was the contrasting consideration that “Arkansas community colleges also have elements of local funding and control” suggestive of a political subdivision. The court considered the former factors to prevail over the latter because “exposure of the state treasury is a more important factor than whether the State controls the entity in question” (citing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)). Thus, despite the fact that NACTC’s daily operations were largely controlled by locally elected officials of a community college district, the district had residual authority to supplement NACTC’s operating budget with local tax revenues, and it had the responsibility for funding capital improvements from local tax revenues, NACTC nevertheless remained financially dependent upon the state for its daily operations and, therefore, should be afforded immunity. In making this determination, the court dismissed the plaintiff’s argument that the nominal sum he was seeking in damages could be entirely paid by NACTC’s federal, tuition, and private revenues, or by future local tax increases, stating that “the nature of the entity, not the nature of the relief,” was to be the determinative factor. (For another case in which the court, like the *Hadley* majority, granted Eleventh Amendment immunity to a community college, see *Cerrato v. San Francisco Community College District*, 26 F.3d 968 (9th Cir. 1994).)

Two other cases, *Pikulin v. City Univ. of NY*, 176 F.3d 598 (2d Cir. 1999), and *Clissuras v. City Univ. of NY*, 359 F.3d 79 (2d Cir. 2004), involved a *city* university rather than a state university or a community college. The court reached the same result as in the *Hadley* case, determining that the City University of New York (CUNY) was an “arm of the state” rather than a political subdivision of the state or an arm of the city of New York. Three factors were key to the court’s determination. First, the state was responsible for paying money judgments against CUNY; second, the state had to approve CUNY’s budget; and third, the governor of the state had appointed ten of the seventeen CUNY board members. Relying on these factors, the court in each case accepted CUNY’s assertion of sovereign immunity and dismissed the claims against it.

More recent cases have also begun to make clear that a state university’s Eleventh Amendment immunity may sometimes extend to other entities that the university has recognized or with whom it is otherwise affiliated. In the *Rounds* case (above), for example, the plaintiffs also sued the student government, the Associated Students of the University of Oregon. The court held that “[t]o the extent that the [plaintiffs] assert a Section 1983 claim against the Associated Students, this claim also is barred, as the Associated Students’ status as the recognized student government at the University allows it to claim the same Eleventh Amendment immunity that shields the University itself” (166 F. 3d at 1035–36). (For further discussion of Eleventh Amendment defenses for affiliated entities, see Section 3.6.6.)

Since the Eleventh Amendment provides states and “arms of the state” with immunity only from *federal* court suits, it does not directly apply to Section 1983 suits in *state* courts. The definition of “person” may thus be the primary focus of the analysis in state court Section 1983 suits. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the U.S. Supreme Court ruled that Section 1983

suits may be brought in state courts, but that neither the state nor state officials sued in their official capacities would be considered “persons” for purposes of such suits. In *Howlett v. Rose*, 496 U.S. 356 (1990), the Court reaffirmed that Section 1983 suits may be brought in state courts against other government entities (or against individuals) that are considered “persons” under Section 1983. In such cases, *state* law protections of sovereign immunity and other *state* procedural limitations on suits against the sovereign (see *Felder v. Casey*, 487 U.S. 131 (1988)) will not generally be available to the governmental (or individual) defendants.

In *Alden v. Maine*, 527 U.S. 706 (1999) (discussed in Section 13.1.5 of this book), however, the Court determined that, even though the Eleventh Amendment does not apply in state courts, the states do have an implied constitutional immunity from suits in state court. Thus states sued in the state court under Section 1983 may now invoke an implied sovereign immunity from state court suits that would protect them to the same extent as the Eleventh Amendment immunity protects them in federal court. States may assert this immunity defense in lieu of arguing, under *Will* and *Howlett*, that they are not “persons”; or may argue that, if they fall within the protection of *Alden*’s implied sovereign immunity, they cannot be “persons” under Section 1983.

Even if an institution is characterized as a Section 1983 “person” with no Eleventh Amendment immunity, it may still be able in particular circumstances to avoid liability in both federal and state court. According to *Monell*:

Local governing bodies . . . can be sued directly under [Section] 1983 . . . [where] the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body’s officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 “person,” by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decision-making channels. . . .

On the other hand, the language of Section 1983 . . . compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory [436 U.S. at 690–91].

Thus, along with its expansion of the “persons” suable under Section 1983, *Monell* also clarifies and limits the types of government actions for which political subdivisions may be held liable.<sup>23</sup>

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<sup>23</sup>The liability of political subdivisions under the *Monell* decision is not limited by the “qualified immunity” that officers and employees would have if sued personally (see this volume, Section 4.7.4). This type of immunity claim was rejected by the U.S. Supreme Court in *Owen v. City of Independence*, 445 U.S. 622 (1980), as being unsupported either by the text and history of Section 1983 or by public policy considerations.

In other cases, courts have considered what money damage awards may be imposed upon political subdivisions under Section 1983. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held that punitive damages could not be assessed against political subdivisions, since the goal of deterrence would not be served by such awards. In another case, *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Court determined that, although compensatory damage awards may be assessed against political subdivisions, these awards may not be based on the “value” or “importance” of the constitutional right that has been violated. Citing *Carey v. Piphus*, 435 U.S. 247 (1978), the Court underscored that actual injuries are the only permissible bases for an award of compensatory damages caused by the denial of a constitutional right.

Various procedural issues of importance to colleges and universities have also arisen in the wake of *Monell*. For instance, in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), a suit by a staff employee of Florida International University alleging race and sex discrimination, the U.S. Supreme Court had to decide whether a Section 1983 plaintiff must “exhaust” available state administrative remedies before a court may consider her claim. For many years preceding *Patsy*, the Court had refused to impose an exhaustion requirement on Section 1983 suits. The Court in *Patsy* declined the Florida Board of Regents’ invitation to overrule this line of decisions, because “Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,” and “a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with . . . [Congress’s] intent” (which it was not here).<sup>24</sup> And in *Burnett v. Grattan*, 468 U.S. 42 (1984), the Court rejected yet another procedural device for limiting the impact of Section 1983. The defendant, a state university, argued that the federal court should “borrow” and apply a six-month state statute of limitations to the case—the same time period as applied to the filing of discrimination complaints with the state human rights commission—and that the plaintiffs’ complaint should be dismissed because it was not filed within six months of the harm (employment discrimination) that the plaintiffs alleged. The Court concluded that, in order to accomplish the goals of Section 1983, it was necessary to apply a longer, three-year, time period for bringing this particular suit—the same period generally allowed for civil actions under the law of the state whose statutes of limitations were being borrowed.

Given these substantial and complex legal developments, at least some public postsecondary institutions are now subject to Section 1983 liability, in both federal courts and state courts, for violations of federal constitutional rights. Those that are subject to suit may be exposed to extensive judicial remedies, which they are unlikely to escape by asserting procedural technicalities. Moreover, institutions and

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<sup>24</sup>Even though exhaustion is not required under *Patsy*, the unreviewed findings of fact of a state administrative agency may nevertheless have a “preclusive” effect on subsequent federal litigation under Section 1983, as long as the parties in the administrative proceeding had an adequate opportunity to litigate disputed issues (*University of Tennessee v. Elliott*, 478 U.S. 788 (1986); see this volume, Section 1.4.4).

systems that can escape Section 1983 liability because they are not “persons,” and are protected by sovereign immunity will find that they are subject in other ways to liability for violations of civil rights. They may be reachable under Section 1983 through “official capacity” suits against institutional officers that seek only injunctive relief (*Power v. Summers*, 226 F.3d 815, 819 (7th Cir. 2000))—relief that is directed to the particular officer or officers who are sued but that effectively would bind the institution. They may be reachable through “personal capacity” suits against the institution’s officers or employees and seeking money damages from them individually, rather than from the institution or the state (see Section 4.7.4.1). They will be suable under other federal civil rights laws establishing statutory rights that parallel those protected by the Constitution, and that serve to abrogate or waive state sovereign immunity (see Section 13.1.5). (For examples, see the statutes discussed in Sections 5.2.1–5.2.3.) They may also be suable under similar state civil rights laws or under state statutes similar to Section 1983 that authorize state court suits for the vindication of state or federal constitutional rights.

In such a legal environment, administrators and counsel should foster full and fair enjoyment of federal civil rights on their campuses. Even when it is clear that a particular public institution is not subject to Section 1983 damage liability, administrators should seek to comply with the spirit of Section 1983, which urges that where officials “may harbor doubt about the lawfulness of their intended actions . . . [they should] err on the side of protecting citizens’ . . . rights” (*Owen v. City of Independence*, 445 U.S. 622, 652 (1980)).

## ***Sec. 3.6. Captive and Affiliated Organizations***

**3.6.1. Overview.** The activities of higher education institutions are no longer conducted under the umbrella of a single corporate or governmental entity. In addition to the degree-granting entity itself, there may be numerous spin-off or related organizations, such as alumni and booster clubs, hospitals and clinics, entities that support research or market products, TV and radio stations, museums, foundations of various kinds, and auxiliary enterprises that provide services for the campus community (see generally Sections 15.3 & 15.4). Although often created by action of the institution itself, these organizations may have their own separate corporate existence and may be at least partially independent from the institution. In other situations, the related organization may have originated and developed completely apart from the institution but later entered an affiliation agreement with the institution—maintaining its separate corporate existence and autonomy but cooperating with the institution in some area of mutual interest. The creation of and affiliation with such organizations; their authority in relation to that of the institution itself; and the reorganization, dissolution, and termination of such relationships have all been the subject of policy debate and legal planning. The applicability of various tax and regulatory statutes to captive and affiliated organizations have also raised concerns, as have the potential legal liabilities of these organizations and the potential legal liabilities that postsecondary institutions might incur as a result of their relationships with them (see,

for example, the *Brown* case in Section 3.4 above (contract liability) and *Jaar v. University of Miami*, 474 So. 2d 239 (Fla. Dist. Ct. App. 1985) (tort liability)).

To avoid such problems, as the cases below illustrate, an institution should carefully structure and document its relationships with each organization it creates or with which it affiliates. In so doing, it should focus on the purposes it seeks to fulfill, the degree of control it needs to attain or retain, and the consequences of particular structural relationships on the respective rights of the parties to act autonomously from one another (see subsection 3.6.2 below). The institution should also consider how particular structural arrangements would affect the applicability of tax and regulatory laws to the separate entity and to the institution (see subsections 3.6.3 & 3.6.4 below), or would subject the separate entity to “state action” determinations (see subsection 3.6.5 below). In addition, the institution should consider whether it may be liable for the actions of the separate entity and, if so, how the institution would control that risk (see subsection 3.6.6 below).

**3.6.2. Structural problems.** Structural issues concerning captive and affiliated organizations may arise in various contexts. In one scenario an institution may wish to transfer part or all of a particular program or function to a separately incorporated entity. One objective of such a transfer may be to free that program or function from certain legal requirements that would apply if it remained within the institution’s corporate or governmental structure. Issues may then arise concerning whether the institution has sufficiently relinquished its control over the separate entity that it operates independently from the institution and may be freed from legal restrictions that would apply to the institution itself. The case of *Colorado Association of Public Employees v. Board of Regents of the University of Colorado*, 804 P.2d 138 (Colo. 1990), provides an instructive example. The state had promulgated legislation that purported to reorganize the university’s hospital into a private, nonprofit corporation. The legislation provided that the board of regents of the university would still control the hospital through regulations and that, “[s]hould the corporation dissolve, the assets of the corporation less amounts owed to creditors will revert to the Regents.” In addition, the legislation required that the hospital must secure the approval of the state legislature before it could transfer the corporation to anyone other than the regents, and before it could exceed a \$60 million debt level within the first two years of its creation. Under this reorganization scheme, more than two thousand state civil servants employed at the hospital had a choice of either continuing as regular members of the hospital staff, in which case they would lose their civil service status, or being assigned by the university to the hospital for a period of two years, after which they would have to relinquish their employment. The employees filed suit, claiming that the legislation violated the Colorado constitution. They asserted two alternative theories of unconstitutionality. If the legislation were construed to create an entity having the status of a *private* corporation, the employees claimed, it would violate Articles V and XI of the state constitution, which prohibit private corporations from receiving public funds or assets. If the legislation were construed to create an entity having the status of a *public* corporation, the plaintiffs

claimed that it would violate Article XII, Section 13, the State Civil Service Amendment, and Article XI, Section 3, which forbids state indebtedness except in limited circumstances.

The Supreme Court of Colorado, with two dissents, held that the legislation reorganized the hospital into a public corporation subject to all laws that governed the University of Colorado itself. The court reasoned that “whether University Hospital may be considered private depends upon whether (1) it is founded and maintained by private individuals or a private corporation and (2) the state is involved in the management or control of its property or internal operations” (804 P.2d at 143). Analyzing the first of these factors, the court determined that “[u]nder the facts before us, the reorganized hospital clearly cannot be characterized as a private hospital [because] the Regents, who are elected officials, established the hospital pursuant to authority granted in Article VIII, Section 5 of the Colorado Constitution and in Colo. Rev. Stat. Section 23-21-403(1)(a).” Regarding the second factor, the court determined that the state maintained control of the hospital by granting the regents power to appoint and remove the hospital directors and to control certain aspects of the hospital’s budgeting, spending, and indebtedness. Thus, despite language in the legislation that expressly precluded the hospital from being considered an agency of state government, “it is evident that the Regents have not sufficiently divested themselves of power over the hospital to enable the new corporation to operate independently as a private corporation. Thus, we find that the reorganized hospital is still a public entity.” Since the hospital remained a state entity, and since the legislation would require more than two thousand of the hospital’s employees to relinquish their civil service status, the court held that the legislation violated the State Civil Service Amendment (Article XII, Section 13) of the state constitution, “which protects state personnel from legislative measures designed to circumvent the constitutional amendment.” The court also held that the financing provisions of the reorganizing legislation, allowing the hospital to become indebted, violated Article XI, which prohibits the state from incurring debts. (For another example of structural issues, see *Gulf Regional Education Television Affiliates v. University of Houston*, 746 S.W.2d 803 (Tex. 1988).)

A quite different set of problems arises when an organization that is not already part of the postsecondary institution’s structure attempts to connect itself to the institution in some way. The general questions then are whether the institution has any obligation to allow particular outside entities to become affiliated with it, and whether and how an institution may restrict the rights of such an organization to claim or publicly assert an affiliation with the school. In *Ad-Hoc Committee of Baruch Black and Hispanic Alumni Association v. Bernard M. Baruch College*, 835 F.2d 980 (2d Cir. 1987), the plaintiff committee alleged that the college had improperly refused to recognize its proposed alumni association dedicated to the needs of minority students. This refusal, the committee argued, was a violation of the First Amendment and the equal protection clause of the Fourteenth Amendment. The college countered that an officially recognized alumni organization, which included minority alumni, already existed and that the creation of another alumni association could

overburden alumni with fund solicitations and thus dilute the current association's power to raise funds.

After a district court dismissed the committee's complaint, the U.S. Court of Appeals reversed and remanded, holding:

[I]t is possible that plaintiffs could demonstrate that the College's selective denial of official recognition to their alumni association was improperly motivated by discrimination based on political viewpoint or race. . . . In this case, the College has not yet offered any justification for its denial of recognition to the Black and Hispanic Alumni Association, and thus it is impossible to determine at this stage whether this action was motivated by a desire to "discourage one viewpoint and advance another" in violation of the First Amendment [835 F.2d at 982].

On remand, however, the district court held that the committee could show no discrimination or other improper motive by the college in not recognizing the proposed alumni association, and that the college was thus not required to acknowledge or support the new association.<sup>25</sup>

**3.6.3. Taxation issues.** The creation or reorganization of separate entities may also give rise to taxation issues under state and federal law. The most important of these issues usually involve tax exemption—in particular the issue of how the relationship between the two entities affects their eligibility for tax-exempt status. This subsection focuses on tax exemption issues under state law. (For discussion of such issues (and other relevant tax issues) under federal law, see Sections 13.3 & 15.3.4.1.) Resolution of such issues may depend on the legal status of the separate entity in relation to the degree-granting entity, and in particular on the degree of control the latter asserts over the former. In addition, the resolution may depend on the functions that the separate entity performs and their relation to the functions of the institution itself.

In *Yale Club of Chicago v. Department of Revenue*, 574 N.E.2d 31 (Ill. App. Ct. 1991), for example, the court considered whether an alumni association that recruited for Yale University qualified for a purchaser's exemption from the state sales tax. The Yale Club of Chicago (YCC), a nonprofit corporation, dedicated its efforts to promoting Yale University. One of its central purposes was to use its members to interview potential Yale students in the Chicago area. Although the club followed admissions guidelines prepared by Yale, it was not controlled in any way by the university and did not receive any funding from the university. The club also sponsored social events for its members: Yale alumni, parents of alumni, and current Yale students.

The appellate court held that the YCC did not qualify for an educational or a charitable tax exemption under Illinois law. Regarding the educational exemption,

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<sup>25</sup>The parties resolved their dispute. By agreement, the Black and Hispanic Alumni Association was allowed to use the college's name and some office space, and the committee expressed willingness to discuss a possible relationship with the Baruch Alumni Association ("College Settles Lawsuit Filed by Minority Alumni," *Chron. Higher Educ.*, May 2, 1990, A2).



the club had argued that “because Yale University is a school to which the exemption would apply, and the YCC is performing the same functions that Yale could, the exemption should apply to those activities performed [to further] Yale’s educational objectives.” In rejecting this argument, the court reasoned that, under the statute and case law, the club could claim exemption based on its relationship with Yale only if the club’s activities were “reasonably necessary” to Yale’s “educational goals or administrative needs.” The YCC’s activities did not fit this characterization, according to the court. The *Yale Club* case thus demonstrates that an affiliated organization performing important beneficial functions for a postsecondary institution does not necessarily qualify for a tax exemption even though the institution itself could receive an exemption on the basis of the same activities.

Another illustrative case, *City of Morgantown v. West Virginia University Medical Corporation*, 457 S.E.2d 637 (W. Va. 1995), involved a health care entity rather than an alumni association and a business and occupation tax rather than a sales tax. The West Virginia University Medical Corporation is a faculty group-practice organization in which faculty members of the West Virginia University School of Medicine provide professional services to patients irrespective of their ability to pay. More than \$13,000,000 in uncompensated medical care was provided by the corporation during fiscal year 1988–89. The corporation was already exempt from federal income taxes as a charitable organization under Section 501(c)(3) of the Internal Revenue Code (see Section 13.3.1 of this book). West Virginia’s tax code, like the federal tax code, contained an exemption for organizations “operated exclusively for religious or charitable purposes,” but the state code did not include any definition of “religious or charitable.” The West Virginia Supreme Court rejected the City of Morgantown’s argument that the medical corporation does bill some patients for medical care and thus does not operate solely as a charitable organization. The actual billing practices of the organization were not determinative of charitable status in light of the substantial amount of uncompensated medical care that it provided yearly to the citizens of West Virginia:

We see no reason why a non-profit medical faculty practice corporation that: (1) enhances educational opportunity for students at the West Virginia Medical School; (2) facilitates medical research; (3) provides medical care irrespective of ability to pay; (4) reasonably supplements clinical faculty salaries facilitating recruitment and retention of top physician faculty members; (5) operates to benefit the West Virginia University medical school; and (6) is exempt from federal tax under . . . Section 501(c)(3) as a charitable, education and scientific organization should not qualify for charitable exemption from the state business and occupation tax [457 S.E.2d at 641–42].

Resolution of tax exemption issues may also depend on technical interpretations of state statutory and constitutional provisions. In *University Medical Center Corporation v. The Department of Revenue of the State of Arizona*, 201 Ariz. 447, 36 P.3d 1217 (Ariz. Ct. App. 2001), for example, an Arizona court addressed

the applicability of real property taxation laws to a full-service, acute care teaching hospital on the campus of the University of Arizona in Tucson. Prior to 1984, the hospital was owned and operated by the Arizona Board of Regents, during which time the hospital incurred substantial losses, regularly burdening state funds. In 1984, the Arizona legislature adopted legislation that authorized the board of regents to “lease real property . . . owned by the Board to a nonprofit corporation . . . for purposes of operating a health care institution . . .,” subject to certain restrictions (Ariz. Rev. Stat. § 15-1637), and that extended a tax exemption to any such lessee (§ 15-1637 (D)). The board of regents then formed the University Medical Center Corporation (UMCC), leased the hospital to UMCC, and conveyed the hospital’s assets to UMCC. After UMCC acquired several off-campus parcels of land, a dispute arose concerning the real property tax status of these properties. The appellate court closely examined the exemption provision, the entire legislation authorizing the lease of the hospital, and the state constitutional provision on tax exemptions before reversing the state tax court and upholding the tax exemption for the properties—so long as they were “not used or held for profit.”

**3.6.4. Application of regulatory laws.** Creation of or affiliation with another entity may also raise issues concerning the application of state regulatory statutes.<sup>26</sup> Various state statutes apply to state agencies or public bodies, for instance, but not to private entities. If a public postsecondary institution creates or affiliates with another entity, there may be questions regarding whether that entity will be subject to these laws. The answer usually depends on whether the separate entity is sufficiently controlled by or related to the public institution that the separate entity would be considered a state agency or public body.

In *Weston v. Carolina Research and Development Foundation*, 401 S.E.2d 161 (S.C. 1991), for example, the issue was whether South Carolina’s Freedom of Information Act (S.C. Code Ann. §§ 30-4-10 to 30-4-110) applied to the Carolina Research and Development Foundation, a nonprofit corporation operating “exclusively for the benefit of the University of South Carolina” (401 S.E.2d at 162). The plaintiffs, media organizations, argued that the Act applied and gave them the right to inspect the foundation’s records. The Act provides that it applies to “public bodies,” defined in part as “any organization, corporation, or agency supported in whole or in part by public funds or expending public funds” (S.C. Code Ann. § 30-4-20(a)). The court determined that the foundation had received public funds on at least four separate occasions. It had accepted nearly 40 percent of the consideration the University of South Carolina received for selling one of the university’s buildings; it had accepted more than \$16 million in federal grant money on behalf of the university and managed the expenditure of these funds for construction of an engineering center for the university; it had accepted grants of money from the city of

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<sup>26</sup>Such issues may also arise under federal regulatory statutes—for instance, whether a captive or affiliated entity is an “employer” for purposes of Title VII (42 U.S.C. §§ 2000e *et seq.*)—as well as under the federal civil rights spending statutes (see Sections 13.5.7.3 & 13.5.7.6 of this book).

Columbia and from Richland County, and a conveyance of real estate from the city, as part of the process of developing a real estate project for the university; and it had retained 15–25 percent of the total payments from private third parties under research and development contracts that the university had executed and channeled through the foundation. The court held that any one of these transactions qualified the foundation as a public body under the language of the Act. The foundation was thus required to permit the plaintiffs to inspect its records.

Similarly, in *State ex. rel. Guste v. Nicholls College Foundation*, 564 So. 2d 682 (La. 1990), the inspector general of Louisiana sought to view the records of the foundation pursuant to the state’s Public Records Act (La. Rev. Stat. Ann. §§ 44:1 *et seq.*). The foundation, a nonprofit corporation organized to promote the welfare of Nicholls College, had received funds from the Nicholls State University Alumni Federation, another nonprofit organization promoting the college’s interests. The federation received its funding through a mandatory fee charged to all Nicholls students registered for more than seven credit hours and transferred 10 percent of these funds to the foundation. Under the Public Records Act, the foundation’s records would be “public records” subject to public inspection if either (a) the foundation were a “public body,” or (b) the records concerned “the receipt or payment” of public funds. Using the second rationale, the Louisiana Supreme Court reasoned that the federation’s close affiliation with Nicholls College (including its occupying a building on campus at only nominal rent, its use of state employees in its operations, and its inclusion in the college’s yearly budget) made the federation a public body under the Act; that the student fees provided to the federation were public funds; and that the foundation’s records of its receipt and use of these funds were thus public records subject to the Act. (Presumably, the federation’s records were also subject to the Act.) The state’s inspector general therefore had a right to view these records. (For further clarifications in later proceedings, see *State ex. rel. Guste v. Nicholls College Foundation*, 592 So. 2d 419 (La. 1991); and see generally Salin Geevarghese, “Looking Behind the Foundation Veil: University Foundations and Open Records Laws,” 25 *J. Law & Educ.* 219 (1996).)

In *Encore College Bookstores, Inc. v. Auxiliary Services Corp. of State University of New York at Farmingdale*, 663 N.E.2d 302 (N.Y. 1995), however, the court reached a different result in a suit under the New York Freedom of Information Law (FOIL). The plaintiff was a private bookstore operating near the Farmingdale Campus of the State University of New York (SUNY). Using the FOIL (McKinney N.Y. Public Officers Law, § 87), the bookstore sought to require the Auxiliary Services Corporation (ASC) of SUNY-Farmingdale to disclose a booklist that its subcontractor had compiled in the course of its responsibilities for operating the campus bookstore and maintaining the inventory of textbooks necessary for the academic year. SUNY had created ASC to provide auxiliary services for the college community, and ASC had elected to contract out the responsibility for maintaining the campus bookstore to a private subcontractor. Like the courts in the *Weston* and *Nicholls* cases, the court determined that the

booklist was a “record” within the ambit of the FOIL. Even though such records were kept by ASC, rather than SUNY, ASC nevertheless ran the bookstore and kept the records “on SUNY’s behalf” and “for the benefit of SUNY.” Moreover, to classify the booklist as something other than a record, simply because it was compiled by a subcontractor and held by an auxiliary corporation, would undermine the intent of the FOIL, and allow government agencies to insulate records from disclosure by delegating their creation and maintenance to nongovernmental entities (663 N.E.2d at 306). Unlike *Weston* and *Nicholls*, however, the court did not order release of the records, but held instead that they fell within one of the FOIL exemptions covering disclosures that would create a risk of “substantial competitive harm.” According to the court, this “substantial competitive harm” could be inferred from the obvious commercial value of the booklist to the plaintiff and the likelihood of competitive disadvantage its disclosure would create for the subcontractor operating the campus bookstore.

(For examples of other cases concerning the applicability of open meetings laws, see *Smith v. City University of New York*, 708 N.E.2d. 983 (N.Y. 1999), and *Board of Regents of the Regency University System v. Reynard*, 686 N.E.2d 1222 (Ill. App. Ct. 1997).)

**3.6.5. “State action” issues.** When a public institution creates a separate entity, questions may also arise concerning whether the entity will be considered to be a state actor and thus bound, like the institution itself, to comply with the federal Constitution’s individual rights guarantees (see generally Section 1.5.2). The U.S. Supreme Court’s decision in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), provides guidance on this question. *Lebron* was a First Amendment challenge to Amtrak’s refusal to permit an individual to post a political advertisement on a billboard owned by Amtrak. The Court ruled that Amtrak (the National Railroad Passenger Corporation), although nominally a private corporation, was created by Congress for the purpose of furthering governmental objectives. The U.S. President appoints six of the nine members of the board of directors, and the corporation is accountable to the federal government through reporting requirements. Given the purposes behind its creation and its accountability to the government, the Court ruled that Amtrak is “an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.” By analogy from this case, it appears that public postsecondary institutions which have or seek to create separate organizations cannot escape their obligations to respect individuals’ constitutional rights “by simply resorting to the corporate form” (513 U.S. at 397); and that whenever a public institution establishes a separate entity to pursue “governmental objectives under the direction and control of . . . governmental appointees” (513 U.S. at 398), the entity will be considered to be a state actor.

**3.6.6. Liability issues.** Postsecondary institutions may become liable for the acts of a captive or affiliated entity when it is engaged in joint action with the institution, when it is acting as the institution’s agent (see Section 2.1.3), or when the

institution has assumed the risk of such liability by way of a “hold-harmless” or indemnification agreement with the entity (see Section 2.5.3.2). In such circumstances the institution may then become liable for the separate entity’s negligence or other tortious acts (see generally Section 3.3 above) or for the performance of contracts that the separate entity enters on the institution’s behalf (see generally Section 3.4 above). In addition, public institutions or their officers could sometimes become liable for the separate entity’s violation of constitutional rights; and private institutions could be subject to such liability in the narrower circumstance where the separate entity is a governmental entity or is otherwise engaged in state action (see subsection 3.6.5 above; and see generally Section 1.5.2).

State colleges and universities may sometimes escape such liability if the state’s sovereign immunity, under state or federal law, extends to the captive or affiliated entity that has engaged in the allegedly unlawful action. In *Watson v. University of Utah Medical Center*, 75 F.3d 569 (10th Cir. 1996), for example, the court considered whether the university’s Eleventh Amendment immunity (see Section 13.1.5) extended to the university medical center. The court determined that, although the medical center generated most of its own revenues, and could use them to pay judgments against it, it was nevertheless “an integral part” of the university. The court thus granted immunity to the medical center. But in another case involving a different type of entity, *Teichgraeber v. Memorial Union Corp. of Emporia State University*, 946 F. Supp. 900 (D. Kan. 1996), the court rejected the Eleventh Amendment’s applicability to a state university’s student union, a separately incorporated nonprofit corporation. According to the court, the student union had not demonstrated “that Kansas law characterizes [it] as an entity of the state subject to significant oversight and control by other state entities,” or that “the judgment in this case would be satisfied out of the state treasury,” and was therefore not entitled to immunity.

Because liability issues loom so large in many structural decisions, risk management should be a major part of the planning for creation of or affiliation with a separate entity. (See generally Section 2.5.)

## Selected Annotated Bibliography

### *Sec. 3.1 (The Question of Authority)*

Bess, James L. *Collegiality and Bureaucracy in the Modern University* (Teachers College Press, 1988). Examines governance in the contemporary university. Discusses the relationship among authority structures, power, and collegiality; and between organizational characteristics and faculty perceptions of administrators. A framework for analysis of university governance is provided.

Hornby, D. Brock. “Delegating Authority to the Community of Scholars,” 1975 *Duke L.J.* 279 (1975). Provides excellent legal and policy analysis regarding delegations of authority in public systems of postsecondary education. Considers constitutional and statutory delegations to statewide governing boards and individual boards of trustees, and subdelegations of that authority to officials, employees, and other bodies in individual institutions. Contains many useful citations to legal and policy materials.

See also the Hynes entry in the Selected Annotated Bibliography for Chapter Two, Section 2.1.

### ***Sec. 3.2 (Sources and Scope of Authority)***

Chait, Richard, Holland, Thomas P., & Taylor, Barbara E. *Improving the Performance of Governing Boards* (ACE/Oryx, 1997). Presents the results of a study of how boards of trustees can raise their competence. Discusses effective ways to initiate board development efforts. Includes charts, exhibits, and practical advice for persuading trustees to engage in developmental processes.

Daugherty, Mary Schmid. "Uniform Management of Institutional Funds Act: The Implications for Private College Board of Regents," *57 West's Educ. Law Rptr.* 319 (1990). Examines state laws based on the Uniform Act, which establishes guidelines for the management and use of the investments of nonprofit educational and charitable organizations. Discusses the standards to which regents are held, the issue of restitution, the types of investments that can be made under these laws, and issues that remain for the courts to clarify. Suggestions for monitoring the institution's investment plan are provided.

Evans, Eileen M., & Evans, William D., Jr. "'No Good Deed Goes Unpunished': Personal Liability of Trustees and Administrators of Private Colleges and Universities," *33 Tort & Insurance L.J.* 1107 (1998).

Fishman, James J. "Standards of Conduct for Directors of Nonprofit Corporations," *7 Pace L. Rev.* 389 (1987). Surveys the evolution in the law regarding nonprofit directors' duty of care, with emphasis on the *Sibley Hospital* case. Distinguishes between and critiques the "corporate" and the "trust" standards of care, and proposes a new "shifting standard of care," whose application would depend on "the type of nonprofit corporation and the nature of a director's conduct and interest in a particular transaction."

Frey, Jeannie Carmedelle, & Overton, George W. (eds.). *Guidebook for Directors of Nonprofit Corporations* (2d ed., ABA Section of Business Law, 2002). Discusses the duties and responsibilities of directors of nonprofits, such as college and university trustees.

Harpool, David. "Minimum Compliance with Minimum Standards: Managing Trustee Conflicts of Interest," *24 J. Coll. & Univ. L.* 465 (1998). Supplements the author's article on *Sibley Hospital* (below) by surveying how 566 private colleges manage trustee conflicts of interest. Concludes that many colleges have not adopted adequate policies for avoiding trustee conflicts of interest; provides recommendations for the development of appropriate policies.

Harpool, David. "The *Sibley Hospital* Case: Trustees and Their Loyalty to the Institution," *23 J. Coll. & Univ. L.* 255 (1996). Reviews the standards articulated in *Sibley Hospital* for trustee conduct, including conflict of interest problems.

Houle, Cyril O. *Governing Boards* (Jossey-Bass, 1997). Discusses the functions of a board of trustees, how to select and orient new board members, board policies and practices, board relationships with staff, and various laws (such as public meetings laws) that may affect board operations.

Ingram, Richard T., & Associates. *Governing Public Colleges and Universities: A Handbook for Trustees, Chief Executives, and Other Campus Leaders* (Jossey-Bass, 1993). A resource book for college trustees. Divided into three parts: "Understanding the

Environment of Public Higher Education,” “Fulfilling Board Functions,” and “Developing the Public Board.” Each part is subdivided into chapters and topics, many of which address legal considerations. Appendices contain resources, including sample statements of board members’ responsibilities and desirable qualifications for trustees; a survey of public governing boards’ characteristics, policies, and practices; and self-study criteria for public multicampus and system boards. Also included is an extensive annotated list of recommended readings.

King, Harriet M. “The Voluntary Closing of a Private College: A Decision for the Board of Trustees?” 32 *S.C. L. Rev.* 547 (1981). Reviews the legal problems inherent in any decision of a board of trustees to close a private postsecondary institution. The article focuses on questions of trust law, especially the application of the doctrine of cy pres, an equitable doctrine permitting the assets of a charity to be used for a purpose other than that specified in the trust instrument when the original purpose can no longer be carried out.

Marsh, Gordon H. “Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions,” 85 *Dickinson L. Rev.* 607 (1981). Compares the different standards of care applied by courts to the common law trustee and the corporate director, respectively, and considers the applicability of these standards to trustees of nonprofit organizations. Although the article will be of particular interest to institutions responsible for the management of museums or other cultural exhibits, its discussion of standards of care and the state of the case law defining a good-faith standard for trustees is of general interest for postsecondary institutions.

Waldo, Charles N. *A Working Guide for Directors of Not-for-Profit Organizations* (Greenwood, 1986). Provides an overview of the mission of an organization’s board of directors in nontechnical terms. Also provided is a discussion of the responsibilities of directors and brief summaries of financial issues, planning, legal issues, and tax problems.

See also Connell & Savage entry for Chapter Two, Section 2.5.

### ***Sec. 3.3 (Institutional Tort Liability)***

Bazluke, Francine T., & Clother, Robert C. *Defamation Issues in Higher Education* (National Association of College and University Attorneys, 2004). A layperson’s guide to defamation law. Authors review the legal framework for a defamation claim and the possible defenses, and then discuss specific employment issues and student disciplinary actions that may give rise to defamation claims. Discusses the institution’s potential liability for defamatory student publications. Provides guidelines to minimize the institution’s exposure to defamation claims.

Bickel, Robert D., & Lake, Peter F. *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Life?* (Carolina Academic, 1999). Develops and describes the role of the college as a facilitator of student development and the significance of that model for the way that tort law is applied to colleges and universities. Focuses on balancing the rights and responsibilities of both students and the institution, while creating a climate in which academic and personal development are facilitated and risk is acknowledged but minimized.

Bowman, Cynthia Grant, & Lipp, MaryBeth. “Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual

Harassment,” 23 *Harv. Women’s L.J.* 95 (2000). Reviews the problem of sexual harassment of students in higher education and discusses three models of internships with varying degrees of institutional control and contractual relationships. Discusses the potential legal remedies for student interns who experience harassment and the university’s potential liability under Title IX and contract law.

Burling, Philip. *Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability* (National Association of College and University Attorneys, 1990). Reviews the legal analyses that courts undertake in responding to claims that liability for injuries suffered on campus should be shifted from the victim to the institution. Includes a review of literature about reducing crime on campus and managing the risk of liability to victims whom the institution may have a duty to protect.

Evans, Richard B. Note, “‘A Stranger in a Strange Land’: Responsibility and Liability for Students Enrolled in Foreign-Study Programs,” 18 *J. Coll. & Univ. L.* 299 (1991). Examines the doctrine of “special relationship” that has been applied to the student-institution relationship and discusses its significance to claims of students injured while participating in a study abroad program. Suggestions for limiting institutional liability are provided.

Feliu, Alfred G., & Johnson, Weyman T., Jr. *Negligence in Employment Law* (Bureau of National Affairs, 2002). Reviews a range of employment torts, including negligent hiring, liability for workplace violence, potential tort liability when dismissing employees, prevention and defense of employment tort claims, and insurance issues.

Gaffney, Edward M., & Sorensen, Philip M. *Ascending Liability in Religious and Other Non-Profit Organizations* (Center for Constitutional Studies, Mercer University (now at Baylor University), 1984). Provides an overview of liability case law related to nonprofit and religiously affiliated organizations, discusses constitutional issues, and provides suggestions for structuring the operations of such organizations to limit liability.

Gehring, Donald D., & Geraci, Christy P. *Alcohol on Campus: A Compendium of the Law and a Guide to Campus Policy* (College Administration Publications, 1989). Examines legal and policy issues related to alcohol on college campuses. Included are chapters reviewing research on student consumption of alcohol, including differences by students’ race and gender; sources of legal liability for colleges if intoxicated students injure themselves or others; and procedural and substantive considerations in developing alcohol policies and risk management procedures. A state-by-state analysis of laws relevant to alcohol consumption, sale, and social host liability is included. The book is updated annually.

Green, Ronald M., & Reibstein, Richard J. *Employer’s Guide to Workplace Torts* (Bureau of National Affairs, 1992). Reviews each of the areas of employment-related torts, explaining the general principles of law involved, summarizing case law precedent, and providing suggestions for avoiding liability.

Gregory, David L. “The Problematic Employment Dynamics of Student Internships,” 12 *Notre Dame J.L. Ethics & Pub. Pol’y* 227 (1998). Views student interns as “exploited” and discusses various legal strategies for providing employment law protections to student interns.

Hoye, William P. “An Ounce of Prevention Is Worth . . . The Life of a Student: Reducing Risk in International Programs,” 27 *J. Coll. & Univ. L.* 151 (2000). Reviews liability issues for college with study abroad programs; suggests measures for reducing risks to students and corresponding liability for institutions.



- Lake, Peter F. "The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law," 64 *Mo. L. Rev.* 1 (1999). Discusses the history of judicial deference to institutional actions under the *in loco parentis* doctrine, and the more recent tendency for courts to hold institutions of higher education to the same tort law standards as business organizations. Reviews the application of premises liability doctrines, judicial responses to injuries related to alcohol use, and concludes that tort law as applied to colleges is being "mainstreamed."
- Lake, Peter F. "The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College," 37 *Idaho L. Rev.* 531 (2001). Discusses the further development of judicial rejection of the *in loco parentis* doctrine and the creation of the "special relationship" doctrine that may hold institutions of higher education responsible for injuries to students, particularly when their injuries arise from circumstances that are foreseeable.
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- Pavela, Gary. *Questions and Answers on College Student Suicide* (College Administration Publications, 2006). Discusses, in a question and answer format, the legal issues faced by college administrators and counselors, provides advice on parental involvement and notification, discipline of students who engage in self-destructive behavior, and responding to a student suicide, among others. Includes checklists and guidelines, OCR letter rulings, and training materials for residence life staff.
- Prosser, William L., & Keeton, W. Page. *Handbook on the Law of Torts* (5th ed., West, 1984). A comprehensive survey of tort doctrines and concepts, with discussion of leading cases and relevant statutes. Includes discussion of sovereign and charitable immunity, defamation, negligence, and the contributory negligence and assumption-of-risk defenses.
- Richmond, Douglas. "Institutional Liability for Student Activities and Organizations," 19 *J. Law & Educ.* 309 (1990). Provides an overview of a variety of tort theories, and judicial precedents related to these theories, in which the institution's liability for the allegedly wrongful acts of student organizations was at issue.
- Stevens, George E. "Evaluation of Faculty Competence as a 'Privileged Occasion,'" 4 *J. Coll. & Univ. Law* 281 (1979). Discusses the law of defamation as it applies to institutional evaluations of professional competence.
- Strohm, Leslie Chambers (ed.). *AIDS on Campus: A Legal Compendium* (National Association of College and University Attorneys, 1991). A collection of materials related to a range of legal, medical, and policy issues concerning AIDS. Included are Centers for Disease Control recommendations, guidelines, and updates regarding precautions to take if employees, patients, or students have AIDS; journal articles; occupational safety and health guidelines; institutional policy statements; and an extensive list of resources.
- Whitten, Amy D., & Mosely, Deanne M. "Caught in the Crossfire: Employers' Liability for Workplace Violence," 70 *Miss. L.J.* 505 (2000). Reviews theories of employer

liability for workplace violence, including *respondeat superior*; negligent hiring, retention, supervision, entrustment, and training; and failure to warn. Although the article focuses primarily on Mississippi cases, it is a useful summary of the various theories of liability involved when workplace violence occurs.

### ***Sec. 3.4 (Institutional Contract Liability)***

Bookman, Mark. *Contracting Collegiate Auxiliary Services* (Education and Nonprofit Consulting, 1989). Discusses legal and policy issues related to contracting for auxiliary services on campus. An overview chapter reviews legal terminology, the advantages and disadvantages of contracting, and the ways in which contracting decisions are made. Another chapter explains what should be negotiated when the contract is developed and how contracted services should be managed. Sample documents are included.

See also Cherry, LaTourette, and Meleaeer entries for Chapter Eight, Section 8.1.

### ***Sec. 3.5 (Institutional Liability for Violations of Federal Constitutional Rights)***

Nahmod, Sheldon H. *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (3d ed., Shepard's/McGraw-Hill, 1991, with annual supp.). A guide to litigation brought under Section 1983. Primarily for legal counsel. Focuses on the positions the courts have taken on the procedural and technical questions common to all Section 1983 litigation.

### ***Sec. 3.6 (Captive and Affiliated Organizations)***

See Curry entry for Chapter 15, Section 15.4, which has several sections discussing research foundations.

See Matthews & Norgaard entry for Chapter 15, Section 15.1, which addresses alliances between higher educational institutions and private industry.

# 4

## The College and Its Employees

### *Sec. 4.1. Overview of Employment Relationships*

Employment laws and regulations pose some of the most complex legal issues faced by colleges and universities. Employees may be executive officers of the institution, staff members, or faculty members—some of whom may be in a dual appointment status as administrators and faculty members and others of whom may be in a dual employee-student status.

The discussion in this chapter, and in Chapter Five on employment discrimination law, applies to all individuals employed by a college or university, whether they are officers, faculty, or staff. Particular applications of employment law to faculty members, and concepts unique to faculty employment (such as academic freedom and tenure), are the subject of Chapters Six and Seven. Special issues of relevance to the employment status of the institution's executive officers are addressed in the first two Sections of Chapter Three and in subsection 4.3.3.7 below.

The institution's relationships with its employees are governed by a complex web of state and federal (and sometimes local) law. Contract law principles, based in state common law, provide the basic legal foundation for employment relationships (see Section 4.3 below). For employees who are covered by a collective bargaining agreement, however, federal or state statutory law and labor board rulings supplement, and to a substantial extent replace, common law contract principles (see Section 4.5 below). And for employees located in a foreign country, the civil law of that country will sometimes replace or supplement the contract law principles of the college's home state.

In addition to contract law and collective bargaining laws, public institutions' employment relationships are also governed by other federal and state statutes,

federal and state agency regulations (including state civil service regulations), constitutional law (both federal and state), administrative law (both federal and state), and sometimes local civil rights and health and safety ordinances of cities and counties. For private institutions, the web of employment law includes (in addition to contract and collective bargaining law) various federal and state statutes and regulations, local ordinances, state constitutional provisions (in some states), and federal and state administrative law (in some circumstances). Whenever a public or private institution employs workers under a government procurement contract or grant, any contract or grant terms covering employment will also come into play, as will federal or state statutes and regulations on government contracts and grants; these sources of law may serve to modify common law contract principles (see generally Section 13.4.2). Moreover, for both public and private institutions, state tort law affects employment relationships because institutions and employees are both subject to a duty of care arising from common law tort principles (see Sections 3.3 & 4.7.2). Like common law contract principles, however, common law tort principles are sometimes modified by statute as, for example, is the case with worker's compensation laws (see Section 4.6.6).

Among the most complex of the federal and state laws on particular aspects of employment are the nondiscrimination statutes and regulations—the subject of Chapter Five. Other examples of complex and specialized laws include collective bargaining laws (Section 4.5 below), immigration laws (Section 4.6.5 below), tax laws (Sections 13.3.1 & 13.3.8), and employee benefits laws. In addition to the Employee Retirement Income Security Act (ERISA) (Section 4.6.3 below), employee benefits are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), discussed in Section 13.2.14, which has relevance not only for employee benefits but also for record keeping in hospitals and some student health centers; and the Consolidated Omnibus Budget Amendment Act of 1986 (COBRA), which requires employers to continue group health insurance benefits, at the employee's cost, after certain events, such as termination. (The Selected Annotated Bibliographies for this chapter, Chapter Five, and Chapter Thirteen contain basic references on the various specialized employment laws.)

A fundamental issue that each college or university must resolve for itself is whether all individuals working for the institution are its employees or whether some are independent contractors. These issues are discussed in Section 4.2.1 below. Similar issues may also arise concerning whether a particular worker is an employee or is working only in a student status. These issues are discussed in Section 4.6.2 below. Colleges and universities also need to address the issue of where their employees are working and what effect the location has on the applicable law. These issues, such as telecommuting, working at off-campus locations, and working in foreign countries, are discussed in Section 4.2.2.

Other legal concerns that may arise for colleges as employers include the free expression rights of employees, particularly in public colleges (see generally Section 7.1.1), privacy in the workplace (including “snail mail” and e-mail privacy), background checks on applicants for employment, drug and

alcohol use by employees (see Section 4.3.3.6), and potential workplace violence. This chapter can only summarize briefly some of the more salient aspects of these issues or refer the reader to the resources in the Selected Annotated Bibliography.

The college may also face a variety of particularized legal issues, or particular risks of legal liability, regarding specific groups of employees. The faculty—the subject of Chapters Six and Seven—is the most common example of a group requiring some separate or special consideration. Another prominent example is the executive officers of the institution (see Chapter Three, Sections 3.1 and 3.2, as well as the discussion of executive contracts in Section 4.3.3.7 below). Other examples include security personnel, student judicial officers, health care personnel, and coaches of intercollegiate athletic teams.

Security personnel, particularly those who are “sworn officers” and carry firearms, may involve their institutions in claims regarding the use of force or off-campus law enforcement activities (see Section 8.6.1). Security personnel may also become the focus of negligence claims if crimes of violence occur on campus (see Section 8.6.2). Arrests and searches conducted by security personnel at public (and sometimes private) institutions may raise issues under the Fourth Amendment or comparable state constitutional provisions (see Sections 8.4.2 & 8.6.1). And the records kept by security personnel may raise special issues under the federal Campus Security Act (see Section 8.6.3) and under the Family Educational Rights and Privacy Act (FERPA) (see Section 9.7.1).

Student judicial officers may involve their institutions in due process claims that arise when students contest penalties imposed upon them for infractions of the college’s code of conduct (see Sections 9.1, 9.2, & 9.4). Student judicial officers may also become involved in various issues concerning the confidentiality of their investigations and deliberations, including issues regarding a “mediation privilege” (see, for example, the *Garstang* case in Section 2.2.3.3).

Health care personnel, including physicians and mental health counselors, may involve their institutions in negligence claims when students under their care injure or kill themselves or others (see Sections 3.3.2.5 & 4.7.2), or in malpractice claims when something else goes wrong in the diagnosis or treatment process (see Section 12.5.5). Physicians and counselors who serve members of the campus community may also confront issues concerning the doctor-patient privilege and other confidentiality privileges (see Section 2.2.3.3).

Athletics coaches may file claims of sex discrimination against their institutions, either because they believe they have been discriminated against or because of a perceived inequity in resources allocated to women’s teams (see, for example, Section 5.3.3.4). Or coaches may have lucrative contracts and fringe benefits that (in public institutions) prompt open-records law requests (see Section 12.5.3). Coaches may also become involved in disputes regarding NCAA rules (see the *Tarkanian* case in Section 14.4.2 and the *Law* case in Section 14.4.4).

The management of the institution’s numerous and varying employment relationships requires the regular attention of professionally trained and experienced staff. In addition to human resources managers, the institution will need compliance officers to handle legal requirements in specialized areas such as

nondiscrimination and affirmative action, immigration status, employee benefits, and health and safety; and a risk manager to handle liability matters concerning employees. The institution's legal counsel will also need to be involved in many compliance and risk management issues, as well as in the preparation of standard contracts and other employment forms, the preparation and modification of employee manuals and other written policies, the establishment and operation of employee grievance processes, and the preparation of negotiated (individual or collective) employment contracts. Sections 4.3.6 and 4.8 of this chapter, as well as Sections 2.4.2 and 2.5 above, provide some guidance on these matters.

## ***Sec. 4.2. Defining the Employment Relationship***

**4.2.1. *Employees versus independent contractors.*** An issue that colleges are likely to face with respect to their staff (more so than with respect to their faculty) is whether some of the individuals who work at the college are independent contractors rather than true employees. An independent contractor is an individual who sells his or her services to an organization but who is not considered an employee of that organization. For example, consultants, outside counsel, or other individuals with expertise that the college needs on a periodic basis are often considered independent contractors. The status of these individuals is important because many laws that protect employees do not necessarily protect independent contractors. On the other hand, an institution may incur liability under certain laws for independent contractors that it would not incur for employees. And in some cases, whether or not the individual is an employee or an independent contractor, liability may ensue.

Colleges and universities, like other employers, use a variety of forms of employment to maximize efficiency and minimize costs. Colleges may use independent contractors as consultants or trainers, or to work on short-term projects. Temporary employees may be used to fill in for regular employees who are on leave or to provide short-term help while the college seeks to fill a vacant position. Temporary employees may be the college's own employees, or they may be "leased employees" who are employed by a temporary agency but who may work for the college for extended periods of time. Although the "leased" employees are technically the employees of the providing agency, which pays them and provides them with benefits (if any), the college may be found to be a "joint employer" under certain laws, and may incur liability despite the fact that the individuals are not the college's employees.<sup>1</sup>

Certain laws, such as the Fair Labor Standards Act (Section 4.6.2), the state worker's compensation statutes (Section 4.6.6), federal and state equal employment opportunity laws (Chapter Five), and some provisions of the Internal Revenue Code (Section 13.1.3), apply to employees but not to individuals who are independent contractors. The definitions of "employee" in each of these laws

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<sup>1</sup>For an example of coemployment in a case involving a temporary staffing agency and a "client" employer, see *Hunt v. State of Missouri, Dept. of Corrections*, 297 F.3d 735 (8th Cir. 2002).

differ from one another, so the employment status of the individual will need to be determined under the provisions of each law. On the other hand, there may be advantages to characterizing an individual as an employee; for example, the worker's compensation statutes limit an employer's liability for tort claims when an employee is injured; but an independent contractor is not precluded from suing for negligence if an injury occurs. And occasionally, individuals whom an employer believed to be independent contractors may be found by a federal or state agency to be employees, which may result in additional tax liability, wage and benefit costs, or other financial consequences.

Employee status is controlled by common law as well as by statute. The common law test for employee status derives from the law of agency and focuses on the degree of control the employer has over the work of the individual. The common law test includes the following factors, none of which, by itself, is dispositive:

- The skill required of the individual
- The source of the instrumentalities and tools used in the work
- The location of the work
- The duration of the relationship between the parties
- Whether the hiring party has the right to assign additional projects to the individual
- The extent of the individual's discretion of when and how long to work
- The method of payment
- Whether the individual can or does hire and pay assistants
- Whether the work is part of the regular business of the hiring organization
- Whether the hiring organization provides employee benefits to the individual
- The tax treatment of the individual

(*Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992), cited in Stephen J. Hirschfeld, "Do You Know Who Your Employees Are?" Outline for Annual Conference of the National Association of College and University Attorneys, June 18–21, 1997, p. 3.) Depending upon which law or laws a claim is brought under, some or all of these factors may be relevant to statutory tests for employee status.

The issue of how independent contractor status is determined was highlighted in *Vizcaino v. Microsoft Corporation*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*). The Internal Revenue Service (IRS) had determined that workers that Microsoft had categorized as independent contractors were actually employees, using the common law test. Rather than challenging that determination, Microsoft paid the employer's share of FICA taxes to the government and issued the workers W-2 forms. Eight former "independent contractors" who had been reclassified as employees then sued Microsoft, asserting that they were entitled to participate in the company's "savings plus" plan and the employee stock purchase plan.

The trial court granted summary judgment to the company, and an appellate panel reversed. After an *en banc* hearing, the full Ninth Circuit decided in the plaintiffs' favor. The court ruled that, because Microsoft offered these benefit plans to all of its employees, the individuals whom the IRS had determined to be employees were also entitled to participate in these benefit plans, and that Microsoft's failure to do so violated their contractual rights.

In addition to contract claims by "independent contractors," colleges using "leased" employees may face joint liability with the actual employers of these "leased" workers for discrimination under federal and state nondiscrimination laws. The Equal Employment Opportunity Commission (EEOC) has issued an Enforcement Guidance (dated December 3, 1997) detailing the application of the federal civil rights laws to "contingent workers," which the EEOC defines as "individuals placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients." A subsequent Enforcement Guidance involving the Americans With Disabilities Act (ADA) (dated December 22, 2000) also covers contingent workers. This Guidance includes the assignment of workers to jobs or companies, unlawful harassment at the worksite, discriminatory wage practices, and other potentially discriminatory practices. The Guidance may be found at the EEOC's Web site, <http://eoc.gov>.

Colleges using contingent workers may also face liability if a court determines that, because the individual is working at the college's worksite, coemployment principles apply. This principle was applied by the U.S. Court of Appeals in a finding that Wal-Mart Stores was liable to an independent contractor who was subjected to a racially hostile work environment (*Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999)). Courts have also held that other laws, such as the Occupational Safety and Health Act (OSHA) (Section 4.6.1 of this book), the National Labor Relations Act (NLRA) (Section 4.5.1), and state worker's compensation laws (Section 4.6.6), may protect temporary workers or leased workers.

Colleges can take several steps to minimize the risk of having independent contractors "transformed" into employees, either by a court using the common law test or by a state or federal regulatory agency under the definition provided by the relevant law. A written document that spells out the relationship between the parties, the individual's right to control his or her own work, and the individual's obligations to pay income and self-employment taxes will help clarify the relationship. Paying for the individual's services on a project basis, rather than weekly or monthly, using independent contractors who have incorporated or who have other indicia of a business independent of the college (a bank account, letterhead, business cards, and so on), and reporting the payments to the individual on an IRS Form 1099 will help demonstrate that the individual is not an employee.

Colleges may also encounter situations where they need to determine whether a particular worker is an employee or a student. One example of this problem is demonstrated in Section 4.5.6, which discusses the status of graduate assistants, medical residents, and others under collective bargaining laws. Another example is discussed in Section 4.6.2, which discusses the status of residence hall staff as employees or students.



**4.2.2. *Where is the workplace?*** Advances in information technology, demands for greater work flexibility in order to balance work and family responsibilities, and limitations on office space have resulted in an increase in work that is performed somewhere other than the college campus. In addition, the idea of the “campus” as a fixed geographic location has changed, as institutions have implemented or expanded distance learning and multisite interactive video-based programs, study abroad programs, off-campus internships, and clinical rotations. Because of the recency of these phenomena, the boundaries of a college’s liability for events that affect an employee off campus are not clear. In general, U.S. workers are protected by U.S. civil rights laws wherever they work in the world. (See Section 5.1 for a discussion of extraterritorial application of the federal civil rights laws.) Depending on the situation, the law of the state in which the college is located may apply to an alleged legal violation that occurs in another state or abroad.

Institutions who hire local nationals to work on study abroad or other college programs should draft contracts that comply with the law of the country in which the program is located as well as U.S. law. It may be necessary to engage the assistance of a local employment attorney in order to ensure that the contracts comply with national law. Administrators may also wish to consider the possibility of limiting the resolution of disputes that may arise under the contract, should national law permit such a limitation, such as through the use of arbitration clauses (see Section 4.5.5). However, the resolution of employment disputes in other nations may be limited to special labor courts or administrative tribunals; because of the differences between U.S. law and the law of other nations, there is no substitute for expert advice from an attorney who is familiar with the law of the country in which the program is operated.

Telework has raised many questions, most of which remain unanswered. For example, if an employee is injured in her own home while engaged in work for the college, is she protected by state worker’s compensation laws? Application of the federal Occupational Safety and Health Act to teleworkers is also unresolved; an attempt by a prior U.S. Secretary of Labor in 1999 to apply OSHA’s safety rules to telecommuters was reversed when the agency was criticized in the press (Dawn R. Swink, “Telecommuter Law: A New Frontier in Legal Liability,” 38 *Am. Bus. L.J.* 857 (2001)). Because telework typically involves the use of computers, teleworkers may have concerns about privacy of e-mail correspondence and the possible electronic monitoring of their work if they are connected to a college’s network (Donald H. Nichols, “Window Peeping in the Workplace: A Look into Employee Privacy in a Technological Era,” 27 *Wm. Mitchell L. Rev.* 1587 (2001)). These issues remain to be resolved as telecommuting gains in popularity and as advances in digital technology permit more work to be done off site.

## **Sec. 4.3. *Employment Contracts***

**4.3.1. *Defining the contract.*** The basic relationship between an employee and the college is governed by contract. Contracts may be either written or oral; and even when there is no express contract, common law principles may allow

the courts to imply a contract between the parties. Contracts may be very basic; for example, an offer letter from the college stating a position title and a wage or salary may, upon acceptance, be construed to be a contract. In *Small v. Juniata College*, 682 A.2d 350 (Pa. Super. 1996), for example, the court ruled that an offer letter to the college's football coach created a one-year contract, and thus the employee handbook's provisions regarding grounds for termination did not apply. Absent any writing, oral promises by a manager or supervisor may nevertheless be binding on the college through the application of agency law (see Section 3.1). A court may also look to the written policies of a college, or to its consistent past practices, to imply a contract with certain employment guarantees. For these reasons, it is important that administrators and counsel ensure that communications to employees and applicants, whether written or oral, and the provisions in employee manuals or policies, clearly represent the institution's actual intent regarding the binding nature of its statements.

Sometimes a state statute will supercede common law contract principles as to a particular issue. This is the case, for instance, with state worker's compensation laws, which substitute for any contractual provisions the parties might otherwise have used to cover employee injuries on the job. Worker's compensation laws are discussed in Section 4.6.6; other statutes that play a similar role are discussed in other subsections of Section 4.6.

**4.3.2. The at-will doctrine.** Until the late 1970s, the common law doctrine of "employment at will" shielded employers from most common law contract claims unless an individual had a written contract spelling out job security protections. Employers had the right to discharge an individual for any reason, or no reason, unless the termination violated some state or federal statute. The at-will doctrine may apply to employees at both private and public colleges for those employees who are not otherwise protected by a state statute, civil service regulations, or contractual provisions according some right to continued employment. In fact, at-will employment in public colleges may defeat an employee's assertion of due process protections because no property interest is created in at-will employment (see, for example, *McCallum v. North Carolina Cooperative Extension Service*, 542 S.E.2d 227 (N.C. App. 2001), *appeal dismissed*, 548 S.E.2d 527 (N.C. 2001)).

Although the doctrine is still the prevailing view in many states, judges have developed exceptions to the doctrine in order to avoid its harsher consequences when individuals with long service and good work records were terminated without cause. Because these exceptions are created by state court rulings, the status of the employment-at-will doctrine varies by state. The two primary approaches to creating exceptions have been through the use of contract law and tort law. In some states, employee handbooks or other policy documents have been found to have contractual status, although courts in a minority of states have rejected this interpretation of contract law. In other cases, courts have allowed employees asserting that they were terminated for improper reasons to state tort claims for wrongful discharge. In *Wounaris v. West Virginia State College*, 588 S.E.2d 406 (W. Va. 2003), for example, the court held that it

was against public policy for an employer to terminate a staff member for defending himself against an allegedly unfair termination.

Tort claims challenging a discharge as a violation of public policy are discussed in Section 4.6.8. (For a general discussion of the at-will doctrine and trends in the creation of judicial exceptions, see Mark A. Fahleson, “The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?” 72 *Neb. L. Rev.* 956 (1993); and Cornelius J. Peck, “Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge,” 66 *Wash. L. Rev.* 719 (1991).)

### 4.3.3. Sources, scope, and terms of the contract

**4.3.3.1. Sources of the contract.** Contracts may take various forms, even within the same institution. In public institutions, particularly if the college has a tenure system, contracts may be governed by state statute in public colleges, or even by state civil service or personnel regulations (see Section 4.4 below). They may also be governed by the state’s common law of contract. In both public and private colleges, faculty contract provisions may be found in faculty handbooks, policy statements, or in the “academic custom and usage” doctrine through which courts seek to fill in gaps in written or implied contracts. These issues, as related to faculty contracts, are discussed in Section 6.2.

Contracts for staff and for nontenured or non-tenure-track faculty may range from a brief notice of appointment on a standard form, with blanks to be filled in for each employee, to a lengthy collective bargaining agreement negotiated under state or federal labor law. Or the contract may not be called by that name at all, but instead may be called an employee handbook or policy manual. As the discussion in Sections 4.3.3.2 and 4.3.3.3 explains, the formal writing does not necessarily include all the terms of the contract.

**4.3.3.2. Contract interpretation.** A contract’s meaning is ascertained primarily by reference to its express terms. Where the contract language is unambiguous, it will govern any factual situation to which it clearly applies. *Billmyre v. Sacred Heart Hospital of Sisters of Charity*, 331 A.2d 313 (Md. 1975), illustrates this principle of contract interpretation. A nurse was employed as a coordinator-instructor at the hospital’s nursing school under a contract specifying that either the employer or the employee could terminate the contract “at the end of the school year by giving notice in writing to the other not later than May 1 of such school year.” On May 18 the nurse received a letter terminating her employment. The court held that the hospital had breached the contract, since the contract language unambiguously provided for notice to the employee by May 1 to effectuate a termination of the contract.

Careful drafting of contracts is important in order to avoid disagreements about their interpretation. For example, in *Washington v. Central State University*, 699 N.E.2d 1016 (Ct. Claims Ohio 1998), the vice president of academic affairs had served under a series of one-year contracts for five years. Each contract provided that the university could terminate the vice president’s appointment at any time for cause, and could also terminate the contract prior to its

expiration upon thirty days notice. Two months after executing another one-year contract, the university terminated the vice president from his academic position, returning him to the ranks of tenured faculty members. The court rejected the vice president's breach of contract claim, noting that the university had provided evidence of incompetence sufficient to support a finding of cause for terminating his administrative appointment.

On the other hand, if the contract does not provide for a specific term and does not specify that termination must be for cause, employment may be at-will (see Section 4.3.2 above). In *Knowles v. Ohio State University*, 2002 Ohio 6962 (Ohio Ct. App. 2002), the court interpreted a contract stating that a vice provost's continued employment was subject to "the results of an annual performance review and continued acceptable performance" as a contract for at-will employment. Although the court characterized the language as creating a "satisfaction contract"<sup>2</sup> under which the employee could be terminated if his supervisor, the provost, was not "satisfied" with his performance, the court noted that any determination that the employee's performance was unsatisfactory must be made in good faith. Because the trial court had excluded evidence of the performance review conducted by the provost and of allegedly defamatory remarks made by the provost, there was no evidence in the record of the provost's good faith in making the determination that the plaintiff's performance was unsatisfactory. The appellate court therefore reversed the trial court's dismissal of the vice provost's breach of contract and defamation claims. (For a contrasting case from the same state concluding that a researcher's termination for academic fraud was appropriate because he was an at-will employee, see *Matikas v. University of Dayton*, 788 N.E.2d 1108 (Ohio Ct. App. 2003), *appeal denied*, 792 N.E.2d 201 (Ohio 2003).)

Sometimes, particularly in public institutions, contravening statutes or other institutional policies will take precedence over the express language of the employment contract. In *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383 (Colo. Ct. App. 1984), for example, the court determined that the one-year term specified in the plaintiff's contract was invalid because the regents had enacted a regulation that required appointments of all untenured faculty to be for three years. Although the regents argued that the one-year contract was justified because of a lack of funding for the plaintiff's position, the court declared that the regents could not ignore their own regulations, which they had the power to amend if financial problems so required.

Similarly, if a public college is subject to a state statute or administrative regulation regarding contract periods, for instance, or if the college's bylaws provide for notice provisions more generous than those in the contract, these other sources of law may supersede the terms of a contract. For example, in *Linkey v. Medical College of Ohio*, 695 N.E.2d 840 (Oh. Ct. Cl. 1997), the plaintiff had been employed under a series of one-year contracts from 1980 until his

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<sup>2</sup>A "satisfaction contract" is considered to be a contract for at-will employment because the sole criterion for the employee's retention or termination is the subjective judgment of the supervisor that the employee's work is satisfactory.

termination in 1994. Although his contract did not provide for advance notice should the college determine not to renew him, it did specify that the contract was subject to the bylaws and other actions of the institution's board of trustees. The bylaws provided that an employee was entitled to ninety days notice prior to the expiration of an appointment. The college had provided the plaintiff with notice of its intent not to reappoint him to a subsequent one-year contract; but it had done so less than ninety days prior to the expiration of his one-year contract by paying him for the days beyond the contract's expiration date necessary to complete the ninety-day notice period.

The plaintiff filed a breach of contract claim, arguing that, because the college provided less than ninety days notice of its intent not to renew his appointment, he was entitled to another one-year contract. The court agreed, noting that the contract must be interpreted in light of the institution's bylaws. Furthermore, the court looked at the institution's past practice of consistently either notifying employees of nonrenewal at least ninety days in advance, or automatically renewing the employees' contract for another year. Because the plaintiff had not received timely notice, said the court, he had a reasonable expectation that his employment would continue for another year, and the institution had breached his contract.

**4.3.3.3. Employee handbooks as contracts.** Contracts are governed by common law, which may vary considerably by state. Some courts have refused to recognize employee handbooks as contracts under state law (see, for example, *Stanton v. Tulane University*, 777 So. 2d 1242 (La. App. 2001); see also *Raines v. Haverford College*, 849 F. Supp. 1009 (E.D. Pa. 1994)). The majority view, however, is that written employee handbooks, bylaws, or other similar policy documents may be construed to be express contracts (see, for example, *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985)). Moreover, an employer's consistent adherence to practices such as termination only for cause or progressive discipline, even if not expressed in writing, may give rise to an implied contract giving an employee rights beyond what an at-will employee would have. In *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981), for instance, the court found an implied contract in periodic promotions and salary increases for an otherwise at-will employee.

In *Collins v. Colorado Mountain College*, 56 P.3d 1132 (Ct. App. Colo. 2002), a court ruled that the dispute resolution process contained in the employee handbook at Colorado Mountain College precluded judicial review of a breach of contract claim. The handbook provided that the decision rendered at the final step of the grievance process would be final. The plaintiff had used the internal grievance process specified in the handbook to challenge her termination for dishonesty. Her grievance was denied at every step of the internal process, including the final step. The court refused to exercise jurisdiction over the breach of contract claim, ruling that the terms of the employee handbook were clear and that the plaintiff had received all the rights to which she was entitled under the contract. The court interpreted the finality provision of the handbook as an expression of the parties' intent that the decision at the final step of the grievance procedure would be binding. (For a discussion of two Pennsylvania

cases that took the same approach to professors' breach of contract claims, see Section 6.7.3.)

**4.3.3.4. Other contract claims.** In addition to using the doctrines of express and implied contract as mechanisms for avoiding the at-will doctrine, courts have applied other contractual or "quasi-contractual" doctrines to the employment relationship. For example, individuals who allege that an agent of the college has made false promises upon which the plaintiff has relied to his or her detriment may state a claim for promissory estoppel. The court in *Sonnichsen v. Baylor University*, 47 S.W. 3d 122 (Tex. Ct. App. 2001) considered but rejected such a claim, holding that a terminated coach could not assert promissory estoppel because the promise to execute a written contract did not meet the requirements of statute of frauds. See also *Heinritz v. Lawrence University*, 535 N.W.2d 81 (Ct. App. Wis. 1995) (employee cannot state claim for promissory estoppel because offer of employment was for at-will status). In addition, courts in some states have recognized an implied "covenant of good faith and fair dealing" that requires an employer to deal with an employee fairly and in good faith—an implicit "good cause" standard that substitutes for at-will status. (For a discussion of the use of the covenant of good faith and fair dealing as a contract interpretation device, see J. Wilson Parker, "At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law," 81 *Iowa L. Rev.* 347 (1995).) These exceptions and others underscore the importance of clarity in written documents and oral statements that could be construed as promises—in particular, clarity on whether the institution intends to be legally bound by the particular provisions or statements.

If the institution does not intend to give a handbook, set of bylaws, or other policy documents the status of a contract, the written document should make this point clearly and state what the purpose of the document is. Courts have ruled that a disclaimer making it clear that the document is not intended to have contractual status will defeat an employee's claim that the breach of any promises in the document should have legal consequences.<sup>3</sup> In *Galloway v. Roger Williams University*, 777 A.2d 148 (R.I. 2001), for example, language in the college's personnel policy manual disclaiming contractual status, and specific language stating that employment was at will, defeated the plaintiff's breach of contract claim for wrongful termination.

Although a clear disclaimer stating that the employee handbook is not a contract will defeat breach of contract claims that rely on handbook provisions, an incomplete or unclear disclaimer may not protect a college against breach of contract claims. For example, in *Dantley v. Howard University*, 801 A.2d 962 (D.C. 2002), the appellate court ruled that a disclaimer stating that "this document is not to be construed as a contract" was insufficient to justify the dismissal of the plaintiff's breach of contract claim. Although the trial court had dismissed the claim, relying on the disclaimer, the appellate court determined

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<sup>3</sup>Cases and authorities are collected in George L. Blum, Annot., "Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Alerting At-Will Employment Relationship," 17 A.L.R.5th 1.

that specific provisions in the handbook for the abolition of positions and reductions in force could be “rationally at odds” with the disclaimer, and thus a trial was necessary to determine whether the university was bound by the language of its handbook and, if so, whether it had breached the handbook’s terms in its layoff of the plaintiff.

**4.3.3.5. Contract rescission.** Even if a contractual provision would ordinarily bind the college, fraud on the part of the employee may result in a contractual *rescission*, which means that the contract no longer exists. In *Sarvis v. Vermont State Colleges*, 772 A.2d 494 (Vt. 2001), for example, the Community College of Vermont hired Robert Sarvis as an adjunct professor of business law and business ethics, as well as a part-time administrator. Sarvis had not disclosed that he had recently been released from prison after serving a four-year sentence for bank fraud. When Sarvis’s parole officer notified the college of his prison record, the college terminated his employment prior to the expiration of his contract. Sarvis sued for breach of contract. The court ruled that the college could rescind the contract because the plaintiff had procured that contract fraudulently.

Colleges and universities have also used contract rescission to protect themselves when they discover that a faculty member holds two full-time positions. In *Nash v. Trustees of Boston University*, 946 F.2d 960 (1st Cir. 1991), for example, the university had reversed its decision to award a professor an early retirement incentive when it learned that he had secured a full-time position at another institution without informing the university. The court held that, because the early retirement agreement was induced by the professor’s fraud, the university’s refusal to honor that agreement was not a breach but a rescission of the contract. And in *Morgan v. American University*, 534 A.2d 323 (D.C. 1987), the university terminated a tenured professor who had taught at the university for two years when it discovered that he held a full-time job concurrently at another institution. The court agreed with the university’s argument that it was a contract rescission because the professor had withheld a material fact, and thus a pretermination hearing, as provided by the faculty handbook, was not required.

**4.3.3.6. Drug testing and medical screening.** Colleges and universities that are recipients of federal grants and contracts exceeding \$100,000 are subject to the Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701–7) (see Section 13.4.4.1 of this book). And if a college or university hires employees to drive commercial vehicles, these employees may be subject to drug testing under the provisions of the Omnibus Transportation Employee Testing Act of 1991 (see below). Legislation such as this has encouraged many institutions to develop policies prohibiting employees from using controlled substances. Such policies may also provide for testing of employees suspected of using controlled substances. These policies may become part of the employment contract, both for unionized and nonunionized employees.

Whether or not a state or a higher educational institution may lawfully require its faculty or staff to submit to drug testing depends on many factors, including the nature of the individual’s job, the type of institution (whether it

is public or private), and the scope of the testing (whether it is done “for cause” or on a random basis). The authority of public institutions to require drug testing is limited by the Fourth Amendment, which protects public employees from unreasonable searches and seizures. (For more on the Fourth Amendment, see Sections 8.4.2 and 10.4.8.) But the U.S. Supreme Court has upheld the legality of drug testing for public employees holding certain types of jobs in *National Treasury Employees Union v. Von Raabe*, 489 U.S. 656 (1989). In this case, certain employees of the U.S. Customs Service were subject to drug testing, whether or not they were suspected of drug use. In a 5-to-4 opinion, the Court ruled that, because of the nature of their jobs (drug interdiction) and the agency’s strong interest in ensuring that its employees were drug-free, the suspicionless drug testing did not violate the employees’ Fourth Amendment rights. In a companion case, *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989), the Court ruled 7 to 2 that regulations of the Federal Railroad Administration, which required blood and urine testing for alcohol and drugs after accidents and when employees violated certain safety rules, did not violate the Fourth Amendment, and that individualized suspicion was not a necessary prerequisite for the testing.

Drug testing in response to other performance problems has also been upheld in the face of constitutional challenges. In *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997), the court upheld the requirement that Pierce, a medical resident at Texas Tech University Health Sciences Center, submit to a drug test after she slapped a patient. Pierce had claimed that the test constituted an invasion of privacy and a violation of her Fourth Amendment rights. The court ruled that the “individualized suspicion” standard applicable to police searches did not apply in the educational context because, given the nature of a medical student’s work, the university had a special need to ensure that these employees were not using drugs. The search was not intrusive on the basis of the facts alleged by Pierce, and because the test results were negative, no action had been taken against her. This case suggests that if a teaching hospital has written policies providing for drug testing when, in the judgment of an employee’s supervisor, the employee’s behavior is consistent with drug use, it can follow these policies without Fourth Amendment liability.

Fourth Amendment challenges to drug testing may be much stronger, however, if a public employer requires that all employees, or all applicants, agree to submit to drug tests. In *Georgia Association of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990), for example, the State of Georgia enacted a law in 1990 that required all applicants for state jobs (including college faculty and staff) to submit to drug tests. The Georgia Association of Educators filed challenges under the Fourth Amendment as well as the equal protection and due process clauses. The federal district judge ruled that Georgia’s general interest in maintaining a drug-free workplace was not sufficiently compelling to outweigh the applicants’ Fourth Amendment protections against unreasonable searches and seizures. The judge also ruled that the plaintiffs had established equal protection and due process claims because the state had not identified any interest sufficiently compelling to outweigh the applicants’ constitutional rights.



A court's attitude toward drug testing may also be very different if the employer implements random drug testing, particularly for employees in jobs that do not implicate safety. In these circumstances, employees may be protected not only by the Fourth Amendment but also by the Americans With Disabilities Act, which protects employees in private as well as public institutions. In *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10th Cir. 1997), the appellate court ordered the trial court to enjoin a private company's policy that provided for random testing of employees for drug or alcohol use. The plaintiff was an accounts manager who objected to the company's requirement that she disclose the use of all prescription medication (whether or not it was unlawfully obtained) in addition to submitting to random drug screening. The court ruled that the requirement to disclose all prescription medication violated Section 102 of the ADA (see Section 5.2.5 of this book), which prohibits medical examinations or inquiries about medical conditions unless they are job related and consistent with business necessity.

If the employee occupies a "safety-sensitive" position, however, some courts may be willing to allow random drug screening on the grounds that public safety needs outweigh individual privacy concerns (see, for example, *Hennessey v. Coastal Eagle Point Oil Company*, 609 A.2d 11 (N.J. 1992)). Federal law also provides for drug testing for certain employees in "safety-sensitive" positions. Drivers of commercial motor vehicles who are required to obtain a commercial driver's license are subject to the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 31306, and the U.S. Department of Transportation's implementing regulations. These regulations, codified at 49 C.F.R. Part 382, provide for testing for alcohol and a variety of controlled substances at the pre-employment stage, and for testing of employees in various circumstances (49 C.F.R. §§ 382.303, 382.305, 382.309, 382.605, 382.311).

Medical screening tests also raise legal issues and may also violate employee rights unless they are closely related to job requirements. In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998), a federal appellate court ruled that the laboratory's practice of testing employees for syphilis, sickle cell anemia, and pregnancy violated their civil rights under Title VII (see Section 5.2.1 of this book) as well as their Fourth Amendment right to privacy. The laboratory, a unit of the University of California, had not notified applicants that they would be tested for these conditions and did not make a showing that the tests were job related. The appellate court reversed the trial court's award of summary judgment to the laboratory on the Title VII and privacy claims, ruling that the testing violated the plaintiff's Fourth Amendment rights because of the unconsented-to seizure of body fluids for purposes unknown to the plaintiffs. The court acknowledged that the plaintiffs had also stated a Fifth Amendment due process claim, but declined to undertake this analysis, since the plaintiffs had already prevailed on their Fourth Amendment claim. The court found a Title VII violation because non-job-related testing for sickle cell anemia singled out African Americans, and pregnancy testing singled out women. Although this case involved federal claims under the U.S. Constitution that could be brought only against public institutions, employees of

private institutions could assert the Title VII claims against their employers, and could also assert both tort and contract actions claims to challenge the type of testing at issue in this case.

**4.3.3.7. Executive contracts.** As the leadership of postsecondary institutions has become more complex, boards of trustees have begun to offer more elaborate compensation packages and other perquisites to attract talented individuals to executive positions and to encourage them to stay. Where once a contract for a college president or vice president may have been one or two paragraphs, these executive contracts now address a broader range of issues and may include specific attention to the circumstances under which the board will terminate the executive's employment.

Contracts for executives of public institutions may be subject to state open records acts (see Section 12.5.3), or discussions of such contracts may be subject to open public meetings law (see Section 12.5.2). Particularly at institutions that are undergoing financial pressures, the contents of the president's contract may be of great interest to the student newspaper or to the media in general.

The following topics should be considered for explicit inclusion in executive contracts, particularly the president's contract:

1. Compensation, which may include salary, a "signing bonus," a housing allowance or the provision of a house, a car or a car allowance, and so forth. Some nonsalary perquisites, such as a house or car, may be taxable to the executive, so a tax expert should be consulted before the contract is executed. Deferred compensation, such as a retention payment, may also have tax consequences.
2. Benefits, including medical insurance, pension contributions and the pension plan, sick and vacation leave, memberships in clubs or other organizations, reimbursement of moving expenses, and others.
3. Travel and entertainment accounts.
4. A statement of the duration of the contract (if not at-will), and the circumstances under which the board of trustees may terminate the president. This statement may include notice provisions, as well as required mechanisms for resolving disputes that arise under the contract (such as restricting the executive to arbitration rather than litigation—see Section 4.3.6).
5. The expectations for the executive's spouse, if any, and any funding for spousal activities, entertaining, or other appropriate activities.
6. Standards of performance for the executive and the method by which the executive will be evaluated.

(For further discussion of executive contracts, see Daniel J. Bernard, "Presidential Contracts: Run, Don't Walk," outline of presentation at the NACUA Continuing Legal Education Conference, Fall 1999, available at <http://www.nacua.org>.)

**4.3.4. Amendment of the contract.** The terms of the original employment contract need not remain static through the entire life of the contract. Courts have accepted the proposition that employment contracts may be amended under certain circumstances. In an early case that predated the prohibition on mandatory retirement for faculty, *Rehor v. Case Western Reserve University*, 331 N.E.2d 416 (Ohio 1975), the court found amendments to be valid either where the right to amend was reserved in the original contract or where there was mutual consent of the parties to amend and adequate consideration was given in return for the changed terms. The plaintiff in *Rehor* was a tenured professor employed under contract at Western Reserve University from 1942 to 1967. Throughout this period, the retirement age was always seventy. After Case Institute of Technology joined with Western Reserve to form Case Western Reserve University, Case Western, which took over the faculty contracts, adopted a resolution requiring faculty members over sixty-eight to petition to be reappointed. The new university's bylaws provided that "the board of trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of the members of the faculty as the board of trustees deems necessary." The court held that this bylaw language "includes a reservation of the right to change the retirement age of the faculty" and thus defeats the plaintiff's claim that the university was in breach of contract. Since the retirement policy is part of tenure, "the reserved right to change rules of tenure includes the right to change the retirement policy." The court also approved of the university's assertion that "an employment contract between a university and a tenured Faculty member may be amended by the parties in writing when supported by adequate consideration." These considerations were satisfied in *Rehor* by the professor's execution of reappointment forms and acceptance of an increased salary after the new retirement policy was put into effect. While current law prohibits retirement policies that use age as a criterion, the reasoning of *Rehor* is still applicable to amendments of contracts between colleges and their faculty or staff.

The outcome in *Rehor* is based in large part upon the apparent renegotiation of faculty members' terms and conditions of employment when they were reappointed by the newly formed university. In contrast, in *Karr v. Board of Trustees of Michigan State University*, 325 N.W.2d 605 (Mich. Ct. App. 1982), the trustees of Michigan State University decided to respond to a budget crisis by placing university employees on a two-and-a-half-day layoff, for which they would receive no pay. Although employees were permitted to specify whether they wanted the reduction in pay deducted in a lump sum or in six equal installments, there was no negotiation with the employees. Although the trial court had granted summary judgment for the university, the appellate court reversed, saying that, if the employees had contracts with the university for a fixed sum, then the university's unilateral decision to withhold two and a half days of the employees' pay was a breach of their employment contract. The existence of such a contract was a question of fact, said the court, and was not amenable to a summary judgment determination.

On the other hand, not all understandings between employees and a college or university constitute a binding contract. In *Faur v. Jewish Theological*

*Seminary of America*, 536 N.Y.S.2d 516 (N.Y. App. Div. 1989), a male professor of rabbinics resigned when the seminary faculty voted to admit female rabbinical students, claiming that the change in admissions policy was incompatible with his personal religious beliefs. The professor argued that the new admissions policy breached his employment contract and also constituted religious discrimination. The court ruled that the seminary had no contractual duty to refrain from changing the admissions requirements in order to avoid offending the professor's religious beliefs. In addition, the court refused to examine whether the seminary's change in admission policy constituted religious discrimination on the grounds that it would require the court to impermissibly inquire into religious doctrine, a violation of the First Amendment (see Sections 1.6.2 & 6.2.5), and dismissed the professor's claim.

Under the common law of many states, a letter may be contractually binding on both parties. In *Levy v. University of Cincinnati*, 616 N.E.2d 1132 (Ohio Ct. App. 1992), a letter outlining the terms of a professor's employment was ruled a contract; a subsequent letter changing those contractual terms was also found to bind both parties. The court ruled that the professor had accepted the terms of the second letter, which established new employment rights and obligations, by continuing to teach at the university.

Occasionally contracts may also be amended unilaterally by subsequent state legislation. But the state's power to modify its own contracts legislatively or to regulate contracts between private parties is circumscribed by Article I, Section 10(1), of the U.S. Constitution, known as the contracts clause: "No state shall . . . pass any . . . law impairing the obligation of contracts." In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (discussed in Section 6.2.2 of this book), for instance, the U.S. Supreme Court held that an Indiana law that had the effect of canceling the tenure rights of certain public school teachers was an unconstitutional impairment of their employment contracts. Under this and subsequent contracts clause precedents, a state may not impair either its own or private contracts unless such impairment is both "reasonable and necessary to serve an important public purpose," with "necessary" meaning that the impairment is essential and no viable alternative for serving the state's purpose exists (*United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977)).

**4.3.5. Waiver of contract rights.** Once a contract has been formed, the parties may sometimes waive their contract rights, either intentionally by a written agreement or unintentionally by their actions. *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975), concerned a professor who after teaching at Mansfield State College for five years was notified that his contract would not be renewed. Through his counsel, the professor negotiated with the state attorney general and agreed to submit the issue of the nonrenewal's validity to an arbitration panel. When the panel upheld the nonrenewal, the professor brought suit, alleging that he was tenured and that the college did not follow the termination procedures set out in the tenure regulations and was therefore in breach of contract. The court, after pointing out that under the state law contract rights may be waived by subsequent agreement between the parties, upheld the district court's finding "that the parties had reached such a subsequent agreement when, after

extensive negotiations, they specifically stipulated to the hearing procedures actually employed.” Ruling that the hearing procedures were consistent with due process guidelines, the court upheld the trial court’s ruling for the college.<sup>4</sup>

Public policy considerations may, however, preclude the waiver of certain contract terms. In *McLachlan v. Tacoma Community College District No. 22*, 541 P.2d 1010 (Wash. 1975), the court addressed this issue but found the rights in question to be properly waivable. The two plaintiffs were employed by the college district under contracts that specifically stated, “The employee waives all rights normally provided by the tenure laws of the state of Washington.” The plaintiffs, who were aware that they were employed to replace people on one-year sabbaticals, contended that, for reasons of public policy, the contractual waivers should not be enforced. While avoiding the broad issue of whether a blanket waiver of tenure rights contravenes public policy, the court said:

We envision no serious public policy considerations which would prohibit a teacher from waiving the statutory nonrenewal notice provisions in advance of the notice date, provided he knows the purpose of his employment is to replace the regular occupant of that position who is on a one-year sabbatical leave.

**4.3.6. Legal planning with contracts.** Given the wealth of legal theories that employees, including faculty members, may use to challenge employment decisions, careful drafting of employment contracts, employee handbooks, and institutional personnel policies is essential. State court opinions regarding the binding nature of such documents, while often favoring the employee, also suggest that the employee’s rights vis-à-vis the institution should be carefully spelled out in these documents in order to reduce potential litigation.

Although careful drafting of contracts and policy documents is important, no amount of careful drafting can prevent litigation. Administrators and counsel may therefore wish to consider the use of individual employment contracts (for nonunionized employees) that contain a clause limiting the parties to arbitration for resolution of disputes arising under the contract. Arbitration and other alternate dispute resolution mechanisms (see Section 2.3) often provide quicker, less expensive, and less formal resolution of disputes than court litigation, and federal courts are beginning to dismiss lawsuits brought by employees who have signed contracts with arbitration clauses. Although the courts have been sharply criticized for enforcing “mandatory arbitration clauses” that deny employees the right to a judicial forum for their employment claims (see the Selected Annotated Bibliography for this Chapter for relevant resources), the U.S. Supreme Court has upheld the validity of such arbitration clauses, as long as they state specifically the types of disputes that are subject to the restriction and the statutory claims for which the employee is foregoing a judicial remedy.<sup>5</sup>

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<sup>4</sup>This case was decided before the Supreme Court’s ruling in *Loudermill* (discussed in Section 6.7.2.3). Thus, the court’s discussion of the parameters of due process should be compared carefully with the rules set down in *Loudermill*.

<sup>5</sup>Cases are collected in Marjorie A. Shields, Annot., “Enforceability of Arbitration Clauses in Collective Bargaining Agreements as Regards Claims Under Federal Civil Rights Statutes,” 152 A.L.R. Fed. 75.

In *Gilmer v. Interstate-Johnson Lane*, 500 U.S. 20 (1991), a registered securities representative had agreed to submit all disputes to compulsory arbitration, and the Court refused to permit him to litigate an age discrimination claim in court because he had entered the agreement to arbitrate. Distinguishing *Alexander v. Gardner-Denver* (a case involving a waiver in a collective bargaining agreement, discussed in Section 4.5.5), the Court noted three differences between *Gardner-Denver* and *Gilmer*. First, *Gilmer* had an individual contract in which he had agreed to arbitrate statutory claims, whereas the arbitration clause at issue in *Gardner-Denver* related to contract-based claims. Second, in *Gardner-Denver* the problem was that the Court did not believe the union should be permitted unilaterally to waive an individual employee's right to seek redress under nondiscrimination laws; in *Gilmer* no such problem existed because the individual employee had voluntarily entered the contract. And third, the Court noted that the Federal Arbitration Act (9 U.S.C. § 1, discussed in Section 15.1.5 of this book) favors arbitration agreements and that such agreements should be upheld whenever appropriate, a matter that had not been discussed in *Gardner-Denver*.

*Gilmer* unleashed a flood of litigation in the federal courts as employers in industries such as financial services and insurance required new and current employees to execute contracts containing mandatory arbitration clauses. Employees who then attempted to litigate discrimination claims found themselves defending an employer's motion to compel arbitration. Federal appellate courts were split on the propriety of enforcing mandatory arbitration clauses, particularly those that did not specify the laws to which the waiver applied. While the U.S. Court of Appeals for the Ninth Circuit ruled that these arbitration clauses violated Title VII (*Duffield v. Robertson Stephens & Company*, 144 F.3d 1182 (9th Cir. 1998)), others were willing to enforce them without close scrutiny of the language of the waiver (for example, *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998)). Still others took the position that the clauses were enforceable if the waiver made it clear precisely which statutory claims were being waived (*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999)).

The U.S. Supreme Court again addressed the enforceability of mandatory arbitration clauses in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In a 5-to-4 decision, the Court ruled that the Federal Arbitration Act permits parties to include enforceable arbitration clauses in employment contracts, rejecting the plaintiff's claim that enforcing such agreements requires employees to forego substantive rights afforded by the civil rights statutes. The majority characterized the effect of these agreements as merely a substitution of an arbitral for a judicial forum, and noted the advantages of arbitration in terms of efficiency, low cost, and informality. Subsequent to this case, the U.S. Supreme Court ruled that the Equal Employment Opportunity Commission was not bound by a mandatory arbitration clause entered into by an individual employee, and that the agency could seek injunctive and specific relief under the Americans With Disabilities Act and Title VII because the EEOC was not a party to the mandatory arbitration agreement (*EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

Despite the Supreme Court's receptiveness to mandatory arbitration clauses, careful drafting is necessary to ensure that they will be enforceable. For example, federal appellate courts in some circuits will not enforce an arbitration clause that requires the employee to pay for the arbitrator's services (*Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997)). Furthermore, the Equal Employment Opportunity Commission opposes the use of mandatory arbitration agreements entered prior to an actual dispute, despite the Supreme Court's rulings. The EEOC has issued a "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" (July 10, 1997; see <http://www.eeoc.gov/policy/docs/mandarb.html>) rejecting these agreements unless they are completely voluntary and are entered into only after the dispute has arisen. A group of labor relations scholars has drafted a "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship." This protocol can be found on the "Protocols" section of the American Arbitration Association's Web site at <http://www.adr.org>.

Other forms of alternate dispute resolution, such as mediation or fact finding, may also be incorporated into employee contracts. Alternate dispute resolution strategies are discussed in Section 2.3 of this book.

### **Sec. 4.4. Civil Service Rules**

In addition to statutory and common law protections, employees of some public colleges may be protected by civil service statutes and regulations (see, for example, W. Va. Code § 18-29-1 *et seq.*). The purpose behind the civil service system, initiated for employees of the federal government in 1883 by the Pendleton Act, is to ensure that government employees obtained their jobs through a system of "merit" rather than through political patronage. Although many of the top policymaking jobs in state and federal government are outside the civil service system (and thus may be filled for politically motivated reasons), the rank-and-file positions in federal and state governments are typically subject to civil service protections and restrictions. Faculty at some state colleges are also covered by civil service regulations.

Although the structure and design of these systems vary by state, the general approach is to classify jobs into categories (for example, clerical, custodial, administrative), develop career ladders within the categories (for example, Custodian I, Custodian II, and so on), to administer tests to determine which candidates are qualified for the position they seek, and to select from either a ranked list or from among a pool of individuals who passed the test. Many states have enacted preferences for military veterans, which may mean that if a veteran passes the test, he or she is ranked first on the hiring list. Hiring, promotions, and transfers are tightly regulated, and exceptions to the regulations are typically difficult to obtain. (See, for example, *Orange v. District of Columbia*, 59 F.3d 1267 (D.C. Cir. 1995), in which the court ruled that University of the District of Columbia's interim president lacked the authority to hire two staff members because he had bypassed the civil service requirements in hiring

them; thus, their terminations were lawful.) In addition, discipline and termination are subject to due process requirements once the individual has successfully completed a probationary period. Prior to the completion of the probationary period, the employee typically has few due process or appeal rights. (See, for example, *Davis v. J. F. Drake State Technical College*, 854 So. 2d 1151 (Ct. Civ. App. Ala. 2002), in which the court affirmed an award of summary judgment to the college on the grounds that the terminated employee had not completed his probationary period and thus was not entitled to notice, a due process hearing, or a performance evaluation.)

The civil service system is usually administered by a state department of personnel or a civil service agency, which may also serve an adjudicatory role when an employee disputes a refusal to hire or promote, or a disciplinary or termination decision. Although state civil service systems originally followed the federal model, several states have initiated reforms in the past decade that have consolidated job classifications, introduced pay-for-performance systems, and elevated the significance of performance evaluations.

Although the rate of unionization in the private sector has declined over the past several decades, unionization of public sector employees has increased over this time period, particularly at the state and local level, where 82 percent of all unionized public employees work.<sup>6</sup> Disputes thus become complicated because such civil servants are protected by state and federal employment law, state labor law, and civil service regulations. State administrative procedure acts (see Sections 1.4.2.3 & 12.5.4) may regulate how a state college hires, evaluates, disciplines, rewards, and terminates its staff.

Differences in collective bargaining laws between the private and public sectors are discussed in Section 4.5.2. For example, many benefits that would be subjects of bargaining in the private sector, such as grievance procedures, health insurance, and holidays, are specified either by law or by civil service regulations in the public sector. A public agency may not be allowed to bargain on its own behalf, but may be represented in negotiations by a state-level commission or office of negotiations. In many states, strikes by public sector employees are illegal.

For colleges whose employees have civil service protections, issues involve whether the college followed the regulations, particularly those involving due process in discipline, layoff, or termination decisions (see, for example, *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995) (termination)). Determining how much process is due an employee is particularly complicated in states, such as West Virginia, where tenured faculty may be protected by state administrative procedure acts or civil service laws as well as by institutional policies on the termination of tenured faculty (see, for example, *Barazi v. West Virginia State College and the Board of Directors of the State College System*, 498 S.E.2d 720 (W. Va. 1997)), and such issues become even more complicated at

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<sup>6</sup>Evan M. Berman, James S. Bowman, Jonathan P. West, & Montgomery Van Wart, *Human Resource Management in Public Service* (Thousand Oaks, CA: Sage, 2001), 298, 300.



public colleges whose faculty have civil service or other state administrative law protections and are simultaneously covered by a collective bargaining agreement. Employees covered by civil service protections and/or collective bargaining agreements may have “bumping rights” when their positions are eliminated in a reduction in force that entitle them to a less senior employee’s job. In *Passonno v. State University of New York at Albany*, 889 F. Supp. 602 (N.D.N.Y. 1995), however, one court held that there are no bumping rights for the least senior employee in a classification. Other issues involve whether a particular job should be afforded civil service status, and the guidelines the college must follow in making that determination (see, for example, *Civil Service Employees Association, Inc., Local 1000, AFSCME v. State University of New York*, 721 N.Y.S.2d 127 (Ct. App. N.Y., 3d Dept., 2001) (staff assistant in mail services department)).

Civil service regulations or state administrative procedure laws may specify that a hearing board (such as a board of regents or a state personnel board) conducts fact finding and makes rulings on employee appeals of discipline or discharge, and that a covered employee must exhaust these remedies before seeking redress in court (see, for example, *Papadakis v. Iowa State University of Science and Technology*, 574 N.W.2d 258 (Iowa 1998)). In some states, this hearing board or panel may serve the function of a trial court, and appeals of the hearing board’s rulings are made to the state court of appeals.

## **Sec. 4.5. Collective Bargaining**

**4.5.1. Overview.** Collective bargaining has existed on many college campuses since the late 1960s, yet some institutions have recently faced the prospect of bargaining with their faculty or staff for the first time. Whether the union is a fixture or a recent arrival, it presents administrators with a complex mixture of the familiar and the foreign. Many demands, such as for shorter staff work weeks, lighter teaching loads and smaller class sizes, and larger salaries, may be familiar on many campuses; but other demands sometimes voiced, such as for standardized pay scales rather than individualized “merit” salary determinations, may present unfamiliar situations. Legal, policy, and political issues may arise concerning the extent to which collective bargaining and the bargained agreement preempt or circumscribe not merely traditional administrative “elbow room” but also the customary forms of shared governance. And potential tension for academia clearly exists when “outsiders” participate in campus affairs through their involvement in all the aspects of collective bargaining: certification of bargaining agents, negotiation of agreements, fact finding, mediation, conciliation, arbitration, and ultimate resolution of internal disputes through state or federal administrative agencies and courts.

Although the number of unionized faculty and staff has increased only slightly in the past few years, most of the organizing has occurred among graduate students and adjunct or part-time faculty. Graduate teaching and research assistants won and then lost the right to bargain at several elite private and public research universities (see Section 4.5.6). And bargaining is

not limited to full-time employees of the college; adjunct and part-time faculty have won the right to bargain at institutions throughout the country (see Section 6.2.4).

Although state law regulates bargaining at public colleges, and federal law regulates bargaining at private colleges, many of these rights are similar. Employees typically have the right to organize and to select a representative to negotiate on their behalf with the employer over terms and conditions of employment. Once a representative is selected by a majority of the employees in a particular bargaining unit, the employer has a statutory duty to bargain with the employees' representative, and employees may not negotiate individually with the employer over issues that are mandatory subjects of bargaining. Either the union or the employer may file an "unfair labor practice" charge with a government agency alleging that the other party committed infractions of the bargaining laws. In the private sector, the National Labor Relations Board (NLRB) hears these claims, and in the public sector a state public employment relations board provides recourse for aggrieved unions or employers. Hearings before these agencies take the place of a civil trial; the rulings of these agencies are typically appealed to state or federal appellate courts.

In addition to claims of failure to bargain, a party may claim that the other has engaged in activity that breaches the collective bargaining agreement. Other contentious issues include the rights of covered individuals who choose not to join the union (but whom the union must represent anyway), and whether employees in the public sector may lawfully go out on strike. The mix of factors involved, the importance of the policy questions, and the complexity of the law make collective bargaining a potentially troublesome area for administrators. Heavy involvement of legal counsel is clearly called for. Use of professional negotiators, or of administrators experienced in the art of negotiation, is also usually appropriate, particularly when the faculty and staff have such professional expertise on their side of the bargaining table.

#### ***4.5.2. The public-private dichotomy in collective bargaining.***

Theoretically, the legal aspects of collective bargaining divide into two distinct categories: public and private. However, these categories are not necessarily defined in the same way as they are for constitutional state action purposes (see Section 1.5.2). In relation to collective bargaining, "public" and "private" are defined by the collective bargaining legislation and interpretive precedents. Private institutions are subject to the federal law controlling collective bargaining, whereas collective bargaining in public institutions is regulated by state law. Privately chartered institutions (see Section 12.3) are likely to be considered private for collective bargaining purposes even if they receive substantial government support. Factors that may determine an institution's status under federal or state collective bargaining laws include actions by a state legislature to transform the institution to a public entity, and proportions of public versus private funds, among others. This issue was addressed in a lengthy case regarding the University of Vermont. In *University of Vermont and State Agricultural College*,

223 NLRB 423 (1976), the National Labor Relations Board, the agency that enforces the federal labor relations law, asserted jurisdiction over the university because it received only 25 percent of its support directly from the state and because it was chartered as private and nonprofit and was not a political subdivision of the state. However, in 1988 the state legislature passed a law bringing the university under the purview of state labor law. The state sought an advisory opinion from the NLRB on whether the university was still subject to federal law for collective bargaining purposes. In *University of Vermont and State Agricultural College*, 297 NLRB 42 (1989), the Board determined that the university was now a political subdivision of the state, reversing its earlier opinion.

**4.5.2.1. Bargaining at private colleges.** Private sector bargaining is governed by the National Labor Relations Act of 1935 (the Wagner Act) as amended by the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), 29 U.S.C. § 141 *et seq.* The Act defines “employer” to exclude “any state or political subdivision thereof,” thereby removing public employers, including public postsecondary institutions, from the Act’s coverage (29 U.S.C. § 152(2)). The NLRA thus applies only to private postsecondary institutions and, under current National Labor Relations Board rules, only to those with gross annual unrestricted revenues of at least \$1 million (29 C.F.R. § 103.1).

These laws provide that employees of an “industry affecting commerce” have the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . .” (29 U.S.C. § 157, commonly referred to as “Section 7”). The right to engage in “concerted activity” applies whether or not the employees are represented by a union.

The right of employees to engage in “concerted activity” has been interpreted to give an employee the right to be accompanied by a coworker when a manager or supervisor meets with that employee for an “investigatory interview” to discuss issues that could result in the employee being disciplined. Although these rights have been recognized for unionized employees since 1975 (*NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975)), the National Labor Relations Board extended these rights to unrepresented employees for a brief time. In *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. No. 92 (2000), the NLRB ruled that, because the source of “Weingarten rights” was Section 7 of the NLRA, which also covers nonunionized employees, whether or not an employee was represented by a union was irrelevant to his or her right to be accompanied by a co-worker at investigatory interviews. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Board’s decision (*Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (2001), *cert. denied*, 536 U.S. 904 (2002)). However, in 2004 the Board, reflecting the departure of some previous members and the arrival of new Board members, reversed itself by a 3-to-2 vote in *IBM Corp.*, 341 N.L.R.B. No. 148 (2004), ruling that Weingarten rights did not extend to unrepresented employees. The

Board based this most recent ruling on policy considerations involving the employer's need to conduct investigations in confidence.

The law prohibits the employer from interfering with or coercing employees in the exercise of their NLRA rights. It also prohibits domination of labor organizations, discrimination against union members or union activists, refusal to bargain with the union, and retaliation against employees who exercise their rights under the NLRA (29 U.S.C. § 158(a)). Similar prohibitions are placed on unions for refusal to bargain, for coercing employees in the exercise of their rights under the statute, or for coercing an employer to bargain with one union if another union is its employees' recognized representative (29 U.S.C. § 158(b)).

The Act defines "employee" to exclude "any individual employed as a supervisor" (29 U.S.C. § 152(3)); a "supervisor" is defined as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment [§ 152(11)].

The National Labor Relations Board has also excluded confidential and managerial employees from the Act's protections.

In *National Labor Relations Board v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001), a federal appellate court reversed a ruling by the NLRB that ordered the college to bargain with shift supervisors and acting shift supervisors for the college's security employees. Because the shift supervisors were held accountable for other security employees' performance, said the court, they exercised the power "responsibly to direct" the security employees, which fit the statutory definition of "supervisor" and thus excluded these individuals from the group of employees protected by the NLRA.

Universities with medical schools may have multiple bargaining units involving a variety of health care professionals. Prior to 1974, acute care hospitals had been exempt from coverage by the NLRA out of concern for the serious public health consequences of labor stoppages. But in 1974 Congress amended the law, in the "NLRA Amendments of 1974" (88 Stat. 395), and subjected all acute care hospitals to coverage by the NLRA. The Congressional Reports accompanying the amendments said that the National Labor Relations Board should give due consideration to "preventing proliferation of bargaining units in the health care industry" (S. Rep. No. 93-766, p. 5; H. R. Rep. No. 9301051, pp. 6-7 (1974), *reprinted in U.S. Code Cong. & Admin. News* 1974, pp. 3946, 3950). After years of public hearings and consultation, the Board, in 1989, issued a rule defining appropriate bargaining units in the health care industry. The rule, codified at 29 C.F.R. § 103.30, specifies that "except in extraordinary circumstances" or where there are existing nonconforming units, there will be no more than eight bargaining units at acute care hospitals. The rule dictates

the type of employees (physicians, nurses, skilled maintenance) for each of these units. Although the hospitals' trade association challenged the rule as unconstitutional and in violation of Congressional intent regarding "undue proliferation," it was upheld by the U.S. Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). (For an example of the rule applied to a university hospital, see *Duke University*, 306 N.L.R.B. No. 101, 139 L.R.R.M. 1300 (1992).)

The NLRB has created an exception to the duty to bargain in situations where the employer has virtually no control over the terms and conditions of employment for its workers. This situation may occur when a college enters a contract with a private sector organization that will provide a service, such as food service or maintenance for the college. For example, in *ARA v. NLRB*, 71 F.3d 129 (4th Cir. 1995), the University of North Carolina at Greensboro, a public university, had contracted with ARA, a private entity, to provide food services on campus. ARA, as a private sector employer, is subject to the NLRA. However, the contract between the university and ARA dictated the terms and conditions of ARA's employees' employment, and the university retained veto authority over any modifications of the wages and fringe benefits of ARA's employees, as well as staffing levels under the contract. Given this relationship, the court ruled, the state of North Carolina controlled the terms and conditions of ARA's employees' employment, and the state was not subject to the jurisdiction of the NLRB. Therefore, ARA's employees were not protected by the NLRA.

Institutions that have attempted to use consultative decision-making practices for administrators and staff may wish to review the NLRB's decision in *Electromation Inc.*, 309 N.L.R.B. No. 163 (1992). In that case, a union charged that the company's joint employee-employer "action committees," created to develop company policy on attendance, pay policies, and other issues constituted an illegally "employer-dominated labor organization" under 29 U.S.C. §§ 152(5) and 158(a)(2). The NLRB agreed with the union, citing the fact that the employer created the committees unilaterally, specified their goals and responsibilities, appointed management representatives (employees volunteered for the committees), and permitted the committees to operate on paid time. The employer appealed the Board's ruling, but in *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994), the appellate court agreed with the Board. In a subsequent decision in *Crown Cork & Seal Co.*, 334 N.L.R.B. No. 92 (2001), however, the Board ruled that employee participation committees that exercised authority delegated to them by the company were permissible under the NLRA because the committees were functioning similarly to supervisors, and thus were acting on behalf of management rather than on behalf of the workers themselves.

Although the coverage of staff under federal collective bargaining laws is relatively clear, it was not at all clear that faculty or other academic professionals could form unions under the protection of the NLRA. The NLRB first asserted jurisdiction over private nonprofit postsecondary institutions in *Cornell University*, 183 NLRB 329 (1970); and in *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971), it specified that its jurisdiction extended to faculty

members.<sup>7</sup> The Board's jurisdiction over higher education institutions was judicially confirmed in *NLRB v. Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975), where the court enforced an NLRB order finding that Wentworth had engaged in an unfair labor practice in refusing to bargain with the certified faculty bargaining representative. Today all private postsecondary institutions, at least all those large enough to have a significant effect on interstate commerce, are included within the federal sphere, and faculty as well as staff are covered by the NLRA, unless the faculty are "managerial employees" (see Section 6.3.1 of this book). Disputes about collective bargaining in private institutions are thus subject to the limited body of statutory authority and the vast body of administrative and judicial precedent regarding the National Labor Relations Act.

Legal authority and precedent have provided few easy answers, however, for collective bargaining issues in postsecondary education. The uniqueness of academic institutions, procedures, and customs poses problems not previously encountered in the NLRB's administration of the national labor law in other employment contexts. There are, moreover, many ambiguities and unsettled areas in the national labor law even in nonacademic contexts. They derive in part from the intentionally broad language of the federal legislation and in part from the NLRB's historic insistence on proceeding case by case rather than under a policy of systematic rule making (see K. Kahn, "The NLRB and Higher Education: The Failure of Policy Making Through Adjudication," 21 *UCLA L. Rev.* 63 (1973); and A. P. Menard & N. DiGiovanni, Jr., "NLRB Jurisdiction over Colleges and Universities: A Plea for Rulemaking," 16 *William and Mary L. Rev.* 599 (1975)). Administrators and counsel will find working with the NLRB's body of piecemeal precedential authority to be a very different experience from working with the detailed regulations of other agencies, such as the U.S. Department of Education.

**4.5.2.2. Collective bargaining in religiously affiliated institutions.** Religiously affiliated or controlled private colleges are not statutorily exempt from coverage by the NLRA, but some colleges have argued successfully that the First Amendment's protections for religious organizations trump the provisions of the NLRA. For example, the U.S. Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) paved the way for subsequent litigation by religiously affiliated colleges seeking to avoid coverage by the NLRA.

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<sup>7</sup>The NLRA specifically includes "professional employees," defined as "any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes." Also included is anyone who has completed the specialized courses described above and is working under the supervision of the professional employee (29 U.S.C. § 152(12)). Cases regarding which types of employees fit this definition are collected in John F. Gillespie, Annot., "Who Are Professional Employees Within Meaning of National Labor Relations Act (29 U.S.C.S. § 152(12))?" 40 A.L.R. Fed. 25.

The *Catholic Bishop* case arose after teachers at two groups of Catholic high schools voted for union representation in NLRB-sponsored elections. Although the NLRB certified the unions as the teachers' collective bargaining representatives, the schools refused to negotiate, and the unions filed unfair labor practice charges against them. In response, the schools claimed that the First Amendment precluded the NLRB from exercising jurisdiction over them. After the Board upheld its authority to order the elections and ordered the schools to bargain with the unions, the U.S. Court of Appeals for the Seventh Circuit denied enforcement of the NLRB's order. By exercising jurisdiction over "church-operated" schools, the court said, the Board was interfering with the freedom of church officials to operate their schools in accord with their religious tenets, thus violating both the free exercise clause and the establishment clause of the First Amendment (see Section 1.6).

The U.S. Supreme Court affirmed the appellate court's decision, by a 5-to-4 vote, but it did so on somewhat different grounds. Rather than addressing the First Amendment issue directly, as had the appeals court, the Supreme Court focused on a question of statutory interpretation: whether Congress intended that the National Labor Relations Act would give the Board jurisdiction over church-operated schools. In deciding that issue, the Court considered the constitutional problem indirectly by positing that an Act of Congress should be construed, whenever possible, in such a way that serious constitutional problems are avoided. Emphasizing the key role played by teachers in religious primary and secondary schools, the Court found that grave First Amendment questions would result if the Act were construed to allow the Board jurisdiction over such teachers. The Court accepted the schools' argument that their employment policies were mandated, at least in part, by religious doctrine. The court found that simply making an inquiry into the good faith religious basis for certain employment policies would violate the First Amendment. Therefore, the Court reviewed the legislative history of the NLRA to ascertain whether Congress had addressed the issue of its jurisdiction over religious organizations.

A survey of the Act's legislative history convinced the Court that Congress had not manifested any "affirmative intention" that teachers in church-operated primary and secondary schools be covered by the Act. Since "Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions," and since such a construction of the Act would require the Court "to resolve difficult and sensitive questions" under the First Amendment, the Court held that the Board's jurisdiction does not extend to teachers in church-operated schools.

The result in *Catholic Bishop* raised questions as to whether its reasoning would apply to church-operated institutions of higher education. The Supreme Court's opinion had given short shrift to the possible distinction between elementary/secondary and higher education. It asserted generally that, whenever extension of NLRB jurisdiction over teachers in "church-operated schools" would raise "serious constitutional questions," a court can uphold the NLRB only if it finds a "clear expression of Congress's intent" to authorize jurisdiction. Thus, the extension of *Catholic Bishop* to higher education hinged on

two questions: (1) whether NLRB jurisdiction would raise “serious constitutional questions” in light of the First Amendment case law distinguishing between elementary/secondary and higher education; and (2) whether the legislative history of the NLRA and its amendments could be construed differently for higher education, so as to reveal a clearly expressed congressional intent to include higher education teachers within the Board’s jurisdiction.

Before the courts had an opportunity to consider these questions, the NLRB asserted jurisdiction over three colleges and universities that had claimed to be exempt under *Catholic Bishop*. In these rulings, the Board held that *Catholic Bishop* did not apply because the college “is not church operated as contemplated by *Catholic Bishop*.” In *Lewis University*, 265 NLRB 1239 (1982), for example, the Board asserted jurisdiction over a historically church-related institution because operating authority had been transferred to a private board of trustees, and the local diocese “does not exercise administrative or other secular control” over, and does not perform any services for, the institution. This approach was contrary to an earlier ruling of a federal appellate court. In *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), the court had denied enforcement of an NLRB order asserting jurisdiction over lay teachers in a Catholic school severed from ownership and control of the local diocese and operated instead by a predominantly lay board of trustees. According to the court, the critical question in determining whether a school is “church operated” under *Catholic Bishop* is not whether a church holds legal title or controls management; it is whether the school has a “religious mission” that could give rise to “entanglement” problems under the establishment clause. Since the school’s history and “present religious characteristics” indicated that its religious mission continued after separation from the diocese, the court held the school to be exempt from NLRB jurisdiction.

This “religious mission” test was used in the first application of *Catholic Bishop* to an institution of higher education when a federal appellate court, in an *en banc* opinion, split evenly on whether the NLRB could assert jurisdiction over a religiously affiliated university. In *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986), the divided *en banc* court did not enforce the NLRB’s bargaining order; it thereby overturned the ruling of a three-judge panel that had ordered the university to bargain with its faculty. The question addressed by both groups of judges was whether a religiously affiliated university is sufficiently different from a parochial elementary or secondary school to justify a departure from *Catholic Bishop*.

The group holding that *Catholic Bishop* should apply cited the substantial religious mission of the university. It also noted that in *Catholic Bishop* the Court had not distinguished postsecondary education from elementary or secondary education and had rejected the NLRB’s distinction between “completely religious schools” and “merely religiously associated schools” because of the potential for entanglement when the Board attempted to determine which of those categories an institution belonged in. The group believed that making such distinctions at the postsecondary level would be equally troublesome. The group favoring the application of the NLRA to the university held that the religious



mission of the university was far less central than that of the high schools in *Catholic Bishop*. It further believed that most unfair labor practice charges would involve secular matters, and that the university still had the right to assert a First Amendment claim should entanglement be a potential problem in any particular Board action.

In subsequent cases, the NLRB and reviewing federal courts focused on the institution's mission and tried to determine whether employment policies derive from the religious sponsor's doctrines or whether they have been secularized (see Sections 6.2.5 & 5.5). For example, in *St. Joseph's College*, 282 NLRB 65 (1986), the Board ruled that it lacked jurisdiction over the college because the Sisters of Mercy exercised administrative and financial control and the college's mission was inextricably interwoven with the religious mission of the order. But in *Livingstone College*, 286 NLRB 1308 (1987), the Board found that the college's purpose was primarily secular, that it was not dependent upon the African Methodist Episcopal Zion Church, and that the church was not involved in the college's daily operations.

A ruling by the U.S. Court of Appeals for the District of Columbia Circuit provides a simpler, and arguably less intrusive, test for whether a religiously affiliated college is exempt from the NLRA. In *University of Great Falls*, 331 N.L.R.B. No. 188 (2000), the Board had found that the university's purpose and function were primarily secular, and exercised jurisdiction over the college, based on six factors. In particular, the curriculum lacked any emphasis on Catholicism, the university had a lay president and other lay leaders, neither faculty nor students were required to be Catholics or to support the teachings of the Catholic church, and the board of trustees was free to establish policy independent of the Catholic religion's teachings. The appellate court refused to enforce the Board's bargaining order, stating that the Board had used the "wrong test." In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court adopted a three-part test derived from the *Bayamon* case, reasoning that any inquiry as to the centrality of a college's religious mission to its primary purpose posed an impermissible entanglement of church and state. Under this three-part test, an institution is exempt if it:

- “holds itself out to students, faculty and community” as providing a religious educational environment;
- is organized as a “nonprofit”;
- is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion [278 F.3d at 1343, citing *Bayamon*, 793 F.2d at 400, 403, and 399–400].<sup>8</sup>

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<sup>8</sup>The university had also argued that the Religious Freedom Restoration Act (RFRA) barred the NLRB from asserting jurisdiction. Although the U.S. Supreme Court invalidated RFRA in 1997 with respect to actions by states (see Section 1.6.2), the Board assumed that the law still applied to federal agencies but ruled that the exercise of jurisdiction over the university by the Board did not violate RFRA. The appellate court did not address the application of RFRA because it found for the university on constitutional grounds.

Should other appellate courts follow the reasoning of the appellate court in *University of Great Falls*, religiously affiliated colleges will find it much easier to avoid the application of the NLRA.

State courts have also been asked to determine whether state constitutions provide a constitutionally protected right to bargain for employees of a school controlled by a religious organization. In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 696 A.2d 709 (N.J. 1997), the New Jersey Supreme Court was asked to determine whether lay teachers in a church-operated elementary school have an enforceable state constitutional right to unionize and to bargain without violating the First Amendment of the U.S. Constitution. The employer, the Diocese of Camden, had a longstanding bargaining relationship with its high school teachers, but objected to bargaining with its elementary school teachers, citing both establishment and free exercise clause defenses. In a unanimous opinion, the New Jersey court ruled for the teachers. The court distinguished *Catholic Bishop*, stating that the case had been decided on statutory interpretation rather than constitutional grounds. It also stated that the scope of negotiation under the state constitution, which requires private employers to bargain with their employees, was already limited by the First Amendment of the U.S. Constitution to secular issues: wages, benefit plans, and other secular terms and conditions of employment. With respect to the establishment clause claim, the court noted that the Diocese had retained its authority over religious matters despite its history of bargaining with high school teachers, and thus there was no impermissible entanglement between church and the state. The primary effect of the law, said the court, was not to inhibit religion, but to require a private employer to bargain with elected representatives of its employees. With respect to the free exercise claim, the court found that the state had a compelling interest in allowing private employees to unionize and bargain collectively over secular terms and conditions of employment, and thus any incidental burden on the free exercise of religion was outweighed by the state's interest in enhancing the economic welfare of employees in the private sector.

Faculty at Seton Hall University, who were barred from bargaining under the *Yeshiva* doctrine in 1983, attempted to use the ruling in the *South Jersey Catholic School Teachers Association* case to convince the state courts to allow them to bargain. A trial court judge dismissed the faculty members' claim, ruling that the NLRB's prior assertion of jurisdiction over Seton Hall University in the 1983 case preempted the use of a state constitutional provision to require the university to bargain. The state supreme court declined to hear the appeal (*Seton Hall University Faculty Association v. Seton Hall University*, 762 A.2d 657 (N.J. 2000)).

**4.5.2.3. Bargaining at public colleges.** Employees of public institutions, though not subject to the NLRA, may have similar protections. These protections are far from uniform, however, and have been characterized as "a crazy-quilt patchwork of state and local laws, regulations, executive orders, court decisions, and attorney general opinions" (John Lund & Cheryl Maranto, "Public Sector Labor Law: An Update," in Dale Belman, Morley Gunderson, & Douglas Hyatt, eds., *Public Sector Employment in a Time of Transition* (Industrial

Relations Research Association, 1996), 21). Thirty-five states either have legislation permitting some form of collective bargaining in public postsecondary education, or the state governing board has enacted a policy that permits employees in public institutions to bargain collectively.

Legislation that enables public employees to bargain collectively is often limited in coverage or in the extent to which it authorizes or mandates the full panoply of collective bargaining rights and services. A statute may grant employees' rights as narrow as the right to "meet and confer" with administration representatives. The permissibility of strikes is also a major variable among state statutes. Frequently, state legislation is designed to cover public employees generally and makes little, if any, special provision for the unique circumstances of postsecondary education. State labor law may be as unsettled as the federal labor law, providing few easy answers for postsecondary education, and may also have a smaller body of administrative and judicial precedents. State agencies and courts often fill in the gaps by relying on precedents in federal labor law.

Even where state collective bargaining legislation does not cover public postsecondary institutions, some "extralegal" bargaining may still take place. A public institution's employees, like other public employees, have a constitutional right, under First Amendment freedom of speech and association, "to organize collectively and select representatives to engage in collective bargaining" (*University of New Hampshire Chapter AAUP v. Haselton*, 397 F. Supp. 107 (D.N.H. 1975)). But employees do not have a constitutional right to require the public institution "to respond to . . . [employee] demands or to enter into a contract with them." The right to require the employer to bargain in good faith must be created by statute. Even if the public institution desires to bargain with representatives of its employees, it may not have the authority to do so under state law. Or state law may remove from the institution the right to set terms and conditions of employment and vest it instead in a state governing or regulatory board (see *Knight v. Minnesota Community College Faculty Association*, discussed in Section 6.3.2).

The employment powers of public institutions may be vested by law in the sole discretion of institutional governing boards; sharing such powers with collective bargaining representatives or arbitrators appointed under collective bargaining agreements may therefore be construed as an improper delegation of authority. In *Board of Trustees of Junior College District No. 508 v. Cook County College Teachers Union*, 343 N.E.2d 473 (Ill. 1976), for example, the court held that the board's powers to decide which faculty members to employ and promote were "nondelegable" and thus not subject to binding arbitration under the collective bargaining agreement.

A primary difference in the rights of public sector employees vis-à-vis their private sector counterparts is the scope of negotiation and permissible subjects of bargaining. These issues are explored in Section 4.5.4.

**4.5.3. Organization, recognition, and certification.** Once the college's employees or a substantial portion of them decide that they want to bargain collectively with the institution, their representative can ask the administration

to recognize it for collective bargaining purposes. A private institution has two choices at this point. It can voluntarily recognize the employee representatives and commence negotiations, or it can withhold recognition and insist that the employee representatives seeking recognition petition the NLRB for a certification election (see *Linden Lumber Division v. NLRB*, 419 U.S. 817 (1974)). Public institutions that have authority to bargain under state law usually have the same two choices, although elections and certification would be handled by the state labor board.

Administrators should consider two related legal implications of choosing the first alternative. First, it is a violation of the National Labor Relations Act (and most state acts) for an employer voluntarily to recognize a minority union—that is, a union supported by fewer than 50 percent of the employees in the bargaining unit (see 29 U.S.C. § 158(a)(1) and (2), and *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961)). Second, it is also a violation of the NLRA (and most state acts) for an employer to recognize any union (even one with apparent majority support) when a rival union makes a “substantial claim of support,” which the NLRB interprets to mean a claim “not . . . clearly unsupportable and lacking in substance” (*American Can Co.*, 218 NLRB 102, 103 (1975)). Thus, unless a union seeking recognition can prove the clear support of the majority of the members of the proposed bargaining unit (usually through “authorization cards” or a secret ballot poll), and the administration has no reason to believe that a rival union with a “substantial claim of support” is also seeking recognition, it is usually not wise to recognize any union without a certification election.

In the interim between the beginning of organizational activity and the actual certification of a union, administrators must be circumspect in their actions. In the private sector, the NLRA prohibits the employer from doing anything that would appear to favor any of the contenders for recognition (29 U.S.C. § 158(a)(2)) or that would “interfere with, restrain, or coerce employees in the exercise of their rights” to self-organize, form or join a union, or bargain collectively (29 U.S.C. § 158(a)(1)). This prohibition would apply to promises of benefits, threats of reprisals, coercive interrogation, or surveillance. Furthermore, the institution may not take any action that could be construed as discrimination against union organizers or supporters because of their exercise of rights under the Act (29 U.S.C. § 158(a)(3)). In the public sector, state laws generally contain comparable prohibitions on certain kinds of employer activities.

Another crucial aspect of the organizational phase is the definition of the “bargaining unit”—that is, the portion of the institution’s employees that will be represented by the particular bargaining agent seeking certification. Again, most state laws parallel the federal law. Generally, the NLRB or its state equivalent has considerable discretion to determine the appropriate unit (see 29 U.S.C. § 159(b)). The traditional rule has been that there must be a basic “community of interest” among the individuals included in the unit, so that the union will represent the interests of everyone in the unit when it negotiates with the

employer.<sup>9</sup> The question of the appropriate bargaining unit arises when a union represents both employees who may have different or even conflicting interests. For example, at several institutions the issue of whether a single bargaining unit may include both full-time and adjunct faculty has arisen. In *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 566 A.2d 955 (Vt. 1989), the state college system challenged the state labor board's ruling that both full-time and adjunct faculty should be combined in a single bargaining unit. The Vermont Supreme Court reversed the board's ruling, holding that the adjunct faculty did not share a community of interest with the full-time faculty because they were hired and paid differently, were ineligible for tenure, and had no advising responsibilities. Similar issues have arisen with respect to units of staff, particularly when police or firefighters seek to have separate units (see, for example, *Teamsters v. University of Vermont*, 19 VLRB 64 (1996) (approving separate unit of campus police)). Employers and their counsel typically seek broad campuswide units rather than occupational units, particularly in the public sector.

Under the NLRA (see 29 U.S.C. § 152(3) and (11)) and most state laws, supervisory personnel are excluded from any bargaining unit (see, for example, *National Labor Relations Board v. Quinnipiac College*, discussed in Section 4.5.2.1). Individual determinations must be made, in light of the applicable statutory definition, of whether particular personnel are excluded from the unit as supervisors.<sup>10</sup> Professionals, however, are explicitly included by the NLRA, and its definition clearly applies to college faculty and other professional staff (see footnote 7 in Section 4.5.2). (For a discussion of the placement of faculty in bargaining units, see Section 6.3.1.)

Once the bargaining unit is defined and the union recognized or certified, the union becomes the exclusive bargaining agent of all employees in the unit, whether or not they become union members and whether or not they are willing to be represented (see *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944)). Courts have generally upheld the constitutionality of such exclusive representation systems. The leading case for higher education, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), discussed in Section 6.3.2, examines (but is not particularly sensitive to) the special concerns that exclusive systems may create for higher education governance. Although this case addresses a bargaining unit of faculty, it also has relevance for an institution whose staff have formed governance groups or self-managing work teams.

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<sup>9</sup>Cases and authorities are collected in Francis M. Dougherty, Annot., "'Community of Interest' Test in NLRB Determination of Appropriateness of Employee Bargaining Unit," 90 A.L.R. Fed. 16; and Jean F. Rydstrom, Annot., "Who May Be Included in 'Unit Appropriate' for Collective Bargaining at School or College, Under Sec. 9(b) of National Labor Relations Act (29 U.S.C.S. § 159(b))," 46 A.L.R. Fed. 580.

<sup>10</sup>Cases and authorities are collected at C. R. McCorkle, Annot., "Who Are Supervisors Within Meaning of National Labor Relations Act, as Amended?" 11 A.L.R.2d 249; and at Russell J. Davis., Annot., "Who Are Supervisors Within Meaning of National Labor Relations Act (29 U.S.C.A. §§ 151 *et seq.*) in Education and Health Services," 52 A.L.R. Fed. 28.

In addition to limiting the independent actions of nonunion employees in matters of governance or institutional policy, the exclusivity doctrine has raised other legal issues. Supreme Court precedent interpreting federal labor law (*International Association of Machinists v. Street*, 367 U.S. 740 (1961)) and state labor law (*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)) permits unions to charge nonmembers an “agency fee” to underwrite the cost of services provided by the union. But if a union represents faculty at public institutions and uses nonmembers’ fees to support political activity with which nonmembers do not agree, their First Amendment rights may have been violated by the forced payment (*Chicago Teachers’ Union v. Hudson*, 475 U.S. 292 (1986)).

This doctrine has also been imputed to the National Labor Relations Act, which governs labor relations in private organizations. In *Communication Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court ruled that objecting bargaining unit members must pay for services provided to their bargaining unit by the union, such as the costs of negotiating contracts or processing grievances. But forced payment of agency fees to support other union activities to which the nonmembers objected, and which were not chargeable to the bargaining unit, violated Section 7 of the National Labor Relations Act.

In February 2001, President George W. Bush issued Executive Order No. 13,201, which required federal contractors receiving \$100,000 or more to post notices informing employees of their right not to join a union or to pay the portion of union dues attributable to nonrepresentational activities. A group of labor organizations challenged the Executive Order, arguing that it was preempted by the NLRA. In *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), the appellate court rejected this argument and upheld the Executive Order. Only those activities that are either protected or prohibited by the NLRA are preempted by that law, said the court, and the NLRB had not prohibited the posting of notices.

Questions concerning the degree to which objecting faculty must pay agency fees, whether and how the union must account for its use of nonmembers’ fees, and the interplay among the NLRA, the First Amendment, and civil rights laws have all been examined in litigation between objecting faculty members and the unions representing faculty. In those states that permit collective bargaining contracts to specify nonpayment of union dues or agency fees as a permissible reason for discharging faculty, the issue has been particularly complex.<sup>11</sup>

In a case decided by the U.S. Supreme Court, *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), nonmember faculty at Ferris State University sued the union representing them, an affiliate of the National Education Association, over the matter of agency fees. Michigan’s Public Employment Relations Act permits a union and a public employer to negotiate an agency shop agreement,

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<sup>11</sup>Cases related to this issue are collected in Wayne F. Foster, Annot., “Union Security Arrangements in State Public Employment,” 95 A.L.R.3d 1102; and Tim A. Thomas, Annot., “Validity of Union Procedures for Fixing and Reviewing Agency Fees of Nonunion Employees Under Public Employees Representation Contract—Post-*Hudson* Cases,” 92 A.L.R. Fed. 893.

and such an agreement was negotiated between the faculty union and the administration of Ferris State College. In their suit the plaintiffs claimed that being forced to support the state and national union's legislative lobbying activities, expenses for travel to conventions by union officers, preparation for a strike, and other activities violated their constitutional rights. The agency fee had been set at an amount equal to union members' dues. In a 5-to-4 decision, the Court ruled that agency fees were permissible for the purpose of supporting union activities directly related to services to bargaining unit members, and that activities by state or national affiliates that were related to collective bargaining, even if not of direct benefit to local union members, could be included in the calculation of the agency fee.

Several Justices wrote separate concurring opinions, and the majority joined only portions of the opinion written by Justice Blackmun. In analyzing the issues before the Court, Justice Blackmun, writing for himself and four other Justices, used a three-part test drawn from prior precedent. First, the chargeable activities must be "germane" to collective bargaining activity. Second, they must be justified by the "government's vital policy interest in labor peace and avoiding 'free riders.'" And third, the activities must "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop" (500 U.S. at 589).

The process developed by a union for employees challenging the calculation of nonmembers' dues was itself challenged by two University of Alaska faculty members in *Carlson v. United Academics*, 265 F.3d 778 (9th Cir. 2001). The professors objected to the union's practice of holding the dues of objecting employees who challenged the agency fee calculation. While employees who objected to paying full dues but accepted the union's calculation of the agency fee received immediate refunds, those who opted to have an impartial arbitrator determine whether the agency fee had been calculated accurately had to wait until the arbitration award had been issued to receive their refund. Furthermore, the arbitrator had the power to either increase or decrease the agency fee. The court ruled that the union's agency fee dispute resolution process satisfied the requirements of *Hudson* in all respects.<sup>12</sup> (For a contrasting case in which a federal district court held that the union's agency fee refund process violated *Hudson* in several respects, see *Swanson v. University of Hawaii Professional Assembly*, 269 F. Supp. 2d 1252 (D. Hawaii 2003).)

Another question concerning the use of nonmembers' agency fees is the potential for such use to violate an individual's First Amendment free exercise rights by compelling a nonmember to pay for union activities that conflict with the nonmember's religious beliefs. This matter is addressed in *EEOC v. University of Detroit*, Section 4.5.5 of this book.

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<sup>12</sup>For a discussion of the implications of *Hudson* for faculty tenure, see S. Olswang, "Union Security Provisions, Academic Freedom and Tenure: The Implications of *Chicago Teachers Union v. Hudson*," 15 *J. Coll. & Univ. Law* 539 (1988); the implications of *Beck* are discussed by R. Hartley, "Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases," 41 *Hastings L.J.* 1 (1989). Although these cases involved faculty, the outcomes are equally relevant to staff employees.

Yet other legal issues may arise concerning the relationship between the union and the college or university as employer. For example, some colleges and universities have sought to insulate themselves against joint liability with the union if nonmembers challenge the amount and use of agency fee payments. In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), non-member staff challenged the amount of the agency fee (90 percent of dues) and its use by the union, suing both the union and the university because the university collected the fee through a “dues check-off” system. The university had negotiated an indemnification clause in the contract that disclaimed liability for any unconstitutional acts or practices by the union. The court refused to enforce the clause, stating that both the union and the employer had obligations under *Hudson*, and that relieving the employer of liability for failure to follow the law was a violation of public policy.

The use of a college’s internal mail system by the faculty or staff union is a common practice on many campuses. The U.S. Supreme Court dealt a blow to unions in ruling that the University of California’s refusal to permit a union to use the university’s internal mail system was lawful. The California Public Employment Relations Board had ordered the university to permit the union to use its mail system under a provision of the California Higher Education Employer-Employee Relations Act that requires employers to grant unions access to their “means of communication” (Cal. Govt. Code Ann. §§ 3560–99). In *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988), the Court ruled that under the Private Express Statutes (18 U.S.C. §§ 1693–99, 39 U.S.C. §§ 601–6) that protect the monopoly of the U.S. Postal Service, the university could not be compelled, over its objection, to carry the union’s mail without postage. Justices Stevens and Marshall dissented from the majority opinion, arguing that the Court’s prior ruling in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983) had established that internal mail systems were a type of public forum, and that any diminution of revenue to the Postal Service by the use of the university’s internal mail system was minimal when weighed against the burden on the plaintiffs’ First Amendment right to communicate through the internal mail system.

In addition to the numerous and complex issues related to the union’s status as exclusive agent of the faculty, the question of when and whether the collective bargaining agreement supersedes or may be supplemented by other institutional policies and procedures can lead to thorny problems. These problems often arise when an employee’s breach of contract claim concerns a matter that is covered by the collective bargaining agreement. In *White v. Winona State University*, 474 N.W.2d 410 (Minn. Ct. App. 1991), for example, the court was asked to determine whether a dean’s decision to remove a department chair from office in the middle of a three-year term violated the faculty member’s individual (rather than collective) contract rights. The faculty member cited a letter from the dean appointing him to a three-year term as the source of his contractual protection. The collective bargaining agreement that governed the faculty member’s terms and conditions of employment contained a “zipper clause,” stating that it was the complete agreement between the parties.



Furthermore, that agreement stated that removal of department chairs was not subject to the agreement's grievance procedure. Professor White argued that the contractual language excluded this issue from coverage by the agreement, and the letter thus became his contract. The court disagreed. Interpreting Minnesota law, the court ruled that if the collective agreement makes it clear that the grievance procedure is intended to be the exclusive remedy for employment disputes, then White could not bring action for common law breach of contract. A similar result was reached under the NLRA in *McGough v. University of San Francisco*, 263 Cal. Rptr. 404 (Cal. 1989), in which the court ruled that the NLRA preempted a faculty member's claim that his tenure denial breached an implied contract with the university. The NLRA did not, however, preempt the faculty member's common law tort claim of intentional infliction of emotional distress.

Although employees covered by a collective agreement have been unsuccessful in filing common law contract claims, they have won the right to file common law tort claims. This development gives employees a choice of the forum to use for dispute resolution. Prior to 1988, unionized employees had been limited to the grievance and arbitration procedures of their collective agreements under the doctrine of *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). But in *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988), the U.S. Supreme Court ruled that an employee who asserts a state law tort claim of wrongful discharge may pursue this claim in court if its resolution does not depend on an interpretation of the collective agreement and even if the employee has already used the contractual grievance system. This ruling gives unionized employees two opportunities to challenge negative employment actions and diminishes some of the benefits afforded by binding arbitration: finality, speed, informality, and low cost. (For an analysis of this issue, see Note, "Steering Away from the Arbitration Process: Recognizing State Law Tort Actions for Unionized Employees," 24 *U. Richmond L. Rev.* 233 (1990).)

**4.5.4. Bargainable subjects.** Once the unit has been defined and the agent certified, the parties must proceed to negotiations. In the private sector, under the NLRA, the parties may negotiate on any subject they wish, although other laws (such as federal employment discrimination laws) may make some subjects illegal. In the public sector, the parties may negotiate on any subject that is not specifically excluded from the state's collective bargaining statute or preempted by other state law, such as a tenure statute. Those subjects that may be raised by either party and that are negotiable with the consent of the other are referred to as "permissive" subjects for negotiation. Academic collective bargaining can range, and has ranged, over a wide variety of such permissive subjects (see M. Moskow, "The Scope of Collective Bargaining in Higher Education," 1971 *Wis. L. Rev.* 33 (1971)). A refusal to negotiate on a permissive subject of bargaining is not an unfair labor practice; on the contrary, it may be an unfair labor practice to insist that a permissive subject be covered by the bargaining agreement.

The heart of the collective bargaining process, however, is found in those terms over which the parties must negotiate. These “mandatory” subjects of bargaining are defined in the NLRA as “wages, hours, and other terms and conditions of employment” (29 U.S.C. § 158(d)). Most state laws use similar or identical language but often exclude particular subjects from the scope of bargaining or add particular subjects to it.<sup>13</sup> The parties must bargain in good faith over mandatory subjects of bargaining; failure to do so is an unfair labor practice under the NLRA (see 29 U.S.C. §§ 158(a)(5) and 158(b)(3)) and most state statutes.

The statutory language regarding the mandatory subjects is often vague (for example, “terms and conditions of employment”) and subject to broad construction by labor boards and courts. Thus, the distinction between mandatory and permissive subjects is difficult to draw, particularly in postsecondary education, where employees have traditionally participated in shaping their jobs to a much greater degree than have employees in industry. Internal governance and policy issues that may never arise in industrial bargaining may thus be critical in postsecondary education. There are few court or labor board precedents in either federal or state law to help the parties determine whether educational governance and educational policy issues are mandatorily or permissibly bargainable. (For a thoughtful discussion of the scope of bargaining under federal law for professional employees, see D. Rabban, “Can American Labor Law Accommodate Collective Bargaining by Professional Employees?” 99 *Yale L.J.* 689 (1990).)

Under state law, where some subjects may be impermissible, there are few precedents to help administrators determine when particular subjects fall into that category. For example, courts in different states have reached opposing conclusions as to whether tenure or promotion criteria or procedures are negotiable, as discussed in Section 6.3.2 of this book. Although wages and salaries are mandatory subjects of negotiation, actions of state legislatures may interfere with or complicate the bargaining process at public colleges. For example, in *South Dakota Education Association v. South Dakota Board of Regents*, 582 N.W.2d 386 (S.D. 1998), the Supreme Court of South Dakota upheld a state appropriations bill providing that the distribution of salary increases to faculty members employed by state colleges and universities be made “at the sole discretion of the Board of Regents. . . .” The board of regents had been negotiating with the faculty union for several years after the expiration of the previous collective bargaining agreement, but no new agreement had been reached. The board had unilaterally implemented its last best offer after the previous agreement expired, and had reached a limited agreement with the union for the distribution of salary increases for one year. When no formal agreement was reached by the second year after the contract expired, and while the regents were still in negotiations with the faculty union, the legislature added language to the higher education appropriations bill to provide for faculty salary increases. The legislature took this action because public college leaders feared that they would lose highly qualified faculty if no salary increases were given. The court ruled that the legislature could direct the

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<sup>13</sup>Cases on this issue are collected in Deborah Tussey, Annot., “Bargainable or Negotiable Issues in State Public Employment Labor Relations,” 84 A.L.R.3d 242.

regents to distribute salary increases of a particular percentage amount, or could leave the distribution of the funds to the regents' discretion. The appropriations bill did not abrogate the requirement that the regents bargain with the faculty union, said the court, but merely reinforced the discretion the regents already had to distribute salary increases, subject to that body's obligation to negotiate over terms and conditions of employment.

A related issue was dealt with by the Supreme Court of Iowa in *Uni-United Faculty v. Iowa Public Employment Relations Board*, 545 N.W.2d 274 (Iowa 1996). Faculty at public colleges in Iowa are represented by a union, which had entered a collective bargaining agreement with the state concerning, among other issues, salary increases. The agreement provided for an across-the-board increase and for a portion of the salary funds to be awarded at the regents' discretion for individual salary adjustments, including merit pay. During the second year of the agreement, the Iowa legislature enacted an appropriations bill that allocated \$275,000 for teaching excellence awards to faculty at the University of Northern Iowa. When the union demanded the right to negotiate the system for distributing the teaching excellence awards, the state refused, stating that the funds were part of the regular salary appropriation and, under the terms of the agreement, could be allocated at the regents' discretion. The union filed an unfair labor practice charge with the state Public Employment Relations Board (PERB), which ruled in favor of the state. The union appealed to the state district court, which upheld the PERB ruling. An appeal to the state supreme court followed.

The Iowa Supreme Court affirmed, ruling that the legislation actually limited the state's discretion to make salary awards under the contract, rather than unlawfully expanding its discretion. Under the terms of the collective bargaining agreement, the state had the right to allocate a portion of the salary appropriation at its discretion; the legislature had provided instructions to the state on the criterion (teaching excellence) upon which to make the allocations. There was no negative impact on collective bargaining in general, said the court, nor on the terms of the agreement between the union and the state.

When the parties are unable to reach agreement on an item subject to mandatory bargaining (called "impasse"), a number of resolution techniques may be available to them. In the private sector, the NLRA specifically recognizes that employees have the right to strike under certain circumstances (see 29 U.S.C. § 163). The basic premise of the Act is that, given the free play of economic forces, employer and union can and will bargain collectively and reach agreement, and the ultimate economic force available to a union is the strike. In the public sector, however, it is almost unanimously regarded as unlawful, either by state statute or state judicial decision, for an employee to strike. The rationale is that states have a vital interest in ensuring that government services remain available to the public without the interruption that would be created by a strike.<sup>14</sup>

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<sup>14</sup>The statutes and cases are collected in James Duff, Jr., Annot., "Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage," 37 A.L.R.3d 1147.

Consequently, almost all state statutes prescribe impasse resolution techniques to take the place of strikes. Depending on the statute, these techniques include mediation, fact finding, and interest arbitration. The most commonly prescribed impasse procedure is mediation, the appointment of a third party who may make recommendations to the disputing parties but who does not dictate any terms of settlement. Fact finding usually involves the appointment of an independent individual or panel to review the dispute and make findings regarding the critical facts underlying it. This process is sometimes mandatory if the parties fail to reach agreement within a specified time period; at other times a fact finder is appointed by order of a labor board or agreement of the parties (see J. Stern, "The Wisconsin Public Employee Fact-Finding Procedure," 20 *Indust. & Labor Rel. Rev.* 3 (1966)). Interest arbitration (as distinguished from grievance arbitration, discussed below) utilizes a third party to settle the contract terms on which the negotiating parties cannot agree. Interest arbitration can be either compulsory (in which case the statute requires the submission of unresolved issues to an arbitrator, who makes a final decision) or voluntary (in which case the parties decide for themselves whether to resort to binding arbitration).<sup>15</sup>

The same techniques used to resolve an impasse in bargaining may also be available in the public sector to resolve disputes concerning the application or interpretation of the bargaining agreement after it has gone into force. The most common technique for resolving such disputes is grievance arbitration.<sup>16</sup>

In the private sector, there are only two techniques for resolving an impasse in negotiating an agreement—mediation and interest arbitration—and the latter is rarely used. Mediation is available through the Federal Mediation and Conciliation Service, which may "proffer its services in any labor dispute . . . either upon its own motion or upon the request of one or more of the parties" (29 U.S.C. § 173(b)), as well as state mediation agencies and the American Arbitration Association. Interest arbitration may be used when the parties have a collective bargaining agreement that is about to expire, and they are willing to have the arbitrator decide any terms they cannot agree upon when negotiating their new agreement. Interest arbitration in the private sector has no statutory basis and is entirely the creature of an existing agreement between the parties.

Negotiated agreements usually provide for grievance arbitration to resolve disputes concerning the application or interpretation of the agreement. The arbitrator's power to entertain a grievance and to order a remedy comes from the language of the contract. In an illustrative case, *Trustees of Boston University v. Boston University Chapter, AAUP*, 746 F.2d 924 (1st Cir. 1984), the court upheld an arbitrator's interpretation of his powers under an arbitration clause of a

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<sup>15</sup> Cases and authorities are collected in James D. Lawler, Annot., "Validity and Construction of Statutes or Ordinances Providing for Arbitration of Labor Disputes Involving Public Employees," 68 A.L.R.3d 885; and E. H. Schopler, Annot., "Matters Arbitrable Under Arbitration Provisions of Collective Labor Contract," 24 A.L.R.2d 752.

<sup>16</sup> Statutes and cases are collected in Judy E. Zelin, Annot., "Rights of State and Municipal Public Employees in Grievance Proceedings," 46 A.L.R.4th 912.

bargaining agreement and affirmed the arbitrator's award of equity and merit raises to three professors who had filed grievances.

The parties specify the degree of authority given to the arbitrator to hear a grievance initially and the remedy the arbitrator may award. In the public sector, some matters may be regulated by state law, and thus an arbitrator would lack the power to rule on those issues. Although most contracts provide that an arbitrator may hear grievances related to any alleged violation of the collective agreement, most contracts limit the arbitrator's authority when the grievance is related to a faculty employment decision, such as reappointment, promotion, or tenure. Although most contracts allow the arbitrator to determine whether a procedural violation has occurred in the decision-making process, the usual remedy is to order the decision to be made a second time, following the appropriate procedures. In the few cases where collective bargaining agreements between institutions of higher education and faculty unions have provided for binding arbitration of employment disputes, arbitrators have overturned a negative employment decision and awarded reappointment, promotion, or tenure in about half of the cases. (For analysis of the outcomes of binding arbitration of faculty employment disputes in the California state college system, see E. Purcell, "Binding Arbitration and Peer Review in Higher Education," 45 *Arbitration J.* 10 (December 1990); and for a more general discussion of alternative dispute resolution strategies, see Section 2.3 of this book.)

In the public sector, state law or regulation may require public employees to exhaust administrative remedies provided by collective bargaining agreements before resorting to the judicial system to resolve disputes. For example, in *Myles v. Regents of the University of California*, 2001 Cal. App. LEXIS 2374 (Ct. App. Cal., 2d App. Dist., 2001) (unpublished), the court ruled that it lacked jurisdiction to review a staff member's challenge to her termination by the university because, although she had filed a grievance (which had been denied), she had failed to exhaust her remedies under the collective bargaining agreement, which provided for arbitration, or under the state's Administrative Procedure Act, since her position was included within the state civil service.

Another method of dispute resolution is the filing of an unfair labor practice claim with the NLRB (for private colleges and universities) or the state public employment relations agency (for public institutions). Allegations of refusing to bargain over an issue that the union believes is a proper subject of bargaining and the administration does not, or allegations that one of the parties is in some way violating federal or state labor law, are often the subject of unfair labor practices. Remedies available to the federal or state agency include orders to bargain or to desist in the unlawful activity, reinstatement of individuals discharged in violation of the labor laws, and compensatory or equitable remedies.<sup>17</sup>

Not infrequently, an alleged violation of the collective bargaining agreement can also be characterized as an unfair labor practice under federal or state law.

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<sup>17</sup>Statutes and cases are collected in Larry D. Scheafer, Annot., "What Constitutes Unfair Labor Practice Under State Public Employee Relations Acts," 9 A.L.R.4th 20.

A case decided by a Rhode Island court provides an illustration of the complexities that occur when parties attempt to use both contractual and statutory remedies for an alleged contract violation. In *University of Rhode Island v. University of Rhode Island Chapter of the American Association of University Professors*, 2001 R.I. Super. LEXIS 123 (Sup. Ct. R.I. 2001), the American Association of University Professors (AAUP), which represented faculty and librarians, objected to the university's decision to remove a library director's position from the bargaining unit without negotiating with the union. The AAUP proceeded under the contractual grievance process, which involved review of the grievance by the state Commissioner of Higher Education. The commissioner ruled in the university's favor, deciding that no contractual violation had occurred. Although the contract provided for arbitration as the next step of the grievance process, the AAUP instead filed an unfair labor practice with the Rhode Island Labor Board, which ruled that the university had committed an unfair labor practice by refusing to negotiate with the AAUP over the change in the position. The university turned to the court to resolve the contradiction between the two rulings.

Following federal law precedent interpreting the NLRA, the state court ruled that, when an action arises out of facts that would constitute both a contractual grievance and an unfair labor practice, the Labor Board should defer to the contractually created grievance process in order to effectuate the intent of the parties to the contract. The proper venue for the claim, said the court, was arbitration, which was the next step of the grievance process; the ruling of the Labor Board was an abuse of its discretion, according to the court, and was reversed.

**4.5.5. Collective bargaining and antidiscrimination laws.** A body of case law is developing on the applicability of federal and state laws prohibiting discrimination in employment (see Section 5.2) to the collective bargaining process. Courts have interpreted federal labor relations law (Section 4.5.2) to impose on unions a duty to represent each employee fairly—without arbitrariness, discrimination, or bad faith (see *Vaca v. Sipes*, 386 U.S. 171 (1967)).<sup>18</sup> In addition, some antidiscrimination statutes, such as Title VII and the Age Discrimination in Employment Act (ADEA), apply directly to unions as well as employers. But these laws have left open several questions concerning the relationships between collective bargaining and antidiscrimination statutes. For instance, when employment discrimination problems are covered in the bargaining contract, can such coverage be construed to preclude employees from seeking other remedies under antidiscrimination statutes? If an employee resorts to a negotiated grievance procedure to resolve a discrimination dispute, can that employee then be precluded from using remedies provided under antidiscrimination statutes?

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<sup>18</sup>Cases discussing the union's duty of fair representation are collected in Jerald J. Director, Annot., "Union's Liability in Damages for Refusal or Failure to Process Employee Grievance," 34 A.L.R.3d 884.

Most cases presenting such issues have arisen under Title VII of the Civil Rights Act of 1964 (see Section 5.2.1). The leading case is *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). A discharged employee claimed that the discharge was motivated by racial discrimination, and he contested his discharge in a grievance proceeding provided under a collective bargaining contract. Having lost before an arbitrator in the grievance proceeding, and having had a complaint to the federal Equal Employment Opportunity Commission dismissed, the employee filed a Title VII action in federal district court. The district court, citing earlier Supreme Court precedent regarding the finality of arbitration awards, had held that the employee was bound by the arbitration decision and thus had no right to sue under Title VII. The U.S. Supreme Court reversed. The Court held that the employee could still sue under Title VII, which creates statutory rights “distinctly separate” from the contractual right to arbitration under the collective bargaining agreement. Such independent rights “are not waived either by inclusion of discrimination disputes within the collective bargaining agreement or by submitting the nondiscrimination claim to arbitration.”

The fact that the grievance system is part of a collectively negotiated agreement, and not an individual employment contract, is important to the reasoning of *Gardner-Denver*. The Court noted in *Gardner-Denver* that it may be possible to waive a Title VII cause of action (and presumably actions under other statutes) “as part of a voluntary settlement” of a discrimination claim. The employee’s consent to such a settlement would have to be “voluntary and knowing,” however, and “mere resort to the arbitral forum to enforce contractual rights” could not constitute such a waiver (see 415 U.S. at 52). *Gardner-Denver* has also been applied to permit an employee covered by a contractual dispute resolution provision to litigate an alleged violation of Section 1983 (see Section 3.3.4) (*McDonald v. City of West Branch*, 466 U.S. 284 (1984)).

Subsequently, the U.S. Supreme Court addressed the waiver issue in *Gilmer v. Interstate-Johnson Lane*, 500 U.S. 20 (1991), a case involving the waiver of the right to a judicial forum in an individual employment contract rather than in a collective bargaining agreement, ruling that an express waiver in an individual employment contract was lawful. This case, and its progeny, are discussed in Section 4.3.6. The U.S. Supreme Court then revisited the issue of waivers in the collective bargaining context in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). In *Wright*, the question was whether an arbitration clause in a collective bargaining agreement limited a bargaining unit member to an arbitral forum in seeking a remedy for an alleged violation of the Americans With Disabilities Act. In a unanimous opinion written by Justice Scalia, the Court determined that the arbitration clause in the agreement was too broad to constitute a “clear and unmistakable waiver” of the plaintiff’s right to pursue a civil rights claim in court. Because the waiver was neither clear nor unmistakable with respect to the waiver of statutory rights, the Court found it unnecessary to reconcile *Gardner-Denver* and *Gilmer*.

*Wright* was applied to the higher education context in *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000), in which the court ruled that the union did not waive plaintiff’s right to bring an action for ADA and Family and

Medical Leave Act (FMLA) discrimination in federal court. (For a discussion of the arbitration of discrimination claims by unionized employees, see Susan A. Fitzgibbon, "After *Gardner-Denver*, *Gilmer*, and *Wright*: The Supreme Court's Next Arbitration Decision," 44 *St. Louis L.J.* 833 (2000).)

Given the holding of *Gardner-Denver*, some institutions have negotiated collective bargaining agreements with their faculty that contain a choice-of-forum provision. For example, the Board of Governors of the Illinois state colleges and universities negotiated with its faculty union a grievance procedure that gave the board the right to terminate grievance proceedings if a faculty member filed a discrimination claim with an administrative agency or in court. Raymond Lewis, a professor denied tenure, filed a grievance challenging the denial and, in order to preserve his rights under the federal Age Discrimination in Employment Act's (see Section 5.2.6) statute of limitations, filed a charge with the EEOC. The board terminated the grievance proceedings, citing the contractual provision. The EEOC filed an age discrimination lawsuit against the board, asserting that this provision constituted retaliation for exercising rights under the ADEA, which is forbidden by Section 4(d) of the Act (29 U.S.C. § 628(d)). After a series of lower court opinions resulting in victory for the board, the U.S. Court of Appeals for the Seventh Circuit reversed, agreeing with the EEOC's position. In *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992), the court, citing *Gardner-Denver*, reaffirmed the right of employees to overlapping contractual and statutory remedies and called the contractual provision "discriminatory on its face" (957 F.2d at 431).

Another situation where Title VII protections may conflict with the rights of the union as exclusive bargaining agent arises in the clash between Title VII's prohibition against religious discrimination and the union's right to collect an agency fee from nonmembers. Robert Roesser, an associate professor of electrical engineering at the University of Detroit, refused to pay his agency fee to the local union because, as a Catholic, he objected to the pro-choice position on abortion taken by the state union and the national union (the National Education Association). According to the university's contract with the union, nonpayment of the agency fee was grounds for termination, and Roesser was discharged.

Roesser filed a complaint with the EEOC, which sued both the union and the university on his behalf. The EEOC claimed that, under Title VII, the union was required to make a reasonable accommodation to Roesser's religious objections unless the accommodation posed an undue hardship (see Section 5.3.6). Roesser had offered to donate to a charity either the entire agency fee or the portion of the fee that was sent to the state and national unions. The union refused, but countered with the suggestion that the amount of the agency fee used for all social and political issues generally, including pro-choice and other issues, be deducted. Roesser refused because he did not want to be associated in any way with the state or national union (adding a First Amendment issue to the Title VII litigation).

The federal district court granted summary judgment to the union and the university, ruling that the union's accommodation was reasonable and that



Roesser's proposal imposed undue hardship on the union. That ruling was overturned by the U.S. Court of Appeals for the Sixth Circuit (*EEOC v. University of Detroit*, 701 F. Supp. 1326 (E.D. Mich. 1988), *reversed and remanded*, 904 F.2d 331 (6th Cir. 1990)). The appellate court stated that Roesser's objection to the agency fee had two prongs, only one of which the district court had recognized. Roesser had objected to both the contribution to and the association with the state and national unions because of their position on abortion; the district court had ruled only on the contribution issue and had not addressed the association issue.

In remanding the case, the appeals court asked the lower court to determine whether the associational prong of Roesser's objection could be reasonably accommodated without undue hardship to the union. In *dicta*, the appeals court suggested that Roesser might be required to pay the entire fee but that no portion of his fee would be sent to either the state or the national union, since he had stated no objection to the activities of the local union.

Thus, collective bargaining does not provide an occasion for postsecondary administrators to lessen their attention to the institution's Title VII responsibilities or its responsibilities under other antidiscrimination and civil rights laws. In many instances, faculty members can avail themselves of rights and remedies both under the bargaining agreement and under civil rights statutes.

**4.5.6. Students and collective bargaining.** Although colleges and universities have traditionally regarded student-employees as students first who happen to work part or full time as institutional employees, state and federal labor law has been interpreted to include student-employees within the protections of the collective bargaining laws. Labor boards and courts have been asked to determine whether instructional, research, or clinical duties create an employment relationship or, instead, are part of an educational program that the student undertakes as student rather than employee.

Graduate assistants at public colleges and universities have enjoyed the protection of public sector bargaining laws for decades; graduate assistants at the University of Wisconsin-Madison have been unionized since 1969 (see Hurd, Foster, & Hillman, *Directory of Faculty Contracts* (National Center for the Study of Collective Bargaining in Higher Education and the Professions, 1997)). For example, in *Regents of the University of California v. Public Employment Relations Board*, 224 Cal. Rptr. 631 (Cal. 1986), the Supreme Court of California ruled that medical residents at University of California hospitals were employees and thus were permitted to bargain. After considering how much time the residents spent in direct patient care, how much supervision they received, and whether they had the "indicia" of employment, the court concluded that their educational goals were subordinate to the services they performed for the hospitals. A similar result was reached in *University Hospital, University of Cincinnati College of Medicine v. State Employment Relations Board*, 587 N.E.2d 835 (Ohio 1992). More recently, teaching assistants at Temple University were found to be employees entitled to bargaining rights by the Pennsylvania Labor Relations Board (*In the Matter of the Employees of Temple University*,

No. PERA-R-99-58-E (Pa. Labor Relations Bd. 2000)), which relied on the analysis of the NLRB in the *Boston Medical Center* case (discussed below). Graduate teaching assistants at the eight campuses of the University of California system voted to unionize after a favorable ruling by California's Public Employment Relations Board ("Footnotes," *Chron. Higher Educ.*, July 2, 1999, A12), and a union representing graduate assistants, tutors, and graders at the California State University system has been recognized by the California state labor board (Scott Smallwood, "Unions for Graduate Students Advance in California, New York, and Washington," *Chron. High. Educ.*, March 22, 2004, available at <http://chronicle.com/daily/2004/03/2004032203n.htm>). But in Illinois, where the state's Educational Labor Relations Act (115 ILCS 5/2(b)) specifically excludes students from the definition of "employee," only those graduate students whose tasks were not related to their education were permitted to organize, effectively excluding most teaching and research assistants (*Graduate Employees Organization v. Illinois Educational Labor Relations Board*, 733 N.E.2d 759 (Ct. App. Ill., 1st Dist.), *app. denied*, 738 N.E.2d 925 (Ill. 2000)).

In the private sector, however, the NLRB had at first refused to extend bargaining rights to student-employees. For example, in *Physicians National House Staff Ass'n. v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980), the court held that interns, residents, and clinical fellows on staffs belonging to the association were "primarily students" and thus not covered by federal collective bargaining law. The Board reversed itself, however, in *Boston Medical Center Corp.*, 330 N.L.R.B. No. 30 (November 26, 1999), ruling that interns, residents, and holders of fellowships at the medical center met the NLRA's definition of employee because they worked for the employer, they were compensated for their services, and they provided direct patient care.

Subsequently, the Board ruled that graduate teaching assistants at Yale University were protected by the NLRA when they engaged in protected activity (*Yale University*, 330 N.L.R.B. No. 28 (November 29, 1999)), and that graduate teaching assistants at New York University met the definition of "employee" under the NLRA and thus were protected (*New York University*, 332 N.L.R.B. No. 111 (October 31, 2000)). The Board rejected the university's argument that giving bargaining rights to graduate students would infringe on the university's academic freedom, noting that faculty had been bargaining with their institutional employers since 1971 without limiting academic freedom.

Following the New York University precedent, a regional director of the NLRB ruled that teaching and research assistants could unionize at Brown University (*Brown University*, Case No. 1-RC-21368, October 16, 2001), and another regional director ruled that teaching and research assistants, including some undergraduate students, at Columbia University were employees protected by the NLRA (*Trustees of Columbia University in the City of New York*, Case No. 2-RC-22358, February 12, 2002). But in mid-2004, in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 342 N.L.R.B. No. 42 (July 13, 2004), the full National Labor Board, in a 3-to-2 ruling, overruled its earlier decision in *New York University* and determined that graduate assistants are students, not employees, and thus are not protected by the NLRA. The majority reasoned that the relationship

between Brown and its graduate student assistants was primarily educational, as only students were given the opportunity to become teaching or research assistants, and most of Brown's academic departments required their doctoral students to teach as a condition of earning the Ph.D.

In another development, the first unit of undergraduate student residence hall advisors seeking to bargain with a college has been certified by the Massachusetts Labor Relations Commission. The commission noted that resident advisors at the University of Massachusetts-Amherst had signed an employment contract with the university, worked an average of twenty hours per week, and received W-2 forms and paychecks. The commission's ruling cleared the way for a unionization vote by the resident advisors (*Board of Trustees of the University of Massachusetts and United Auto, Aerospace and Agricultural Implement Workers*, Case No. SCR-01-2246, January 18, 2002). A majority of the resident assistants voted to unionize (Eric Hoover, "Resident Assistants at U. of Massachusetts at Amherst Vote to Unionize," *Chron. Higher Educ.*, March 2, 2002, available at <http://chronicle.com/daily/2002/03/2002030603n.htm>).

(For a review of graduate student organizing and a list of those institutions at which graduate teaching assistant unions have been recognized, see Scott Smallwood, "Success and New Hurdles for T.A. Unions," *Chron. Higher Educ.*, July 6, 2001, A10-A12. For an analysis of the legal issues, see Grant M. Hayden, "'The University Works Because We Do': Collective Bargaining Rights for Graduate Assistants," 69 *Fordham L. Rev.* 1233 (2001); and Joshua Rowland, Note, "'Forecasts of Doom': The Dubious Threat of Graduate Teaching Assistant Collective Bargaining to Academic Freedom," 42 *Boston College L. Rev.* 941 (2001).)

## **Sec. 4.6. Other Employee Protections**

**4.6.1. Occupational Safety and Health Act.** Private postsecondary institutions must conform to the federal Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. § 651 *et seq.*). Under this Act, a private institution must "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" (29 U.S.C. § 654) (the "general duty clause"). Institutions must also comply with health and safety standards promulgated by the U.S. Secretary of Labor (§ 665). Violations may result in fines or imprisonment (§ 666). OSHA prohibits retaliation against an employee for filing a complaint with the Occupational Safety and Health Administration regarding a potentially unsafe workplace.<sup>19</sup>

Regulations of particular importance to higher education institutions include the Hazard Communication Standard (29 C.F.R. § 1910.1200), which requires employers to provide information and training to their workers about the hazards of the substances with which they are working. "Hazardous

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<sup>19</sup>Cases and authorities are collected in Glenn A. Guarino, Annot., "Prohibition of Discrimination Against, or Discharge of, Employee Because of Exercise of Right Afforded by Occupational Safety and Health Act, Under § 11(c)(1) of the Act (29 U.S.C.S. § 660(c)(1))," 66 A.L.R. Fed. 650.

substances” are broadly defined. OSHA standards also regulate the handling of blood and other body fluids (29 C.F.R. § 1910.1030) as well as chemicals. Research laboratories are required to develop a “chemical hygiene plan” and to specify work procedures and policies in writing (29 C.F.R. § 1910.1450). Employers are also required to maintain records of all “lost-time” injuries, and are subject to fines if records are incomplete (29 U.S.C. § 657(c)). In the higher education context, science laboratories, art rooms, hospitals, and maintenance shops are particular targets for enforcement of OSHA regulations.

The original OSHA rule on record keeping was promulgated in 1971, and required all employers subject to OSHA to report any work-related accident resulting in either a fatality or the hospitalization of three or more workers. In 2001, OSHA issued a final rule designed to provide improved information about occupational illnesses and injuries, while simultaneously making the record-keeping system simpler and more accessible to workers. The revised final rule, which can be found at 66 Fed. Reg. 5916 (January 19, 2001), also provides for privacy protections for the documents used to record work-related injuries.

Violations of the record-keeping and reporting regulations can lead to citations, fines, and litigation. For example, in *Kaspar Wire Works, Inc. v. Sec’y of Labor*, 268 F.3d 1123 (D.C. Cir. 2001), the court upheld a finding by OSHA that the company’s failure to record and report several hundred work-related injuries and illnesses was willful, and also upheld a fine of \$224,000. Under OSHA, a violation may be shown to be “willful” if the employer intentionally disregarded the law’s requirements; malice need not be proven.

An employee’s repeated failure to follow safety procedures or to wear OSHA-required safety gear may provide grounds for discipline or termination. For example, in *Taylor v. St. Vincent’s Medical Center*, 1998 U.S. App. LEXIS 7991 (6th Cir. 1998) (unpublished), an appellate court affirmed an award of summary judgment in favor of a hospital that had fired an X-ray technician for failing to wear the OSHA-required safety gear, rejecting the technician’s discrimination, contract, and tort claims. To prevail in such cases, it is important that the employer document the employee’s failures. Similarly, if an employee is injured because of his or her refusal to wear the required gear, it is important for the employer to document its discipline of the employee for refusing to follow OSHA standards, in order to avoid an OSHA citation.

The Act does not preempt an employee’s right to pursue civil actions or other remedies under state laws (§ 653(b)(4)), but it does preempt some overlapping state laws. For example, many states have passed “right-to-know” laws that require employers to disclose the hazardous substances used at the workplace to employees, public safety agencies (such as the local fire department), and the general public. If these laws overlap or conflict with OSHA, however, they are subject to preemption challenges. For example, in *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court held that New Jersey’s Right-to-Know Law was preempted by OSHA, but only with regard to the regulation of safety in the workplace; provisions requiring disclosure to public safety agencies and the general public were not preempted.

OSHA provides that states with safety and enforcement plans approved by OSHA may assume responsibility for workplace safety and health (29 U.S.C.

§ 667). But approval must precede a state's attempt to fashion its own occupational safety and health laws. For example, the U.S. Supreme Court struck portions of two Illinois laws that established training and examination requirements for workers at certain hazardous waste facilities (*Gade v. National Solid Waste Management Ass'n.*, 505 U.S. 88 (1992)). Illinois did not have an OSHA-approved state plan, and the Court ruled that "a state law requirement that directly, substantially and specifically regulates occupational safety and health" is preempted by OSHA even if the state law has another nonoccupational purpose. Unless the state has an OSHA-approved state plan, the Court said, OSHA impliedly preempts any state regulation of an occupational safety and health issue where a federal standard has been established.

Public institutions of higher education are not subject to OSHA regulation, but they are subject to state occupational safety and health laws, many of which have used OSHA as a model.<sup>20</sup> For those states with OSHA-approved plans, state standards for both public and private employers must be at or above the level of federal OSHA protection. In states without OSHA-approved plans, the OSHA standard may be used to set tort standards of care in negligence suits against public employers.

Several of the federal environmental laws make "knowing endangerment" of a worker a felony (see Section 13.2.10). (For further information, see R. Schwartz, Comment, "Criminalizing Occupational Safety Violations: The Use of 'Knowing Endangerment' Statutes to Punish Employers Who Maintain Toxic Working Conditions," 14 *Harvard Environmental L. Rev.* 487 (1990).) In recent years, OSHA and the Environmental Protection Agency (EPA) have been coordinating enforcement and sharing information. (The Thompson entry in the Selected Annotated Bibliography for this Section discusses the coordination of effort between these two agencies.)

During the Clinton administration, OSHA attempted to promulgate an "ergonomic" standard that would require employers to organize work and purchase equipment that would minimize repetitive strain injuries for workers. The proposed regulation drew heavy criticism from employers, and it was withdrawn by the Bush administration. In early 2002, the Bush administration announced that OSHA would work with joint employer-employee groups to develop "voluntary" standards to reduce musculoskeletal disorders in industries in which such injuries are numerous, such as in health care organizations. Administrators and counsel should monitor developments in this area, particularly at institutions with medical schools and/or hospitals.

**4.6.2. Fair Labor Standards Act.** The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, establishes the minimum hourly wage and the piecework rates as well as overtime pay requirements for certain nonsupervisory employees. In situations where an applicable state law establishes a minimum

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<sup>20</sup>Whether a state-related institution (a formerly private institution that receives substantial public funding) is covered by OSHA may be difficult to determine. For cases related to this issue, see Kristine Cordier Karnezis, Annot., "Who Is 'Employer' for Purposes of Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*)," 153 A.L.R. Fed. 303.

wage rate that conflicts with the federal standard, the higher rate must prevail (29 U.S.C. § 218). The law does not apply to independent contractors.<sup>21</sup> The law also requires that records be kept of the hours worked by nonexempt employees and the compensation paid therefor.

The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor. The Secretary of Labor has two years from the date of the violation to file an enforcement action, but the statute provides that if the violation is “willful,” the limitations period is extended to three years (29 U.S.C. § 255(a)). A violation is “willful” if the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA” (*McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)).

The FLSA specifically exempts employees employed as bona fide executive, administrative, professional, or outside sales employees from the minimum wage and maximum hour requirements (29 U.S.C. § 213(a)(1)). Another section, 29 U.S.C. § 213(a)(17), also exempts certain computer employees. The Department of Labor has revised the long-standing regulations implementing this provision (29 C.F.R. Part 541); the new regulations became effective on August 23, 2004. The regulations establish the conditions of employment that must exist before an employer may consider an employee to be an exempt “executive,” “administrative,” “professional,” or an exempt sales employee and state clearly that an individual’s job title does not determine exempt status. In addition to meeting one of these tests, the employee must be paid a salary of at least \$455 per week.

Of particular interest to higher education, the term “administrative” includes persons “whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof” (29 C.F.R. § 541.202(a)(2)) and who meet the other conditions set by the regulations. Furthermore, the employee’s primary duty must involve the “exercise of discretion and independent judgment with respect to matters of significance” (29 C.F.R. § 541.202(a)). The term “professional” includes any person whose primary duty is the performance of work “requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction [the ‘learned professional’ exemption]; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor [the ‘creative professional’ exemption]” (29 C.F.R. § 541.300(a)(2)). A teacher who meets the regulations’ definition of “teaching, tutoring, instructing, or lecturing . . . and who [is] employed and engaged in this activity as a teacher in the . . . educational establishment or institution by which he is employed” (29 C.F.R. § 541.303(a)) is also considered an exempt professional. Professionals also must meet the regulations’

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<sup>21</sup>For analysis of how an individual’s status as independent contractor or employee is determined under the FLSA, see Debra T. Landis, Annot., “Determination of ‘Independent Contractor’ and ‘Employee’ Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.S. § 203(e)(1)),” 51 A.L.R. Fed. 702.

other conditions, except that teachers need not meet the regulations' salary test (29 C.F.R. § 541.303(d)).

Employees who work in certain computer-related jobs may be exempt from the FLSA. The regulations specify that "computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals" (29 C.F.R. § 541.400(a)) as long as they perform one or more of a series of skilled duties that are detailed in § 541.400.

Under the revised regulations, certain athletic trainers are exempt professionals.

Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption [29 C.F.R. § 541.301(e)(8)].

Because the revised regulations have modified the previous tests for exemptions under the FLSA, care should be taken when determining whether any particular employee is exempt from the Act. The U.S. Department of Labor has posted on its Web site "Fair Pay Fact Sheets" that explain the revised regulations and provide examples of employees who meet and who do not meet the new tests ([http://www.dol.gov/esa/regs/compliance/whd/fairpay/fs17a\\_overview.htm](http://www.dol.gov/esa/regs/compliance/whd/fairpay/fs17a_overview.htm)).

The FLSA has always applied to most private postsecondary institutions, but the Act's application to public postsecondary institutions has been the subject of historical turmoil. After several conflicting rulings by the U.S. Supreme Court, Congress amended the FLSA to limit the application of its overtime requirements. State and local government employers, including public postsecondary institutions, may provide compensatory leave in lieu of overtime compensation (Pub. L. No. 99-150, codified at 29 U.S.C. §§ 207(o) and (p)). The amendments also discuss the treatment of volunteers who perform services for a public agency. Regulations implementing these amendments are found at 29 C.F.R. Part 553. The rules include a special limited exemption for public employees in executive, administrative, or professional jobs: public employers will not risk having to pay overtime to these employees if they are occasionally paid on an hourly rather than on a salary basis. This rule was necessary to protect the exemption for public employees covered by public pay systems that reduce the pay of otherwise-exempt employees for partial day absences when paid leave is not used to cover such absences, and for deductions due to budget-required furloughs. The rule can be found at 29 C.F.R. § 541.710. (For a critique of the "salary basis" test, see Garrett Reid Krueger, "Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act," 70 *Wash. L. Rev.* 1097 (1995).)

A public employer's policy of requiring that compensatory time off be taken in lieu of cash payment for overtime was upheld by the U.S. Supreme Court. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court ruled that nothing in the law prohibited a public employer from requiring its employees to schedule

time off in order to reduce the amount of accrued compensatory time and thus avoid having to compensate employees for unused compensatory time.

The FLSA has no exemption for religiously affiliated institutions, so they must also comply with this law. The U.S. Supreme Court ruled in *Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), that religious organizations engaged in commercial activities (such as selling books)—if those activities met the Act’s “enterprise” and “economic reality” tests—were subject to minimum wage and overtime requirements. The Court also ruled that neither the payment requirements nor the record-keeping provisions violated the First Amendment establishment clause or the free exercise clause; the record-keeping requirement applied only to the organization’s business activities, not to its religious ones, and if individuals did not wish to receive wages, they could donate them back to the organization. The Fourth Circuit, following *Alamo*, ruled that a church-related elementary school was subject to the minimum wage and equal pay provisions of the FLSA (*Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990)). Thus, the secular activities of a religiously affiliated college or university are subject to FLSA requirements.

Full-time faculty are typically exempt from the FLSA’s overtime protections under the professional exemption. For example, in *Wong-Opasi v. Tennessee State University*, 2000 U.S. App. LEXIS 21242 (6th Cir. 2000) (unpublished), decided under the previous regulations, the court dismissed a faculty member’s claim that she was entitled to overtime pay. Because she “falls within the advanced type of study specifically contemplated by the professional exemption,” the court would not entertain her claim.

The revised regulations may change formerly exempt employees to nonexempt status, particularly if they do not exercise independent judgment. For example, the regulations are silent on whether assistant athletic coaches or admissions counselors are exempt or nonexempt. If admissions counselors exercise independent judgment, they may be exempt under the “general administrative employee exemption” (29 C.F.R. § 541.202). If, however, they do not exercise independent judgment, they may be covered by the law’s overtime provisions. With respect to assistant coaches, unless they also teach for a substantial part of their responsibilities, they may not fall into the teacher exemption (29 C.F.R. § 541.303). The “academic administrative” exemption requires that the individual’s work be “directly related to academic instruction or training,” which would not apply to most assistant coaches unless they tutor students or provide other academic services, such as academic counseling. (For guidance on this complicated issue, see “Payment of Assistant Coaches Under Federal Overtime Laws,” prepared by the law firm of Gibson, Dunn & Crutcher, August 2004, available at <http://www.nacua.org>.)

Even more basic than whether one is a professional, executive, or administrative employee is the question of whether one can be classified as an employee at all. In *Marshall v. Regis Educational Corp.*, 666 F.2d 1324 (10th Cir. 1981), the Secretary of Labor contended that the college’s student residence hall assistants (RAs) were “employees” within the meaning of the Act and therefore must be paid the prescribed minimum wage. The college argued that its RAs were not



employees and that, even if they were, application of the Act to these RAs would violate the college's academic freedom protected by the First Amendment. Affirming the district court, the appellate court accepted the college's first argument and declined to consider the second. The court focused on the unique circumstances of academic life, concluding that resident assistants performed an educational function as well as supervising students in residence halls.

Thus, said the court, the RAs were not employees because they were "legally indistinguishable from athletes and leaders in student government who received financial aid," categories of students who had previously been found not to be employees. The court warned that "[t]here are undoubtedly campus positions which can be filled by students and which require compliance with the FLSA. Students working in the bookstore selling books, working with maintenance, painting walls, etc., could arguably be 'employees'" (666 F.2d at 1326–28). But in *Alabama A&M University v. King*, 643 So. 2d 1366 (Ala. Ct. Civ. App. 1994), the court not only held that residence hall counselors were employees but refused to apply the administrative exemption to them, making them eligible for overtime payments if they worked more than forty hours per week.<sup>22</sup> Because the employees' duties involved making sure that rooms were clean, securing the building after the residence hall closed, and checking for repairs, the court ruled that their duties did not meet the test for the administrative exemption.

Private causes of action for employees to enforce FLSA are authorized by 29 U.S.C. § 216(b); see also 29 U.S.C. § 203(x). In recent years, controversy has arisen regarding use of this private cause of action to sue states and state agencies and institutions. In *Alden v. Maine* (discussed in Section 13.1.6), the U.S. Supreme Court held that states are immune from the FLSA suits of their employees whether brought in federal or in state court. As a result of this ruling, state colleges and universities may no longer be sued by their employees in state or federal court for FLSA violations unless they have expressly consented to such litigation. However, the U.S. Department of Labor can still sue public colleges and states for FLSA violations.

In another opinion that has significance for both public and private colleges, *Auer v. Robbins*, 519 U.S. 452 (1997), the U.S. Supreme Court addressed the claim of several police officers that they were owed overtime pay under the FLSA. The employer argued that the officers were exempt from the overtime pay requirements, in part because they were paid a salary. Under both the previous and the revised regulations implementing the FLSA, 29 C.F.R. § 541.602, an employee is considered to be salaried if "he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because

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<sup>22</sup>In 1994 the Wage-Hour Administrator for the U.S. Department of Labor (DOL) issued an opinion letter stating that the DOL would not seek to apply the FLSA to graduate research assistants (as opposed to graduate teaching assistants or residence hall advisors). Given the NLRB's ruling in *Brown University*, discussed in Section 4.5.6 of this book, and the fact that the definition of "employee" has not changed either in the law or the revised regulations, it appears that the 1994 opinion letter remains valid.

of variations in the quality or quantity of the work performed” (29 C.F.R. § 541.602(a)). Because one police officer had been disciplined by having his salary reduced, the other police officers claimed that the “salary basis” test did not apply to them and they were eligible for overtime pay. Under the revised regulations, 29 C.F.R. § 541.603(c), employers who have imposed pay deductions on salaried employees may reimburse those employees and promise to comply with the regulation in the future, as long as the deductions were made inadvertently or for reasons other than lack of work. In a unanimous opinion by Justice Scalia, the Court upheld the regulations as reasonable and their application to public sector employees as appropriate. Of interest to colleges and universities is the portion of the opinion that discusses the implications of an employer practice or policy of making deductions from the pay of salaried employees for disciplinary reasons. If such a practice or policy exists, this may result in making all the employees subject to the policy qualified for overtime pay under the FLSA, as well as liquidated damages.

Although the “salary test” is still in effect, a federal circuit court has ruled that it is inapplicable when an otherwise exempt employee is paid on an hourly basis for working part time under the provisions of the Family and Medical Leave Act (see Section 4.6.4). In *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115 (9th Cir. 2001), the court ruled that an employer’s compliance with the FMLA did not negatively affect an employee’s exempt status, as provided in the FMLA regulations.

An issue that has received considerable judicial attention is whether employees who are “on call” and must be available to their employers within a specific period of time after being called in to work must be paid for the time they are “on call.” Because these cases are very fact-specific, bright-line rules are difficult to determine. However, if the employee’s time is spent predominantly for the benefit of the employer, the employee must be paid; if the employee can use the time for a variety of activities unrelated to the needs of the employer, then the employee will not be paid. (For a discussion of the on-call doctrine as applied to nurses employed by a hospital, see *Reimer v. Champion Healthcare*, 258 F.3d 720 (8th Cir. 2001).)

Ruling on a similar issue, a federal district court refused to grant Howard University’s motion for summary judgment in a case involving an overtime claim by campus police officers. The police officers were paid for an eight-hour shift that did not include a paid meal break. The officers were permitted to leave campus for a thirty-minute meal break as long as they were available to respond to a campus emergency during that time and as long as they checked their weapons and equipment at the campus police station before leaving campus. The officers argued that the weapon and equipment checking requirements were so time consuming that it was virtually impossible for them to leave campus for their meal break, and asked to be paid for the additional thirty minutes that they were “required” to be on campus. The court ordered a trial on the matter (*Summers v. Howard University*, 127 F. Supp. 2d 27 (D.D.C. 2000)). The parties then entered a settlement agreement, but the university moved to vacate the settlement agreement, and refused to pay the damages and fees calculated by a special master appointed under the agreement, because the employees had filed

a second lawsuit. The trial court refused to vacate the consent decree, and the appellate court affirmed (374 F.3d 1188 (D.C. Cir. 2004)), ruling that the university had not been prejudiced by the second lawsuit (which was subsequently dismissed). The court affirmed the lower court's order that the university pay the back wages and liquidated damages as calculated by the special master.

Although the FLSA requires employers to pay nonexempt workers for hours "worked," the Portal to Portal Act provides that employees need not be paid for activities that are "preliminary or postliminary" to actual work (29 U.S.C. § 254(a)(2)). For example, in *Bienkowski v. Northeastern University*, 285 F.3d 138 (1st Cir. 2002), a federal appellate court ruled that the time that police officers spent in emergency medical technician training was not work time, and rejected the plaintiffs' argument that they should have been paid overtime for attending these required sessions. The court stated that, during these mandatory training sessions, the plaintiffs were performing no "work" for the university. But in *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005), the U.S. Supreme Court ruled that time spent by workers "donning and doffing" protective clothing, as well as time spent walking from the changing area to the work area, was "integral and indispensable" to the employees' principal activity, and thus was compensable.

The FLSA includes a provision that prohibits retaliation against an employee who exercises rights provided for by the law (29 U.S.C. § 215). Individuals who engage in such retaliation may be held individually liable for FLSA violations. The Supreme Court of Colorado ruled that state employees do not enjoy sovereign immunity from individual liability under this FLSA provision (*Middleton v. Hartman*, 45 P.3d 721 (Colo. 2002)).

Class action litigation involving alleged violations of the FLSA has increased sharply over the past several years, and may be brought by either the Department of Labor or by private plaintiffs. In fact, the number of FLSA class actions exceeded the number of employment discrimination class actions in 2001 and 2002 (see Michael Orey, "Lawsuits Abound from Workers Seeking Overtime Pay," *Wall Street Journal*, May 30, 2002, p. B-1). In July 2004, after the Department of Labor filed a class action suit against the University of Phoenix for FLSA violations, the university entered an agreement with the agency to pay up to \$3.5 million in claims for overtime pay by 1,700 current and former admissions counselors (*BNA Workplace Law Report*, Vol. 2, no. 31, July 30, 2004). (For advice on avoiding collective actions under the FLSA, see Terrence H. Murphy, "Special FLSA Issues for College and Universities," outline prepared for the 2004 Annual Conference of the National Association of College and University Attorneys, and available at <http://www.nacua.org>.)

**4.6.3. Employee Retirement Income Security Act.** The Employee Retirement Income Security Act of 1974 (known as ERISA or the Pension Reform Act) establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" (29 U.S.C. § 1001(b)). The terms "employee benefit plan" and "employee pension plan" are defined to encompass various health benefits, death benefits, disability benefits, unemployment benefits, retirement plans, and income deferral programs (29 U.S.C. § 1002(1) and (2)). The ERISA

requirements for the creation and management of these plans are codified partly in the federal tax law (26 U.S.C. § 401 *et seq.*) and partly in the federal labor law (29 U.S.C. § 1001 *et seq.*). These requirements apply only to private postsecondary institutions. The plans of public institutions are excluded from coverage as “governmental plan(s)” under 29 U.S.C. § 1002(32) and 26 U.S.C. § 414(d).<sup>23</sup>

The ERISA standards have been construed as minimum federal standards designed to curb the funding and disclosure abuses of employee pension and benefit plans (*Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977)). Rules and regulations have been issued covering reporting and disclosure requirements, minimum standards of conduct, and fiduciary responsibilities (see 29 C.F.R. Parts 2510, 2520, 2530, & 2550). Interpretive bulletins explaining the Act have also been issued and reprinted at 29 C.F.R. Part 2509. Rules and regulations for group health plans are found at 29 C.F.R. Part 2590.

Some special rules apply to benefit plans for teachers and other employees of tax-exempt educational institutions. Under certain circumstances, for instance, such employees may delay their participation in a benefit plan until they reach the age of twenty-six (26 U.S.C. § 410(a)(1)(B)(ii); 29 U.S.C. § 1052(a)(1)(B)(ii)).

ERISA requirements are numerous and complex; a few are offered here for purposes of illustration only. For example, the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) (Title X, Pub. L. No. 99-272, 100 Stat. 222 (1986)) amended ERISA to require employers to permit employees who leave employment on good terms (for example, by retirement, voluntary resignations, or layoffs) to continue medical insurance coverage at their own expense at approximately the employer’s group rate for eighteen months; their dependents have similar rights upon divorce or a child’s emancipation. Regulations related to continuing health care coverage under COBRA are found at 29 C.F.R. § 2590.606 1–4; the final rule was published at 69 Fed. Reg. 30084 (May 26, 2004). Other amendments to ERISA in the Retirement Equity Act of 1984 (98 Stat. 1426 *et seq.*) protect employees’ pension benefits during periods of maternity or paternity leave (§ 102(e)); establish requirements for the provision, by pension plans, of joint and survivor annuities and preretirement survivor annuities for surviving spouses of employees (§ 103); and establish rules for the assignment of rights to pension benefits in divorce proceedings (§ 104).

Another rule protects employers from lawsuits by workers who are dissatisfied with the return on their pension funds’ investments. That rule, codified at 29 C.F.R. § 2550.404(c)(1), offers this protection if the employer fulfills the following conditions: the participant or beneficiary must have the opportunity under the plan to (1) choose from at least three investment alternatives; (2) give investment instruction to the plan administrator on a frequent basis; (3) diversify investments at least once every quarter; and (4) obtain information to make informed investment decisions.

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<sup>23</sup>Only those public colleges that are an “agency or instrumentality” of a state or its political subdivisions are exempt from ERISA. Thus, a public college established by state law would meet this test, but a public college that was chartered as a nonprofit corporation might not. *Zarilla v. Reading Area Community College*, 1999 U.S. Dist. LEXIS 10448 (E.D. Pa. 1999) (unpublished).

With various listed exceptions, ERISA supersedes any and all state laws “insofar as they may now or hereinafter relate to any employee benefit plan” subject to the ERISA statute (29 U.S.C. § 1144(a)). The exceptions are for state laws regulating insurance, banking, or securities, and state criminal laws, none of which are superseded by ERISA (29 U.S.C. § 1144(b)). These provisions, and their relation to other provisions in the statute, have been the subject of varying interpretations by the courts, and it has often proved difficult in particular cases to determine when ERISA preempts state law. (See generally D. Gregory, “The Scope of ERISA Preemption of State Law: A Study in Effective Federalism,” 48 *U. Pitt. L. Rev.* 427 (1987).) The U.S. Supreme Court has ruled that ERISA preempts common law contract or tort claims relating to employee benefits that are brought in state court, and that such claims may be removed to federal court and tried under ERISA (*Metropolitan Life Insurance v. Taylor*, 481 U.S. 58 (1987)). Remedies for ERISA violations, if not specified in the statute, have been developed under federal common law (see S. H. Thomsen & W. M. Smith, “Developments in Common-Law Remedies Under ERISA,” 27 *Tort & Insurance L.J.* 750 (1992)).

The relationship between ERISA and state and federal disability discrimination laws has yet to be resolved. In *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1992), the court ruled that ERISA did not limit an employer’s right to change or terminate a group health insurance plan to exclude coverage of certain diseases (in this case, AIDS). Another federal appellate court ruled that insurance caps for HIV-related diseases did not violate ERISA (*Owens v. Storehouse*, 984 F.2d 394 (11th Cir. 1993)). However, refusal to include certain diseases within medical insurance coverage may violate the Americans With Disabilities Act. The EEOC has published enforcement guidance on the circumstances under which employer-provided health insurance policy provisions may violate the ADA. Although the guidance is “interim,” it had not been withdrawn or superseded as of late 2005. (See *Interim Enforcement Guidance on the Application of the Americans With Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (June 8, 1993) (available at <http://eoc.gov/ada/adadocs/html>).)

As a result of the evolving nature of the relationship between ERISA and related state laws, as well as the overall complexity of this law and its regulations and the pace of ERISA developments, private institutions should obtain assistance from experienced ERISA counsel.

**4.6.4. Family and Medical Leave Act.** The Family and Medical Leave Act (FMLA) of 1993 (Pub. L. No. 103-3, codified at 29 U.S.C. §§ 2601 *et seq.*) applies to all organizations that have employed fifty or more employees, within a radius of 75 miles, for each working day during each of twenty or more weeks in the preceding year. Employees who qualify may take up to twelve weeks of unpaid leave in any twelve-month period for the following:

1. The birth of a child and its care during the first year
2. The adoption of a child or placement in the employee’s home of a foster child (not necessarily a newborn)

3. The care of the employee's spouse, child, or parent with a serious health condition
4. The serious health condition of the employee

Employees who take FMLA leave are entitled to reinstatement to an equivalent position upon their return to work, and the employer must maintain any health benefits to which the worker was entitled before taking FMLA leave.

The Department of Labor issued final rules interpreting the FMLA, which are codified at 29 C.F.R. Part 825. The regulations are lengthy and complicated; the following summary highlights only a few issues, and administrators should consult the full text of the regulations or employment counsel for assistance in applying the FMLA to the individual circumstances of employees.<sup>24</sup>

Most institutions of higher education will easily meet the fifty-employee requirement for coverage. If an institution has a small satellite location more than 75 miles away that employs fewer than fifty employees (and those employees work exclusively at that location), it is not clear that those employees would be protected by the FMLA. Institutions facing this situation, however, should consider the propriety of excluding such employees from coverage when the majority of their employees have FMLA protection.

Any employee who has worked for 1,250 hours during the previous twelve months (or, for a full-time salaried employee for whom records of hours worked are not kept, for twelve months in the past year) is entitled to twelve weeks of family and medical leave. The number of hours worked, according to the regulations, is to be calculated in conformance with Fair Labor Standards Act regulations (29 C.F.R. § 825.110(c)). Full-time faculty in institutions of higher education are deemed to have met the 1,250-hour test "in consideration of the time spent at home reviewing homework and tests" (29 C.F.R. § 825.110(c)).

The regulations specifically define the categories of "family member" (29 C.F.R. § 825.113). For example, "spouse" may include a common law spouse (if permitted by the law of the state in which the work site is located), but does not include an unmarried domestic partner. A "parent" is a biological parent or an individual who acted as the employee's parent when the employee was a child; this category does not include the parents of the employee's spouse. A "child" may be a biological, adopted, or foster child, stepchild, or a person for whom the employee is acting as a parent, if the child is either under age eighteen or is over eighteen but needs care because of a mental or physical disability.

The regulations expand upon the FMLA's definition of "serious health condition" and detail the employer's right to request medical certification of the employee's need for the leave, including consultation with second and third

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<sup>24</sup>Cases and authorities are collected at Deborah F. Buckman, Annot., "Award of Damages Under Family and Medical Leave Act (29 U.S.C.A. §§ 2601 *et seq.*)," 176 A.L.R. Fed. 591; and Ann K. Wooster, Annot., "Individual Liability Under Family and Medical Leave Act (29 U.S.C.A. §§ 2601 *et seq.*)," 170 A.L.R. Fed. 561.

medical providers (29 C.F.R. §§ 825.114 & 825.305–307). The regulations also describe the employer’s right to request certification of the employee’s ability to return to work (29 C.F.R. § 825.310) and the meaning of an “equivalent position” (§ 825.215).

FMLA leave for medical reasons may be taken on an intermittent or part-time basis (called “reduced leave”), depending on the needs of the employee or the family member, but intermittent or reduced leave for the care of a newborn or an adopted child or a foster child may be taken only with the employer’s agreement. If an employee takes intermittent or reduced leave, the employer may transfer that employee to a part-time position, as long as the pay and benefits remain equivalent (29 C.F.R. § 825.204).

The regulations also provide detailed information on the relationship between paid and unpaid leave, and the continuation of medical benefits. The law and regulations are silent on whether employers must continue or reinstate non-medical benefits (such as tuition assistance or child care benefit plans).

The law and regulations permit the employer to deny reinstatement (but not FMLA leave) to a “key employee,” defined as a salaried employee who is among the highest-paid 10 percent of all employees within 75 miles of the worksite. But the employer must show that “substantial and grievous economic injury” to its operations will ensue if reinstatement is required (the economic impact of the employee’s absence is not part of the test for substantial and grievous economic injury). The specificity of the showing that employers must make to justify refusal to reinstate a key employee (29 C.F.R. §§ 825.216–18) suggests that the exception will rarely be used.

The FMLA requires employers to post a notice detailing its provisions and instructing employees on how complaints may be filed. Employee handbooks must incorporate FMLA information; in the absence of a handbook, employers must provide written information about the FMLA to any employee who asks for FMLA leave. The regulations specify the type of information that employers must give those individuals who request such a leave (29 C.F.R. § 825.301), as well as the law’s record-keeping requirements (§ 825.500).

Employees have two avenues for redressing alleged violations of the FMLA. They may file a complaint with the Department of Labor or a lawsuit in federal court. Damages include lost earnings, interest, liquidated damages (lost earnings and interest), reinstatement, and attorney’s fees (29 C.F.R. §§ 825.400–404). (For a description of the FMLA and a discussion of its application to colleges and universities, see T. Flygare, *The Family and Medical Leave Act of 1993: Applications in Higher Education* (National Association of College and University Attorneys, 1994). For a discussion of the FMLA’s application to college faculty, see Donna Euben & Saranna Thornton, *The Application of the Family and Medical Leave Act to College and University Faculty: Some Questions and Answers* (American Association of University Professors, 2002).)

FMLA regulations promulgated by the U.S. Department of Labor have been challenged on a variety of grounds. The U.S. Supreme Court addressed the FMLA for the first time in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* involved 29 C.F.R. § 825.700(a), which provides that if the

employer fails to notify an employee that a leave requested by the employee is FMLA leave, then the leave does not count against the employee's twelve-week entitlement. The plaintiff, Ragsdale, had been given thirty weeks of leave by her employer to seek treatment for cancer, and the company had held her job open and paid her health insurance benefits while she was on leave. When Ragsdale requested additional leave, it was denied, and she was terminated when she did not return to work. Ragsdale argued that she was entitled to an additional twelve weeks of leave because of her employer's failure to notify her that leave she had already taken would count against her FMLA entitlement. In a 5-to-4 opinion, the majority invalidated the regulation, stating that it required employers to provide more leave than the statute required, and that the regulation did not require the employee to demonstrate that the employer had interfered with, restrained, or denied the exercise of FMLA rights. The dissenters would have upheld the regulation as permissible, and because there had been no showing that the regulation was "arbitrary, capricious, or manifestly contrary to the statute" under the teaching of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Although *Ragsdale* invalidated the regulation at issue, it did not invalidate the requirement that employers notify employees that the leave will be counted toward their FMLA entitlement; only the automatic penalty portion of the regulation was invalid. Furthermore, the Court left the door open for claims by employees that they were harmed financially by an employer's failure to notify them that their leave would be charged to their FMLA entitlement. Therefore, in practical terms, it is still important for the employer to notify an employee in writing of this fact.

Although the FMLA entitles employees to twelve weeks of unpaid leave for a serious medical condition, some employees may need additional time. The Americans With Disabilities Act requires employers to provide "reasonable accommodation" for workers with disabilities (see Section 5.2.5 of this book). Such accommodations could include unpaid or paid leave (depending on the employer's policies) and part-time work. The FMLA and the ADA provide significant protections to employees with serious health conditions, and administrators should be aware that the ADA may be used to extend an employee's rights to leave for health-related reasons. (For an example of litigation against a college involving claims under both laws, see *Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001), in which the court held that a business manager who could not perform the essential functions of her position was not entitled to intermittent leave under the FMLA or to protection under the ADA.)

Until the U.S. Supreme Court's ruling in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), many state employers invoked Eleventh Amendment sovereign immunity to defend themselves against FMLA claims brought by their employees. The federal appellate courts were split on whether the FMLA had validly abrogated sovereign immunity (see, for example, *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), *rejecting abrogation*, and *Hibbs v. Dept. of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *affirming abrogation*).



The Supreme Court affirmed the Ninth Circuit’s ruling in *Hibbs*, ruling that Congress had properly abrogated sovereign immunity because it had relied not only on its commerce power, but also on its Section 5 enforcement power under the Fourteenth Amendment. Congress had stated that the FMLA’s purpose was to “balance the demands of the workplace with the needs of families” and “to promote the goal of equal employment opportunity for women and men” (29 U.S.C. § 2601(b)(1)). Relying on its earlier ruling in *City of Boerne v. Flores* (Section 13.1.5 of this book), the Court asserted that Congress had the power to enact “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct” (538 U.S. at 727–28). The Court then distinguished the *Kimel* and *Garrett* cases, in which it had ruled that Congress had not validly abrogated sovereign immunity in enacting the ADA and the ADEA (see Sections 5.2.5 & 5.2.6 of this book), noting that the FMLA, unlike the ADA and ADEA, had been enacted to counter sex discrimination, which receives heightened scrutiny under the equal protection clause (538 U.S. at 735). (For more on sovereign immunity, abrogation, and *Hibbs*, see Section 13.1.6.)

*Hibbs* involved only the family care provisions of the FMLA; the high court has not yet ruled on whether the personal medical leave provisions of the law were a valid abrogation of sovereign immunity. (For an analysis of the results in federal circuit courts with respect to this issue, see *Brockman v. Wyoming Dept. of Family Services*, 342 F.3d 1159 (10th Cir. 2003).)

Similarly unresolved is the issue of individual liability of supervisors under the FMLA. For example, in the Tenth Circuit, a three-judge panel has ruled that supervisors may be held individually liable for FMLA violations because the Eleventh Amendment does not bar federal court jurisdiction over claims against a supervisor in his individual capacity (*Cornforth v. University of Oklahoma Board of Regents*, 263 F.3d 1129 (10th Cir. 2001)). And a three-judge panel in the Eighth Circuit has ruled that an employee of the Kansas City Police Department may sue police department officials and city managers individually because the FMLA allows an employee to sue public officials in their individual capacities (*Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002)). On the other hand, a panel from the Eleventh Circuit disagreed, saying that the FMLA’s definition of “employer” was identical to that in the Fair Labor Standards Act (Section 4.6.2 of this book), which covered corporate officers but not public officials (*Wascara v. Carver*, 169 F.3d 683 (11th Cir. 1999)). Given the disagreement among the federal circuits, a final answer will only come from the Supreme Court.

**4.6.5. Immigration laws.** U.S. immigration law, constantly in flux, is of particular interest to colleges because the college may wish to employ faculty, staff, or students who are not U.S. citizens. Laws enacted to regulate immigration also have consequences for all employees, including U.S. citizens. Administrators and counsel should ensure that they are aware of the latest developments in immigration law because the regulations and restrictions are numerous and complex. This Section discusses issues involving the employment of foreign nationals or

permanent U.S. (noncitizen) residents. Section 13.2.2 of this book discusses issues involving noncitizen students and visitors who are not employees.

Under the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. No. 99-603, 100 Stat. 3359), codified at 8 U.S.C. § 1324a, employers must certify that employees are eligible to work in the United States.<sup>25</sup> They must also ensure that employees who are not citizens are either permanent residents or have unexpired visas that authorize them to work in the United States. IRCA applies to all newly hired employees, whether or not they are U.S. citizens, and requires that they present proof of identity and proof that they are entitled to work in the U.S. (8 U.S.C. § 1324a(a)). Employers must examine specific documents to make this determination before allowing the new employee to begin work (§ 1324a(b)). IRCA violations may be punished by civil fines or criminal prosecution penalties against either the employer or the employee, or both.

IRCA also prohibits employers from discriminating against applicants or employees simply because they may appear to be noncitizens; noncitizens who are authorized to work in the United States may not be discriminated against on the basis of citizenship (with certain exceptions for national security reasons). Individuals who believe they have been discriminated against on these bases may file discrimination claims under IRCA and also under Title VII of the Civil Rights Act of 1964 or state civil rights laws for national origin, race, or religious discrimination (see Section 5.2.1).

The U.S. Department of Labor plays an important role in labor certification for employees with H-1B visas or those seeking to establish permanent residence (<http://www.doleta.gov>). And the Department of State oversees the J-1 exchange program for foreign student visitors who may be employed under its “practical training” provisions. Spouses and children of noncitizen employees or visitors must also comply with a panoply of immigration regulations. Immigration law also circumscribes the postsecondary institution’s decisions on employing aliens in faculty or staff positions and inviting aliens to campus to lecture or otherwise participate in campus life.

Aliens who are invited to work in the United States on a temporary basis must obtain a visa under the “H” category, which includes three subcategories of temporary alien workers: nurses, fashion models, and specialized workers (H-1’s); other workers who will “perform temporary service or labor” when such services or labor are agricultural in nature or when “unemployed persons capable of performing such service or labor cannot be found in this country” (H-2’s); and workers who will act as trainees (H-3’s) (8 U.S.C. § 1101(a)(15)(H)(i)–(iii)). For each subcategory, the statute prescribes more limited rules for alien medical school graduates.

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<sup>25</sup>In addition to IRCA, four federal laws form the core of employment-related immigration law: the Immigration Act of 1990 (IMMACT) (Pub. L. No. 101-649, 104 Stat. 4978); the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) (Pub. L. No. 102-232, 105 Stat. 1733); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546); and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (Pub. L. No. 105-277, Title IV of Div. C, 112 Stat. 2861). Subsequent legislation has amended these laws and has increased the cap on H-1B visas, which are discussed below.

The most frequently used visa category for college or university employees is the H-1B visa. An individual holding an H-1B visa is limited to a stay of six years, but if the individual has applied for permanent resident status, this limitation may be extended. The employer must file a labor certification with the state workforce agency and must pay at least the prevailing wage for the position. The individual may not begin work until the petition for the H-1B visa has been approved, and the individual's authorization to work is specific to the employer, the geographic area, and the position. However, 8 U.S.C. § 1184(n) allows a holder of an H-1B visa to change employers as long as the new employer files a petition requesting permission for the change.

Congress has capped the number of H-1B visas that may be issued in any one year. Because of the demands of business for specialized workers from abroad, the cap has been reached early in each federal fiscal year (FY), which begins on the first of October. For example, the cap for FY 2005 was reached by October 1, 2004, the first day of the 2005 fiscal year. (Ed Frauenheim, "H-1B Visa Limit for 2005 Is Already Reached," *News.com*, available at [http://news.com.com/H-1B+visa+limit+for+2005+already+reached/2100-1022\\_3-5392917.html](http://news.com.com/H-1B+visa+limit+for+2005+already+reached/2100-1022_3-5392917.html). For a recent history of amendments to immigration law and a discussion of the requirements of the H-1B visa, see Tracey Halliday, "The World of Offshoring: H-1B Visas Can Be Utilized to Curb the Business Trend of Offshoring," 25 *Hamline J. Pub. L. & Pol'y* 407 (2004).)

The Immigration Act of 1990 (IMMACT) created three additional categories that are important to higher education institutions. The "O" visa is for nonimmigrant visitors who have extraordinary ability in the areas of arts, sciences, education, business, or athletics and are to be employed for a specific project or event such as an academic year appointment or a lecture tour (8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)). The "P" visa is for performing artists and athletes at an internationally recognized level of performance who seek to enter the United States as nonimmigrant visitors to perform, teach, or coach (8 U.S.C. § 1101(a)(15)(P); 8 C.F.R. § 214.2(p)). The "Q" visa is designated for

coming temporarily (for a period not to exceed fifteen months) to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality [8 U.S.C. § 1101(a)(15)(Q); 8 C.F.R. § 214.2(q)].

The Web site of the U.S. Citizenship and Immigration Services has a special section for employers that explains the law and regulations regarding visitors and foreign workers, and directs employers to the correct forms (<http://www.uscis.gov/graphics/services/employerinfo/index.htm>).

The State Department also has authority over these employment and visitor categories as well as the foreign student categories. Pertinent State Department regulations are in 22 C.F.R. § 41.31 (temporary visitors) and 22 C.F.R. § 41.53 (temporary workers and trainees).

The U.S. Department of Labor issues "labor certifications" for aliens, indicating that their employment will not displace or adversely affect American

workers (8 C.F.R. § 214.2(h)). Labor Department regulations on labor certification are codified at 20 C.F.R. § 656.2 and 29 C.F.R. Part 501. Regulations related to the labor certification process for individuals who will hold teaching positions at colleges or universities are found at 20 C.F.R. § 656.21a. This labor certification process need not be followed, however, if the individual can be classified as an individual of “extraordinary ability” under 8 C.F.R. § 204.5(h)(2).

**4.6.6. Workers’ compensation laws.** Every state requires employers to participate in a system that provides compensation to an employee or the employee’s family in cases where the employee has been injured or killed in the course of employment. These laws are intended to limit employers’ liability for negligence or other potential employee claims in exchange for the employer’s agreement to pay for the employee’s medical treatment and to provide a wage replacement while the employee cannot work. In some cases, employers purchase workers’ compensation insurance, while in other states the state collects premiums from employers and pays the benefits out of a state fund.

Although the details of workers’ compensation laws differ by state, several themes are common to this area of the law. Workers’ compensation is the exclusive remedy for employees injured at work, which means that a court will dismiss tort claims filed against the employer. In order to be entitled to workers’ compensation benefits, the individual must be an employee, must have been injured by accident, and the injury must either have occurred while the employee was working or be related to the individual’s job responsibilities. Although most litigation concerns employees’ (or other individuals’) allegations that they were wrongfully denied workers’ compensation benefits, workers in some cases seek to avoid the workers’ compensation scheme and sue those responsible for their injuries; potential damage awards can greatly surpass the value of workers’ compensation benefits.

Workers’ compensation is a “no fault” system that awards benefits to workers who qualify whether or not the worker was negligent, and whether or not the employer was negligent. In certain situations, however, a worker may seek to avoid coverage in order to receive greater compensation. Several states have carved out an exception to the exclusivity doctrine if an injured worker can demonstrate that the employer intentionally acted in a manner that had a strong probability of resulting in injury. For example, the New Jersey Supreme Court in *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884 (N.J. 2002) allowed a negligence lawsuit by an injured worker to proceed because the worker claimed that a supervisor removed a safety device from a machine, knowing that serious harm could result. Although it is difficult for plaintiffs to overcome the presumption of exclusivity that undergirds the workers’ compensation system, intentional actions by a supervisor or manager that lead to serious and foreseeable consequences may convince a court to pierce the exclusivity shield, as in *Laidlow*.

An important benefit to employers is that, because workers’ compensation is the exclusive remedy for workers injured in the course of employment, courts will

typically dismiss employee tort claims such as negligence, negligent infliction of emotional distress, and so on. But state laws and judicial rulings differ as to whether intentional torts will fall under the workers' compensation law's exclusivity doctrine. In *Maas v. Cornell University*, 683 N.Y.S.2d 634 (N.Y. App. Div. 1999), for example, a faculty member sued Cornell University for negligence in its handling of a sexual harassment complaint against him. The court rejected the professor's claims of negligence and negligent infliction of emotional distress, ruling that he could not sue his employer in tort because of the exclusivity of workers' compensation as a remedy for unintentional employment-related injuries. On the other hand, a federal trial court ruled that Pennsylvania's workers' compensation law did not preclude claims for intentional infliction of emotional distress, and allowed a plaintiff to sue her employer for emotional injury arising from an alleged sexual harassment incident (*Brooks v. Mendoza*, 2002 U.S. Dist. LEXIS 4991 (E.D. Pa. 2002)). But in *Klan-Rastani v. Clark University*, 2001 Mass. Super. LEXIS 535 (Mass. Super. 2001), a Massachusetts trial court dismissed claims of negligent and intentional infliction of emotional distress brought by plaintiffs who were upset when they discovered alleged pay discrimination by the college. Because emotional distress is considered a personal injury, said the court, the state's workers' compensation statute was the exclusive remedy, and the plaintiff was limited to workers' compensation benefits. And a federal district court rejected a plaintiff's negligent hiring and retention claims against a college, ruling that workers' compensation benefits were the only remedy for injuries resulting from alleged negligence (*Gomez-Gil v. University of Hartford*, 63 F. Supp. 2d 191 (D. Conn. 1999)).

Most workers' compensation laws exempt employers from liability if a non-employee caused the employee's injury. For example, in *California State Polytechnic University-Pomona v. Workers' Compensation Appeals Board*, 179 Cal. Rptr. 605 (Cal. Ct. App. 1982), a claim had been filed on behalf of a former stenographer at the university who had been shot and killed while working at her desk. A great deal of circumstantial evidence implicated a former boyfriend as the likely suspect. The boyfriend was never prosecuted for the shooting because of what the court termed "evidentiary problems." The deceased's family argued that she was killed in the course of employment. The university argued that she was killed out of "personal motives," a defense that would shield it from the workers' compensation claim. The court decided the case in favor of the university.

With respect to those individuals who seek workers' compensation benefits, colleges and universities have faced claims from student interns that their injuries were employment-related and thus they were entitled to compensation. A student employee injured at an on-campus worksite would typically be covered by the workers' compensation law, although a federal trial court refused to make such a finding in *Grant v. Tulane University*, 2001 U.S. Dist. LEXIS 3041 (E.D. La. 2001) because the student plaintiff was paid by federal work-study funds (see Section 8.3.2) that could be characterized as financial aid rather than wages.

A more difficult issue is posed when students are required to participate in an internship at an off-campus site, supervised by both academic staff and

nonemployees. Cases from two state courts suggest that, even if the students are not paid and are receiving college credit for their internship experience, the court will find them to be employees for workers' compensation purposes. For example, in *Ryles v. Durham County Hospital Corp.*, 420 S.E.2d 487 (N.C. Ct. App. 1992), *review denied*, 424 S.E.2d 406 (N.C. 1992), a student was injured when he slipped and fell in a puddle of water at the employer's site. He filed a negligence action against the hospital (the employer). The hospital argued that the negligence claim was barred by the state's workers' compensation law. The court held that the plaintiff was an "apprentice" of the employer, not a student, for workers' compensation purposes, since the employer received the same benefit from the student's work as it would have from a regular employee.

Similarly, in *Hallal v. RDV Sports, Inc.*, 682 So. 2d 1235 (Fla. Ct. App. 1996), a student was injured while he was participating in an internship with the marketing office of the Orlando Magic team. Hallal sued the Magic, and the defendant raised the defense of the exclusiveness of workers' compensation as a remedy for workplace injury. Hallal denied that he was an "employee" for workers' compensation purposes, but the court disagreed, citing *Ryles*. Although Hallal did not receive a salary, he did receive \$250 from the Magic. Furthermore, said the court, even if he had not received any monetary compensation, his "participation in the internship program constituted valuable consideration in that such participation was necessary in order for him to satisfy the requirements of his degree" (682 So. 2d at 1237).

A Colorado appellate court ruled that an unpaid student intern at Colorado State University was entitled to workers' compensation benefits. In *Kinder v. The Industrial Claim Appeals Office of the State of Colorado*, 976 P.2d 295 (Colo. Ct. App. 1998), the student was injured during an internship and suffered permanent partial disability. The university had provided workers' compensation coverage for the student during her internship, and the student's medical costs had been paid. But because the student had not been paid a wage or salary, the state workers' compensation agency denied her permanent partial disability payments. The court ruled that the agency should have imputed an appropriate wage upon which to base her disability payments.

But the Supreme Court of Massachusetts rejected a student's claim that her institution owed her a duty to ensure that her internship-employer provided a safe workplace and covered her with workers' compensation insurance. In *Judson v. Essex Agricultural and Technical Institute*, 635 N.E.2d 1172 (Mass. 1994), the institute required students to find employment related to their course of study and to have the employer complete a placement agreement with the institute. The agreement stated that the employer would provide workers' compensation insurance coverage for the student, and also stated that the instructor would visit the workplace from time to time. After the plaintiff was injured falling from a barn loft, she was advised by her employer that it had not secured workers' compensation coverage for her. She sued the institute, claiming it had a duty to ensure that her employer had secured coverage for her, as well as a duty to ensure that she had a reasonably safe place to work. The court rejected both of these claims, noting that the placement agreement "merely

provided notice to the plaintiff and [the employer] that it was the plaintiff's employer's responsibility to provide such insurance." The court similarly rejected the student's claim that the placement agreement's language concerning the visits of the instructor created a duty to inspect the place of employment for safety hazards.

Graduate students are particularly likely to have a mixed status as students and employees. In *Torres v. State*, 902 P.2d 999 (Mont. 1995), for example, a doctoral student pursuing a degree in chemistry at Montana State University was also employed there as a teaching and research assistant. Claiming that exposure to toxic substances in the chemistry lab had caused her injury, Torres filed a workers' compensation claim. The claim was eventually settled under the state's Occupational Disease Act. Torres then sued the university as a student (rather than an employee) for compensation for her injuries. The Montana Supreme Court affirmed summary judgment for the university, noting that workers' compensation is the exclusive remedy for injuries to employees, and that Torres had already received compensation for her injury. Three judges dissented, believing that, because Torres had dual status as an employee and student, her damages could be apportioned between exposure as a student and exposure as an employee.

A Wisconsin case illustrates the hazards of allowing a graduate student-employee to work at an off-campus site unrelated to the actual work. In *Begel v. Wisconsin Labor and Industry Review Commission*, 631 N.W.2d 220 (Ct. App. Wis., Dist. 4, 2001), a state appellate court reversed a denial of workers' compensation benefits to a student research assistant. The student was supervised by a professor who was building a house, had no telephone, and was seldom on campus. Therefore, the student had to travel to the professor's home in order to discuss his job responsibilities. When the student visited the construction site to discuss the research project he was working on for the professor, he agreed to help the professor with the house construction. While doing so, the student was injured, rendering him a quadriplegic. When he filed a workers' compensation claim against the university, the university argued that, although the student was its employee, he was not engaged in work for the university at the time he was injured. The court ruled that the student had traveled to the construction site for work-related purposes, and that under the circumstances it was both reasonable for him to be at the professor's home and to comply with the professor's request for help. The court therefore found the injury to be compensable.

In certain situations, the college would face less financial liability if it could characterize students as employees who were limited to workers' compensation benefits when injured. For example, the Vermont Supreme Court determined that student members of a volunteer fire department sponsored by Norwich University were not covered by the state's workers' compensation laws, leaving the university potentially exposed to negligence lawsuits as a result. In *Wolfe v. Yudichak*, 571 A.2d 592 (Vt. 1989), a student volunteer fire fighter sued the university for negligence after he was injured when a fire truck skidded off the road. The court ruled that, under Vermont law, the fire brigade had the choice

of whether or not it wished to participate in the workers' compensation system, and since the brigade had not done so, the university could not unilaterally decide that its members were covered by workers' compensation. (See generally Bruce J. Berger & John R. Manthei, "Graduate Students' Injury Claims: Tort Liability or Workers Compensation and the Impact on Insurance Coverage," 26 *College L. Dig.* 9 (April 18, 1996).)

With respect to student athletes, several cases have raised the question whether a varsity scholarship athlete has an employment relationship with his institution and is therefore covered by workers' compensation when he loses the scholarship because he is injured and unable to play.<sup>26</sup> In *Rensing v. Indiana State University Board of Trustees*, 444 N.E.2d 1170 (Ind. 1983), the Supreme Court of Indiana upheld the Industrial Board of Indiana's denial of workers' compensation to a scholarship athlete who was permanently disabled by an injury received in football practice. Indiana's intermediate appellate court had overruled the board's decision (437 N.E.2d 78 (Ind. Ct. App. 1982)). In reversing the appeals court and reinstating the board's decision, the state supreme court held that "there was no intent to enter into an employer-employee relationship" when the student and the university entered into the scholarship agreement. Since the plaintiff athlete was therefore not considered an "employee" under the Indiana Workmen's Compensation Act (Ind. Code § 22-3-6-1(b)), he was not eligible for benefits under the Act. Other courts have issued similar rulings. In *Graczyk v. Workers' Compensation Appeals Board*, 229 Cal. Rptr. 494 (Cal. Ct. App. 1986), the court ruled that a student athlete who had received an athletic scholarship, and who was seriously injured during football practice, did not meet the statutory definition of "employee." In *Coleman v. Western Michigan University*, 336 N.W.2d 224 (Mich. Ct. App. 1983), the court ruled that, although an athletic scholarship was "wages," the student was not an "employee" for purposes of the state's workers' compensation act. A Texas appellate court reached a similar conclusion in *Waldrep v. Texas Employers Insurance Association*, 21 S.W.3d 692 (Ct. App. Tex., 3d Dist., 2000). (For critical commentary see A. Larson, *The Law of Workmen's Compensation*, Vol. IA, § 22.21(c) (Matthew Bender, 1993); Note, "Workers' Compensation and College Athletes: Should Universities Be Responsible for Athletes Who Incur Serious Injuries?" 10 *J. Coll. & Univ. Law* 197 (1983-84); Note, "Play for Pay: Should Scholarship Athletes Be Included Within State Workers' Compensation Systems?" 12 *Loyola L.A. Ent. L.J.* 441 (1992); and Jason Gurdus, Note, "Protection Off of the Playing Field: Student Athletes Should Be Considered University Employees for Purposes of Workers' Compensation," 29 *Hofstra L. Rev.* 907 (2001).)

The compensability of stress-related injuries has received considerable judicial attention. For example, in *Decker v. Oklahoma State Technical University*, 766 P.2d 1371 (Okla. 1988), an instructor whose relationship with his supervisor was difficult and stressful successfully argued that his heart attack should be compensated

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<sup>26</sup>Cases and authorities are collected in Donald P. Duffala, Annot., "Workers' Compensation: Student Athlete as 'Employee' of College or University Providing Scholarship or Similar Financial Assistance," 58 A.L.R.4th 1259.



as a work-related injury. (For analysis of *Decker* and other workers' compensation issues related to college faculty, see K. N. Hasty, Note, "Workers' Compensation: Will College and University Professors Be Compensated for Mental Injuries Caused by Work-Related Stress?" 17 *J. Coll. & Univ. Law* 535 (1991).)

Under most state workers' compensation statutes, employees who are injured during the commute to work are not eligible for worker's compensation. If the employee has a home office and is injured while traveling between the worksite and the home office, the injuries may be compensable. On occasion, this "second job site" exception to the exclusion of injuries incurred on the way to or from one's place of work can result in workers' compensation benefits for faculty injured at home. This theory was not successful, however, in *Santa Rosa Junior College v. Workers' Compensation Appeals Board*, 708 P.2d 673 (Cal. 1985). The professor, who often graded papers and prepared for class at home because his office was noisy, was killed in an automobile accident on his way home from the college. The court denied benefits to his widow, ruling that the college did not require the professor to work at home and thus his home was not a second job site. Advances in technology that permit telecommuting have tested the boundaries of workers' compensation law. (For a review of litigation in this area, see Matthew B. Duckworth, Comment: "The Need for Workers' Compensation in the Age of Telecommuters," 5 *J. Small & Emerging Bus. L.* 403 (2001).) Other legal issues related to telecommuting are discussed in Section 4.2.2, above.

Although the employer is shielded from negligence claims, nonemployee visitors in the workplace, including the unborn children of employees, are not bound by the exclusivity rule. For example, if a pregnant employee is injured at work and the unborn child suffers physical or mental injuries as a result, the employer may not be immune from negligence claims because the child is not an employee and its injuries are distinct from those of the mother (*Meyer v. Burger King Corporation*, 26 P.3d 925 (Wash. 2001)). Thus, a college could face negligence liability for injuries to a fetus occasioned by a work-related injury to a pregnant employee, even though the college would be immune from litigation concerning the employee's injuries.

Employees with work-related injuries may also seek protections under the Americans With Disabilities Act (see Section 5.2.5). The Equal Employment Opportunity Commission has issued an Enforcement Guidance that discusses the interaction between the two systems of protection: *EEOC Enforcement Guidance: Workers' Compensation and the ADA* (September 1996) (available at <http://eeoc.gov/docs/workcomp>).

**4.6.7. Unemployment compensation laws.** Federal law requires most postsecondary institutions, public or private, to make contributions to a state unemployment insurance program. Every state has a law, tailored to guidelines in the Federal Unemployment Tax Act (FUTA, 26 U.S.C. § 3301 *et seq.*), regulating the collection of unemployment taxes and the payment of unemployment benefits. The FUTA imposes a payroll tax on employers of 6.2 percent of the first \$7,000 in wages of every covered employee; those employers operating in a state

whose unemployment tax law tracks the requirements of FUTA receive a credit of up to 5.4 percent for any unemployment taxes they have paid to the state. Participating colleges are treated the same as other employers in the state. Even religiously affiliated colleges are typically required to participate in the unemployment compensation system (see, for example, *Salem College & Academy v. Employment Division*, 695 P.2d 25 (Ore. 1985), in which the Oregon Supreme Court rejected the college's claim that participation in the unemployment compensation system was a burden on the free exercise of religion).

State unemployment laws define the nature of "employment" and specify how long an individual must have been employed and how much the employee must have earned prior to becoming eligible for unemployment benefits. In most states, claimants must wait a week after losing their job prior to collecting unemployment benefits. Benefits typically extend for twenty-six weeks, although the payment period is occasionally extended in times of economic recession. Unemployment benefits are usually approximately 50 percent of the individual's prior weekly wage, with a statutory maximum.

Although a college's employees who work a full calendar year would typically be covered by the unemployment insurance system, it is less clear whether academic-year employees are eligible for unemployment compensation in the summer. The legal standard in most states is whether the claimant has a reasonable assurance of returning to his or her former position at the beginning of the next academic year.<sup>27</sup> This is a factual issue, and courts examine contracts, offer letters, handbooks, and an employer's past practice. In most cases, the courts have rejected the claims of academic year employees, even if their employment for the subsequent year is contingent on sufficient enrollments (see, for example, *Emery v. Boise State University and Embry Riddle Aeronautical*, 32 P.3d 1112 (Idaho 2001); see also *In re Claim of Doru Tsaganea*, 720 N.Y.S.2d 585 (Supreme Ct. N.Y., App. Div., 3d Dept., 2001)). On the other hand, a court in Washington ruled that, because a community college teacher had not been asked to teach during summer quarter, and had not been advised as to any employment for the fall quarter, she was entitled to unemployment insurance benefits after completing her teaching in the spring (*Evans v. Employment Security Dept.*, 866 P.2d 687 (Ct. App. Wash. 1994)). Since the intervening summer term was a regular term, rather than a break between terms, she was found eligible. In most states, academic year employees are not eligible for unemployment compensation during semester breaks if they have a reasonable assurance of returning to teaching after the break (see, for example, *Community College of Allegheny County v. Unemployment Compensation Board of Review*, 634 A.2d 845 (Pa. Commw. 1993), *app. denied*, 653 A.2d 1234 (Pa. 1994)).

The laws of most states deny unemployment benefits to individuals who are on strike. New York, however, allows striking employees to receive unemployment compensation if the strike lasts longer than seven weeks. In *In re*

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<sup>27</sup>Cases and authorities are collected in Pataricia C. Kussman, Annot., "Right to Unemployment Compensation or Social Security Benefits of Teacher or Other School Employee," 33 A.L.R.5th 643.

*Goodman and Barnard College*, 709 N.Y.S.2d 884 (N.Y. 2000), the court ruled that, because the striking academic year employees had not received the usual rehire letter from the college during the strike, which had taken place during the summer, they were entitled to unemployment benefits.

The laws of each state list criteria for disqualifying an otherwise eligible employee from obtaining unemployment benefits. For example, individuals who leave work for personal reasons may be denied unemployment benefits in most states. In *Wimberly v. Labor and Industrial Commission of Missouri*, 479 U.S. 511 (1987), the U.S. Supreme Court upheld a provision of Missouri's unemployment law that included a resignation because of pregnancy in a list of reasons for disqualifying voluntary separation from employment. The Court rejected the plaintiff's argument that disqualification of persons who left because of pregnancy constituted sex discrimination. Although the state could not single out pregnancy for harsher treatment, the Court held, the state could characterize a resignation because of pregnancy as a "voluntary" separation. Similarly, individuals who refuse to perform certain required tasks may be denied benefits in most states. In *Stapp v. Review Board of the Indiana Employment Security Division*, 521 N.E.2d 350 (Ind. Ct. App. 1988), the court ruled that a laboratory technician who refused to perform tests on AIDS-infected fluids could be denied unemployment benefits. The technician had refused to perform the tests on the grounds that AIDS was a "plague on men" and thus the tests were against God's will. Challenging her discharge for insubordination, the technician claimed that she had the right to refuse to perform unsafe work. The court disagreed, ruling that the laboratory's safety procedures were appropriate and did not justify her insubordination. (She had not made a claim on the grounds of religious discrimination.) And employee misconduct, such as theft or dishonesty, may also be grounds for denial of unemployment benefits (see, for example, *Temple University v. Unemployment Compensation Board of Review*, 772 A.2d 416 (Pa. 2001) (falsification of time card); and *In Re Claim of Arlene Egelberg*, 664 N.Y.S.2d 186 (N.Y. Ct. App. 1997) (failure of instructor to report for class in violation of college policy)).

Many state laws exclude full-time college students from eligibility for unemployment compensation. In *Pima Community College v. Arizona Department of Economic Security*, 714 P.2d 472 (Ariz. Ct. App. 1986), for example, the court was asked to determine whether a former student who had been employed by the college under the federal work-study program was a student or an employee for eligibility purposes. The court ruled that the individual was a student and thus ineligible for unemployment compensation.

**4.6.8. Whistleblower protections.** Employees who believe they have been subjected to negative employment action because they reported a workplace problem are protected by a variety of legal doctrines. Courts in most states allow certain employees to bring tort claims for wrongful discharge "in violation of public policy" if they have been terminated or penalized due to whistleblowing. In addition, all fifty states and the District of Columbia have some form of statutory protection for whistleblowers, although the scope of protection and

the range of employees protected vary considerably by state. Several federal laws also provide protection for whistleblowers.

The federal protections are found in environmental, labor, and workplace health and safety laws that prohibit retaliation against workers who report suspected violations of these laws to appropriate federal regulatory agencies. For example, the Safe Drinking Water Act (42 U.S.C. § 9610) and the Toxic Substances Control Act (15 U.S.C. § 2622) contain such provisions. Labor relations laws, such as the Fair Labor Standards Act (see Section 4.6.2) and the National Labor Relations Act (see Section 4.5.2) also contain antiretaliation provisions. OSHA (see Section 4.6.1 of this book) provides protection for employees who report their employers' alleged health or safety violations.

In addition, the False Claims Act (31 U.S.C. § 3729–30), discussed in Section 13.2.15, allows individuals, including employees, to file claims against federal contractors for alleged misuse of federal funds. This law has been used frequently in recent years by college faculty and staff to challenge allegedly inappropriate use of federal research funds.

Most whistleblowers, however, will attempt to use either the common law “public policy” claim or will file claims under a state whistleblower law. Those individuals who choose to proceed under the common law tort claim (perhaps because the potential damage awards are higher than under state statutes) must be able to articulate a recognized source of public policy, such as a statute, constitutional provision, or professional code of ethics. For example, if an individual were discharged for complaining that an employer was violating the criminal law, such a complaint, if proven, would support a claim of wrongful discharge on the grounds of public policy (see *Shea v. Emmanuel College*, 682 N.E.2d 1348 (Mass. 1997)). On the other hand, an employee who simply disagreed with an employer's action could not avail herself of this theory if the employer's action was not unlawful or unsafe (see *Pierce v. Ortho Pharmaceutical*, 417 A.2d 505 (N.J. 1980)).

Although state whistleblower laws vary, individuals attempting to use these laws to challenge terminations or discipline will generally be required to demonstrate:

- that the employer has engaged in some behavior that is allegedly unsafe, unlawful, or a violation of public policy
- that the employee has notified a supervisor or other employer representative of the problem (although some laws waive this requirement if it is an emergency or the employee reasonably anticipates physical harm as a result of the report)
- that the employer has taken no action or inadequate action
- that the employee has notified the proper authority (for example, the police, the health department, a state or federal agency charged with the responsibility of preventing or curing the problem the employee has identified) (although some courts exempt employees from this requirement if the notification has been made to an appropriate individual inside the organization), and

- that the employer has taken some adverse employment action as a direct result of the employee's complaint (such as discipline, termination, involuntary transfer, failure to promote when a promotion is due, salary reduction or denial of a salary increase to which the employee is otherwise entitled)

For example, in *University of Houston v. Elthon*, 9 S.W.3d 351 (Ct. App. Tex. 1999), a professor and chair of the chemistry department complained to the dean of alleged ethical violations by his faculty colleagues. The dean took no action on the complaints. The professor complained to the provost and was later denied a salary increase on the recommendation of the dean and the provost. The professor filed a lawsuit under the Texas Whistleblower Act (Tex. Gov't. Code Ann. §§ 554.001–.009), and the university sought dismissal of the case, asserting that the professor should have used the institution's internal grievance procedure. Both the trial and appellate courts refused to dismiss the lawsuit, finding that the professor had used the university's ethical code and its procedures, which were sufficient to satisfy the Whistleblower Act's requirement that an individual must use an internal grievance or appeal procedure before suing under the law.

Similarly, in *Barrett v. University of Texas Medical Branch at Galveston*, 112 S.W.3d 815 (Tex. Ct. App. 2003), a physician whose appointments at the university and its affiliated hospital were not renewed challenged the nonrenewal under the Texas Whistleblower Act, alleging that complaints about colleagues' violations of hospital rules led to the nonrenewal. The appellate court reversed a trial court's award of summary judgment for the university and ordered that the whistleblower claim to be tried.

In contrast, in *Zinno v. Patenaude*, 770 A.2d 849 (R.I. 2001), Zinno, a staff employee at Brown University, reported an alleged work-related injury and was provided workers' compensation benefits for a year. Benefits were terminated when an orthopedic consultant retained by the university determined that Zinno's physical problems were not work related. Concurrently, Zinno had complained to his supervisors about alleged violations of the Occupational Safety and Health Act. Zinno claimed that he was forced into early retirement in retaliation for his OSHA complaints. The court found that Zinno had never complained, or threatened to complain, to OSHA, and therefore his conduct did not satisfy the requirements of the Rhode Island Whistleblowers' Protection Act.

Litigation by "whistleblowers" against public colleges or universities often includes allegations of First Amendment violations. These claims are generally analyzed under the *Pickering/Connick* line of cases and the *Mt. Healthy* line of cases, both concerning the free speech rights of public employees (see Sections 7.1.1 & 7.6). Unless the plaintiff can demonstrate that (1) the termination or discipline was a response to his or her speech activities and (2) that the speech was a matter of public concern, the plaintiff typically will not prevail. See, for example, *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996), in which the court rejected both the free speech and whistleblowing complaints of a staff member whose contract was not renewed after her conflicts with several staff members "threw the whole college into turmoil," according to the court. But

in *Jones v. Board of Regents of the University System of Georgia*, 585 S.E.2d 138 (Ga. App. 2003), although the court rejected the First Amendment claim of a former public safety director at Augusta State University, it allowed his claim that he had been dismissed for exposing police corruption to be tried under the state whistleblower act.

Closely related to whistleblower claims are claims that an employer retaliated against an employee for having exercised statutory rights, such as filing an employment discrimination claim. Plaintiffs are often more successful with retaliation claims than with the underlying discrimination claim. Retaliation claims and discrimination claims are both discussed in Sections 5.2.1 & 13.5.7.5.

Given the myriad protections available to employees who report real or imagined employer wrongdoing, colleges should train managers and supervisors to respond to whistleblower complaints appropriately and to document their responses. No response, or a response that indicates that the supervisor does not take the complaint seriously, can lead to litigation and to liability, even if the underlying “threat” was a product of the employee’s imagination.

#### **4.6.9. Uniformed Services Employment and Reemployment Rights Act.**

Veterans of U.S. wars enjoy special protections under state civil service laws (Section 4.4) and under federal law as well. Congress has amended the laws providing employment and reemployment rights for veterans several times. In addition, individuals who are eligible for military duty, or whose reserve or national guard units are activated, are also protected by federal law.

The basic thrust of these laws is to prohibit discrimination against individuals on the basis of eligibility for military service and to provide reemployment rights for individuals who must leave their jobs to serve on active duty in the military. The Veterans Readjustment Benefits Act (Pub. L. No. 89-358 (1966)), amended by the Vietnam Era Veterans Readjustment Assistance Act of 1974 (Pub. L. No. 93-508, codified at 38 U.S.C. § 4212 *et seq.*), requires that employers who receive \$100,000 or more in federal contracts “shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era” (39 U.S.C. § 4121(a)). Another law, first enacted in 1954 and modified, retitled, and recodified several times since then, is now entitled “Uniformed Services Employment and Reemployment Rights Act” (USERRA) (38 U.S.C. § 4301 *et seq.*). This law requires that all employers (defined as “any person, institution, organization, or other entity that pays salary or wages for work performed . . .” as well as the state and federal governments) (38 U.S.C. § 4304(4)(A)(I)) may not discriminate against any applicant or employee who has performed or who has an obligation to perform military service, and must restore individuals covered by these laws to their previous positions or similar ones, unless the employer can demonstrate that such restoration is impossible or unreasonable. Amendments added in 1991 (Pub. L. No. 102-25) require the employer to retrain returning veterans for their previous positions, if necessary; the amendments also regulate the provision of employer-offered health insurance for such individuals. In *King v. St. Vincent’s Hospital*, 502 U.S. 215 (1991), the U.S. Supreme Court ruled unanimously that the Veterans’ Reemployment Rights Act did not limit the amount of time

individuals may serve on active duty before they lose the right to be restored to their former position. However, Congress amended this law in 1994 to limit the reinstatement protections to those veterans absent from their jobs for five years or less (38 U.S.C. § 4312, added by Pub. L. 103-353, 108 Stat. 3150 (1994)), and retitled the law the Uniformed Service Employment and Reemployment Rights Act.

USERRA provides that an employee returning from military leave with an honorable discharge is entitled to reemployment if:

1. The individual reports for work within ninety days of being relieved of his or her service obligations;
2. The individual has a certificate of completion of military service; and
3. The individual is qualified to perform his or her former job, or can become requalified without imposing undue hardship on the employer.

Exceptions to the reemployment requirement may be allowed if the employer's circumstances have so changed as to make reemployment impossible or unreasonable, or if the original employment was short term with no reasonable expectation of continued employment. These protections apply whether or not the employee's military service is voluntary or involuntary.

USERRA was further amended in 1998 to confer jurisdiction over lawsuits against a state employer only on state courts (Pub. L. No. 105-368, 112 Stat. 3315 (1998)). This provision is now unconstitutional due to the U.S. Supreme Court's ruling in *Alden v. Maine* (discussed in Section 13.1.6), which recognizes constitutional immunity for states against federal law claims filed in state court. Attempts by employees to file USERRA claims against state employers subsequent to *Alden* have been unsuccessful. (See, for example, *Larkins v. Dept. of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001).)

In response to *Alden*, Congress passed Section 211 of the Veterans Programs Enhancement Act (Pub. L. No. 105-368, 112 Stat. 3315, 3331, codified at 38 U.S.C. § 4323). This amendment allows the U.S. Department of Justice to sue a state employer on behalf of one or more state employees, which makes the United States the plaintiff and avoids the sovereign immunity problem. This strategy requires that the Justice Department first make a finding that the employee's case has legal merit. If the U.S. government prevails, it pays the damages it has received to the aggrieved employee. (For a discussion of employees' options if the Justice Department declines to act as plaintiff in a USERRA claim against a state employer, see "TJAGSA Practice Note: USERRA Note," 1999 *Army Lawyer* 52 (1999).)

The 1998 USERRA amendments also extended the reach of the act to U.S. citizens working in other countries for U.S.-owned companies and for foreign-owned companies that are "controlled" by a U.S. employer. Regulations related to this amendment are found at 5 C.F.R. § 353.103, "Restoration to Duty from Uniformed Service."

Final regulations interpreting the USERRA were published by the U.S. Department of Labor on December 19, 2005, and may be found at 29 C.F.R. Part 1002.

Information for employers and members of military reserve units on the protections of the USERRA can be found at the Web site of the National Committee for Employer Support of the Guard and Reserve (ESGR) at <http://www.esgr.org>. This Web site contains an “Employer Resource Guide” and describes its ombudsman service for the voluntary, informal resolution of disputes between returning veterans and their employers. The U.S. Department of Labor Web site also contains information about the USERRA at <http://www.dol.gov/elaws/userra.htm>.

## ***Sec. 4.7. Personal Liability of Employees***

**4.7.1. Overview.** Although most individuals seeking redress for alleged wrongs in academe sue their institutions, they may choose to add individuals as defendants, or they may sue only the person or persons who allegedly harmed them. Most colleges have indemnification policies that provide for defending a faculty or staff member who is sued for acts that occurred while performing his or her job. (For a discussion of indemnification, see Section 2.5.3.2.)

Individuals may face personal liability under various common law claims, such as negligence, defamation, intentional or negligent infliction of emotional distress, or fraud. And although courts have ruled that individuals typically are not liable for violations of federal nondiscrimination laws such as Title VII or the ADEA, since these laws impose obligations on the “employer,” not on managers or individuals, some state courts have imposed individual liability under state nondiscrimination laws (see, for example, *Matthews v. Superior Court*, 40 Cal. Rptr. 2d 350 (Cal. App. 2 Dist. 1995), holding supervisors who participated in sexual harassment individually liable under California’s Fair Employment and Housing Act). Other federal laws, such as Sections 1981 and 1983 of the Civil Rights Act (see Sections 3.5 & 5.2.4) do provide for individual liability. In addition, whistleblower laws in some states provide for individual liability of managers or supervisors.

Individuals may also face liability for intentional torts. For example, in *Minger v. Green*, 239 F.3d 793 (6th Cir. 2001), a federal appellate court applying Kentucky law ruled that the associate director of the housing office at Murray State University was not immune from personal liability in a wrongful death suit brought by the deceased student’s mother. The associate director was accused of intentionally misrepresenting the seriousness of an earlier fire in the student’s residence hall to his mother; the mother claimed that had she known that the first fire had been set by an arsonist, she would have removed her son from the residence hall, thus preventing his death when the arsonist returned and set a subsequent fire five days later.

Individuals may also face liability when they enter contracts on behalf of the college or university. Personal contract liability is discussed in Section 4.7.3 below.

### ***4.7.2. Tort liability***

**4.7.2.1. Overview.** An employee of a postsecondary institution who commits a tort may be liable even if the tort was committed while he or she was



conducting the institution's affairs.<sup>28</sup> The individual must actually have committed the tortious act, directed it, or otherwise participated in its commission, however, before personal liability will attach. The individual will not be personally liable for torts of other institutional agents merely because he or she represents the institution for whom the other agents were acting. The elements of a tort and the defenses against a tort claim (see Section 3.3.2) in suits against the individual personally are generally the same as those in suits against the institution. An individual sued in his or her personal capacity, however, is usually not shielded by the sovereign immunity and charitable immunity defenses that sometimes protect the institution.

If an employee commits a tort while acting on behalf of the institution and within the scope of the authority delegated to him or her, both the individual and the institution may be liable for the harm caused by the tort. But the institution's potential liability does not relieve the individual of any measure of liability; the injured party could choose to collect a judgment solely from the individual, and the individual would have no claim against the institution for any part of the judgment he or she was required to pay. However, where individual and institution are both potentially liable, the individual may receive practical relief from liability if the injured party squeezes the entire judgment from the institution or the institution chooses to pay the entire amount.

If an employee commits a tort while acting outside the scope of delegated authority, he or she may be personally liable but the institution would not be liable (Section 3.3.1). Thus, the injured party could obtain a judgment only against the individual, and only the individual would be responsible for satisfying the judgment. The institution, however, may affirm the individual's unauthorized action ("affirmance" is similar to the "ratification" discussed in connection with contract liability in Section 3.4), in which case the individual will be deemed to have acted within his or her authority, and both institution and individual will be potentially liable.

Employees of public institutions can sometimes escape tort liability by proving the defense of "official immunity." For this defense to apply, the individual's act must have been within the scope of his or her authority and must have been a discretionary act involving policy judgment, as opposed to a "ministerial duty" (involving little or no discretion with regard to the choices to be made). Because it involves this element of discretion and policy judgment, official immunity is more likely to apply to a particular individual the higher in the authority hierarchy he or she is.

State tort claims acts may also define the degree to which public employees will be protected from individual liability. For example, the Georgia Tort Claims

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<sup>28</sup>Cases and authorities are collected in Christopher Bello, Annot., "Personal Liability of Public School Teacher in Negligence Action for Personal Injury or Death of Student," 34 A.L.R.4th 228; Annot., "Personal Liability of Public School Executive or Administrative Officer in Negligence Action for Personal Injury or Death of Student," 35 A.L.R.4th 272; Annot., "Personal Liability in Negligence Action of Public School Employee, Other Than Teacher or Executive or Administrative Officer, for Personal Injury or Death of Student," 35 A.L.R.4th 328.

Act has been interpreted by that state's courts as extending immunity in two cases to the department chair and academic vice president at Gordon College who recommended that one professor be denied tenure (*Hardin v. Phillips*, 547 S.E.2d 565 (Ga. Ct. App. 2001)) and that an untenured professor be fired for neglect of duty and insubordination (*Wang v. Moore*, 544 S.E.2d 486 (Ga. Ct. App. 2001)).

**4.7.2.2. Negligence.** Although the institution is typically the defendant of choice in a negligence claim, faculty and staff are occasionally found liable for negligence if their failure to act, or their negligent act, contributed to the plaintiff's injury. The elements of a tort claim (discussed in Section 3.3.1) are the same for suits against institutions and suits against individuals. But employees of public institutions may enjoy immunity from liability, while employees of private institutions may not (unless they are shielded by charitable immunity, also discussed in Section 3.3.1). For example, in *Defoor v. Evesque*, 694 So. 2d 1302 (Ala. 1997), the Supreme Court of Alabama ruled that an employee of a public college was not immune from personal tort liability in relation to a slip-and-fall claim. The college had entered a contract with USX Corporation to provide testing services for individuals applying for certain jobs at USX. A college administrator hired Evesque to administer the tests. Although Evesque usually made certain that there was no spilled hydraulic fluid in the testing area, on the day that Defoor took his test, fluid was spilled on the floor, and Defoor fell, sustaining injuries. Although the college and USX were absolved from potential liability, Evesque was not, because the court characterized his duty to clean up the spill "ministerial" rather than "discretionary." The court explained that cleaning the site "involved no marshaling of State resources, no prioritizing of competing needs, no planning, and no exercise of policy-level discretion" (694 So. 2d at 1306).

Medical professionals and counselors may face individual liability for alleged negligence in treating student patients. In a widely reported case, *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the parents of a girl murdered by a psychiatric patient at the university hospital sued the university regents, four psychotherapists employed by the hospital, and the campus police. The patient had confided his intention to kill the daughter to a staff psychotherapist. Though the patient was briefly detained by the campus police at the psychotherapist's request, no further action was taken to protect the daughter. The parents alleged that the defendants should be held liable for a tortious failure to confine a dangerous patient and a tortious failure to warn them or their daughter of a dangerous patient. The psychotherapists and campus police claimed official immunity under a California statute freeing "public employee(s)" from liability for acts or omissions resulting from "the exercise of discretion vested in [them]" (Cal. Govt. Code § 820.2). The court accepted the official immunity defense in relation to the failure to confine, because that failure involved a "basic policy decision" sufficient to constitute discretion under the statute. But regarding the failure to warn, the court refused to accept the psychotherapists' official immunity claim, because the decision whether to warn was not a basic policy decision. The campus police needed no official

immunity from their failure to warn, because, the court held, they had no legal duty to warn in light of the facts in the complaint. (For a discussion of the continuing viability of *Tarasoff*, despite rulings by other state courts that have rejected its outcome, see Peter F. Lake, “Virginia Is Not Safe for ‘Lovers’: The Virginia Supreme Court Rejects *Tarasoff* in *Nasser v. Parker*,” 61 *Brooklyn L. Rev.* 1285 (1995).)

The Supreme Court of Rhode Island, addressing a similar issue, ruled that a jury must determine whether a psychologist was individually liable. In *Klein v. Solomon*, 713 A.2d 764 (R.I. 1998), the mother of a Brown University student who had committed suicide filed a negligence suit against the university, the psychologist who had diagnosed her son as having suicidal tendencies, and another counselor to whom the psychologist had referred the son. She alleged that the psychologist was negligent in referring her son to a list of four therapists, none of whom specialized in suicide prevention, and none of whom could prescribe medication. The court affirmed a summary judgment for the university with respect to its own liability, but reversed the lower court’s summary judgment award to the psychologist. The court stated that a jury could have concluded that the psychologist was negligent in failing to refer the student to someone who was qualified to treat him for suicidal tendencies. (For a discussion of a preliminary ruling in *Shin v. MIT*, in which the university was found not liable for a student’s suicide but the judge allowed the case to proceed against individual defendants, see Section 3.3.2.5.)

Malpractice claims against doctors employed by hospitals affiliated with public institutions provide a potential opportunity for an immunity defense. The breadth of coverage is dependent upon state law. For example, in *Rivera v. Hospital Universitario*, 762 F. Supp. 15 (D.P.R. 1991), the court applied Puerto Rico law to determine that medical school professors who worked part time as attending physicians at the university hospital were employees, not independent contractors, and thus shared the university’s governmental immunity.

On the other hand, the Supreme Court of Virginia in *James v. Jane*, 282 S.E.2d 864 (Va. 1980), rejected a defense of sovereign immunity asserted by physicians who were full-time faculty members at the state university medical center and members of the hospital staff. The defendants had argued that, as state employees, they were immune from a suit charging them with negligence in their treatment of certain patients at the university’s hospital. The trial court accepted the physicians’ defense. Although agreeing that under Virginia law certain state employees and agents could share the state’s own sovereign immunity, the Virginia Supreme Court reversed the trial court and refused to extend this immunity to these particular employees.

In reaching its decision, the appellate court analyzed the immunity defense and the circumstances in which its assertion is appropriate, concluding that immunity was appropriate for officials such as the governor, state officials, and judges. Furthermore, said the court, if a state employee is acting on behalf of the state by “exercis[ing] broad discretionary powers, often involving both the determination and implementation of state policy,” then immunity is appropriate. If, however, the state employee is engaged in an activity that is also

performed in the private sector, immunity may not be appropriate. The court concluded that because the state exercised minimal control over the work of the doctors, they were not entitled to the state's immunity defense.

The "sovereign" or "state employee" immunity thus created by the Virginia court is potentially broader than the "official immunity" recognized in some other jurisdictions. In states recognizing "official immunity," the likelihood of successfully invoking the defense is, as mentioned, proportional to the officer's or employee's level in the authority hierarchy. This official immunity doctrine seeks to protect the discretionary and policy-making functions of higher-level decision makers, a goal that the *James v. Jane* opinion also recognized. The sovereign immunity defense articulated in *James*, however, encompasses an additional consideration: the degree of state control over the employee's job functions. In weighing this additional factor, the Virginia sovereign immunity doctrine also seeks to protect state employees who are so closely directed by the state that they should not bear individual responsibility for negligent acts committed within the scope of this controlled employment. Sovereign immunity Virginia-style may thus extend to lower-echelon employees not reached by official immunity. Although *James* held that this theory does not apply to physicians treating patients in a state university medical center, the theory could perhaps be applied to other postsecondary employees—such as middle- or low-level administrative personnel (*Messina v. Burden*, 321 S.E.2d 657 (Va. 1984), concerning the superintendent of buildings at a community college) or support staff.

Although *James* is binding law only in Virginia, it illustrates nuances in the doctrine of personal tort immunity that may also exist, or may now develop, in other states. When contrasted with the cases relying on the official immunity doctrine, *James* also illustrates the state-by-state variations that can exist in this area of the law. (For a contrasting view and a different result in a case with similar facts, see *Sullivan v. Washington*, 768 So. 2d 881 (Miss. 2000).)

Because state immunity is a matter of state law, the application and interpretation of this doctrine differ among the states. For example, a federal appellate court found several members of the athletic staff protected by a qualified immunity against liability for negligence in the death of a student. In *Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988), a football player at the University of Southern Mississippi collapsed during practice and died shortly thereafter. The court applied Mississippi's qualified immunity for public officials performing discretionary, rather than ministerial, acts to the trainer, the team physician, and the football coach, finding that the first two were performing a discretionary act in administering medical treatment to the student. The coach was entitled to qualified immunity because of his general authority over the football program. Noting that "a public official charged only with general authority over a program or institution naturally is exercising discretionary functions" (849 F.2d at 964), the court denied recovery to the plaintiff.

Other potential sources of individual liability for alleged negligence include claims of negligent hiring, supervision, and retention. Employer liability for these claims is discussed in Section 3.3.5; individuals may also be found liable

under these theories. (For a discussion of the standards applied to a claim of negligent supervision, see *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002) (supervisor not personally liable for negligent supervision because he had neither actual nor constructive notice that subordinate would secretly videotape an individual while at work).)

**4.7.2.3. Defamation.** As discussed in Section 3.3.4, claims that an oral or written communication resulted in injury to an individual are a rapidly increasing area of litigation for colleges. College employees may face individual liability for defamation as well. Administrators and faculty have been sued for defamation by both faculty and students who allege that oral or written statements made by college employees have derailed academic careers or have interfered with employment opportunities.

Defamation claims brought by faculty and staff against college officials who have been critical of their work performance or their behavior have proliferated over the past few years, but few have been successful. Plaintiffs must meet a four-part test (discussed in Section 3.3.4) in order to make a claim of defamation. In some cases, courts have found that the communication was not defamatory, either because it did not harm the individual's reputation, or because the information in the communication was too general to cause harm to the plaintiff, or because the allegedly defamatory information was true. For example, in *Constantino v. University of Pittsburgh*, 766 A.2d 1265 (Pa. Super. 2001), a department chair who wrote a letter stating that there were "problems" with a faculty member's teaching was found not to have defamed the faculty member because the letter was sent to officials who were responsible for evaluating the plaintiff's performance, and the statements were general in nature. And in *Wynne v. Loyola University of Chicago*, 741 N.E.2d 669 (Ill. Ct. App. 1st Dist. 2000), an Illinois appellate court ruled that the faculty author of a letter discussing a department chair's alleged psychological problems and unpleasant behavior could not be found liable for defamation, even though the letter was circulated to departmental colleagues, because the plaintiff had admitted that the information in the letter was true, and the court characterized some of the author's statements as opinion.

Defendants who are employed by public colleges or universities may be shielded by state law official immunity. *Staheli v. Smith*, 548 So. 2d 1299 (Miss. 1989) provides an example of the application of state law official immunity. The Supreme Court of Mississippi was asked to determine whether the dean of the School of Engineering at the University of Mississippi was a public official for purposes of governmental immunity against a defamation lawsuit. A faculty member had sued the dean, stating that a letter from the dean recommending against tenure for the plaintiff was libelous. The court found that the dean was, indeed, a public figure and thus protected by qualified government immunity. Since the faculty handbook authorized administrators to make "appropriate" comments, and since making a subjective evaluation of a faculty member's performance is a discretionary, rather than a ministerial, duty, the court found that the dean had acted within the scope of his authority and had not lost the immunity by exceeding his authority.

Employees acting within the scope of their authority may also be protected by a common law privilege for communications between persons sharing a common duty or interest, such as communications between individuals within a business or an academic organization. In *Kraft v. William Alanson White Psychiatric Foundation*, 498 A.2d 1145 (D.C. 1985), the court applied an “absolute privilege” to communications among faculty members about the plaintiff’s inadequate academic performance in a postgraduate certificate program. The court stated: “A person who seeks an academic credential and who is on notice that satisfactory performance is a prerequisite to his receipt of that credential consents to frank evaluation by those charged with the responsibility to supervise him” (498 A.2d at 1149). Despite the court’s application of an “absolute” privilege in *Kraft*, the more typical approach is for a court to consider whether the communication should be protected by a “qualified” or “conditional” privilege, which may be lost if the confidential information is shared with one or more individuals who do not have a business-related reason to receive the information.

In *Gernander v. Winona State University*, 428 N.W.2d 473 (Minn. Ct. App. 1988), a female associate professor denied promotion sued her department chair, claiming that a memo he wrote to her and distributed to higher-level administrators was defamatory. The court rejected the claim on several grounds. First, the plaintiff had requested the promotion and thus “opened herself” to evaluation. Second, the memo had a limited audience and thus did not meet the “publication” requirement for defamation (see Section 3.3.4). And third, the memo expressed the chair’s opinion, and thus was protected by the First Amendment.

Characterizing statements as opinion, however, may not provide complete protection against liability for defamation. A ruling by the U.S. Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), suggests that this “opinion privilege” to defamation liability may not be legally sound when applied to a “public figure” (see Section 3.3.4). The plaintiff claimed that an article in which he was portrayed as a perjurer was defamatory. The defendant, a newspaper, asserted an “opinion privilege” as its entire defense to the defamation claim. In an opinion by Chief Justice Rehnquist, the Supreme Court denied that any constitutional “opinion privilege” existed, although it said that “statements on matters of public concern must be provable as false before liability attaches,” at least in situations where “a media defendant is involved” (497 U.S. at 19). Although future nonmedia defendants may attempt to limit *Milkovich* to its narrow facts, the opinion’s wholesale rejection of a constitutional “opinion privilege” appears to apply to all defendants, not just the media.

Certain university administrators or trustees may be viewed as “public figures” by a court; in such instances they would have to demonstrate that an employee who allegedly defamed them had acted with “actual malice” in publishing the defamatory information. The constitutional standard that a public figure must meet was established by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the court defined “actual malice” to include knowledge of the falsity of the statement or reckless disregard for its truth or falsity. Athletics coaches, university trustees and administrators, and even prominent faculty have sometimes been determined to be public figures,

in which case public comment on their activities or decisions must meet the “actual malice” standard in order to be actionable.

Faculty and staff at public colleges may also be provided a form of immunity from liability for defamation by provisions in state personnel laws. For example, in *Fieno v. State of Minnesota*, 567 N.W.2d 739 (Ct. App. Minn. 1997), an associate dean, Fieno, was terminated after her supervisor, the dean, gave her a very negative performance evaluation. Fieno sued the college and the dean for, among other claims, defamation. The court applied Minnesota statute, Section 13.43, subdivision 2, which affords absolute immunity from defamation actions to persons who disclose public personnel data that are not protected from disclosure by that law, such as complaints against a public employee. Characterizing the negative performance evaluation as a “complaint” against the employee, the court ruled that the dean was immune from liability.

Written or oral statements made in the course of litigation or settlement agreements may also be protected by an absolute judicial privilege. (For a discussion of the application of this privilege to a defamation claim concerning letters of apology made in a settlement of a sexual harassment lawsuit, see *Sodergren v. The Johns Hopkins University Applied Physics Laboratory*, 773 A.2d 592 (Ct. Spec. App. Md. 2001).)

But simply because an internal investigation is involved does not subject the allegedly defamatory statements to an absolute privilege. In *Arroyo v. Rosen*, 648 A.2d 1074 (Md. App. 1994), a faculty member sued his former postdoctoral fellow for defamation. Dr. Rosen chaired the Department of Pharmacology and Toxicology at the University of Maryland at Baltimore, where Dr. Arroyo was employed as a postdoctoral fellow and then as a research associate. The two scientists worked together on a project, and Arroyo drafted a paper, based on the research, listing herself as first author and Rosen as a coauthor. She submitted it to a journal; it was returned for revision. Although Rosen asked to see the reviewers’ comments, Arroyo revised the paper and resubmitted it without showing it to Rosen. Rosen was concerned because he did not believe that their data supported the conclusions that Arroyo had drawn in the paper. Although the paper had been accepted for publication, Rosen asked Arroyo to withdraw it. She appealed to the pharmacy dean, who had the paper reviewed by external experts, who in turn agreed with Rosen’s concerns. Arroyo then filed charges of scientific misconduct against Rosen with the U.S. Department of Health and Human Services; she also sent a letter to forty-three colleagues around the United States accusing Rosen of misconduct. Two investigations—one internal and one by his funding agency—cleared Rosen of all the charges. Arroyo continued her campaign against Rosen, and apparently provided a journalist with confidential material from the investigation. Rosen sued Arroyo for defamation and invasion of privacy. A jury found for him on both claims and also awarded him \$25,000 in punitive damages.

On appeal, Arroyo claimed that her acts were privileged because they were related to the investigation. She attempted to use the absolute privilege afforded to witnesses when testifying in a judicial proceeding. The court rejected this argument, stating that a university hearing does not have the trappings of a

judicial process (witnesses are not under oath or subject to cross-examination, the unavailability of discovery, and the lack of a record of the hearing). The appellate court affirmed the jury's finding that Arroyo had exhibited actual malice in her statements because she knew that they were false, or did not attempt to ascertain whether or not they were false. The court also found sufficient evidence of malice in Arroyo's act of providing confidential information from the hearing to a colleague and to a newspaper reporter. Distribution of the confidential information was also an invasion of privacy, said the court, since the report was not a public document.

But a scholarly article that criticized another scholar's scientific theory was found not to be defamatory in *Ezrailson v. Rohrich*, 65 S.W.3d 373 (Ct. App. Tex. 9th Dist. 2001). The court agreed with the defendants' argument that the article addressed a matter of public health and medicine, and was not actionable because the issue at hand was the subject of public debate and no reasonable person could perceive the article as defamatory. Furthermore, said the court, to rule that the article was defamatory would unduly restrict the free flow of ideas essential to medical science discourse.

Defendants in certain defamation cases may be protected by the concept of "invited libel" and thus found not to have been responsible for the "publication" element of a defamation claim. In *Sophianopoulous v. McCormick*, 385 S.E.2d 682 (Ga. Ct. App. 1989), for example, a state appellate court rejected a faculty member's defamation claim against his department chair. The professor had complained to the American Association of University Professors that his chair had mistreated him. When the AAUP contacted the chair to inquire about the professor's performance, the chair sent the AAUP copies of memoranda critical of the professor's performance. The judges ruled that, by involving the AAUP in the dispute with his chair, the plaintiff consented to having the offending information published to the AAUP.

The concept of privilege has also been applied to lawsuits brought by students against faculty and staff. For example, in *Ostasz v. Medical College of Ohio*, 691 N.E.2d 371 (Ct. Cl. Oh. 1997), Ostasz, a former medical resident seeking hospital privileges at the end of his residency, requested a letter of reference from the director of the Medical College of Ohio. The director, Dr. Horrigan, reviewed the former resident's file and noted that he had experienced academic problems during his residency, and that six other residents had provided letters expressing their reservations about Ostasz's competency. Horrigan's letter also expressed reservations about Ostasz's competency. When Ostasz was denied hospital privileges, he sued Horrigan and the Medical College of Ohio for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. The court applied the doctrine of qualified privilege to the letter because its purpose was to assist the hospital in determining whether to grant Ostasz hospital privileges. Only if the writer of the letter had acted with actual malice would the privilege be lost. The court found no malice in Horrigan's letter and awarded judgment as a matter of law to the medical college and to Horrigan.

In *Hupp v. Sasser*, 490 S.E.2d 880 (W. Va. 1997), a graduate student was told that his teaching assistantship might not be renewed because several students



had complained about his alleged unprofessional and intimidating behavior toward them. It was also alleged that an instructor had been exposed to abuse by the teaching assistant. After a meeting between the dean and the student, the student was told that his assistantship would be renewed on the condition that he did not repeat the abusive behavior, and that further complaints would result in immediate termination of his assistantship. The student rejected those conditions on his employment and filed a claim of defamation, as well as other nontort claims. The court examined each of the statements attributed to the dean that the student had alleged were defamatory, and concluded that each was either truthful and factual and, therefore, could not be defamatory, or was a subjective conclusion about the student's behavior protected by the First Amendment under the Supreme Court's *Milkovich* standard and, therefore, was not actionable. Because the court had determined that the statements had no defamatory content, it did not reach the issue of whether or not a qualified privilege existed.

*Dean v. Wissmann*, 996 S.W.2d 631 (Mo. Ct. App. 1999) provides an example of the successful use of the qualified privilege because the communication at issue was limited to individuals with a business need for the information. In this case, the professor had written a letter accusing the plaintiff, a nursing student, of stealing a test. The letter was read by the head of the nursing department, the college dean, and the vice president of student affairs. The court held that the professor had reported the alleged dishonesty to the appropriate people, and thus, the letter was not "published," an essential element of a defamation claim. Because the professor had communicated the allegedly defamatory information only to individuals within the organization with a legitimate organizational reason to be informed about the situation, the court ruled that internal "publication" of this information did not meet the "publication" element of the defamation claim.

The privilege may be lost, however, if an employee acts with malice or otherwise unprofessionally. In *Smith v. Atkins*, 622 So. 2d 795 (La. App. 1993), Theresa Smith, a first-year law student at Southern University, filed claims of defamation, invasion of privacy, and intentional infliction of emotional distress against one of her law professors, Curklin Atkins. Professor Atkins routinely discussed his social life in class and directed many sexually explicit comments to Smith and another female student. He called Smith a "slut" in front of the entire class on two occasions, and, also in front of the entire class, related a humiliating event experienced by Smith at a local bar. The trial court ruled in the plaintiff's favor on the defamation claim, but rejected her emotional distress claim. The appellate court affirmed the defamation ruling, but reversed the emotional distress ruling, and held in the student's favor, finding that "calling a female law student a 'slut' is defamatory per se" (622 So. 2d 799), and thus, she had sustained an intentional injury. A dissent suggests that the evidence supporting the emotional distress claim was very weak and that the majority wanted to "punish" the professor for his unprofessional conduct, despite the fact that punitive damages for defamation are not available in Louisiana. Although it is not possible to ascertain the majority's motivation from simply

reading the published opinion, it is quite likely that the majority was incensed by the alleged behavior of the faculty member.

On occasion, faculty members have sued students for defamation. These claims tend to occur when sexual harassment is alleged by a student. For example, in *Chiavarelli v. Williams*, 681 N.Y.S.2d 276 (App. Div. 1998), the chair of the division of cardiothoracic surgery at the SUNY Health Science Center in Brooklyn sued the chief resident for defamation. The plaintiff claimed that the defendant wrote a libelous letter concerning sexual advances the plaintiff had allegedly made toward the defendant, and then circulated the letter to the plaintiff's supervisors. The letter claimed that the plaintiff had given the defendant negative evaluations because the defendant had spurned the plaintiff's sexual advances. Although the defendant sought to have the complaint dismissed (the plaintiff had not alleged or proven special damages), the court agreed that the claim should be characterized as a claim of libel per se, which does not require a plaintiff to allege special damages. Allegations suggesting that a professional is unfit for his or her professional role reflect adversely on that individual's integrity, and even if no claims are made that the professional is incompetent in his or her profession, defamation per se may be established without evidence of special damages.

Institutions should consider whether or not they wish to protect their personnel from the financial consequences of personal tort liability. Insurance coverage and indemnification agreements, discussed in Section 2.5.3.2, may be utilized for this purpose. (For an overview of liability insurance and related issues, see B. Higgins & E. Zulkey, "Liability Insurance Coverage: How to Avoid Unpleasant Surprises," 17 *J. Coll. & Univ. Law* 123 (1990).)

**4.7.2.4. Other tort claims.** Although negligence and defamation claims are the most frequent source of tort claims against individual employees, other tort theories are occasionally used by either employees or students. For example, several Rutgers University basketball players brought an invasion-of-privacy claim against their coach for forcing them to run laps in the nude after losing a game of free-throw shooting at the university's athletic center (Donna Leusner, "Ex-Players Can Sue Over Sprints in the Nude," *Newark Star Ledger*, July 5, 2001, p. 13). Employees who believe that managers or supervisors have deliberately provided them with false information to induce them to accept a job offer have prevailed in claims of fraudulent inducement. (For an example of a successful claim in a nonacademic context, see *Hyman v. International Business Machines Corp.*, 2000 U.S. Dist. LEXIS 15136 (S.D.N.Y. 2000).) But a former Northwestern University employee who alleged that her former supervisor's negative employment reference was responsible for her inability to obtain a job was unsuccessful in her suit against the supervisor. The plaintiff could not establish interference with prospective economic advantage because, the court ruled, she could not demonstrate that she had a reasonable expectation of obtaining that particular position (*Anderson v. Vanden Dorpel*, 667 N.E.2d 1296 (Ill. 1996)).

Closely related to the tort of interference with prospective economic advantage is the tort of interference with contractual advantage (or contractual relationship). Typically, the current or former employer of the plaintiff cannot

be sued under this theory because the doctrine requires a plaintiff to demonstrate that a third party interfered with the contractual relationship between the plaintiff and his or her employer. While disappointed tenure candidates rarely convince a court to entertain a claim of intentional interference with contractual advantage, the court in *Witczak v. Gerald*, 793 A.2d 1193 (Ct. App. Ct. 2002), reversed a trial court's dismissal of a claim against three faculty members who had recommended that the plaintiff be denied tenure. According to the plaintiff, the defendants, who were members of the Dean's Advisory Council, destroyed a letter that supported the plaintiff's tenure candidacy, underreported the amount of external funding and the number of publications that the plaintiff had written, and rejected the plaintiff's request to correct these inaccuracies. Although Connecticut General Statute § 4-165 provides immunity for certain state employees acting within the scope of their employment unless their conduct is "wanton, reckless or malicious," the appellate court concluded that the actions alleged by the plaintiff could be sufficiently malicious so as to meet the terms of the exception to the immunity statute.

A perennial claim brought by individuals who are challenging the termination of employment or, for students, mistreatment by a faculty or staff member, is a claim of either intentional or negligent infliction of emotional distress. A student successfully raised this claim against several faculty and administrators in *Ross v. St. Augustine College*, 103 F.3d 338 (4th Cir. 1996). The plaintiff, an honors student who had testified on behalf of a professor who had successfully sued the college, claimed that faculty and administrators had retaliated against her by wrongfully awarding her low or failing grades, altering her transcript, and preventing her from graduating. The administration also tried to have her impeached as president of the senior class. The jury found the college and some of the individual defendants (including the academic vice president) liable for intentional infliction of emotional distress, and also awarded the student punitive damages. The appellate court upheld both awards.

A very significant case involving a middle school student is instructive for faculty and administrators who are asked to write letters of recommendation for current or previous students or employees. In *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997), a middle school student and her parents sued several previous employers of Robert Gadams, the vice principal of the student's middle school, as well as individuals who had provided Gadams with letters of recommendation. The plaintiffs alleged that Gadams had sexually assaulted the student, and that he had been accused of similar conduct while serving in similar positions in other school districts. The plaintiffs stated claims of negligence, negligent hiring, negligent misrepresentation, fraud, and negligence per se, against the prior school districts where Gadams had worked as well as the individuals who had provided highly positive letters of reference written on Gadams's behalf. The court stated that:

although policy considerations dictate that ordinarily a recommending employer should not be held accountable to third persons for failing to disclose negative information regarding a former employee, nonetheless liability may be imposed

if . . . the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a third person [929 P.2d at 584].

The court rejected the plaintiffs' negligence, negligent hiring, negligence per se, and Title IX claims, but ruled in their favor on their negligent misrepresentation and fraud claims. The court ruled that, given the defendants' knowledge of the prior charges against Gadams, it was foreseeable that he would repeat the behavior in another school. And it was also reasonably foreseeable, said the court, that the hiring school district would read the letters of recommendation and would rely on them in making a hiring decision. The letters contained only positive information and omitted any mention of the charges that had been brought against Gadams. The employees of the former employers, said the court, had two choices in deciding how to write a letter of reference in this situation. First, they could write a "full disclosure" letter that discussed all the relevant facts known to the writer of the letter. Or second, they could have written a "no comment" letter or merely verified the dates of his employment. The court rejected the notion that an employer or an individual has a duty to disclose any relevant information to a prospective employer, absent some special relationship. No such special relationship had been alleged by the plaintiffs. Thus, the court held that "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons" (929 P.2d at 591). The letters, "essentially recommending Gadams for any position without reservation or qualification, constituted affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students" (929 P.2d at 593). Furthermore, said the court, the injury to the student was the proximate result of the school district's decision to hire Gadams, in reliance on the letters of recommendation. (But the court rejected the plaintiffs' argument that the previous employer's failure to report the assault charges against Gadams to state authorities (as required by law) provided an independent basis for tort liability.)

As the cases discussed in this subsection demonstrate, courts are quite willing to impose personal liability on college faculty and staff if they fail to exercise care in carrying out their responsibilities. Particularly for staff whose responsibilities involve potentially dangerous activities or substances (for example, athletics staff, science laboratory staff, security officers, custodians, and drivers of vans and buses), training should be provided on appropriate performance of these responsibilities and how to handle emergency situations. In addition, faculty and administrators who are involved in making judgments about students or staff may need to limit the scope and content of their communications to avoid potential liability for defamation, misrepresentation, or fraud.

**4.7.3. Contract liability.** An employee who signs a contract on behalf of an institution may be personally liable for its performance if the institution breaches the contract. The extent of personal liability depends on whether the

agent's participation on behalf of the institution was authorized—either by a grant of express authority or by an implied authority, an apparent authority, or a subsequent ratification by the institution. (See the discussion of authority in Sections 3.1 & 3.4.) If the individual's participation was properly authorized, and if that individual signed the contract only in the capacity of an institutional agent, he or she will not be personally liable for performance of the contract. If, however, the participation was not properly authorized, or if the individual signed in an individual capacity rather than as an institutional agent, he or she may be personally liable.

In some cases the other contracting party may be able to sue both the institution and the agent or to choose between them. This option is presented when the contracting party did not know at the time of contracting that the individual participated in an agency capacity, but later learned that was the case. The option is also presented when the contracting party knew that the individual was acting as an institutional agent, but the individual also gave a personal promise that the contract would be performed. In such situations, if the contracting party obtains a judgment against both the institution and the agent, the judgment may be satisfied against either or against both, but the contracting party may receive no more than the total amount of the judgment. Where the contracting party receives payment from only one of the two liable parties, the paying party may have a claim against the nonpayer for part of the judgment amount.

An agent who is a party to the contract in a personal capacity, and thus potentially liable on it, can assert the same defenses that are available to any contracting party. These defenses may arise from the contract (for instance, the absence of some formality necessary to complete the contract, or fraud, or inadequate performance by the other party), or they may be personal to the agent (for instance, a particular counterclaim against the other party).

Even if a contract does not exist, the doctrine of promissory estoppel may be used by a candidate for a position who is given an offer of employment that is subsequently withdrawn. This claim allows an individual to seek a remedy for detrimental reliance on a promise of employment, even where no contract existed (see *Restatement of Contracts*, § 90). In *Bicknese v. Sultana*, 635 N.W.2d 905 (Wis. Ct. App. 2001), the plaintiff had applied for a faculty position at the University of Wisconsin. The plaintiff claimed that the department chair, Sultana, had offered her the position, and that she resigned her faculty position at SUNY-Stony Brook and rejected a job offer from SUNY at Buffalo. A university committee rejected Sultana's recommendation that Bicknese be hired. She sued Sultana individually, and a jury ruled in her favor on her claim of promissory estoppel. Sultana appealed, claiming that he had been performing discretionary acts within the scope of his employment, and thus was immune from liability. The court agreed, rejecting the plaintiff's contentions that Sultana had acted maliciously or with the intent to deceive, and finding that Sultana's acts were discretionary rather than ministerial.

Department chairs, deans, and other individuals must be careful not to imply that they have the authority to hire, or to confer a promotion or tenure, when speaking with a prospective faculty member (unless, of course, they do have

that authority). Clear statements on appointment letters and written contracts that only the Board of Trustees has the authority to confer promotion or tenure should help protect the college against later claims of oral contracts or promissory estoppel.

#### ***4.7.4. Constitutional liability (personal liability under Section 1983)***

**4.7.4.1. Qualified immunity.** The liability of administrators and other employees of public postsecondary institutions (and also individual trustees) for constitutional rights violations is determined under the same body of law that determines the liability of the institutions themselves (see Section 3.5) and presents many of the same legal issues. As with institutional liability, an individual's action must usually be taken "under color of" state law, or must be characterizable as "state action," before personal liability will attach. But, as with tort and contract liability, the liability of individual administrators and other employees (and trustees) is not coterminous with that of the institution itself. Defenses that may be available to the institution (such as the sovereign immunity defense) may not be available to individuals sued in their personal capacities; conversely, defenses that may be available to individuals (such as the qualified immunity defense discussed later in this subsection) may not be available to the institution.

The federal statute referred to as Section 1983, quoted in Section 3.5 of this book, is again the key statute. Unlike the states themselves, state government (and also local government) officials and employees sued in their personal capacities are clearly "persons" under Section 1983 and thus subject to its provisions whenever they are acting under color of state law. Also unlike the states, officials and employees sued in their personal capacities are not protected from suit by a constitutional sovereign immunity. But courts have recognized a qualified immunity for public officials and employees from liability for monetary damages under Section 1983. (See K. Blum, "Qualified Immunity: A User's Manual," 26 *Ind. L. Rev.* 187 (1993).) This immunity applies to officials and employees sued in their *personal* (or *individual*) capacities rather than their *official* (or *representational*) capacities. *Mangaroo v. Nelson*, 864 F.2d 1202 (5th Cir. 1989), illustrates the distinction. The plaintiff had been demoted from a deanship to a tenured faculty position. She sued both Nelson, the acting president who demoted her, and Pierre, Nelson's successor, alleging that their actions violated her procedural due process rights. She sued the former in his *personal* (or *individual*) capacity, seeking monetary damages, and the latter in his *official* (or *representational*) capacity, seeking injunctive relief. The court held that Nelson was entitled to claim qualified immunity, since the plaintiff sought money damages from him in his personal capacity for the harm he had caused. In contrast, the court held that Pierre was not eligible for qualified immunity, because the plaintiff sued him only in his official capacity, seeking only an injunctive order compelling him, as president, to take action to remedy the violation of her due process rights. (For further explanation of the distinction between personal

capacity suits and official capacity suits, see *Hafer v. Melo*, 502 U.S. 21, 25–31 (1991).)

In 1974 and again in 1975, the U.S. Supreme Court laid the foundation for qualified immunity as it applies to school officials. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court considered a suit for damages brought on behalf of three students killed in the May 1970 Vietnam War protests at Kent State University. The Court rejected the contention that the president of Kent State and other state officials had an absolute “official immunity” protecting them from personal liability. The Court instead accorded the president and officials a “qualified immunity” under Section 1983: “[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.” Because the availability of this immunity depended on facts not yet in the record, the Supreme Court remanded the case to the trial court for further proceedings.<sup>29</sup>

In *Wood v. Strickland*, 420 U.S. 308 (1975), the Supreme Court extended, and added enigma to, the Section 1983 qualified immunity for school officials. After the school board in this case had expelled some students from high school for violating a school disciplinary regulation, several of the students sued the members of the school board for damages and injunctive and declaratory relief. In a 5-to-4 decision, the Court held that school board members, as public school officials, are entitled to a qualified immunity from such suits:

We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that . . . they need not exercise their discretion with undue timidity. . . .

[B]ut an act violating a student’s constitutional rights can be no more justified by *ignorance or disregard of settled, indisputable law* on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of Section 1983 in a case in which his action violated a student’s constitutional rights, a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on *knowledge of the basic, unquestioned constitutional rights* of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office . . . , nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of Section 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983: (1) if he knew or reasonably should have known that the action he took

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<sup>29</sup>On remand the case proceeded to trial against all defendants. No defendant was held immune from suit. The president of Kent State was eventually dismissed as a defendant, however, because the facts indicated that he had not personally violated any of the plaintiffs’ rights (see *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977)). Eventually the case was settled, and an award of \$600,000 plus attorney’s fees was made to the plaintiffs (see *Krause v. Rhodes*, 640 F.2d 214 (6th Cir. 1981)).

within his sphere of official responsibility would violate the constitutional rights of the student affected, or (2) if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student [420 U.S. at 321–22; emphasis and numbering added].

The Court's reliance on the *Scheuer* case at several points in its *Wood* opinion indicated that the *Wood* liability standard applied to public officials and executive officers in postsecondary education as well. While the immunity of lower-level administrators and faculty members was less clear under *Scheuer* and *Wood*, the Supreme Court and lower courts in later cases have generally applied the qualified immunity concept to all officers and employees named as defendants.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court modified its *Wood* analysis in ruling on a suit brought against two senior aides to President Nixon. The immunity test developed in *Wood* had two parts (see quote above). The first part was objective, focusing on whether the defendant “knew or reasonably should have known that the action he took . . . would violate the constitutional rights” of the plaintiff (420 U.S. at 322). The second part was subjective, focusing on the defendant’s “malicious intention to cause a deprivation of constitutional rights.” The Court in *Harlow* deleted the subjective part of the test because it had inhibited courts from dismissing insubstantial lawsuits prior to trial:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (see *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. at 321).

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. . . . If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained [457 U.S. at 817–19].

In Section 1983 litigation, qualified immunity is an affirmative defense to be pleaded by the individual seeking to assert the immunity claim (*Gomez v. Toledo*, 446 U.S. 635 (1980)). Once the defendant has asserted the claim, the court must determine (1) whether the plaintiff's complaint alleges the violation of a right protected by Section 1983; and (2), if so, whether this right “was clearly established at the time of [the defendant's] actions” (*Siegert v. Gilley*, 500 U.S. 226, 232–33 (1991); *Saucier v. Katz*, 533 U.S. 194, 200 (2001)). If the court answers



both of these inquiries affirmatively, it will reject the immunity claim unless the defendant can prove that, because of “extraordinary circumstances,” he “neither knew nor should have known” the clearly established law applicable to the case (*Harlow*, above). The burden of proof here is clearly on the defendant, and it would be a rare case in which the defendant would sustain this burden.

As a result of this line of cases, personnel of public colleges and universities are charged with responsibility for knowing “clearly established law.” Unless “extraordinary circumstances” prevent an individual from gaining such knowledge, the disregard of clearly established law is considered unreasonable and thus unprotected by the cloak of immunity. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [person] that his conduct was unlawful in the situation he confronted” (*Saucier v. Katz*, 533 U.S. 194, 202 (2001)). This is a test of “objective legal reasonableness” (*Behrens v. Pelletier*, 516 U.S. 299, 306 (1996)), that is, a test that focuses on what an objective reasonable person would know rather than on what the actual defendant subjectively thought. Thus, a determination of qualified immunity “turns on the ‘objective legal reasonableness’ of the [challenged] action . . . assessed in light of the legal rules that were ‘clearly established’ at the time [the action] was taken” (*Anderson v. Creighton*, 483 U.S. 635, 639 (1987), quoting *Harlow*, 457 U.S. at 818–19).

It will often be debatable whether particular principles of law are sufficiently “clear” to fall within the Court’s characterization. Moreover, the applicability of even the clearest principles may depend on a complex set of facts. In some qualified immunity cases, lower courts have sought to cope with this problem by considering whether there was a precedent in existence with facts and competing interests that are closely analogous to the situation in the current case. As one court explained, “[I]n the absence of case law that is very closely analogous,” it would be “difficult for a government official to determine . . . whether the balance that he strikes is an appropriate accommodation of the competing individual and governmental interests” (*Gregorich v. Lund*, 54 F.3d 410, 414 (7th Cir. 1995)). But judges can and do disagree on whether the facts at issue are “closely analogous” to those in an earlier precedent. In *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004), for example, the court rejected a university chancellor’s qualified immunity defense to an employee’s free speech claim that turned on a balancing of interests. According to the majority, there was a prior case in the Seventh Circuit that presented “a remarkably similar situation” (370 F.3d at 680). The dissent, however, distinguished the earlier case on two grounds and argued that “[t]he plaintiffs have not approached meeting their burden of showing “very closely analogous case law” (370 F.3d at 688 (Manion, J. dissenting)).<sup>30</sup>

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<sup>30</sup>The *Crue* case also presents an interesting question of whether the law was clearly established when there were two lines of prior precedents that arguably applied to the current case, and one line used a more stringent test than the other. The majority argued that the plaintiff-faculty members’ claim was governed by the balancing test from the U.S. Supreme Court’s *National Treasury Employee Union* case, while the dissent argued that it was governed by the balancing test in the *Pickering/Connick* line of cases (370 F.3d at 678–80; compare 370 F.3d at 683–88). (The *National Treasury* case and the *Pickering/Connick* line are discussed and compared in Section 7.1.4 of this book.)

Other difficult issues have arisen concerning the “clearly established” standard. These issues have proven to be the most sensitive, and to create the greatest difficulties for plaintiffs, when the applicable law requires either a finding that the violation of the plaintiff’s rights was intentional or some other finding regarding the defendant’s motives. In such circumstances, subjective factors become a critical part of the plaintiff’s claim that his or her rights have been violated, and it is unclear how these *subjective* factors are to be merged into a qualified immunity analysis that the U.S. Supreme Court has said is based on *objective* factors. In addition, qualified immunity issues are very sensitive and difficult when the determination of a rights violation requires a balancing of interests or a finding that the defendant acted “unreasonably.” In such circumstances, the analysis becomes ad hoc and highly fact sensitive, making it difficult to determine whether the right claimed was “clear” or “clearly established.” The following cases are illustrative.

In *Williams v. Alabama State University*, 102 F.3d 1179 (11th Cir. 1997), a former university professor alleged that she had been terminated in retaliation for her constitutionally protected criticism of a grammar textbook authored by several of her colleagues. The court determined that the issue she raised was governed by the balancing test laid out in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (see Section 7.1.1 of this book). Three administrators who were defendants asserted qualified immunity, claiming that the plaintiff had not alleged a “clearly established right” under the *Pickering* test.

The *Williams* court emphasized that the fact-sensitive analysis used to determine a violation of the professor’s rights inevitably left some ambiguity in the extent of the rights themselves:

Because the law in this area employs a balancing test rather than a bright-line rule to determine when a public employee’s right to free speech is violated, “the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful” [102 F.3d at 1183, quoting *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989)].

The court then proceeded to assess the university’s action under the *Pickering* test, concluding that it was “not sufficiently clear” whether the plaintiff’s speech activities “involved a matter of public concern,” and that “the *Pickering* balancing test does not inevitably weigh in [the plaintiff’s] favor.” The defendants therefore had a qualified immunity from the plaintiff’s damage claims under Section 1983.

Similarly, in *Arneson v. Jezwinski*, 592 N.W.2d 606 (Wis. 1999), Wisconsin’s highest court accepted a qualified immunity defense to a university supervisor’s claim that he had been denied procedural due process when he was found to have committed sexual harassment. The supervisor did have a clearly established property interest in his job, according to the court, but under the procedural due process balancing test that applies to deprivations of property interests (see Section 6.6.2), it was not clearly established that the supervisor was entitled to the presuspension hearing that he had requested.

In accepting the qualified immunity defense, the *Arneson* court also confirmed the difficulty (for plaintiffs) of cases requiring a balancing of interests:

The federal circuit courts of appeals have observed that “allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law ‘clearly established.’” *Medina v. City and County of Denver*, 960 F. 2d 1493, 1498 (10th Cir. 1992) (citations omitted). And as the Seventh Circuit has explained:

[I]t would appear that there is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact-dependent that the “law” can rarely be considered “clearly established.” In determining due-process requirements for discharging a government employee, for example, the courts must carefully balance the competing interests of the employee and the employer in each case. Thus, the Supreme Court has consistently stated that one can only proceed on a case-by-case basis and that no all-encompassing procedure may be set forth to cover all situations. It would appear that, whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under . . . *Harlow*. . . [Q]ualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required. *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) (internal citations and footnotes omitted) [592 N.W.2d at 621].

*Edwards v. Wallace Community College*, 49 F.3d 1517 (11th Cir. 1995), illustrates yet another difficult problem for plaintiffs seeking to avoid the qualified immunity defense: the problem that arises when the plaintiff’s underlying claim is a disparate treatment claim requiring a showing of discriminatory intent.<sup>31</sup> In *Edwards*, an African American employee was terminated from her position as a word processing specialist after ten months in that position. The court addressed the qualified immunity claim of the vice president of the college, who had acted briefly as the plaintiff’s supervisor. The court explained that “although intent is irrelevant for a qualified immunity inquiry per se, it is relevant if intent is an element of the underlying [claim].” The court cited a Sixth Circuit decision for the proposition that the “plaintiff must present direct evidence that the officials’ actions were improperly motivated by racial discrimination when the officials have asserted qualified immunity as a defense” (quoting *Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 512 (6th Cir. 1991)). The court did not continue this inquiry, however, because the plaintiff had “not presented any concrete evidence of discriminatory intent on the part of [the vice president]” and thus had not cleared the first obstacle in overcoming the qualified immunity defense: proof of a *prima facie* case of constitutional violation.

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<sup>31</sup>In cases where subjective intent is an element of the plaintiff’s *prima facie* case, there are many technical complexities about the parties’ burdens of pleading the elements of qualified immunity, as well as about the scope of the plaintiff’s discovery and the availability to defendants of partial summary judgment. See, for example, *Walker v. Schwalbe*, 112 F.3d 1127 (11th Cir. 1997). In 1998, in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the U.S. Supreme Court addressed some of these complexities and provided some initial guidance on their resolution.

An Ohio case adds another twist to the complex body of law on Section 1983 qualified immunity. This twist concerns reliance on a state statute as a possible justification for violating clearly established law. In *F. Buddie Contracting Limited v. Cuyahoga Community College District*, 31 F. Supp. 2d 584 (N.D. Ohio 1998), the plaintiff used Section 1983 to challenge a community college district's minority business set-aside policy requiring prime contractors on public works projects of the college to award at least 10 percent of the contract's value to minority business subcontractors. The college had followed the policy when awarding a contract for the repair of planters located on a plaza. A nonminority contractor who was not selected for the project sued the college and also sued the members of the college's board of trustees, the college president, and two vice presidents.

The district court determined that the college's set-aside policy was inconsistent with the U.S. Supreme Court's requirements for governmental affirmative action programs, and thus violated the Fourteenth Amendment's equal protection clause. Furthermore, the court determined that the applicable legal principles on affirmative action were clearly established at the time the defendants applied their policy to the plaintiff. The individual defendants nevertheless contended that they were entitled to qualified immunity because, in devising and applying their policy, they had been following the mandate of an Ohio minority business enterprise statute. The court rejected this argument, relying in part on a U.S. Court of Appeals decision from the Ninth Circuit:

“Courts have . . . held that the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.” *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). While an authorizing statute is evidence of objective good faith, it is not dispositive of the issue. “Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity.” *Id.* . . .

Thus, it is clear that the existence of an authorizing state law does not alter the qualified immunity analysis. A law which is clearly established by Supreme Court and/or Circuit court decisions does not become less clear by reason of conflicting state statutes [31 F. Supp. 2d at 589].

The court also noted two factors that provided additional justification for imposing this degree of responsibility on the individual defendants: (1) these trustees and officers “are endowed with independent policy-making authority [under state law] and have an obligation to make reasoned decisions with respect to programs and policies which they promulgate,” and (2) the state statute that the trustees and officers were following “involves racial classifications and, therefore, enjoys no presumption of constitutionality” (31 F. Supp. 2d at 589, 590). Thus, had the defendants been lower-level administrators, or had the state statute presented a constitutional issue less obviously deserving of strict scrutiny, the good-faith adherence to the mandate of a state statute may have supported the defendants' claim to qualified immunity.

Officers, administrators, and other employees found personally liable under Section 1983 are subject to money damage awards in favor of the prevailing plaintiff(s). Unlike the institution itself, individual defendants may be held liable for punitive as well as compensatory damages. To collect compensatory damages, a plaintiff must prove “actual injury,” tangible or intangible; courts usually will not presume that damage occurred from a violation of constitutional rights and will award compensatory damages only to the extent of proven injury (*Carey v. Phipus*, 435 U.S. 247 (1978)). To collect punitive damages, a plaintiff must show that the defendant’s actions either manifested “reckless or callous disregard for the plaintiff’s rights” or constituted “intentional violations of federal law” (*Smith v. Wade*, 461 U.S. 30, 51 (1983)).

The state of the law under Section 1983 and the Eleventh Amendment, taken together, gives administrators of public postsecondary institutions no cause to feel confident that either they or other institutional officers or employees are insulated from personal constitutional rights liability. Since it is extremely difficult to predict what unlawful actions would fall within the scope of qualified immunity, administrative efforts will be far better spent taking preventive measures to ensure that Section 1983 violations do not occur than in trusting that immunity will usually protect university officers and employees if violations do occur. To minimize the liability risk in this critical area of law and social responsibility, administrators should make legal counsel available to institutional personnel for consultation, encourage review by counsel of institutional policies that may affect constitutional rights, and provide personnel with information on, and training in, basic constitutional law. To absolve personnel of the emotional drain of potential liability, and the financial drain of any liability that actually does occur, administrators should consider the purchase of special insurance coverage or the development of indemnity plans. As discussed in Section 2.5.5, however, public policy in some states may limit the use of these techniques to cover intentional constitutional rights violations.

**4.7.4.2. Issues on the merits: State-created dangers.** In Section 1983 suits against individuals, difficult issues also arise concerning the merits of the plaintiffs’ claims. (Such issues on the merits arise much less frequently in suits against institutions, since public institutions may usually assert sovereign immunity as a basis for dismissing the suit before reaching the merits (see Section 3.5).) Since Section 1983 provides remedies for “the deprivation of . . . rights . . . secured by the Constitution,” analysis of the merits of a Section 1983 claim depends on the particular constitutional clause involved and the particular constitutional right asserted.

One particularly difficult and contentious set of issues on the merits has arisen concerning the “substantive” (as opposed to the procedural) content of the Fourteenth Amendment’s due process clause. In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the U.S. Supreme Court held that the due process clause does not impose any general “affirmative obligation” on state officials to protect private individuals from danger. The Court did acknowledge, however, that such a duty may exist in “certain limited circumstances” where the state has a “special relationship” with the endangered

person. As an example, the Court noted situations in which a state agency has an individual in its custody and “so restrains [the] individual’s liberty that it renders him unable to care for himself” (489 U.S. at 200). In later cases, lower courts expanded this state duty to situations in which state officers or employers have themselves created the danger. (See, for example, *Kniepp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), recognizing an affirmative duty on the part of the state to protect individuals in such circumstances.) This approach to substantive due process liability under Section 1983 is now called “the state-created danger theory” (95 F.3d at 1205). While lower courts differ on the particulars of this state duty (and on the extent of their support for the theory), a state-created danger claim usually requires proof that state actors used their authority to create or increase a risk of danger to the plaintiff by making him or her “more vulnerable” to injury, and thus depriving the plaintiff of a “liberty interest in personal security” (95 F.3d at 1203). In addition, a plaintiff generally must show that, in acting or failing to act as they did, the state actors were deliberately indifferent to the plaintiff’s safety.

The leading example of state-created danger claims in higher education is the litigation concerning the 1999 Texas A&M Bonfire collapse in which twelve students were killed and twenty-seven others were injured. In the aftermath, six civil suits were filed in federal court on behalf of eleven of the victims, alleging state claims as well as federal Section 1983 claims against the university and various university officials. The court dismissed the Section 1983 claims against the university because it had sovereign immunity (see Section 3.5 of this book), and the focus of the litigation became the plaintiff’s substantive due process claims against university officials, based on the state-created danger theory.

The tradition of the Texas A&M Bonfire began in 1909. Over the years it became a symbol “not only of one school deeply rooted in tradition, but . . . representative of the entire Nation’s passionate fascination with the most venerated aspects of collegiate football” (*Self v. Texas A&M University, et al.*, 2002 WL 32113753 (S.D. Tex. 2002)). Prior to the tragedy, the building of the bonfire had “occupied over five thousand students for an estimated 125,000 hours each fall.” The students had developed a complex “wedding cake design” for the bonfire, weighing in at “over two million pounds” and standing “sixty to eighty feet tall” (*Self v. Texas A&M University*). The tower of logs collapsed on November 18, 1999, resulting in the twelve deaths and twenty-seven injuries. The university quickly appointed a special commission to investigate the bonfire collapse, which issued a final report in May 2000: Special Commission on the 1999 Texas A&M Bonfire, *Final Report*, May 2, 2000, available at <http://www.tamu.edu/bonfire-commission/reports/Final.pdf>. In the preliminary stages of the ensuing litigation, the parties accepted the Commission’s *Final Report* as an authoritative account of the bonfire collapse.

In *Self v. Texas A&M University*, above, the district court combined the six lawsuits for a common ruling on the Section 1983 claims asserted in each case. As the court summarized these claims, the plaintiffs alleged that university officials “deprived the bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that

killed or injured them.” In considering these claims the court acknowledged that an affirmative state duty arises in two situations: “when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation” (*Self* at p. 6, citing *McClendon v. City of Columbia*, 258 F.3d 432, 436 (5th Cir. 2001)). Under the second approach, a plaintiff must prove that “(1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference” (*Self* at p. 6, citing *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995)). Applying these principles, the district court determined that “[t]he facts . . . clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse,” but “it is quite clear that they did not do so with ‘deliberate indifference’—the requisite culpability to make out a constitutional violation.” Deliberate indifference, said the court, is “‘a lesser form of intent’ rather than a ‘heightened form of negligence’” (*Self* at p. 7, quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.2d 521, 531 (5th Cir. 1994)). To establish deliberate indifference, “the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not have otherwise existed for the injury to occur” (*Self* at p. 7, quoting *Johnson v. Dallas Indep. School District*, 38 F.3d 198, 201 (5th Cir. 1994)). The “key . . . lies in the state actors’ culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid” (*Self* at p. 7, quoting *Johnson*, 38 F.3d at 201).

In resolving the plaintiffs’ state-created danger claims, the district court adopted the Special Commission’s *Final Report*, above, as the “definitive narrative of the relevant facts” and cited the *Report’s* conclusion that the “absence of a proactive risk management model; the University community’s cultural bias impeding risk identification; the lack of student leadership, knowledge and skills pertaining to structural integrity; and the lack of formal, written . . . design plans or construction methodology” were “the overarching factors that brought about the physical collapse.” Thus, said the court, the “bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years” (*Self* at p. 4). Relying on findings from the *Final Report*, the court reasoned that, although university officials “may have contributed” to the danger, they lacked the “requisite culpability” to meet the deliberate indifference prong. They “were aware of the dangers posed” and failed “to pro-actively avert or reduce those risks,” but they “were unaware of the *precise* risk at hand—the risk that the entire bonfire would come tumbling down.” Such ignorance “might appear naive,” but “it cannot support a finding of deliberate indifference” in light of measures that were taken with respect to bonfire safety. The court then concluded that, because the officials’ conduct was not sufficiently culpable to meet the deliberate indifference prong of the state-created danger test, plaintiffs’ Section 1983 claims failed on the merits, and the defendants were therefore entitled to summary judgment.

On appeal, the U.S. Court of Appeals for the Fifth Circuit generally agreed with the legal principles stated by the district court, in particular that “plaintiff must show the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff” (*Scanlan v. Texas A&M University, et al.*, 343 F.3d 533, 537–38 (5th Cir. 2003), citing *Johnson v. Dallas Indep. School District*, 38 F.3d 198, 201 (5th Cir. 1994)). But the appellate court held that the district court had erred in adopting the report of “a defendant-created commission rather than presenting the questions of material fact to a trier of fact” (*Scanlan v. Texas A&M University, et al.*, 343 F.3d at 539). Instead, construing allegations in the complaints in the light most favorable to the plaintiffs, the district court “should have determined the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur.” The Court of Appeals therefore reversed the district court’s judgment for the university officials and remanded the case to the district court for further proceedings.

On remand, the district court again dismissed the plaintiffs’ Section 1983 claims, this time on “qualified immunity” grounds (see subsection 4.7.4.1 above) that had not been addressed in the district court’s prior opinion. In its new opinion, in a case renamed *Davis v. Southerland*, 2004 WL 1230278 (S.D. Tex. 2004), the district court asserted that the Fifth Circuit had been noncommittal about the state-created danger theory in the decade preceding the bonfire collapse, and that the “validity of the state-created danger theory is uncertain in the Fifth Circuit.” Thus the theory “was not clearly established at the time of Defendants’ bonfire-related activities,” and “a reasonable school official would not have been aware that the Fourteenth Amendment’s Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator’s failure to exercise control over an activity such as [the] bonfire would violate that right.”

In addition, deferring to the circuit court’s determination in *Scanlan* that the district court “should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory,” the district court analyzed the merits of the plaintiffs’ claims “as if the theory is a valid one” and “the violations Plaintiffs claim are indeed constitutional ones.” The court’s conclusion was that resolution of the plaintiffs’ rights “requires examination of literally hundreds of contested facts,” and that the persistence of “multiple questions of fact . . . prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.”

Other contexts in which state-created-danger issues may arise include stalking, sexual assaults, and other crimes of violence that take place on campus and of which a student or employee is the victim. The institution, to be subject to suit, must be a public institution or otherwise be acting “under color of law” when it creates the alleged danger. It will be very difficult for plaintiffs to prevail in such suits, as the Texas A&M litigation suggests. It is not necessarily



enough that institutional employees were aware of the stalking or impending violence, or that they were negligent in their response or lack thereof. In *Thomas v. City of Mount Vernon*, 215 F. Supp. 2d 329 (S.D.N.Y. 2002), for example, neither a professor who witnessed a student being confronted by her former boyfriend in the hallway of a classroom building, nor office personnel who declined to offer the student assistance when she ran into their office, were liable under Section 1983 for the severe injuries the student received when the boyfriend shot her shortly thereafter. The professor and staff members had not deprived the student of liberty or property “by virtue of their own actions”; and under *DeShaney* (above), “‘a state’s failure to protect an individual against private violence does not constitute a violation of the due process clause’” (215 F. Supp. 2d at 334, quoting 489 U.S. at 197).

## **Sec. 4.8. Performance Management Issues**

**4.8.1. Pre-hire issues.** Although even the best-managed college may face litigation and potential liability for employment or academic decisions, a comprehensive system of performance management should reduce the number of potential lawsuits and should make it easier for the college to defend those lawsuits that are filed. This system should begin at the preemployment stage and continue throughout the life cycle of employment.

Whether the college is hiring a faculty member or a staff member, a written job description should provide information about what is expected of the employee. This is particularly important in light of the requirement of the Americans With Disabilities Act that an employee be capable of performing the “essential functions” of the position (see Section 5.2.5). Job descriptions may be considered to be contracts at some institutions, particularly if the employees are covered by a collectively negotiated agreement that incorporates them into the contract.

Employment interviews have the potential to create legal claims if promises made by managers or supervisors anxious to attract the candidate are not honored at a later time. Oral promises have contractual effect in some states. Furthermore, the nondiscrimination laws prohibit the use of irrelevant criteria such as gender, race, religion, national origin, or age from being used as criteria for determining whether to offer a candidate a position; questions that refer to any of these “protected” characteristics may expose the college to a civil rights lawsuit if the individual is not hired or is later terminated (see Section 5.2).

Administrators at various colleges have found, to their dismay, that reference or background checks should be done to ensure that the individual has not engaged in unlawful or violent behavior in a previous position, and that the individual actually holds the degrees and certificates claimed on the application. Failure to conduct reference or background checks could result in claims of negligent hiring (see Sections 3.3.5 & 4.7.2) if the employee engages in violent or dangerous behavior, and the college could have learned about previous similar actions had it checked the candidate’s references.

The Fair Credit Reporting Act (FCRA), 15 U.S. § 1681 *et seq.*, regulates the collection and use of information by employers who use a third party to conduct background checks on employees. The law, designed to protect consumer privacy and to provide the opportunity to correct mistakes in credit reports, requires employers to notify applicants in writing that the employer may undertake an “investigative consumer report” as part of the application process, and to inform the applicant of the scope of the investigation. This notice must be in a document that is separate from other application materials. The law is not limited to reports on an applicant’s credit rating; it applies to reports prepared by any consumer reporting agency that include information on reputation or personal characteristics. Examples of consumer reports covered by the law include records checks by the state’s motor vehicle agency, criminal background checks, and, under some circumstances, drug test reports.

If the employer conducts its own background check without the use of an external agent, then the FCRA does not apply. If, however, the employer uses an outside credit reporting or investigative service to perform the background check, the FCRA requires that certain steps be taken.

1. The employer must notify the job candidate in writing, “in a document that consists solely of the disclosure,” that a consumer report may be used to make a hiring decision.
2. The employer must obtain the candidate’s written authorization to obtain a consumer report from an external agent.
3. If the employer relies on the consumer report to make a negative hiring or other employment decision, the employer must, prior to making the decision, give the candidate a “pre-adverse action disclosure,” a copy of the consumer report, and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” which the consumer reporting agency is required to provide along with the consumer report.
4. After the employer has made a negative employment decision, the employer must give the candidate notice of the negative action in oral, written, or electronic form. The notice must include the name, address, and telephone number of the consumer reporting agency that supplied the consumer report, a statement that the consumer reporting agency did not make the negative employment decision, and a notice of the candidate’s right to dispute the accuracy or completeness of the information provided by the consumer reporting agency, as well as notice of the candidate’s right to obtain a free consumer report from the agency within sixty days.

The employer will also be required to certify to the consumer reporting agency that the employer will not misuse any information in the report in a manner that would violate federal or state equal employment opportunity laws or regulations (15 U.S.C. § 1681(b)). The law excludes “investigative consumer reports,” where information about the individual is collected by interviewing people who know

the applicant, if they are made in connection with “suspected misconduct relating to employment” (§ 1681a(x)), such as an investigation of alleged sexual harassment or other workplace misconduct.

The Fair Credit Reporting Act is enforced by the Federal Trade Commission. The Commission’s Web site, <http://www.ftc.gov>, provides additional information on the Act. The regulations, codified at 16 C.F.R. Part 600, include a “Notice to Users of Consumer Reports: Obligations of Users Under the FCRA,” which is found at <http://www.ftc.gov/statutes/2user.htm>.

**4.8.2. Evaluation.** Evaluation of employee performance is important for both the college and the employee. Employees (including high-level administrators) should be evaluated on a regular basis so that any performance problems can be corrected early and discipline or termination can be avoided. The importance of evaluating probationary faculty on a regular basis is discussed in Section 6.7.1.

Employees should be provided with written performance criteria and evaluated against those criteria. It may be easier to develop written performance criteria for staff than for faculty, particularly at colleges where faculty are expected to produce high-quality research and scholarship. But clarifying what is expected of employees will reduce subsequent litigation over what the performance standards were and to what degree the employee met those standards.

It is important to train the individuals who will evaluate employee performance to ensure that they understand the performance criteria and how to apply them. Again, this training may be somewhat simpler for supervisors of staff than for department chairs or deans, but it is equally important for academic administrators to be trained to evaluate faculty. (For resources on training department chairs and deans, see the Selected Annotated Bibliography for this Chapter, under Section 4.8.)

The importance of training individuals who make employment recommendations or decisions was emphasized in *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001). In this case, an individual who was not hired was able to demonstrate that supervisors who interviewed candidates for sales positions routinely noted the candidates’ age on the employment applications. The plaintiff sued the company for race and age discrimination. Although not a case involving a college, this case sends an instructive message: “[L]eaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ for a company to make . . .” (269 F.3d at 778). The appellate court upheld a jury finding that the manager’s treatment of the employee amounted to reckless indifference, a finding that, under the Age Discrimination in Employment Act (see Section 5.2.6 of this book) permitted the awarding of double damages to the plaintiff.

Performance evaluations should be committed to writing and should be discussed orally with the faculty or staff member. Individuals being evaluated should be allowed to provide a written response to the evaluation. This “rebuttal” provides two benefits: it allows the individual being evaluated to correct potential mistakes or misunderstandings by the supervisor, and it also demonstrates that the supervisor allowed the employee to respond to an

evaluation in the event that a later lawsuit claims that the evaluation was unfair or inaccurate. (For potential legal claims involving performance evaluations, see Section 4.7.2.)

If a faculty or staff member's performance is judged to be inadequate, a performance improvement plan (PIP) should be developed between the supervisor and the individual. The written PIP should describe what steps the individual needs to take to improve his or her performance and to receive a satisfactory evaluation. The PIP should not promise that the employee will be retained or promoted if performance improves, but should indicate what performance improvements need to be made to raise the individual's performance to a satisfactory level.

**4.8.3. Discipline.** Employees who violate the employer's rules, policies, or state or federal laws, should be subject to discipline by the college. The college may have a handbook or written policies that address discipline or a collective bargaining agreement, and, for public institutions, state law or regulations (for employees with civil service protection, for example) may apply to faculty, staff, or both. It is important that these provisions be followed when the college imposes discipline, since procedural violations can lead to litigation and liability even if the misconduct leading to the discipline is acknowledged by the employee.

Although insubordination (failure to follow the order of a supervisor) is used routinely in nonacademic organizations as a reason for disciplining or even discharging an employee, it is less common in academic settings to punish a faculty or staff member for insubordination. Reasonable people may differ as to whether an employee's refusal to follow a supervisor's order that the employee believed to be unjust is insubordination. The case of *Butts v. Higher Education Interim Governing Board/Shepherd College*, 569 S.E.2d 456 (W. Va. 2002), provides some guidance on this issue. Butts, a tenured associate professor at Shepherd College, a public institution, refused to provide her supervisor with student grades because Butts interpreted Shepherd's student privacy policy as permitting only the registrar to release student grades to college employees. Butts's supervisor issued two reprimands, and Butts appealed this discipline. The college's hearing officer upheld the discipline, and the employee appealed to the state circuit court, which also upheld the discipline. She then appealed to the state's highest court, which reversed the ruling of the circuit court and ordered the discipline expunged.

The court in *Butts* ruled that, for an employee to be disciplined for insubordination, three elements must be present: (1) an employee must refuse to obey an order (or rule or regulation), (2) the refusal must be willful, and (3) the order (or rule or regulation) must be reasonable and valid. The court determined that the employee's conduct had met the first two conditions, but not the third, finding that the college's privacy policy was ambiguous and that the employee's refusal to follow her supervisor's order was done in good faith.

Public colleges are constitutionally required to provide due process to their employees when taking an action that can affect their terms and conditions of

employment (such as suspension without pay or termination). Moreover, in order to avoid breach of contract claims, both public and private colleges should follow the procedures in their handbooks and policies, and in any written contracts they may have, whether they are collectively negotiated with a union or are individual employment contracts. Although private institutions are not required to provide the type of due process required of public institutions by the U.S. Constitution, procedural protections help assure a fair disciplinary process and should be followed by both public and private colleges.

Due process requires that the college provide notice to its faculty and staff of the rules, regulations, and performance standards that they must adhere to. It must also notify its employees that failure to comply with these requirements may lead to discipline or termination. Furthermore, due process requires that the college provide the employee with an opportunity to be heard before discipline that may impact a liberty or property interest is imposed, unless the alleged behavior has been so egregious that, for safety reasons, the employee must be removed from the college premises pending a hearing. (Due process requirements for faculty at public colleges are discussed in Section 6.7.2.)

Although not required by law, a grievance system provides a useful opportunity for colleges to reconsider employee discipline, and also provide an opportunity to demonstrate that the institution did not act arbitrarily in imposing discipline. Grievance systems are a standard component of collective bargaining agreements, and civil service regulations typically provide for a grievance process as well. At institutions that are not legally required to implement grievance systems, the system can be relatively simple, involving one or two levels of review beyond the supervisor who imposed the discipline. In some states, the institution's grievance system and hearing process may serve as the "trial" level for an employee challenging a negative employment decision (see Section 4.4). (For an example of an informal appeals process that passed constitutional muster, see *Gregory v. Hunt*, 24 F.3d 781 (6th Cir. 1994), in which an informal hearing by the chancellor of the University of Tennessee provided a discharged police officer with an opportunity to clear his name, thus satisfying constitutional requirements for protecting a liberty interest. See also *Ludwig v. Board of Trustees of Ferris State University*, 123 F.3d 404 (6th Cir. 1997), in which a head basketball coach terminated for making ethnic slurs against certain players received due process because he had three opportunities to tell his side of the story and had access to the information used by decision makers who made the termination decision.)

Another benefit of a formal discipline and grievance system is its usefulness if the employee challenges the discipline or termination in court. For example, in *Gaither v. Wake Forest University*, 129 F. Supp. 2d 863 (M.D.N.C. 2000), the university avoided a trial on a former employee's claim that his termination was motivated by racial discrimination. The court awarded summary judgment to the university after it produced fourteen written warnings given to the plaintiff over a six-year period for violating safety rules, sleeping on the job, and falsifying time records. (For a helpful resource on developing effective grievance

procedures, see Ann H. Franke, *Grievance Procedures: Solving Campus Employment Problems Out of Court* (United Educators Insurance Risk Retention Group, Inc., 1998).)

**4.8.4. Promotion.** For both faculty and staff, career ladders in colleges are relatively short. Particularly for faculty, a promotion decision may be made only twice in the individual's career—once when the faculty member is promoted from assistant to associate professor (often with a tenure decision at the same time), and a second time when the individual is promoted from associate to full professor. Staff may have the opportunity for more promotions, but the hierarchy in most colleges is flatter than in most business organizations. Their infrequency makes promotions very significant to faculty and staff, and the potential for conflict is increased because of this significance.

Criteria for promoting and tenuring faculty are discussed in Section 6.6, and procedures for promotion and tenure decisions are discussed in Section 6.7. Whether the candidate for promotion is a faculty or a staff member, however, similar principles apply. The criteria for promotion should be clear, the performance evaluations discussed in Section 4.8.2 above should have been performed regularly and accurately, and all applicable policies and procedures should be followed during the promotion process.

Challenges to negative promotion decisions tend to be based on allegations that the decision was infected with discrimination (see Sections 5.2 & 5.3), that a breach of contract occurred (see Section 4.3), that some employment tort occurred (see Section 4.7), or all of these. While documentation and careful adherence to policies and procedures are important to a defense to these claims, consistent treatment of similarly situated individuals is particularly important to defending discrimination claims. If the promotion criteria are interpreted differently for individuals of different genders or races, for example, these differences can suggest that discrimination occurred.

Because of the significance of promotion decisions to faculty and staff, the discussion of performance evaluation in Section 4.8.2 above is particularly relevant. If the college can demonstrate that an individual has been told regularly that his or her performance needs improvement, and can produce written confirmation of those communications, it will be difficult for the individual to prevail in litigation unless, of course, he or she can demonstrate that the evaluations were tainted as well. On the other hand, if an individual receives no feedback, or only positive feedback, on his or her performance and then is denied the promotion or tenure, it is not unreasonable for the individual to believe that the decision was not based on performance, but on some unlawful criterion.

A case involving the termination of a staff member after several years of inadequate performance is illustrative of the significance of written performance evaluations. In *Jones v. University of Pennsylvania*, 2003 U.S. Dist. LEXIS 6623 (E.D. Pa. March 20, 2003), the University of Pennsylvania was granted summary judgment by a federal trial court because the plaintiff, who

claimed that her termination was motivated by racial discrimination, had been given numerous performance appraisals that warned her that her performance was unsatisfactory. The plaintiff, an administrative assistant, had a history of performance problems, and several students and faculty had complained about her behavior and her inability to provide them with information they needed. The plaintiff's supervisors had given her a performance improvement plan and had placed her on probation for ninety days. When her performance did not improve, they terminated her employment prior to the completion of the probationary period.

**4.8.5. Termination.** Although performance evaluations, progressive discipline, and grievance systems can help improve employee performance, they are not infallible, and termination decisions may be necessary. This Section discusses performance-based termination; terminations resulting from a reduction in force or financial exigency are discussed in Section 6.8.

If a progressive discipline system is used, termination would typically be the final step after an oral warning, written warning, and suspension have been used. If the employee is being discharged for especially severe or dangerous misconduct, the college may legitimately decide to bypass the earlier stages of discipline. Documentation of all previous discipline, and of the incidents or reasons for the termination, is important in the event that the employee challenges the termination decision through a grievance system, in an administrative agency proceeding, or in court.

Terminations are considered the “capital punishment” of employment relations, and administrators should prepare very carefully prior to making the termination decision. They should be able to answer these questions:

1. Is there sufficient documentation of performance problems to support the termination decision?
2. Have all relevant policies and procedures been followed, and can this be proven?
3. Have other individuals who have had similar performance problems also been terminated? If not, why not?
4. Has the termination decision been discussed with the college's counsel? With the supervisor's manager?
5. Is this employee capable of performing adequately in another position at the college that is available? If so, why has this not been considered?
6. Has some event that could be viewed as a reason for the termination happened recently (for example, the employee filed a workers' compensation claim, or announced that she was pregnant, or took a family or medical leave)?

Resources on “best practices” and guidelines for lawful termination are listed in the Selected Annotated Bibliography for this Chapter, under Section 4.8.

One strategy for avoiding litigation is to have the departing employee sign a waiver, or release, of liability. A waiver is a contract in which the employee promises not to sue the former employer for claims related to the employment in return for some form of severance payment. Although experts disagree as to the usefulness of waivers, and whether or not they actually encourage litigation, many colleges use them, particularly when employees terminate their employment (whether voluntarily or involuntarily). The Older Workers Benefit Protection Act (OWBPA), which is part of the Age Discrimination in Employment Act (see Section 5.2.6), provides guidelines for, among other issues, drafting waivers and giving the employee time to review and to rescind his or her agreement to the waiver. Waivers that follow the guidelines of the OWBPA are typically upheld by courts, unless there is evidence of coercion or fraud (see, for example, *Phillips v. Moore*, 164 F. Supp. 2d 1245 (D. Kan. 2001) (waiver upheld because it met OWBPA standard and the employee had retired voluntarily)).

Administrators should consider whether a pretermination hearing is necessary, as opposed to a hearing after the termination decision is made. If the college's policies or handbooks provide for such a hearing, then the college must provide one. (If the college is terminating a tenured faculty member, it will need to follow the AAUP guidelines for such a decision if the college has adopted those guidelines; the process is discussed in Section 6.7.2.3.) Even if there is no written requirement that a pretermination hearing be held, a public college should consider whether the individual being terminated could claim a "liberty interest" in his or her reputation (see Section 6.7.2.1), which would trigger the need for a name-clearing hearing. The wisdom of providing such a hearing is particularly strong if the allegations against the individual have been reported in the press or have otherwise been communicated beyond those with a business need to know, or if college officials have made public comments about the individual to be terminated. (See, for example, *Campanelli v. Bockrath*, 100 F.3d 1476 (9th Cir. 1996), holding that the head basketball coach at the University of California-Berkeley, who was terminated in mid-season, had a liberty interest and was entitled to a name-clearing hearing; failure to provide a hearing was a denial of due process.) As discussed in Section 4.8.3 above, the "hearing" need not be formal (unless the college's own written policies, collective bargaining agreement, or handbooks require a formal hearing). An opportunity to be heard by the individual or group making the decision should be sufficient in most circumstances (see, for example, the *McDaniels* case, discussed in Section 6.7.2.3), although following the guidance of *Loudermill*, discussed in Section 6.7.2.3, may be the wisest course of action.

A well-designed and carefully followed performance management system cannot insulate a college and its administrators from litigation. It can, however, provide the college with credible evidence that it followed its own rules and the law, should the college be sued by a current or former employee. Such a system will also demonstrate to employees, whether faculty or staff, that the college is committed to rewarding good performance and to correcting performance that falls short of the standard.



## Selected Annotated Bibliography

### *Sec. 4.2 (Defining the Employment Relationship)*

Carlson, Richard R. "Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying," 22 *Berkeley J. Emp. & Lab. L.* 295 (2001). Criticizes both Congress and the courts for complicating employers' ability to distinguish between employees and independent contractors, examines the failure of the common law test to provide guidance to Congress and courts, and discusses the weaknesses of statutory definitions of employee. Proposes amending statutes to focus on the transactions between the parties rather than the status of the individual, which would eliminate the need to distinguish between employees and independent contractors, but would protect individuals from discrimination, unsafe workplaces, compensation irregularities, and workplace injury.

### *Sec. 4.3 (Employment Contracts)*

Fritz, Ted P. *Employment Issues in Higher Education: A Legal Compendium* (2d ed., National Association of College and University Attorneys, 2003). Discusses training, dealing with difficult employees, retaliation, employee references, employee handbooks, leaves of absence, and downsizing.

Gross, Allen J. *Employee Dismissal Law: Forms and Procedures* (2d ed., Wiley, 1992, with 1997 Cumulative Supplement). Discusses suits alleging wrongful dismissal. Follows the litigation path from the time a decision to litigate is made through interrogatories, depositions, the trial, and its closing arguments. Useful for attorneys representing either party, the book focuses on the litigation process rather than the substance of the legal claims. Model forms and policies are included, as are suggestions for presenting wrongful discharge cases before a jury.

Holloway, William, & Leech, Michael. *Employment Termination: Rights and Remedies* (2d ed., Bureau of National Affairs, 1993, with 2003 supp.). Discusses legal issues surrounding employment termination under both federal and state law, as well as common law. Discusses discovery issues, settlement and release, insurance considerations, workplace investigations, workplace violence, and medical leave issues.

King, Kenneth. Note, "Mandating English Proficiency for College Instructors: States' Responses to 'the TA Problem,'" 31 *Vand. J. Transnat'l L.* 203 (1998). Reviews fifteen state statutes that mandate English proficiency for college instructors, discusses possible legal issues related to the enforcement of these statutes, and provides recommendations for avoiding legal liability related to these statutes.

Perritt, Henry H., Jr. *Employee Dismissal Law and Practice* (3d ed., Wiley, 1992, and periodic supp.). A guide to litigation for plaintiffs and defendants. Includes information on state statutory and common law of wrongful discharge, discusses common law actions in tort, implied contract, and the implied covenant of good faith. Also discusses the access to these theories by employees covered by collective bargaining agreements.

Berman, Evan M., Bowman, James S., West, Jonathan P., & Van Wart, Montgomery. *Human Resource Management in Public Service* (Sage, 2001). A textbook that reviews techniques for selection, evaluation, and discipline of public sector employees.

- Condrey, Stephen E. *Handbook of Human Resource Management in Government* (Jossey-Bass, 2004). Discusses compensation, job analysis, sexual harassment, diversity, and performance appraisal for workers in the public sector. Also discusses total quality management, benchmarking, and budgeting.
- “Developments in the Law—Public Employment,” 97 *Harv. L. Rev.* 1611 (1984). A review of the law of public employment that includes a review of the development of civil service systems. It reviews collective bargaining in the public sector and its interaction with the civil service system; discusses limits placed on the free speech and association rights of public employees by civil service laws and regulations.
- Light, Paul. *The Tides of Reform: Making Government Work 1945–1995* (Yale University Press, 1997). Reviews the history of the federal civil service system and discusses its implications for the functioning of the federal government. Discusses four theories of “reform” in the federal civil service, concluding that reform efforts overall have been ineffective.

### Sec. 4.5 (Collective Bargaining)

- American Federation of Teachers. *Recognition and Respect: Standards of Good Practice in the Employment of Graduate Employees* (AFT, 2004). Provides standards for compensating, hiring, and evaluating graduate students who serve as teaching or research assistants. Available at [http://www.aft.org/pubs-reports/higher\\_ed/grad\\_employee\\_standards.pdf](http://www.aft.org/pubs-reports/higher_ed/grad_employee_standards.pdf).
- Angell, George W., Kelly, Edward P., Jr., & Associates. *Handbook of Faculty Bargaining* (Jossey-Bass, 1977). A comprehensive guide to collective bargaining for administrators. Provides information and recommendations on preparing for collective bargaining, negotiating contracts, administering contracts, and exerting institutional leadership in the bargaining context. Includes a special chapter on statewide bargaining in state postsecondary systems.
- Finkin, Matthew. “The NLRB in Higher Education,” 5 *U. Tol. L. Rev.* 608 (1974). Probes the whole gamut of NLRB authority and activity in postsecondary education. Discusses and criticizes NLRB decisions dealing with jurisdiction over private institutions; faculty status as managers, supervisors, or employees; appropriate bargaining units; and employers’ unfair labor practices.
- Gregory, David L., & Russo, Charles J. “The First Amendment and the Labor Relations of Religiously-Affiliated Employers,” 8 *B.U. Pub. Int. L.J.* 449 (1999). Provides a critical review of the *Catholic Bishops* case and suggests ways that religiously affiliated institutions can maintain their religious prerogatives while allowing their employees to unionize.
- Hardin, Patrick, & Higgins, John E., Jr. (eds.). *Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* (4th ed., Bureau of National Affairs, 2001, with 2004 Cumulative Supplement). The standard reference work for private sector labor relations law. Includes discussion of protected employee activity, the representation process, union recognition by the employer, strikes, and related issues.
- Hutchins, Neal H., & Hutchens, Melissa B. “Catching the Union Bug: Graduate Student Employees and Unionization,” 39 *Gonzaga L. Rev.* 105 (2003–04). Although written prior to the NLRB’s decision in *Brown University*, reviews the rights of graduate assistants at public and private universities to unionize. Examines the potential conflict between the NLRA and FERPA with respect to the rights of union organizers to

- gain access to information about students in order to contact them. Reviews a variety of arguments for and against the unionization of graduate students.
- Julius, Daniel J., & Gumpport, Patricia J. "Graduate Student Unionization: Catalysts and Consequences," 26 *Rev. Higher Educ.* 187–216 (2002). Describes the "current landscape" of graduate student unionization and draws conclusions about the reasons for graduate student organization and its effect on graduate education. Analyzes interview data from twenty institutions where graduate students are unionized and concludes that, although collective bargaining tends to rationalize the workloads and compensation of graduate assistants across academic departments, it does not appear to have a negative effect on the pedagogical relationship between faculty and doctoral students.
- Lee, Barbara A. "Faculty Role in Academic Governance and the Managerial Exclusion: Impact of the *Yeshiva University* Decision," 7 *J. Coll. & Univ. Law* 222 (1980–81). An in-depth analysis of the *Yeshiva* case. Discusses origins and definitions of the terms "supervisory," "managerial," and "professional" employees; the faculty's role in academic governance; and the implications of the *Yeshiva* decision for both unionized and nonunionized colleges and universities.
- Lund, John, & Maranto, Cheryl L. "Public Sector Law: An Update." In Dale Belman, Morley Gunderson, & Douglas Hyatt, *Public Sector Employment in a Time of Transition* (Industrial Relations Research Association, 1996), 21–57. Reviews a variety of developments in the collective bargaining law for public employees, including negotiable subjects, the interaction of state law and collective bargaining, and the use of interest arbitration.
- Rabban, David. "Is Unionization Compatible with Professionalism?" 45 *Indus. & Lab. Rel. Rev.* 97 (1991). Analyzes the compatibility of unionization with professionalism by examining the provisions of more than one hundred collective bargaining agreements involving a variety of professions. Author discusses the effect of contractual provisions on professional standards, participation by professionals in organizational decision making, and other issues of professional concern, and concludes that unionization and professionalism are not "inherently incompatible."

#### **Sec. 4.6 (Other Employee Protections)**

- Burling, Philip, & Matthews, Kathryn A. *Responding to Whistleblowers: An Analysis of Whistleblower Protection Acts and Their Consequences* (National Association of College and University Attorneys, 1992). A practical guide to responding to employee complaints, with a discussion of federal and state statutory and state common law whistleblower protections.
- Clemons, Jennifer. "FLSA Retaliation: A Continuum of Employee Protection," 53 *Baylor L. Rev.* 535 (2001). Discusses the degree of formality required to protect an employee who complains of FLSA violations under the law's anti-retaliation provisions. Reviews the concept of retaliation under the FLSA and comparable provisions in other employment laws (such as Title VII); recommends that employees who complain to employers about alleged FLSA violations be protected by the anti-retaliation provisions.
- Coleman, Barbara J. *Primer on ERISA* (4th ed., Bureau of National Affairs, 1993). A concise overview of the major provisions of the Employee Retirement Income Security Act, focusing on pension, health care, disability, and accident plans, and noting relevant sections of the Internal Revenue Code. Includes forms for disclosure, a

calendar for reporting benefits, model statements of employee rights under ERISA, a checklist for summary plan descriptions, and other model statements.

- Euben, Donna R., & Thornton, Saranna R. *The Family and Medical Leave Act: Questions and Answers for Faculty* (American Association of University Professors, 2002). Analyzes the rights of faculty to leave under the FMLA, discussing eligibility under the law, job protections and benefits, special issues for unionized faculty, and interaction among the FMLA, the ADA, and the Rehabilitation Act.
- Fanning, Richard W. "Federal Standards and Enforcement: Introduction: The Federal-State Partnership of Unemployment Compensation," 29 *U. Mich. J.L. Reform* 475 (1996). This introduction to a symposium on unemployment compensation reviews the statutory and regulatory basis for the federal-state partnership that forms the unemployment compensation system. It discusses how the federal government works with states to administer the unemployment insurance (UI) system, and reviews how states interact when a UI claim involves more than one state.
- Flygare, Thomas J. *The Family and Medical Leave Act of 1993: Applications in Higher Education* (National Association of College and University Attorneys, 1995). A comprehensive overview of the FMLA and its particular implications for higher education. Included are several hypothetical situations relevant to colleges and universities, and a discussion of how a college can determine whether the leave qualifies under the FMLA. A particularly helpful guide for supervisors, department chairs, and deans.
- Flygare, Thomas J. *What to Do When the U.S. Department of Labor Comes to Campus: Wage and Hour Law in Higher Education* (National Association of College and University Attorneys, 1999). Designed to help colleges and universities respond to U.S. Department of Labor investigations of wage and hour issues as well as to provide guidance in complying generally with the Fair Labor Standards Act. Discusses exemptions, calculation of working time, and overtime issues. (Published prior to the revision of the FLSA exemptions in 2004.)
- Hunter, Richard J., & Mason, Phyllis. "Law, Ethics and Public Policy in the Creation of an Environmental Imperative: The Hazard Communication Standard Insuring Workers' Rights," 18 *T. Jefferson L. Rev.* 1 (1996). Reviews the history and development of the Hazard Communication Standard, discusses significant appellate and Supreme Court cases, and discusses employers' responsibilities for communicating to employees the risks they face in the workplace.
- Kearns, Ellen C. (ed.). *Fair Labor Standards Act* (Bureau of National Affairs, 1999, with 2004 Cumulative Supplement). Includes a discussion of the 2004 changes to regulations on exemptions for salaried workers, as well as recommendations for record keeping and other compliance issues.
- Keller, J. J., & Associates. *OSHA Compliance Manual: Application of Key OSHA Topics* (J. J. Keller & Associates, 2000). This 600-page volume reviews OSHA's purpose and coverage, discusses the development and enforcement of workplace standards, the General Duty Clause, OSHA's record-keeping and reporting requirements, and workplace inspections. It discusses OSHA-approved state health and safety programs, employer and employee rights and responsibilities under OSHA, and lists the OSHA regional offices.
- Kurzban's Immigration Law: A Comprehensive Outline and Reference Tool* (American Immigration Law Foundation, published annually). Includes 1,200 pages, with appendices, of information concerning all areas of immigration law. Available from the American Immigration Lawyers Association at <http://aila.org>.

- Malpert, Rodney A., & Peterson, Amanda. *Business Immigration Law: Strategies for Employing Foreign Nationals* (Law Journal Press, 2000, with periodic updates). A loose-leaf service that provides updated information on legal requirements for employing noncitizens. Includes an index and forms.
- Phillips, Eric. Note: "On-Call Time Under the Fair Labor Standards Act," 95 *Mich. L. Rev.* 2633 (1997). Reviews litigation concerning whether an employee is working while on call, suggesting that neither the appellate courts nor the Supreme Court have provided clear guidance for determining when an employee is working. Proposes standards for determining whether an on-call worker is covered by the FLSA.
- Rabinowitz, Randy S. (ed.). *Occupational Safety and Health Law* (2d ed., Bureau of National Affairs, 2002). Discusses the regulatory and enforcement authority of OSHA, the procedures used in an OSHA inspection, how to challenge an enforcement action, and significant developments in OSHA jurisprudence.
- Song, Janet K., & Kushner, Michael G. (eds.). *ERISA: The Law and the Code* (Bureau of National Affairs, 2004). Includes the text of the statute and all amendments, with cross-references, as well as a cross-referenced index and a section-by-section finding list for ERISA and the Internal Revenue Code.
- Thompson, Anthony J., et al. *OSHA Environmental Compliance Handbook* (West Group, Environmental Law Series, 1998). Discusses the interplay between occupational safety and health and environmental laws, and the collaborative enforcement activities of the two federal agencies charged with enforcing these laws. Provides a primer for OSHA's statutory and regulatory framework, discusses its record-keeping requirements and the agency's efforts to force ergonomic improvements in the workplace. Also reviews certain Environmental Protection Agency (EPA) regulations and provides references to other reference sources for both laws. Suggests strategies for dealing with OSHA inspections and conducting health and safety audits.
- Welch, Edward M. *Employer's Guide to Workers' Compensation* (Bureau of National Affairs, 1999). Explains how to determine which injuries are covered, provides advice for working with workers' compensation insurance companies, describes the operation of state workers' compensation agencies, and provides checklists and suggestions for reducing the cost of workers' compensation programs.
- Westman, Daniel P., & Modesitt, Nancy M. *Whistleblowing: The Law of Retaliatory Discharge* (2d ed., Bureau of National Affairs, 2004). Discusses state common law protections for employees as well as the protections of the Sarbanes-Oxley Act. Also reviews state statutes protecting whistleblowers. Includes an appendix listing relevant state and federal whistleblower laws.
- Yamada, David C. "The Employment Law Rights of Student Interns," 35 *Conn. L. Rev.* 215 (2002). Discusses legal and policy issues related to student internships, including FLSA implications, protection by the nondiscrimination laws, and other potential legal protections if interns are considered to be employees.

### ***Sec. 4.7 (Personal Liability of Employees)***

- Traynor, Michael. "Defamation Law: Shock Absorbers for Its Ride Into the Groves of Academe," 16 *J. Coll. & Univ. Law* 373 (1990). Reviews strategies for avoiding personal and institutional liability for defamation, with particular emphasis on research and publication by faculty.

See also Evans & Evans entry in Chapter Three, Section 3.2; NACUA entry in Section 3.3; and Nahmod entry in Section 3.5.

### ***Sec. 4.8 (Performance Management Issues)***

DelPo, Amy, & Guerin, Lisa. *Dealing with Problem Employees: A Legal Guide* (Nolo, 2001). Discusses the use of progressive discipline, how to investigate employee performance problems, and litigation avoidance. Includes sample forms and policies, checklists, and state statutes related to employment.

Mink, Oscar G., Owen, Keith Q., & Mink, Barbara P. *Developing High-Performance People: The Art of Coaching* (Perseus, 2001). Provides advice for managers and supervisors on working with employees to improve performance. Discusses performance improvement plans and provides suggestions for evaluating employee performance.

Seldin, Peter. *Evaluating and Developing Administrative Performance* (Jossey-Bass, 1988). Presents a comprehensive system for assessing administrative performance and helping administrators improve their performance. Chapters discuss the demand for accountability and its effect on evaluation, the use of evaluative information in personnel decisions, characteristics of a successful evaluation system, the process of creating an evaluation system, and legal pitfalls of evaluation.

# 5

## Nondiscrimination and Affirmative Action in Employment

### *Sec. 5.1. The Interplay of Statutes, Regulations, and Constitutional Protections*

The area of employment discrimination is probably more heavily blanketed with overlapping statutory, regulatory, and constitutional requirements than any other area of postsecondary education law. Several federal statutes and one major executive order prohibit discrimination by employers, including postsecondary institutions, and each has its own comprehensive set of administrative regulations or guidelines (see Section 5.2). Other federal laws prohibit retaliation for the exercise of the rights provided by the laws—also a form of discrimination. All states also have fair employment practices statutes, some of which provide greater protections to employees than federal nondiscrimination statutes.

Because of their national scope and comprehensive coverage of problems and remedies, and because in some cases they provide greater protection than the laws of many states, the federal antidiscrimination statutes have assumed great importance. The federal statutes, moreover, supplemented by those of the states, have outstripped the importance of the federal Constitution as a remedy for employment discrimination, particularly for employees of private colleges. The statutes cover most major categories of discrimination and tend to impose more affirmative and stringent requirements on employers than does the Constitution.

Race discrimination in employment is prohibited by Title VII of the Civil Rights Act of 1964 as amended, by 42 U.S.C. § 1981, and by Executive Order 11246 as amended. Sex discrimination is prohibited by Title VII, by Title IX of the Education Amendments of 1972, by the Equal Pay Act, and by Executive Order 11246. Age discrimination is outlawed by the Age Discrimination in

Employment Act (ADEA). Discrimination against employees with disabilities is prohibited by both the Americans With Disabilities Act (ADA) and the Rehabilitation Act of 1973. Discrimination on the basis of religion is outlawed by Title VII and Executive Order 11246. Discrimination on the basis of national origin is prohibited by Title VII and by Executive Order 11246. Discrimination against aliens is prohibited indirectly under Title VII and directly under the Immigration Reform and Control Act of 1986 (IRCA; discussed in Section 4.6.5). Discrimination against veterans is covered in part by 38 U.S.C. § 4301. Some courts have ruled that discrimination against transsexuals is sex discrimination, and thus violates Title VII (see, for example, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)). Other forms of discrimination are prohibited by the laws of some states.

The nondiscrimination aspects of the statutes and Executive Order 11246 are discussed in this Section, and they are contrasted with the requirements of the federal Constitution, as interpreted by the courts in the context of discrimination claims. The affirmative action aspects of the statutes and Executive Order 11246 are discussed in Section 5.4 (as applied to staff) and Section 6.5 (as applied to faculty).

The rationale for laws prohibiting discrimination in employment decisions is that characteristics such as race, sex, religion, or age (among others) are irrelevant for employment decisions. In debates prior to the passage of the Civil Rights Act of 1964, the first comprehensive federal law prohibiting employment discrimination, congressional leaders stressed the financial cost to both business and members of minority groups of employment decisions based not on individual qualifications or merit, but on “immutable” characteristics such as sex or race.

In cases where discrimination is alleged, the parties must follow a prescribed order of proof, which is described later in Section 5.2. In cases of intentional discrimination, for example, the plaintiff must present sufficient evidence to raise an inference of discrimination; the defense then is allowed to rebut that inference by presenting evidence of a legitimate, nondiscriminatory reason for the action the plaintiff alleges was discriminatory. The plaintiff then has an opportunity to demonstrate that the defendant’s “legitimate nondiscriminatory reason” is a pretext, that it is unworthy of belief. The substantive and procedural requirements of each of the relevant laws are examined in Section 5.2, as are the nature of the remedies available to plaintiffs. Then each type of discrimination (race, sex, and so on) is examined in Section 5.3, with examples of how these claims typically arise, the types of issues that colleges defending these claims must generally address, and the implications of these cases for administrators and institutional counsel.

Although disputes arising under the nondiscrimination laws have tended to be litigated in federal court, some employers in the nonacademic sector are using “mandatory arbitration agreements” to require employees who raise allegations of employment discrimination to arbitrate their claims rather than submitting them to a judicial forum. The use and lawfulness of requiring employees to arbitrate discrimination claims is discussed in Section 2.3.



Beginning in the late 1990s, the U.S. Supreme Court handed down a series of rulings limiting congressional authority to abrogate the sovereign immunity of states with respect to their liability for violations of federal nondiscrimination laws. These cases are discussed in Section 13.1.6. They apply to claims asserted against state colleges and universities by their employees in federal court, but by extension may now also apply to such claims brought in state court (see *Alden v. Maine*, discussed in Section 13.1.6). These cases have addressed some, but not all, of the federal nondiscrimination laws discussed in this section. Application of the sovereign immunity doctrine to discrimination claims against state colleges is discussed for each law so affected.

Several of the federal nondiscrimination laws have extraterritorial application. This is significant for colleges that employ U.S. citizens outside the United States to staff study abroad programs or other college programs that occur outside of the United States. The Civil Rights Act of 1991, discussed in Section 5.2.1, amended Title VII and the Americans With Disabilities Act to provide for extraterritorial application, thus legislatively overruling a U.S. Supreme Court decision, in *EEOC v. Arabian American Oil Co.*, 498 U.S. 808 (1990), that Title VII did not have extraterritorial application. The Age Discrimination in Employment Act was amended in 1984 to extend extraterritorial jurisdiction to U.S. citizens working abroad for U.S. employers, or for a foreign company that is owned or controlled by a U.S. company (29 U.S.C. § 623(h)). The Equal Pay Act also provides for extraterritorial application; a 1984 amendment changed the definition of “employee” in the Fair Labor Standards Act (of which the Equal Pay Act is a part) to include “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country” (29 U.S.C. § 630(f)). Equal Employment Opportunity Commission (EEOC) Guidelines on the extraterritorial application of these three laws can be found on the EEOC’s Web site, available at <http://www.eeoc.gov>.

Another issue of increasing importance is the number of retaliation claims that employees who allege discrimination are now filing. The nondiscrimination laws contain language that makes it unlawful to take an adverse employment action against an individual who opposes or otherwise complains about alleged employment discrimination. Language in Title VII is similar to that in other federal nondiscrimination laws:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. § 2000e-3(a)].

Retaliation claims have more than doubled since the mid-1990s, and constituted 27 percent of all claims filed with the EEOC in 2002. Such claims are further discussed in Section 13.5.7.5.

## Sec. 5.2. Sources of Law

**5.2.1. Title VII.** Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is the most comprehensive and most frequently utilized of the federal employment discrimination laws. It was extended in 1972 to cover educational institutions both public and private. According to the statute's basic prohibition, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The law covers not only employers but labor unions and employment agencies as well. Liability under Title VII is corporate; supervisors cannot be held individually liable under Title VII, although they may under other legal theories (*Miller v. Maxwell's International*, 991 F.2d 583 (9th Cir. 1993)).

Students who are employees may be protected under Title VII, but whether a student is also an employee is a factual issue (see, for example, *Cuddeback v. Florida Board of Education*, 318 F.3d 1230 (11th Cir. 2004), ruling that a graduate student research assistant was an employee for Title VII purposes under the "economic realities test"). Fellowships may be considered wages, or they may be characterized as financial aid. (For a discussion of the guidelines for determining whether a fellowship recipient is an employee, see *Sizova v. National Institute of Standards and Technology*, 282 F.3d 1320 (10th Cir. 2002) (ruling that the National Institute of Standards and Technology (NIST), not the University of Colorado, was the plaintiff's employer because the plaintiff worked at the NIST site and was supervised by its employees, and thus dismissing the Title VII claim against the university).)

The major exception to the general prohibition against discrimination is the "BFOQ" exception, which permits hiring and employing based on "religion, sex, or national origin" when such a characteristic is a "bona fide occupational qualification necessary to the normal operation of that particular business or enterprise" (42 U.S.C. § 2000e-2(e)(1)). Religion as a BFOQ is examined in Section 5.5 in the context of employment decisions at religious institutions of higher education. Sex could be a permissible BFOQ for a locker room attendant or, perhaps, for certain staff of a single-sex residence hall. Race and national origin are not permissible BFOQs for positions at colleges and universities.

Title VII is enforced by the Equal Employment Opportunity Commission, which has issued a series of regulations and guidelines published at 29 C.F.R.

Parts 1600 through 1610. The EEOC may receive, investigate, and conciliate complaints of unlawful employment discrimination, and may initiate lawsuits against violators in court or issue right-to-sue letters to complainants (29 C.F.R. Part 1601).

Title VII was amended by the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991)), in large part as a reaction by Congress to seven decisions of the U.S. Supreme Court in 1989 that sharply limited the procedural and substantive rights of plaintiffs under Title VII and several other nondiscrimination laws. These decisions are discussed briefly in this Section and in Section 5.4. In addition, the Civil Rights Act of 1991 provides for compensatory and punitive damages,<sup>1</sup> as well as jury trials, in cases of intentional discrimination.

Although Title VII broadly prohibits employment discrimination, it does not limit the right of postsecondary institutions to hire employees on the basis of job-related qualifications or to distinguish among employees on the basis of seniority or merit in pay, promotion, and tenure policies. Institutions retain the discretion to hire, promote, reward, and terminate employees, as long as the institutions do not make distinctions based on race, color, religion, sex, or national origin. If, however, an institution does distinguish among employees on one of these bases, courts have broad powers to remedy the Title VII violation by “making persons whole for injuries suffered through past discrimination” (*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)). Remedies may include back pay awards (*Albemarle*), awards of retroactive seniority (*Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)), and various affirmative action measures to benefit the group whose members were the subject of the discrimination (see Section 5.4), as well as the right, in disparate treatment cases, to compensatory and punitive damages.

There are two basic types of Title VII claims: the “disparate treatment” claim and the “disparate impact” or “adverse impact” claim. In the former type of suit, an individual denied a job, promotion, or tenure, or subjected to a detrimental employment condition, claims to have been treated less favorably than other applicants or employees because of his or her race, sex, national origin, or religion (see, for example, *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981) (alleged sex discrimination in denial of tenure)). In the “disparate impact” or “adverse impact” type of suit, the claim is that some ostensibly neutral policy of the employer has a discriminatory impact on the claimants or the class of persons they represent (see, for example, *Scott v. University of Delaware*, 455 F. Supp. 1102, 1123–32 (D. Del. 1978), *affirmed on other grounds*, 601 F.2d 76 (3d Cir. 1979) (alleging that requirement of Ph.D. for faculty

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<sup>1</sup>Compensatory and punitive damages are capped on the basis of the size of the employer: organizations with 15–100 employees may be assessed up to \$50,000; 101–201 employees, \$100,000; 201–500 employees, \$200,000; and more than 500 employees, \$300,000. These damages may be assessed in addition to the “make-whole” remedies of back pay and attorney’s fees. Other nondiscrimination statutes do not have these caps. Awards of “front pay” are not considered to be compensatory damages, and thus are not subject to the statutory cap (*Pollard v. E. I. duPont de Nemours & Co.*, 532 U.S. 843 (2001)).

positions discriminated against racial minorities)). Of the two types of suits, disparate treatment is the more common for postsecondary education. The disparate treatment and disparate impact theories are also sometimes used when claims are litigated under other nondiscrimination laws, such as the Equal Pay Act and Title IX of the Education Amendments of 1972.

Although the disparate treatment claim may involve either direct or circumstantial evidence of discrimination, most plaintiffs are unable to present direct evidence of discrimination (such as written statements that the institution will not hire or promote them because of their race, sex, and so on, or corroborated oral statements that provide direct evidence of discrimination). An example of direct evidence of discrimination occurred in *Clark v. Claremont University*, 6 Cal. App. 4th 639 (Ct. App. Cal. 1992), a case brought under California's Fair Housing and Employment Act (Cal. Gov't. Code § 12900 *et seq.*) but analyzed under the Title VII disparate treatment theory. The plaintiff, an assistant professor who was denied tenure, introduced evidence of numerous racist remarks made by faculty members involved in the tenure review process, and a jury found that racial discrimination had motivated the tenure denial. The appellate court upheld the jury verdict, finding that the number and the nature of the racist remarks made by the faculty members provided substantial evidence of race discrimination.

Most plaintiffs, however, must use circumstantial evidence to attempt to demonstrate that discrimination motivated some negative employment action. The U.S. Supreme Court developed a burden-shifting paradigm that allows the plaintiff to demonstrate his or her qualifications for the position, promotion, or other employment action, and then requires the employer to introduce evidence of the reason for the negative decision. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that decision:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a [category protected by Title VII]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . .

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection [411 U.S. at 802].

This burden-shifting approach requires the employer to provide a reasonable, job- or performance-related reason for the negative decision. It does not require the employer to prove that it did not discriminate. The *McDonnell Douglas* methodology has been applied to other types of discriminatory treatment prohibited by Title VII; likewise, though the case concerned only job applications, courts have adapted its methodology to hiring, termination, discipline, salary decisions, promotion, and tenure situations. This paradigm is used for the litigation of discrimination claims under other federal nondiscrimination laws as well. A subsequent Supreme Court case adds an important gloss to *McDonnell*

*Douglas* by noting that, in a disparate treatment (as opposed to disparate impact) case, “proof of discriminatory motive is critical [to complainant’s case], although it can in some situations be inferred from the mere fact of difference in treatment” (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 355 n.12 (1977)).

Courts had difficulty interpreting *McDonnell Douglas*’s requirements concerning the evidentiary burden of both the plaintiff and the defendant in Title VII cases. The Supreme Court clarified its “burden-of-proof” ruling in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The case was brought by a state agency employee whose position had been abolished in a staff reorganization. Justice Powell, writing for a unanimous Court, explained that the plaintiff’s burden in the *prima facie* case was to create a presumption that discrimination motivated the employer’s actions. The employer’s burden, said Justice Powell, was to rebut that presumption, not by proving that the employer did not discriminate, but by articulating a “legitimate, nondiscriminatory reason” for its decision, which would then create an issue of fact as to the employer’s motivation for the decision. Once the employer’s reason is given, the burden shifts back to the plaintiff

to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence [450 U.S. at 253–56; footnotes omitted].

*Burdine* clarifies the distinction between the burden of *production* (of producing evidence about a particular fact) and the burden of *persuasion* (of convincing the trier of fact that illegal discrimination occurred). The plaintiff always carries the ultimate burden of persuasion; it is only the burden of production that shifts from plaintiff to defendant and back to plaintiff again. The requirement that the defendant “articulate” rather than “prove” a nondiscriminatory reason does not relieve the defendant of the need to introduce probative evidence; it merely frees the defendant from any obligation to carry the ultimate burden of persuasion on that issue.

In *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993), the Supreme Court reemphasized that the plaintiff carries the ultimate burden of proving intentional discrimination (instead of merely demonstrating that the defendant’s reasons for its action were false). In *Hicks*, the employer had offered two reasons for the plaintiff’s discharge: a series of disciplinary violations and an incident of gross insubordination. In the “pretext” stage of the case, the plaintiff convinced the trial court that these were not the reasons for the discharge, because other employees with similar disciplinary problems had not been discharged. The trial court ruled against the plaintiff because the plaintiff was unable to show racial animus in the decision, but the U.S. Court of Appeals for the Eleventh Circuit reversed, saying that, under the *Burdine* language, if the plaintiff could

demonstrate that the employer's reasons were "unworthy of belief," the plaintiff should prevail.

The Supreme Court, in a 5-to-4 opinion written by Justice Scalia, disagreed, saying that Title VII did not afford a plaintiff a remedy simply because an employer gave untruthful reasons, but only if the employer's decision was based on the plaintiff's race. Justice Scalia wrote:

We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*. . . . [N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable [509 U.S. at 514–15; emphasis in original].

In other words, in order to prevail under Title VII, the plaintiff must show two things: that the employer's stated reasons for the challenged decision are untrue, and that the true reason is discrimination. Few plaintiffs have direct evidence of discrimination, and many plaintiffs who have prevailed in discrimination claims have done so by indirect proof of discrimination of the type that the majority appeared to reject in *Hicks*.

The U.S. Supreme Court clarified its *Hicks* ruling in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Although *Reeves* was brought under the Age Discrimination in Employment Act (discussed in Section 5.2.6), the Court reviewed the lower courts' evaluations of the plaintiff's evidentiary burdens under the teachings of *Hicks*. *Reeves* had alleged that his termination was a result of age discrimination rather than the employer's determination that he had falsified time cards. The Court ruled that because *Reeves* had established a *prima facie* case of age discrimination and had demonstrated that the employer's allegations regarding the falsification were untrue, he did not have to make a specific link between age-related comments by his supervisor and his termination. Said the Court:

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law [530 U.S. at 148–49].

Independent evidence of discrimination was not necessary under these circumstances, according to the Court.

Occasionally, a plaintiff will have direct evidence of discrimination and allege the problem of "mixed motives" in an employment decision. In such cases, the plaintiff demonstrates that one or more of the prohibited factors (sex, race, and so on) was a motivating factor in a negative employment decision. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the plaintiff had proved that a committee evaluating her for partnership in an accounting firm used gender

stereotypes to reach its decision not to award her a partnership. Both the plaintiff's and the defendant's burden of proof were at issue in *Hopkins*: the plaintiff argued that, in order to hold the defendant liable for discrimination, she need only demonstrate that gender played a part in the decision; the defendant insisted that, before liability could be found, the plaintiff must prove that gender was the "decisive consideration" in the decision.

A plurality of the Court, in an opinion authored by Justice Brennan, ruled that the plaintiff need only show that gender was one of the considerations in the employment decision. With regard to the defendant's burden of proof, Justice Brennan wrote:

[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role [490 U.S. at 244].

In other words, in "mixed motive" cases, simply "articulating a legitimate nondiscriminatory reason" in the face of demonstrated bias would be insufficient for a defendant to rebut the plaintiff's evidence; instead, to be found not liable, an employer would have to demonstrate that it would have reached the same decision even if the impermissible factors were absent.

In the Civil Rights Act of 1991, Congress agreed with the plurality's determination regarding the plaintiff's burden, but it overturned its determination that a defendant could still prevail even if an impermissible factor contributed to an employment decision. The Act amended Title VII's Section 703 by adding subsection (m), which states that if the plaintiff shows that a prohibited factor motivated an employment decision, an unlawful employment practice is established. But if the plaintiff establishes a violation under subsection (m) and the employer successfully demonstrates that the same action would have been taken in absence of the prohibited factor, then a court may not award damages or make-whole remedies (such as reinstatement or promotion). This amendment permits plaintiffs who do not prevail on the merits to be awarded attorney's fees and declaratory relief.

Lower federal courts attempting to interpret the new language of Title VII in mixed motive cases differed on whether a plaintiff was required to present direct evidence of discrimination in such cases, or whether indirect evidence of discrimination was sufficient to obtain a mixed-motive jury instruction. The U.S. Supreme Court, in a unanimous opinion, ruled that indirect or circumstantial evidence was sufficient to entitle a plaintiff to a mixed motive jury instruction in such cases (*Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

Disparate treatment cases may also be brought by a class of plaintiffs. In these cases, called "pattern and practice" cases, the plaintiffs must prove intentional discrimination by the employer in one or more employment conditions. For example, in *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458 (9th Cir. 1987), female faculty alleged systemwide discrimination against women in salary, promotion, and tenure practices, because statistical analysis revealed that women, on the whole, were paid less than male faculty and tended to be

at lower ranks. The appellate court affirmed the trial court's conclusion that the postsecondary system had provided legitimate nondiscriminatory reasons for the statistical differentials, such as the fact that most women faculty were less senior and that external economic factors had depressed the salaries of junior faculty compared with those of senior faculty, most of whom were male. The court's careful articulation of the burdens of proof in pattern and practice cases is instructive.

Although most Title VII litigation in academe involves allegations of disparate treatment, several class action complaints have been brought against colleges and universities using the disparate impact theory. For example, in *Scott v. University of Delaware*, 455 F. Supp. 1102 (D. Del. 1987), affirmed on other grounds, 601 F.2d 76 (3d Cir. 1979), a black professor alleged, on behalf of himself and other black faculty, that requiring applicants for faculty positions to hold a Ph.D. had a disparate impact on blacks because blacks are underrepresented among holders of Ph.D. degrees. The court agreed with the university's argument that training in research, symbolized by the doctoral degree, was necessary for universities because of their research mission.

The paradigm for disparate impact suits is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the U.S. Supreme Court explained in that case: "Under [Title VII] practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices . . ." (401 U.S. at 429).

In its unanimous opinion in *Griggs*, the Court interpreted Title VII to prohibit employment practices that (1) operate to exclude or otherwise discriminate against employees or prospective employees on grounds of race, color, religion, sex, or national origin, and (2) are unrelated to job performance or not justified by business necessity. Both requirements must be met before Title VII is violated. Under the first requirement, it need not be shown that the employer intended to discriminate; the effect of the employment practice, not the intent behind it, controls. Under the second requirement, the employer, not the employee, has the burden of showing the job relatedness or business necessity of the employment practice in question.

The disparate impact test developed in *Griggs* was applied by the Supreme Court in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). The Court added an element to the *Griggs* tests: where a practice with a disparate impact is justified by business necessity, the plaintiffs may still prevail if they can demonstrate that "other selection processes that have a lesser discriminatory effect could also suitably serve the employer's business needs" (487 U.S. at 1006, Blackmun concurrence). In addition, the Court ruled that plaintiffs could attack subjective decision-making practices under the disparate impact theory—a ruling that is particularly important to faculty plaintiffs, who have frequently alleged that subjective performance standards are susceptible to bias.

In 1989, the U.S. Supreme Court issued a ruling in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that changed *Griggs*'s requirement that the employer demonstrate the business necessity of the challenged practices and



made the plaintiff's burden of production much more difficult. Congress responded in the Civil Rights Act of 1991 by codifying the *Griggs* standard, thus nullifying that portion of *Wards Cove*. The Act adds subsection (k) to Section 703. The subsection requires the employer to rebut a showing of disparate impact by demonstrating that "the challenged practice is job related for the position in question and consistent with business necessity" (42 U.S.C. § 2000e-2(k)(1)(a)(i)). The subsection also permits the plaintiff to challenge the combined effects of several employment practices if the plaintiff "can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis." The new law also codifies the Court's *Watson* holding by adding that unlawful disparate impact may also be established if the plaintiff can demonstrate that a less discriminatory and equally effective alternative practice is available to the employer but the employer refuses to use it.

Another issue litigated under Title VII has relevance for claims under other nondiscrimination laws. Under Title VII, an individual claiming discrimination must file a complaint with the EEOC within 180 days "after the alleged unlawful employment practice occurred" (42 U.S.C. § 2000e-5(e)), or within 300 days if a claim has first been filed with a state or local civil rights agency. The claim lapses if the individual does not comply with this time limit. Although this provision may appear straightforward, most colleges and universities use multiple decision levels on faculty status matters. In addition, many individuals may be involved in a staff employment decision. These practices make it difficult to determine exactly when an employment practice "occurred." Did it occur with the first negative recommendation, perhaps made by a department chair, or is the action by an institution's board of trustees the "occurrence"? And since many colleges give a faculty member a "terminal year" contract after denial of tenure, at what point has the alleged discrimination "occurred"?

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the U.S. Supreme Court interpreted this time requirement as it applies to faculty members making claims against postsecondary institutions. Overruling the appellate court, the Supreme Court held that the time period commences when an institution officially announces its employment decision and not when the faculty member's employment relationship terminates.

In a 5-to-4 decision, the Court dismissed the claim of Ricks, a black Liberian professor who had been denied tenure, because he had not filed his claim of national origin discrimination within 180 days of the date the college notified him of its decision. Ricks had claimed that his terminal year of employment, after the tenure denial, constituted a "continuing violation" of Title VII, which allowed him to file his EEOC charge within 180 days of his last day of employment. The Court rejected this view, stating that the alleged discrimination occurred at a single point in time. The Court also rejected an intermediate position, adopted by three of the dissenters, that the limitations period should not have begun until after the final decision of the college grievance committee, which had held hearings on Ricks's complaint.

In *Chardon v. Fernandez*, 454 U.S. 6 (1981), a *per curiam* opinion from which three Justices dissented, the Court extended the reasoning of *Ricks* to cover non-renewal or termination of term appointments (as opposed to tenure denials). Unless there are allegations that discriminatory acts continued to occur after official notice of the decision, the 180-day time period for nonrenewal or termination claims also begins to run from the date the complainant is notified.

The U.S. Court of Appeals for the Seventh Circuit was asked to determine at what point the “official notice” of the decision occurs: when an administrator makes a decision to which higher-level administrators routinely defer, or when the chief academic officer confirms that decision? In *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), the appellate court ruled that the point at which the discriminatory act occurs is a question of fact, which must be determined by reference to the institution’s policies and practices. In this case, language in the faculty handbook indicated that a dean’s decision to deny tenure was final unless reversed by the provost on appeal, and that the provost did not review negative recommendations by deans unless asked to do so by the candidate. Citing *Ricks*, the court stated that appeal of a negative decision made by the dean does not toll the limitations period.

The Civil Rights Act of 1991 addresses the issue of timely filing, although it does not overturn *Ricks*. In a case decided in 1989, the U.S. Supreme Court ruled that the limitations period begins to run when a practice that later has a discriminatory effect on an individual or group is first enacted, rather than when the individual or group is harmed. In *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), a group of women were not permitted to challenge an allegedly discriminatory seniority provision that had been adopted several years earlier, because they waited until they were harmed by the provision’s application rather than filing a claim within 180 days of the date the provision took effect. Congress reversed this ruling by adding a new paragraph (2) to Section 112 of Title VII. The law now provides that a seniority system that intentionally discriminates may be challenged when the system is adopted, when an individual becomes subject to it, or when an individual is actually harmed by it.

Remedies available to prevailing parties in Title VII litigation include reinstatement, back pay, compensatory and punitive damages (for disparate treatment discrimination), and attorney’s fees. Front pay is also available to plaintiffs who can demonstrate that the discrimination diminished their future ability to earn an income at the level they would have enjoyed absent the discrimination. For example, in *Thornton v. Kaplan*, 958 F. Supp. 502 (D. Colo. 1996), a jury had found that the university had discriminated against the plaintiff when it denied him tenure, and had awarded him \$250,000 in compensatory damages, plus attorney’s fees and court costs. The university argued that the award was excessive and moved for remittur (a request that the judge reduce the damage award) to \$50,000. The judge refused, citing evidence that the denial of tenure resulted in a “loss of enjoyment” that the plaintiff derived from teaching, a loss of income, diminished prospects for future employment, humiliation, stress, depression, and feelings of exclusion from the academic community. Calling these losses “significant,” the judge refused to reduce the damage award.

Although punitive damage awards are unusual in employment discrimination cases (except for sexual harassment complaints, discussed in Section 5.3.3.3), plaintiffs often demand punitive as well as compensatory damages in discrimination lawsuits. The U.S. Supreme Court established the standard for awarding punitive damages in Title VII cases in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The plaintiff must demonstrate that the individual found to have engaged in the discrimination is an agent of the employer, employed in a managerial capacity, acting within the scope of employment, and acting with malice or reckless indifference toward the plaintiff's federally protected rights (527 U.S. at 535–45). A finding that an employer has made a good-faith effort to comply with Title VII, despite the unlawful actions of one particular manager or supervisor, will prevent the award of punitive damages. (For a discussion of the *Kolstad* standard and its application to a sexual harassment lawsuit against Tulane University, see *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002).) As long as the plaintiff can establish the required “malice” or “reckless indifference” of the employer, she may receive punitive damages even if no compensatory damages are awarded (*Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2d Cir. 2001)).

Institutions may be able to shield themselves from punitive damage awards, even if their conduct is found to violate the nondiscrimination laws, by implementing and following grievance or appeal procedures. For example, in *Elghamni v. Franklin College of Indiana*, 2000 U.S. Dist. LEXIS 16667 (S.D. Ind. October 2, 2000) (unpublished), a faculty member denied tenure sought both compensatory and punitive damages under Title VII. A federal trial court granted the college's motion for summary judgment with respect to the plaintiff's claim for punitive damages, stating that the plaintiff had availed himself of an “extensive grievance process” that reviewed his claim of alleged discrimination before the decision became final, and thus punitive damages were not warranted.

Although Title VII remains an important source of protection for faculty alleging discrimination, an increasing number of discrimination claims are being brought under state nondiscrimination laws. Many state laws have no caps on damages like those of Title VII, and thus allow more generous damage awards. Other states may have laws that make it easier for a plaintiff to establish a *prima facie* case of discrimination than is the case under Title VII. (For an example of the use of state law to challenge an allegedly discriminatory tenure decision in a case against Trinity College, see Section 6.4.)

The U.S. Supreme Court has not addressed the issue of whether states have immunity from federal court litigation under Title VII since its *Kimel* ruling (see Sections 13.1.5 & 13.1.6), but federal appellate courts have concluded that Congress expressly and validly abrogated sovereign immunity in crafting both Title VII and the Civil Rights Act of 1991. (See, for example, *Okruhlik v. The University of Arkansas*, 255 F.3d 615 (8th Cir. 2001).)

**5.2.2. Equal Pay Act.** Both the Equal Pay Act (part of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206(d)) and Title VII prohibit sex discrimination

in compensation. Because of the similarity of the issues, pay discrimination claims under both laws are discussed in this subsection.

Congress's purpose in enacting this provision was to combat the "ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman" and to establish, in its place, the principle that "equal work will be rewarded by equal wages" (quoting *Corning Glass Workers v. Brennan*, 417 U.S. 188 (1974)). The Equal Pay Act provides that:

no employer [subject to the Fair Labor Standards Act] shall discriminate . . . between employees on the basis of sex . . . on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex [29 U.S.C. § 206(d)(1)].

Thus, the determination of whether jobs are equal, and the judgment as to whether one of the four exceptions applies to a particular claim, is the essence of an equal pay claim under this law.

The plaintiff in an Equal Pay Act lawsuit must find an employee in the same job, of a different gender, who is paid more. Even if the titles and job descriptions are the same, the court examines the actual responsibilities of the plaintiff and the comparator. For example, in *Gustin v. West Virginia University*, 63 Fed. Appx. 695 (4th Cir. 2003), the court ruled that the job responsibilities of a female assistant dean for student affairs were not equal to the responsibilities of a male assistant dean who had responsibilities for physical facilities and budget, and thus her Equal Pay Act claim failed.

Nonwage benefits may also be subject to the provisions of the Equal Pay Act. For example, in *Stewart v. SUNY Maritime College*, 83 Fair Empl. Prac. Cases (BNA) 1610 (S.D.N.Y. 2000), a female public safety officer at the college was denied on-campus housing, although all male public safety officers doing the same work as the plaintiff were provided free on-campus housing. The trial court denied the college's motion for summary judgment, ruling that whether the on-campus housing provided to male public safety officers constituted "wages" for purposes of the Equal Pay Act was a question of fact that must be determined at trial.

As part of the FLSA, the Equal Pay Act provides for double back pay damages in cases of willful violations of the Act. A plaintiff must demonstrate an employer's knowing or reckless disregard for its responsibilities under this law to establish a willful violation. (For an example of a successful plaintiff in this regard, see *Pollis v. The New School for Social Research*, 132 F.3d 115 (2d Cir. 1997).)

Although several public colleges have attempted to argue that they are shielded from liability for Equal Pay Act violations by Eleventh Amendment immunity, the courts have disagreed. Because the Equal Pay Act prohibits discrimination on the basis of sex, courts have ruled that it was promulgated under the authority of the Fourteenth Amendment. (See, for example, *Cherry v.*

*University of Wisconsin System Board of Regents*, 265 F.3d 541 (7th Cir. 2001); see also *Varner v. Illinois State University*, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001).)

Equal Pay Act claims may be brought by an individual or by a class of individuals who allege that the college underpaid them relative to members of the opposite sex who were doing equal work. Most class action Equal Pay Act cases against colleges have been brought by women faculty, and are discussed in Section 6.4. The Equal Pay Act is enforced by the Equal Employment Opportunity Commission. The EEOC's procedural regulations for the Act are codified in 29 C.F.R. Parts 1620–21.

Salary discrimination claims under Title VII are not subject to the “equal work” requirement of the Equal Pay Act, and thus challenges can be brought to pay discrimination between jobs that are comparable rather than strictly equal. Several “comparable worth” claims have been brought by women faculty who have asserted that Title VII prohibits colleges and universities from setting the compensation of faculty in female-dominated disciplines at a level different from that of faculty in male-dominated disciplines. In each of these cases, plaintiffs have asserted that the Supreme Court's decision in *Gunther* permits a comparable worth claim under Title VII.

In the early 1980s, the U.S. Supreme Court appeared to open the door to comparable worth claims. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Court sorted out the relationships between the Equal Pay Act and Title VII as they apply to claims of sex discrimination in pay. Although the *Gunther* decision broadened the avenues that aggrieved employees have for challenging sex-based pay discrimination, the Court's opinion did not adopt the “comparable worth” theory that some forecasters had hoped the case would establish. According to the majority:

We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of “comparable worth,” under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community. Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted. The narrow question in this case is whether such a claim is precluded by [Title VII] [452 U.S. at 166].

Although the *Gunther* opinion neither rejected nor accepted the comparable worth theory, the Court's application of Title VII to pay disparity claims provided impetus for further attempts to establish the theory. A number of lawsuits were filed in the wake of *Gunther*. In the first higher education case to reach the appellate courts, *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), members of the university's nursing faculty raised both disparate treatment and disparate impact claims to challenge disparities in salary levels between their department and others on campus. The court

rejected both claims. As to the former claim, the plaintiffs had not shown that the university acted with discriminatory intent in establishing the salary levels. According to the court, the direct evidence did not indicate such intent, and “we will not infer intent merely from the existence of wage differences between jobs that are only similar.” As to the latter claim (which does not require a showing of intent), the court held that the law does not permit use of the disparate impact approach in cases, such as this one, that “involve wide-ranging allegations challenging general wage policies” for jobs that are “only comparable” rather than equal. In particular, said the court, an employer’s mere reliance on market forces in setting wages cannot itself constitute a disparate impact violation.

Subsequent comparable worth litigation against nonacademic organizations has also been unsuccessful for plaintiffs. In *American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985), the federal appeals court overruled the finding of a trial judge that Washington’s failure to implement a statutorily required comparable worth salary system was either intentional discrimination or satisfied the disparate impact theory under Title VII (see Section 5.3.2.1). The Supreme Court has not ruled on the comparable worth theory, either directly or indirectly, since its *Gunther* ruling. Several states have passed laws requiring comparable worth in the public sector, but there has been little activity related to college faculty, although women staff at some unionized colleges and universities have benefited from comparable worth adjustments in collective bargaining agreements.

A particularly troubling issue in salary discrimination claims is the determination of whether pay differentials are, in fact, caused by sex or race discrimination, or by legitimate factors such as performance differences, market factors, or educational background. These issues have been debated fiercely in the courts and in the literature. The use of “market factors” in salary discrimination claims brought by faculty is discussed in Section 6.4.

**5.2.3. Title IX.** Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, prohibits sex discrimination by public and private educational institutions receiving federal funds (see Section 13.5.3 of this book). The statute is administered by the Office for Civil Rights (OCR) of the Department of Education. The department’s regulations contain provisions on employment (34 C.F.R. §§ 106.51–106.61) that are similar in many respects to the EEOC’s sex discrimination guidelines under Title VII. The regulations may be found on the OCR Web site, available at <http://www.ed.gov/offices/OCR/regs>. Like Title VII, the Title IX regulations contain a provision permitting sex-based distinctions in employment where sex is a “bona fide occupational qualification” (34 C.F.R. § 106.61). Title IX also contains a provision exempting any “educational institution which is controlled by a religious organization” if Title IX’s requirements “would not be consistent with the religious tenets of such organization” (20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12).

The applicability of Title IX to employment discrimination was hotly contested in a series of cases beginning in the mid-1970s. The U.S. Supreme Court

resolved the dispute, holding that Title IX does apply to and prohibit sex discrimination in employment (see *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) (discussed in Section 13.5.7.1)).

The decision of the U.S. Supreme Court in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (discussed in Sections 13.5.3 & 13.5.9), that plaintiffs alleging discrimination under Title IX may be awarded compensatory damages, has stimulated discrimination claims under Title IX that might otherwise have been brought under Title VII, given Title VII's cap on damages (see Section 5.2.1). Title IX does not require the exhaustion of administrative remedies, and it borrows its statute of limitations from state law, which may be more generous than the relatively short period under Title VII. Plaintiffs with dual status as employees and students (for example, graduate teaching assistants, work-study students, and residence hall counselors) may find Title IX appealing because they need not prove they are "employees" rather than students in order to seek relief.

Some courts have held, however, that plaintiffs are barred from filing employment discrimination claims seeking money damages under Title IX. For example, in *Cooper v. Gustavus Adolphus College*, 957 F. Supp. 191 (D. Minn. 1997), a male faculty member was found guilty of sexually harassing a student and was subsequently dismissed; he claimed that the dismissal procedure was flawed and that it violated Title IX, but he did not also bring a claim under Title VII. The court noted that, although students and prospective students may bring claims for damages under Title IX, an employee who asserts a sex discrimination claim must use Title VII because Title VII "provides a comprehensive and carefully balanced remedial mechanism for redressing employment discrimination, and since Title IX does not clearly imply a private cause of action for damages for employment discrimination, none should be created by the courts" (957 F. Supp. at 193). The court also rejected the plaintiff's claim that Title IX created an independent right to due process in the procedure used to determine whether an employee should be disciplined or terminated. Citing *Yusuf v. Vassar College* (Section 9.4.4), the court stated: "[T]here is no Title IX statutory due process right separate from a right to be free from discrimination, even for a student. This must be all the more true for an employee, whose action for damages for discrimination must be found in Title VII, not Title IX" (957 F. Supp. at 194).

The federal appellate courts are split on this issue. Appellate courts in the Fourth and Sixth Circuits have ruled that Title IX does permit a private right of action in employment cases (*Preston v. Virginia*, 31 F.3d 203 (4th Cir. 1994); and *Ivan v. Kent State Univ.*, 1996 U.S. App. LEXIS 22269 (6th Cir. 1996) (unpublished)).<sup>2</sup> (See also *Arceneaux v. Vanderbilt University*, 2001 U.S. App. LEXIS 27598 (6th Cir. 2001) (unpublished).) But appellate panels in the Fifth and Eleventh Circuits disagree. These courts view Title VII's remedial structure,

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<sup>2</sup>The precedential value of these two cases is open to question; *Preston* has been criticized in subsequent trial and appellate court opinions, and *Ivan* is unpublished.

including its exhaustion of remedies requirement, as precluding a parallel right of action under Title IX. In *Morris v. Wallace Community College-Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001), *affirmed without opinion*, 34 Fed. Appx. 388 (11th Cir. 2002), the court stated that it had “discovered no appellate decision clearly and analytically holding that a plaintiff may maintain a Title IX action against her employer for a wrong prohibited, and a remedy provided, by Title VII” (125 F. Supp. 2d at 1343, n.38), citing *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1997); and *Lowery v. Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997). The *Lowery* court, however, did permit the plaintiff to state a claim under Title IX for retaliation, since the factual circumstances of her claim would not be covered by Title VII. Lowery asserted that she had been retaliated against for objecting to the university’s alleged inequitable allocation of resources between male and female athletes; this assertion “stated a claim under Title IX but not under Title VII.” The court therefore permitted her to claim retaliation, but not employment discrimination, under Title IX. The *Lowery* case is discussed in Section 5.3.3.4.

The decision of the U.S. Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001), discussed in Section 13.5.9, persuaded some federal courts that even a claim of retaliation cannot be litigated in court under Title IX, since it relies upon the Title IX regulation on retaliation rather than any express retaliation provision in the Title IX statute itself. In *Atkinson v. Lafayette College*, 2002 U.S. Dist. LEXIS 1432 (E.D. Pa. 2002), a female athletics director alleged that she was terminated in retaliation for her complaints about the college’s alleged infringements of Title IX. She also brought employment discrimination claims under Title VII and the state human rights law. The trial court dismissed her Title IX retaliation claim, which had been brought under Section 902 of Title IX, stating that the result in *Sandoval*, which involved Title VI of the Civil Rights Act of 1964, was directly applicable to Title IX because of the similarities in the interpretation and enforcement provisions of the two laws. A federal trial court in Virginia reached a similar conclusion, finding that Title IX’s antiretaliation regulations were beyond the scope of the plain language of the statute (*Litman v. George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001)). That result, however, was vacated by the U.S. Court of Appeals for the Fourth Circuit (92 Fed. Appx. 41 (4th Cir. 2004)), based upon Fourth Circuit precedent in a case involving Title VI (*Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003)). In *Peters*, a case involving the dismissal of an elementary school administrator, the Fourth Circuit had ruled that Title VI confers a private right of action for challenging alleged retaliation. Thus, said the appellate court in *Litman*, the same rationale should apply to retaliation claims brought under Title IX.

The U.S. Supreme Court resolved this issue in a case involving the male coach of a high school girls’ basketball team who claimed that he was terminated in retaliation for complaining about allegedly unequal facilities for boys’ and girls’ teams. In *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002), *reversed*, 125 S. Ct. 1497 (2005), the appellate court had dismissed the case, stating that the plaintiff was not himself a victim of sex



discrimination and thus could not sue under Title IX. The U.S. Supreme Court reversed, stating that retaliating against an individual for complaining about unlawful sex discrimination was itself intentional sex discrimination, a violation of Title IX. The Court rejected the lower courts' reliance on *Sandoval*, stating that the Title IX statute, not the retaliation regulation, provided the basis for Jackson's claim. This case is discussed in Section 13.5.7.5 of this book.

**5.2.4. Section 1981.** A post-Civil War civil rights statute, 42 U.S.C. § 1981, commonly known as "Section 1981," states:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 is enforced through court litigation by persons denied the equality that the statute guarantees.<sup>3</sup> It prohibits discrimination in both public and private employment, as the U.S. Supreme Court affirmed in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

Section 1981 covers racially based employment discrimination against white persons as well as racial minorities (*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)). Although in earlier cases Section 1981 had been held to apply to employment discrimination against aliens (*Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974)), more recent federal appellate court rulings suggest that this broad reading of the law is inappropriate. In *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987), a federal appellate court overturned *Guerra* and, after a lengthy review of the 1866 Civil Rights Act, determined that Congress had not intended Section 1981 to cover private discrimination against aliens, although the court did not address the issue of such discrimination by a public entity. The U.S. Supreme Court vacated the *Bhandari* opinion because the appellate court had speculated that the Supreme Court would overturn *Runyon v. McCrary*, 427 U.S. 160 (1976), (which had applied Section 1981 to private discrimination) in its opinion in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). On the contrary, the Supreme Court reaffirmed *Runyon* and, vacating *Bhandari*, instructed the Fifth Circuit to analyze this case in light of *Patterson*. On remand, the U.S. Court of Appeals,

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<sup>3</sup>Cases interpreting Section 1981 are collected in Ann K. Wooster, Annot., "Actions Brought Under 42 USCA §§ 1981-1983 for Racial Discrimination—Supreme Court Cases," 164 A.L.R. Fed. 483; Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases," 168 A.L.R. Fed. 1; Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases," 150 A.L.R. Fed. 1.

sitting *en banc*, reinstated its holding in *Bhandari* at 887 F.2d 609 (1989), asserting that *Patterson* did not alter the rationale for its earlier ruling. The Supreme Court denied review (494 U.S. 1061 (1990)).<sup>4</sup>

Although Section 1981 does not specifically prohibit discrimination on the basis of national origin (*Ohemeng v. Delaware State College*, 676 F. Supp. 65 (D. Del. 1988), *affirmed*, 862 F.2d 309 (3d Cir. 1988)), some courts have permitted plaintiffs to pursue national origin discrimination claims under Section 1981 in cases where race and national origin were intertwined.<sup>5</sup> In two special cases, moreover, the U.S. Supreme Court has interpreted Section 1981 to apply to certain types of national origin and ethnicity discrimination. In *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Court permitted a professor of Arabian descent to challenge his tenure denial under Section 1981. And in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), the Court extended similar protections to Jews. In both cases the Court looked to the dictionary definition of “race” in the 1860s, when Section 1981 was enacted by Congress; the definition included both Arabs and Jews as examples of races.

While Section 1981 overlaps Title VII (see Section 5.2.1) in its coverage of racial discrimination in employment, a back pay award is not restricted to two years of back pay under Section 1981, as it is under Title VII (see *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975)). Furthermore, Section 1981 does not have the short statute of limitations that Title VII imposes. In *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), the U.S. Supreme Court ruled that a four-year statute of limitations should apply to claims brought under the Civil Rights Act of 1866, of which Section 1981 is a part. Therefore, individuals alleging race discrimination in employment are likely to file claims under both Section 1981 and Title VII.

In *General Building Contractors Ass’n. v. Pennsylvania*, 458 U.S. 375 (1982), the U.S. Supreme Court engrafted an intent requirement onto the Section 1981 statute. To prevail in a Section 1981 claim, therefore, a plaintiff must prove that the defendant intentionally or purposefully engaged in discriminatory acts. This requirement is the same as the Court previously applied to discrimination claims brought under the equal protection clause (see Section 5.2.7).

Congress amended Section 1981 in the Civil Rights Act of 1991 by adding subsections (b) and (c), which read:

- (b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

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<sup>4</sup>Cases addressing whether aliens are protected by Section 1981 are collected in Tim A. Thomas, Annot., “Application of 42 U.S.C.S. Section 1981 to Private Discrimination Against Aliens,” 99 A.L.R. Fed. 835.

<sup>5</sup>Cases related to national origin claims under Section 1981 are collected in Jean F. Rydstrom, Annot., “Applicability of 42 U.S.C.S. § 1981 to National Origin Employment Discrimination Cases,” 43 A.L.R. Fed. 103.

- (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(For a thoughtful analysis of race discrimination and its legal remedies, see L. Alexander, “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,” 141 *U. Pa. L. Rev.* 149 (1992).)

Although Section 1981 has been found to cover employment decisions of both private and public employers, colleges that are arms of the state are immune from Section 1981 damages liability under the Eleventh Amendment of the U.S. Constitution. (For an illustrative case holding that a federal trial court lacked jurisdiction to hear an employee’s suit against the City University of New York, see *Bunch v. The City University of New York Queens College*, 2000 U.S. Dist. LEXIS 14227 (S.D.N.Y. 2000).)

### **5.2.5. Americans With Disabilities Act and Rehabilitation Act of 1973.**

Two federal laws forbid employment discrimination against individuals with disabilities. The Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, prohibits employment discrimination by employers with fifteen or more employees, labor unions, and employment agencies. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (also discussed in Section 13.5.4), also prohibits discrimination against individuals with disabilities, but unlike the ADA, there is no threshold number of employees required for coverage by Section 504 (*Schrader v. Fred A. Ray M.D.*, 296 F.3d 968 (10th Cir. 2002)). Section 504 is patterned after Title VI and Title IX (see Sections 13.5.2 & 13.5.3), which prohibit, respectively, race and sex discrimination in federally funded programs and activities. Each federal funding agency enforces the Rehabilitation Act with respect to its own funding programs.

Title I of the Americans With Disabilities Act of 1990 prohibits employment discrimination against “qualified” individuals who are disabled. (The other titles of the ADA are discussed in Section 13.2.11.) The prohibition of discrimination in the ADA uses language very similar to that of Title VII:

- (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment [42 U.S.C. §12102(a)].

The law defines “discrimination” very broadly, and prohibits the following practices: segregating or limiting the job opportunities of the individual with a disability; participating in a relationship with another entity, such as a labor union or employment agency, that engages in discrimination against an individual with a disability; using hiring or promotion standards that have a discriminatory effect or perpetuate the discrimination of others; denying employment or benefits to an individual who has a relationship with someone who is disabled; not making reasonable accommodation (unless an undue hardship exists); denying employment opportunities in order to avoid having to

accommodate an individual; using selection tests or standards that screen out individuals with disabilities unless the tests or standards are job related and a business necessity; failing to use tests that identify an individual's skills rather than his or her impairments.<sup>6</sup>

The law defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires" (42 U.S.C. § 12111(8)). This definition, which would apply to an individual with a disability who could perform the job only if accommodated, rejects the U.S. Supreme Court's interpretation of the Rehabilitation Act's definition of "otherwise qualified" in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Because the ADA's language is broader than that of the Rehabilitation Act, it is more likely that employees claiming disability discrimination will seek redress under the ADA rather than the Rehabilitation Act.

The law requires that, if an applicant or a current employee meets the definition of "qualified individual with a disability," the employer must provide a reasonable accommodation unless the accommodation presents an "undue hardship" for the employer. The terms are defined thusly in the statute:

The term "reasonable accommodation" may include—

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
  - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities [42 U.S.C. §12111(9)].
- (10) (A) The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
- (B) In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
- (i) the nature and cost of the accommodation needed under this chapter;

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<sup>6</sup>Cases and authorities related to the Americans With Disabilities Act are collected at William H. Danne, Jr., Annot., "Who Is 'Qualified Individual' Under Americans With Disabilities Act Provisions Defining, and Extending Protection Against Employment Discrimination to Qualified Individual with Disability (42 USCA §§ 12111(8), 12112(a)), " 146 A.L.R. Fed. 1; Ann K. Wooster, Annot., "What Constitutes Employment Discrimination by Public Entity in Violation of Americans With Disabilities Act (ADA), 42 USCA §§ 12132," 164 A.L.R. Fed. 433; Laurel M. Cohn, Annot., "When Is Individual Regarded as Having, or Perceived to Have, Impairment Within Meaning of Americans With Disabilities Act (42 USCA §§ 12102(2)), " 148 A.L.R. Fed. 305; Thomas J. Kapusta, Annot., "When Does Job Restructuring Constitute Reasonable Accommodation of Qualified Disabled Employee or Applicant," 142 A.L.R. Fed. 311; John F. Wagner, Annot., "What Constitutes Substantial Limitation on Major Life Activity of Working for Purposes of Americans With Disabilities Act (42 USCA §§ 12101-12213), " 141 A.L.R. Fed. 603.

- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity [42 U.S.C. § 12111(10)].

The ADA also contains provisions regarding the use of preemployment medical examinations, the confidentiality of an individual's medical records, and the individuals who may have access to information about the individual's disability.<sup>7</sup>

The law specifically excludes current abusers of controlled substances from coverage, but it does protect recovering abusers, individuals who are incorrectly perceived to be abusers of controlled substances, and individuals who have completed or are participating in a supervised rehabilitation program and are no longer using controlled substances. Since the law does not exclude persons with alcoholism, they are protected by the ADA, even if their abuse is current. However, the law permits employers to prohibit the use of alcohol or drugs at the workplace, to outlaw intoxication on the job, and to conform with the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 *et seq.*) (discussed in this book, Section 13.4.3.1). Employers may also hold users of drugs or alcohol to the same performance standards as other employees, and the law neither requires nor prohibits drug testing.

The ADA's employment discrimination remedies are identical to those of Title VII, and the Act is enforced by the EEOC, as is Title VII. The same limitation on damages found in Title VII applies to actions brought under the ADA, except that language applicable to the ADA provides that if an employer makes a good-faith attempt at reasonable accommodation but is still found to have violated the ADA, neither compensatory nor punitive damages will be available to the plaintiff (42 U.S.C. § 1981A).<sup>8</sup> This provision also applies to the Rehabilitation Act. Regulations interpreting the ADA are published at 29 C.F.R. § 1630. In addition to

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<sup>7</sup>Cases and authorities are collected in Deborah F. Buckman, Annot., "Construction and Application of § 102(d) of Americans With Disabilities Act (42 USCA § 12112(d)) Pertaining to Medical Examinations and Inquiries," 159 A.L.R. Fed. 89. See also the EEOC's "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act," July 2000, at <http://www.eeoc.gov>.

<sup>8</sup>Cases and authorities regarding ADA remedies are collected in Mary L. Topliff, Annot., "Remedies Available Under Americans With Disabilities Act (42 USCA § 12101 *et seq.*)," 136 A.L.R. Fed. 63.

expanding on the concepts of “qualified,” “reasonable accommodation,” and “undue hardship,” they include guidelines for determining whether hiring or retaining an employee with a disability would pose a safety hazard to coworkers or to the employee (29 C.F.R. § 1630.2(r)). The EEOC has also issued several Enforcement Guidance documents that state the agency’s position on and interpretation of the ADA. These documents are available on the agency’s Web site at <http://www.eeoc.gov>.

Title II of the ADA prohibits discrimination on the basis of disability by “public entities,” which includes public colleges and universities. The language of Title II mirrors the language of Title VI and Section 504 of the Rehabilitation Act:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity [42 U.S.C. § 12132].

The regulations interpreting Title II prohibit employment discrimination by a public entity (28 C.F.R. § 35.140). Title II adopts the remedies, rights, and procedures of Section 505 of the Rehabilitation Act, which has been interpreted to provide a private right of action for individuals alleging discrimination under the Rehabilitation Act (see Section 13.5.9 of this book). No exhaustion of administrative remedies is required by either Title II or Section 505.

In 1993, a federal district court examined the relationship between Titles I and II of the ADA—the first time such an examination had been made. An employee of the University of Wisconsin whose one-year contract was not renewed filed a lawsuit in federal court under Title II of the ADA. In *Petersen v. University of Wisconsin Board of Regents*, 818 F. Supp. 1276 (W.D. Wis. 1993), the university argued that the court lacked jurisdiction because Petersen did not exhaust his administrative remedies by first filing a charge with the EEOC, as required by Title I of the ADA. The court, noting the language of the statute, the regulations, and the legislative history, concluded that Title II includes employment discrimination as prohibited conduct and explicitly does not require exhaustion of administrative remedies. This ruling appears to create an exception for employees of public colleges and universities to the requirement that claims of employment discrimination under the ADA be first filed with the EEOC. (For a discussion of this issue, see Jason Powers, Note, “Employment Discrimination Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements,” 76 *Texas L. Rev.* 1457 (1998).)

Colleges and universities have been subject to the Rehabilitation Act since 1972, and a body of judicial precedent has developed interpreting that Act’s requirements. The law was amended by the Rehabilitation Act Amendments of 1992 (Pub. L. 102-569, 106 Stat. 4344) to replace the word “handicap” with the word “disability” and to conform the language of the Rehabilitation Act in other ways with that of the ADA (see Section 13.5.4). Regulations interpreting the Rehabilitation Act’s prohibitions against disability discrimination by federal

contractors have been revised to conform to ADA provisions, and are found at 34 C.F.R. § 104.11 and 29 C.F.R. § 1641.<sup>9</sup>

The regulations implementing Section 504 of the Rehabilitation Act prohibit discrimination against qualified disabled persons with regard to any term or condition of employment, including selection for training or conference attendance and employers' social or recreational programs. Furthermore, the regulations state that the employer's obligations under the statute are not affected by any inconsistent term of any collective bargaining agreement to which the employer is a party (34 C.F.R. § 104.11).

In language similar to that of the ADA, the Section 504 regulations define a qualified person with a disability as one who "with reasonable accommodation can perform the essential functions" of the job in question (34 C.F.R. § 104.3(k)(1)). The regulations impose an affirmative obligation on the recipient to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program" (34 C.F.R. § 104.12(a)). Reasonable accommodations can take the form of modification of the job site, of equipment, or of a position itself. What hardship would relieve a recipient of the obligation to make reasonable accommodation depends on the facts of each case. As a related affirmative requirement, the recipient must adapt its employment tests to accommodate an applicant's sensory, manual, or speaking disability unless the tests are intended to measure those types of skills (34 C.F.R. § 104.13(b)).

The regulations include explicit prohibitions regarding employee selection procedures and preemployment questioning. As a general rule, the fund recipient cannot make any preemployment inquiry or require a preemployment medical examination to determine whether an applicant is disabled or to determine the nature or severity of a disability (34 C.F.R. § 104.14(a)). Nor can a recipient use any employment criterion, such as a test, that has the effect of eliminating qualified applicants with disabilities, unless the criterion is job related and there is no alternative job-related criterion that does not have the same effect (34 C.F.R. § 104.13(a)). These prohibitions are also found in the ADA and its regulations.

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), discussed in Sections 8.2.4.3 and 13.5.4, the U.S. Supreme Court addressed for the first time the extent of the obligation that Section 504 imposes on colleges and universities. The case involved the admission of a disabled applicant to a clinical nursing program, but the Court's opinion also sheds light on the Rehabilitation Act's application to employment of disabled persons.

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<sup>9</sup>Cases related to who is qualified under the Rehabilitation Act are collected in Colleen R. Courtade, Annot., "Who Is 'Qualified' Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 (29 U.S.C.S. §§ 701 *et seq.*) and Regulations Promulgated Thereunder," 80 A.L.R. Fed. 830. See also Francis M. Dougherty, Annot., "Who Is 'Individual with Handicaps' Under Rehabilitation Act of 1973 (29 U.S.C.S. § 701 *et seq.*)," 97 A.L.R. Fed. 40.

In *Davis*, the Court determined that an “otherwise qualified handicapped individual” protected by Section 504 is one who is qualified *in spite of* his or her disability, and thus ruled that the institution need not make major program modifications to accommodate the individual. Because the definition of “otherwise qualified” appears only in the Department of Education’s regulations implementing Section 504, not in the statute, the Court did not consider itself bound by the language of the regulations, which defined a “qualified handicapped individual” for employment purposes as one who, “with reasonable accommodation,” can perform the job’s essential functions. However, statutory language in the ADA virtually repeats the language of Section 504’s regulations; thus, the Court’s opinion in *Davis* has limited relevance for employment challenges under the ADA.

The Court apparently equated accommodation of an individual with a disability with affirmative action rather than viewing the accommodation as the removal of barriers for an individual with a disability. The framers of the ADA have rejected the former interpretation; since the accommodation requirement is stated clearly in the ADA, and the term “affirmative action” appears nowhere in the statute, the continued vitality of *Southeastern Community College* in the context of employment is questionable.

The U.S. Supreme Court again interpreted the Rehabilitation Act in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which the Court determined that persons suffering from a contagious disease (in this case, tuberculosis) were protected by the Act. The Court listed four factors that employers must take into consideration when determining whether an employee with a potentially contagious disease poses a danger to other employees or to clients, customers, or students:

- 1) the nature of the risk (how the disease is transmitted);
- 2) the duration of the risk (how long is the carrier infectious);
- 3) the severity of the risk (what is the potential harm to third parties); and
- 4) the probabilities the disease will be transmitted and will cause varying degrees of harm [480 U.S. at 288].

Congress adopted the Court’s position in this case in an amendment to the Rehabilitation Act tacked onto the Civil Rights Restoration Act of 1987 (Pub. L. No. 100-259, 102 Stat. 28, § 9).

Section 503 of the Rehabilitation Act requires all institutions holding contracts with the federal government in excess of \$10,000 to “take affirmative action to employ and advance in employment qualified handicapped individuals.” While the Court in *Davis* emphatically rejected an affirmative action obligation under Section 504, its decision in no way affects the express obligation imposed on federal contractors by Section 503 of the Act (see Section 5.4 of this book).

Between 1998 and 2002, the U.S. Supreme Court issued eight decisions interpreting the employment provisions of the ADA. The first dealt with the issue of whether asymptomatic HIV qualified as a disability under the ADA’s definition.



In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the court ruled that HIV, whether or not the individual has symptoms of the disease, substantially limits an individual's ability to procreate (a major life function), and thus constitutes a disability for ADA purposes. Although *Bragdon* was brought under the public accommodation provisions of the ADA rather than the employment provisions, the definition of disability is common to all of the ADA's provisions.

The Court issued three opinions interpreting the ADA in 1999, all of which involved employment, and all of which dealt with the issue of "mitigating measures." Both the legislative history of the ADA and the EEOC's Interpretative Guidance state that the existence of a disability is to be determined without regard to any mitigating measures that the individual may have taken to ameliorate the condition (for example, medication to control the effects of a disease, or devices, such as corrective lenses, to improve poor eyesight) (29 C.F.R. § 1630.2(j) (Interpretive Guidance)). Several appellate courts had refused to follow the EEOC's guidance on this issue, stating that the statutory language made it clear that if the disorder did not "substantially limit" the individual in some major life activity, then the individual did not meet the statute's definition of disability. Other appellate courts followed the EEOC's guidance; the high court agreed to review three cases to resolve the dispute among the circuits.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), two plaintiffs challenged the airline's refusal to hire them as commercial pilots because they were nearsighted, even though their vision with corrective lenses was within airline guidelines. They sought to establish that myopia was a disorder that met the ADA's definition. In *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), a truck driver with monocular vision challenged his discharge by a grocery store because he could not meet the basic vision standards of the U.S. Department of Transportation (DOT), despite the fact that he had received a waiver from the DOT and had been driving safely for many years. And in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), a mechanic with high blood pressure challenged his termination, stating that, despite the fact that his blood pressure was controllable with medication, he was protected by the ADA because his disability should be assessed in its uncorrected state. In each of these cases, the Court ruled that, because the definition of "disability" states that the disorder must "substantially limit one or more major life activities," a corrected or correctable disorder would not necessarily limit the individual, and thus the definition would not be met. The Court expressly rejected the EEOC guidelines because the Court believed that the guidelines contradicted the clear wording of the statute. And because the Court determined that the ADA's language was clear, it did not consider the law's legislative history, which also stated that disorders were to be considered in their unmitigated state. The Court commented that an individual might be able to meet the definition even if the disorder were considered in its mitigated or corrected state if the disorder still limited the individual in a significant way.

The results in this trio of "mitigation" cases may reduce the number of ADA lawsuits brought by individuals whose disorders are controlled or controllable by medication or other devices. But a fifth Supreme Court opinion may have

the opposite effect, for it may allow more individuals to maintain ADA lawsuits. In *Cleveland v. Policy Management Systems Corporation et al.*, 526 U.S. 795 (1999), the court ruled that an individual's representation that he or she is too disabled to work for purposes of receiving Social Security Disability Insurance (SSDI) does not necessarily prevent an individual from pursuing an ADA claim. Federal appellate courts were split on this issue; several had ruled that an individual's assertion that he or she could not work for SSDI purposes precluded an argument that the individual was a "qualified individual with a disability" who could perform the essential functions of a job if a reasonable accommodation were provided. Applying judicial estoppel to these claims, trial judges were dismissing plaintiffs' ADA claims based on their SSDI assertions. Because the ADA requires that the court determine whether an individual is qualified to perform a job with accommodation, an inquiry that is not part of the SSDI evaluation, the Court ruled that ADA plaintiffs should be given an opportunity to explain the discrepancy between their SSDI assertions and their ADA claims.

In 2002, the U.S. Supreme Court issued three more opinions: two involving the employer's duty to accommodate an otherwise qualified employee with a disability, and a third interpreting the Act's "direct threat" provisions. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Court examined the Act's definition of disability, which requires that the individual demonstrate a substantial limitation of a "major life activity." The Court ruled unanimously that a "major life activity" must be one that is of "central importance to daily life." Thus, activities that are required for an employee's job, but which are not performed by most people as part of their daily lives, would not fit the definition of a "major life activity," and thus the individual would not meet the Act's definition of disability.

In *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), the Court was asked to rule on whether altering a voluntarily adopted seniority system in order to provide an accommodation for a worker with a disability was an "undue hardship." In *Barnett*, a cargo handler (Barnett) for an airline injured his back and was transferred to a position in the mailroom. When a more senior employee bid on his mailroom position, Barnett was terminated. In a 5-to-4 decision written by Justice Breyer, the Court ruled that seniority systems—whether collectively negotiated or unilaterally imposed by the employer—provided "important employee benefits" in the form of job security and predictability of advancement. The Court refused to impose a rule that violating a seniority system in order to accommodate an otherwise qualified worker would always be an undue hardship. Instead, the Court created a rebuttable presumption in favor of seniority systems, stating that if a plaintiff could show "special circumstances," such as a history of exceptions to the seniority system, the accommodation might trump the seniority rights in that case.

In a concurring opinion, Justice O'Connor would have limited the determination of whether a reassignment that violated a seniority system was an undue hardship to whether the seniority system was legally enforceable. Voluntary systems, such as the system in question in *Barnett*, would not trump

the accommodation requirement, in her opinion. Justice Scalia dissented because he viewed seniority systems as totally unrelated to disability, and thus never subject to violation in order to provide a reasonable accommodation for a disabled worker.

The third Supreme Court ruling on the ADA in 2002 involved the EEOC's interpretation of the term "direct threat." Among the reasons why employers may lawfully refuse to hire or to continue to employ a worker with a disability is the finding that the worker's disability poses a "direct threat" to the worker's own safety or to the safety of others (29 C.F.R. § 1630.15(b)(2)). In *Chevron v. Echazabal*, 536 U.S. 73 (2002), a worker with a history of hepatitis C who was denied employment by Chevron because the company feared that exposure to workplace chemicals would further damage the employee's liver challenged the EEOC regulation's use of "danger to self." In a unanimous opinion written by Justice Souter, the Court ruled that the EEOC's definition was a reasonable reading of the statute.

The U.S. Supreme Court has added Title I of the ADA to the list of federal non-discrimination laws that are unenforceable against state entities in federal court. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), discussed in Sections 13.1.5 and 13.1.6, the Court ruled that Congress had not validly abrogated the states' Eleventh Amendment immunity when it enacted the ADA. Although the Court agreed that the statutory language makes it clear that Congress intended the ADA to apply to states as employers, the Court found that Congress was primarily concerned with employment discrimination against individuals with disabilities by private employers, and that Congress had not identified a history and pattern of disability-based discrimination by states sufficient to provide a constitutional foundation for outlawing such discrimination. Comparing the amount of state-created discrimination that engendered the Voting Rights Act to the legislative history of the ADA, the majority found insufficient justification to provide a rationale for abrogating the states' immunity to suit in federal courts. On remand, the U.S. Court of Appeals for the Eleventh Circuit ruled that the university had waived sovereign immunity by accepting federal funds, so it could be sued in federal court under Section 504 of the Rehabilitation Act (*Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288 (11th Cir. 1288)). The U.S. Court of Appeals for the Third Circuit reached a similar conclusion in *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002). (For a discussion of ADA litigation by public employees post-*Garrett*, see Roger C. Hartley, "Enforcing Federal Civil Rights Against Public Entities After *Garrett*," 28 *J. Coll. & Univ. Law* 41 (2001).)

**5.2.6. Age Discrimination in Employment Act.** The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, prohibits age discrimination only with respect to persons who are at least forty years of age. It is contained within the Fair Labor Standards Act (29 U.S.C. §§ 201–19) and is subject to the requirements of that Act (see Section 4.6.2).

Prior to the Act's amendment in 1978, the protection ended at age sixty-five (29 U.S.C. § 631). The 1978 amendments raised the end of protection to age

seventy, effective January 1, 1979; and amendments added in 1986 removed the limit completely, except for persons in certain professions. Individuals in public safety positions (police officers, firefighters), “high-level policy makers,”<sup>10</sup> and tenured college faculty could be required to retire at certain ages (seventy for tenured faculty). The amendment provided that the exemption for individuals in public safety positions and tenured faculty would expire on December 31, 1993. Thus, as of January 1, 1994, mandatory retirement for most employees, whether tenured or not, became unlawful.

The Act, which is applicable to both public and private institutions, makes it unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter [29 U.S.C. § 623].<sup>11</sup>

The ADEA is enforced by the Equal Employment Opportunity Commission (EEOC), and implementing regulations appear at 29 C.F.R. Parts 1625–27. The law, regulations, and Enforcement Guidance may be found on the EEOC Web site at <http://www.eeoc.gov>. Among other matters, the interpretations specify the criteria an employer must meet to establish age as a bona fide job qualification.<sup>12</sup>

As under other statutes, the burden of proof has been an issue in litigation. Generally, the plaintiff must make a *prima facie* showing of age discrimination, at which point the burden shifts to the employer to show that “age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business” at issue (29 U.S.C. § 623(f)(1)); or that distinctions among employees or applicants were “based on reasonable factors other than

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<sup>10</sup>“High-level policy makers” are considered to be those few individuals who are senior executives of the organization. For an example of a university that applied this exemption to a wide array of administrators and ran afoul of the ADEA as a result, see Alex P. Kellogg, “Under Federal Pressure, Indiana U. Will Scale Back Mandatory-Retirement Policy,” *Chron. Higher Educ.*, January 30, 2002, at <http://chronicle.com/daily/2002/01/2002013004n.htm>.

<sup>11</sup>Relevant authorities construing the Act are collected in Brian L. Porto, Annot., “Who Is ‘Employer’ Within Meaning of Age Discrimination in Employment Act of 1967 (29 USCA §§ 621 *et seq.*),” 137 A.L.R. Fed. 551; Andrew M. Campbell, Annot., “What Constitutes ‘Willful’ Violation Under Age Discrimination in Employment Act, (29 USCA §§ 621 *et seq.*),” 165 A.L.R. Fed. 1; Elaine K. Zipp, Annot., “Proving That Discharge Was Because of Age, for Purposes of Age Discrimination in Employment Act, (29 USCA §§ 621 *et seq.*),” 58 A.L.R. Fed. 94.

<sup>12</sup>Cases regarding age as a BFOQ are collected in Teresa B. Jovanovic, Annot., “Age as Bona Fide Occupational Qualification ‘Reasonably Necessary’ for Normal Conduct of Business Under § 4(f)(1) of Age Discrimination in Employment Act (29 U.S.C.S. § 623 (f)(1),” 63 A.L.R. Fed. 610.

age” (29 U.S.C. § 623(f)(1)); or that, in the case of discipline or discharge, the action was taken “for good cause” (29 U.S.C. § 623(f)(3)). (See *Laugeson v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); and *Hodgson v. First Federal Savings and Loan*, 455 F.2d 818 (5th Cir. 1972).) Employment decisions that appear neutral on their face but that use criteria that are closely linked with age (such as length of service) and that tend to disadvantage over-forty employees disproportionately may run afoul of the ADEA. Litigation is particularly likely when colleges are merged or when there is a reduction in force of faculty and/or staff (program closures and mergers are discussed in Section 6.8).

Federal courts have routinely dismissed ADEA claims by plaintiffs who were over forty but who were ineligible for certain employment benefits (such as early retirement plans) because they were too young, under the theory that the law was intended to protect older workers from discriminatory employer actions. Although the U.S. Court of Appeals for the Sixth Circuit ruled that workers who were over forty but were too young for health benefit plans provided to older workers could state a claim under the ADEA, the U.S. Supreme Court reversed that ruling. In *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002), *reversed*, 540 U.S. 581 (2004), the Court ruled that the ADEA does not prohibit favoring older workers at the expense of younger workers, and that the benefits plan in question was reasonable. The EEOC has issued final rules on retiree health benefits, which may be found at 29 C.F.R. Parts 1625 and 1627.

Federal courts were divided for many years as to whether a plaintiff may proceed under a disparate impact theory (see Section 5.2.1) to challenge alleged age discrimination. In *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), the U.S. Supreme Court ruled 6 to 3 that plaintiffs challenging alleged discrimination under the ADEA may use the disparate impact theory.

Individuals claiming age discrimination under the ADEA must first file a claim either with the federal EEOC (within 180 days) or with the appropriate state civil rights agency. Sixty days after such a claim is filed, the individual may bring a civil action in federal court (29 U.S.C. § 626(d)). A jury trial is provided for by the statute, and remedies include two years of back pay, liquidated damages (double back pay), front pay, and other make-whole remedies.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the U.S. Supreme Court considered whether an employee or a former employee claiming age discrimination must seek relief from appropriate state agencies before bringing an ADEA suit in the federal courts. The Court held that such resort to state agencies is mandatory under Section 14(b) of the ADEA (29 U.S.C. § 633(b)) whenever there is a state agency authorized to grant relief against age discrimination in employment, but that the employee need not commence state proceedings within the time limit specified by state law. If the state agency rejects the employee’s complaint as untimely or does not resolve the complaint within sixty days, the employee can then turn to the federal courts.

The ADEA was amended in 1990 by the Older Workers Benefit Protection Act (OWBPA), 104 Stat. 981, in part as a reaction to a decision by the U.S. Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989).

In that opinion, the Court had ruled that only employee benefit plans that could be shown to be a subterfuge for discrimination violated the Act, even if their terms had the effect of discriminating against older workers. OWBPA prohibited discriminatory employee benefit plans (29 U.S.C. § 623(k)) and codified the “equal benefits or equal cost” principle articulated in *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988). In *Karlen*, the appellate court had found discriminatory two provisions of a retirement plan that gave more generous benefits to faculty who were sixty-five years old and under. The court ruled that employers could provide benefits of equal *cost* to the employer, even if older workers received benefits of less *value* because of the higher cost of benefits to older workers. An employer, however, could not vary benefits (such as sick leave or severance pay) in ways that favored younger employees.

The law requires employers to give older workers benefits that are equal to or better than those given younger workers, unless the employer can demonstrate that benefits (such as term life insurance) carry a higher cost for older workers. The legislation also defines requirements for early retirement plans and regulates the conditions under which severance benefits may be offset by other benefits included in early retirement plans (29 U.S.C. § 623(1)). Furthermore, the law specifies how releases or waivers of an employee’s right to sue under the ADEA must be formulated, and requires a twenty-one-day waiting period and a seven-day revocation period for releases (29 U.S.C. § 626(f)(1)). Employees who sign such waivers and then institute litigation, claiming that the waivers were not knowing or voluntary, are not required to return the additional payment they were given as an inducement to sign the waiver (29 C.F.R. § 1625.23). Institutions planning to offer early retirement incentives should confer with experienced counsel in order to comply with the numerous requirements of OWBPA.<sup>13</sup>

Congress included language in the Higher Education Amendments of 1998 (Pub. L. No. 105-244, October 7, 1998) that amends the Age Discrimination in Employment Act only for institutions of higher education. The Amendments allow colleges and universities to offer tenured faculty retirement incentive packages that include supplementary benefits that are reduced or eliminated on the basis of age, as long as there is compliance with certain provisions.

The language in 29 U.S.C. § 623(m) provides a “safe harbor” for colleges that offer tenured faculty members supplemental retirement incentives that either diminish or become unavailable as the faculty member’s age increases. The law also provides that tenured faculty who would otherwise be too old for the incentive program at the time it is implemented must be allowed to participate.

The U.S. Supreme Court has ruled that states and their agencies cannot be sued under the ADEA in federal court by private individuals (*Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)). Relying on its earlier decision in *Seminole Tribe of Florida v. Florida* (discussed in Section 13.1.5), the Court stated that,

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<sup>13</sup>For analysis of this issue, see James Lockhart, Annot., “‘Bona Fide Employee Benefit Plan’ Exception to General Prohibition of Age Discrimination in Employment Act (29 U.S.C.S. § 623(f) et seq.) as Applied to Early Retirement Incentive Plans,” 176 A.L.R. Fed. 115.

although Congress had made its intent to abrogate states' Eleventh Amendment immunity "unmistakeably clear," the ADEA had been enacted under the authority of the commerce clause. And because age is not a suspect classification under the equal protection clause, said the Court, states could discriminate on the basis of age without violating the Fourteenth Amendment if the use of age was rationally related to a legitimate state interest.

**5.2.7. Constitutional prohibitions against employment discrimination.** While the Fourteenth Amendment's equal protection clause applies to employment discrimination by public institutions (see Section 1.5.2), the constitutional standards for justifying discrimination are usually more lenient than the various federal statutory standards. (See the discussions of constitutional equal protection standards in Section 8.2.4.) Even where constitutional standards are very strong, as for race discrimination, the courts usually strike down only discrimination found to be intentional; the federal statutes, on the other hand, do not always require a showing of discriminatory intent. In *Washington v. Davis*, 426 U.S. 229 (1976), for instance, the U.S. Supreme Court distinguished between disparate impact cases brought under Title VII (see Section 5.2.1) and those brought under the equal protection clause, noting that the equal protection cases "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Under Title VII, in contrast, "discriminatory purpose need not be proved." Title VII thus "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed."

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Court elaborated on the requirement of discriminatory intent, which must be met to establish a violation of the equal protection clause. *Feeney* concerned a female civil servant who challenged the constitutionality of a state law providing that all veterans who qualify for civil service positions must be considered ahead of any qualified nonveteran. The statute's language was gender neutral—its benefits extended to "any person" who had served in official U.S. military units or unofficial auxiliary units during wartime. The veterans' preference law had a disproportionate impact on women, however, because 98 percent of the veterans in Massachusetts were men. Consequently, nonveteran women who received high scores on competitive examinations were repeatedly displaced by lower-scoring male veterans. Feeney claimed that the preference law discriminated against women in violation of the Fourteenth Amendment.

The Court summarized the general approach it would take in ruling on such constitutional challenges of state statutes:

In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the . . . classification. When some other independent right is not at stake . . . and when there is no "reason to infer antipathy," it is presumed that "even improvident decisions will eventually be rectified by the democratic process" (*Vance v. Bradley*, 440 U.S. 93) [442 U.S. at 272; citations omitted].

The Supreme Court agreed with the district court's finding that the law was enacted not for the purpose of preferring males but, rather, to give a competitive advantage to veterans. Since the classification "nonveterans" includes both men and women, both sexes could be disadvantaged by the laws. The Court concluded that too many men were disadvantaged to permit the inference that the classification was a pretext for discrimination against women. Since neither the statute's language nor the facts concerning its passage demonstrated that the preference was designed to deny women opportunity for employment or advancement in the Massachusetts civil service, the Supreme Court, with two justices dissenting, upheld the statute.

*Feeney* extends the reasoning in *Washington v. Davis* by stating unequivocally that a statute that has a disproportionate impact on a particular group will withstand an equal protection challenge unless the plaintiff can show that it was enacted in order to affect that group adversely. Thus, a statute neutral on its face will be upheld unless the disparate impact of the law "could not plausibly be explained on neutral grounds," in which case "impact itself would signal that the classification made by the law was in fact not neutral." The effect of this reasoning—controversial especially among civil rights advocates—is to increase the difficulty of proving equal protection violations.

The Supreme Court applied its *Feeney* analysis in considering a challenge to an Alabama law that disenfranchised any individual who had been convicted of a crime "involving moral turpitude." Since these crimes included misdemeanors, two individuals who had been found guilty of passing bad checks, a misdemeanor in Alabama, were disenfranchised. The plaintiffs had demonstrated that the framers of the 1901 Alabama constitution, which contained the challenged provision, intended to discriminate against black voters, despite the fact that the law was applied to blacks and whites equally. Justice Rehnquist, writing for a unanimous court in *Hunter v. Underwood*, 471 U.S. 222 (1985), explained that if the intent of the law was discriminatory, then its effects are still discriminatory, and thus the Fourteenth Amendment was violated.

Besides its less vigorous standards, the equal protection clause also lacks the administrative implementation and enforcement mechanisms that exist for most federal nondiscrimination statutes. Consequently, postsecondary institutions will be subject to a narrower range of remedies for ensuring compliance under the Constitution, compared with the statutes, and also will not have the benefit of administrative agency guidance via regulations and interpretive bulletins.

In employment discrimination, the Constitution assumes its greatest importance in areas not covered by any federal statute. Age discrimination against persons less than forty years old is one such area, since the Age Discrimination in Employment Act does not cover individuals under age forty (although the laws of some states do). A second example is discrimination against aliens, which is no longer covered by Section 1981. Another important uncovered area is discrimination on the basis of sexual preference (such as discrimination



against homosexuals), which is discussed in Section 5.3.7.<sup>14</sup> Discrimination on the basis of residence is a fourth important example.<sup>15</sup>

In *Ambach v. Norwick*, 441 U.S. 68 (1979), the U.S. Supreme Court considered the constitutionality of a New York statute that discriminated against aliens by prohibiting their employment as public school teachers. The Court determined that “the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest.” Applying this principle, the Court held that the state’s citizenship requirement did not violate equal protection because it was a rational means of furthering the teaching of citizenship in public schools. The Court focused specifically on elementary and secondary education, however, and it is not clear that its reasoning would also permit states to refuse to employ aliens as teachers in postsecondary education, where the interest in citizenship education may be less.

**5.2.8. Executive Orders 11246 and 11375.** Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303 (adding sex to the list of prohibited discriminations), prohibits discrimination “because of race, color, religion, sex, or national origin,” thus paralleling Title VII (Section 5.2.1). Unlike Title VII, the Executive Orders apply only to contractors and subcontractors who received \$10,000 or more in federal government contracts and federally assisted construction contracts (41 C.F.R. § 60-1.5).<sup>16</sup> Agreements with each such contractor must include an equal opportunity clause (41 C.F.R. § 60-1.4), and contractors must file compliance reports after receiving the award and annual compliance reports thereafter (41 C.F.R. § 60-1.7(a)) with the federal contracting agency. In addition to their equal opportunity provisions, the Executive Orders and regulations place heavy emphasis on affirmative action by federal contractors, as discussed in Section 5.4.

The regulations implementing these Executive Orders exempt various contracts and contractors (41 C.F.R. § 60-1.5), including church-related educational

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<sup>14</sup>Such discrimination is sometimes challenged on freedom-of-speech or freedom-of-association grounds rather than equal protection. See *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977), where the court ordered reinstatement and \$15,000 damages for a lecturer whose freedom of speech was violated when the university refused to renew his contract because of statements he had made on homosexuality.

<sup>15</sup>See, for example, *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), upholding a continuing residency requirement for city employees; and *Cook County College Teachers Union v. Taylor*, 432 F. Supp. 270 (N.D. Ill. 1977), upholding a similar requirement for college faculty members. Compare *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984), suggesting that discrimination in employment on the basis of state or local residency may violate the privileges and immunities clause in Article IV, Section 2, of the Constitution. Also compare the student residency cases discussed in Section 8.3.5.

<sup>16</sup>The Executive Orders’ affirmative action requirements apply to contractors who employ fifty or more employees and who receive \$50,000 or more in federal contracts. These requirements are discussed in this book, Section 5.4.

institutions defined in Title VII (41 C.F.R. § 60-1.5(a)(5)). While the regulations contain a partial exemption for state and local government contractors, “educational institutions and medical facilities” are specifically excluded from this exemption (41 C.F.R. § 60-1.5(a)(4)). The enforcing agency may hold compliance reviews (41 C.F.R. § 60-1.20), receive and investigate complaints from employees and applicants (41 C.F.R. §§ 60-1.21 to 60-1.24), and initiate administrative or judicial enforcement proceedings (41 C.F.R. § 60-1.26(a)(1)). It may seek orders enjoining violations and providing other relief, as well as orders terminating, canceling, or suspending contracts (41 C.F.R. § 60-1.26(b)(2)). The enforcing agency may also seek to debar contractors from further contract awards (41 C.F.R. § 60-1.27(b)).

The requirements of the Executive Orders are enforced by the Office of Federal Contract Compliance Programs (OFCCP), located within the U.S. Department of Labor. The regulations require each federal contractor subject to the Executive Orders to develop a written affirmative action program (AAP) for each of its establishments. In November 2000, a provision was added at 41 C.F.R. § 60-2.1(d)(4) that permits federal contracts to develop AAPs organized by business or functional unit rather than by geographical location. A procedural directive for determining whether a college or university is eligible to submit a functional AAP can be found on the OFFCP Web site at <http://www.dol.gov/esa>.

The regulations interpreting the Executive Orders and explaining the enforcement process were revised, and a final rule was published at 165 Fed. Reg. No. 219 (November 13, 2000). The final rule can be accessed from the OFFCP Web site.

The primary remedy for violation of the Executive Orders is cutoff of federal funds and/or debarment from future contracts. Individuals alleging employment discrimination by federal contractors have sought to file discrimination claims in court, but have been rebuffed. For example, in *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), two women faculty members filed sex discrimination claims against the university under authority of the Executive Orders. Their claims were dismissed; the court found no private right of action in the Executive Orders. Similar outcomes occurred in *Braden v. University of Pittsburgh*, 343 F. Supp. 836 (W.D. Pa. 1972), *vacated on other grounds*, 477 F.2d 1 (3d Cir. 1973), and *Cap v. Lehigh University*, 433 F. Supp. 1275 (E.D. Pa. 1977).<sup>17</sup>

### **Sec. 5.3. The Protected Classes**

**5.3.1. Race.** As noted above, race discrimination claims may be brought under Title VII (see Section 5.2.1 of this book), Section 1981 (Section 5.2.4), the U.S. Constitution (Section 5.2.7), or federal Executive Orders (Section 5.2.8). Race discrimination claims may also be brought under state nondiscrimination

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<sup>17</sup>Cases related to private rights of action under the Executive Orders are collected in Phillip E. Hassman, Annot., “Right to Maintain Private Employment Discrimination Action Under Executive Order 11246, as Amended, Prohibiting Employment Discrimination by Government Contractors and Subcontractors,” 31 A.L.R. Fed. 108.

laws.<sup>18</sup> In “disparate treatment” race discrimination claims (see Section 5.2.1 above), as in other employment discrimination claims, an employee must demonstrate that an adverse employment action was motivated by the individual’s race rather than by some “neutral” reason unrelated to race. Because direct evidence of race discrimination (in the form of written or oral racist statements, for example) is very rare, most plaintiffs must use indirect methods of proving disparate treatment.

An individual alleging race discrimination may demonstrate that “similarly situated” employees of a different race were treated better than the plaintiff. If two employees are similar in skills, experience, job responsibilities, and job performance, but are of different races, race discrimination may be the reason that one employee experiences an adverse employment action while the similarly situated employee does not. However, if the plaintiff cannot identify a “comparator,” proving race discrimination will be very difficult. For example, in *Jackson v. Northeastern Illinois University*, 2001 U.S. App. LEXIS 25339 (7th Cir. 2001) (unpublished), an African American building service worker fired for hitting his supervisor was unable to identify a Caucasian employee who had engaged in the same misconduct but was not terminated. In the absence of such a “similarly situated” employee, said the court, the plaintiff could not prevail.

As noted in the discussion of Title VII in Section 5.2.1, colleges typically defend against discrimination claims by asserting that there was a “legitimate nondiscriminatory reason” to support the adverse employment action. Documented poor performance of the plaintiff will typically allow the college to prevail unless there is direct evidence of race discrimination or a similarly situated coworker of a different race who is treated more favorably. (For cases involving successful defenses against alleged race discrimination by the use of documented poor performance, see *Fortson v. Embry-Riddle Aeronautical University*, 1998 U.S. Dist. LEXIS 20701 (N.D. Miss. 1998); and *Chambers v. McClenney*, 1999 U.S. App. LEXIS 329 (10th Cir. 1999) (unpublished).) Lack of funds may also provide a legitimate nondiscriminatory reason for a termination if there is no direct evidence of race discrimination (see *Lewis v. Chattahoochie Valley Community College*, 136 F. Supp. 2d 1232 (M.D. Ala. 2001)).

The plaintiff must identify a specific adverse employment action that has been taken, allegedly on the basis of the plaintiff’s race. Typically, termination, discipline, demotion, or reducing an individual’s pay are adverse employment actions. However, an involuntary lateral transfer that does not reduce an individual’s salary may not be viewed as an adverse employment action (see, for example, *Adams and Moore v. Triton College*, 2002 U.S. App. LEXIS 8622 (7th Cir. 2002) (unpublished)).

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<sup>18</sup>Cases involving race discrimination are collected in J. F. Ghent, Annot., “Racial Discrimination in Hiring, Retention, or Assignment of Teachers—Federal Cases,” 3 A.L.R. Fed. 325. See also Donald T. Kramer, Annot., “What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases,” 168 A.L.R. Fed. 1; and Donald T. Kramer, Annot., “What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases,” 150 A.L.R. Fed. 1.

Harassment on the basis of race is a form of race discrimination, and federal courts have applied Supreme Court precedent from sexual harassment cases (see Section 5.3.3.3) to claims of racial harassment. Racial harassment claims may be brought under Title VII or Section 1981; the latter statute's lack of a cap on damages makes it likely that plaintiffs may file under both laws, as well as state nondiscrimination laws. A dramatic example of a plaintiff's success occurred in *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002), in which the only African American employee of a small company quit after five months because of coworkers' daily racial jokes, which were observed and condoned by Swinton's supervisor. The court upheld a \$1 million punitive damage award; his back pay award was less than \$6,000. Conflicts between a supervisor and subordinate of different races, however, will typically not support a claim of racial harassment unless actual racist language is used. For example, in *Trujillo v. University of Colorado Health Sciences Center*, 157 F.3d 1211 (10th Cir. 1998), a Hispanic employee's claim of racial harassment by his African American supervisor was rejected by the court, which characterized the difficulties he faced as a "personality conflict" and upheld summary judgment for the college.

Tribal colleges are immune from race discrimination lawsuits, according to a federal appellate court. In *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000), the court ruled that because Indian tribes enjoy sovereign immunity, tribal colleges may not be sued in federal courts. The court reversed a jury award to two former employees of the college who alleged that their one-year employment contracts had not been renewed because of their race.

**5.3.2. National origin and alienage.** Claims of national origin discrimination may be brought under Title VII, the U.S. Constitution, or federal Executive Orders and, sometimes, under Section 1981. Title VII prohibits discrimination "because of [an] individual's . . . national origin" (42 U.S.C. § 2000e-2(a))—that is, discrimination based on the employee's nationality. In *Briseno v. Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984), for example, the court held that the defendant had intentionally discriminated against the plaintiff, a Mexican American, because of his national origin. National origin claims are frequently combined with claims of race and/or religious discrimination (Sections 5.3.1 & 5.3.6).

The U.S. Supreme Court has ruled that the statutory term "national origin" does not cover discrimination on the basis of alienage—that is, discrimination against employees who are not citizens of the United States (*Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973)). But the Court cautioned in *Espinoza* that a citizenship requirement may sometimes be part of a scheme of, or a pretext for, national origin discrimination and that "Title VII prohibits discrimination on the basis of citizenship [alienage] whenever it has the purpose or effect of discriminating on the basis of national origin." The Court also made clear that aliens, as individuals, are covered by Title VII if they have been discriminated against on the basis of race, color, religion, or sex, as well as national

origin. To implement the statute and case law, the EEOC has issued guidelines barring discrimination on the basis of national origin (29 C.F.R. Part 1606).

Claims of alleged national origin discrimination brought under Title VII are evaluated under the *McDonnell Douglas* test described in Section 5.2.1. An illustrative case is *Castro v. Board of Trustees of the University of Illinois*, 1999 U.S. Dist. LEXIS 17303 (N.D. Ill. 1999), in which an individual of Puerto Rican descent applied for and was denied twenty-seven jobs at the University of Illinois at Chicago. The court ruled that Castro had established a *prima facie* case of national origin discrimination for three of the twenty-seven jobs because the individuals who were hired, who were not of Puerto Rican descent, had similar or lesser credentials than Castro. The court granted summary judgment to the university on Castro's discrimination claims for twenty-four of the twenty-seven positions, but denied summary judgment with respect to the three for which Castro had established a *prima facie* case.

Although *Espinoza* prevents plaintiffs from attacking citizenship (alienage) discrimination under Title VII, such plaintiffs may be more successful making constitutional claims. In *Chacko v. Texas A&M University*, 960 F. Supp. 1180 (S.D. Tex. 1997), *affirmed without opinion*, 149 F.3d 1175 (5th Cir. 1998), a Canadian citizen was terminated shortly after she was hired, allegedly because coworkers complained that the university was hiring "foreigners." With respect to her Title VII claim of national origin discrimination, the federal court awarded the university summary judgment, characterizing it as "citizenship" discrimination rather than national origin discrimination. But the court allowed the plaintiff's constitutional claims against individuals (but not against the institution) to proceed under Sections 1981 and 1983 (see Section 5.2.4 of this book). Her claims against the institution were dismissed on Eleventh Amendment immunity grounds.

Employers' requirements that employees speak only English while at work have stimulated claims of national origin discrimination. Although the EEOC guidelines state that English-only rules are a form of prohibited discrimination under Title VII (29 C.F.R. § 1606.7), most federal courts have upheld these rules if the employer has articulated a legitimate business reason (for example, customer service, safety) for the rules. (See, for example, *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); and *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993).) A federal trial court ruled that Cornell University could impose a requirement that employees speak English on the job because the interpersonal conflicts between the plaintiff and her coworkers made the requirement a business necessity (*Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D.N.Y. 1999)). However, if the court finds that the rule was applied in a manner indicating national origin discrimination rather than a legitimate business concern, the court may rule for an employee terminated for violating the rule. For example, the court in *Saucedo v. Brothers Wells Service*, 464 F. Supp. 919 (S.D. Tex. 1979), ruled that an employee terminated for speaking two words of Spanish on the job had been a victim of national origin discrimination.

The Arizona Supreme Court invalidated a state constitutional provision requiring state employees to speak only English on the job as a violation of the

First Amendment of the U.S. Constitution (*Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), *cert. denied*, 525 U.S. 1093 (1999)). (The uncertain legality of English-only rules and a proposal to fully implement the EEOC guidelines are discussed in Mark Colon, Note, "Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees," 20 *Yale L. & Pol'y Rev.* 227 (2002).)

State laws requiring colleges and universities to certify that non-native U.S. residents who are teaching assistants are proficient in English may be challenged as a violation of Title VII or Section 1981, in that no such standards are applied to individuals born in the United States. Testing the language proficiency of all teaching assistants should prevent discrimination claims. A statement in the institution's college catalog that instruction will be conducted in English would make English proficiency a bona fide occupational qualification, and as long as that requirement is applied to all instructors, it should not run afoul of the nondiscrimination laws.<sup>19</sup> Similarly, a requirement that unaccented English is required for a certain position would also be vulnerable to a national origin claim if the individual could be understood.<sup>20</sup> (For a discussion of bias against individuals with accents, see M. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction," 100 *Yale L.J.* 1329 (1991).)

The terrorist attacks of September 11, 2001, have stimulated increased attention to potential national origin discrimination. The EEOC, the U.S. Department of Justice, and the U.S. Department of Labor have issued a "Joint Statement Against Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks," as well as a set of questions and answers concerning the employee rights and employer responsibilities regarding Muslims, Arabs, South Asians, and Sikhs. These statements may be found at <http://www.eeoc.gov>.

In addition to Title VII and Section 1981, the Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603, 100 Stat. 3359, codified in scattered sections of 8 U.S.C.) may pose potential liability for college and universities with regard to race and national origin. The Act prohibits employers from hiring workers who cannot document that (1) they are in the United States legally and (2) they are legally entitled to work. Employers must ask applicants for proof of both elements, and civil penalties may be assessed against the employer for each undocumented worker hired. The law also forbids discrimination against aliens who are lawfully entitled to work and describes the complaint procedures available through the U.S. Department of Justice (8 U.S.C. § 1324b). The law is discussed in more detail in Section 4.6.5.

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<sup>19</sup>Cases related to requiring English proficiency are collected in Tim A. Thomas, Annot., "Requirement That Employees Speak English in Workplace as Discrimination in Employment Under Title VII of Civil Rights Act of 1964 (42 U.S.C.S. §§ 2000e *et seq.*)," 90 A.L.R. Fed. 806.

<sup>20</sup>Cases related to employment denials based on an individual's accent are collected in Timothy M. Hall, Annot., "When Does Adverse Employment Decision Based on Person's Foreign Accent Constitute National Origin Discrimination in Violation of Title VII of Civil Rights Act of 1964?" 104 A.L.R. Fed. 816.

With the advent of the Immigration Reform and Control Act, discrimination claims by individuals denied employment because the employer believes they may not be in the country lawfully have risen. (For discussion of this problem and a comparison of IRCA's antidiscrimination provisions with those of Title VII, see L. S. Johnson, "The Antidiscrimination Provisions of the Immigration Reform and Control Act," 62 *Tulane L. Rev.* 1059 (1988). See also Comment, "IRCA's Antidiscrimination Provisions: Protections Against Hiring Discrimination in Private Employment," 25 *San Diego L. Rev.* 405 (1988).)

### 5.3.3. Sex

**5.3.3.1. Overview.** Claims of sex discrimination may be brought under Title VII of the Civil Rights Act of 1964 (see Section 5.2.1 of this book), the Equal Pay Act (Section 5.2.2), the Constitution, the Executive Orders, or state civil rights laws.<sup>21</sup> In addition to claims that an individual was subject to an adverse employment action because of his or her sex, claims of sexual harassment may be brought under Title VII because sexual harassment is a form of discrimination on the basis of sex. Discrimination on the basis of pregnancy is also a form of sex discrimination, and is specifically prohibited by Title VII. In addition, differential treatment by sex in retirement plans has been found to violate Title VII. And there has been considerable litigation by coaches of women's sports alleging discrimination in salary and coaching assignments. Although Title VII does not outlaw discrimination on the basis of sexual orientation, several states have enacted laws prohibiting such discrimination (see Section 5.3.7).

Most sex discrimination claims against colleges have been brought by women faculty members. Illustrative cases are discussed in Section 6.4. However, several cases brought by nonfaculty employees illustrate significant principles in sex discrimination litigation.

Treating a similarly situated employee of one sex more favorably than a corresponding employee of the opposite sex may violate Title VII or state nondiscrimination laws. For example, in *Lawley v. Dept. of Higher Education*, 36 P.3d 1239 (Colo. 2001), the state supreme court ruled that the university had terminated a female director of parking in order to retain two male subordinates. The court ordered the university to reinstate the plaintiff to her former position. On the other hand, another federal appellate court reversed a trial court judgment in favor of a research assistant. In *Woodruff v. Ohman*, 2002 U.S. App. LEXIS 2087 (6th Cir. 2002) (unpublished), the plaintiff had claimed that her supervisor had mistreated her on the basis of her sex. The trial court had awarded punitive damages and injunctive relief in the form of an apology from the former

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<sup>21</sup>Cases and authorities are collected at Thomas Fusco, Annot., "What Constitutes Sex Discrimination in Termination of Employee so as to Violate Title VII of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2)," 115 A.L.R. Fed. 1; Wesley Kobylak, Annot., "Disparate Impact Test for Sex Discrimination in Employment Under Title VII of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2)," 68 A.L.R. Fed. 19; Thomas Fusco, Annot., "What Constitutes Constructive Discharge of Employee Due to Sex Discrimination so as to Violate Title VII of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2)," 116 A.L.R. Fed. 1.

supervisor. The appellate court noted that the trial court had not made specific findings concerning whether the plaintiff had been treated less favorably than similarly situated male research assistants, and thus liability had not been established.

Stereotyping an individual because of his or her gender may provide evidence of sex discrimination, as in *Price Waterhouse v. Hopkins*, the U.S. Supreme Court case discussed in Section 5.2.1. But in *Crone v. United Parcel Service*, 301 F.3d 942 (8th Cir. 2002), a federal appellate court sided with the company that had refused to promote a female employee who was not “confrontational enough” for promotion to a job supervising truck drivers; the court affirmed the dismissal of the plaintiff’s sex discrimination claims. The court ruled that being “confrontational” was a bona fide occupational qualification for the position; it was the plaintiff’s personality, not her gender, that disqualified her from the position.

**5.3.3.2. Pregnancy and health benefits discrimination.** The Pregnancy Discrimination Act of 1978 makes it a violation of Title VII for an employer to discriminate on the basis of pregnancy, childbirth, or related illnesses in employment opportunities, health or disability insurance programs, or sick leave plans.<sup>22</sup> Regulations issued by the Equal Employment Opportunity Commission pursuant to this law may be found at 29 C.F.R. § 1604.10 and Appendix, “Questions and Answers on the Pregnancy Discrimination Act.” Pregnancy-related conditions must be treated the same as any other disabilities, and health insurance for pregnancy-related conditions must extend not only to female employees but also to wives of male employees (*Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)). Health benefit plans must also provide the same level of prescription coverage to women as to men. A federal trial court ruled that Title VII prohibits employers from excluding contraceptives used by women from a prescription drug plan if more comprehensive coverage is provided to men (*Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001)).

Some states have enacted laws that attempt to “level the playing field” for women, who have the biological responsibility for bearing children, in order to ease their return to work. For example, a California law requires employers to give pregnant employees unpaid maternity leave and to reinstate them to the same or an equivalent position upon their return to work. That law was challenged in *California Federal Savings & Loan v. Guerra*, 479 U.S. 272 (1987), in which the employer claimed that Title VII did not permit more favorable treatment of an individual because of pregnancy, but merely mandated that pregnant women not be discriminated against. The Supreme Court ruled that the

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<sup>22</sup>Cases and authorities are collected at Paul A. Fischer, Annot., “Pregnancy Leave or Maternity Leave Policy, or Lack Thereof, as Unlawful Employment Practice Violative of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*),” 27 A.L.R. Fed. 537; Sheila A. Skojec, Annot., “Job Discrimination Against Unwed Mothers or Unwed Pregnant Women as Proscribed Under Pregnancy Discrimination Act (42 U.S.C.A. § 2000e(k)),” 91 A.L.R. Fed. 178; J. A. Bryant, Jr., Annot., “Termination of Employment Because of Pregnancy as Affecting Right to Unemployment Compensation,” 51 A.L.R.3d 254; Shauna Cully Wagner, Annot., “Discrimination Against Pregnant Employee as Violation of State Fair Employment Laws,” 99 A.L.R.5th 1.



Pregnancy Discrimination Act provided a “floor” of protection for pregnant employees, but not a ceiling, and that Title VII did not preempt state laws that recognized the special circumstances of pregnant employees.<sup>23</sup>

However, in a challenge to Missouri’s unemployment compensation law, which denies benefits to women who leave work because of the birth of a child, the Supreme Court ruled that Title VII does not prevent a state from categorizing a resignation on account of the birth of a child as a voluntary resignation, resulting in ineligibility for unemployment benefits (*Wimberly v. Labor & Industrial Relations Commission*, 479 U.S. 511 (1987)). (For discussion of state unemployment compensation laws, see Section 4.6.7.)

Another issue related to pregnancy, or potential pregnancy, is the lawfulness of employer policies that exclude pregnant or potentially pregnant employees from work sites where exposure to substances could cause birth defects. Lab assistants, postdoctoral fellows, faculty, or students may work with fetotoxins. And some nonacademic employers have excluded from such jobs all women who were capable of becoming pregnant.<sup>24</sup> They have done so in order to avoid liability for litigation by children seeking a remedy for birth defects allegedly traceable to their mothers’ workplace exposure to fetotoxins.

These “fetal vulnerability” policies were challenged in *United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991). The company, which manufactures automobile batteries, argued that exposure to the lead used in the manufacturing process could cause birth defects, and that permitting women to work with the lead was unsafe. The company excluded all women capable of becoming pregnant—unless they could prove that they were unable to conceive a child—from the high-paying jobs involving lead exposure; but the company permitted men, even those who wished to father children, to work in these jobs.

A unanimous Supreme Court ruled that fetal vulnerability policies that excluded only women constituted intentional disparate treatment discrimination, and rejected the company’s argument that, on the grounds of safety, inability to become pregnant was a bona fide occupational qualification for a position involving exposure to fetotoxins. The Court stated that the BFOQ is a narrow concept and is used only in “special situations” (499 U.S. at 201). The opinion clarifies the concept of BFOQ in the following manner:

Our case law . . . makes it clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee’s ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job [499 U.S. at 204].

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<sup>23</sup>The federal Family and Medical Leave Act of 1993 (Pub. L. No. 103-3) requires employers with fifty or more employees to grant up to twelve weeks of unpaid leave each year to an employee for the care of a sick, newborn, or recently adopted child, or a seriously ill family member, or for the employee’s own serious health condition. This law is discussed in Section 4.6.4.

<sup>24</sup>Cases regarding fetal vulnerability policies are collected in Wesley Kobylak, Annot., “Exclusion of Women from Employment Involving Risk of Fetal Injury as Violative of Title VII of Civil Rights Act of 1964 (42 U.S.C.S. §§ 2000e *et seq.*),” 66 A.L.R. Fed. 968.

Given the language of *Johnson Controls*, it is unlikely that a college or university could successfully specify gender as a BFOQ for jobs involving exposure to fetotoxins, or for virtually any other job either.

**5.3.3.3. Sexual harassment.** Much attention has been given to the issue of sexual harassment in recent years. The number of sexual harassment claims by students, staff, and faculty is growing, as individuals become aware that such conduct is prohibited by law, whether the target is an employee or a student. Sexual harassment of staff and faculty is addressed in this Section; harassment of students is discussed in Sections 8.1.5 and 9.3.4.

Sexual harassment is a violation of Title VII of the Civil Rights Act of 1964 (discussed in Section 5.2.1) because it is workplace conduct experienced by an individual on the basis of his or her sex. It is also a violation of Title IX of the Education Amendments of 1972 (discussed in Section 5.2.3), although it may be difficult for an employee to state a sexual harassment claim under Title IX rather than under Title VII. Sexual harassment victims may be male or female, and harassers may be of either gender as well. Furthermore, same-sex sexual harassment is also a violation of Title VII and Title IX.

The EEOC's guidelines prohibiting sexual harassment expansively define sexual harassment and establish standards under which an employer can be liable for harassment occasioned by its own acts as well as the acts of its agents and supervisory employees. The guidelines define sexual harassment as:

(a) . . . Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment . . . [29 C.F.R. § 1604.11].

Whether or not the alleged harasser is an employee, if the target of the harassment is an employee, the employer may be liable for the unlawful behavior. Because the EEOC guidelines focus on both speech and conduct, the question of the interplay between sexual harassment and academic freedom arises, particularly in the classroom context. This interplay is discussed in Sections 7.2.2 and 9.3.4.

Two forms of sexual harassment have been considered by the courts, and each has a different consequence with regard to employer liability and potential remedies. Harassment that involves the exchange of sexual favors for employment benefits, or the threat of negative action if sexual favors are not granted, is known as "*quid pro quo* harassment." The U.S. Supreme Court addressed this form of sexual harassment for the first time in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), ruling that, if *quid pro quo* harassment were proven, employer liability under Title VII would ensue even if the victim had not reported the harassment. Using principles of agency law, the Court asserted

that harassment involving an actual or threatened change in terms and conditions of employment would result in a form of strict liability for the employer.<sup>25</sup>

The Court did not elaborate on the showing that the plaintiff must make to demonstrate that the employer “knew or should have known,” but it did mention two tests to assist courts in determining whether a plaintiff’s decision not to report alleged sexual harassment was reasonable:

- 1) the employer should have a clearly-worded policy prohibiting sexual harassment in the workplace that is communicated to all employees;
- 2) the employer should have a system for reporting sexual harassment that provides an alternate channel so that the victim, if harassed by a supervisor, can avoid the traditional complaint procedure of discussing the problem with that supervisor [477 U.S. at 71–73].

The other form of harassment, the creation of a hostile or offensive environment, may involve virtually anyone that the target employee encounters because of the employment relationship. Supervisors, coworkers, clients, customers, and vendors have been accused of sexual harassment. (For an example of potential university liability for harassment of an employee by a homeless individual who frequented the law school library, see *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999).) If the allegations are proven, and if the employer cannot demonstrate that it responded appropriately when it learned of the harassment, the employer may be found to have violated Title VII or state law.

The U.S. Supreme Court has decided several cases involving hostile environment sexual harassment, beginning with *Harris v. Forklift Systems*, 510 U.S. 17 (1993). In *Harris*, the plaintiff had demonstrated that her supervisor had repeatedly engaged in verbal sexual harassment. The major issue in the case was not whether the behavior was harassment (the defense had conceded that it was), but whether the plaintiff must demonstrate serious psychological harm in order to convince a court that the harassment was sufficiently severe and pervasive to constitute a “hostile or offensive environment.” In a unanimous opinion, the U.S. Supreme Court rejected the argument that serious harm must be demonstrated. The Court determined that the harassing conduct itself is unlawful, and whether it has a psychological, or even a financial, impact on the plaintiff is irrelevant.

Although the standard for *quid pro quo* harassment is clear in that the accused harasser must have the power to affect the target’s terms and conditions of employment, the standard for establishing hostile or offensive environment is less clear, and is particularly fact sensitive. Name calling, sexual jokes, sexual touching, sexually explicit cartoons, and other sexual behavior by

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<sup>25</sup>Cases and authorities are collected at Ethel R. Alston, Annot., “Sexual Advances by Employee’s Superior as Sex Discrimination Within Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e *et seq.*),” 46 A.L.R. Fed. 224; Linda A. Sharp, Annot., “Workers’ Compensation as Precluding Employee’s Suit Against Employer for Sexual Harassment in the Workplace,” 51 A.L.R.5th 163.

supervisors or coworkers have been found to constitute sexual harassment (see, for example, *Alston v. North Carolina A&T State University*, 304 F. Supp. 2d 774 (M.D.N.C. 2004)). Furthermore, vandalism or harassing conduct of a nonsexual nature directed at a target because of his or her gender has also been found to violate Title VII, sometimes as sexual harassment and sometimes as sex discrimination (see, for example, *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988)).

Words alone may be sufficient to constitute sexual harassment. In a case involving a female faculty member, *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990), false rumors that the plaintiff had engaged in a sexual relationship with her department chair in order to obtain favorable treatment were found to constitute actionable sexual harassment, and the institution was ordered to promote the plaintiff and to give her back pay and attorney's fees. But a single remark, even if "crude," will probably not be sufficient to establish a claim of sexual harassment, according to the U.S. Supreme Court (*Clark County School District v. Breeden*, 532 U.S. 268 (2001)).

The U.S. Court of Appeals for the Ninth Circuit, in *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988), described the showing that the plaintiff must make in order to demonstrate a hostile environment. The plaintiff must prove:

- 1) that he or she was subjected to demands for sexual favors, or other verbal or physical conduct of a sexual nature;
- 2) that this conduct was unwelcome;
- 3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [847 F.2d at 1373].

But the definition of an "abusive working environment" has not been uniformly interpreted. Establishing whether the conduct is sufficiently severe or pervasive, and whether the plaintiff's claim that the behavior was offensive meets the standard for liability, has been a problem for the courts.

The U.S. Court of Appeals for the Ninth Circuit created a special standard by which to determine whether the complained-of conduct constituted a hostile environment. In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the court created the "reasonable woman" standard, in which the court assumes the perspective of a reasonable person of the plaintiff's gender, since "conduct that many men consider unobjectionable may offend many women" (924 F.2d at 878).

EEOC guidelines use the "reasonable person" standard (*Policy Guidance on Sexual Harassment*, available at <http://www.eeoc.gov>), but several state courts have decided that the "reasonable woman" standard is appropriate (see, for example, *Lehman v. Toys 'R' Us*, 626 A.2d 445 (N.J. 1993)). While the U.S. Supreme Court did not discuss the question of standards in *Harris*, Justice O'Connor appeared to use the "reasonable person" rather than the "reasonable woman" standard. (For a brief discussion of interpretation problems related to the "reasonable woman" standard, see E. H. Marcus, "Sexual Harassment Claims: Who Is a Reasonable Woman?" 44 *Labor L.J.* 646 (1993).)

As sexual harassment jurisprudence developed in the federal courts, there was disagreement as to whether an employer could escape liability for harassment if it were unaware of the harassment or if no negative employment action had been taken. In 1998, the U.S. Supreme Court issued opinions in two cases that crafted guidelines for employer responses to harassment complaints, and also created an affirmative defense for employers who had acted in good faith. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), the Court addressed the issue of an employer's liability for a supervisor's verbal sexual harassment when no negative employment action had been taken against the target of the harassment. In both cases, supervisors had made numerous offensive remarks based on the targets' gender and had threatened to deny them job benefits. Neither of the plaintiffs had filed an internal complaint with the employer; both had resigned and filed a sexual harassment claim under Title VII. The employers in both cases had argued that, because no negative employment actions were taken against the plaintiffs, and because the plaintiffs had not notified the employer of the alleged misconduct, the employers should not be liable under Title VII.

The Supreme Court rejected this argument, ruling that an employer can be vicariously liable for actionable discrimination caused by a supervisor. The employer, however, may assert an affirmative defense that examines the reasonableness of the employer's and the target's conduct. If the employer had not circulated a policy against sexual harassment, had not trained its employees concerning harassment, and had not communicated to employees how to file a harassment complaint, then the target's failure to use an internal complaint process might be completely reasonable, according to the Court. But if the employer had been proactive in preventing and responding to sexual harassment, then a plaintiff's failure to use an internal complaint process might not be reasonable.

The Court explained that the employer can establish an affirmative defense to a sexual harassment claim if it can demonstrate:

- (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and
- (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise [524 U.S. at 807].

The Court's rulings in *Ellerth* and *Faragher* blur the previous distinction between liability for *quid pro quo* harassment and liability for hostile environment harassment. But the cases also recognize an important defense for those "good employers" who have developed clear policies, advised employees of the complaint process, and conducted training about avoiding harassment. The approach taken by the Court has subsequently been applied to litigation concerning harassment on the basis of race (*Wright-Simmons v. The City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998)).

An example of a college's successful use of the affirmative defense is *Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001). A female police officer alleged

that she had endured verbal and physical sexual harassment by a supervisor for a period of seven months. At that point, the plaintiff filed a formal complaint under the university's harassment complaint process. The university investigated promptly, issued a report finding that harassment had occurred, and the harassment stopped as soon as the report was issued. The court ruled that the plaintiff's delay in reporting the harassment was unreasonable, and that, given the university's response when it learned of the harassment, filing a complaint promptly would have ended the harassment at a much earlier point in time. The appellate court affirmed the trial court's award of summary judgment to the university.

In order to take advantage of the *Faragher/Ellerth* affirmative defense, the employer must demonstrate that its policy effectively communicates to supervisors how they should handle harassment complaints and provides an effective mechanism for bypassing the supervisor should that individual be the alleged harasser. In *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1998), the Court ruled that the college had not established an affirmative defense because its complaint procedure was inadequate and it did not take timely and effective remedial action. The court criticized the college's harassment policy because it did not discuss the responsibilities of a supervisor who learned of alleged harassment through informal means. Furthermore, said the court, the unavailability of individuals to receive harassment complaints during the evening or on weekends, when the college was open and students and employees were present, was additional evidence of an ineffective harassment policy.

The U.S. Supreme Court addressed the question of whether a plaintiff who quit as a result of exposure to a sexually hostile work environment could establish a "constructive discharge" theory, and if so, whether the employer then lost the benefit of the *Faragher/Ellerth* affirmative defense. In *Pennsylvania State Police v. Nancy Drew Suders*, 542 U.S. 129 (2004), the Court, in an 8-to-1 ruling, determined that the plaintiff could establish constructive discharge by showing that the abusive work environment "became so intolerable that her resignation qualified as a fitting response." The Court stated that the employer would not be able to use the affirmative defense if a supervisor's "official act" (such as demotion or discipline) precipitated the constructive discharge, but that absent such a "tangible employment action," the affirmative defense would be available to employers if the employee resigned and then established a constructive discharge.

Consensual relationships that turn sour may result in sexual harassment claims and liability for the college. For example, in *Green v. Administrators of the Tulane Education Fund*, 284 F.3d 642 (5th Cir. 2002), a former office manager for a department chair alleged that the chair harassed her because their sexual relationship had ended and because the chair's new love interest insisted that the plaintiff be fired. Although the university provided evidence that it had attempted to transfer the plaintiff to another position and had attempted to ensure that the chair did not retaliate against her, a jury reached a verdict for

the plaintiff and awarded her \$300,000 in compensatory damages, in addition to back pay and front pay awards, and more than \$300,000 in attorney's fees. The trial court had not allowed the jury to address the plaintiff's claim for punitive damages.

Although the appellate court upheld the jury award, it agreed with the university's argument that the standard for awarding punitive damages had not been met. Analyzing the facts under the standard established by the U.S. Supreme Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the appellate court held that because the university had attempted in good faith to respond to the plaintiff's complaints about the chair's behavior, its behavior did not meet the "malice" or "reckless indifference" showing required by *Kolstad*.

Although most federal courts have ruled that liability for sexual harassment under Title VII is corporate rather than individual, some state laws provide for individual liability of supervisors for harassment (see, for example, *Matthews v. Superior Court*, 40 Cal. Rptr. 2d 350 (Cal. App. 2 Dist. 1995)). (For a discussion of individual liability under Title VII, see Scott J. Connolly, Note, "Individual Liability of Supervisors for Sexual Harassment Under Title VII: Courts' Reliance on the Rules of Statutory Construction," 42 *B.C. L. Rev.* 421 (2001).)

Although Title VII does not forbid harassment on the basis of sexual orientation, it does permit claims of same-sex sexual harassment if the target can demonstrate that the harassment was based on the sex of the target. The U.S. Supreme Court addressed this issue for the first time in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1997). The Court ruled that a claim of male-to-male harassment was cognizable under Title VII if the plaintiff could demonstrate that the offensive conduct occurred "because of" his gender. In a unanimous opinion, the Court, through Justice Scalia, stated that "[Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. [The law] forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment" (523 U.S. at 81).

Same-sex sexual harassment claims have increased substantially since the Court's ruling in *Oncale* (see Reed Abelson, "Men, Increasingly, Are the Ones Claiming Sex Harassment by Men," *New York Times*, June 10, 2001, p. 1). Courts have allowed plaintiffs to state claims of same-sex sexual harassment if the alleged harasser is homosexual. For example, in *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512 (5th Cir. 2001), the appellate court affirmed an award of back pay, front pay, and compensatory damages and attorney's fees to a male professor harassed and retaliated against by a male superior whose sexual advances he had rejected. The trial judge had given the plaintiff a substantial award of front pay because, after the jury returned a verdict of retaliation against the plaintiff by the university, the university president sent an e-mail message to eight thousand university employees stating that the plaintiff had not been terminated but had failed to return from a leave of absence. Because of those comments, the trial judge added five years of front

pay to the plaintiff's original front pay award, reasoning that such negative remarks would make it difficult for the plaintiff to find another position.

In other cases, plaintiffs who can demonstrate that they are harassed because of hatred or hostility toward them because of their gender may be allowed to state same-sex harassment claims. For example, a male employee who was verbally harassed by male coworkers because he was viewed as effeminate prevailed in his claim of sexual harassment in *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001). The court sided with the plaintiff's argument that the Supreme Court's theory developed in *Price Waterhouse v. Hopkins* (discussed in Section 5.2.1) should apply in this case, stating that the verbal abuse that the plaintiff endured was "closely linked to gender."

(For a discussion and analysis of same-sex sexual harassment claims in both academic and nonacademic settings, see Mary Ann Connell, "Evolving Law in Same-Sex Harassment and Sexual Orientation Discrimination," 23rd Annual National Conference on Law and Higher Education, Stetson University College of Law, 2002. See also Nailah A. Jaffree, Note, "Halfway Out of the Closet: *Oncale's* Limitations in Protecting Homosexual Victims of Sex Discrimination," 54 *Fla. L. Rev.* 799 (2002).)

Subsection (f) of the EEOC guidelines emphasizes the advisability of implementing clear internal guidelines and sensitive grievance procedures for resolving sexual harassment complaints. The EEOC guidelines' emphasis on prevention suggests that the use of such internal processes may alleviate the postsecondary institution's liability under subsections (d) and (e) and diminish the likelihood of occurrences occasioning liability under subsections (c) and (g). Title IX requires grievance procedures.

In light of the social and legal developments, postsecondary institutions should give serious attention and sensitive treatment to sexual harassment issues. Sexual harassment on campus may be not only an employment issue but, for affected faculty and students, an academic freedom issue as well. Advance preventive planning is the key to successful management of these issues, as the EEOC guidelines indicate. Institutions should involve the academic community in developing specific written policies and information on what the community will consider to be sexual harassment.

**5.3.3.4. Application to athletics coaches.** Although there have been several federal appellate rulings on the application of Title IX of the Education Amendments of 1972 to participants in collegiate athletics activities (see Section 10.4.3), less attention has been paid to alleged discrimination against women coaches, or against coaches of either gender who coach women's teams. A survey of gender equity data collected under the Equity in Athletics Disclosure Act of 1994 (Pub. L. 103-382, 108 Stat. 3969, codified at 20 U.S.C. § 1092 (2002)) revealed that the average salary of women coaches was roughly two-thirds of the average salary of male coaches, and that pay disparities exist in all divisions (see Jennifer Jacobson, "Female Coaches Lag in Pay and Opportunities to Oversee Men's Teams," *Chron. Higher Educ.*, June 8, 2001, A38). Discrimination claims may be brought by coaches under Title VII of the Civil Rights Act of 1964 (see Section 5.2.1 of this book), the Equal Pay Act (Section 5.2.2), and Title IX (5.2.3).



Although the requirements of an Equal Pay Act claim differ somewhat from those of a Title VII or Title IX claim (in that a four-part test is required under the Equal Pay Act in order for a plaintiff to make a *prima facie* case of salary discrimination based on sex), in practice the courts have used the Equal Pay Act standards to evaluate these claims under all three statutes. In a few cases, male coaches have been the plaintiffs.

In 1997, the Equal Employment Opportunity Commission issued an “Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions” (available at <http://www.eeoc.gov/docs/coaches/>). Cases decided prior to the issuance of the Guidance tended to reject the salary discrimination claims of women coaches. For example, plaintiffs who argued that the gender of the team members, rather than the gender of the coach, was responsible for the lower salary were not able to satisfy the *prima facie* case requirements of Title VII or the Equal Pay Act because team members are not employees (*Deli v. University of Minnesota*, 863 F. Supp. 958 (D. Min. 1994)). And plaintiffs who could not link institutional decisions regarding the status and value of women’s sports to gender discrimination also did not prevail (*Bartges v. University of North Carolina at Charlotte*, 908 F. Supp. 1312 (W.D.N.C. 1995), *affirmed without opinion*, 94 F.3d 641 (4th Cir. 1996)).

The EEOC Guidance discusses the standards for evaluating claims of coaches alleging salary discrimination under the Equal Pay Act and Title VII. For Equal Pay Act claims, the Guidance states that plaintiffs must identify one or more comparators; “a plaintiff must show that a specific employee of the opposite sex earned higher wages for a substantially equal job,” rather than using a hypothetical employee or the composite features of jobs of several employees. The Guidance notes that plaintiffs must demonstrate that they have equal skills, exert equal effort, have equal responsibility, and share the same working conditions as the individual with whom they wish to be compared. Therefore, if a plaintiff cannot prove that her skills or experience are equivalent to those of the comparator, she will not be able to make out a *prima facie* case.

With respect to employer defenses to Equal Pay Act claims, the most likely defense is that the salary differential was based on “any factor other than sex” (29 U.S.C. § 206(d)(1)). The Guidance states that, under the defense, the following justifications for differential pay are acceptable, if proven: additional responsibilities (for example, the size of the team, the number of assistants, the demands of event and media management, scheduling, and budgetary responsibilities); superior experience, ability, or skills as long as they are closely related to the coaching position; and “marketplace value of the particular individual’s job-related characteristics.” The Guidance rejects the following justifications for differential pay: that the salary is the “going rate” for a particular sport, the gender of the team members, and prior salary without examination of whether it was linked to prior discrimination. With respect to the argument that sports producing more revenue justify higher salaries for their coaches, the Guidance reserves judgment. Although recognizing that differentials in revenue might be a legitimate “factor other than sex,” the Guidance states that “the Commission is also aware of the studies showing that women’s athletic programs historically

and currently receive considerably less resources than men's programs," and notes that the Commission will examine whether an institution has discriminatorily provided reduced support to a female coach to produce revenue for her team. (For a case in which the court rejected the Equal Pay Act claim of a male assistant coach on the grounds that his female counterpart had more numerous and significant responsibilities, see *Horn v. University of Minnesota*, 362 F.3d 1042 (8th Cir. 2004).)

The analysis for Title VII claims under the Guidance is similar to that for Equal Pay Act claims, insofar as the plaintiff asserts that the coaching positions are substantially equal. The Guidance notes that the sports need not be the same or similar; it is the functional duties of the coaches that are compared, not the nature of the sports. While an employment practice that violated Title VII would not necessarily violate the Equal Pay Act, a violation of the Equal Pay Act would also violate Title VII.

An illustrative case litigated under the Equal Pay Act, Title VII, and Title IX is *Weaver v. Ohio State University*, 71 F. Supp. 2d 789 (S.D. Ohio 1998), *affirmed* 194 F.3d 1315 (6th Cir. 1999). Weaver, the women's field hockey coach, brought claims of discriminatory termination, salary discrimination, and retaliation against the university. For her salary discrimination claims, she compared herself to the male ice hockey coach. The court rejected her claims, noting that there were sufficient differences between the responsibilities, skill, and effort required of the coaches. The ice hockey season was longer, and more games were played. Furthermore, there were more players to coach on the ice hockey team. The court also ruled that the male coach had additional responsibilities with respect to public relations and marketing, and that prevailing market rates for ice hockey coaches were higher than for field hockey coaches. The appellate court affirmed these rulings and declined the trial court's invitation to rule on whether Weaver's Title IX claim was preempted by Title VII.

Jan Lowery, the former women's basketball coach and women's athletics coordinator at Tarleton State University, asserted claims of salary discrimination under Title VII, the federal equal protection clause, and Title IX, as well as Title IX and First Amendment retaliation claims (for her opposition to allegedly discriminatory practices related to women's athletics at the university). Although Lowery resigned from Tarleton, she claimed constructive discharge, demotion, and failure to promote her to the position of overall athletic director.

In *Lowery v. Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997), the court dismissed Lowery's Title IX salary discrimination claim, stating that there was no private right of action under Title IX for employment discrimination, but allowed her retaliation claims and other salary discrimination claims to proceed. The university then sought summary judgment on the remaining claims. The trial court denied the university's motion for summary judgment on these claims (11 F. Supp. 2d 895 (S.D. Tex. 1998)).

With respect to the Equal Pay Act claim, the university had conceded that Lowery and the male coach-athletic coordinator with whom she compared herself had comparable duties and responsibilities. The court ruled that Lowery had raised issues of fact that could not be resolved at the summary judgment

stage about how the two individuals were paid, whether salary increases they received were for additional responsibilities or their current responsibilities, and other apparent inconsistencies in the way the two employees were treated. With respect to Lowery's Title VII claim, the court ruled that a demotion is an adverse employment action, and thus Lowery had established a *prima facie* case of retaliation under Title VII. With respect to the retaliation claims, the court held that Lowery could make out a *prima facie* case of retaliation under Title IX because the evidence showed that the university had reprimanded her for discussing her concerns about alleged Title IX violations with individuals outside the athletic department, and demoted her from the position of women's athletics coordinator shortly thereafter. Regarding Lowery's First Amendment retaliation claim, the court ruled that her stated concerns about potential Title IX violations were matters of public concern and thus were protected by the First Amendment's free speech clause (see Section 7.1.1).

But another women's basketball coach was less successful in her discrimination claims against the University of Southern California (USC). Marianne Stanley was hired by USC in 1989 and given a four-year contract at a salary substantially below that of the coach of the men's basketball team, George Raveling. The women's basketball team was very successful during Stanley's term as coach, and when it came time to negotiate a renewal of her contract, Stanley asked that she be paid a salary equivalent to Raveling's. The athletic director refused to pay her at that level, but offered her a new contract at a higher salary. Stanley held out for an equivalent salary, but the parties could not agree, and when Stanley's initial contract expired, it was not renewed. Stanley filed claims under the Equal Pay Act and Title IX, as well as state claims, including several under the California Fair Employment and Housing Act and the California constitution.

In 1995, the trial court awarded summary judgment to the university, and Stanley appealed. Four years later, the appellate court affirmed in *Stanley v. University of Southern California*, 178 F.3d 1069 (9th Cir. 1999). The university argued that the jobs held by Stanley and Raveling were different (primarily because the men's coach bears greater revenue-generating responsibilities and is under greater pressure from the media and fans to have a winning season, and because Raveling did generate more revenue than did Stanley), while Stanley argued that differences between the two jobs were primarily attributable to the university's prior gender-based decisions about resource allocation to men's and women's sports. The court assumed without ruling that the jobs were substantially equal for Equal Pay Act purposes, and then found that Raveling had qualifications superior to Stanley's. The court cited the following differences in their qualifications at the time each was hired: Raveling had thirty-one years of coaching experience (compared with Stanley's seventeen); Raveling had coached the men's Olympic basketball team, and had twice been named national coach of the year (Stanley had done neither); Raveling had nine years of marketing and promotional experience (Stanley had none); and Raveling had written several books on basketball, which Stanley had not. The court noted that the EEOC Guidance specifically permitted superior experience to justify pay

differentials, and ruled that the university had successfully demonstrated that the salary differential was a result of a factor “other than sex.” The court rejected Stanley’s other discrimination claims on the same basis. Furthermore, the court ruled that the university had not retaliated against Stanley by refusing to enter a new contract, and that she was not constructively discharged simply because the parties could not agree on the terms of a new contract.

Claims of discrimination by athletics coaches are very fact sensitive, as the following case illustrates. The case also illustrates the effect of allowing a case to go to a jury, which most of the cases involving alleged discrimination against women coaches do not. A federal jury awarded the women’s basketball coach and women’s sports administrator at Brooklyn College, City University of New York (CUNY), \$85,000 in compensatory damages plus back pay of \$274,920 in her Equal Pay Act and Title VII claims. In *Perdue v. City University of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998), Molly Perdue established that she performed jobs that were substantially equal to the men’s basketball coach and the men’s sports administrator. She was paid less than half of the average salaries of the two male comparators, but asserted that she had the same responsibilities as each of these individuals. Furthermore, she had a smaller office, a smaller budget, fewer assistant coaches, and no locker room for her team; she also cleaned the gym and washed the players’ uniforms, which the male coach did not. The court ruled that there was enough evidence for the jury to find that Perdue’s job responsibilities, skill, and effort were comparable to each of the male comparators, despite the fact that each of the male comparators had more experience in these roles than did Perdue.

The laws prohibiting sex discrimination in employment protect male coaches as well as female coaches. The EEOC ruled in 1998, for instance, that the University of Pennsylvania had discriminated against the assistant coach of its men’s rowing team by not permitting him to apply for the vacant position of head coach of the women’s crew team (*Medcalf and University of Pennsylvania*, Charge No. 170980294, decided December 9, 1998). A federal trial court rejected the University’s motion for summary judgment (*Medcalf v. Trustees of the University of Pennsylvania*, 2001 U.S. Dist. LEXIS 10155 (E.D. Pa. June 19, 2001)), and a federal jury found for the plaintiff, awarding him compensatory and punitive damages and lost wages. The university appealed, and a federal appellate court affirmed the jury’s verdict (71 Fed. Appx. 924 (3d Cir. 2003)) (unpublished).

This area of the law is still developing, and it remains to be seen whether courts will follow the EEOC Enforcement Guidance’s framework for analyzing claims of salary discrimination or will defer to the “business judgment” of the institution with respect to how it allocates resources for athletic programs. Coaches who believe that their pay is lower than that of similar coaches because of their gender (rather than the gender of the team members) may find some success under Title IX (at least for retaliation claims), the Equal Pay Act (if they can find a suitable comparator), or under Title VII. In fact, the EEOC’s statement that the sports do not have to be the same suggests that coaches of women’s teams, such as basketball or softball, might wish to compare

themselves with coaches of different sports with similar-sized teams, responsibilities, and experience. The issue of whether revenue production is a neutral factor “other than sex” will have to be resolved on a case-by-case basis.

These cases suggest a strategy for avoiding litigation on, or defending against, claims of sex discrimination in coaches’ salaries. First, the institution may find it useful to conduct an audit of coaches’ salaries and to adjust the salaries of those coaches whose functions are similar to those of higher-paid coaches with similar experience, seniority, and coaching success. Written position descriptions for coaches should specify the duties, skills, and responsibilities necessary for satisfactory performance. New coaches should be recruited from a diverse pool that includes other-gender applicants and minorities. Drafting contracts that specify the duties of the coach, whether there will be bonuses and under what circumstances, and what other responsibilities are expected of each coach may also help an institution avoid liability. And the institution will need to clarify the basis for any negative employment action to defend against retaliation claims by coaches, which in some cases have been more successful than their underlying discrimination claims.

(For an analysis of how discrimination law is applied to pay disparities among coaches, see John Gaal, Michael S. Glazier, & Thomas S. Evans, “Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues,” 28 *J. Coll. & Univ. Law* 519 (2002). For practical advice on this subject, see Janet Judge, David O’Brien, & Timothy O’Brien, “Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches,” 6 *Seton Hall J. Sports L.* 549 (1996).)

**5.3.4. Disability.** Colleges have not escaped the flood of disability discrimination cases that resulted from the enactment of the Americans With Disabilities Act (ADA) of 1990. Like their counterparts in nonacademic organizations, college employees have usually been unsuccessful in establishing claims under this law.<sup>26</sup> Depending on the protections offered by state law, plaintiffs’ counsel may prefer to bring these claims under state nondiscrimination law because of the narrowness of the ADA’s definition of disability and the complications of establishing under the ADA that the plaintiff is “qualified.”<sup>27</sup>

Employer defenses to ADA claims typically focus on the effect of the disorder on the employee’s work performance, attendance, behavior, or some other relevant concern. In some cases, however, the employer’s defense is that the disability was irrelevant to the negative employment action.

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<sup>26</sup>A study of ADA employment cases litigated between the law’s enactment and June 2000 concluded that plaintiffs succeeded on the merits only 4 percent of the time (Barbara A. Lee, “A Decade of the Americans With Disabilities Act: Judicial Outcomes and Unresolved Problems,” 42 *Industrial Relations* 11 (2003)).

<sup>27</sup>For example, both California’s and New Jersey’s nondiscrimination laws have a more expansive definition of “disability” than the ADA, which greatly improves plaintiffs’ ability to get their cases to a jury (California Fair Employment and Housing Act, Cal. Gov’t. Code § 12940; New Jersey Law Against Discrimination, N.J.S.A. 10:5-5(q)).

*IS THE EMPLOYEE DISABLED FOR ADA PURPOSES?* As discussed in Section 5.2.5, an employee seeking a remedy for alleged disability discrimination must first demonstrate that he or she meets the Act's definition of disability. This has been a substantial hurdle for many plaintiffs. The law requires the plaintiff to demonstrate that the disorder "substantially limits" one or more "major life functions." The U.S. Supreme Court has determined that the effect of the disorder on the plaintiff must be evaluated taking into consideration any "mitigating measures," such as medication or physical aids (such as a prosthetic device). And if the disorder limits the plaintiff's ability to perform a particular job, but not a class of jobs, the courts have ruled that the individual is not "disabled" under the Act's definition (see discussion in Section 5.2.5).

The opinion in *Palotai v. University of Maryland at College Park*, 2002 U.S. App. LEXIS 12757 (4th Cir. 2002) (unpublished), provides an example of the application of ADA principles to a discrimination claim. The plaintiff, Thomas Palotai, was hired as a greenhouse technician. Because the greenhouse plants were used for research and teaching, Palotai was required to adhere to a specified schedule of care for the plants. On several occasions, Palotai was unable to complete his tasks within the time framework required by his supervisor. Seven months after he was hired, he informed his supervisor that he had a learning disability that made it impossible for him to meet the time frames. Several meetings were held with his supervisor to discuss his performance problems; he was disciplined after each meeting. In addition, Palotai disregarded safety rules, such as failing to wear protective glasses while spraying the plants with pesticides and wearing shorts in an area where the safety rules required that long pants be worn.

After several written warnings, the university suspended Palotai, who then requested sick leave because of an eye injury related to his pesticide spraying responsibilities. After returning from sick leave, his performance problems persisted, and he was terminated. Palotai filed a Fourteenth Amendment due process claim and an ADA claim. He claimed three "disabilities" under the ADA: a learning disorder, obsessive-compulsive disorder, and the eye injury sustained while working for the university. Noting that Palotai held a B.S. in biology and had completed thirty hours of graduate work, the court rejected the claim that Palotai's learning disability interfered with a major life function (learning). The court refused to characterize Palotai's obsessive-compulsive disorder as an ADA-protected disability because there was no evidence that it limited his ability to work. And because the visual impairment was quite moderate, the court concluded as well that Palotai was not disabled in this respect. The court concluded by ruling that, even assuming that Palotai's disorders met the ADA's definition of disability, the university's insistence that he perform his tasks within a specific time frame was reasonable, and an accommodation that disregarded those time frames would have been an undue hardship.

Similarly, a nurse with multiple sclerosis was found not to be disabled for ADA purposes in *Sorensen v. University of Utah Hospital*, 194 F.3d 1084 (10th Cir. 1999). Although her physician had cleared her to return to work after a five-day hospitalization related to her disorder, the physician in charge of the burn

unit, where the plaintiff had worked, refused to allow her to return to work because he was concerned that she would encounter further problems related to her disorder. She was, however, allowed to work in the emergency room and in the surgical intensive care unit. Because of the hospital's continuing refusal to allow the plaintiff to return to the burn unit, she resigned and filed a claim of constructive discharge and disability discrimination. The court ruled that she was not disabled (she could perform all functions without accommodation), that she was not regarded as disabled, nor was she discriminated against because of a record of a disability, basing its ruling on the fact that the position in the burn unit was the only position from which the plaintiff had been excluded. Citing *Sutton* (Section 5.2.5), the court ruled that the inability to perform one job does not meet the ADA's definition of substantial limitation, and that the plaintiff was not excluded from a wide class of jobs. Similar reasoning led to a similar outcome for the parties in *Broussard v. University of California*, 192 F.3d 1252 (9th Cir. 1999), in which an animal care technician with carpal tunnel syndrome was found not be disabled under the ADA because her particular job was the only job she could not perform as a result of her disability.

Employees with mental disorders are also potentially protected by the ADA if the employee can meet the Act's definition of disability. But a mental disorder that is linked to a particular job or supervisor will probably not qualify as a disability for ADA purposes. For example, in *Schneiker v. Fortis Insurance Co.*, 200 F.3d 1055 (7th Cir. 2000), an employee diagnosed with major depression was unsuccessful in her discrimination claim because her work performance had been acceptable until she began working for a new supervisor. The court characterized her difficulties as a personality conflict rather than a disability.

*IS THE EMPLOYEE QUALIFIED?* If the plaintiff can convince the court that he or she has a disability that meets the ADA's narrow definition, the plaintiff's next task is to demonstrate that he or she is qualified for the position held or desired. The Act requires that the individual demonstrate that he or she can perform the "essential functions" of the position in question.

*Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001) provides an analysis of whether an employee is qualified. Hatchett was the business manager for the college. When the position was upgraded to a dean of administrative services, Hatchett applied for, but was not offered, the position, and continued working as the business manager.

Approximately eight months after applying for the deanship, Hatchett was injured by falling debris while on college business. Although being treated by a neurologist and a psychologist for her injuries, Hatchett continued working, but could not perform all of the functions of the business manager. She then took medical leave, and the college eliminated the business manager position while she was on leave. A male employee whom Hatchett had trained, and who had performed the business manager responsibilities while she was on leave, was promoted to the deanship. The college president offered Hatchett three part-time positions, which she declined.

The court reviewed the recommendations of Hatchett's physician that she avoid conflict, only deal with individuals one on one, and not confer with

students or attend meetings. The written job description for the deanship, in addition to Hatchett's own testimony, included these duties. The court determined that these duties, which Hatchett's physician stated that she could not perform, were essential functions of the position, and denied Hatchett's ADA claim.

*Menes v. C.U.N.Y.*, 92 F. Supp. 2d 294 (S.D.N.Y. 2000) demonstrates how a college's adherence to the ADA's "interactive" process of attempting to accommodate a disabled employee provides protection against an ADA claim. The plaintiff had been diagnosed with depression, and his doctor had recommended a three-day work week as an accommodation. The college complied, but the plaintiff's performance was unsatisfactory even with the shorter work week. The court ruled that, although the plaintiff had established that he was disabled for ADA purposes, he could not perform the essential functions of his position, and thus was not qualified.

Another case demonstrates the interplay between the Family and Medical Leave Act (FMLA) (Section 4.6.4) and the ADA. A finding that an employer complied with the FMLA does not necessarily lead to a finding of compliance with the ADA. A federal trial court rejected a college's motion for summary judgment in an ADA claim that involved the matter of the employee's qualifications. In *Rogers v. New York University*, 250 F. Supp. 2d 310 (S.D.N.Y. 2002), an administrative assistant had taken FMLA leave in order to cope with her mental disorders. Although the employee's FMLA claim was dismissed because the employee had received the twelve weeks of leave to which she was entitled and did not provide the proper written documentation of her fitness to return to work, the court ruled that her ADA claim must be tried to a jury. Her doctor had stated that an additional month's leave would have been sufficient to accommodate a return to work; the court ruled that the plaintiff was entitled to demonstrate that alternate positions had been available for which she was qualified. On the other hand, most courts concur that an indefinite leave of absence without a target date of return is not a reasonable accommodation under both state and federal law (see, for example, *Scott v. University of Toledo*, 739 N.E.2d 351 (Ct. App. Ohio 2000)).

An accommodation that requires other employees to perform essential functions of an individual's job is not required under the ADA. In *Piziali v. Grand View College*, 2000 U.S. App. LEXIS 1823 (8th Cir. 2000) (unpublished), a federal appellate court upheld a trial court's grant of summary judgment to the college on the grounds that the plaintiff was not qualified. The accommodations requested by the plaintiff would have required other faculty to perform some of her duties, which the court viewed as essential functions of her position.

*IS THE REQUESTED ACCOMMODATION REASONABLE?* The law states that an accommodation is not reasonable if it poses an undue hardship for the employer. Thus, indefinite leaves of absence, the creation of new light-duty positions, or the removal of a job's essential functions are typically viewed as undue hardships. In addition, the employer need not "bump" a nondisabled individual out of a position in order to accommodate an employee who is disabled (*Lucas v. W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001)).



On the other hand, the law and its Interpretive Guidance require an employer to attempt to restructure the position, reassign the individual to a vacant position, or accommodate the employee in other ways that do not pose an undue hardship. Because so many plaintiffs cannot establish that they are disabled under the ADA, there are relatively few cases that examine the reasonableness of a requested accommodation, particularly those involving colleges or universities. One such case is *Norville v. Staten Island University Hospital*, 196 F.3d 89 (2d Cir. 1999). Norville, a nurse, sustained a spinal injury that prevented her from engaging in heavy lifting, stretching, or bending. The hospital offered her a transfer to other positions, but the positions were not equivalent in benefits. They involved the loss of seniority and the freezing of her pension benefits, and made her more vulnerable to layoffs. The plaintiff had claimed that vacant positions comparable to her former position were available, but were not offered to her. Although a jury had returned a verdict in favor of the hospital, the appellate court reversed, stating that the jury instructions were inadequate, and remanded for a new trial.

But in *Wright v. N.C. State University*, 169 F. Supp. 2d 485 (E.D.N.C. 2000), the trial court awarded summary judgment to the college, rejecting the plaintiff’s claims that the employer had refused to provide a reasonable accommodation. The plaintiff, who was deaf and worked on the night shift in a building considered to be dangerous, requested either a different shift or a transfer to the library. The university had offered her an alternate accommodation: transfer to a new, safer building. The court ruled that the university’s accommodation proposal was reasonable, noting that the employer is not required to provide the accommodation that the employee prefers if another accommodation is also reasonable.

*THE “NONDISCRIMINATION” DEFENSE.* Although most ADA cases involve an employer’s acknowledgment that the employee’s disorder was related in some way to the negative employment action (but not unlawful), in some instances the employer’s defense is that discrimination was unrelated to the employment decision. For example, in *King v. Hawkeye Community College*, 2000 U.S. Dist. LEXIS 1695 (N.D. Iowa 2000), a professor who was morbidly obese was not returned to his teaching job after taking medical leave for gastric bypass surgery. Although the court ruled that the college’s failure to allow him to return was a breach of contract, it granted the college summary judgment on the employee’s ADA claim. The court found that the individual who decided not to allow the employee to return to work was also morbidly obese, and thus found that disability discrimination was not a factor in the decision.

Although the federal circuits and state supreme courts differ on the issue, several courts have ruled that obesity is a disability under federal or state law. For example, in *Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993), a case brought under the Rehabilitation Act, the court ruled that a state agency’s refusal to rehire a qualified former employee because of its concern that her weight (320 pounds) would interfere with her ability to evacuate patients in the event of an emergency, and its speculation that she had a higher probability of injury or illness than employees who were not obese, violated Section 504. The

court did not say whether, in its view, obesity is a disability, but rather ruled that her obesity was perceived as a disability, which brought her under the law's protections. (The ADA has the same protections for nondisabled individuals who are perceived as disabled.) The EEOC has argued that obesity should be characterized as a disability protected under both Section 504 and the ADA.

Although the ADA is similar to the Rehabilitation Act in most respects (see Section 5.2.5), several differences suggest that employees will turn to the ADA first for relief when they believe discrimination has occurred. The ADA includes reassignment to a vacant position as a form of accommodation that the employer must consider (42 U.S.C. § 12111(9)(B)), a requirement absent from the language of the Rehabilitation Act, although it is included in its regulations. The ADA protects individuals with alcoholism, and it is not yet clear whether, or how often, a college or university would be required to offer an employee with alcoholism an opportunity for inpatient rehabilitation. The ADA has strict confidentiality requirements for medical information related to employees' disabilities (42 U.S.C. § 12112(d)(3)(B)); the interplay between these requirements and the right of a labor union to receive information related to an employment grievance is as yet unresolved.

**5.3.5. Age.** With the elimination of the age-seventy cap from the ADEA, mandatory retirement for age is no longer legal, with the exception of certain law enforcement and public safety employees. This "uncapping" has required colleges that wish to terminate an older worker either to provide documentation of poor performance or financial reasons for the termination or to provide incentives for the employees to retire.

Although most lawsuits brought by college employees claiming age discrimination are unsuccessful for the plaintiffs, colleges can improve their chances of successfully defending such cases by careful documentation of performance problems, training of supervisors to refrain from ageist comments and actions, and consistent treatment of employees irrespective of age. A case illustrative of some of the problems that a college may encounter in defending an age discrimination claim is *Manning v. New York University*, 2000 U.S. Dist. LEXIS 19606 (S.D.N.Y. 2000). The court rejected the university's motion for summary judgment in an age discrimination case brought by the former director of security for the university. The director had been terminated at age sixty-seven, according to the university, for "poor communication skills," a contentious relationship with his supervisors, and inability to represent the university appropriately to outside agencies. The court, reviewing the plaintiff's claims, determined that the plaintiff had made a *prima facie* case of age discrimination based upon the following evidence: the supervisor had made negative comments about the plaintiff's age and noted the need for "new blood"; the supervisor had stated that the plaintiff would soon be "on the golf course" and need not be involved in contract negotiations; the supervisor insisted that the plaintiff bring his thirty-year-old assistant to meetings but did not require the same of other employees at the plaintiff's level; the supervisor's decision to promote all but the three oldest directors to assistant vice presidents; and the assignment of an

important security responsibility to the plaintiff's young assistant rather than to the plaintiff. Furthermore, there were no written documents criticizing the plaintiff's performance, and he had received regular merit raises. The judge ruled that these allegations raised material factual issues that must be resolved at trial.

Similarly, remarks by trustees and a college president that could be interpreted as ageist were sufficient to persuade a court to deny summary judgment to a college accused of age discrimination in the termination of the former academic vice president. In *Lepanto v. Illinois Community College District #525*, 2000 U.S. Dist. LEXIS 46 (N.D. Ill. 2000), a new president told the academic vice president, who had served in that role for eleven years, that he wanted a "fresh start" and a "new mix" of leadership, and terminated the plaintiff at age sixty-one. Although the plaintiff was unable to persuade the court that these remarks, in addition to statements by trustees that there was a new majority on the board, "a younger group of people trying to break up this good old boy network who had their way for thirty years at the college," were direct evidence of age discrimination, the remarks were sufficient to support a *prima facie* case of discrimination. Given the lack of written criticism of the vice president's performance, the court ruled that a jury might conclude that the defendants' claim of poor performance was a pretext for discrimination.

On the other hand, if the college has investigated and documented an employee's performance problems, the college's motion for summary judgment may be successful. For example, in *Debs v. Northeastern Illinois University*, 153 F.3d 390 (7th Cir. 1998), a former chief engineer in the university's heating plant challenged his demotion at age fifty-five, alleging age discrimination. The university, after receiving complaints from several employees who had worked for the plaintiff, had engaged an outside consultant to investigate the employees' complaints, which included allegations of safety violations as well as dishonesty and abusive behavior toward subordinates. The investigator's report substantiated the employees' complaints and recommended that the plaintiff be relieved of supervisory responsibility. A state civil service Merit Board upheld the demotion, and the plaintiff filed a claim with the EEOC. This lawsuit followed.

The sole evidence of age discrimination provided by the plaintiff was an allegation that the plaintiff's supervisor had asked him when he was going to retire and a comment that the plaintiff was too old to work in the heating plant. These allegations were insufficient, according to the court, to rebut the university's legitimate nondiscriminatory reasons for demoting him. The court found the investigator's report credible because of her independence, and because she did not make the demotion decision.

In order to be helpful to the defendant college, the documentation must be contemporaneous and untainted by age-related language. In *EEOC v. Board of Regents of the University of Wisconsin System*, 288 F.3d 296 (7th Cir. 2002), a federal appellate court affirmed a jury verdict against the university for terminating four employees of the University of Wisconsin (UW) Press for age-related reasons. Although the plaintiffs could not have brought this claim

against the university in federal court because of *Kimel's* holding that state entities are protected from ADEA claims by sovereign immunity (see Section 5.2.6), the EEOC can bring claims on their behalf without constitutional limitations.

The UW Press was facing financial difficulties and decided to reduce its staff by four. The director of the Press selected the four oldest employees for layoff. When asked for a rationale for their selection (after determining who would be laid off), he created a written justification for selecting these four individuals, but he apparently did not conduct an overall evaluation of all the Press employees. The responsibilities of the laid-off workers were assumed by younger employees, some of whom were hired at the same time or shortly after the plaintiffs were laid off. According to the court, the justification document included language that could be viewed as age biased, and included several incorrect statements about the purportedly superior skills of younger staff. The court also upheld the jury's finding that the director's conduct was willful, a finding that allows a court to order that double damages be paid to prevailing plaintiffs.

Early retirement incentive programs are regulated by the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), discussed in Section 5.2.6. The amendments to the ADEA that took effect January 1, 1988, require, among other things, that institutions continue pension contributions without regard to the individual's age. An opinion by the U.S. Court of Appeals for the Ninth Circuit applied the provisions of the OWBPA to a university's disability and retirement plans. In *Kalvinskas v. California Institute of Technology*, 96 F.3d 1305 (9th Cir. 1996), the plaintiff, a research scientist at CalTech's Jet Propulsion Laboratory, developed Parkinson's disease. He took a medical leave and began receiving long-term disability benefits. CalTech's disability plan provided that disability benefits could be reduced by pension payments or other disability benefits. The college's retirement plan did not allow the payment of pension benefits until an employee actually retired.

When the plaintiff reached age sixty-five, he was eligible to retire but chose not to. He was still receiving disability benefits. CalTech then offset his disability benefits by the amount of pension payments he would have received had he chosen to retire. Since the retirement benefits exceeded the disability benefits, the plaintiff received no payments after the age of sixty-five. He sued CalTech under the ADEA and California's nondiscrimination law, arguing that the offset policy forced him to retire at age sixty-five.

This was a case of first impression for the interpretation of provisions added to the ADEA by the OWBPA. The court was required to interpret two provisions of the ADEA: Section 4(f)(2), which forbids any action that would "require or permit the involuntary retirement of any individual," and Section 4(1)(3)(B), which permits the offset of benefits in order to prevent "double dipping"—circumstances in which a retiree would receive a windfall of both pension benefits and disability benefits. The appellate court ruled that reducing the plaintiff's disability benefits to zero effectively forced him to retire, a violation

of Section 4(f)(2). Given the college's actions, said the court, a reasonable person would have believed he had no choice but to retire. With respect to the application of Section 4(1)(3)(B), the court examined the legislative history of the OWBPA. Since the plaintiff was not in a position to receive a windfall, this section did not protect CalTech's actions.

More recently, several retired employees sued the University of Rhode Island, asserting that the voluntary retirement incentive plan (VRIP) that they accepted violated both state and federal age discrimination laws. The plan provided that the university would pay a stipend for retiree health benefits that was based on the actual cost of these benefits. Employees who were under sixty-five when they retired received a \$5,000-per-year health benefit stipend, while employees aged sixty-five or older received a stipend of \$2,000 per year because they were eligible for Medicare. The court determined that, under the "safe harbor" provisions of the ADEA (29 U.S.C. § 623(f)(2)(B)(ii)) (discussed in Section 5.2.6), the VRIP was voluntary and the difference in stipends was linked directly to the differences in the actual cost of medical benefits.

The complexity of designing retirement incentive programs that do not run afoul of the ADEA may discourage some colleges from offering these programs. (For a discussion of these issues, see Christopher Condeluci, Comment, "Winning the Battle but Losing the War: Purported Age Discrimination May Discourage Employers from Providing Retiree Medical Benefits," 35 *J. Marshall L. Rev.* 709 (2002). See also Marianne C. DelPo, "Too Old to Die Young, Too Young to Die Now: Are Early Retirement Incentives in Higher Education Necessary, Legal, and Ethical?" 30 *Seton Hall L. Rev.* 827 (2000).)

**5.3.6. Religion.** Discrimination on the basis of religion is one of the prohibited forms of discrimination under Title VII (42 U.S.C. § 2000e-2(a)), subject to an exception for situations where a particular religious characteristic is a bona fide occupational qualification for the job (42 U.S.C. § 2000e-2(e)(1)). A related exception, applicable specifically to educational institutions, permits the employment of persons "of a particular religion" if the institution is "owned, supported, controlled, or managed" by that religion or if the institution's curriculum "is directed toward the propagation of a particular religion" (42 U.S.C. § 2000e-2(e)(2)). The application of nondiscrimination laws to religious colleges is discussed in Section 5.5.

Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief" (42 U.S.C. § 2000e(j)). The same section of the statute requires that an employer "reasonably accommodate to" an employee's religion unless the employer can demonstrate an inability to do so "without undue hardship."<sup>28</sup> In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the

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<sup>28</sup>Cases and authorities are collected in Andrew M. Campbell, Annot., "What Constitutes Employer's Reasonable Accommodation of Employee's Religious Preferences Under Title VII of Civil Rights Act of 1964," 134 A.L.R. Fed. 1.

U.S. Supreme Court narrowly construed this provision, holding that it would be an undue hardship to require an employer to bear more than minimal costs in accommodating an employee's religious beliefs. To further explicate the statute and case law, the EEOC has issued revised guidelines on the employer's duty under Title VII to reasonably accommodate the religious practices of employees and applicants (29 C.F.R. Part 1605).

The Supreme Court addressed religious discrimination a second time in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). In *Ansonia* a school-teacher had asked to use the paid "personal days" provided by the collective bargaining agreement for the observance of religious holidays. The collective bargaining agreement provided that religious holidays taken beyond those that were official school holidays would be taken as unpaid leave. Philbrook sued, alleging religious discrimination under Title VII and stating that the school board should have accommodated his religious needs by permitting him to use paid leave. In analyzing the scope of the "reasonable accommodation" requirement, the Court ruled that the employer need not accede to the employee's preferred accommodation, but could offer its own as long as that accommodation also met the "reasonableness" criterion articulated in *Hardison*. The employer did not have to prove that the employee's preferred accommodation would pose an undue hardship; it only had to prove that the accommodation it offered was a reasonable one.

Most litigation involving alleged religious discrimination against college staff involves scheduling disputes, as in the *Hardison* case, discussed above. For example, in *Gay v. SUNY Health Science Center of Brooklyn*, 1998 U.S. Dist. LEXIS 20885 (E.D.N.Y. 1998) (unpublished), a federal trial court rejected the claim of a hospital orderly that the hospital's decision to change his schedule was a form of religious discrimination. The hospital had accommodated the orderly, a Muslim, by allowing him to work a four-day week, with Friday off as a religious accommodation. When the hospital's staffing needs changed, the plaintiff was also required to work Friday mornings, but was allowed to leave in time to attend religious services on Friday.

Other conflicts involving alleged religious discrimination involve conflicts between an employee's religious beliefs and work assignments. For example, in *Shelton v. University of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000), a nurse working in the labor and delivery unit at the university's hospital refused because of her religious beliefs to accept assignments that involved the termination of pregnancies. After she refused to participate in emergency procedures determined necessary to save the life of the mother, the hospital offered her a transfer to the newborn intensive care unit as an accommodation to her religious beliefs. The nurse refused the transfer, however, because she had been told that newborn infants with serious medical problems were not treated but were allowed to die. Because there were no other positions for which the nurse was qualified, she was terminated. Although the trial court determined that the plaintiff had established a *prima facie* case of religious discrimination, the court found that the hospital had attempted to

accommodate her. Because there was no corroboration for the claim that infants were untreated and allowed to die, the plaintiff could not rebut the employer's nondiscriminatory reason for her termination. The appellate court affirmed the trial court's summary judgment award.

The line between allowing an employee the right to exercise his or her religion freely and the employer's right to forbid proselytizing in the workplace may be difficult to draw, particularly for publicly supported colleges. For example, in *Knight v. Connecticut Department of Public Health*, 275 F.3d 156 (2d Cir. 2001), two employees of state agencies were disciplined for proselytizing clients of the agency during their work assignments. The court assumed without deciding that the speech involved a matter of public concern, but ruled that, because the proselytizing upset the clients in both instances, the speech was disruptive and thus was not entitled to First Amendment protection. The court ruled further that allowing these employees to proselytize at work was not a reasonable accommodation for their religious beliefs, because it hampered the state agency's ability to provide services on a religion-neutral basis.

But if the employee's religious beliefs or behavior do not interfere with work performance, and discipline is imposed solely because of those beliefs, a court may find that discrimination has occurred. In *EEOC v. University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002), a federal appellate court reversed an award of summary judgment for the defendant hospital, ruling that the hospital staff had engaged in religious discrimination. A supervisor had discharged a Southern Baptist staff recruiter because the recruiter used her own church as a source of hospital employees. The supervisor had called the plaintiff a "religious fanatic," had ordered her to remove a religious calendar and clock from her desk, and had fired another supervisor for refusing to terminate the plaintiff after criticizing her for "bringing religion into the workplace." The defendant hospital had not provided evidence of any disruption caused by the plaintiff's religious beliefs, and the evidence was sufficient, said the court, to reverse the summary judgment award and send the case to a jury.

According to the Supreme Court in *Hardison*, the employer's responsibility to provide a reasonable accommodation for an employee's religious beliefs is not a heavy one. When faced with a request for an accommodation, such as the reallocation of job responsibilities so that those that are offensive to the individual need not be performed, or revising work schedules so that an employee may attend religious services, the employer needs to determine whether these requests will pose an undue hardship. An undue hardship may be financial, or it may involve the employer's determination that the request will disrupt the efficiency or effectiveness of the workplace. Although the reasonable accommodation requirement under Title VII is easier to satisfy than the accommodation requirement under the Americans With Disabilities Act (see Section 5.2.5), the employer will need to document its attempt(s) to accommodate the religious needs of its workers in order to defend successfully a Title VII religious discrimination claim.

**5.3.7. Sexual orientation.** Discrimination on the basis of sexual orientation is not prohibited by Title VII, nor is there any other federal law directed at such discrimination. However, seventeen states prohibit employment discrimination on the basis of sexual orientation in both the public and private sectors,<sup>29</sup> and numerous municipalities have enacted similar local laws prohibiting such discrimination. Laws prohibiting employment discrimination against gays were repealed in Iowa and Maine, and protections for gay employees in Ohio and Louisiana have been withdrawn.

Employment issues related to sexual orientation go beyond the issues—such as discipline, discharge, or salary discrimination—faced by other protected class members. Access to benefits for unmarried same-sex partners, access to campus housing reserved for heterosexual couples, and the effect of the military’s refusal to recruit homosexuals add to the complexity of dealing with this issue.

The U.S. Supreme Court has not yet ruled in a case directly involving alleged employment discrimination on the basis of sexual orientation. The Court’s opinion in *Oncale*, discussed in Section 5.3.3.3, involved same-sex sexual harassment, rather than sexual orientation discrimination, and was brought under Title VII. In March 2003, however, the Court overruled its earlier holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986) that had upheld a Georgia law criminalizing sodomy. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas law that made sodomy a criminal offense on due process clause grounds. The Court stated that the individuals’ “right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual’s personal and private life.”

On the other hand, the Court upheld the right of the Boy Scouts of America to exclude homosexuals from positions as volunteer leaders, ruling that the First Amendment’s freedom of association protections prohibited New Jersey from using its nondiscrimination law, which includes sexual orientation as a protected class, to require that the Boy Scouts accept leaders who are homosexual. (*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)).

Although the EEOC has stated that Title VII does not extend to sexual orientation discrimination (EEOC Compliance Manual § 615.2(b)(3)), state and federal courts have been more responsive to sexual orientation discrimination claims brought under Section 1983 of the Civil Rights Act (see Section 3.5 of

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<sup>29</sup>As of late 2005, the following states prohibited discrimination on the basis of sexual orientation in both private and public sector employment: California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin. The District of Columbia also prohibits such discrimination in both private and public employment. In six states, sexual orientation discrimination is prohibited in public employment by law or Executive Order (Alaska, Arizona, Colorado, Delaware, Indiana, Kentucky, Louisiana, Montana, Pennsylvania, and Washington) (see <http://www.lambdalegal.org>).



this book), alleging violations of the Fourteenth Amendment's equal protection clause.<sup>30</sup> For example, in *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002), a state appellate court rejected the employer's motion to dismiss a claim brought by a hospital employee under Section 1983 that her dismissal was a result of her sexual orientation, and that the dismissal violated the equal protection clause. Although the employee was allowed to proceed on her Section 1983 claim, the court rejected her claim that a dismissal based on one's sexual orientation violated the public policy of the State of Washington because the state legislature had not enacted a law prohibiting discrimination on the basis of sexual orientation (Washington's protection for gay employees is by Executive Order, not statute). Similarly, in *Lovell v. Comsewogue School District*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002), a federal trial court denied the school district's motion to dismiss a teacher's claims that the school principal was less responsive to claims of sexual orientation harassment than he was to other types of harassment claims. The court stated that treating harassment complaints on the basis of sexual orientation differently than other types of harassment claims was, if proven, an equal protection clause violation, and actionable under Section 1983. On the other hand, a college that responded promptly to a staff member's complaints of sexual orientation harassment was successful in obtaining a summary judgment when the staff member resigned and then sued under Section 1983, asserting an equal protection clause violation (*Cracolice v. Metropolitan Community College*, 2002 U.S. Dist. LEXIS 22283 (D. Neb., November 15, 2002)).

Although not all same-sex harassment claims involve claims of sexual orientation discrimination, there is considerable overlap between the two. Same-sex harassment claims are potentially actionable under Title VII, while claims of sexual orientation discrimination and/or harassment are not. (The following discussion is adapted from Mary Ann Connell, "Evolving Law in Same-Sex Harassment and Sexual Orientation Discrimination," 23rd Annual National Conference on Law and Higher Education, Stetson University College of Law, February 18, 2002.)

The U.S. Supreme Court recognized a cause of action for same-sex sexual harassment in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1997), discussed in Section 5.3.3.3. Connell divides post-*Oncale* claims of same-sex harassment into three categories: (1) "desire" cases, in which there is evidence that the harasser sexually desires the target; (2) "hate" cases, in which there is evidence that the harasser is hostile to the presence of a particular sex in the

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<sup>30</sup>Cases and authorities are collected in Elizabeth Williams, Annot., "Same-Sex Harassment Under Title VII (42 U.S.C. §§ 2000e *et seq.*) of Civil Rights Act," 135 A.L.R. Fed. 307; Norma Rotunno, Annot., "Same-Sex Sexual Harassment Under State Antidiscrimination Laws," 73 A.L.R.5th 1; Robin Cheryl Miller, Annot., "Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination," 82 A.L.R.5th 1; and Robin Cheryl Miller, Annot., "Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct," 96 A.L.R.5th 391.

workplace; and (3) cases in which the court examines the alleged harasser's treatment of both sexes in the workplace.

An illustrative "desire" case is *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512 (5th Cir. 2001). The plaintiff claimed that he was harassed repeatedly by his male supervisor and department chair, who made unwanted and offensive sexual advances toward the plaintiff on several occasions at out-of-town conferences. The jury found for the plaintiff against the university (the alleged harasser had settled with the plaintiff prior to trial); the appellate court upheld the jury verdict, ruling that the university had failed to respond properly and to correct the harassment.

"Hatred" cases involve claims either that the plaintiff was harassed because he or she did not conform to gender stereotypes, or because the alleged harasser was motivated by contempt for the individual's sexual orientation. Plaintiffs bringing hatred cases based on sex stereotyping have been successful in a limited number of cases, but plaintiffs attempting to attack alleged harassment based on sexual orientation have been unsuccessful under Title VII. For example, the U.S. Court of Appeals for the Ninth Circuit found for a plaintiff who claimed that he was harassed because his behavior did not conform to the male stereotype. In *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001), the court ruled that a four-year pattern of verbal abuse by coworkers based on the plaintiff's effeminate behavior violated Title VII. But those courts that have characterized a same-sex harassment claim as grounding in sexual orientation discrimination rather than stereotyping have rejected plaintiffs' Title VII claims (see, for example, *Dandan v. Radisson Hotel Lisle*, 2000 U.S. Dist. LEXIS 5876 (N.D. Ill. March 28, 2000)), even if the harassment was instigated by individuals who disliked the plaintiff's nonconforming behavior.

An *en banc* ruling by the U.S. Court of Appeals for the Ninth Circuit, if followed by other circuits, may enable plaintiffs to establish sexual orientation harassment claims under Title VII. In *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001), *reversed and remanded*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*), the plaintiff asserted that he had endured severe and pervasive offensive physical conduct of a sexual nature, including numerous assaults, because of his perceived homosexuality. The trial court had granted the employer's motion for summary judgment, ruling that the plaintiff had not stated a claim under Title VII because the law did not prohibit discrimination on the basis of sexual orientation. A split three-judge panel of the Ninth Circuit agreed. That ruling was vacated, and the eleven-judge *en banc* court reversed. With four dissenting votes, the judges ruled that

an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser have [sic] engaged in severe or pervasive unwelcome physical conduct of a sexual nature. We therefore would hold that the plaintiff in this case has stated a cause of action under Title VII [305 F.3d at 1063-64].

The *en banc* court justified its reasoning by explaining that the conduct in *Rene* was similar to the offensive conduct in *Oncale*, which occurred in an all-male work environment, as did the harassment in *Rene*. But the ruling in this case appears to be a departure from the language of *Oncale*, which states that the offensive conduct must be directed at the target because of his or her sex; *Rene* appears to base its ruling on the sexual nature of the conduct, not the sex of the target. Two judges wrote opinions concurring in the result, but stating that they believed the proper theory of the case was sexual stereotyping, citing *Price Waterhouse v. Hopkins* (Section 5.2.1) and the Ninth Circuit's opinion in *Nichols*, discussed above. The dissenters disagreed with the majority's assertion that the sex or motive of the harasser was irrelevant as long as the conduct was sexual in nature.

The third category of post-*Oncale* cases involves claims that both men and women were subject to offensive sexualized treatment at work. In these cases, if the employer can demonstrate that both sexes were equally subject to the same type of offensive behavior, there is no Title VII violation (see, for example, *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000)). But in some cases, the courts have ruled that the motives for the sexualized treatment of men were different than the motives of the offensive behavior toward women, and have allowed the claims to go forward (see, for example, *Steiner v. Showboat Operating Company*, 25 F.3d 1459 (9th Cir. 1994)).

Title IX prohibits discrimination on the basis of sex at colleges and universities receiving federal funds, and its enforcement guidelines specifically address the possibility of claims involving same-sex discrimination or harassment (OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (available at <http://www.ed.gov/ocr/shguide/index.html>)). Most federal courts, however, have ruled that claims of employment discrimination cannot be brought under Title IX because Title VII provides the federal remedy for sex discrimination (see Section 5.2.3).

In addition to employment discrimination or harassment claims, some colleges have faced litigation concerning the availability of medical and other benefits for the partners of gay employees. According to a survey conducted by the Lambda Legal Defense and Education Fund in mid-2001, more than eighty colleges offer domestic partner benefits to their employees (see <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record-21>).

Access to employment benefits for the partners of homosexual employees is a matter generally governed by state or local law.<sup>31</sup> One state, Vermont, has enacted a law that allows same-sex couples to enter into civil unions, a status that provides the couple with the same legal benefits and responsibilities enjoyed by married heterosexual couples (Vt. Stat. Ann. Tit. 32, 3001(c)). Other state legislatures may follow suit, although there is considerable opposition to these laws and their future is uncertain. Unless state law forbids it, a college may offer benefits to unmarried domestic partners, and may choose to limit this

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<sup>31</sup>As of late 2005, twelve states offered domestic partnership benefits to public employees (see <http://www.lambdalegal.org>).

benefit to same-sex domestic partners on the grounds that they are not allowed to marry.

With respect to the availability of domestic partner benefits in states that have not enacted civil union laws, state courts have made opposing rulings in litigation concerning health insurance coverage for the domestic partners of gay employees. The state supreme court of Alaska ruled that the university's refusal to provide health insurance for the domestic partners of unmarried employees was a violation of the Alaska Human Rights Act (AS 18.80.220(a)(1)), which forbids employment discrimination on the basis of marital status. However, a New Jersey appellate court has ruled that Rutgers University did not violate state law when it refused to provide health benefits to the domestic partners of gay employees.

In the Alaska case, *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997), the court noted that the university had admitted that its position on health insurance constituted discrimination on the basis of marital status. But the university argued that the Human Rights Act's prohibition against such discrimination did not apply to these circumstances because the plaintiffs were not "similarly situated" to married couples in that they were not legally obligated to pay the debts of their domestic partners. The state's high court disagreed, saying that the university had three options, all of which complied with the Human Rights Act.

1. It could refuse to provide health insurance for spouses of its employees;
2. It could rewrite its plan to include within the category of "dependents" all individuals for whom its employees provide the majority of financial support;
3. It could rewrite the plan to specifically include coverage for domestic partners and could require employees and their partners to provide affidavits of spousal equivalency [933 P.2d at 1148].

Nor did the state laws governing health benefits for public employees supersede the Human Rights Act or prohibit the university from providing health insurance for unmarried domestic partners. Stating that the "clear language" of the law prohibits marital status discrimination, the court unanimously ruled for the plaintiff-employees. (In 1995, the university had changed its policy to provide benefits to those who provided "spousal equivalency" affidavits; in the *Tumeo* litigation, it had sought clarification of whether the law actually required such a program; see Lisa Guernsey, "State Courts Split on Benefits for Domestic Partners," *Chron. Higher Educ.*, March 28, 1997, A13.)

The New Jersey case, *Rutgers Council of AAUP Chapters v. Rutgers, The State University*, 689 A.2d 828 (N.J. Super. A.D. 1997), *certification denied*, 707 A.2d 151 (N.J. 1998), differs from the Alaska situation in several respects. First, although the state's Law Against Discrimination outlaws employment discrimination on the basis of both marital status and sexual orientation, the law contains an exemption for employee benefits plans. Therefore, the court was required to examine the wording of the state's statute on health benefits for state

employees, which defines “dependents” as children of married spouses. Finding no language in the benefits statute that would compel the university to provide insurance for unmarried domestic partners, the trial judge noted that the impetus for providing such benefits should come from the legislature, not the courts; a first step would be to legalize marriage between gay or lesbian couples, according to the judge. Concurring judges noted that, although they could not disagree with the legal analysis, they found the decision “distasteful” and unfair, and urged the legislature to take action. The legislature did so, passing the Domestic Partnership Act (N.J. Stat. §§ 26:8A-1 *et seq.*) in 2004. The law requires the state to provide health benefits to dependent domestic partners of state employees.

In a third case, an Oregon appellate court ruled that the state constitution requires the Oregon Health Sciences University to provide life and health insurance benefits for the domestic partners of gay and lesbian employees. In *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Ore. Ct. App. 1998), three lesbian nursing professionals challenged the university’s refusal to provide medical and dental insurance benefits for their domestic partners. (Although the university had adopted an employee benefit plan during the pendency of this litigation that provided benefits for domestic partners of its employees, it maintained that it was not legally required to do so.)

The plaintiffs presented both statutory and constitutional claims. In regard to the former, the plaintiffs had argued that the university’s policy of “treating all unmarried employees alike” with respect to the availability of benefits for domestic partners was a violation of the state’s nondiscrimination law, which includes sexual orientation as a protected class, because homosexual couples could not marry. Although the court found that the university’s “practice of denying insurance benefits to unmarried domestic partners of its homosexual employees had an otherwise unlawful disparate impact on a protected class,” it also found that the university’s benefits policy was not a subterfuge to discriminate against homosexuals, and thus, under Oregon statutory law, the university did not engage in an unlawful employment practice (971 P.2d at 444).

But the constitutional claim was a different matter. The court had to determine whether unmarried homosexual couples are members of a suspect class. The court determined that they were:

[S]exual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice [971 P.2d at 447].

Although there was no showing that the university intended to discriminate against the plaintiffs on the basis of their sexual orientation, “its actions have the undeniable effect of doing just that. . . . What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms” (971 P.2d at 447). Since homosexual couples were not permitted to

marry, said the court, denying homosexual employees benefits for their domestic partners on the basis of marital status violated Article I, Section 20 of the Oregon constitution.

The issue of domestic partner benefits has been addressed in two opinions of the Vermont Labor Relations Board. In the first, *Grievance of B.M.S.S. et al.*, 16 VLRB 207 (1993), a case arising prior to the passage of the Vermont Civil Union law, the state labor board ruled that the university had committed an unfair labor practice under the State Employee Labor Relations Act (3 V.S.A. § 901 *et seq.*) by denying medical and dental benefits to the partners of gay and lesbian employees. Section 961(6) of the law prohibits discrimination on the basis of sexual orientation. The labor board concurred with the grievants' characterization of the denial of benefits as disparate impact discrimination, following the theory of *Griggs v. Duke Power Co.* (discussed in Section 5.2.1), and ordered the university to provide medical and dental benefits to the domestic partners of its gay and lesbian employees within sixty days.

In a second case involving the same university, *Willard Miller v. UVM*, 24 VLRB 1 (2001), an unmarried faculty member claimed that the university's refusal to provide medical and dental benefits to his female domestic partner violated the university's own policies against discrimination on the basis of sexual orientation. Shortly after the Vermont Civil Union law was passed, the university notified all of its employees that dependents (whose definition includes spouses or "same-sex spousal equivalents") would be entitled to medical and dental benefits only if the employee was either married to the spouse or had entered a civil union with a "same-sex spousal equivalent." The labor board reasoned that there was no disparate impact on unmarried heterosexual employees with domestic partners because there was no legal impediment to their marrying. Now that employees could qualify for health benefits for spouses by either marrying or entering a civil union, there was no disparate impact on the grounds of sexual orientation. The labor board denied Miller's claim.

The military services' ban on homosexuals has posed several problems for colleges whose employment and student life policies prohibit discrimination on the basis of sexual orientation. The military's policy has raised issues of whether the military may recruit students at campus locations, whether a campus is willing to host Reserve Officer Training Corps units, and eligibility for research funds from the U.S. Department of Defense. Under current federal law, institutions whose nondiscrimination policies include protections for sexual orientation or gender identity must, however, give the military access to their students for recruitment purposes. The "Solomon Amendment," discussed in Section 13.4.3, requires that colleges provide such access or risk the loss of federal funds.

## ***Sec. 5.4. Affirmative Action***

**5.4.1. Overview.** Affirmative action has been an intensely controversial concept in many areas of American life. While the ongoing debate on affirmative action in student admissions (Section 8.2.5) parallels in its intensity the

affirmative action debate on employment, the latter has been even more controversial because it is more crowded with federal regulations and requirements. In addition, beneficiaries of affirmative action in employment may be more visible because they compete for often-scarce openings, particularly for faculty or other professional positions.

Affirmative action in employment is governed by federal Executive Orders (Section 5.2.8) and related federal contracting statutes, by Title VII of the Civil Rights Act of 1964 (Section 5.2.1), and by the equal protection clause of the Constitution's Fourteenth Amendment (Section 5.2.7). The affirmative action requirements of the Executive Orders apply to contractors with fifty or more employees who receive federal contracts of at least \$50,000 (which covers most colleges and universities), while the equal protection clause applies only to public colleges and universities. Title VII applies to both private and public colleges. Each of these authorities poses somewhat different obligations for employers and involves different legal analyses.

Affirmative action became a major issue because the federal government's initiatives regarding discrimination have a dual aim: to "bar like discrimination in the future" and to "eliminate the discriminatory effects of the past" (*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)). Addressing this latter objective under Title VII, courts may "'order such affirmative action as may be appropriate'" (*Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), quoting *Albemarle*). Affirmative action can be appropriate under *Franks* even though it may adversely affect other employees, since "a sharing of the burden of the past discrimination is presumptively necessary." Under statutes other than Title VII, and under Executive Orders 11246 and 11375, courts or administrative agencies may similarly require employers, including public and private post-secondary institutions, to engage in affirmative action to eliminate the effects of past discrimination.

Executive Orders 11246 and 11375 (see Section 5.2.8) have been the major focus of federal affirmative action initiatives. Aside from their basic prohibition of race, color, religion, sex, and national origin discrimination, these executive orders require federal contractors and subcontractors employing fifty or more employees and receiving at least \$50,000 in federal contracts to develop affirmative action plans. The implementing regulations were revised in 2000 (65 Fed. Reg. No. 219, November 13, 2000) and are codified at 41 C.F.R. Parts 60-1 and 60-2. Section 60-1.40 of the regulations requires that a contractor have an affirmative action program. 41 C.F.R. Section 60-2.10 lists the required elements of an affirmative action program. One requirement is "placement goals" (41 C.F.R. § 60-2.16), which the contractor must establish in light of the availability of women and minorities for each job group. The regulation states that "placement goals may not be rigid and inflexible quotas which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden" (41 C.F.R. § 60-2.16 (e)(1)).

An institution's compliance with affirmative action requirements is monitored and enforced by the Office of Federal Contract Compliance Programs (OFCCP),

located in the U.S. Department of Labor. The OFCCP may also conduct an investigation of an institution's employment practices before a federal contract is awarded.

Postsecondary institutions contracting with the federal government are also subject to federal affirmative action requirements regarding persons with disabilities and veterans. "Qualified" persons with disabilities are covered by Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. § 793), which requires affirmative action "to employ and advance in employment qualified individuals with disabilities" on contracts of \$10,000 or more.

A variety of laws regarding the employment and training of veterans are codified at 38 U.S.C. Section 4212. The law specifies that organizations that enter a contract with the U.S. government worth \$100,000 or more must "take affirmative action to employ and advance in employment qualified covered veterans" (§ 4212(a)(1)). Covered veterans include both disabled and nondisabled veterans who served on active duty "during a war or in a campaign or expedition for which a campaign badge has been authorized." The law regarding veterans thus has a broader scope than Section 503.

The Department of Labor has issued regulations to implement both Section 503 (41 C.F.R. Part 60-741) and the veterans' law (41 C.F.R. Part 60-250). Both sets of regulations provide that any job qualification that tends to screen out members of the covered groups must be job related and consistent with business necessity (41 C.F.R. § 60-741.21(g); 41 C.F.R. § 60-250.21(g)). The regulations also require contractors to accommodate the physical and mental limitations of employees and disabled veterans "unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the operation of its business" (41 C.F.R. § 60-741.21(f); 41 C.F.R. § 60-250.21(f)).

Under the various affirmative action provisions in federal law, the most sensitive nerves are hit when affirmative action creates "reverse discrimination," that is, when the employer responds to a statistical "underrepresentation" of women or minorities by granting employment preferences to members of the underrepresented or previously victimized group, thus discriminating "in reverse" against other employees or applicants.<sup>32</sup> Besides creating policy issues of the highest order, such affirmative action measures create two sets of complex legal questions: (1) To what extent does the applicable statute, Executive Order, or implementing regulation require or permit the employer to utilize such employment preferences? (2) What limitations does the Constitution place on the federal government's authority to require or permit, or the employer's

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<sup>32</sup>The relevant authorities are collected in Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Public Employment Cases," 153 A.L.R. Fed. 609; Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Private Employment Cases," 162 A.L.R. Fed. 273; Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitutional Statutes—Private Employment Cases," 150 A.L.R. Fed. 1; Donald T. Kramer, Annot., "What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases," 168 A.L.R. Fed. 1.



authority to utilize, such employment preferences, particularly in the absence of direct evidence of discrimination by the employer?

The response to the first question depends on a close analysis of the particular legal authority involved. The answer is not necessarily the same under each authority. In general, however, federal law is more likely to require or permit hiring preferences when necessary to overcome the effects of the employer's own past discrimination than it is when no such past discrimination is shown or when preferences are not necessary to eliminate its effects. Section 703(j) of Title VII, for instance, relieves employers of any obligation to give "preferential treatment" to an individual or group merely because of an "imbalance" in the number or percentage of employed persons from that group compared with the number or percentage of persons from that group in the "community, state, section, or other area" (42 U.S.C. § 2000e-2(j)). But where an imbalance does not arise innocently but, rather, arises because of the employer's discriminatory practices, courts in Title VII suits have sometimes required the use of hiring preferences or goals to remedy the effects of such discrimination (see, for example, *Local 28 of the Sheet Metal Workers' International Ass'n. v. EEOC*, 478 U.S. 421 (1986)).

Constitutional limitations on the use of employment preferences by public employers stem from the Fourteenth Amendment's equal protection clause. (See the discussion of that clause's application to admissions preferences in Section 8.2.5.) Even if the applicable statute, Executive Order, or regulation is construed to require or permit employment preferences, such preferences may still be invalid under the federal Constitution unless a court or an agency has found that the employer has discriminated in the past. Courts have usually held hiring preferences to be constitutional where necessary to eradicate the effects of the employer's past discrimination, as in *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971). Where there is no such showing of past discrimination, the constitutionality of employment preferences is more in doubt.

The U.S. Supreme Court has analyzed the legality of voluntary affirmative action plans and race- or gender-conscious employment decisions made under the authority of these plans. The cases have involved sharp divisions among the justices and are inconsistent in several ways. Furthermore, the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), discussed in Section 8.2.5 of this book, arose in the context of student admissions rather than employment, and its implications for employment are far from clear. Moreover, changes in the composition of the Court may alter its stance on the legality of voluntary affirmative action in employment. Therefore, the analysis of Supreme Court jurisprudence in the area of affirmative action is difficult, and predictions about future directions of the Court in this volatile area are nearly impossible.

**5.4.2. Affirmative action under Title VII.** The U.S. Supreme Court has addressed challenges to employment decisions in cases of both voluntary and court-ordered affirmative action plans. The Court has issued two rulings involving voluntary affirmative action plans in employment that were challenged under Title VII under a "reverse discrimination" theory. In its first

examination of a voluntary affirmative action plan involving a private employer, the Court strongly endorsed the concept.

In *Weber v. Kaiser Aluminum Co.*, 443 U.S. 193 (1979), the Court considered a white steelworker's challenge to an affirmative action plan negotiated by his union and employer. The plan provided for a new craft-training program, with admission to be on the basis of one black worker for every white worker selected. The race-conscious admission practice was to cease when the proportion of black skilled craft workers at the plant reflected the proportion of blacks in the local labor force. During the first year the plan was in effect, the most junior black selected for the training program was less senior than several white workers whose requests to enter the training program were denied. One of those denied admission to the program filed a class action claim, alleging "reverse discrimination."

The federal district court ruled that the plan unlawfully discriminated against white employees and therefore violated Title VII of the Civil Rights Act (415 F. Supp. 761 (E.D. La. 1976)), and the appellate court affirmed (563 F.2d 216 (5th Cir. 1978)). In a 5-to-2 decision written by Justice Brennan, the Supreme Court reversed, ruling that employers and unions in the private sector may take race-conscious steps to eliminate "manifest racial imbalance" in "traditionally segregated job categories." Such action, the Court said, does not run afoul of Title VII's prohibition on racial discrimination (see Section 5.2.1).

The Court considered Weber's claim that, by giving preference to junior black employees over more senior whites, the training program discriminated against white employees in violation of the 1964 Civil Rights Act. Because the employment action did not involve state action, no constitutional issues were involved. The Court framed the issue as an inquiry into whether private parties could voluntarily agree to give racial preferences such as those in the collective bargaining agreement.

After reviewing the legislative history describing the concerns that led Congress to pass Title VII, the Court stated that, given Title VII's intent, voluntary efforts to achieve greater racial balance in the workforce did not violate the law. Thus concluding that the use of racial preferences in hiring is sometimes permissible, the Court went on to uphold the Kaiser plan in particular. In doing so, the Court found it unnecessary to set forth detailed guidelines for employers and unions. Instead, it identified several factors that courts in subsequent cases have used to measure the lawfulness of affirmative action programs.

First, there was a "manifest racial imbalance" in the job categories for which Kaiser had established the special training program. While the percentage of blacks in the area workforce was approximately 39 percent, fewer than 2 percent of the craft jobs at Kaiser were filled by blacks. Second, as the Court noted in a footnote to its opinion, these crafts had been "traditionally segregated"; rampant discrimination in the past had contributed to the present imbalance at Kaiser. Third, the Court emphasized that the plan in *Weber* did not "unnecessarily trammel" the interests of white employees; it did not operate as a total bar to whites, and it was temporary, designed to bring minority representation up to that of the area's workforce rather than to maintain racial balance permanently.

These factors cited by the Court left several questions open: How great a racial imbalance must there be before it will be considered “manifest”? What kind of showing must be made before a job category will be considered “traditionally segregated”? At what point will the effects of a plan on white workers be so great as to be considered “unnecessary trammeling”? These questions were raised in a subsequent challenge to a gender-conscious employment decision made under the authority of an affirmative action plan, this time by a public employer. To date, it is the only Supreme Court analysis of gender preferences in employment.

In *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), Paul Johnson, who had applied for a promotion, alleged that the agency had promoted a less qualified woman, Diane Joyce, because of her gender, in violation of Title VII. In a 6-to-3 opinion, the Supreme Court, relying on its *Weber* precedent, held that neither the affirmative action plan nor Joyce’s promotion violated Title VII.

As is the practice in many public agencies, the agency’s promotion policies permitted the decision maker to select one of several individuals who were certified to be minimally qualified for the position in question—in this case, a road maintenance dispatcher. Both Joyce and Johnson, as well as several other men, had been rated “qualified,” although Johnson’s total score (based on experience, an interview, and other factors) was slightly higher than Joyce’s.

The agency had developed an affirmative action plan that attempted to increase the number of women and racial minorities in jobs in which they were traditionally underrepresented. The agency had not submitted evidence of any prior discrimination on its part, but noted the statistical disparities between the proportion of potentially qualified women and their low representation in certain occupations.

The majority opinion, written by Justice Brennan, first addressed the burden-of-proof issue. It is up to the plaintiff, wrote Brennan, to establish that the affirmative action plan is invalid. In assessing the plan’s validity, the Court applied the tests from *Weber*. First, the plan had to address a “manifest imbalance” that reflected underrepresentation of women in traditionally segregated job categories. Statistical comparisons between the proportion of qualified women in the labor market and those in segregated job categories would demonstrate the imbalance. Regarding the employer’s responsibility for that imbalance, the majority rejected the notion that the employer must demonstrate prior discrimination, a requirement that would be imposed if the case had been brought under the equal protection clause of the Fourteenth Amendment.

Having determined that the affirmative action plan satisfied the first part of the *Weber* test, the majority then examined whether the plan “unnecessarily trammelled” the rights of male employees or created an absolute bar to their advancement. Finding that Johnson had no absolute entitlement to the promotion, and that he retained his position, salary, and seniority, the majority found that the plan met the second *Weber* test.

The majority then assessed whether the plan was a temporary measure, the third requirement of *Weber*. Although the plan was silent with regard to its

duration, the Court found that the plan was intended to attain, rather than to maintain, a balanced workforce, thus satisfying the third *Weber* test. Justice Brennan wrote that “substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees” (480 U.S. at 640).

Both the *Weber* and the *Johnson* cases involved voluntary affirmative action plans that were challenged under Title VII. A year before *Johnson*, the Supreme Court had addressed the legality, under Title VII, of race-conscious hiring and promotion as part of court-ordered remedies after intentional discrimination had been proved. One issue in both cases centered on whether individuals who had not been actual victims of discrimination could benefit from race-conscious remedies applied to hiring and promotion. In both cases, the Supreme Court upheld those remedies in situations where lower courts had found the discrimination to be egregious. In *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), a majority of six justices approved a consent decree that required race-conscious promotions for Cleveland firefighters as a means of remedying prior discrimination against blacks and Hispanics. In response to the assertion by the city that Title VII prohibited race-conscious remedies for individuals who had not themselves suffered discrimination, Justice Brennan, writing for the majority, said: “It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination” (478 U.S. at 516).

A majority of six justices also approved race-conscious selection and promotion requirements in *Local 28 of the Sheet Metal Workers’ International Ass’n. v. EEOC*, 478 U.S. 421 (1986), as a remedy for long-standing and egregious race discrimination in access to union apprenticeship programs and admission to the union. (For a review and analysis of the affirmative action cases decided in 1986, see M. Clague, “The Affirmative Action Showdown of 1986: Implications for Higher Education,” 14 *J. Coll. & Univ. Law* 171 (1987).)

Federal appellate courts reviewing affirmative action employment cases under Title VII have generally struck the plans unless there was substantial evidence that the plan was necessary to remedy the employer’s past race or sex discrimination or a “manifest imbalance” in a segregated job title. For example, in *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (*en banc*), discussed in Section 6.4, a federal appellate court invalidated a race-conscious layoff whose purpose was to maintain racial diversity among teachers at a public high school rather than remedying any prior discrimination by the employer.<sup>33</sup> The same federal circuit invalidated the regulations of the

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<sup>33</sup>Although the Supreme Court’s opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), may have invalidated part of the reasoning in *Taxman* (which had stated that diversity was not a compelling interest under Title VII), the outcome in *Taxman* is unaffected by *Grutter* because, in *Taxman*, race was used as the only criterion for making a layoff decision, a strategy outlawed in *Grutter*’s companion case of *Gratz v. Bollinger*, 539 U.S. 244 (2003).

New Jersey Casino Control Commission that established goals for hiring, promotion, demotion, layoff, and termination on the basis of gender, race, and ethnicity. In *Schurr v. Resorts International Hotels, Inc.*, 196 F.3d 486 (3d Cir. 1999), the court ruled that there had been no showing of prior or present discrimination either in the casino industry or in the job categories involved in the lawsuit. Similarly, in *Albright v. City of New Orleans*, 1999 U.S. Dist. LEXIS 2735 (E.D. La., March 9, 1999), a federal trial court invalidated a consent decree and related affirmative action plan because there was no evidence of a manifest racial imbalance and there was evidence that the rights of nonminorities were trammled by the plan—a violation of two prongs of the *Weber* test.

On the other hand, when courts have found strong evidence of a manifest imbalance or overt discrimination in the past by the employer, they have been more willing to approve the affirmative action plan. For example, in *Dix v. United Air Lines, Inc.*, 2000 U.S. Dist. LEXIS 12464 (N.D. Ill., August 28, 2000), *affirmed*, 2001 U.S. App. LEXIS 3225 (7th Cir., February 23, 2001), *cert. denied*, 534 U.S. 892 (2001), a federal trial court rejected a “reverse discrimination” hiring claim by a white male, ruling that the airline had demonstrated that a historical imbalance existed and denying the plaintiff’s motion for summary judgment. And in *Airth v. City of Pomona*, 2000 U.S. App. LEXIS 7270 (9th Cir., April 19, 2000), the court approved an affirmative action ranking plan that controlled the promotions of firefighters, but remanded for a determination as to whether the particular promotion decisions at issue had been made in a discriminatory fashion.

A challenge to an affirmative action hiring program at Illinois State University resulted in a ruling against the university. In *United States v. Board of Trustees of Illinois State University*, 944 F. Supp. 714 (C.D. Ill. 1996), the U.S. Department of Justice filed a Title VII lawsuit against the university, asserting that a program designed to circumvent veterans’ preferences by filling custodial positions through a “learner’s program” violated the statute. White males were not selected for the learner’s program, as it was limited to women and to non-white males. The court ruled that the program failed all of the *Weber* tests in that it did not remedy a manifest imbalance, its purpose was to circumvent the veterans’ preference rather than to remedy prior discrimination, and it trammled the rights of white males who wished to be employed in these jobs.

Despite the difficulty of translating the outcome in *Grutter* to the employment context, it appears that employers who can demonstrate a “manifest imbalance” and whose voluntary affirmative action plans—and actions taken under their guidance—can pass the *Weber* test, may be able to practice affirmative action in hiring and promotion decisions. But the lessons of *Grutter* and its companion case, *Gratz*, discussed in Section 8.2.5, should be heeded, so that these programs are not practicing racial balancing or using quotas to accomplish the goal of diversity.

**5.4.3. Affirmative action under the equal protection clause.** The U.S. Supreme Court has also addressed the validity of affirmative action plans—both voluntary and involuntary—under the equal protection clause. In these cases, courts subject the plan to a “strict scrutiny” standard of review, requiring

proof that remedying the targeted discrimination is a “compelling government interest” and that the plan’s race- or gender-conscious employment criteria are “narrowly tailored” to accomplish the goal of remedying the targeted discrimination.

In *United States v. Paradise*, 480 U.S. 149 (1987), an involuntary (or mandatory) affirmative action case, federal courts had ordered that 50 percent of the promotions to corporal for Alabama state troopers be awarded to qualified black candidates. The lower courts found that the state police department had systematically excluded blacks for more than four decades, and for another decade had resisted following court orders to increase the proportion of black troopers. The Supreme Court, in a 5-to-4 decision, found ample justification to uphold the one-black-for-one-white promotion requirement imposed by the lower federal courts.

The United States, acting as plaintiff in this case, argued that the remedy imposed by the court violated the equal protection clause. Justice Brennan, writing for the majority, noted that the Court had yet to agree on the appropriate standard of review for affirmative action cases brought under the equal protection clause. He refused to do so in *Paradise* because “we conclude that the relief ordered survives even strict scrutiny analysis: it is ‘narrowly tailored’ to serve a ‘compelling [governmental] purpose’” (480 U.S. at 167). In reaching this conclusion, the majority determined that “the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and firm justification for the race-conscious relief ordered by the District Court” (480 U.S. at 167). The Court left for another day the delineation of more specific equal protection guidelines for remedial affirmative action plans.

The Supreme Court’s opinion in *Paradise*, like its opinions in *Weber*, *Sheet Metal Workers*, *Cleveland Firefighters*, and *Johnson* (all Title VII cases analyzed in subsection 5.4.2. above), involved promotions or other advancement opportunities that did not result in job loss for majority individuals. When, affirmative action plans are used to justify racial preferences in layoffs, however, the response of the Supreme Court has been quite different. In *Firefighters v. Stotts*, 467 U.S. 561 (1984), for example, the Court invalidated a remedial consent decree that approved race-conscious layoff decisions in order to preserve the jobs of more recently hired minorities under the city’s affirmative action plan.

In another case, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (a case that had significance for the Third Circuit’s later ruling in *Taxman*; see Section 6.4), the Supreme Court addressed the issue of voluntary racial preferences in reductions-in-force. The school board and the teachers’ union had responded to a pending race discrimination claim by black teachers and applicants for teaching positions by adopting a race-conscious layoff provision in their collective bargaining agreement. The agreement specified that, if a layoff occurred, those teachers with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the percentage of minority personnel employed at the time of the layoff. A layoff occurred, and the board, following the bargaining agreement, laid off some white teachers with more seniority than minority teachers who were

retained in order to meet the proportionality requirement. The more senior white teachers challenged the constitutionality of the contractual provision. Both the federal district court and the U.S. Court of Appeals for the Sixth Circuit upheld the provision as permissible action taken to remedy prior societal discrimination and to provide role models for minority children. In a 5-to-4 decision, the Court reversed the lower courts, concluding that the race-conscious layoff provision violated the equal protection clause. In a plurality opinion by Justice Powell, four Justices agreed that the bargaining agreement provision should be subjected to the “strict scrutiny” test used for other racial classifications challenged under the equal protection clause (476 U.S. at 274, citing *Fullilove v. Klutznick*, 448 U.S. 448, 480). The fifth Justice concurring in the judgment, Justice White, did not address the strict scrutiny issue (476 U.S. at 294–95).

Rejecting the school board’s argument that remedying societal discrimination provided a sufficient justification for the race-conscious layoffs, the plurality opinion stated:

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination [476 U.S. at 274].

The plurality then discussed the Court’s ruling in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), which established a method for demonstrating the employer’s prior discrimination by comparing qualified minorities in the relevant labor market with their representation in the employer’s workforce. The correct comparison was of teachers to qualified blacks in the labor market, not of minority teachers to minority children. Moreover, said the plurality:

[B]ecause the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students [476 U.S. at 275–76].

Having rejected the “societal discrimination” and “role model” arguments, and having found no history of prior discrimination by the school board, the plurality concluded that the school board had not made the showing of a compelling interest required by the strict scrutiny test.

In a concurring opinion, Justice O’Connor considered whether it was necessary for a public employer to make specific findings of prior discrimination at the time it adopted an affirmative action plan. She concluded that requiring such a finding would be a powerful disincentive for a public employer to initiate a voluntary affirmative action plan, and stated that “a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer’s voluntary agreement to an affirmative action plan” (476 U.S. at 289). But the employer should “act on

the basis of information which gives [the public employer] a sufficient basis for concluding that remedial action is necessary” (476 U.S. at 291), so that findings by a court or an enforcement agency would be unnecessary. As long as the public employer had a “firm basis for believing that remedial action is required” (476 U.S. at 286), presumably through evidence demonstrating statistical disparity between the proportion of minorities in the qualified labor market and those in the workforce, a state’s interest in affirmative action could be found to be “compelling.” In addition, in a comment with potential significance for proponents of affirmative action as a tool to promote racial diversity, O’Connor noted: “Although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest” (476 U.S. at 286; citing *Bakke*, discussed in Section 8.2.5).

Justice Marshall, in a dissent joined by Justices Brennan and Blackmun, characterized the case quite differently from the plurality:

The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged [476 U.S. at 300].

Justice Marshall found that the school board’s goal of preserving minority representation of teachers was a compelling interest under the factual record presented to the court. He concluded that the contractual provision was narrowly tailored because it neither burdened nor benefited one race but, instead, substituted a criterion other than absolute seniority for layoff decisions.

Two later Supreme Court cases, *Croson* and *Adarand* (below), confirm the applicability of the strict scrutiny test to affirmative action programs and provide additional guidance on use of the narrow tailoring test. In addition, although these cases did not involve employment, they suggest that public employers may need to demonstrate a history of race or sex discrimination in employment, rather than simply a statistical disparity between minority representation in the workforce and the labor market. In *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), the Court, again sharply divided, ruled 6 to 3 that a set-aside program of public construction contract funds for minority subcontractors violated the Constitution’s equal protection clause. Applying the strict scrutiny test, a plurality of Justices (plus Justice Scalia, using different reasoning) ruled that the city’s requirement that prime contractors awarded city construction contracts must subcontract at least 30 percent of the amount of each contract to minority-owned businesses was not justified by a compelling governmental interest, and that the set-aside requirement was not narrowly tailored to accomplish the purpose of remedying prior discrimination.

The Supreme Court extended its analysis of *Croson* in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), a case involving contracts awarded by the



U.S. Department of Transportation (DOT). Adarand, the low bidder on a sub-contract for guard rails for a highway project, mounted an equal protection challenge under the Fifth Amendment to the DOT's regulations concerning preferences for minority subcontractors. The regulations provided the prime contractor with a financial incentive to award subcontracts to small businesses certified as controlled by "socially and economically disadvantaged" individuals. Adarand was not so certified, and the contract was awarded to a certified subcontractor whose bid was higher than Adarand's.

In a 5-to-4 ruling, the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." The Court then remanded the case for a trial on the issue of whether the federal contracting program's subcontracting regulations met the strict scrutiny test.<sup>34</sup>

Since *Croson* and *Adarand*, litigation challenging race- or gender-conscious employment decisions, most of which involves challenges by white male police officers or firefighters to race- or gender-conscious hiring and promotion decisions, has focused squarely on the employer's ability to demonstrate its own prior discrimination. Affirmative action plans were invalidated in *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997); *Dallas Fire Fighters Association v. City of Dallas*, 150 F.3d 438 (5th Cir. 1998), *cert. denied*, 526 U.S. 1046 (1999); and *Alexander v. Estep*, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997). The courts in these cases determined either that there was insufficient data indicating the employer's discrimination or that the race-conscious provisions were not sufficiently narrowly tailored. However, in three other cases—*Majeske v. City of Chicago*, 218 F.3d 816 (7th Cir. 2000); *Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288 (11th Cir. 2001); and *Boston Police Superior Officers Federation*, 147 F.3d 13 (1st Cir. 1998)—affirmative action plans were upheld. The respective appellate courts cited substantial evidence of prior discrimination, and determined that the employers' race- or gender-conscious hiring and promotion criteria were narrowly tailored remedies for that discrimination.

In two other cases, the U.S. Court of Appeals for the D.C. Circuit invalidated the affirmative action regulations of the Federal Communications Commission (FCC). These courts ruled that the regulations were unconstitutional because they sought to promote diversity rather than to remedy documented discrimination. In the first case, *Lutheran Church—Missouri Synod v. Federal Communication Commission*, 141 F.3d 344 (D.C. Cir. 1998), the Lutheran Church challenged the regulations on both First Amendment free exercise and Fifth Amendment equal protection grounds. The church required employees of its

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<sup>34</sup>On remand, the trial court ruled that the regulations, which the Department of Transportation had revised in response to the Supreme Court's ruling, still violated the equal protection clause. The U.S. Court of Appeals for the Tenth Circuit reversed, ruling that the government had met both the "compelling interest" test and the "narrow tailoring" test in the revised regulations (*Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000)). The plaintiffs appealed and, although the U.S. Supreme Court initially granted *certiorari*, it reversed itself and dismissed *certiorari* as improvidently granted (*Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001)).

radio stations to have both knowledge of Lutheran doctrine and a background in classical music, since religion and classical music were the formats for the radio stations' programming. With respect to the church's claim that requiring the stations to use racial preferences in hiring violated the equal protection doctrine of the Fifth Amendment, the court, following *Adarand*, applied the strict scrutiny test and required the FCC to demonstrate that its regulations are narrowly tailored to serve a compelling governmental interest. The court rejected the FCC's contention that diversity—in both programming and employment—was a compelling interest. The court also rejected the FCC's argument that its regulations were narrowly tailored, since these regulations required the stations to use racial preferences for all positions, even those that had no influence over programming. Because the FCC had criticized the church for its religious preferences for employees in non-broadcast or programming positions, its insistence that racial preferences be used for all positions was irrational, according to the court. Because it had disposed of the church's appeal on equal protection grounds, the court did not address the church's free exercise claim.

In another challenge to FCC regulations, *MD/DC/DE Broadcasters Associations v. Federal Communications Commission*, 236 F.3d 13 (D.C. Cir. 2001), broadcasting associations brought equal protection claims. The regulations

required stations to seek out sources likely to refer female and minority applicants for employment, to track the source of each referral, and to record the race and sex of each applicant and of each person hired. If these data indicated that a station employed a lower percentage of women and minorities than were employed in the local workforce, then the Commission would take that into account in determining whether to renew the station's license [236 F.3d at 16].

The appellate court found that the regulations were not narrowly tailored because the rule required the broadcasters to recruit women and minorities without a preliminary finding that the broadcaster had discriminated against these groups in the past. Having made this finding, the court did not rule on whether the FCC's interest in race-conscious recruitment policies was compelling.

The U.S. Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, both discussed in Section 8.2.5 of this book, concerned the diversity rationale for affirmative action rather than the remedying prior discrimination rationale, and neither case concerned employment. These cases therefore do not add to or change the analysis in *Croson* and *Adarand* or the lower court cases applying this analysis. But *Gratz* and *Grutter* do indirectly raise the important question of whether the diversity rationale, recognized in those cases for affirmative action in admissions, may have some applicability to employment affirmative action. The D.C. Circuit rejected that approach in the FCC cases discussed above, but in *Wygant* (above), Justice O'Connor's concurring opinion does suggest the possible applicability of diversity rationales to employment.

(For a thoughtful discussion of *Taxman*, the *Lutheran Church* case, and other cases related to affirmative action in employment published prior to the

Court's 2003 rulings in *Grutter* and *Gratz*, see Robert S. Whitman, "Affirmative Action on Campus: The Legal and Practical Challenges," 24 *J. Coll. & Univ. Law* 637 (1998).)

**5.4.4. State regulation of affirmative action.** In 1996, California voters approved Proposition 209, a state constitutional provision that prohibits public organizations from having affirmative action employment programs. The provision also applies to college admissions. This constitutional provision was used to invalidate a California state law (Education Code §§ 87100–107) that required each community college district to have an affirmative action plan. The purpose of the plans was to "hire and promote persons who are underrepresented in the work force compared to their number in the population," including disabled individuals, women, and racial and ethnic minorities (§ 87101, subdiv. (d)).

In *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (Ct. App. Cal., 3d App. Dist. 2001), a group of plaintiffs challenged this law, and others involving affirmative action in the sale of state bonds, the state lottery, and the state civil service system. Although a state trial court had upheld the law, ruling that the community college law did not require the colleges to grant preferential treatment to any particular group, a state appellate court reversed, ruling that the law was incompatible with Proposition 209.

Voters in the state of Washington also approved a ballot question that outlawed the use of affirmative action in employment or admissions decisions (see Section 8.2.5 of this book). Neither the California nor the Washington law is directly affected by the U.S. Supreme Court's ruling in *Grutter*.

**5.4.5. Conclusions.** The collective implications of the complex decisions discussed in subsections 5.4.1 to 5.4.4 above, and especially the sharp differences of opinion by the Supreme Court justices regarding the lawfulness of race- or gender-conscious employment decisions, mean that employment decisions linked to affirmative action should be made with caution. It appears that private institutions that can document "manifest" underrepresentation of women or minority faculty or staff in certain positions, and that can show a substantial gap between the proportion of qualified women and minorities in the relevant labor market and their representation in the institution's faculty workforce, may be able to act in conformance with a carefully developed affirmative action plan.

Public colleges and universities located in states subject to *Adams* agreements (see Sections 13.5.2 & 13.5.8) will very likely have an easier time meeting the standards of the equal protection clause for voluntary affirmative action plans. Furthermore, for public institutions operating under the dictates of a judicially supervised consent decree regarding remedies for prior discrimination, the Civil Rights Act of 1991 has removed the threat of challenges to remedial employment decisions made under the aegis of the consent decree. In *Martin v. Wilks*, 490 U.S. 755 (1989), the Supreme Court had ruled that any nonparty to the litigation culminating in a consent decree could later challenge both the decree and

employment decisions made in conformance with that decree. Congress overturned the result in *Martin v. Wilks* by adding a new subsection to Section 703 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). The law now provides that a litigated or consent judgment may not be challenged by a person who had actual notice of the proposed judgment or order prior to its entry and an opportunity to object, or by a person whose interests were adequately represented by another person who had challenged the judgment or order.

For public colleges and universities that do not have a clearly documented history of prior discrimination, or that are unwilling to rely on such a rationale, it will apparently be necessary to rely on a diversity rationale in any attempt to justify the use of race or gender preferences in employment. In such a situation, to maximize its chance of success, the institution would need to demonstrate clearly how affirmative action-related hiring or promotion will promote the type of educational diversity that the Court found to be a compelling state interest in *Grutter* and *Gratz*. This showing may depend upon the specifics of each job or position covered by the affirmative action plan. For example, the race, gender, or national origin of a residence hall counselor or a teaching assistant might be linked to educational diversity, whereas it would be more difficult to demonstrate this linkage for a dining services worker, custodian, or groundskeeper.

### ***Sec. 5.5. Application of Nondiscrimination Laws to Religious Institutions***

A major coverage issue under federal and state employment discrimination statutes is their applicability to religious institutions, including religiously affiliated colleges and universities. The issue parallels those that have arisen under federal collective bargaining law (see the *Catholic Bishop* case in Section 4.5), unemployment compensation law (see *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981)), and federal tax law (see the *Bob Jones* case in Section 13.3.2, footnote 38). Title VII (see Section 5.2.1 of this book), the primary federal employment discrimination statute, has been the focus of most litigation on religious institutions.<sup>35</sup>

Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), specifically exempts “a religious corporation, association, educational institution, or society” from the statute’s prohibition against religious discrimination “with respect to the employment of individuals of a particular religion” if they are hired to “perform work connected with the carrying on by such corporation, association,

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<sup>35</sup>Issues about coverage of religious schools, however, can and do arise under other federal employment discrimination statutes. See, for example, *Dole v. Shenadoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (Equal Pay Act); and *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (Age Discrimination in Employment Act). Such issues can and do also arise under state employment discrimination statutes. See, for example, *Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426 (Cal. App. 1999).

educational institution, or society of its activities.”<sup>36</sup> The phrase “its activities” is not addressed in the statute, and it was unclear whether the organization’s “activities” had to be closely related to its religious mission to be included within the exemption, or whether all of its activities would be exempt. The U.S. Supreme Court addressed this issue in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), a case concerning a challenge to the Mormon Church’s decision that all employees working for a gymnasium owned by the church but open to the public must be members of the Mormon Church. The plaintiffs argued that, although Section 702(a) could properly be applied to the religious activities of a religious organization, the First Amendment’s establishment clause did not permit the government to extend the exemption to jobs that had no relationship to religion. The Supreme Court held that Section 702 does not distinguish between secular and religious job activities, and that the Section 702 exemption could apply to all job positions of a religious organization without violating the establishment clause. The Court reasoned that Section 702’s purpose is to minimize governmental interference with the decisions of religious organizations, and it would be “a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious” (483 U.S. at 336).

Section 702(a) was also at issue in *Killinger v. Samford University*, 917 F. Supp. 773 (N.D. Ala. 1996), *affirmed*, 113 F.3d 196 (11th Cir. 1997), as was Section 703(e)(2) (42 U.S.C. § 2000e-2(e)(2)), another Title VII provision providing a similar exemption for some religiously affiliated schools. Section 703(e)(2) applies to any “school, college, university, or other educational institution” that is “owned, supported, controlled, or managed by a particular religion or religious corporation, association, or society. . . .” Institutions fitting this characterization are exempted from Title VII with respect to “hir[ing] and employ[ing] employees of a particular religion.” In *Killinger*, the plaintiff was a faculty member at Samford University, a private institution affiliated with the Baptist faith. He alleged that administrators at Samford would not permit him to teach certain religion courses at its Beeson Divinity School because of the theological and philosophical positions that Killinger had taken. In defense, the university invoked the Section 702(a) and Section 703(e)(2) exemptions. The major issue was whether the university was a “religious” institution or was supported or controlled by a “religious” entity for purposes of the exemptions. The federal

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<sup>36</sup>A college need not be affiliated with a particular denomination in order to receive the protection of the Section 702(a) exemption. In *Wirth v. College of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998), for example, a federal district court ruled that the College of the Ozarks was a religious organization that qualified for the exemption despite the fact that the college is a non-denominational Christian organization. Significant indicators of its religious nature were that the college’s mission is to provide a “Christian education,” that it belongs to the Coalition for Christian Colleges, and that it is a member of the Association of Presbyterian Colleges and Universities. The appellate court affirmed the trial court’s ruling in an unpublished *per curiam* opinion (2000 U.S. App. LEXIS 3549 (8th Cir. 2000)).

district court, and then the appellate court, determined that the university is religious and is supported by a religious entity, and therefore applied both exemptions. The courts reasoned that the university was controlled by the Baptists, since all of its trustees were required to be practicing Baptists; that its students were required to attend religious convocations; and that university publications emphasized the religious nature of the education provided. Moreover, Samford received a substantial proportion of its budget (7 percent) from the Alabama Baptist State Convention, and the university required all faculty to subscribe to the Baptist Statement of Faith and Message. Both the Internal Revenue Service and the U.S. Department of Education recognized Samford as a religious institution. The appellate court noted that the substantial contribution from the Baptist Convention was sufficient, standing alone, to bring the university within the reach of Section 703(e)(2), since the university was “supported” in “substantial part” by a religious corporation.

In *Pime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir. 1986), the court used a different provision of Title VII to protect a religious institution’s autonomy to engage in preferential hiring. Affirming a lower court ruling (585 F. Supp. 435 (N.D. Ill. 1984)), the appellate court held that membership in a religious order can be a “bona fide occupational qualification” (BFOQ) within the meaning of Section 703(e)(1) (42 U.S.C. §2000e-2(e)(1)) of Title VII. The plaintiff, who was Jewish, had been a part-time lecturer in the university’s philosophy department when it adopted a resolution requiring that seven of the department’s thirty-one tenure-track positions be reserved for Jesuit priests. The court, finding a historical relationship between members of the religious order and the university, concluded that the Jesuit “presence” was a significant aspect of the university’s educational traditions and character, and important to its successful operation.

But in *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir. 1993), the court distinguished *Pime* and ruled that two private schools could not restrict their hiring to Protestant Christians, even though the will that established the schools so required. The court examined the schools’ ownership and affiliation, their purpose, the religious affiliations of the students, and the degree to which the education provided by the schools was religious in character, concluding that the schools did not fit within the Section 702(a) exemption. The court then also ruled that being Protestant was not a bona fide occupational qualification for employment at the schools. (For an analysis of the *Kamehameha Schools* decision, see Jon M. VanDyke, “The Kamehameha Schools/Bishop Estate and the Constitution,” 17 *U. Hawaii L. Rev.* 413 (1995).)

Although Title VII, as construed in *Amos*, *Killinger*, and *Pime*, sanctions religious preferences in hiring for religious institutions that qualify for the pertinent exemptions, the statute does not exempt them from its other prohibitions on race, national origin, and sex discrimination. If a religious organization seeks to escape these other nondiscrimination requirements, it must rely on its rights under the federal Constitution’s establishment and free exercise clauses (see generally Section 1.6 of this book). In two cases decided in 1980 and 1981, the U.S. Court of Appeals for the Fifth Circuit thoroughly analyzed the extent to which religious colleges and universities are subject to the race and sex discrimination prohibitions

of Title VII. The cases also include useful analysis of how a religious institution may respond to investigatory subpoenas and other information requests served on it by the federal Equal Employment Opportunity Commission.

The first case, *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), concerned a four-year coeducational school owned by the Mississippi Baptist Convention, an organization of Southern Baptist churches in Mississippi. The Baptist Convention's written policy stated a preference for employing active members of Baptist churches and also prohibited women from teaching courses concerning the Bible because no woman had been ordained as a minister in a Southern Baptist church. A female part-time faculty member, Dr. Summers, filed a charge with the EEOC when the college denied her application for a full-time faculty position. Summers alleged that the college's choice of a male constituted sex discrimination and that the college's employment policies discriminated against women and minorities as a class. When the EEOC attempted to investigate Summers's charge, the college refused to cooperate, and the EEOC sought court enforcement of a subpoena.

The college asserted that it had selected a male instead of Summers because he was a Baptist and she was not—thus arguing that religion, not sex, was the grounds for its decision and that its decision was therefore exempt from EEOC review under Section 702(a). The court agreed in principle with the college but indicated the need for additional evidence on whether the college had accurately characterized its failure to hire Summers:

If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, then Section 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination. On the other hand, should the evidence disclose only that the College's preference policy could have been applied, but in fact it was not considered by the College in determining which applicant to hire, Section 702 does not bar the EEOC's investigation of Summers' individual sex discrimination claim [626 F.2d at 486].

The college also argued, in response to Summers's individual claim and her allegation of class discrimination against women and blacks, that (1) the employment relationship between a church-related school and its faculty is not covered by Title VII; and (2) if this relationship is within Title VII, its inclusion violates both the establishment clause and the free exercise clause of the First Amendment. The court easily rejected the first argument, reasoning that the relationship between a church-related school and its faculty is not comparable to the church-minister relationship that is beyond the scope of Title VII. The court spent more time on the second argument but rejected it as well.

Regarding the establishment clause, the court reasoned:

The information requested by the EEOC's subpoena does not clearly implicate any religious practices of the College. . . . The only practice brought to the attention of the district court that is clearly predicated upon religious beliefs that

might not be protected by the exemption of Section 702 is the College's policy of hiring only men to teach courses in religion. The bare potential that Title VII would affect this practice does not warrant precluding the application of Title VII to the College.

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Although the College is a pervasively sectarian institution, the minimal burden imposed upon its religious practices by the application of Title VII and the limited nature of the resulting relationship between the federal government and the College cause us to find that application of the statute would not [violate the establishment clause] [626 F.2d at 487–88].

Regarding the free exercise clause, the court reasoned that:

the relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs. The fact that those of the College's employment practices subject to Title VII do not embody religious beliefs or practices protects the College from any real threat of undermining its religious purpose of fulfilling the evangelical role of the Mississippi Baptist Convention, and allows us to conclude that the impact of Title VII on the free exercise of religious beliefs is minimal [626 F.2d at 488].

Even if the college had engaged in sex (or race) discrimination based on its religious beliefs, said the court,

creating an exemption from the statutory enactment greater than that provided by Section 702 would seriously undermine the means chosen by Congress to combat discrimination and is not constitutionally required. . . . If the environment in which [religious educational] institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated [626 F.2d at 488–89].

On this point, however, the court in *EEOC v. Mississippi College* was writing prior to the U.S. Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (discussed in Section 1.6.2). That case introduced a new aspect to free exercise analysis: whether the statute at issue was "generally applicable" and neutral toward religion. It is possible that Title VII's prohibitions on race and sex discrimination would fit this characterization, in which case the courts would no longer need to engage in the type of "strict scrutiny" analysis highlighted by the court in the *Mississippi College* case.

In *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), the same court refined its *Mississippi College* analysis in the special context of religious seminaries. The defendant seminary is a nonprofit corporation owned, operated, supported, and controlled by the Southern Baptist Convention. This seminary offers degrees only in theology, religious education, and church music, and its purposes and character were described by the court as "wholly sectarian." The EEOC had asked the seminary to complete form EEO-6,



a routine information report. When the seminary refused, the EEOC sued to compel compliance under 42 U.S.C. § 2000e-8(c), Title VII's record-keeping and reporting provision.

The court determined that the general principles set out in *Mississippi College* applied to this case but that the differing factual setting of this case required a result partly different from that in *Mississippi College*. In particular, the court held that "Title VII does not apply to the employment relationship between this seminary and its faculty." Reasoning that the Southwestern Baptist Seminary, unlike Mississippi College, was "entitled to the status of 'church'" and that its faculty "fit the definition of 'ministers,'" the court determined that Congress did not intend to include this ecclesiastical relationship, which is a special concern of the First Amendment, within the scope of Title VII. Using the same reasoning, the court also excluded from Title VII administrative positions that are "traditionally ecclesiastical or ministerial," citing as likely examples the "President and Executive Vice-President of the Seminary, the chaplain, the dean of men and women, the academic deans, and those other personnel who equate to or supervise faculty." But the court refused to exclude other administrative and support staff from Title VII, even if the employees filling those positions were ordained ministers.

Having held "nonministerial" staff to be within Title VII, the court then considered whether the First Amendment would prohibit the EEOC from applying its reporting requirement to those employees. Again using the principles of *Mississippi College*, the court concluded that the First Amendment was not a bar and that the EEOC could require the seminary to provide the information requested in the EEO-6 form for its nonministerial employees. The court left open the question whether the First Amendment would prohibit the EEOC from obtaining further information on the seminary's nonministerial employees by use of the more intrusive investigatory subpoena, as was done in *Mississippi College*.

The "ministerial exception" recognized in *Southwestern Baptist Theological Seminary* was also at issue in *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996). In that case, Sister McDonough, a Catholic nun in the Dominican Order, challenged a negative tenure decision at Catholic University. She had been hired as an assistant professor in the department of canon law, the first woman to hold a tenure-track position in the department. Five years later, she was promoted to associate professor and shortly afterward submitted an application for tenure. After a series of split votes and revotes at various levels of review, McDonough was ultimately denied tenure after a negative vote of the Academic Senate's Committee on Appointments and Promotions. McDonough, joined by the EEOC, filed a Title VII sex discrimination claim against the university. The district court determined that it could not review the university's tenure decision because McDonough's role in the department of canon law was the "functional equivalent of the task of a minister," and judicial review would therefore violate both the free exercise and the establishment clauses of the First Amendment (856 F. Supp. 1 (D.D.C. 1994)). In affirming, the U.S. Court of Appeals for the D.C. Circuit rejected the plaintiffs' argument that the "ministerial" exception should not apply to McDonough because she was neither an ordained priest

nor did she perform religious duties. The appellate court determined, first, that ordination was irrelevant; the ministerial exception applies to individuals who perform religious duties, whether or not they have been ordained. Second, the court determined that McDonough's duties were indeed religious because the department's mission was to instruct students in "the fundamental body of ecclesiastical laws," and, as the only department in the United States empowered by the Vatican to confer ecclesiastical degrees in canon law, the mission of its faculty, including McDonough, was "to foster and teach sacred doctrine and the disciplines related to it" (quoting from the university's Canonical Statutes). Furthermore, said the court, it was irrelevant that the tenure denial had not been on religious grounds. The act of reviewing the employment decision of a religious body concerning someone with "ministerial" duties was offensive to the U.S. Constitution, regardless of the basis for the decision.

The above cases provide substantial clarification of Title VII's application to religious colleges and universities. What emerges is a balanced interpretation of the Section 702(a) and 703(e)(2) exemptions against the backdrop of First Amendment law. It is clear that these exemptions protect only employment decisions based on the religion of the applicant or employee. In most circumstances, the First Amendment does not appear to provide any additional special treatment for religious colleges; the two exemptions provide the full extent of protection that the First Amendment requires. There is one established exception to this position: the "ministerial exception" recognized by the *Southwestern Baptist Theological Seminary* and *Catholic University* cases, which provides additional protection by precluding the application of Title VII to "ministerial" employees. A second possible exception, mentioned briefly in the *Mississippi College* case, may be urged in other contexts: If an institution practices some form of discrimination prohibited by Title VII or other nondiscrimination laws, but can prove that its discrimination is based on religious belief, it may argue that the First Amendment protects such discrimination. The developing case law does not yet provide a definitive response to this argument. But the U.S. Supreme Court's opinion in the *Bob Jones* case (Section 13.3.2, footnote 38)—although addressing a tax benefit rather than a regulatory program such as Title VII—does suggest one way for courts to respond to the argument. As to the free exercise clause aspects of the argument, however, courts must now also take account of the Court's decision in *Employment Division v. Smith* (above), which suggests another approach that may involve only minimal scrutiny by the courts.

## Selected Annotated Bibliography

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suggestions for modifying employment policies and practices to comply with the ADA. The Rehabilitation Act of 1973 also is described, and an appendix provides a summary of the ADA's public accommodation provisions.

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- Paludi, Michele A. (ed.). *Sexual Harassment on College Campuses: Abusing the Ivory Power* (State University of New York Press, 1996). A revised and updated edition of *Ivory Power*. Includes updates on case law and additional material on harassment training; expanded sections on consensual relationships and on dealing with targets of harassment; and additional information on training and resources on developing harassment policies and grievance procedures.
- Rothstein, Laura F. "The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws," 47 *Syracuse L. Rev.* 931 (1997). Reviews federal disability discrimination law and its impact on employer discipline or discharge of employees for misconduct.
- Rubenstein, William B. "Do Gay Rights Laws Matter?: An Empirical Assessment," 75 *S. Cal. L. Rev.* 65 (2001). Analyzes discrimination complaints brought in states with protective legislation, concluding that a federal law protecting gays against employment discrimination would not result in a "deluge" of lawsuits.
- Sandler, Bernice R., & Shoop, Robert J. (eds.). *Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students* (Allyn & Bacon, 1997). Includes chapters on peer sexual harassment of students, faculty harassment of other faculty, electronic sexual harassment, how to develop an effective policy, how to conduct an investigation, and numerous other issues. A thorough and well-organized resource for campus administrators and faculty.
- Stoner, Edward N. II, & Ryan, Catherine S. "*Burlington, Faragher, Oncale, and Beyond: Recent Developments in Title VII Jurisprudence*," 26 *J. Coll. & Univ. Law* 645 (2000). Discusses three significant U.S. Supreme Court decisions related to sexual harassment in employment. Discusses subsequent lower court rulings that rely on these cases, and suggests ways that institutions of higher education can prevent and avoid liability for sexual harassment.
- Weber, Mark C. "Disability Discrimination Litigation and Institutions of Higher Education," 25 *J. Coll. & Univ. Law* 53 (1998). Discusses administrative enforcement and litigation issues, settlement, and alternatives to litigation, for cases brought by employees or students.
- See the Brandenburg entry for Section 13.5.

### **Sec. 5.4 (Affirmative Action)**

- Anderson, Terry H. *The Pursuit of Fairness: A History of Affirmative Action* (Oxford University Press, 2004). Provides a history of affirmative action, from the nondiscrimination policies of Presidents Roosevelt and Truman through the U.S. Supreme Court's University of Michigan cases. Discusses the multiple views of affirmative action and the central role of U.S. Presidents in the debate and the policy issues.
- Foster, Sheila. "Difference and Equality: A Critical Assessment of the Concept of 'Diversity,'" 1993 *Wis. L. Rev.* 105 (1993). Explores and criticizes the concept of diversity as developed through equal protection jurisprudence, with special emphasis on *Bakke* and *Metro Broadcasting*. Examines the concept of "difference" and discusses that concept against the history of exclusion of various groups. Also discussed is the tension between equal treatment and equal outcomes.
- Oppenheimer, David B. "Distinguishing Five Models of Affirmative Action," 4 *Berkeley Women's L.J.* 42 (1988). Discusses quotas, preference systems, the use of goals and timetables for selected occupations, expanded recruitment pools, and affirmative commitment not to discriminate as alternate models for increasing the proportion of underrepresented persons in the workforce. Selected discrimination lawsuits are also analyzed.
- Tilles, Eric A. "Lessons From *Bakke*: The Effect of *Grutter* on Affirmative Action in Employment," 6 *U. Pa. J. Lab. & Emp. L.* 451 (2004). Reviews the effect of *Bakke* (discussed in Section 8.2.5) on subsequent litigation concerning affirmative action in employment. Concludes that *Grutter* may have some impact on employment-based affirmative action in public sector organizations, but that the current affirmative action jurisprudence in private sector employment may limit the impact of *Grutter*.
- White, Rebecca Hanner. "Special Feature: The Future of Affirmative Action: *Gratz* and *Grutter* in Context: Affirmative Action in the Workplace: The Significance of *Grutter*?" 92 *Ky. L.J.* 263 (2003–2004). Reviews the judicial standards used to evaluate voluntary affirmative action plans under Title VII, including the Third Circuit's rejection of diversity as a permissible rationale for voluntary affirmative action. Suggests that, after *Grutter*, public employers may be able to demonstrate that diversity is a compelling public interest, but concludes that *Grutter*'s impact on voluntary affirmative action in employment, in either public or private organizations, is still an open question.

### **Sec. 5.5 (Application of Nondiscrimination Laws to Religious Institutions)**

- Sandin, Robert T. *Autonomy and Faith: Religious Preference in Employment Decisions in Religiously Affiliated Higher Education* (Omega Publications, 1990). Discusses the circumstances under which religiously affiliated colleges and universities may use religion as a selection criterion. Provides a taxonomy of religiously affiliated colleges and models of their preferential hiring policies, reviews state and federal nondiscrimination statutes, summarizes judicial precedent regarding secular and religious functions in establishment clause litigation, and discusses the interplay between religious preference and academic freedom.

PART THREE

THE COLLEGE AND  
ITS FACULTY





# 6

## Faculty Employment Issues

### ***Sec. 6.1. Overview***

The legal relationship between a college and its faculty members is defined by an increasingly complex web of principles and authorities. In general, this relationship is governed by the common law doctrines, statutes, and constitutional provisions discussed in Chapter Four and Chapter Five. The particular applications of this law to faculty may differ from its applications to other employees, however, because courts and administrative agencies often take account of the unique characteristics of institutional customs and practices regarding faculty (such as tenure) and of academic freedom principles that protect faculty members but not all other employees. Therefore, special protections for faculty may emanate from contract law (see especially Section 6.2), labor relations law (Section 6.3), employment discrimination law (Sections 6.4 & 6.5), and, in public institutions, constitutional law (see especially Sections 6.6 & 6.7) and public employment statutes and regulations. Federal regulations also affect the faculty employment relationship (Section 13.2).

### ***Sec. 6.2. Faculty Contracts***

**6.2.1. Overview.** The special nature of the college's relationship with its faculty complicates the development and interpretation of faculty contracts. The college may enter formal written contracts with individual faculty members, or it may simply send an annual letter stating the faculty member's teaching and other obligations for the year. The college may have a faculty handbook that discusses faculty governance rights and responsibilities, or it may have a detailed, collectively negotiated agreement with an agent of the faculty (or

both). Particularly for faculty at private colleges, contracts are a very important source of faculty and institutional rights and responsibilities. Faculty at public colleges may enjoy rights created by statute, but public colleges are making increasing use of contracts to define and delimit faculty—and institutional—rights and responsibilities.

One development of interest to administrators (and concern to faculty) is the suggestion that renewable term contracts replace lifetime tenure. While most of the shifts from tenure policies to long-term contracts have occurred within the private college sector (Robin Wilson, “Contracts Replace the Tenure Track for a Growing Number of Professors,” *Chron. Higher Educ.*, June 12, 1998, A12), some states have considered this alternative as well (“Footnotes,” *Chron. Higher Educ.*, May 14, 1999, A14). (For a survey of alternatives to tenure at a variety of institutions, see William T. Mallon, “Standard Deviations: Faculty Appointment Policies at Institutions Without Tenure,” in Cathy A. Trower, ed., *Policies on Faculty Appointment: Standard Practices and Unusual Arrangements* (Anker, 2000).)

Contracts are governed by common law, which may vary considerably by state. As is the case for nonfaculty employees (see Section 4.3.2), faculty handbooks and oral promises to faculty have been ruled to create binding contracts in some states, while other state courts have rejected this theory. For example, in *Sola v. Lafayette College*, 804 F.2d 40 (3d Cir. 1986), a faculty member sought to maintain a cause of action for tenure denial by relying on the faculty handbook’s language concerning affirmative action. The court ruled that such language had contractual status and provided the faculty member with a cause of action. Similarly, in *Arneson v. Board of Trustees, McKendree College*, 569 N.E.2d 252 (Ill. App. Ct. 1991), the court ruled that the faculty manual was a contract; however, a state appellate court in Louisiana reached the opposite result in *Marson v. Northwestern State University*, 607 So. 2d 1093 (La. Ct. App. 1992). In *Yates v. Board of Regents of Lamar University System*, 654 F. Supp. 979 (E.D. Tex. 1987), an untenured faculty member who had no written contract challenged a midyear discharge, asserting that oral representations made by the institution’s officials constituted a contract not to be dismissed prior to the end of the academic year. The court, in denying summary judgment for the university, agreed that oral promises and policies could create an implied contract, citing *Perry v. Sindermann* (see Section 6.7.2.1). On the other hand, if the institution has a written tenure policy, a faculty member’s claim that he had gained tenure through an unwritten, informal “understanding” will not succeed (*Jones v. University of Central Oklahoma*, 910 P.2d 987 (Okla. 1995)).

Unless a faculty handbook, individual contract, or other written policy document promises tenure, courts may be hesitant to infer that a tenure system exists. In *Tuomala v. Regent University*, 477 S.E.2d 501 (Va. 1996), for example, the Supreme Court of Virginia ruled that faculty at Regent University did not have tenure. Three professors at Regent had filed declaratory judgment suits asking the court to declare that they had tenure, and could only be dismissed if they were in breach of their contracts or unless their academic unit was disbanded. The university defended by stating that the individual contracts that

the faculty had signed indicated that they were “three-year continuing contracts” that, under the terms of the faculty handbook, could be renewed annually. Determining that the language of both the contracts and the faculty handbook was ambiguous, the court reviewed testimony by members of the board of trustees concerning their intent vis-à-vis tenure. The board members denied that the university had a tenure system, stating that the three-year “continuing contracts” were a mechanism for cushioning the economic blow of job loss for a faculty member by ensuring two years of income after the faculty member’s services were no longer desired. Although the university president had stated, during an accreditation team visit by the American Bar Association, that the law school faculty members were tenured, the court ruled that the president did not have the discretion to modify the trustees’ determination that there would be no tenure system at Regent University.

Even if a university acknowledges that it has a tenure system, there may be a difference of opinion as to where the locus of tenure is. Is it in the position, the department, the school, or the institution as a whole? This issue is particularly significant when a reduction in force or program closure is initiated (see Section 6.8). In *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517 (Ky. Ct. App. 1995), the dispute involved whether Professor Gale’s tenure was in the endowed chair he held or whether it was in the department or the university. The court examined the offer letter that Gale had accepted; it offered him the position of professor of humanities occupying Kentucky State University’s Endowed Chair in the Humanities, and provided for tenure upon appointment to that position. When the university later attempted to remove Gale from the endowed chair, increase his teaching load, and reduce his salary, Gale sought a declaratory judgment and an injunction preventing the university from taking this action. Calling the university’s argument a “bait and switch” approach, the court ruled that both the literal terms of the offer letter and academic custom with respect to attracting faculty stars to endowed chairs supported Gale’s argument that his tenure was in the endowed chair. Had the university provided for a periodic review of Gale’s performance in the endowed chair position, or had it specified that tenure was in the department and he would occupy the chair for a specific period of time, the result of the litigation would have been different.

Contracts may be used to limit the rights of faculty as well as to provide certain rights. For example, in *Kirschenbaum v. Northwestern University*, 728 N.E.2d 752 (Ct. App. Ill. 2000), the plaintiff, a tenured professor of psychiatry at Northwestern’s medical school, brought a breach of contract claim against the university for failure to provide him with a salary. The court examined the language of the four documents that comprised the professor’s contract. Two of the four documents specified that the professor’s “base salary” was zero, and that total salary would be recommended annually by the department chair. The plaintiff had not received a salary from the university, but had from its affiliated hospital and a faculty practice plan. When the plaintiff’s salary was reduced by the affiliated organizations because he had not generated sufficient clinical revenue, he sued the university.

Both the trial and appellate courts interpreted the contractual documents as providing for tenure but not for a salary. They found that the plaintiff was

notified and understood that the relationship with the university involved tenure but no compensation, and that his compensation would be provided from other sources.

Even if written institutional policies are clear, administrators may make oral representations to faculty members or candidates for faculty positions that either contradict the written policies or that seem to create additional employment security that the institution may not have intended to provide. For example, in *The Johns Hopkins University v. Ritter* (discussed in Section 6.7.1), two faculty members with “visiting professor” titles failed to convince a state appellate court that they had tenured status on the basis of the department chair’s assurances to that effect. The court rejected that argument, stating that the chair lacked both actual and apparent authority to abrogate the university’s written tenure policies, which provided that only the board of trustees could grant tenure.

In *Geddes v. Northwest Missouri State University*, 49 F.3d 426 (8th Cir. 1995), a federal appellate court rejected a faculty member’s claim that nonrenewal of her contract was impermissible because she was tenured. Geddes had been hired as dean, without tenure, of the School of Communications. When that school was merged with the School of Fine Arts three years later, Geddes was not offered the deanship of the combined school, but was offered the opportunity to continue as a professor in the speech department. She received annual contracts each year. At the time of the merger, the university’s president had assured Geddes that she could teach at the university “for the rest of her life if she wanted to.” The faculty handbook stated, however, that oral promises did not have contractual status, and that tenure could be awarded only after the formal tenure review process and only by the board of regents. The court rejected Geddes’s tenure claim, stating that Geddes’s reliance on the president’s statement was not reasonable in light of the specificity of the annual contracts, the faculty handbook, and the university’s tenure policies.

Some contracts clearly state that another document has been incorporated into the terms of employment. For a postsecondary institution, such documents as the faculty handbook, institutional bylaws, or guidelines of the American Association of University Professors (AAUP) may be referred to in the contract. The extent to which the terms of such outside writings become part of the faculty employment contract is discussed in *Brady v. Board of Trustees of Nebraska State Colleges*, 242 N.W.2d 616 (Neb. 1976), where the contract of a tenured professor at Wayne State College incorporated “the college bylaws, policies, and practices relating to academic tenure and faculty dismissal procedures.” When the institution dismissed the professor, using procedures that violated a section of the bylaws, the court held that the termination was ineffective:

There can be no serious question but that the bylaws of the governing body with respect to termination and conditions of the employment became a part of the employment contract between the college and [the professor]. At the time of the offer and acceptance of initial appointment . . . [the professor] was advised in writing that the offer and acceptance . . . constituted a contract honoring the policies and practices set forth in the faculty handbook, which was furnished to him at that time [242 N.W.2d at 230–31].

A case litigated under New York law demonstrates the significance of an institution's decision to adopt certain AAUP policy statements and not to adopt others. Fordham University had adopted the AAUP's "1940 Statement of Principles on Academic Freedom and Tenure" but not its 1973 statement "On the Imposition of Tenure Quotas," in which the AAUP opposed tenure quotas. (Both statements are included in *AAUP Policy Documents and Reports* (9th ed., AAUP, 2001), 3–10 and 47–49.) Fordham denied tenure to faculty whose departments would exceed 60 percent tenured faculty if they were awarded tenure. A professor of social service who had been denied tenure because of the quota policy sued the university, claiming that the tenure quota policy violated both of the AAUP statements. In *Waring v. Fordham University*, 640 F. Supp. 42 (S.D.N.Y. 1986), the court, noting that the university had not adopted the 1973 Statement, ruled that the university's action was appropriate and not a breach of contract.

But not all institutional policies are contractually binding. For example, in *Goodkind v. University of Minnesota*, 417 N.W.2d 636 (Minn. 1988), a dental school professor sued for breach of contract, stating that the institution's policy for searching for a department chair was part of his employment contract and that the university's failure to follow the dental school's written search policy violated his contractual rights. The Minnesota Supreme Court disagreed, asserting that the search policy was a general statement of policy and not sufficiently related to the faculty member's own terms and conditions of employment to be considered contractually binding on the university.

A breach of contract claim brought by a professor found to have engaged in sexual harassment of students posed the novel idea that the *student* code of conduct was incorporated into the faculty employment contract. In *Maas v. Cornell University*, 721 N.E.2d 966 (N.Y. 1999), the court rejected the plaintiff's claim that the university's student code of conduct, which included policies on how sexual harassment complaints would be investigated and adjudicated, could provide the basis for a breach of contract claim by a faculty member. The court stated:

[T]he University nowhere reflected an intent that the provisions of its Code would become terms of a discrete, implied-in-fact agreement. . . . While the Code and its attendant regulations promulgate the University's sexual harassment policy and provide procedures for dealing with sexual harassment claims, Maas' essential employment duties and rights are only indirectly affected by these provisions [721 N.E.2d at 970].

This result differs from the willingness of the court in *McConnell v. Howard University*, discussed in Section 6.2.3 below, to entertain a claim that the student code of conduct created a duty on the part of the college to protect the professor's "professional authority" in a dispute over the professor's right to maintain discipline in his classroom.

On occasion a court is asked to fill in the "gaps" in a written or unwritten contract by determining what the intent of the parties was, even if that intent was not directly or indirectly expressed. The parties' intent may sometimes be

ascertained from oral statements made at the time a hiring decision is made. In *Lewis v. Loyola University of Chicago*, 500 N.E.2d 47 (Ill. App. Ct. 1986), the plaintiff, a professor of medicine and chair of the pathology department at the university's medical school, argued that two letters from the dean of the medical school, in which the dean promised to recommend Dr. Lewis for early tenure consideration as soon as he obtained a license to practice medicine in Illinois, constituted a contract and that the institution's failure to grant him tenure breached that contract.

In 1980, the dean, as part of the process of recruiting Lewis as chair of the pathology department, wrote two letters in which he explicitly promised to recommend Lewis for tenure. Lewis accepted the university's offer, and his official appointment letter incorporated by reference the provisions of the faculty handbook. Lewis served as chair for three years on one-year contracts; just before the expiration of the third one-year contract, he received notice relieving him of his duties as department chair and advising him that his next one-year contract would be a terminal contract.

The dean did not submit Lewis's tenure candidacy at the time he had promised to, and several months later he resigned as dean and became a full-time faculty member. Before his resignation, the dean told Lewis orally that he had forgotten to submit his name for tenure and that he would do it the following year. The dean assured Lewis that the oversight would not be harmful.

Although the university argued that the letters and the dean's oral promises should not be considered part of Lewis's employment contract, the court disagreed. Noting that "the record discloses conversations, meetings and correspondence over a period of a year," the court asserted that "[it] cannot seriously be argued that a form contract for a teaching position . . . embodied the complete agreement and understanding of the parties" (500 N.E.2d at 50). Furthermore, said the court, objective—rather than subjective—criteria were used to make the tenure decision at the medical school, and Lewis was able to demonstrate that deans' tenure recommendations were rarely reversed. The court agreed with the trial judge's finding of "ample evidence" to indicate that Lewis would have been tenured absent the dean's oversight.

The opinion contains a useful discussion of remedies in academic breach of contract cases. The trial court had awarded Lewis the balance of his salary from the terminal contract (about \$36,500) but had also awarded him \$100,000 annually until he became disabled, died, or reached age sixty-five. The appellate court reversed this latter award, stating that it was based on speculation about the probable length of Lewis's employment had his contract not been breached. Thus, despite the finding of a contractual breach and the finding that Lewis should have been tenured, his damage award was relatively low. Furthermore, contractual remedies generally do not include reinstatement.

Challenges to tenure denials brought by faculty against private colleges are usually framed as breach of contract claims. Many of these cases involved alleged failure by the college or its faculty and administrators to follow written policies and procedures, such as in *Berkowitz v. President and Fellows of Harvard College*, 2001 Mass. Super. LEXIS 4 (Superior Ct. Mass., January 4, 2001). In *Berkowitz*,

a professor denied tenure by Harvard brought a breach of contract claim, alleging that Harvard had failed to follow its written grievance procedures as set forth in the faculty handbook. The court denied the college's motion to dismiss the claim, stating that it was reasonable for the plaintiff to rely on the procedures in the handbook. The case is discussed in Section 6.7.3.

Although judicial review is often deferential in cases involving subjective judgments about faculty performance (see the discussions of judicial deference in Sections 2.2.5 & 6.4), the courts will apply standard tools of contractual interpretation if the terms of the contract are unambiguous. For example, in *Ferrer v. Trustees of the University of Pennsylvania*, 825 A.2d 591 (Pa. 2002), a jury found that the university had breached the plaintiff's employment contract by punishing him for alleged research misconduct when he had been found innocent by a faculty investigative committee. Under the university's policies, the finding of the committee was binding on the institution, but the dean and provost imposed sanctions on the plaintiff despite the finding of the committee. The jury awarded Ferrer \$5 million in damages. The appellate court reversed, ruling that the standard of review for decisions by the leadership of a private university was deferential and that the punishment was reasonable. The Supreme Court of Pennsylvania reversed, rejecting the deferential standard of review. The high court reinstated the jury verdict, but reduced the damage award to \$2.9 million. The court emphasized that ordinary principles of contract interpretation applied to its review of the institution's compliance with its own rules and procedures. Although the court noted that it was not appropriate to review the correctness of the decision, review of the institution's procedural compliance was within the competence of the court.

Breach of contract claims may be brought when a faculty member's assignment or routine teaching responsibilities are changed against his or her will. For example, in *Walker v. Board of Regents of the University System of Georgia*, 561 S.E.2d 178 (Ct. App. Ga. 2002), a dean accused of sexual harassment by a faculty member was removed from his administrative position, which provided for a twelve-month contract, and reassigned to a nine-month faculty position. The court rejected the former dean's breach of contract claim, stating that he was given a nine-month contract on terms that were similar to contracts given to other tenured faculty at the university, despite the fact that the rest of the faculty in the former dean's department were employed on twelve-month contracts.

On occasion, an institution may wish to include a noncompete clause in the contract of a faculty member, particularly if it wishes to limit the faculty member's ability to resign and establish a practice that competes with an institutional program. For example, in *Albany Medical College v. Lobel*, 745 N.Y.S.2d 250 (N.Y. App. Div. 2002), a state appellate court affirmed the finding of a trial court that a noncompete clause in a faculty member's employment contract was enforceable. The faculty member, a physician, had been employed as a professor and a member of the medical school's practice group. He had signed an agreement not to practice medicine within 30 miles of the city of Albany for five years if he left the medical school's employ. After a dispute with the medical school leadership, the faculty member left and set up a competing practice

in Albany. The medical school sued, and the court enforced the noncompete clause because it was reasonably limited as to time and area, and the public was not denied access to medical care as a result of its enforcement.

Although tenured faculty are typically protected from termination without reasonable cause from their *faculty* positions, most faculty who also hold *administrative* positions do not have tenure in those administrative roles. Unless some written document provides for tenure in an administrative role, courts will reject breach of contract claims brought by tenured faculty who are ousted from administrative positions, as in *Murtaugh v. Emory University*, 152 F. Supp. 2d 1356 (N.D. Ga. 2001).

Even if a contractual provision would ordinarily bind the college or university, fraud on the part of the faculty member may result in a contractual *rescission*, which means that the contract no longer exists. Cases involving rescission of contracts, including faculty contracts, are discussed in Section 4.3.3.5.

Contracts may not only specify faculty's duties and rights but also may have additional requirements, such as acceptance of the tenets of a particular religion (if the institution is affiliated with a religious organization) or a code of conduct. For example, several colleges and universities have promulgated policies that forbid faculty from entering into sexual relationships with students who are in their classes or under their supervision.

Some states have enacted laws requiring that, as a condition of employment, faculty and graduate teaching assistants be competent in spoken English. In other states a statewide regulatory body or governing body has promulgated a similar requirement. Many of these laws or policies require that the institution certify the English proficiency only of nonnative speakers of English, a requirement that might be interpreted as discrimination on the basis of national origin (see Section 5.3.2). (For a discussion of these laws and policies, see P. Monoson & C. Thomas, "Oral English Proficiency Policies for Faculty in U.S. Higher Education," 16 *Rev. Higher Educ.* 127 (1993).)

Given the rapid changes in state common law of contract and the interest of state legislators in the conditions of faculty employment, administrators and faculty should continually be sensitive to the question of what institutional documents or practices are, or should be, part of the faculty contract. Where ambiguity exists, administrators and faculty should decide whether there is some good policy reason for maintaining the ambiguity. If not, the contracts should be clarified. And both faculty and administrators need to understand how the law of their state interprets handbooks, policy manuals, and oral promises. Careful drafting and the use, if desirable, of disclaimers in documents that are not intended to afford contractual rights may protect the institution against liability for claims that arise from oral promises or policy documents in some states, although substantial differences exist among states in judicial attitudes toward disclaimers.

**6.2.2. Statutory versus contract rights in public institutions.** A public institution's legal relationship with faculty members may be defined by



statute and administrative regulation as well as by written employment contract.<sup>1</sup> Tenure rights, for instance, may be created by a state tenure statute rather than by the terms of the employment contract; or pay scales may be established by a board of regents or state personnel rules rather than by the employment contract. The distinction between statutory rights and contract rights can be critical. A right created by statute or by administrative rule can be revoked or modified by a subsequent statute or rule, with the result that the public institution has no further obligation to recognize that right. A contract right, however, usually cannot be revoked or modified by subsequent statute or rule unless the parties have made provision for such changes in the contract itself, or unless the modification satisfies the requirements of the Constitution's contracts clause.

The Supreme Court's test for compliance with the contracts clause was created in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). In *Gardiner v. Tschechtelin*, 765 F. Supp. 279 (D. Md. 1991), a federal trial judge applied the *United States Trust* criteria to determine whether the state could abrogate tenure contracts with college faculty. In 1989, by act of the state legislature, the State of Maryland had assumed ownership of a municipal college, the Community College of Baltimore, because of the college's serious financial problems and a strong concern about the quality of the curriculum and the faculty. That legislation abolished faculty tenure and provided that faculty employed at the college would be employed only through the end of 1990. All faculty were sent termination notices. The faculty sued under Section 1983 of the Civil Rights Act (see Section 3.4 of this book), claiming that the legislation violated the Constitution's contracts clause (see Section 4.3.4 of this book) because their tenure was guaranteed by contract.

Under *United States Trust Co.*, the court was required to determine whether the legislation served a "legitimate public purpose" and whether the faculty contracts were private or public contracts. If the contracts were public, the court's standard of review would be higher, since the state's "self-interest" was at stake (765 F. Supp. at 288, citing 431 U.S. at 26). Because the faculty contracts were public, the court also was required to determine whether the legislation was "reasonable and necessary."

The judge determined that the legislature's concerns about the financial viability and quality of education at the college were legitimate, and that the state had chosen a less drastic means to try to improve the college than it could have by retaining all the faculty for one year and providing that those evaluated as above average or excellent teachers would receive additional annual contracts. Given the legislature's decision to continue supporting the college for only three

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<sup>1</sup>Cases related to faculty rights under tenure statutes are collected in Annot., "Construction and Effect of Tenure Provisions of Contract or Statute Governing Employment of College or University Faculty Member," 66 A.L.R.3d 1018; James Timothy Payne, Annot., "Sufficiency of Notice of Intention to Discharge or Not to Rehire Teacher Under Statutes Requiring Such Notice," 52 A.L.R.4th 301; Dale A. Linden, Annot., "Who Is 'Teacher' for Purposes of Tenure Statute," 94 A.L.R.3d 141.

years, pending an evaluation of the appropriateness of continuing its existence, the court ruled that the abrogation of tenure and the dismissal of some of the faculty was “reasonable and necessary to serve an important public purpose” (765 F. Supp. at 290) and therefore did not violate the contracts clause.

Budgetary pressures have persuaded the legislatures of several states to implement “pay lags” or brief “furloughs” in which public employees either lose pay or sustain a delay in receiving their pay. With one exception, the courts have found these practices to conflict with the contracts clause if those employees’ pay rights are protected by collective bargaining agreements. For example, in *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999), a federal appellate court upheld a preliminary injunction issued against the State of Hawaii, ruling that the state’s “pay lag” law violated the contracts clause. The law provided that the employees would be paid several days later than provided for in their collective bargaining agreement (through consistent past practice over several decades), and also provided that the pay lag was not subject to negotiation. The court ruled that the “pay lag” law would impose a substantial hardship on employees. In its ruling, the court cited *Massachusetts Community College Council v. Commonwealth of Massachusetts*, 649 N.E.2d 708 (Mass. 1995), a state court opinion nullifying a state law creating an “employee furlough,” which required employees to take unpaid days off in order to meet a budget crisis. Because the affected employees were covered by collective bargaining agreements, the court ruled that the furlough law violated the contracts clause. A contrary ruling by the U.S. Court of Appeals for the Fourth Circuit in *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012 (4th Cir. 1993) was criticized by subsequent courts in similar cases, and in “Recent Case: Fourth Circuit Upholds City’s Payroll Reduction Plan as a Reasonable and Necessary Impairment of Public Contract,” 107 *Harv. L. Rev.* 949 (1994).

But if there is no contract protecting the employees (or former employees), the contracts clause is not at issue. The Supreme Court of Rhode Island was asked to rule on whether the state legislature had authority to change the terms under which retired faculty were reemployed by public institutions in the state. In *Retired Adjunct Professors of the State of Rhode Island v. Almond*, 690 A.2d 1342 (R.I. 1997), professors who had retired from state institutions argued that, at the time they retired, state law allowed them to be employed by the state for the equivalent of seventy-five days without losing their pension benefits. In 1994, the Rhode Island legislature changed the law to provide that pension benefits would be suspended for the period of time that the retired professors were paid by the state.

The law was later amended to permit them to earn up to \$10,000 per year without suspending their pension benefits. The retired professors claimed that the action by the legislature violated the contract clauses of both the state and federal constitutions. A state trial court judge agreed and permanently enjoined the application of the new law to these plaintiffs.

The state supreme court reversed, ruling that there had been no contract between the state and the retired professors to reemploy them. Reemployment was discretionary on the part of the state institutions, and thus, the legislature

could change the terms upon which state institutions made these discretionary employment decisions without implicating constitutional protections. The court added that a statutory public pension benefit plan such as the one at issue in this case is not a “bargained-for” exchange that characterizes a contract. Furthermore, the legislature needed the freedom to modify the state pension system when financial or other policy considerations dictated.

Even if particular rights emanate from statutes or regulations, they may become embodied in contracts and thus be enforceable as contract rights. The contract may provide that certain statutory rights become part of the contract. Or the statute or regulation may itself be so written or interpreted that the rights it creates become enforceable as contract rights. This latter approach has twice been dealt with by the U.S. Supreme Court in cases concerning tenure laws. *Phelps v. Board of Education of West New York*, 300 U.S. 319 (1937), concerned a New Jersey Act of 1909, which provided that teachers employed by local school boards could only be dismissed or subject to reduced salary for cause. By an Act of 1933, the state enabled the school boards to fix and determine salaries. When one board invoked this authority to reduce salaries without cause, teachers claimed that this action impaired their contracts in violation of the Constitution’s contracts clause. The Court held that there was no constitutional impairment, since the Act of 1909 did not create a contract between the state and the teachers. The Court agreed with the New Jersey court that the statute established “a legislative status for teachers” but failed to establish “a contractual one that the legislature may not modify.” Thus, “although the Act of 1909 prohibited the board, a creature of the state, from reducing the teacher’s salary or discharging him without cause, . . . this was but a regulation of the conduct of the board and not a continuing contract of indefinite duration with the individual teacher” (300 U.S. at 323).

A year after *Phelps*, the Supreme Court came to a contrary conclusion in a similar impairment case. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), dealt with Indiana’s Teachers Tenure Act, adopted in 1927. The Act provided that, once a teacher had tenure, his or her contract “shall be deemed to be in effect for an indefinite period.” Sometime after the Act was amended in 1933 to omit township school corporations, the job of the plaintiff, a tenured teacher, was terminated. The Court found that the Act of 1927 created a contract with the teacher because the title of the Act was “couched in terms of contract,” the “tenor of the Act indicates that the word ‘contract’ was not used inadvertently or in other than its usual legal meaning,” and the state courts had previously viewed the Act of 1927 as creating a contract. The Court then held that the 1933 amendment unconstitutionally impaired the contracts created by the Act of 1927.

Given the fundamental distinction between contract and statutory rights, and the sometimes subtle relationships between them, administrators of public institutions should pay particular attention to the source of faculty members’ legal rights and should consult counsel whenever the administrators are attempting to define or change a faculty member’s legal status.

**6.2.3. Academic custom and usage.** As a method of contractual interpretation, a court may look beyond the policies of the institution to the manner

in which faculty employment terms are shaped in higher education generally. In these cases the court may use “academic custom and usage” to determine what the parties would have agreed to had they addressed a particular issue. This interpretive device is only used, however, when the contract is ambiguous, or when a court believes that a significant element of the contract is missing. If the intent of the parties is clear, the court will not look beyond the words of the contract. (See, for example, *Kashif v. Central State University*, 729 N.E.2d 787 (Ct. App. Ohio 1999). For a general discussion of academic custom and usage as an “internal” source of law, see Section 1.4.3.3.)

If a contract’s wording is alleged to be unclear, a court may be persuaded to look to external writings or statements for help in interpreting the parties’ intent. For example, in *Katz v. Georgetown University*, 246 F.3d 685 (D.C. Cir. 2001), the appellate court referred to writings of experts and to policy statements of the American Association of University Professors to define the meaning of “tenure” in the university’s faculty handbook. And in *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969), the court looked to outside writings to determine the customs and usual practices of the institution and interpret the contract in light of such custom and usage. The plaintiffs in *Greene* were five non-tenured professors who had been fired after a university investigation purported to find that they had been involved in disorders on campus. When the university terminated the professors as of the close of the academic year, the professors asserted that the university had breached a contractual obligation to give appropriate advance notice of nonrenewal or to provide a hearing prior to nonrenewal. The court concluded: “The contractual relationship existing here, when viewed against the regulations provided for, and the practices customarily followed in, their administration, required the university in the special circumstances here involved to afford the teachers an opportunity to be heard” (412 F.2d at 1131).

The court derived the institution’s customary practices from the faculty handbook, buttressed by testimony in court, even though the handbook was not specifically incorporated by reference and even though it stated that the university did not have a contractual obligation to follow the notice-of-nonreappointment procedures. The professors were found to be relying “not only on personal assurances from university officials and on their recognition of the common practice of the university, but also on the written statements of university policy contained in the faculty handbook under whose terms they were employed.” The court reasoned:

Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this noncommercial context. . . . The employment contracts of [the professors] here comprehend as essential parts of themselves the hiring policies and practices of the university as embodied in its employment regulations and customs [412 F.2d at 1135].

Courts may also look to an institution’s customary practice for assistance in understanding the reasonable expectations of the parties to the contract. For

example, in *Brown v. George Washington University*, 802 A.2d 382 (Ct. App. D.C. 2002), a faculty member denied tenure and promotion asserted that the university had breached her employment contract because the department's written policy provided that the candidate(s) for promotion would be invited to appear before the promotion committee "to provide additional information as may appear relevant." Departmental members testified that the department had a past practice of interpreting this language as discretionary, and had, in fact, excluded other candidates for promotion from the same meeting. The court ruled that the department faculty's interpretation of this policy was reasonable and not a breach of contract.

A court may look to the recommendations of an internal committee to aid in interpreting unclear or missing contractual provisions. In *Tacka v. Georgetown University*, 193 F. Supp. 2d 43 (D.D.C. 2001), a faculty member filed a breach of contract claim when the university refused to halt his tenure review process to deal with a claim of plagiarism against the tenure candidate. As part of the tenure review process, the department chair had solicited an evaluation of the candidate's research by an external expert. The external expert's evaluation accused Tacka of plagiarism in a paper he had published. The faculty handbook provided that any charges of academic misconduct were to be referred to the university's Research Integrity Committee. Before the department chair referred the plagiarism charge to that committee, however, the department voted to deny Tacka tenure. Tacka sued, saying that the department should have suspended the tenure review pending the outcome of the Research Integrity Committee's deliberations. (Several months after Tacka was denied tenure by the university, the Research Integrity Committee exonerated him; Tacka underwent a second tenure review the following year and was awarded tenure.)

Although the university argued that the faculty handbook did not require that the tenure process be suspended while an allegation of academic misconduct was reviewed, the court disagreed. The court was persuaded by the handbook's language requiring that such charges be reviewed and resolved promptly. The court also found relevant a memo from the chair of the Research Integrity Committee to the academic vice president, stating that the tenure review process should have been put on hold until the committee had completed its review of the allegations of academic misconduct. The views of these committee members, according to the court, are relevant "to construe the terms of the contract created by the Faculty Handbook in accordance with the University's understanding" (193 F. Supp. 2d at 48).

Another possible source of contractual protection for faculty could be the code of student conduct. In *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), a professor refused to meet his class because the administration would not remove a disruptive student from the class. When the professor was discharged for failure to perform his professional duties, he sued for breach of contract, claiming that both the faculty handbook and the code of student conduct created a duty on the part of the university to protect his professional authority. The court ruled that he should have the opportunity to demonstrate that the university owed him this duty. A decade later, however, the highest

court of New York rejected a similar theory in *Maas v. Cornell University*, discussed in Section 6.2.1.

Although academic custom and usage can fill in gaps in the employment contract, it cannot be used to contradict the contract's express terms. In *Lewis v. Salem Academy and College*, 208 S.E.2d 404 (N.C. 1974), a professor had been employed from 1950 to 1973 under a series of successive one-year contracts. The college had renewed the contract the last two years, even though the professor had reached age sixty-five, but did not renew the contract for the 1973–74 academic year. The professor argued that he had a right to continue teaching until age seventy because that was a usual and customary practice of the college and an implied benefit used to attract and retain faculty. The college's faculty guide, however, which was incorporated into all faculty contracts, had an explicit retirement policy providing for continued service beyond sixty-five to age seventy on a year-to-year basis at the discretion of the board of trustees.<sup>2</sup> The court held that custom and usage could not modify this clear contract provision.

Similarly, an attempt to convince a court to consider academic custom and usage in determining whether tenure survives the affiliation or merger of two colleges failed because the court found that the terms of the faculty handbook were clear. The case, *Gray v. Mundelein College*, 695 N.E.2d 1379, *appeal denied*, 705 N.E.2d 436 (Ill. 1998), is discussed in Section 6.8.2.

Selective incorporation of AAUP policies into handbooks or other policy documents will bind the college (and the faculty) only with respect to those policies that are clearly incorporated (*Jacobs v. Mundelein College* 628 N.E.2d 201 (Ill. Ct. App. 1993)). Furthermore, the college may decide to incorporate AAUP policies that regulate faculty conduct (such as its Statement on Professional Ethics), but not those that protect the faculty member's rights under other AAUP policy statements (*Barham v. University of Northern Colorado*, 964 P.2d 545 (Ct. App. Colo. 1997)).

While academic custom and usage as a device for interpreting contracts is useful under some circumstances, both the faculty and the college are better served by contracts that are specific and clear with respect to their protections for each party. If the parties wish AAUP statements or other recognized sources of academic custom and usage to be used as interpretation devices, incorporating these into faculty handbooks, policy documents, or other sources of contractual rights (see Section 6.2.1) will provide more predictability in their later interpretation by courts.

**6.2.4. Part-time faculty.** Facing ever-increasing financial constraints, many colleges and universities have increasingly turned to part-time faculty to provide instruction at considerably lower cost than hiring a full-time faculty member. Part-time faculty often are paid on a per-course basis, and generally are not entitled to employee benefits such as medical insurance or pensions.

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<sup>2</sup>Such a policy is now contrary to the dictates of the Age Discrimination in Employment Act (ADEA) (Section 5.2.6), which prohibits employment decisions made on the basis of an employee's age.

The status of part-time faculty members in postsecondary institutions has received attention within and outside the postsecondary community (see, for example, Judith Gappa & David Leslie, *The Invisible Faculty: Improving the Status of Part-Timers in Higher Education* (Jossey-Bass, 1993); Howard Bowen & Jack Schuster, *American Professors: A National Resource Imperiled* (Oxford University Press, 1986); David Leslie, ed., *The Use and Abuse of Adjunct Faculty* (New Directions in Higher Education no. 104, 1998)). The number and percentage of part-time faculty members in the academic workforce has increased substantially over the past decades. Data collected by the U.S. Education Department in 1999 reveal that part-time faculty accounted for 42 percent of all faculty across institutional types, but there are sharp differences by institutional type and control. In 1999, 65 percent of the faculty at public community colleges were employed part time, while 27.5 percent of the faculty at public four-year colleges taught part time. Percentages of part-time faculty at private four-year and two-year colleges in 1999 were 41 and 47.5 percent respectively. Women comprise nearly half (47 percent) of part-time faculty across institutional types, while they comprise only 37 percent of full-time faculty overall. Legal issues concerning this large and important faculty group are likely to demand special attention.

The questions being raised about part-time faculty involve such matters as pay scales, eligibility for fringe benefits (life insurance, health insurance, sick leave, sabbaticals, retirement contributions), access to tenure, rights upon dismissal or nonrenewal, and status for collective bargaining purposes. (For a description of a successful attempt by a union of part-time faculty to gain job security, higher wages, expanded benefits, and eligibility for academic leave, see John Gravois, "Both Sides Say Agreement at the New School Sets a Gold Standard for Adjunct-Faculty Contracts," *Chron. Higher Educ.*, November 2, 2005, available at <http://chronicle.com/daily/2005/11/2005110207n.htm>.) Each of these questions may be affected by two more general questions: (1) How is the distinction between a part-time and a full-time faculty member defined? (2) Are distinctions made between (or among) categories of part-time faculty members? The initial and primary source for answering these questions is the faculty contract (see Section 6.2.1). Also important are state and federal statutes and administrative rulings on such matters as defining bargaining units for collective bargaining (see *University of San Francisco and University of San Francisco Faculty Association*, 265 NLRB 1221 (1982), approving part-time faculty unit, and see also Section 6.3.1), retirement plans, civil service classifications, faculty tenure, wage-and-hour requirements, and unemployment compensation. These statutes and rulings may substantially affect what can and cannot be provided for in faculty contracts.

Two lawsuits brought by part-time faculty in the state of Washington highlight the difficult financial and policy issues related to the heavy reliance of colleges on part-time faculty. In the first, *Mader v. Health Care Authority*, 37 P.3d 1244 (Super. Ct. Wash. 2002), a group of part-time faculty members appealed the denial of their claim for paid health care coverage during the summer. The faculty plaintiffs acknowledged that they did not teach during the summer, but based their claim on language in state regulations that provided for paid health

care during the summer to “seasonal” employees. The court rejected that argument because the language of the regulation explicitly excluded employees such as the plaintiffs. The plaintiffs’ second claim was equally unsuccessful. A state regulation provides that employees who teach for two consecutive academic terms are entitled to paid health care benefits; it provides that the intervening summer between the spring and fall terms does not break the consecutive nature of the teaching. The court rejected the plaintiffs’ claim that this language entitled them to paid health benefits during the summer if they had taught during the spring term.

The state supreme court reversed both rulings of the superior court, stating that the state’s Health Care Authority was required to make an individualized determination, based upon the employee’s actual work circumstances, as to whether the employee was eligible for employer contributions to their health care coverage (70 P.3d 931 (Wash. 2003)).

The same group of plaintiffs brought a second lawsuit against the state, this time claiming that the state had miscalculated the number of hours they had taught and thus had not contributed the appropriate amount to their retirement plans. They sought adjusted contributions back to 1977, and a ruling that future contributions would be made correctly. The parties settled this case for \$12 million; \$8.3 million for the underpayment of retirement benefits, and \$3.6 million in attorney’s fees (*Mader v. State of Washington*, King Co. Cause No. 98-2-30850 SEA settlement agreement, discussed in Daniel Underwood, “Adjunct Faculty and Emerging Legal Trends,” Presentation to the 24th Annual National Conference on Law and Higher Education, Stetson University College of Law, February 16–18, 2003).

Another case brought in Washington state court involved an attempt by a group of part-time faculty to be paid overtime wages. In *Clawson v. Grays Harbor College District No. 2*, 61 P.3d 1130 (Wash. 2003), the state supreme court rejected that argument, stating that the college’s practice of paying part-time faculty for the number of in-class instructional hours did not render the employees nonexempt for purposes of the state wage and hour law. The court ruled that the faculty were professionals, and that despite the fact that their compensation was calculated with reference to the number of hours they taught, it was a salary, not a wage.

Another issue relevant to the status of part-time faculty is whether full-time faculty at a community college engaged in a reduction in force can “bump” part-time faculty from the courses that faculty to be laid off are qualified to teach. In *Biggiam v. Board of Trustees of Community College District No. 516*, 506 N.E.2d 1011 (Ill. App. Ct. 1987), the court was required to determine whether the Illinois Community College Tenure Act and/or the collective bargaining agreement between the faculty and the board afforded tenured faculty the right to bump any instructor or just full-time faculty members. The court agreed with the board’s argument that full-time faculty could bump nontenured or less senior faculty from “positions,” but that part-time instructors were not “faculty” and did not have “positions,” but only taught courses. Thus, faculty could not bump instructors from courses. Although this case rested on interpretation of a



state law, it may have relevance to institutions in other states that need to reduce the number of full-time faculty.

As the proportion of part-time faculty continues to increase in relation to the proportion of full-time, tenure-track faculty, the scholarly debate continues about the propriety of using part-timers to avoid the long-term financial commitment of tenure. The January–February 1998 issue of *Academe*, the journal of the AAUP, includes several articles that discuss the use of part-time faculty (including graduate teaching assistants). The AAUP has developed statements and guidelines regarding the use of part-time faculty, such as “The Status of Non-Tenure-Track Faculty,” *AAUP Policies and Documents* (2001), 77–87, which contains a discussion of the status of part-time and non-tenure-track faculty and offers recommendations for their employment. The AAUP has also developed “Guidelines for Good Practice: Part-Time and Non-Tenure-Track Faculty,” available at <http://www.aaup.org/Issues/part-time/Ptguide.htm>. The American Federation of Teachers has also issued standards for the treatment of part-time faculty members, entitled “Standards of Good Practice in the Employment of Part-Time/Adjunct Faculty.” The statement can be found at [http://www.aft.org/higher\\_ed](http://www.aft.org/higher_ed).

To respond effectively to issues involving part-time faculty, administrators should understand the differences in legal status of part-time and full-time faculty members at their institutions. In consultation with counsel, they should make sure that the existing differences in status and any future changes are adequately expressed in faculty contracts and institutional rules and regulations. Administrators should also consider the extent and clarity of their institution’s legal authority to maintain the existing differences if they are challenged or to change the legal status of part-timers if changes are advisable to effectuate new educational policy.

**6.2.5. *Contracts in religious institutions.*** In religious institutions, employment issues involving the interplay between religious doctrine and civil law have been litigated primarily in cases construing state and federal employment discrimination laws (see Section 5.5); however, when the faculty member is a member of a religious order or when the institution makes employment decisions on religious grounds, complex questions of contract law may also arise.

The contract made between a faculty member and a religious institution would normally be governed by state contract law unless the parties explicitly or implicitly intended that additional sources of law be used to interpret the contract. Some religiously affiliated institutions require their faculty to observe the code of conduct dictated by the doctrine of the religious sponsor; others incorporate church law or canon law into their contracts. Judicial interpretation of contracts is limited by the religion clauses of the First Amendment (see Section 1.6.2).

Several cases have addressed the nature of the contract between a religious institution and a faculty member. The religious institution typically argues that the U.S. Constitution’s First Amendment prevents the court from reviewing the

substance of the employment dispute. Both the free exercise and the establishment clauses have been invoked by religious colleges seeking to avoid judicial review of these employment disputes. In some of these cases, the courts have determined that the issues involved religious matters and that judicial intervention would be unconstitutional; in others, the court determined that only secular issues were involved and no constitutional violation was present.

In *Curran v. Catholic University of America*, Civ. No. 1562-87, 117 *Daily Wash. L.R.* 656 (D.C. Super. Ct., February 28, 1987), a tenured professor of Catholic theology filed a breach of contract claim when the university prohibited him from teaching courses involving Catholic theology. Curran had taken a public stand against several of the Catholic Church's teachings, and the Holy See had ruled him ineligible to teach Catholic theology. The university's board of trustees then withdrew Curran's ecclesiastical license, which is required of all faculty who teach in departments that confer ecclesiastical degrees. Although the university attempted to place Curran in another, nontheological teaching assignment, Curran argued that the university had constructively discharged him without a finding that he was not competent to teach Catholic theology. He also argued that the university had incorporated protections for academic freedom into his contract and that the treatment afforded him because of his scholarly beliefs constituted a violation of those protections.

The court was faced with three potential sources of contract law: District of Columbia common law, canon law, and explicit or implied contractual promises of academic freedom that were judicially enforceable (see Section 6.2.2). The court saw its duty not to interpret canon law, which it was forbidden to do by establishment clause principles, but to determine whether the parties had intended to be bound by canon law, a question of fact. The court found that, even though his contract did not explicitly mention canon law or its requirements, Curran knew that ecclesiastical faculties were different from nonecclesiastical faculties, that the Holy See could change the requirements for ecclesiastical faculties, and that the university was obligated to accede to those changes. In fact, the Apostolic Constitution of 1979 required ecclesiastical faculties to have a "canonical mission," meaning that such faculty were required to teach in the name of the Catholic Church and not to oppose its doctrine. The court noted:

[I]f the court had come to the opposite conclusion on this issue [that Curran was contractually required to maintain a canonical mission], it would have been squarely presented with a substantial constitutional question [the Establishment Clause problem]. . . . In light of the court's conclusion that Professor Curran's contract required him to have a canonical mission as a condition of teaching in the Department of Theology, it is unnecessary to reach the University's "canon law defense" [the argument that the Constitution prohibited the court from interpreting canon law] [Civ. No. 1562-87, opinion, at 19].

The court ruled that the university had the right to require faculty who taught theology to meet the requirements of the Holy See, since that body could withdraw the university's authority to award ecclesiastical degrees if the university

failed to comply with its requirements. Because the university had a special relationship with the Holy See, the court found implied in Curran’s contract with the university an obligation to abide by the Holy See’s requirements. The court also found that, whatever academic freedom Curran was due, his academic freedom could not limit the Holy See’s authority to determine which ecclesiastical faculty were qualified to teach theology. (For a discussion of academic freedom in religious institutions, see Section 7.8.)

The New Jersey Supreme Court was faced with two cases involving the interplay between religious doctrine and civil contract law. In *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218 (N.J. 1992), an untenured assistant professor of theology who was an ordained minister claimed that the seminary’s president offered him a non-tenure-track position with the promise of an eventual tenured position. When that promise was not acted upon, Alicea resigned, claiming constructive discharge and breach of contract. The ecclesiastical body that governed the seminary, the Reform Church’s Board of Theological Education (BTE), had reserved to itself all final decision power regarding the hiring and retention of faculty. Alicea claimed that the BTE had impliedly ratified the promise made to him by the president, and that the president had the apparent authority to make such promises. The court ruled that it could not determine whether the seminary had breached an implied contract with an untenured professor because such an inquiry would constitute an inquiry into ecclesiastical polity or doctrine. Although the court refused to adopt a *per se* rule that courts may not hear employees’ lawsuits against religious institutions, the court noted that “governmental interference with the polity, *i.e.*, church governance, of a religious institution could also violate the First Amendment by impermissibly limiting the institution’s options in choosing those employees whose role is instrumental in charting the course for the faithful” (608 A.2d at 222). Explaining further, the court said:

When State action would impose restrictions on a religious institution’s decisions regarding employees who perform ministerial functions under the employment relationship at issue, courts may not interfere in the employment relationship unless the agreement between the parties indicates that they have waived their free-exercise rights and unless the incidents of litigation—depositions, subpoenas, document discovery and the like—would not unconstitutionally disrupt the administration of the religious institution [608 A.2d at 222].

The court noted that because Alicea taught theology and counseled prospective ministers, he performed a ministerial function. Therefore, although the case involved issues of church governance (rather than doctrine, as in the *Curran* case), the court was similarly required to abstain from exercising jurisdiction.

Although the faculty handbook contained a grievance provision, which the seminary had not honored, the court refused to order the parties to use the procedure, because it was “optional” in light of the BTE’s reservation of full authority. The court stated: “Enforcement of the ministerial-employment agreement

would have violated the Free Exercise Clause whether based on actual or apparent authority” (608 A.2d at 224). In other words, the court could suggest that the parties abide by the manual but could not enforce the manual because its provisions were “vague and clearly optional” (608 A.2d at 224).

The court outlined the analysis to be applied to such cases:

[A] court should first ascertain whether, because of the ministerial role played by the employee, the doctrinal nature of the controversy, or the practical effect of applying neutral principles of law, the court should abstain from entertaining jurisdiction. . . . In assessing the extent to which the dispute implicates issues of doctrine or polity, factors such as the function of the employee under the relationship sought to be enforced, the clarity of contractual provisions relating to the employee’s function, and the defendant’s plausible justifications for its actions should influence the resolution of that threshold question. . . . If neither the threat of regulatory entanglement, the employee’s ministerial function, nor the primarily-doctrinal nature of the underlying dispute mandates abstention, courts should effectuate the intent of the parties to the contract [608 A.2d at 223–224].

The court explained that, if compliance with the contract could be determined through the application of “neutral principles of law,” then courts could enforce promises to comply with religious doctrine, or waivers of rights to act in compliance with religious beliefs. Examination of the text of the contract or handbook, on the type of employees supervised by the individual seeking judicial review, and the parties’ positions as church officials would be relevant, as well as the apparent intent of the parties to seek judicial review of disputes arising under the contract.

The same court decided a case with similar issues on the same day as *Alicea*. In *Welter v. Seton Hall University*, 608 A.2d 206 (1992), two Ursuline nuns who had taught for three years at Seton Hall, a Catholic university, filed breach of contract claims when their contracts were not renewed. The university claimed that the sisters’ order, the Ursuline Convent of the Sacred Heart, had refused permission for the sisters to continue teaching at the university, and that the court lacked jurisdiction to entertain the breach of contract claims.

The New Jersey Supreme Court ruled against the university on several grounds. First, the sisters did not perform a ministerial (pastoral) function—they taught computer science. Second, the dispute did not implicate either doctrinal issues or matters of church polity; the university simply refused to honor its contractual obligation to give the untenured sisters twelve months’ notice (a one-year terminal contract) before discharging them. The contract included no mention of canon law, nor did it require the sisters to obtain the permission of their religious superiors before accepting employment. It was the same contract that the university used for lay faculty. Furthermore, when the Ursuline convent requested that the university forward the sisters’ paychecks directly to it, the university refused and advised the sisters to open a checking account and deposit their paychecks.

There was substantial evidence that the university desired to terminate the sisters’ employment because of dissatisfaction with their performance. Instead

of issuing the terminal contracts, university administrators contacted the sisters' religious superiors and asked that they be recalled. The university then terminated the sisters' employment without the required notice. The university admitted that the issue would be a completely secular one if the sisters were not members of a religious order. In deciding this case, the court applied a two-part test. First, the court analyzed whether the sisters performed any ministerial functions for the university, and found that they did not. Second, the court assessed whether the sisters could have contemplated that canon law would have superseded the procedural safeguards of the contract, and found no such evidence:

The purely secular nature of plaintiffs' employment obligations; the absence of a contractual provision imposing religious obligations on plaintiffs; Seton Hall's rejection of the Ursulines' prior request regarding plaintiffs' paychecks; and the absence of any religious connotations behind the hiring of, tenure of, or decision to terminate plaintiffs all plainly indicate the contrary [608 A.2d at 216].

Courts have also been asked to construe the authority religiously affiliated colleges to require lay faculty to adhere to religious doctrine in their teaching. In *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334 (Ct. App. Ind. 1999) (also discussed in Section 7.8), a professor of Catholic theology and doctrine at a seminary that trains candidates for the priesthood signed a statement opposing the pope's teachings on the ordination of women as priests. After learning that Professor McEnroy had signed this statement, the head of the seminary removed her as a professor. McEnroy sued for breach of contract and several related tort claims. The seminary sought dismissal of the case on First Amendment grounds, arguing that judicial review of the complaint would require the court to "decide religious issues regarding the Church's good faith motivation and doctrinal basis for removing [the plaintiff] under canon law" (713 N.E.2d at 336). The trial court agreed with the seminary's argument, and a state appellate court affirmed. Two years later, the U.S. Conference of Catholic Bishops issued "Guidelines Concerning the Academic *Mandatum* in Catholic Universities" (June 15, 2001), which specifies that all faculty who teach "theological disciplines" in a Catholic college or university must receive a *mandatum* (an acknowledgment by church authority that a Catholic professor of a theological discipline is teaching "within the full communion of the Catholic Church").

In another case, a lay faculty member was discharged by a Baptist seminary for failing to adhere to the "lifestyle and behavior" expected of a faculty member at the seminary. In *Patterson v. Southwestern Baptist Theological Seminary*, 858 S.W.2d 602 (Tex. Ct. App. 1993), the faculty member filed a wrongful discharge claim, alleging that his contractual rights had been violated. The faculty handbook required each faculty member to be an "active and faithful member of a Baptist church" and to "subscribe in writing to the Articles of Faith" of the Southern Baptist Convention. The court ruled that the explicit inclusion of these requirements in the faculty handbook made it evident that the seminary "makes employment decisions regarding faculty members largely upon religious criteria"

(858 S.W.2d at 1199), rendering judicial review of the discharge decision a violation of the Constitution's First and Fourteenth Amendments.

In a case involving a former priest, *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200 (D. Conn. 2000), a federal trial court rejected the college's motion for summary judgment on constitutional grounds. The ex-priest, who had been hired by the college as an associate professor in the department of religious studies and philosophy, was relieved of his teaching and administrative responsibilities when the college president was sent newspaper articles that identified the plaintiff as an ex-priest who was "married to another man." The plaintiff charged the college with breach of contract, defamation, and related tort claims.

Although the court ruled that the college was sufficiently affiliated with the Roman Catholic Church to be entitled to invoke the free exercise clause, it found insufficient evidence that the plaintiff's duties were primarily religious in nature in order to support summary judgment for the college. The court ruled that a trial on the merits of the breach of contract claim would not involve the court in matters of religious interpretation, but that the defamation claim would involve competing religious interpretations of whether an individual ordained as a priest remained a priest for life even after leaving the active priesthood. Therefore, the court awarded summary judgment to the college on the defamation claims, but ruled that the plaintiff could proceed with his contract claims.

The cases are consistent in deferring to religious institutions on matters that involve the interpretation of church doctrine (*Curran, Hartwig*) or matters of church governance. The decisions have clear implications for academic freedom disputes at religious institutions (Section 7.8), especially where issues of adherence to religious doctrine are intertwined with free speech issues. Counsel acting for religiously affiliated institutions whose leaders wish their faculty employment contracts to be interpreted under church law as well as civil contract law should specify in written contracts and other institutional documents that church law or religious doctrine will be binding on the parties to the contract, and that church law will prevail in any conflict between church and civil law.

### ***Sec. 6.3. Faculty Collective Bargaining***

***6.3.1. Bargaining unit eligibility of faculty.*** Although the laws, cases, and doctrines discussed in Section 4.5 apply to faculty as well as to staff (and, in some cases, to students), the special nature of the faculty role has required labor boards and courts to interpret labor law in sometimes unique ways. Federal law, which regulates collective bargaining in the private sector, contains no special provisions (or exceptions) for college faculty. State law, which regulates collective bargaining in the public sector, may deal specifically with higher education (as in California), or may include college faculty with public school teachers or public employees in general (as in many other states). For this reason, faculty and administrators at public colleges need to pay special attention to their state's regulation of public sector bargaining, while the interpretation of federal labor relations law is somewhat more uniform across the country.

The National Labor Relations Board (NLRB) asserted jurisdiction over higher education in 1970 and determined in 1971 that college faculty in private

institutions could organize under the protections of the National Labor Relations Act (NLRA) (see Section 4.5.2). Between 1971 and 1980, the NLRB routinely ruled that faculty were “employees” and thus were eligible to form unions under the NLRA, even if they participated in hiring, promotion, and tenure decisions and controlled the curriculum and their course content. The routine inclusion of faculty under the NLRA came to an abrupt halt, however, in 1980.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the U.S. Supreme Court considered, for the first time, how federal collective bargaining principles developed to deal with industrial labor-management relations apply to private academic institutions. Adopting a view of academic employment relationships very different from that of the dissenting justices, a bare majority of the Court denied enforcement of an NLRB order requiring Yeshiva University to bargain collectively with a union certified as the representative of its faculty. The Court held that Yeshiva’s full-time faculty members were “managerial” personnel and thus excluded from the coverage of the NLRA.

In 1975 a three-member panel of the NLRB had reviewed the Yeshiva University Faculty Association’s petition seeking certification as bargaining agent for the full-time faculty members of certain of Yeshiva’s schools. The university opposed the petition on the grounds that its faculty members were managerial or supervisory personnel and hence not covered by the Act. After accepting the petition and sponsoring an election, the Board certified the faculty association as the exclusive bargaining representative. The university refused to bargain, maintaining that its faculty members’ extensive involvement in university governance excluded them from the Act. When the faculty association charged that the refusal was an unfair labor practice, the NLRB ordered the university to bargain and sought enforcement of its order in federal court. The U.S. Court of Appeals for the Second Circuit denied enforcement, holding that Yeshiva’s faculty were endowed with “managerial status” sufficient to remove them from the coverage of the Act (*NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978)).

In affirming the appellate court’s decision, Justice Powell’s majority opinion discussed the application of the “managerial employee” exclusion to college faculty who were involved in governance decisions at a university. The Court looked to previous NLRB decisions and Supreme Court opinions to formulate a definition of managerial employee: those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer . . . [or] exercise discretion within or even independently of established employer policy and [are] aligned with management” (444 U.S. at 682–83).

Applying this standard to the Yeshiva faculty, the Court concluded that the faculty exercised “managerial” authority because of their “absolute” authority over academic matters, such as which courses would be offered and when, the determination of teaching methods, grading policies, and admission standards, and admissions, retention, and graduation decisions. Said the court:

When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served [444 U.S. at 686].

The NLRB had acknowledged this decision-making function of the Yeshiva faculty but argued that “alignment with management” was the proper criterion for assessing management status. Because the faculty were not evaluated on their compliance with university policy, nor on their effectiveness in carrying out university policy, according to the NLRB, their independence would not be compromised by allowing them to unionize and negotiate with the administration. Rather than being aligned with management, said the Board, the faculty pursued their own professional interests and should be allowed to organize as other professional employees do.

The Court explicitly rejected the Board’s approach, noting that “the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise.” And furthermore, said the Court, the Board’s determination that the “professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned” was incorrect. According to the Court, “the faculty’s professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution” (444 U.S. at 686–88).

Four members of the Court dissented. On behalf of these dissenters, Justice Brennan argued that the NLRB’s decision should be upheld. He argued that “mature” universities had dual authority systems: a hierarchical system of authority culminating in a governing board, and a professional network that enabled professional expertise to inform and advise the formal authority system. According to Brennan, the faculty has an independent interest that underlies its recommendations, but the university retains “the ultimate decision-making authority” and defers to faculty judgment, or not, as it “deems consistent with its own perception of the institution’s needs and objectives.” Brennan also argued that the faculty were not accountable to the administration for their governance functions, nor did the faculty act as “representatives of management” in performing their governance roles.

Just as the *Yeshiva* case sparked sharp debate within the Court, it generated much dialogue and disagreement among commentators. (See, for example, D. Rabban, “Distinguishing Excluded Managers from Covered Professionals under the NLRA,” 89 *Columbia L. Rev.* 1775 (1989); see also G. Bodner, “The Implications of the *Yeshiva University* Decision for Collective Bargaining Rights of Faculty at Private and Public Institutions of Higher Education,” 7 *J. Coll. & Univ. Law* 78 (1980–81); and the response in M. Finkin, “The *Yeshiva* Decision: A Somewhat Different View,” 7 *J. Coll. & Univ. Law* 321 (1980–81).) The debate has developed on two levels. The first is whether the Court majority’s view of academic governance and its adaptation of labor law principles to that context are justifiable—an issue well framed by Justice Brennan’s dissenting opinion. The second level concerns the extent to which the “management exclusion” fashioned by the Court should be applied to university settings and faculty governance systems different from *Yeshiva*’s.



The Court focused on the autonomy of the Yeshiva faculty to “effectively determine [the University’s] curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.” However, noted the Court, if faculty at other colleges seeking to bargain did not have the scope or amount of influence that the Court attributed to Yeshiva’s faculty, they would not meet the test for “managerial employee” status and thus would be protected by the labor relations laws.

Thus, the *Yeshiva* decision appears to create a managerial exclusion only for faculty at “Yeshiva-like,” or what the Court called “mature,” private universities. Even at such institutions, it is unlikely that all faculty would be excluded from bargaining under federal law. Most part-time faculty, for instance, would not be considered managers and would thus remain eligible to bargain. Legitimate questions also exist concerning faculty with “soft money” research appointments, instructors and lecturers not on a tenure track, visiting professors, and even nontenured faculty generally, at mature universities.

At private institutions that are not “Yeshiva-like,” the NLRB and reviewing appellate courts have refused to apply the managerial exclusion to faculty. For example, *NLRB v. Stephens Institute*, 620 F.2d 720 (9th Cir. 1980), concerned the faculty of an art academy on the opposite end of the spectrum from Yeshiva. The academy was a corporation whose principal shareholder was also chief executive officer. Faculty members, except department heads, were paid according to the number of courses they taught each semester. According to the court: “The instructors at the academy . . . have no input into policy decisions and do not engage in management-level decision making. They are simply employees. Also, the academy bears little resemblance to the nonprofit ‘mature’ university discussed in *Yeshiva*.”

Another case, in which the court reached a similar conclusion, concerned the faculty of a liberal arts college that was closer to Yeshiva on the spectrum than was the art academy. In *Loretto Heights College v. NLRB*, 742 F.2d 1245 (10th Cir. 1984), the court determined that “faculty participation in college governance occurs largely through committees and other such groups” and that, outside such committees, faculty members’ governance roles were limited to participation in decision making “within or concerning particular program areas” in matters such as hiring and curriculum development. Concluding that the faculty’s authority in institutional governance was “severely circumscribed,” the court concluded that they did not meet the “managerial employee” test and thus were permitted to organize.

Other cases in which the Board and courts refused to exclude faculty as managerial employees include *Bradford College and Milk Wagon Drivers and Creamery Workers Union, Local 380*, 261 NLRB 565 (1982); *Montefiore Hospital and Medical Center and New York State Federation of Physicians and Dentists*, 261 NLRB 569 (1982); *NLRB v. Cooper Union for Advancement of Science*, 783 F.2d 29 (2d Cir. 1986); *Marymount College of Virginia*, 280 NLRB 486 (1986); *NLRB v. Florida Memorial College*, 820 F.2d 1182 (11th Cir. 1987); *Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989); *Spencer v. St. John’s University*, 1989 U.S. Dist. LEXIS 3421 (E.D.N.Y. 1989); *St. Thomas University*, 298 NLRB 280 (1990); and *Lemoyne-Owens College*, 338 N.L.R.B. No. 92 (2003).

But the Board and federal courts have applied the *Yeshiva* criteria to exclude faculty from coverage in several other cases. Faculty were found to be “managerial employees” excluded from bargaining in *Ithaca College and Ithaca College Faculty Ass’n.*, 261 NLRB 577 (1982); *Thiel College and Thiel College Chapter, AAUP*, 261 NLRB 580 (1982); *Duquesne University of the Holy Ghost and Duquesne University Law School Faculty Ass’n.*, 261 NLRB 587 (1982); *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982); *Fairleigh Dickinson University and Fairleigh Dickinson University Council of American Association of University Professors Chapters*, Case no. 22-RC-7198 (1986); *NLRB v. Lewis University*, 765 F.2d 616 (7th Cir. 1985); *University of New Haven*, 267 NLRB 939 (1986); *American International College*, 282 NLRB 189 (1986); *Livingstone College*, 286 NLRB 1308 (1987); *Boston University Chapter, AAUP v. NLRB*, 835 F.2d 399 (1st Cir. 1987); *University of Dubuque*, 289 NLRB 349 (1988); *Lewis and Clark College*, 300 NLRB 155 (1990); *Elmira College*, 309 NLRB 842 (1992); *Manhattan College*, 1999 NLRB LEXIS 903 (November 9, 2001); *Sacred Heart University*, Case No. 34-RC-1876, and *Sage Colleges*, Case No. 3-RC-11030 (July 31, 2001). (For a discussion of the *University of Great Falls* case, in which a federal appellate court ruled that the NLRB did not have jurisdiction over the university, which was owned by a religious order, see Section 4.5.2.2.)

Attempts have been made to apply *Yeshiva* by analogy to public sector institutions, but without success. The most notable example involved the University of Pittsburgh. Although a hearing examiner for the Pennsylvania Labor Relations Board ruled that the faculty were managerial, the full board reversed that finding and allowed an election to proceed (*University of Pittsburgh*, 21 Pa. Publ. Employee Rpts. 203 (1990)). The faculty elected “no agent,” rejecting union representation (D. Blum, “After 7-Year Fight, Pitt Professors Vote Against Union,” *Chron. Higher Educ.*, March 20, 1991, A2; see also J. Douglas, “The Impact of *NLRB v. Yeshiva University* on Faculty Unionism at Public Colleges,” 19 *J. Coll. Negot. in the Pub. Sector* 1 (1990)).

At institutions that are not “*Yeshiva*-like,” the managerial exclusion could apply to individual faculty members who have special governing responsibilities. Department heads, members of academic senates, or members of grievance committees or other institutional bodies with governance functions could be excluded as managerial employees, and have been at institutions where they have supervisory authority over faculty. But the numbers involved are not likely to be so large as to preclude formation and recognition of a substantial bargaining unit.

The NLRB and state employment relations agencies make decisions about which employees should be included in the same bargaining unit on the basis of the “community of interest” of the employees (see Section 4.5.3 of this book). Generally, several factors have traditionally been used to determine a “community of interest,” including the history of past bargaining (if any), the extent of organization, the skills and duties of the employees, and common supervision. But these factors are difficult to apply in postsecondary education’s complex world of collegially shared decision making. To define the proposed unit as “all faculty members” does not resolve the issue. For example, does the unit include

all faculty of the institution, or only the faculty of a particular school, such as the law school? Part-time as well as full-time faculty members? Researchers and librarians as well as teachers? Graduate teaching assistants? Chairs of small departments whose administrative duties are incidental to their primary teaching and research functions? The problems are compounded in multicampus institutions, especially if the programs offered by the individual campuses vary significantly from one another.

The question of whether department chairs or coordinators are “employees” (who are protected by the NLRA) or “supervisors” (who are not) was addressed by the Board in *Detroit College of Business and Detroit College of Business Faculty Association*, 296 NLRB 318 (1989). Prior to this case, the Board had used the “50 percent” rule developed in *Adelphi University*, 195 NLRB 639 (1972), which stated that, unless an individual spent at least half of his or her time in supervisory functions, the supervisory exclusion did not apply. In *Detroit College of Business*, the Board rejected the “50 percent” rule, stating that even though the department coordinators spent the majority of their time teaching, their responsibilities to evaluate and hire part-time faculty brought them within the definition of “supervisor” and thus excluded them from the NLRA’s protection.<sup>3</sup> Given the breadth of this definition of supervisor, it is possible that faculty members who supervise graduate student research or teaching assistants (who are employees also) could theoretically be excluded from the protections of the NLRA.

Part-time faculty have won the right to bargain, although they may be required to form a separate bargaining unit, rather than being included with full-time faculty, if a state labor board or NLRB panel finds that they do not share a “community of interest” (see Section 4.5.3) with full-time faculty. In most cases, part-time faculty are found not to share a community of interest with full-time faculty (see, for example, *New York University*, 205 NLRB 4 (1973); *NLRB v. Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975); *University of San Francisco*, 207 NLRB 12 (1973); *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 152 Vt. 343 (1989); *Community College of Philadelphia*, 432 A.2d 637 (Pa. Commw. 1981)).

The nature of the employment relationship between part-time or adjunct faculty and their institutions has posed complex issues for labor relations agencies. For example, in *Appeal of the University System of New Hampshire Board of Trustees*, 795 A.2d 840 (N.H. 2002), the New Hampshire Supreme Court upheld the state labor board’s decision to certifying a bargaining unit of adjunct faculty who had taught for the state university system, but remanded to the labor board the question of how to determine which adjuncts were “not temporary” and thus eligible for the unit. Furthermore, adjunct faculty at “mature” private universities have been given the right to unionize that has been denied to full-time faculty at those same universities under the *Yeshiva* doctrine (Scott Smallwood, “United We Stand?” *Chron. Higher Educ.*, February 21, 2003, A10–A11).

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<sup>3</sup>Cases are collected in Russell J. Davis, Annot., “Who Are ‘Supervisors’ Within Meaning of NLRA (29 U.S.C.S. §§ 151 *et seq.*) in Education and Health Services,” 52 A.L.R. Fed. 28.

Given the many possible variations from the circumstances in *Yeshiva*, faculty, administrators, and counsel can estimate the case's application to their campus only by comprehensively analyzing the institution's governance structure, the faculty's governance role in this structure, and the resulting decision-making experience.

On campuses with faculty members who would be considered "managers," bargaining does not become unlawful as a result of *Yeshiva*. The remaining faculty members not subject to exclusion may still form bargaining units under the protection of federal law. And even faculty members subject to the managerial exclusion may still agree among themselves to organize, and the institution may still voluntarily choose to bargain with them. But the administration may block the protection of federal law. Thus, for instance, faculty managers would have no federally enforceable right to be included in a certified bargaining unit or to demand good-faith bargaining over mandatory bargaining subjects (see Section 4.5.4). Conversely, the institution would have no federally enforceable right to file an unfair labor practice charge against a union representing only faculty managers for engaging in recognitional picketing, secondary boycotts, or other activity that would violate Section 8(b) of the NLRA (29 U.S.C. § 158(b)) if the federal law applied. A collective bargaining agreement entered through such a voluntary process could, however, be enforced in state court under the common law of contract.

In addition to raising questions about the legal status of faculties under *Yeshiva*, the decision has had a more subtle impact on relationships between faculty and administration (see generally J. V. Baldrige, F. Kemerer, & Associates, *Assessing the Impact of Faculty Collective Bargaining*, ERIC/Higher Education Research Report no. 8 (American Association for Higher Education, 1982)). It has given rise to numerous policy issues and sociological questions about faculty power on campus, and such matters merit reconsideration. Faculty at "mature" institutions have pressed for new mechanisms for exercising authority that the Supreme Court characterized as "managerial." At "nonmature" institutions, administrators have accorded greater authority to faculty in order to forestall their resort to the bargaining process highlighted by *Yeshiva*. And at all types of institutions—mature or not, public or private—all affected constituencies may wish to better define and implement faculty's role in academic governance, not as a legal matter but as an exercise of sound policy judgment.

**6.3.2. Coexistence of collective bargaining and traditional academic practices.** A major concern of faculty and administrators alike when a union represents faculty is whether the union's right to negotiate over terms and conditions of employment will conflict with, or compete with, traditional academic governance practices. For example, curricular changes can have implications for faculty workload; if a committee or a faculty senate recommends curricular changes, the implications of those changes for faculty workload may need to be negotiated. To the degree possible, an agreement that allocates responsibility for representing faculty views on various aspects of institutional policy and practice to the union or to a nonunion committee or other structure will minimize conflict in the long run.

Collective bargaining contracts traditionally come in two kinds, those with a “zipper” clause and those with a “past practices” clause. A zipper clause usually states that the union agrees to forgo its rights to bargain about any employment term or condition not contained in the contract; prior relationships between the parties thus become irrelevant. A past practices clause incorporates previous customary relationships between the parties in the agreement, at least insofar as they are not already inconsistent with its specific terms. Administrators faced with collective bargaining should carefully weigh the relative merit of each clause. A contract without either clause will likely be interpreted consistently with past practice when there are gaps or ambiguities in the contract terms. (See Sections 1.4.3.3 & 6.2.3.)

The availability of the past practices clause, however, by no means ensures that such traditional academic practices will endure under collective bargaining. In the early days of faculty bargaining, several commentators argued that such academic practices would steadily and inevitably disappear (for example, see D. Feller, “General Theory of the Collective Bargaining Agreement,” 61 *Cal. L. Rev.* 663, 718–856 (1973)). One view was that collective bargaining brings with it the economic warfare of the industrial bargaining model, forcing the two parties into much more clearly defined employee and management roles and diminishing the collegial characteristics of higher education. The opposing view was that collective bargaining can be domesticated in the postsecondary environment with minimal disruption of academic practices (see M. Finkin, “Collective Bargaining and University Government,” 1971 *Wis. L. Rev.* 125 (1971); and M. Finkin, “Faculty Collective Bargaining in Higher Education: An Independent Perspective,” 3 *J. Law & Educ.* 439 (1974)).

As with most opposing theories, the outcome seems to be somewhere between the predictions of those who believed faculty would negotiate away tenure for higher salaries and those who believed that faculty unions would have no effect on traditional governance mechanisms. Although faculty senates have either been abolished or atrophied at a few colleges and universities, relationships between faculty unions and senates have, for the most part, been cooperative and mutually supportive. In fact, on many campuses, faculty who are active in the union are also active in nonunion governance groups, such as a faculty senate. Thus, the issue for administrators is not whether traditional governance systems will be destroyed, but the extent to which faculty involvement in institutional governance should and can be maintained by incorporating such arrangements in the bargaining agreement, through either a past practices clause or a more detailed description of forms and functions. Given the result in *College of Osteopathic Medicine*, 265 NLRB 37 (1982), in which college faculty who attained a role in governance through their collective agreement were found to be managerial employees by the NLRB, faculty union leaders at private institutions may resist the incorporation of governance structures into the collective agreement.

On some campuses, however, traditional faculty governance structures have been replaced by the collective bargaining process. In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Court upheld a

Minnesota law that requires public employers to “meet and negotiate” with exclusive bargaining representatives of public employees over mandatory subjects of bargaining and, when the employees are professionals, to “meet and confer” with their exclusive representatives regarding nonmandatory subjects. (Subjects of bargaining are discussed in Section 4.5.4.) Pursuant to this law, the Minnesota Community College Faculty Association was designated the exclusive bargaining agent for state community college faculty members. The association and the state board established statewide meet-and-confer committees as well as local committees on each campus. These committees discussed various policy matters, such as curriculum, fiscal planning, and student affairs. Only members of the association served on the committees.

This arrangement was challenged by a group of faculty members who were not members of the association and thus could not participate in the meet-and-negotiate or meet-and-confer processes. The faculty members argued that their exclusion deprived them of their First Amendment rights to express their views and also discriminated against them in violation of the Fourteenth Amendment’s equal protection clause. The lower court (1) rejected these arguments as applied to the negotiation of mandatory bargaining subjects but (2) agreed with the faculty members that exclusion from the meet-and-confer committees violated the First Amendment (571 F. Supp. 1 (D. Minn. 1982)). On the faculty members’ appeal from the first ruling, the U.S. Supreme Court summarily affirmed the lower court (*Knight v. Minnesota Community College Faculty Ass’n.*, 465 U.S. 271 (1984)). On the state board and the association’s appeal from the second ruling, in an opinion joined by only five members, the U.S. Supreme Court overruled the lower court. According to the Court majority, the faculty members’ free speech challenge to their exclusion from meet-and-confer committees was unavailing:

Appellees have no constitutional right to force the government to listen to their views. . . . [T]his Court has never recognized a constitutional right of faculty to participate in policy making in academic institutions. . . . Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policy making. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution [465 U.S. at 287–88].

The equal protection claim similarly failed:

The state has a legitimate interest in insuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, whatever other advice they may receive on those questions. Permitting selection of the “meet-and-confer” representatives to be made by the exclusive representative, which has its unique status by virtue of majority support within the bargaining unit, is a rational means of serving that interest . . . [465 U.S. at 291–92].

When the faculty are represented by a union, some decisions traditionally made unilaterally by administrators may need to be negotiated with the union. For example, when the dean of arts and sciences at Rutgers University-Newark decided to move seven tenured faculty members from twelve-month to ten-month contracts because they were not performing work for the university during the summer, the union sued the university for breach of contract. In *Troy v. Rutgers, the State University of New Jersey*, 774 A.2d 476 (N.J. 2001), the state appellate court had ruled that the collective bargaining agreement superseded individual contracts between the faculty and the university, and the union appealed. The New Jersey Supreme Court reversed the appellate court, ruling that a trial was necessary to determine whether, in fact, the university had entered supplementary individual contracts with certain faculty members that enhanced the protections afforded by the collective bargaining agreement. In addition, the court ruled that decisions affecting the faculty members' salaries and working conditions were not a matter of managerial prerogative, but had to be negotiated.

But the decision of whether to transfer a faculty member whose position is eliminated in a reduction in force is a managerial prerogative, according to the Supreme Court of Massachusetts. In *Higher Education Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Association*, 666 N.E.2d 479 (Mass. 1996), the court vacated an arbitrator's award ordering the college to assign a laid-off professor trained as a civil engineer to a vacant position in the mathematics department. The court ruled that the college could not delegate the power to decide where to place a faculty member to the collective bargaining process because the assignment of work is a managerial prerogative.

Disputes have arisen over whether faculty have the right to bargain with the administration over tenure criteria or procedures. The issue turns on whether or not a court will view tenure criteria or procedures as a mandatory subject of bargaining rather than as a managerial prerogative. Courts have differed on this issue. For example, in *Ass'n. of New Jersey State College Faculties v. Dungan*, 316 A.2d 425 (N.J. 1974), a state statute gave public employees the right to bargain over the "terms and conditions of employment" and "working conditions." The court held that rules for granting tenure are not "mandatorily negotiable" under the statute because such rules "represent major educational policy pronouncements entrusted by the legislature [under the state's Education Law] to the board [of higher education's] educational expertise and objective judgment." Under such reasoning, tenure rules could also be beyond the scope of permissible bargaining, as "inherent managerial policy" (*University Education Association v. Regents of the University of Minnesota*, 353 N.W.2d 534 (Minn. 1984)) or as a nondelegable function of the board or as a function preempted by other state laws or administrative agency regulations (see *New Jersey State College Locals v. State Board of Higher Education*, 449 A.2d 1244 (N.J. 1982)).

Other courts or agencies, however, particularly when dealing with private institutions under the NLRA, may reason that tenure is a mandatory, or at least permissive, bargaining subject because it concerns job security (see A. Menard,

“May Tenure Rights of Faculty Be Bargained Away?” 2 *J. Coll. & Univ. Law* 256 (1975)). In *Hackel v. Vermont State Colleges*, 438 A.2d 1119 (Vt. 1981), for example, the court determined that faculty promotion and tenure are “properly bargainable” under that state’s Employee Labor Relations Act and upheld a provision on tenure and promotion in a collective bargaining agreement. Given this variation in judicial results, it is impossible to generalize about whether tenure or promotion standards or procedures are negotiable in general.

In *Central State University v. American Association of University Professors*, 526 U.S. 124 (1999), a case concerning faculty workloads rather than tenure, the U.S. Supreme Court upheld the federal constitutionality of an Ohio law barring collective bargaining over faculty workloads. Public debate in Ohio in the early 1990s focused on a perceived decline in the amount of time faculty were spending teaching in relation to the time spent on research. In 1993, the Ohio legislature enacted a law that required a 10 percent increase in statewide undergraduate teaching activity. The law instructed public colleges to adopt a faculty workload policy and provided that workload policies were not appropriate subjects for collective bargaining. The law further provided that if collective bargaining agreements conflicted with the new workload policies, the policy would prevail over the agreement. The language concerning collective bargaining was inserted because the faculty at several large state universities are not unionized; it was feared that faculty on unionized campuses might be able to avoid the additional workload through negotiating, while faculty on nonunionized campuses would not.

The trustees of Central State University adopted a workload policy and notified the local AAUP chapter, the elected representative of the faculty, that it would not bargain over faculty workload. The union filed a complaint in state court for declaratory and injunctive relief, arguing that the law denied the faculty equal protection under both the U.S. and the Ohio constitutions because it created a class of public employees not entitled to bargain. In *American Association of University Professors v. Central State University*, 699 N.E.2d 463 (Ohio 1998), the Ohio Supreme Court struck the law under both the Ohio and the U.S. constitutions, ruling that, although the legislature’s objective in enacting the statute was legitimate, there was no rational relationship between this objective (changing the balance between teaching and research) and collective bargaining because there was no evidence that collective bargaining had caused the decline in faculty teaching loads. The university appealed to the U.S. Supreme Court.

The Supreme Court issued a *per curiam* opinion reversing the Ohio Supreme Court’s ruling concerning the U.S. Constitution and remanding the case for further proceedings. The Court held that the Ohio court had misapplied the “rational basis” test of the equal protection clause. The legislature’s imposition of a faculty workload policy was “an entirely rational step. . . . The legislature could quite reasonably have concluded that the policy animating the law would have been undercut and likely varied if it were subject to collective bargaining” (526 U.S. at 128).

Justice Stevens dissented, arguing that the decision to bargain over the allocation of faculty time to research or teaching was a matter of academic freedom. Stevens concluded that the Court should have left this issue to the Ohio courts.



Because the federal and state laws governing collective bargaining are complex and involve substantial labor board and judicial interpretation, experienced labor counsel should be consulted when the faculty attempt to organize a union, or when the administration and faculty begin to negotiate a collective agreement. Particular attention should be paid to the structuring of dispute resolution processes under the agreement; administrators should consider the implications of including binding arbitration in the agreement for decisions such as promotion, tenure, and hiring of faculty.

### ***Sec. 6.4. Application of Nondiscrimination Laws to Faculty Employment Decisions***

**6.4.1. Overview.** Discrimination claims are particularly complex for faculty to prove and for colleges to defend against because of the subjective nature of employment decisions in academe. A successful discrimination claim generally depends on a plaintiff's ability to demonstrate unequal treatment of otherwise similar individuals. But identifying "similar" faculty members or demonstrating unequal treatment can be difficult. Particularly at institutions where faculty peers play a significant role in recommending candidates for hiring, promotion, or tenure, the locus of decision-making responsibility and the effect on upper levels of administration of potentially tainted recommendations at lower levels can be difficult to trace and to prove. Furthermore, opinions about what is "excellent" research or teaching may differ, even within the same academic department; and a plaintiff who attempts to compare herself or himself to colleagues in order to demonstrate unequal treatment may have difficulty doing so, especially in a small department.

Other issues facing academic institutions involve shifting performance standards, which may result in greater demands on recently hired faculty than those conducting the evaluation were required to meet—an outcome that can appear discriminatory whether or not there was a discriminatory intent. Comparisons of faculty productivity or quality across disciplines pose difficulties as well. And the practice at many colleges and universities of shielding the deliberations of committees or individuals from the scrutiny of the candidate or, in some cases, the courts (see Section 7.7) adds to the complexity of academic discrimination cases.

Discrimination claims have been brought by faculty challenging negative hiring, promotion, or tenure decisions or objecting to work assignments or other types of decisions (salary increases, office or lab space, and so on). A few cases illustrate the range of issues, and the judicial reaction, to these discrimination claims.

**6.4.2. Judicial deference and remedies for tenure denial.** Faculty challenging negative promotion or tenure decisions typically claim that the decision-making process was flawed or that the denial was a result of unlawful bias rather than some performance-related reason. Cases involving allegations of flawed decision-making processes are discussed in Section 6.7. Cases involving the rationale for the negative decision are discussed in this Section.

Despite the relatively large number of discrimination claims brought by faculty denied tenure or promotion, very few faculty have prevailed on the merits. A study of discrimination lawsuits brought between 1972 and 1986 by faculty denied tenure found that plaintiffs won on the merits only about 20 percent of the time (G. LaNoue & B. Lee, *Academics in Court: The Consequences of Faculty Discrimination Litigation* (University of Michigan Press, 1987)). Litigation results in subsequent years have been similar. In addition to the fact that the subjective nature of these decisions makes it difficult for a judge or jury to second-guess the determination of a university with regard to the quality of a faculty member's work, many courts have deferred to the judgment of faculty peers or other experts in these cases, finding for plaintiffs only if significant procedural errors had been made or if there was direct evidence that discrimination motivated the negative decision.

Early cases in which courts were asked to review denials of tenure or promotion made clear the judges' discomfort with the request. In situations where peer review committees had determined that a plaintiff's scholarship and/or teaching did not meet the proper standards, judges were reluctant to impose either their own judgments or their own performance standards on peer review committees, external evaluators, or college administrators. In an early case, *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), the U.S. Court of Appeals for the Second Circuit stated:

[O]f all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decisionmaking process [502 F.2d at 1231-32].

The Fourth Circuit, echoing *Faro*, stated that “[c]ourts are not qualified to review and substitute their judgment for the subjective, discretionary judgments of professional experts on faculty promotions” (*Clark v. Whiting*, 607 F.2d 634, 640 (1979)).

Federal appellate courts in subsequent academic discrimination cases were more willing to review academic judgments. In *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir. 1978), the court rejected its earlier deference, stating that the courts' “anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias,” and that the court would not “rely on any such policy of self-abnegation where colleges are concerned” (580 F.2d at 1153). Despite this apparent rejection of the *Faro* deferential standard, courts have generally refused to overturn tenure decisions where there has been an internal determination that the candidate's performance does not meet the institution's standard for tenure. One state court declared flatly that the “arbitrary and capricious” standard should be used to evaluate the tenured faculty's recommendation against granting tenure is because it is a professional judgment, not an employment decision (*Daley v. Wesleyan University*, 772 A.2d 725 (Ct. App. Conn. 2000), *appeal denied*, 776 A.2d 1145 (Conn. 2001)). In most cases, however, the courts do examine the college's justification for the tenure

denial to determine the credibility of the nondiscriminatory reason for the negative decision.

An illustrative case is *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), a case involving claims of age, marital status, and sex discrimination. The college had stated that Cynthia Fisher, a professor of biology, had been denied tenure in part because she “had been away from science” for too long. Fisher had interrupted her academic career for nine years to raise her children. The trial court had ruled in Fisher’s favor, citing Fisher’s strong publication record (finding it superior to that of several male faculty who were tenured just before and just after Fisher was denied tenure), her success at obtaining research grants, and the fact that no married woman had received tenure in the hard sciences at Vassar for the thirty years prior to Fisher’s tenure review, as evidence that the college had engaged in age and “sex plus marital status” discrimination (852 F. Supp. 1193 (S.D.N.Y. 1994)). The court did not find that the college had engaged in sex discrimination, as such, because another female faculty member in that department had received tenure the same year that Fisher’s tenure bid was denied. Instead, the trial court relied on a ruling by the U.S. Supreme Court in *Phillips v. Martin Marietta*, 400 U.S. 542 (1971) that a Title VII claim may arise if an employer discriminates against an employee because of sex plus another characteristic, such as marital status. The trial court also found that Fisher’s salary was depressed as a result of sex discrimination, an Equal Pay Act violation.

On appeal, a panel of the U.S. Court of Appeals for the Second Circuit reversed. Although the panel upheld the trial court’s rulings for the plaintiff in both the *prima facie* and pretext portions of the case (see Section 5.2.1), the panel reversed the trial court’s ultimate finding that the college intentionally discriminated against Fisher, stating that there was insufficient direct evidence of such discrimination. That opinion was withdrawn when the full court determined to hear oral arguments *en banc*. The *en banc* court confined its review to whether it was permissible for an appellate court to affirm rulings for the plaintiff on the *prima facie* case and pretext issues, and yet reverse the ultimate finding of discrimination.

The *Fisher* case demonstrates the influence of *St. Mary’s Honor Center v. Hicks* (Section 5.2.1). It also demonstrates that appellate judges are sharply divided on the meaning of *Hicks*, as well as on the standard of review to be used in a Title VII case. The dispute between the majority and dissenters concerned whether a trial court’s finding for the plaintiff at both the *prima facie* stage and the pretext stage requires a ruling for the plaintiff on the merits. The majority insisted that some evidence of bias was needed; proving that the college was untruthful in the reasons it gave was insufficient to justify a verdict for Fisher. The minority argued that if the plaintiff prevailed at the pretext stage, the plaintiff should prevail in the lawsuit. Six judges joined the majority, one judge concurred in part and dissented in part, and four judges dissented from the majority opinion.

Simply because the plaintiff might have been able to demonstrate that the college’s reason for the tenure denial was pretextual, said the majority, did not

mean that a finding of discrimination was warranted. Showing some understanding of academic politics, the judge writing for the majority commented:

In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. For example, a member of a tenure selection committee may support a protégé who will be eligible for tenure the following year. If only one tenure line is available, that committee member might be inclined to vote against tenure . . . thereby ensuring that the tenure line remains open. Any reason given by the committee member, other than the preference for his protégé, will be false. . . . [T]he fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff [114 F.3d at 1337].

The *en banc* majority left undisturbed the ruling by the appellate panel that, although Fisher had established a *prima facie* case of age and marital status discrimination, the college had supplied sufficient neutral reasons for the tenure denial (inability to meet the standards for tenure and qualifications inferior to those of other tenure candidates). Despite the trial court's finding that some of the college's reasons were inaccurate, the panel had held that the trial court's findings were insufficient to support a finding of actual discrimination against Fisher. The panel had thus overruled the trial court's findings of age and "sex plus marital status" discrimination in the tenure denial, as well as its ruling on sex-based wage discrimination. The *en banc* majority fully concurred with this reasoning and outcome of the panel discussion.

The dissenting judges criticized the *en banc* majority for substituting its judgment for that of the fact finder (the trial judge), and castigated the majority for protecting untruthful employers from a finding of discrimination, absent some clear evidence of discriminatory conduct. They also asserted that the *en banc* court should review every finding made by the trial court *de novo* rather than relying on the panel's review.

Faculty plaintiffs seeking to avoid the problems they face under the *Hicks* doctrine may not fare any better under state nondiscrimination laws. In a widely reported decision, a Connecticut jury awarded more than \$12.6 million to a female chemistry professor who claimed sex discrimination in her tenure denial. In *Craine v. Trinity College*, 791 A.2d 518 (Conn. 2002), the state's high court affirmed the jury's finding that the college had breached Craine's employment contract and had negligently misrepresented the tenure criteria, but ruled that the plaintiff had not demonstrated a discriminatory motive on the part of the college. Because the plaintiff could not identify males with similar qualifications who had been granted tenure the same year she was denied tenure, she had to rely on procedural violations in order to make out a *prima facie* case of sex discrimination. The high court found that the breach of contract (the college's failure to advise Craine that she

was not making adequate progress toward tenure) provided a rebuttable inference of discrimination. However, the court ruled that the procedural inconsistency and a single reference to a male tenure candidate as “old boy Jack” were insufficient to permit a reasonable jury to find that sex discrimination was the motive for the tenure denial. The college’s defense that the plaintiff’s scholarly productivity was too low was a legitimate nondiscriminatory reason for the tenure denial, according to the court, and it ruled that the plaintiff had not demonstrated that the college’s reason was a pretext for discrimination.

Although the plaintiff claimed that two successful candidates for tenure were no better qualified than she, the court refused to perform a comparative analysis of the qualifications. First, said the court, the comparator faculty were in different departments (history and math). But more important, said the court:

The first amendment guarantees that the defendant may pass its own judgment on the plaintiff’s scholarship and accept or reject other evaluations in the process. . . . To compare these publication records would require an inadmissible substantive comparison between the candidates and an improper intrusion into the right of the defendant to decide for itself which candidates satisfied its publication requirements. In the absence of any independent evidence of discrimination, evidence that an academic institution appears to have been more critical of one candidate than of another is not sufficient to raise an inference of discrimination [791 A.2d at 537, 538].

In another tenure denial case involving a female chemistry professor, *Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000), a federal appellate court, over a strong dissent by one panel member, affirmed a trial court’s award of summary judgment to the university on the plaintiff’s sex discrimination claim. Although the plaintiff, a faculty member at Barnard College, had been supported in her quest for tenure by the faculty in her department, by the dean and president of Barnard College, and by external reviewers of her scholarly work, the provost of Columbia University recommended against tenure, and the president concurred, on the basis that they considered her scholarship to be weak. Although Weinstock appealed the president’s negative decision through an internal review process, the new president of Columbia upheld the negative decision. Despite Weinstock’s assertion that numerous procedural irregularities infected the decision-making process, the court ruled that the university’s reason for the tenure denial—inadequate quality of her scholarship—was a legitimate nondiscriminatory reason unrelated to her gender.

Even if the plaintiff has evidence that a tenure decision was affected by “academic politics,” proving that discrimination was the reason for the tenure denial is very difficult. For example, a faculty member claiming that racial and national origin discrimination infected a denial of tenure was not able to persuade a federal appellate court to reverse a ruling in the university’s favor. In *Fabunmi v. University of Maryland at College Park*, 1999 U. S. App. LEXIS 2726 (4th Cir. 1999) (unpublished), the court affirmed the trial court’s ruling that the plaintiff had not provided evidence of either racial or national origin bias on the part of

the individuals who recommended against tenure. Despite the fact that the department in which the plaintiff taught had “poor personnel management practices” (p. \*6), the court remarked: “[A] professor who pursues a Title VII action in a tenure case cannot prevail merely by demonstrating that his tenure vote was animated by interpersonal conflict or petty academic politics” (p. \*5).

An issue that has troubled courts analyzing academic Title VII cases is the appropriate remedy for a denial of tenure or promotion that is found to have been discriminatory. In nonacademic settings, reinstatement to the position along with retroactive promotion is a routine remedy. But the courts, citing their lack of expertise in evaluating the scholarly or teaching ability of college faculty, sometimes have been reluctant to award “make-whole” remedies to college faculty.

The issue of a remedy for a discriminatory denial of tenure was addressed squarely in *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). The decision, written by Judge Dolores Sloviter, a former law professor, takes into account the need for academic freedom and the significance of peer evaluation while also recognizing that individuals who make academic judgments are still subject to Title VII’s prohibitions on discrimination.

Connie Kunda, a physical education instructor, brought suit after the college had denied her applications for promotion and tenure. The trial court (463 F. Supp. 294 (E.D. Pa. 1978)), holding that the college had intentionally discriminated against Kunda because of her sex, awarded her (1) reinstatement to her position; (2) back pay from the date her employment terminated, less amounts earned in the interim; (3) promotion to the rank of assistant professor, back-dated to the time her application was denied; and (4) the opportunity to complete the requirements for a master’s degree within two full school years from the date of the court’s decree, in which case she would be granted tenure.

In affirming the trial court’s award of relief, the appellate court carefully analyzed the particular facts of the case. These facts, as set out below, played a vital role in supporting and limiting the precedent set by this opinion.

When Kunda was appointed an instructor in the Muhlenberg College physical education department in September 1966, she held a Bachelor of Arts degree in physical education. Although the department’s terminal degree requirement, for tenure purposes, was the master’s, Kunda was never informed that a master’s was needed for advancement. Kunda was first recommended for promotion in the academic year 1971–72. Although her department supported the promotion, the Faculty Personnel and Policies Committee (FPPC) of the college rejected the recommendation after the dean of the college, who seldom attended FPPC deliberations on promotions, spoke against the recommendation. Subsequently, to determine the reasons for the denial, Kunda met individually with her department chairman, the dean, and the college’s president. The court found that none of these persons told her that she had been denied promotion because she lacked a master’s degree.

In the two subsequent years, Kunda’s department colleagues and all relevant faculty committees recommended that she be promoted and, in the last year, granted tenure. Both times, the dean recommended against promotion and tenure,

citing various institutional concerns rather than Kunda's lack of a master's degree, and affirming Kunda's worth to the college by recommending to the president that she be retained in a non-tenure-track status. Both years, the president recommended against promotion and tenure, and Kunda was given a terminal contract.

Kunda appealed the tenure denial to the Faculty Board of Appeals (FBA). The FBA recommended that Kunda be promoted and awarded tenure because (1) Kunda displayed the "scholarly equivalent" of a master's degree, (2) the policy of granting promotions only to faculty possessing the terminal degree had been bypassed frequently for the physical education department, and (3) no significant financial considerations mandated a denial of tenure. Despite the FBA recommendation, the board of trustees voted to deny tenure.

After reviewing these facts, the court of appeals examined other facts comparing Kunda's situation with that of similarly situated males at Muhlenberg. With respect to promotion, three male members of the physical education department had been promoted during the period of Kunda's employment, notwithstanding their lack of master's degrees. In another department of the college, a male instructor had been promoted without a terminal degree. There was also a difference between the counseling offered Kunda and that offered similarly situated males; while Kunda was not told that the master's would be a prerequisite for a grant of tenure, male members had been so advised.

Basing its conclusions on its analysis of these facts found by the trial court, and its approval of the trial court's allocation of burdens of proof, the appellate court agreed that Kunda had been discriminated against in both the denial of promotion and the denial of tenure. Concerning promotion, the appellate court affirmed the finding that the defendant's reason for denial articulated at trial, lack of the terminal degree, was a pretext for discrimination. Concerning tenure, the appellate court affirmed the trial court's determination that the articulated reason (lack of terminal degree) was not pretextual but that Kunda had been subjected to intentional disparate treatment with respect to counseling on the need for the degree.

Having held the college in violation of Title VII, the court turned to what it considered the most provocative issue raised on appeal: the propriety of the remedy fashioned by the trial court. Awards of back pay and reinstatement are not unusual in academic employment discrimination litigation; awards of promotion or conditional tenure are. The appellate court therefore treated the latter remedies extensively, emphasizing the special academic freedom context in which they arose.

The court discussed the tension between the freedom of a college to make employment decisions based upon institutional considerations and the academic judgment that is necessary to review a faculty member's qualifications for promotion or tenure. It also acknowledged the need for academics, rather than judges, to evaluate faculty performance. Said the court:

Wherever the responsibility [for evaluating faculty performance] lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college

with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges [621 F.2d at 547–48].

The court noted that all faculty committees had judged Kunda to be qualified for promotion and tenure, and that the dean had recommended extending her a non-tenure-track appointment. Since the tenure denial was premised on the lack of a master's degree rather than upon the quality of her performance, the court found that its decision to award promotion and conditional tenure was consistent with the academic judgments made about Kunda.

The appellate court stated that the trial judge's award of "conditional tenure" placed Kunda in the position she would have been in had the dean and president informed her of the requirement of a master's degree. This ruling was consistent with remedies for discrimination in nonacademic settings, according to the court.

The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands [621 F.2d at 550].

*Kunda* was a ground-breaking case because the court in effect awarded a promotion and conditional tenure as the remedy for the discrimination against the plaintiff. The case was also controversial because the remedy is subject to the charge that it interferes with institutional autonomy in areas (promotion and tenure) where autonomy is most important to postsecondary education. Yet, as a careful reading of the opinion indicates, the court's holding is actually narrow and its reasoning sensitive to the academic community's needs and the relative competencies of college and court. The court emphasizes that the case was unusual in that Kunda's performance had been found by all involved to be acceptable. Thus, the case's significance is tied tightly to its facts.

Another federal court of appeals addressed the thorny issue of remedies for academic discrimination in two cases, refusing in both to award tenure to plaintiffs who had prevailed on the merits. In *Gutzwiller v. University of Cincinnati*, 860 F.2d 1317 (6th Cir. 1988), the court, affirming the trial court's finding of discrimination, remanded the case to the trial court on the issue of a remedy, cautioning that court-awarded tenure should be "provided in only the most exceptional cases, [and] [o]nly when the court is convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration . . . of her tenure application" (860 F.2d at 1333). The district court awarded Professor



Gutzwiller back pay, reinstated her without tenure for the 1989–90 academic year, and ordered that a new tenure review be conducted under the court’s supervision within the following year. The university conducted a tenure review during the 1989–90 academic year and awarded Gutzwiller tenure.

In a second case before the same federal circuit court, *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), the appellate court reversed a trial court’s award of reinstatement as a tenured full professor to Lanni Ford, who had been denied reappointment as an instructor in 1977 at Middle Tennessee State University. Although Ford had prevailed on the merits in 1984 (741 F.2d 858 (6th Cir. 1984)), the issue of the appropriate remedy had occupied the court for another five years. The plaintiff had argued that only reinstatement as a full professor would provide a “make-whole” remedy; the court disagreed, noting that Ford had taught for only two years and had never been evaluated for promotion or tenure. The court remanded the case to the trial court with instructions to fashion some remedy short of tenure that would compensate Ford for her losses.

The first time a federal appellate court examined and approved the outright award of tenure occurred in *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989).<sup>4</sup> Julia Brown, an assistant professor of English, had received the unanimous recommendation of her department and positive recommendations from outside evaluators, but was denied tenure by the university’s president. After a jury trial, the university was found to have discriminated in its denial of tenure to Brown. The court, in reinstating Brown with tenure, noted that her peers had judged her to be qualified (a factor absent in *Gutzwiller* and *Ford*, but present in *Kunda*), and that the president’s sexist remarks about the English department showed evidence of gender bias. The university had raised an academic freedom challenge to a court award of tenure, stating that it infringed upon its First Amendment right to determine “who may teach” (see *Sweezy v. New Hampshire*, discussed in Section 7.1). The appellate court rejected that argument, noting that the First Amendment could not insulate the university against civil rights violations.

The court also rejected the university’s argument that the appropriate remedy be another three-year probationary period or a nondiscriminatory tenure review, such as was the remedy in *Gutzwiller*. The court said these remedies would not make the plaintiff whole. The court engaged in an extensive review of Brown’s publications and teaching record, an unusual level of scrutiny for academic employment discrimination claims. Thus, the appellate court reviewed the substance of the decision as well as its procedural fairness, rather than the deferential review used by courts in previous cases. This willingness to review the substance of academic judgments is also evident in *Bennun v. Rutgers, The State University of New Jersey*, 737 F. Supp. 1393 (D.N.J. 1990), *affirmed*, 941

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<sup>4</sup>Two federal trial courts had awarded tenure to plaintiffs, but in neither case was the remedy examined on appeal. See *Gladney v. Thomas*, 573 F. Supp. 1232 (D. Ala. 1983), and *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971), *affirmed mem.*, 6 Fair Empl. Prac. Cases 314 (7th Cir. 1973).

F.2d 154 (3d Cir. 1991) (discussed in Section 6.4.3.1), and in *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990).<sup>5</sup>

Recent court opinions in academic discrimination cases make it clear that postsecondary institutions have no special dispensation from the requirements of federal antidiscrimination legislation. Courts will defer to institutions' expert judgments concerning scholarship, teaching, and other educational qualifications if they believe that those judgments are fairly reached, but courts will not subject institutions to a more deferential standard of review or a lesser obligation to repair the adverse effects of discrimination. And despite the fact that tenure is an unusual remedy in that it has the potential to give lifetime job security to a faculty member, the federal courts appear to have lost their reluctance to order tenure as a remedy when they believe that discrimination has occurred.

In addition to equitable remedies such as reinstatement or tenure, and damages, prevailing plaintiffs are entitled to attorney's fees under Title VII (42 U.S.C. § 2000e-5(k)). The Wisconsin Supreme Court was asked to determine whether a faculty member who prevailed in a sex discrimination claim in an internal university grievance procedure was entitled to attorney's fees under the rationale of Title VII. In *Duello v. Board of Regents, University of Wisconsin*, 501 N.W.2d 38 (Wis. 1993), the Wisconsin Supreme Court ruled that an internal university appeals committee's decision that the plaintiff had suffered sex discrimination was not a "proceeding" under the meaning of Title VII and thus the university was not liable to the plaintiff for her attorney's fees.

### **6.4.3. Challenges to employment decisions**

**6.4.3.1. Race and national origin discrimination claims.** Faculty may bring claims of race and/or national origin discrimination under both Title VII and Section 1981 (see Sections 5.2.1 & 5.2.4 of this book). In *Bennun v. Rutgers, The State University of New Jersey*, 941 F.2d 154 (3d Cir. 1991), a Hispanic professor—stating both Title VII and Section 1981 claims—charged that the university's four refusals to promote him to full professor were based on his race and/or national origin. The trial court compared Professor Bennun's research and publication record with the record of a departmental colleague, a white female who had been promoted to full professor at the same time Bennun's promotion was denied. The trial court found nine instances in which different, and more demanding, standards were applied to Bennun than to the comparator faculty member. In light of these findings, the district court concluded that the university's reason for denying Bennun promotion—inadequate research production—was a pretext for discrimination. Although Bennun apparently had no direct evidence of discrimination, his ability to demonstrate pretext was sufficient to establish liability, the court ruled.

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<sup>5</sup>Cases related to the issue of discrimination and the award of tenure are collected in Richard Neumeg, Annot., "Application to Tenured Positions in Educational Institutions of Provisions of Civil Rights Act of 1964, as Amended (42 U.S.C.S. § 2000e *et seq.*), Prohibiting Discrimination on Basis of Sex," 55 A.L.R. Fed. 842.

The comparison of Bennun with his departmental colleague was disputed at the appellate level. The university argued that, because the female professor had been rated “outstanding” in both teaching and service and Bennun had not, they were not “similarly situated” and thus the comparisons were inappropriate. The court rejected the university’s argument, stating that the different standards applied to the professors’ research quality and productivity were sufficient to establish disparate treatment, and that whether or not the two faculty were similar enough in other respects for comparison purposes was irrelevant.

The university petitioned the Third Circuit for a rehearing by the entire panel of judges, which was denied. Judge Sloviter, a former law school professor and the author of the *Kunda* decision (discussed in Section 6.4.2), believed that the rehearing should be granted, arguing that, unlike *Kunda*, Bennun’s qualifications were in dispute, and that the trial judge had impermissibly inserted himself into the evaluation process.

A second race discrimination claim resulted in one of the largest damage awards in an academic discrimination lawsuit. It also demonstrates the inflammatory effect of racist comments upon a jury’s decision concerning the amount of damages to award. Reginald Clark, an African American professor of education, asserting that the decision by Claremont Graduate School to deny him tenure was racially motivated, brought suit under California’s Fair Employment and Housing Act (Govt. Code § 12900 *et seq.*), which permitted a jury trial. The jury found for Professor Clark, in part because Clark was able to demonstrate several examples of race-related remarks made by departmental colleagues, both before and during the time that they made the tenure recommendation (a split vote). The jury awarded Clark \$1 million in compensatory damages and \$16,327 in punitive damages. The trial judge awarded Clark attorney’s fees of more than \$400,000. The California Court of Appeal affirmed the jury verdict and damage awards (*Clark v. Claremont University Center*, 8 Cal. Rptr. 2d 151 (Cal. Ct. App. 1992)), stating:

We must add we are not surprised by the jury’s verdict. Many employment discrimination cases do not even survive to trial because evidence of the employer’s improper motive is so difficult to obtain. This case is unusual, not because of Clark’s claims, but because of Clark’s strong evidence of improper motive. Our own computer-assisted research of tenure denial cases across the nation revealed none involving university professors who made such blatant remarks as in this case [8 Cal. Rptr. at 170].

White faculty have also used Section 1981 and Title VII to challenge negative employment decisions under a theory of “reverse discrimination.” In *Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), a class action brought on behalf of white faculty and other white employees and former employees at a predominantly black institution, the court concluded on the basis of evidence presented at trial that “in the hiring of its administrative, teaching, and clerical and support staff and the promotion and tenure of its faculty, A.S.U. has . . . engaged in a pattern and practice of discrimination against

whites.” The U.S. Court of Appeals for the Fifth Circuit affirmed (614 F.2d 1295 (5th Cir. 1980)).

Shortly after *Craig*, the Fifth Circuit reached a similar result in a case brought by a single faculty member. In *Whiting v. Jackson State University*, 616 F.2d 116 (5th Cir. 1980), a white psychometry professor working at a predominantly black university claimed that his discharge was motivated by racial discrimination. The court outlined the burdens of proof applicable to the professor’s claim, using the same standards applicable to other Title VII “disparate treatment” claims (see Section 5.2.1). Finding that the university’s articulated reason for the discharge was a pretext and that the discharge had been motivated by racial considerations, the court affirmed the trial court’s judgment for the professor: “Our traditional reluctance to intervene in university affairs cannot be allowed to undermine our statutory duty to remedy the wrong.”

The *Whiting* standards were followed in *Fisher v. Dillard University*, 499 F. Supp. 525 (E.D. La. 1980), in which a predominantly black university had discharged a white Ph.D. psychologist and hired a black psychologist instead at a higher salary. The court entered judgment for the white professor. And in another similar case, *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928 (11th Cir. 1983), the court affirmed the lower court’s ruling that a white professor would have had her contract renewed but for her race.

In several cases that have arisen at traditionally black institutions, the defendants have argued that black faculty are needed to serve as role models for black students. However, in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (see Section 5.4), the U.S. Supreme Court rejected the role model theory as a defense to race-conscious employment decisions. And in *Arenson v. Southern University*, 911 F.2d 1124 (5th Cir. 1990), a white professor seeking a tenure-track position at Southern University Law School argued that the dean’s assertion that no tenure-track position existed was a pretext for race discrimination. The jury hearing Professor Arenson’s Section 1981 claim found the school’s defense to be pretextual, given the fact that a tenure-track position had been given to a less experienced black woman and the statement made by the chair of the law school’s tenure and promotion committee that there were too many white professors on the faculty. After complicated procedural wranglings, an appellate court upheld the jury’s award.<sup>6</sup>

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<sup>6</sup>Although the jury found in Arenson’s favor, the trial judge granted judgment to the university. Arenson appealed, a federal appellate court reversed the trial judge, and the trial judge then ordered a new trial. Arenson did not prevail at the second trial; the trial judge directed a verdict for all but one of the defendants at the close of the plaintiff’s case. The jury found for the remaining defendant. Arenson appealed again, claiming that the district court should not have ordered the second trial because, at the time the trial court granted the judgment to the university, it did not rule on the university’s motion for a new trial. Despite its discomfort with the fact that two juries reached different conclusions in this very close case, and that the trial judge had concluded that Arenson should not have prevailed, the federal appellate court ruled that the second trial should not have been granted. Judgment was granted for Arenson, and he was awarded attorney’s fees as a prevailing party (*Arenson v. Southern University Law Center*, 43 F.3d 194 (5th Cir.), decision clarified on rehearing, 53 F.3d 80 (5th Cir. 1995)).

However, the fact that a black institution may attempt to recruit black faculty or emphasizes the role model theory is not necessarily dispositive. In *Dybczak v. Tuskegee Institute*, 737 F.2d 1524 (11th Cir. 1984), the only white academic administrator was returned to the faculty when the institute refused to agree to his demands for additional salary and a sabbatical leave. Although Professor Dybczak alleged that his return to the faculty was racially motivated, a jury found that the plaintiff's replacement, a black professor of aerospace science, was better qualified and that the plaintiff was neither discharged nor discriminated against. The appellate court found the jury's verdict supported by evidence and affirmed the verdict for the institute.

Some faculty challenging tenure or promotion denials under theories of race discrimination have claimed that bias on the part of *students*, rather than faculty or administrators, has infected the review process. This issue typically arises when a faculty member is denied promotion or tenure on the grounds of low student course evaluation scores. In these cases, the faculty member asserts that the course evaluation results are infected with students' racial bias, and thus should not be relied upon by either the college or the court. Absent some compelling evidence of student bias, however, these claims have been unsuccessful. (See, for example, *Bickerstaff v. Vassar College*, 992 F. Supp. 372 (S.D.N.Y. 1998).)

A federal trial court addressed the issue of whether a personality characteristic, alleged to be linked to an individual's national origin, can be a source of discrimination. In *Javetz v. Board of Control, Grand Valley State University*, 903 F. Supp. 1181 (W.D. Mich. 1995), a faculty member who was a native of Israel was notified that her contract would not be renewed and that she would not be evaluated for tenure. She sued the institution, alleging discrimination on the basis of national origin, religion, and gender. Among other claims, she asserted that she was discriminated against because of her personality. She argued that Israelis are "opinionated and direct," and that these are immutable characteristics and thus an inherent part of her national origin. To the extent that her colleagues and students perceived her as "confrontational, demanding, [and] difficult" (a few of the reasons given for her nonrenewal), she attributed this to her national origin and argued that negative reactions to her personality were national origin discrimination. The court refused to accept this characterization, adding that "the law does not prohibit discrimination in the workplace based on conduct that interferes with the performance of job responsibilities" (903 F. Supp. at 1190).

**6.4.3.2. Sex discrimination.** The largest number of discrimination lawsuits filed by faculty against colleges and universities have involved allegations of sex discrimination. Between 1972 and 1984, women filed more than half of all academic discrimination claims that resulted in decisions on the merits (George LaNoue & Barbara Lee, *Academics in Court: The Consequences of Faculty Discrimination Litigation* (University of Michigan Press, 1987), 35–36). Given the underrepresentation of women among college faculty in general (although not as severe as the underrepresentation of racial and ethnic minority faculty), and particularly at the tenured ranks, the perception that women have not been treated on equal terms with male faculty is not surprising (see

“Inequities Persist for Women and Non-Tenure-Track Faculty: The Annual Report on the Economic Status of the Profession 2004–05,” *Academe*, March–April 2005, 19–98).<sup>7</sup>

Women faculty focused a spotlight on the problem of sex discrimination in academe with the release by the Massachusetts Institute of Technology (MIT) of a report stating that women professors in science disciplines were treated less favorably than their male counterparts (Carey Goldberg, “MIT Acknowledges Bias Against Female Professors,” *New York Times*, March 23, 1999, pp. A1, A16). That report stimulated similar studies at other research universities around the country, and an examination of a wide variety of issues such as teaching assignments, workloads, office and laboratory space, and travel funds.

Sex discrimination claims have ranged from claims by individual women that a department or college applied higher standards to her than to comparable male faculty (*Namenwirth v. Regents of the University of Wisconsin*, 769 F.2d 1235 (7th Cir. 1985)) to class actions alleging that an entire institution’s system of recruiting, hiring, and promoting faculty was infected with sex bias (*Lamphere v. Brown University*, 491 F. Supp. 232 (D.R.I. 1980), *affirmed*, 685 F.2d 743 (1st Cir. 1982)). In the *Lamphere* case, Brown University entered a consent decree containing guidelines on how faculty would be recruited and evaluated for hiring, promotion, and tenure. During the fourteen years that the consent decree was in effect, Brown increased the number of tenured women faculty from 12 to 67, and the number of female faculty members overall from 52 to 128 (A. De Palma, “Rare in Ivy League: Women Who Work as Full Professors,” *New York Times*, January 24, 1993, at 1, 23). The University of Minnesota entered a similar consent decree after settling a class action sex discrimination case (*Rajender v. University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982), 563 F. Supp. 401 (D. Minn. 1983)).

Most sex discrimination lawsuits, however, involve a single plaintiff who argues that she was given less favorable treatment than comparable males. For example, in *Namenwirth v. Board of Regents of the University of Wisconsin*, 769 F.2d 1235 (7th Cir. 1985), an assistant professor of zoology, the first woman to be hired in a tenure-track position in the department in thirty-five years, challenged her tenure denial by arguing that her department colleagues had treated her less favorably than a male colleague with a very similar publication record. Despite the plaintiff’s demonstration that more stringent standards were applied to her performance than to the comparable male faculty member, the court deferred to the department’s judgment that Namenwirth showed “insufficient promise” to be granted tenure.

Women who have challenged the fairness of peer judgments have generally not been successful in court; between 1972 and 1984, only about one-fifth of individual women who claimed sex discrimination prevailed on the merits

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<sup>7</sup>According to an AAUP survey conducted in academic year 2003–04, 23 percent of the full professors in U.S. colleges and universities, 38 percent of the associate professors, and 46 percent of the assistant professors were women. “Faculty Salary and Faculty Distribution Fact Sheet 2003–04,” available at <http://www.aaup.org/research/sal&distribution.htm>.

(see LaNoue & Lee (cited above), 31). However, women who could demonstrate actual gender bias in employment decisions (such as the sexist language used in *Brown v. Trustees of Boston University*, discussed in Section 6.3.2) or a clearly different *objective* standard for men and women (such as in *Kunda v. Muhlenberg College*, also discussed in Section 6.4.2) have prevailed in their discrimination claims.

Cases involving claims of alleged sex discrimination in salary decisions are discussed in Section 6.4.4.

**6.4.3.3. Disability discrimination.** Most claims of disability discrimination by faculty involve allegations that the college has refused to accommodate the faculty member's physical or mental disorder. As with disability discrimination claims generally, most faculty claims of disability discrimination are unsuccessful because of the difficulty faced by all plaintiffs in meeting the Americans With Disabilities Act's (ADA) definition of disability (discussed in Section 5.2.5).

Very few ADA cases involving faculty have reached the federal appellate courts, but one such case is instructive. In *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998), the university terminated the tenure of a professor of photography, who then claimed that the termination was linked to a psychiatric disorder that he suffered. Although Newberry's behavior had been erratic and "noncollegial," and although his department peers recommended against it, the university had granted him tenure. After several incidents of problematic behavior over several years, the dean suggested that Newberry obtain counseling. The problematic behavior continued, and the dean warned Newberry that, if he did not behave more "professionally" toward his colleagues, he would be dismissed. When Newberry requested a year of disability leave, the university requested documentation of the disability, which Newberry then did not provide. The administration subsequently recommended his dismissal and, even though a faculty committee issued an advisory recommendation against this action, the president upheld Newberry's dismissal.

At trial, Newberry presented evidence that he suffered from obsessive-compulsive disorder and had been treated for that condition for several years. A jury found that Newberry was not a qualified individual with a disability for ADA purposes, and he subsequently appealed the verdict. Because there had been no testimony by any university employee that they regarded Newberry as disabled, the court affirmed the jury's verdict.

This ruling is important because it distinguishes between unprofessional behavior which, if serious enough, can sustain the termination of a tenured faculty member, and the perception that an individual who engages in problematic behavior suffers from a psychiatric disorder. The court made it clear that, particularly if the university is unaware that the individual has a psychiatric disorder, it may discipline or terminate the individual even if the misconduct is a product of the disorder.

If a faculty member's behavior interferes with the efficient operation of the institution, discharge may be upheld even if the behavior is a result of the disability. For example, in *Motzkin v. Trustees of Boston University*, 938 F. Supp. 983

(D. Mass. 1996), an untenured professor of philosophy was terminated after being found guilty by a faculty committee of sexually harassing several students and a faculty colleague. Motzkin challenged the termination, stating that he had a “depressive disorder” that caused the misconduct. The court ruled that, because teaching and interactions with students and faculty colleagues were an essential function of Motzkin’s job as a professor, he was not qualified, and thus was not protected by the ADA. The court also noted that the university was not aware of Motzkin’s disorder when it terminated him.

But in *Nedder v. Rivier College*, 908 F. Supp. 66 (D.N.H. 1995), 944 F. Supp. 111 (D.N.H. 1996), a federal trial court was more sympathetic to a faculty member’s claim of disability discrimination. An untenured faculty member whose obesity made walking difficult was criticized by college officials and was denied reappointment. The court rejected the plaintiff’s claim that her obesity constituted a disability because the court did not regard the difficulty she encountered in walking as a substantial limitation. But the court refused to grant summary judgment on the issue of whether college officials perceived Professor Nedder as disabled. A jury concluded that the college had regarded her as disabled, primarily because her supervisors had made critical comments characterizing her as a negative role model for students because of her obesity. The court ordered the college to reinstate Nedder to her faculty position, and awarded her \$137,500 in compensatory damages.

In *Nedder*, unlike *Newberry* and *Motzkin*, there was testimony concerning critical remarks about the plaintiff’s condition and negative stereotyping of the plaintiff. In cases in which a plaintiff attempts to demonstrate that he or she is regarded as disabled by an employer, the employer’s own words and actions may be used to demonstrate an improper motive on the employer’s part. The *Nedder* case provides an interesting and useful reminder of this fact.

For faculty and administrators who desire guidance on the type of issue presented in *Newberry*—employee disclosures of psychiatric disorders—the EEOC has issued “Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities” (March 25, 1997), which is available on the EEOC’s Web site at <http://www.eeoc.gov>. These guidelines describe the type of psychiatric disorders that may be protected by the ADA, discuss the circumstances under which an employer may seek information from an individual about a possible psychiatric disability, discuss the application of “reasonable accommodation” to psychiatric disabilities, examine the relationship between workplace misconduct and psychiatric disabilities, and review the “direct threat” standard in the context of psychiatric disabilities. (For a discussion of employers’ obligations under the ADA to employees with psychiatric disorders, see Barbara A. Lee & Peter H. Ruger, *Accommodating Faculty and Staff with Psychiatric Disorders* (National Association of College and University Attorneys, 2003).)

**6.4.3.4. Age discrimination.** College faculty alleging age discrimination have directed their complaints at two major areas: discrimination with regard to pensions or other retirement benefits, and salary discrimination. An additional issue with both legal and policy ramifications for institutions of higher education is the “uncapping” of the mandatory age-seventy retirement provision in the Age Discrimination in Employment Act (ADEA) (see Section 5.2.6).



The elimination of mandatory retirement means that colleges and universities may divest themselves of older faculty in one of two ways: entice them to retire, usually by providing financial incentives, or dismiss them for cause. Legal issues related to dismissing tenured faculty for cause are discussed in Section 6.7.2; such action would require extensive documentation of performance or discipline problems. (For an analysis of this issue, see A. Morris, *Dismissal of Tenured Higher Education Faculty: Legal Implications of the Elimination of Mandatory Retirement* (National Organization on Legal Problems of Education, 1992). See also N. DiGiovanni, Jr., *Age Discrimination: An Administrator's Guide* (College and University Personnel Association, 1989).)

Others have questioned whether, in light of the elimination of mandatory retirement, colleges and universities should consider alternatives to tenure. (For discussion of potential alternatives to tenure for older faculty, see O. Ruebhausen, "The Age Discrimination in Employment Act Amendments of 1986: Implications for Tenure and Retirement," 14 *J. Coll. & Univ. Law* 561 (1988); and a rejoinder, M. Finkin, "Tenure After an Uncapped ADEA: A Different View," 15 *J. Coll. & Univ. Law* 43 (1988). For an analysis of the impact of uncapping on college staffing policies and practices, see Ronald G. Ehrenberg, "The Survey of Changes in Faculty Retirement Policies" (2001), conducted by Professor Ehrenberg for the American Association of University Professors, and available on its Web site at <http://www.aaup.org/retrpt.htm>.) A study comparing retirement patterns of faculty before and after the 1994 expiration of the faculty exemption concluded that retirement rates for faculty age seventy and over fell substantially after 1994 (Orley Ashenfelter & David Card, "Did the Elimination of Mandatory Retirement Affect Faculty Retirement?" 92 *American Economic Review* 957 (2002)).

**6.4.4. Challenges to salary decisions.** The Equal Pay Act (see Section 5.2.2 of this book) forbids gender-based salary discrimination, and Title VII protects individuals from salary discrimination on the basis of gender, race, religion, national origin, and color. The Age Discrimination in Employment Act prohibits employers from treating older workers less favorably with respect to compensation. Most salary discrimination claims brought by faculty involve charges of either age or sex discrimination.

Individual faculty have challenged salary decisions under the ADEA, asserting that their institution favored younger faculty by paying newly hired faculty a higher salary than that of older faculty hired years earlier. In *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991), two business school professors who were the oldest and the lowest-paid faculty in the college alleged both disparate impact and disparate treatment discrimination in the university's salary practices. Their disparate impact claim was based on the business school's practice of basing the salary of incoming faculty on market factors and research productivity, since the school was seeking accreditation of its business school. The trial judge ordered a directed verdict for the university on the ground that, although the market-rate salary practice did exclude older faculty, the university made market-based salary adjustments for older faculty and each plaintiff had received one. The appellate court affirmed that portion of the

ruling, holding that market-linked pay for new hires is a legitimate business reason for paying younger faculty more than older faculty.

With regard to the plaintiffs' claim of disparate treatment, the trial judge found that comparator faculty who were younger and more highly paid had more skills and different disciplines; furthermore, the plaintiffs had done little significant research and had few publications. There was some question, however, about the way in which salary decisions were made, so the appellate court affirmed the trial judge's order for a new trial.

The U.S. Court of Appeals for the Seventh Circuit was presented with a similar claim in *Davidson v. Board of Governors of State Colleges and Universities*, 920 F.2d 441 (7th Cir. 1990). A professor of business hired at age fifty-eight challenged a provision in the collective bargaining agreement that permitted the institution to give a salary adjustment to any faculty member who could present a bona fide offer of employment from another institution. Although Judge Posner, writing for a unanimous panel, agreed that salary practices that relied on market forces had a disparate impact on older faculty members, he noted that comparable worth is not required by the civil rights laws, and that the market is a neutral criterion on which to base salary determinations. Posner observed that the market alternatives of faculty who have been at an institution for a long time are "relatively poor and they fare relatively badly under any market-based compensation scheme, regardless of age" (920 F.2d at 446).

*MacPherson* and *Davidson* illustrate the difficult problem of salary compression faced by many institutions, and the potential for age discrimination allegations if salary decisions are not clearly based on factors unrelated to age. For example, merit pay systems have been challenged as discriminatory, and the criteria for decisions must relate closely to the institution's need for productive faculty. (For an example of a merit pay system that survived judicial scrutiny when sex discrimination was alleged, see *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988).)

A survey conducted during the 2004–05 academic year shows that nationally, women faculty at the same rank as male faculty earn less than their male peers. According to the survey results, women full professors earned 91 percent of what male full professors earned, women associate professors earned 94 percent of what their male counterparts earned, and women assistant professors earned 93 percent of male assistant professors' pay ("Inequities Persist for Women and Non-Tenure Track Faculty: The Annual Report on the Economic Status of the Profession," *Academe*, March–April 2005, 19–98). While some experts believe that rank and number of years since the doctorate are the strongest predictors of salary differences, others argue that rank may be a "tainted variable" if women or racial minorities are promoted more slowly than their male counterparts. And apart from these arguments, there is evidence that salaries are lower for faculty in predominantly female disciplines, such as nursing and social work (a potential equal pay issue).

An extreme example of the debate over the appropriate criteria to use in making salary equity comparisons occurred in *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983), *reversed and remanded*, 797 F.2d 1478 (2d Cir. 1986),

on remand, 656 F. Supp. 587 (S.D.N.Y. 1987), *reversed and remanded*, 839 F.2d 18 (2d Cir. 1988). In this class action, a female medical school professor alleged that salaries of women faculty were significantly lower than salaries of male faculty, using multiple regression analysis to isolate the effect of certain variables on salary levels. Although a trial judge twice found the plaintiff's statistical evidence to be inadequate, the appellate court remanded and ordered that the court apply the standard developed by the U.S. Supreme Court in *Bazemore v. Friday*, 478 U.S. 385 (1986). In *Bazemore*, the Court had ruled that plaintiffs could rely in their statistical analyses on pre-Title VII enactment salary data if they could show that such data influenced post-Title VII actions (or inaction) by the employer. (For analysis of the problems involved in demonstrating salary discrimination through the use of statistics, see J. McKeown, "Statistics for Wage Discrimination Cases: Why the Statistical Models Used Cannot Prove or Disprove Sex Discrimination," 67 *Ind. L.J.* 633 (1992); and T. Campbell, "Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet," 36 *Stan. L. Rev.* 1299 (1984). For an analysis of the comparable worth doctrine in general, see "Symposium: Comparable Worth," 20 *J.L. Reform* 1 (1986).)

Classwide salary discrimination cases have been brought by faculty at the University of Washington, Virginia Commonwealth University, the University of Rhode Island, Kent State University, the University of Minnesota, and Illinois State University, among others (see Donna R. Euben, "Show Me the Money: Pay Equity in the Academy," *Academe*, July–August 2001, 30–36). Not all of the cases were brought by women faculty, however; the Virginia Commonwealth and Minnesota cases were brought by men who challenged salary adjustments given only to women whose salaries were found to be lower than those of comparable male faculty.

The cases differ in reasoning and outcome, since the defendant colleges have widely varying salary practices. For example, when women faculty sued the University of Rhode Island, claiming that its system of grouping similar disciplines in salary tiers discriminated against women, who were clustered in the lower-paid tiers, the court ruled for the university. In *Donnelley v. Rhode Island Board of Governors for Higher Education*, 110 F.3d 2 (1st Cir. 1997), the court found that "the professors' choice of academic field and the workings of the national market," not the university's salary structure, were the reasons for pay differences between men and women (110 F.3d at 5). And five women professors of dentistry suing the University of Washington were unable to persuade the court to grant them class certification because the women presented evidence of intentional salary discrimination only within the School of Dentistry, not the university as a whole (*Oda et al. v. State of Washington*, 44 P.3d 8 (Ct. App. Wash. 2002)). Women faculty at Kent State University and Eastern Michigan University, however, received classwide salary settlements as a result of salary discrimination litigation (both settlements are discussed in the Euben article, cited above).

Two cases of "reverse discrimination" resulted in victories for male faculty who challenged gender-based salary adjustments as violations of Title VII. In

*Maitland v. University of Minnesota*, 155 F.3d 1013 (8th Cir. 1998), a male professor, Ian Maitland, challenged the university's decision to distribute \$3 million in salary increases to women faculty who could demonstrate that they were underpaid relative to men. (The special salary increases were a result of the *Rajender* settlement, discussed briefly in Section 6.4.2.2.) Although the trial court had ruled in the university's favor, the appellate court reversed, ruling that the statistical studies used by the women faculty and the university's own study were both flawed, and their conclusions concerning the seriousness of the salary gap did not agree.

In *Smith v. Virginia Commonwealth University*, 84 F.3d 672 (4th Cir. 1996), five male faculty members challenged the university's decision to distribute \$440,000 in salary increases to women faculty whom a salary study had found were underpaid relative to similar male faculty. Although the trial court had ruled for the university, the appellate court reversed, criticizing the statistical study on which the decision had been based because it did not take into account the quality of the faculty members' performance or the fact that some of the male faculty had previously held administrative positions, which had inflated their subsequent faculty salaries. Although the appellate court remanded the case for trial, the university settled with the faculty plaintiffs.

Individual women faculty have achieved some success in equal pay claims. In *Siler-Khodr v. University of Texas Health Science Center San Antonio*, 261 F.3d 542 (5th Cir. 2002), a federal appellate court affirmed a jury verdict awarding nearly \$100,000 in back pay to a female professor of obstetrics and gynecology whom a jury found was paid \$20,000 per year less than a male colleague with the same academic qualifications and job responsibilities. The plaintiff had introduced two statistical reports that found that women faculty throughout the university were paid less than similar male faculty. The defendant university did not provide expert testimony to rebut the plaintiffs' reports. In addition to the back pay award, the judge ordered the university to raise the plaintiff's pay to the amount paid her male counterpart.

In *Lavin-McEleney v. Marist College*, 239 F.3d 476 (2d Cir. 2001), the plaintiff, a professor of criminal justice, sued the college under the Equal Pay Act. Her expert produced a statistical analysis demonstrating that the plaintiff was paid less than comparable male faculty in her division. Although the college provided evidence that the salary difference was linked to market factors (women faculty tended to cluster in lower-paying disciplines) rather than to gender, the jury returned a verdict for the plaintiff. The college appealed, criticizing the statistical analysis and arguing that it was based on a "composite" male comparator rather than an actual individual. The court disagreed, ruling that, although an actual comparator male faculty member used by the plaintiff was in a different department, he was in the same division, and the differences between the two disciplines were unrelated to salary.

In light of the attention generated by the MIT study of gender inequity, and the level of litigation activity with respect to gender equity in salary, colleges should carefully consider the implications of salary surveys and how they will respond to either individuals or to groups of faculty—of either gender—who

believe that their compensation is below that of genuinely comparable faculty of the opposite gender. Regular evaluations of faculty performance linked to relevant criteria (such as the quality of teaching, publishing, and service), and salary decisions tied to those evaluations, should help institutions practice both good performance management and lawful salary-setting practices. Institutions that allow administrators to make salary increase decisions without clear criteria and without explicit links to performance risk the outcome of *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), in which a federal appellate court considered whether the law school's associate dean at Texas Southern University, an historically black institution, had discriminated against three white law professors in determining their salaries over a period of several years. Using African American faculty of the same seniority and rank as comparators, the plaintiff professors had claimed that the approximately \$3,000 average gap between the salaries of white faculty and African American faculty was due to race discrimination. The court upheld the jury verdict and trial court judgment that the associate dean's actions violated Section 1981 (see Section 5.2.4).

**6.4.5. Other workplace issues.** The end of mandatory retirement for college faculty appears to have stimulated litigation over changes in work assignments for older faculty. For example, in *Boise v. Boufford*, 127 F. Supp. 2d 467 (S.D.N.Y. 2001), *affirmed in part and vacated in part*, 42 Fed. Appx. 496 (2d Cir. 2002) (unpublished), a seventy-two-year-old professor of public administration claimed that actions by the dean of the School of Public Service to reduce his teaching assignments and to assign him to develop new courses under the direction of a less experienced professor of lower rank constituted discrimination. He also claimed that these actions constituted “indentured [sic] servitude, involuntary service, maladministration, administrative malpractice, and hostile work environment.” The appellate court affirmed the trial court's dismissal of the latter claims, but refused to dismiss the age, disability, gender, and race discrimination claims, finding that the allegations were sufficient to establish a *prima facie* case of discrimination. (The complaint was later dismissed at 2003 U.S. Dist. LEXIS 18639 (S.D.N.Y. October 21, 2003).)

However, the outcome was different for a sixty-two-year-old professor of psychology. The plaintiff had not published for several years nor supervised a dissertation for nearly a decade, and was reassigned from graduate teaching to undergraduate courses by the graduate director. The plaintiff filed an age discrimination claim. In *Curley v. St. John's University*, 19 F. Supp. 2d 181 (S.D.N.Y. 1998), the graduate director and dean had received complaints from graduate students about the poor quality of the plaintiff's teaching. The graduate director had made negative age-related comments about the plaintiff in the past, and the court ruled that these were sufficient to allow the case to proceed to trial; the university's motion for summary judgment was denied.

In a case with facts similar to those in *Curley*, but no evidence of age-related remarks by administrators, the plaintiff did not withstand the college's motion for summary judgment. In *Tuttle v. Brandeis University*, 2002 Mass. Super. LEXIS 7 (Mass. Super. 2002), a chemistry professor of thirty-four years' tenure at

the university who had received poor student course evaluations was given no salary increase that year, and was assigned to develop new interdisciplinary courses. When the plaintiff responded by refusing to participate in administering Ph.D. examinations, his salary was reduced by \$500 the following year. When the plaintiff refused to develop the new interdisciplinary course, the university reduced his salary by 30 percent. A faculty committee reviewed the administration's decision to invoke the salary reduction, but split into majority and minority groups. The salary reduction was done, and the plaintiff sued under state law for age discrimination, retaliation, and breach of contract. The court entered summary judgment for the university, ruling that there was no evidence that either the new work assignment or the salary reduction were based upon his age.

### ***Sec. 6.5. Affirmative Action in Faculty Employment Decisions***

As discussed in Section 5.4, affirmative action in employment has had a volatile history, and that history is still being written. The principles of affirmative action, the legal justifications and criticisms, and judicial reaction to affirmative action in employment are discussed in Section 5.4. The rulings of the U.S. Supreme Court in two college admissions cases involving affirmative action, *Gratz v. Bollinger* and *Grutter v. Bollinger*, are discussed in Section 8.2.5.

Race- or gender-conscious faculty hiring or promotion decisions are equally controversial, if not more so, because of the relative scarcity of faculty positions and the intense competition for them. Challenges to such hiring or promotion decisions tend to be brought under federal or state employment discrimination laws by a white plaintiff who alleges “reverse discrimination,” a claim that the college improperly used race, gender, or some other protected characteristic to make the employment decision. (For a discussion of nondiscrimination law as applied to faculty, see Section 6.4.)

Affirmative action for remedial purposes requires the college to prove a history of racial segregation or other racial discrimination. Even for those colleges in states where segregation was practiced prior to the Civil Rights Act of 1964, showing the present effects of past discrimination may be difficult (see, for example, the *Podberesky* case, discussed in Section 8.3.4). For public institutions in states where a history of *de jure* segregation of public higher education has not been documented or addressed, however, establishing prior discrimination in the employment of faculty may be even more difficult. Similar difficulties may arise in attempting to ascertain the present effects of prior gender discrimination.

Given the outcomes in *Weber*, *Wygant*, and related cases (discussed in Section 5.4), both public and private institutions should analyze carefully the effect of their affirmative action plans on existing and prospective majority faculty members to ensure that racial or gender preferences are not implemented in a way that would “unnecessarily trammel” their interests (under Title VII) or fail the strict scrutiny test (under the federal equal protection clause). Two of the factors relied on in *Weber*—that the plan did not require the discharge of any white workers and that the plan was temporary—appear to be easily

transferable to and easily met in the context of postsecondary faculty hiring. But the third factor—that the plan did not “create an absolute bar to the advancement of white employees”—bears careful watching in postsecondary education. The special training programs at issue in *Weber* benefited both black and white employees. Thirteen workers were selected, seven black and six white. At postsecondary institutions, however, faculty vacancies or special opportunities such as department chairmanships generally occur one at a time and on an irregular basis. A decision that a particular opening will be filled by a minority (or a woman) may, in effect, serve as a complete bar to whites (or men), especially in a small department where there is little turnover and where the date of the next opening cannot be predicted. Institutions that use race or gender only as a “plus” factor, rather than targeting specific positions for a particular race or gender, may be able to satisfy the *Weber* test more successfully (see the *Johnson* case in Section 5.4.2). Public institutions, however, must still satisfy the requirements of the equal protection clause. The rulings of the U.S. Supreme Court in *Gratz v. Bollinger* and *Grutter v. Bollinger* (2003) suggest that using race or gender as one nondecisive criterion among others used to make a hiring or promotion decision may pass equal protection clause scrutiny (and Title VII scrutiny as well). The success of such arguments will depend on whether the courts accept a diversity rationale as a basis for affirmative action in employment (see Section 5.4.3).

The U.S. Supreme Court has not yet ruled on a case in which a college or university used race-conscious provisions in an affirmative action plan to make a faculty employment decision. A federal appellate court, however, addressed this issue. In *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), Valentine, a disappointed white job applicant, challenged an affirmative action plan in place at Arkansas State University (ASU) under the equal protection clause. ASU had an affirmative action program for faculty hiring that was implemented as part of a court-ordered desegregation plan for the Arkansas state college and university system. The court found the affirmative action plan to have relied upon appropriate governmental findings of prior *de jure* segregation, and ruled that the use of race as a hiring criterion was lawful.

Although *Valentine*, unlike *Weber*, is an equal protection case, the court’s equal protection analysis of affirmative action plans is similar to the *Weber* and *Johnson* Title VII analyses, and does not apply the strict scrutiny test later mandated by *Croson*. The court’s opinion focuses, for example, on the existence of racial imbalance in the relevant job categories, on the temporary character of the affirmative action plan, and on the absence of “unnecessary trammeling” on white employees’ interests—the same factors emphasized in *Weber*. The court’s failure to apply the strict scrutiny test, used subsequently by the Supreme Court in *Wygant*, *Croson*, *Adarand*, *Gratz*, and *Grutter*, suggests that it is unlikely that the analysis used in *Valentine* meets equal protection clause standards, although the outcome of the case might have been the same because of the remedial nature of the affirmative action plan.

Once findings of the institution’s historical discrimination and its present effects are made, a public college or university apparently has much the same

authority as a private institution to implement a remedial affirmative action plan.<sup>8</sup> One difference is that *Weber* allows private employers to use explicit quotas under Title VII, while the equal protection clause, applicable to public employers, prohibits the use of explicit quotas (see *Bakke*, *Croson*, *Adarand*, *Grutter*, and *Gratz*).

An unusual lawsuit against the City University of New York (CUNY) suggests that administrators should consider carefully the implications of including certain ethnic groups (beyond the traditional categories of African American, Asian, Hispanic, and Native American) in affirmative action plans. In *Scelsa v. City University of New York*, 806 F. Supp. 1126 (S.D.N.Y. 1992), *affirmed* 76 F.3d 37 (2d Cir. 1996), an Italian American professor challenged a decision by CUNY to transfer the Calendra Italian American Institute from Manhattan to Staten Island and to reassign its director of nearly twenty years to other administrative responsibilities. Scelsa, the director, sued the university under Title VI of the Civil Rights Act (see Section 13.5.2) as well as under Title VII and the equal protection clause. He asserted that the university's affirmative action plan, developed nearly two decades earlier, had designated Italian Americans an underrepresented group among its faculty and staff, but the university had done little to correct that underrepresentation. The plaintiffs sought a preliminary injunction to halt the transfer of the institute and its director, which the judge granted, citing evidence of underrepresentation of Italian Americans among CUNY's faculty and staff and the evident failure of the university to follow its voluntarily adopted affirmative action plan.

Three other "reverse discrimination" cases demonstrate the continuing struggles of courts to reconcile the equal opportunity laws with universities' concern for diversity. The most thoughtful discussion of the issue occurs in *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999). In *Hill*, the psychology department at the University of Wisconsin at Whitewater had selected a male candidate for a tenure-track position. The dean rejected the department's recommendation, stating that the department was required to hire a woman because there were fewer women faculty in the department than their proportion among holders of doctoral degrees in psychology. Hill, the male candidate who was not hired, filed a sex discrimination claim against the dean and the university under both Title VII and the equal protection clause. The university defended its actions on the basis of its affirmative action plan, and the trial court awarded summary judgment to the university. The appellate court reversed.

The appellate court reviewed U.S. Supreme Court affirmative action cases, including *Wygant* and *Johnson*. Those cases, the court said, concluded that race or gender could be used "only as factors in a more complex calculus, not as independently dispositive criteria" (183 F.3d at 588). The dean had used gender as the "sole basis" for the hiring decision, and did not discuss Hill's qualifications

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<sup>8</sup>See, for example, *Palmer v. District Board of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984) (judicial and federal agency findings of prior *de jure* segregation justified race-conscious hiring by the university). See also *Enright v. California State University*, 57 Fair Empl. Prac. Cases 56 (E.D. Cal. 1989) (university's actions complied with *Weber* test). Both cases were brought under Title VII.



nor the department's recommendation in his memo rejecting Hill's candidacy. Nor did the dean use the department's apparent failure to follow the recruitment process required by the university's affirmative action plan as justification for rejecting Hill. A jury could conclude, said the court, that the dean had created a quota system for hiring in the psychology department.

Citing the U.S. Supreme Court's opinion in *United States v. Commonwealth of Virginia* (see Section 8.2.4.2 of this book), the court said that any preference for a particular sex must be "exceedingly persuasive." And even if the plaintiff had the burden to demonstrate that the affirmative action plan was unconstitutional (as *Wygant* and *Johnson* had established), the court suggested that this burden may no longer exist after *Adarand*. Moreover, Hill had proven that the dean's reliance on the plan was pretextual. The plan's own terms did not support the dean's decision, said the court, and because the university denied having engaged in prior discrimination, it could not justify the plan as a remedial strategy. The court then embarked on a lengthy discussion of how women (or some other group) could be "underrepresented" in a small department as a result of chance rather than as a result of discrimination. Furthermore, said the court, the university had not provided institution-wide data, so it could not demonstrate systemic exclusion of women from faculty positions (a showing that might have justified gender-conscious hiring as a remedy, such as in *Johnson*). The court concluded that "a plan to have every department duplicate the pool from which it is drawn cannot be sustained as a valid affirmative action plan" (183 F.3d at 592), and remanded the case for trial.<sup>9</sup>

In *Stern v. Trustees of Columbia University*, 131 F.3d 305 (2d Cir. 1997), the court vacated the trial court's grant of summary judgment for the university in a "reverse" national origin discrimination case. Professor Stern, a white male, had served as acting director of the Spanish Language program. The university decided to appoint a full-time director. Following the requirements of its affirmative action plan, and despite the department's strong preference that Stern be given the full-time position, the university initiated a national search for applicants. The vice president for arts and sciences appointed an interdepartmental search committee, most of whom did not speak, read, or write Spanish. Stern was among three finalists for the position. The other candidates were a white woman and a Latino male, Augustus Puelo. After conducting interviews and observing each of the candidates teaching a "model" class, the search committee recommended that Puelo be given the position on the strength of his superior teaching. Stern was the only candidate who held a doctorate, the only candidate who had extensive publications and teaching experience, and the only candidate who could teach Portuguese, a language that the department needed additional faculty to teach. Stern then sued the university for national origin discrimination under Title VII.

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<sup>9</sup>The reasoning of this case, and the Supreme Court's opinions in *Gratz* and *Grutter*, suggest that the analysis used in *Enright v. California State University*, 57 Fair Empl. Prac. Cases 56 (E.D. Cal. 1989) may be insufficient to satisfy equal protection clause requirements (manifest imbalance between the proportion of women in the population and the proportion of women with Ph.D.s in sociology rendered the sociology profession a "traditionally segregated" field, justifying gender-conscious hiring by a public university).

The trial court granted the university's motion for summary judgment, stating that Stern had not provided sufficient evidence to rebut the university's contention that Puelo had administrative and teaching skills that were superior to Stern's. The appellate court vacated that judgment, ruling that the trial court had given insufficient weight to Stern's assertions that the vice president had predetermined the outcome of the search, and that members of the search committee had stated that Stern would not be given serious consideration for the job. Stern had also offered evidence of the preference of several search committee members for a Latino director. The court ruled that Stern's case should go to trial.

A dissenting judge objected to the majority's "improper" substitution of its own judgment for that of the university, citing *Fisher v. Vassar College* (Section 6.4.2). Despite Stern's allegedly superior qualifications, said the dissenting judge, the university had the right to make the hiring decision based on the faculty's reaction to the candidates' teaching prowess; the determination of which qualifications were more important rested with the university, said the judge, not with the court.

In contrast to *Stern* and *Hill*, the Nevada Supreme Court was more deferential to the judgment of a university with respect to an allegation of "reverse discrimination." The reasoning used by that court was closer to the reasoning of *Grutter*, particularly in its reliance on *Bakke*, than the decisions discussed above. In *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), the state's highest court reversed a state trial court's ruling that the University of Nevada, Reno impermissibly used racial criteria to hire a black male for a faculty position in the sociology department. The university had instituted a "minority bonus policy" because of its concern that only 1 percent of its faculty were black and 25 percent were women. The policy allowed a department to hire an additional faculty member if it first hired a candidate from a racial minority group.

The department of sociology had a vacant faculty position in 1990 and instituted a national search. Farmer, a white female, and Makoba, a black male, were two of the three finalists. The department sought permission to interview only Makoba, the candidate ranked most qualified by the department. The university agreed, and Makoba was hired at a salary of \$35,000, which would increase to \$40,000 when he completed his dissertation. This salary exceeded the published salary range in the position description. One year later, Farmer was hired by the same department at a starting salary of \$31,000, and a \$2,000 increase upon completion of her dissertation.

Farmer subsequently sued the university, challenging its affirmative action plan and its "minority bonus policy" as both unconstitutional and as contrary to Title VII's proscription of race and gender discrimination. The trial court entered judgment for Farmer in the amount of \$40,000. On appeal, the Nevada Supreme Court reversed the trial court. Citing *Bakke* (see Section 8.2.5), the court noted that Makoba had been selected not only because of his race, but because he was well qualified for the position by virtue of his publications, teaching experience, and his area of specialization. The court said: "We also

view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court” (930 P.2d at 735). The university’s affirmative action plan complied with the *Weber* factors, said the court, and even passed the strict scrutiny test:

The University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University’s white enclave and further limits student exposure to multicultural diversity. Moreover, the minority bonus policy is narrowly tailored to accelerate racial and gender diversity [930 P.2d at 735].

Thus the plan passed constitutional muster, and, since the court determined the qualifications of the candidates to be equivalent (although the university had concluded that Makoba was slightly better qualified), “the University must be given the latitude to make its own employment decisions provided that they are not discriminatory” (930 P.2d at 735).

Farmer had also asserted an Equal Pay Act claim. The court rejected it as well, since the higher salary was necessary to attract Makoba who, as a scarce resource in the labor market, could command a higher salary. The university had paid higher salaries to women in disciplines in which they were underrepresented (such as chemistry), so it was able to persuade the court that the salary differential was a result of market forces, not discrimination.

The Supreme Court’s ruling in *Grutter* established that student body diversity is a compelling interest for public colleges and universities. Although it remains to be seen how directly subsequent courts will apply *Grutter* to affirmative action in employment (rather than in admissions), it appears that colleges could make the argument that diversity of faculty is as important to “educational diversity” as the diversity of the student body. The opinion in *Farmer* suggests that such an argument could comply with *Grutter* if the protected characteristic (race, gender) were not the sole reason for the hiring or promotion decision, but only one factor among others used after determining that the individual was well qualified for the position and that there was a “manifest imbalance” that needed to be addressed. Although the Court in *Grutter* did not explicitly apply the *Weber* test to the admissions decisions at the University of Michigan Law School, it stated that narrow tailoring (a required element of strict scrutiny under the equal protection clause) requires that there be no “undue harm” to nonminorities, and that the affirmative action plan be limited in time—two of the *Weber* criteria. *Grutter* also exhibits deference to the decisions of academic institutions, citing *Sweezy* (see Section 7.1.4) regarding the academic freedom of institutions to select their own students. That case also discusses the selection of “who may teach” as an element of an institution’s academic freedom, suggesting that the rationale of *Grutter* could also be applied to academic employment decisions.

Although *Grutter* did not address employment at all, its declaration that diversity in an educational institution is a compelling state interest, and its

reaffirmance of the vitality of Justice Powell's opinion in *Bakke*, provides some guidance for colleges with respect to academic employment. For private colleges, *Grutter* does not limit, and in some ways enhances, the colleges' ability to implement carefully developed voluntary affirmative action programs for faculty hiring that meet the *Weber* test and that involve hiring and promotions rather than dismissals or layoffs. For public colleges, *Grutter* suggests that affirmative action plans that are closely linked to the institution's educational mission, and that can demonstrate a strong relationship between the institution's educational mission and the diversity of its faculty, may survive constitutional challenge. Of course, the plan would need to use goals rather than quotas, and would need to ensure that the protected characteristic (race, gender) was not the sole criterion, but one of a constellation of relevant factors, in the hiring decision.

## ***Sec. 6.6. Standards and Criteria for Faculty Personnel Decisions***

**6.6.1. General principles.** Postsecondary institutions commonly have written and published standards or criteria to guide decisions regarding faculty appointments, contract renewals, promotions, and the granting and termination of tenure. Since they will often constitute part of the contract between the institution and the faculty member (see Section 6.2) and thus bind the institution, such evaluative standards and criteria should receive the careful attention of administrators and faculty members alike. If particular standards are not intended to be legally binding or are not intended to apply to certain kinds of personnel decisions, those limitations should be made clear in the standards themselves.

While courts will enforce standards or criteria found to be part of the faculty contract, the law accords postsecondary institutions wide discretion in determining the content and specificity of those standards and criteria. And although the traditional criteria of teaching, scholarship (or creative activity), and service have been applied for decades to faculty employment decisions, additional criteria (and challenges to the use of those criteria) have developed in the past decade. Additional performance criteria addressing the interpersonal relationships of the tenure or promotion candidate ("collegiality") have been applied—and challenged—on many campuses. Cases alleging that the interpretation of tenure criteria has changed between a faculty member's hiring and eventual tenure review have also been brought—and generally rejected by courts. And criteria unrelated to a faculty member's performance, such as the proportion of tenured faculty already present in a department, have been used, and challenged, as well. Judicial responses to these challenges are discussed in Section 6.6.3.

Courts are less likely to become involved in disputes concerning the substance of standards and criteria than in disputes over procedures for applying standards and criteria. (Courts draw the same distinction in cases concerning students; see the discussion in Sections 9.2 through 9.4.) In rejecting the claims of a community

college faculty member, for example, the court in *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126 (8th Cir. 1975), quoted an earlier case to note that “such matters as the competence of teachers and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.” And in *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1986), the court indicated that it “must give deference to [the board of trustees’] expertise” and that it “may not reweigh the evidence or determine the credibility of witnesses,” since “peer groups make the judgment on the performance of a faculty member.” And in *Dorsett v. Board of Trustees for State Colleges and Universities*, 940 F.2d 121, 123 (5th Cir. 1991) (quoting earlier cases), the court warned that “[o]f all fields that the federal courts ‘should hesitate to invade and take over, education and faculty appointments at the university level are probably the least suited for federal court supervision.’”

Despite this generally deferential judicial attitude, there are several bases on which an institution’s standards and criteria may be legally scrutinized. For both public and private institutions, questions regarding consistency with AAUP policies may be raised in AAUP investigations (Section 14.5) or in court (Section 6.2.3). When standards or criteria are part of the faculty contract, both public and private institutions’ disputes over interpretation may wind up in court or in the institution’s internal grievance process. Cases on attaining tenure and on dismissal from tenured positions for “just cause” are prominent examples. For public institutions, standards or criteria may also be embodied in state statutes or administrative regulations that are subject to interpretation by courts, state administrative agencies (such as boards of regents or civil service commissions), or decision makers within the institution’s internal grievance process. The tenure denial and termination cases are again excellent examples.<sup>10</sup> And under the various federal nondiscrimination statutes discussed in Section 5.3, courts or federal administrative agencies may scrutinize the standards and criteria of public and private institutions for their potential discriminatory applications (see, for example, *Bennun v. Rutgers, The State University of New Jersey*, 941 F.2d 154 (3d Cir. 1991)); these standards and criteria also may be examined in the course of an internal grievance process when one is required by federal regulations or otherwise provided by the institution.

In public institutions, standards and criteria may also be subjected to constitutional scrutiny under the First and Fourteenth Amendments. Under the First Amendment, a standard or criterion can be challenged as “overbroad” if it is so broadly worded that it can be used to penalize faculty members for having exercised constitutionally protected rights of free expression. Under the Fourteenth Amendment, a standard or criterion can be challenged as “vague” if it is so unclear that institutional personnel cannot understand its meaning in concrete circumstances. (The overbreadth and vagueness doctrines are discussed further

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<sup>10</sup>The cases and authorities for both statutes and contract clauses are collected in Annot., “Construction and Effect of Tenure Provisions of Contract or Statute Governing Employment of College or University Faculty Member,” 66 A.L.R.3d 1018.

in Sections 9.1.3, 9.2.2, and 9.5.3.) The leading U.S. Supreme Court case on overbreadth and vagueness in public employment standards is *Arnett v. Kennedy*, 416 U.S. 134 (1974). A federal civil servant had been dismissed under a statute authorizing dismissal “for such cause as will promote the efficiency of the service.” A majority of the Court held that this standard, as applied in the federal service, was neither overbroad nor vague.

While the result in *Arnett* suggests that the overbreadth and vagueness doctrines do not substantially restrict the standard-setting process, it does not necessarily mean that public postsecondary institutions can use the same “cause” standard approved in *Arnett*. Employment standards should be adapted to the characteristics and functions of the group to which the standards apply. A standard acceptable for a large heterogeneous group such as the federal civil service may not be acceptable for a smaller, more homogeneous group such as a college faculty. (See, for example, *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), which held that the discharge standard of a local police force must be more stringently scrutinized for overbreadth and vagueness than was the federal discharge standard in *Arnett*.) Courts may thus be somewhat stricter with a postsecondary institution’s standards than with the federal government’s—particularly when the standards are applied to what is arguably expressive activity, in which case the overbreadth and vagueness doctrines would combine with academic freedom principles (see Section 7.1) to create important limits on institutional discretion in devising employment standards.

Under the Fourteenth Amendment, a public institution’s standards and criteria for personnel decisions may also be challenged using substantive due process principles. Such challenges are only occasionally successful. In *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), for instance, a federal appellate court affirmed a jury’s verdict that the manner in which merit pay decisions were made at the Thurgood Marshall School of Law of Texas Southern University was arbitrary and capricious, and constituted a violation of professors’ substantive due process rights. The parties had agreed that the professors had a property interest in a “rational application” of the university’s merit pay policy. The court assumed, without deciding, that such a property interest existed, and held that the jury could reasonably conclude, based on the evidence, that the dean and associate dean had “acted in an arbitrary and capricious manner” in making their recommendations for merit pay increases. The most important evidence, apparently, concerned the possible manipulation of the evaluation system so that black faculty members would receive higher increases than white faculty members with similar records of scholarship and teaching achievements. Other courts will not be as hospitable to substantive due process claims as the *Harrington* court. (See, for example, *Boyett v. Troy State Univ. at Montgomery*, 971 F. Supp. 1403, 1414 (M.D. Ala. 1997), *affirmed without opinion*, 142 F.3d 1284 (11th Cir. 1998).)

(For a discussion of tenure definitions and criteria for tenure across a variety of institutional types, see Thomas P. Hustoles, “Auditing a Tenure Policy from the Perspective of the University Administration,” National Association of College and University Attorneys Conference Outline, June 26, 2000, available from <http://www.nacua.org>.)

The continued justification for tenure systems has been the subject of much recent scholarly and popular writing, legislative action, and litigation. The Selected Annotated Bibliography for this Section and for Section 7.1 contains various resources on the meaning of tenure, alternatives to tenure, efforts to preserve tenure, and the relationship between tenure and academic freedom.

**6.6.2. Terminations of tenure for cause.** Perhaps the most sensitive issues concerning standards arise in situations where institutions attempt to dismiss a tenured faculty member “for cause” (see T. Lovain, “Grounds for Dismissing Tenured Postsecondary Faculty for Cause,” 10 *J. Coll. & Univ. Law* 419 (1983–84)). Such dismissals should be distinguished from dismissals due to financial exigency or program discontinuance, discussed in Section 6.8. For-cause dismissals—being more personal, potentially more subjective, and more debilitating to the individual concerned—may be even more troublesome and agonizing for administrators than dismissals for reasons of financial exigency or program discontinuance. Similarly, they may give rise to even more complex legal issues concerning adequate procedures for effecting dismissal (see Section 6.7); the adequacy of standards for defining and determining “cause”; and the types and amount of evidence needed to sustain a termination decision under a particular standard of cause.

The American Association of University Professors’ 1976 “Recommended Institutional Regulations on Academic Freedom and Tenure” (in *AAUP Policy Documents and Reports* (AAUP, 2001), 21–30) acknowledges “adequate cause” as an appropriate standard for dismissal of tenured faculty. These guidelines caution, however, that “adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.” Since the guidelines do not further define the concept, institutions are left to devise cause standards on their own or, occasionally for public institutions, to find standards in state statutes or agency regulations.

A straightforward example of a dismissal for cause—incompetence—occurred in *Weist v. State of Kansas*, Dkt. # 00 C 3 09 (Dist. Ct., Riley Co. Kan., October 17, 2002). The university had adopted a post-tenure review program that provided that if a tenured faculty member’s performance had been found to be unsatisfactory for two consecutive years, the faculty member could be terminated after a hearing before a faculty committee. The university’s procedure provided that there must be clear and convincing evidence that the faculty member was performing below the “minimum level of productivity.” Furthermore, the department had provided the faculty member with an “improvement plan” that he failed to follow. The court upheld the termination.

Performance failures may also be characterized as “neglect of duty,” as in *In re Bigler v. Cornell University*, 698 N.Y.S.2d 472 (N.Y. App. Div. 1999); or as misconduct, as in *Wells v. Tennessee Board of Regents*, 9 S.W.3d 779 (Tenn. 1999) (sexual harassment of student by tenured professor), and *Holm v. Ithaca College*, 682 N.Y.S.2d 295 (N.Y. App. Div. 1998) (sexual harassment of multiple students by tenured professor). Dishonesty as a justification for dismissal of a tenured

faculty member has also been sanctioned by the courts (see, for example, *Lamvermeyer v. Denison University*, 2000 Ohio App. LEXIS 861 (Ct. App. Ohio, 5th Dist. 2000) (“moral delinquency”—falsification of expense vouchers)).

For-cause dismissals may raise numerous questions about contract interpretation. In *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), for example, a mathematics professor had been verbally abused during class by a student and refused to resume teaching his course until “the proper teaching atmosphere was restored” (818 F.2d at 61). The university did not take any disciplinary action against the student, did not take other initiatives to resolve the situation, and rejected a grievance committee’s recommendation in favor of the professor. It then dismissed the professor for “neglect of professional responsibilities”—an enumerated “cause” stated in the faculty handbook. The professor sued the institution for breach of contract. Construing the pertinent contract provisions in light of custom and usage (see Section 1.4.3.3), the court held that the institution, in a for-cause dismissal, must consider not only the literal meaning of the term “cause” but also all surrounding and mitigating circumstances; in addition, the institution must evaluate the professor’s actions “according to the standards of the profession.” Since the institution had not done so, the court remanded the case to the district court for further proceedings.

Courts also might question the clarity or specificity of an institution’s dismissal standards. In *Garrett v. Matthews*, 625 F.2d 658 (5th Cir. 1980), the University of Alabama had dismissed the plaintiff, a tenured professor, for “insubordination and dereliction of duty.” The charges had been brought pursuant to a faculty handbook provision permitting dismissal for “adequate cause” as found after a hearing. The plaintiff argued that the handbook’s adequate-cause standard was so vague that it violated constitutional due process. Although due process precedents suggest that this argument is one to be taken seriously,<sup>11</sup> the court rejected it in one terse sentence that contains no analysis and relies on a prior opinion in *Bowling v. Scott*, 587 F.2d 229 (5th Cir. 1979) (this book, Section 6.7.2.3), which does not even address the argument. Thus, although *Garrett* is authority for the constitutionality of a bare adequate-cause standard, it is anemic authority indeed.

In a more instructive case, *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984), the university had adopted the AAUP’s 1987 “Statement on Professional Ethics” (in *AAUP Policy Documents and Reports* (AAUP, 1990), 75–76) and published it in the faculty handbook. Subsequently, the university applied the statement’s ethical standards to a tenured professor who, according to the findings of a university hearing committee, had made sexual advances toward and exploited male students. Specifically, the university relied on the portions of the AAUP statement that prohibit “exploitation of students . . . for private advantage” and require that a professor “demonstrates respect for the student as an

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<sup>11</sup>See, for example, *H & V Engineering, Inc. v. Board of Professional Engineers and Land Surveyors*, 747 P.2d 55 (Idaho 1987) (invalidating disciplinary action taken under “misconduct” and “gross negligence” standard); *Tuma v. Board of Nursing*, 593 P.2d 711 (Idaho 1979) (invalidating suspension under standard of “unprofessional conduct”); and *Davis v. Williams*, 598 F.2d 916 (5th Cir. 1979) (invalidating regulation prohibiting “conduct prejudicial to good order”).



individual and adheres to his proper role as intellectual guide and counselor.” When the university dismissed the professor for violating these standards, the professor sued, claiming that the dismissal violated due process because the statement did not specifically mention sexual conduct and therefore did not provide him adequate notice of the standard to which he was held. The court rejected this claim (which was essentially a claim of unconstitutional vagueness), stating that a code of conduct need not “specifically delineate each and every type of conduct . . . constituting a violation” (726 F.2d at 1227–28).

In a later case, *San Filippo v. Bongiovanni*, 961 F.2d 1125 (3d Cir. 1992), Rutgers University had adopted the AAUP’s “Statement on Professional Ethics” (University Regulation 3.91). In separate regulations, however, it had also adopted an adequate-cause standard to govern dismissals of tenured faculty (University Regulation 3.93) and had defined “adequate cause” as “failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime of moral turpitude” (University Regulation 3.94). Relying on both the AAUP Statement and the adequate-cause regulations, the university dismissed the plaintiff, a tenured chemistry professor. The charges stemmed from the professor’s “conduct towards visiting Chinese scholars brought to the University to work with him on research projects.” A university hearing panel found that the professor had “‘exploited, threatened and been abusive’” to these student scholars and had “‘demonstrated a serious lack of integrity in his professional dealings’” (961 F.2d at 1132; quoting the panel report).

The professor challenged his dismissal in federal court, arguing (among other things) that the university’s dismissal regulations were unconstitutionally vague because they did not give him fair notice that he could be dismissed for the conduct with which he was charged. The university argued that the adequate-cause regulations (Regulations 3.93 & 3.94) “incorporated” the AAUP “Statement on Professional Ethics” (3.91), which applied to the professor’s conduct and gave him sufficient notice. The appellate court (like the district court) rejected the university’s “incorporation” argument and determined that the grounds for dismissal must be found in the adequate-cause regulations themselves, apart from the AAUP statement. But the appellate court (unlike the district court) nevertheless rejected the professor’s vagueness argument because the portion of the adequate-cause regulation on “failure to maintain standards of sound scholarship and competent teaching” (3.94) was itself sufficient to provide fair notice:

A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for “failure to maintain standards of sound scholarship and competent teaching.” Regulation 3.94. He would know that the standard did not encompass only actual teaching or research skills. . . . It is not unfair or foreseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior’s directive, and to be truthful and forthcoming in dealing with payroll, federal research

funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching [961 F.2d at 1137].

An Ohio court overturned the termination of a tenured professor in *Ohio Dominican College v. Krone*, 560 N.E.2d 1340 (Ohio Ct. App. 1990) because the faculty member's alleged misconduct had not met the contractual standard for dismissal. The court interpreted the faculty handbook's specification of "grave cause" for tenure termination as limiting the college's ability to discharge a faculty member with whom it had a contractual dispute. Joan Krone was a tenured assistant professor and chair of the mathematics department at Ohio Dominican College (ODC). After the college received federal funds to initiate a computer science department, Krone was granted a one-year paid leave for academic year 1982-83 to obtain a master's degree in computer science, in return for her agreement to return and to teach for at least two years. Leaving ODC prior to her two-year teaching obligation would require her to reimburse ODC for the costs of her education.

Krone completed her master's degree in 1983 but continued her graduate work in computer science under a series of agreements with ODC, including a one-semester unpaid leave during which she had agreed to perform several tasks for the college. Her obligation was now to teach for three years upon returning to the college. In contemplating Krone's return to work in the fall of 1984, the academic vice president offered her a half-time contract for the fall semester for \$5,500 in salary. Krone signed the contract after changing the salary to \$10,000.

ODC rejected the change made by Krone and offered her a full-time teaching contract at an annual salary of \$22,000. The letter making this offer stated that failure to sign and return it within ten days would be interpreted as a resignation and forfeiture of tenure. The day before the contract was due, Krone requested a meeting with the ODC president. The meeting was held, and ODC officials refused to change the most recent offer. At the same time, the college was negotiating with a male professor, who accepted the college's offer eleven days after Krone's signed contract was due. A week after that, ODC sent a letter to Krone, informing her that she had forfeited her tenured faculty position and must begin reimbursing the college for her educational expenses within a month.

When Krone refused to reimburse the college, stating that the terms of its offer were unacceptable, the college sued her for reimbursement; Krone countersued for wrongful termination. A trial judge granted judgment for the college based on the written contracts.

Krone appealed, asserting that the college had breached its contract (contained in the faculty handbook), and also arguing that under the Ohio constitution and the U.S. Constitution's Fourteenth Amendment she was entitled to a pretermination hearing. The ODC faculty handbook contained the following provision: "An appointment with continuous tenure is terminable by the institution only for grave cause or on account of extraordinary financial emergencies. Grave cause shall include demonstrated incompetence, crime, or similar

matters” (560 N.E.2d at 1343). Krone also noted that the faculty handbook defined a full-time teaching load as three courses per semester; the college’s last offer to Krone was to teach five courses and to serve as department chair. This portion of the contract was the basis for Krone’s refusal to sign it.

The court concluded that the contract negotiations between ODC and Krone were separate from her status as a tenured professor, and that her inability to reach an agreement with the college was not a form of misconduct. The court ruled that ODC breached Krone’s contract for tenure “by unilaterally setting forth a condition for continued employment” (560 N.E.2d at 1345). The court refused to address Krone’s constitutional claims, but upheld Krone’s claim of wrongful discharge and concluded that she was entitled to reinstatement in order to meet her three-year teaching obligation to ODC.

Freedom-of-expression issues may also become implicated in the institution’s application of its dismissal standards. In *Adamian v. Jacobson*, 523 F.2d 929 (9th Cir. 1975), a professor from the University of Nevada at Reno had allegedly led a disruptive demonstration on campus. Charges were brought against him under a university code provision requiring faculty members “to exercise appropriate restraint [and] to show respect for the opinions of others,” and the board of regents determined that violation of this provision was adequate cause for dismissal. In court the professor argued that this standard was not only unconstitutionally vague but also unconstitutionally “overbroad” in violation of the First Amendment (see Sections 9.1.3, 9.2.2, & 9.5.3 regarding overbreadth). The appellate court held that the standard would violate the First Amendment if interpreted broadly but could be constitutional if interpreted narrowly, as prescribed by AAUP academic freedom guidelines, so as not to refer to the content of the professor’s remarks. The court therefore remanded the case to the trial court for further findings on how the university interpreted its code provision. On a second appeal, the court confined itself to the narrow issue of the construction of the code provision. Determining that the university’s construction was consistent with the AAUP guidelines and reflected a limitation on the manner, rather than the content, of expression, the court held that the code provision was sufficiently narrow to avoid an overbreadth (as well as a vagueness) challenge (608 F.2d 1224 (9th Cir. 1979)).

Despite the summary approval in *Garrett*, institutions should not comfortably settle for a bald adequate-cause standard. Good policy and (especially for public institutions) good law should demand more. Since incompetency, insubordination, immorality, unethical conduct, and medical disability are the most commonly asserted grounds for dismissals for cause, institutions may wish to specifically include them in their dismissal policies.<sup>12</sup> If unethical conduct is a stated ground for dismissal, the institution should consider adopting the AAUP “Statement on Professional Ethics,” as did the institution in the *Korf* case. If it adopts the AAUP statement or its own version of ethical standards, the

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<sup>12</sup>Another ground for dismissal or other discipline is the ground of “scientific misconduct.” The ground refers to particular types of ethical problems that arise in the context of scientific research. See also this book, Sections 13.2.3 and 13.4.2.

institution should make clear how and when violations of the statement or standards may be considered grounds for dismissal—thus avoiding the problem in *San Filippo*. If medical disability (either physical or mental) is a stated ground for dismissal, the institution should comply with the requirements of Section 504 and the Americans With Disabilities Act (this book, Section 5.2.5). The AAUP's recommended regulation on termination for medical reasons (Regulation 4(e), in *AAUP Policy Documents and Reports* (AAUP, 2001), 25) may also be helpful.

For each ground (or "cause") included in its dismissal policy, the institution should also include a definition of that ground, along with the criteria or standards for applying the definition to particular cases. (The AAUP Statement may serve this purpose for the "unethical conduct" ground.) Since such definitions and criteria may become part of the institution's contract with faculty members, they should be drafted clearly and specifically enough, and applied sensitively enough, to avoid contract interpretation problems such as those faced by the institution in the *McConnell* case. Such definitions and criteria should also be sufficiently clear to guide the decision makers who will apply them and to forewarn the faculty members who will be subject to them, thus avoiding vagueness problems; and (as in *Adamian*) they should be sufficiently specific to preclude dismissal of faculty members because of the content of their expression. In addition, such definitions and criteria should conform to the AAUP's caution that cause standards must have a direct and substantial relationship to the faculty member's professional fitness. Hand in hand with such standards, if it chooses to adopt them, the institution will want to develop record-keeping policies, and perhaps periodic faculty review policies (see S. Olswang & J. Fantel, "Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles," 7 *J. Coll. & Univ. Law* 1 (1980–81)) that will provide the facts necessary to make reliable termination decisions. The case of *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), provides an instructive example of a university's success in this regard.

Administrators will also want to keep in mind that involuntary terminations of tenured faculty, because of their coercive and stigmatizing effect on the individuals involved, usually create a far greater number of legal problems than voluntary means for dissolving a tenured faculty member's employment relationship with the institution. Thus, another way to minimize legal vulnerability is to rely on voluntary alternatives to dismissals for cause. For example, the institution might provide increased incentives for retirement, or opportunities for phased or partial retirement, or retraining for midcareer shifts to underpopulated teaching or research. Or it might maintain flexibility in faculty development by increased use of fixed-term contracts, visiting professorships, part-time appointments, and other non-tenure-track appointments. All these alternatives have one thing in common with involuntary termination: their success depends on thorough review of personnel policies, coordinated planning for future contingencies, and careful articulation into written institutional policies.

**6.6.3. Denial of tenure.** Although the typical criteria for evaluating a faculty member for tenure are the quality of the individual's performance in

teaching, scholarship (at research-oriented institutions), and service, additional criteria are sometimes used. Religiously affiliated colleges and universities may require faculty members to adhere to the religion's tenets or the institution's religious mission, or may even require that the faculty member profess that particular religion. At research institutions, tenure candidates in certain disciplines may be evaluated on the basis of their ability to obtain external funding for research or other activities. Collegiality, or institutional "citizenship," is increasingly being used, either openly or covertly, to make tenure decisions. And considerations of student enrollment trends or institutional/departmental financial health may also figure (either openly or covertly) into tenure decisions.

A line of cases has examined whether departments are permitted to interpret criteria for promotion or tenure more strictly than the way they were interpreted for previous tenure decisions. For example, plaintiffs denied tenure have argued that requirements for numbers or quality of publications had risen between the time they were hired and the time they were evaluated for tenure. The courts have been unsympathetic to these claims. In *Lawrence v. Curators of the University of Missouri*, 204 F.3d 807 (8th Cir. 2000), a federal appellate court affirmed a trial court's summary judgment ruling in favor of the university. Lawrence, an assistant professor of accounting, had been denied tenure primarily on the basis of a weak record of scholarly publication. She was criticized by senior faculty in her department for not placing her articles in top-tier journals. Although the plaintiff introduced evidence that the standards for what a top-tier journal was considered to be changed during the years she was at the university, and that male faculty who published in the same journals that she did were awarded tenure two years before she was denied tenure, the trial court had ruled that this evidence was insufficient to establish a discriminatory motive for the tenure denial. A vigorous dissent by Judge McMillan points out the effect of the shifting standards on the plaintiff's tenure review and states that summary judgment should have been denied in order to resolve the factual dispute.

A federal appellate court ruled that a university could apply higher standards when evaluating an internal applicant for a newly created faculty position than it had used to hire her for a temporary lecturer position. In *Kobrin v. University of Minnesota*, 121 F.3d 408 (8th Cir. 1997), the university had hired Kobrin, one of its own graduates, to fill a lecturer position. When the department was permitted to create two tenure-track faculty positions, Kobrin applied for the junior position but was not selected. A male was judged to be better qualified because he possessed two areas of expertise while Kobrin possessed only one. Kobrin's argument that the university changed its criteria did not impress the court, which ruled that even if inconsistent reasons had been given at various times during the hiring process, Kobrin was not as well qualified as the male who was selected, nor as well qualified as several of the female candidates.

In *Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000), the plaintiff, a professor at Barnard College, a unit of Columbia University, argued that the standards applied to her tenure review were inappropriately high, because Barnard professors were traditionally held to a lower standard of scholarly productivity than were their counterparts at Columbia because the teaching loads

at Barnard were heavier. The court rejected that argument, stating that it was the quality, not the quantity, of her research and publications that was the concern, and that it was undisputed that the same standards of quality were required for both Barnard and Columbia faculty.

In *Lim v. Trustees of Indiana University*, 297 F.3d 575 (7th Cir. 2002), a federal appellate court affirmed a trial court's award of summary judgment to the university. Professor Lim, who was denied tenure at Indiana University, alleged that the denial was caused by sex discrimination. The same year that Lim was hired as an assistant professor, the department chair, who recruited and hired Lim, instituted higher standards for research and publication for untenured faculty than had been expected in the past. Lim was denied tenure, in large part, for her failure to meet these higher standards.

The court noted that Lim had been warned on a regular basis during her six-year probationary period that she was not meeting the department's publication standards. The court rejected Lim's attempt to compare her publication record to that of male faculty who were tenured prior to the implementation of the new standards. The court ruled that these faculty were not similarly situated and could not serve as comparators for purposes of Lim's sex discrimination claim.

Disputes over the propriety of using collegiality as a criterion for tenure decisions have flared for more than two decades. In an early case, *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981), a federal appellate court ruled that collegiality was an appropriate criterion for evaluating faculty members for tenure. Federal trial courts have also upheld tenure denials on the grounds of poor relationships between the candidate and faculty colleagues (*Stein v. Kent State Univ. Bd. of Trustees*, 994 F. Supp. 898 (N.D. Ohio 1998); *Bresnick v. Manhattanville College*, 864 F. Supp. 327 (S.D.N.Y. 1994)). The plaintiffs in these cases argued that college documents did not list collegiality as a criterion for tenure and it was therefore improper to judge them on this basis. The courts replied that, even if institutional documents do not specifically mention collegiality, this criterion is implicit in the other express criteria or otherwise appropriate for consideration.

This issue was prominent in *University of Baltimore v. Peri Iz*, 716 A.2d 1107 (Md. Ct. Special App. 1998). Professor Iz, a specialist in decision science, was hired in 1990 as an assistant professor in the university's business school. She was reviewed for tenure in 1993. Although her departmental colleagues and department chair rated Iz's teaching as good to excellent and her research and service as very good, and the business school's tenure and promotion committee rated her highly on all three criteria, the dean recommended against tenure because of Iz's uncollegial relationships with her departmental colleagues. The provost concurred with the dean, and Iz filed an internal appeal. A university-wide faculty appeals committee received testimony from Iz and several other witnesses, but the committee could not agree on whether to uphold the provost's tenure denial recommendation. The committee members who voted to reverse the provost's recommendation did so on the grounds that university documents did not specify lack of collegiality as a reason for denying tenure. When the president accepted the provost's recommendation against tenure, Iz sued the

university for sex and national origin discrimination under Title VII, violation of equal protection, and breach of contract.

The breach of contract claim was based upon Iz's assertion that the university could use only criteria listed in university policy documents to make tenure decisions. Rejecting all claims except the contract claim, the jury determined that the university had breached the professor's contract and awarded \$425,000 in compensatory damages. The sole issue before the appellate court was whether the university had the discretion to use collegiality as a criterion for tenure. The court ruled that it did. Because the award of tenure was a discretionary decision delegated to the president, said the court, a breach of contract claim would lie only if the president had exercised his discretion in bad faith or in a discriminatory fashion. "We are persuaded that collegiality is a valid consideration for tenure review. . . . Without question, collegiality plays an essential role in the categories of both teaching and service" (716 A.2d at 1122). The court held that the trial court should have ruled, as a matter of law, that the university could use collegiality as a tenure criterion.

The propriety of using collegiality as a criterion for tenure was also at issue in *McGill v. The Regents of the University of California*, 52 Cal. Rptr. 2d 466 (Ct. App. Cal. 4th Dist. 1996). The University of California at Irvine (UCI) hired McGill as an untenured assistant professor of mathematics. McGill's area of specialization was probability studies, and he was hired because his early scholarly work was considered very influential. Four years after being hired, he was evaluated for tenure.

Although all but one outside reviewer praised McGill's scholarship, a departmental tenure committee recommended denial of tenure for several reasons. The committee members believed that McGill's recent scholarly work was not significant, that he interacted poorly with graduate students, and that his teaching as "adequate at best." The full department voted 23 to 2 to recommend against tenure. The department chair concurred on the basis of the limited impact of McGill's scholarship, his difficulty interacting with faculty, his lack of success as a teacher, and his minimal service to the university. The chair also found McGill to be deficient in collegiality, noting that McGill had criticized departmental colleagues to candidates for faculty positions. The dean also recommended that McGill be denied tenure. A university-wide Committee on Academic Personnel (CAP) then recommended that the tenure decision be deferred for two years because the tenure file was "confusing" (and that in the meantime McGill be given a salary increase). Furthermore, said the CAP, collegiality was not a proper criterion for a tenure decision. But the vice chancellor and chancellor recommended against tenure, primarily on the basis of lack of scholarly achievement while at UCI.

McGill appealed the decision to the CAP, which granted him a remand. The entire tenure process was repeated, starting with the department level. McGill was permitted to submit additional materials, including teaching evaluations and articles. He was also permitted to submit a statement describing alleged animosity against him by certain departmental faculty. The department considered all of the material submitted by McGill, but reaffirmed its earlier vote. All

succeeding levels repeated their earlier recommendations, including the CAP, which recommended tenure. The chancellor ruled against tenure, and McGill filed for a writ of administrative mandamus (attempting to persuade the court to reverse the tenure denial) under state law, as well as claims of fraud, due process violations, and age discrimination.

Although the trial court granted the writ and directed the chancellor to set aside the tenure denial and repeat the tenure process the following year, the appellate court disagreed. Focusing on the writ of mandamus, the appellate court held that the court could overrule the university's action only if it were "arbitrary, capricious, or entirely lacking in evidentiary support." The court then examined the actions of the faculty and administrators under this more deferential standard of review.

In a well-reasoned opinion, the appellate court discussed the subjective nature of tenure decisions, even when criteria are stated objectively. It held that collegiality was an appropriate criterion because the AAUP "Statement on Professional Ethics," which the university had adopted as policy, requires professors to respect the opinions of others and to accept "a share of faculty responsibilities for the governance of the institution" (52 Cal. Rptr. at 470, quoting AAUP Statement). Furthermore, collegiality was only one of several reasons for the tenure denial. Concerns about the quality of McGill's scholarship and teaching, and his limited university and public service, buttressed the university's defense. The court also warned of the inappropriateness of judicial determination of the merits of a tenure case, stating that "the University may even have shown poor judgment in not granting McGill tenure. But nothing in the record suggests its decision was made for illegal or improper reasons" (52 Cal. Rptr. at 473).

In *Bresnick v. Manhattanville College*, 864 F. Supp. 327 (S.D.N.Y. 1994), another court rejected the claim of a faculty member that the college's use of "cooperation" as a criterion for a tenure decision breached his employment contract. The plaintiff, a professor of dance and theater, was denied tenure because he had difficulty working with other faculty in a collaborative manner. Even though the written tenure criteria included only teaching excellence, scholarship, and service to the college, the court rejected the breach of contract claim, stating: "It is predictable and appropriate that in evaluating service to an institution, ability to cooperate would be deemed particularly relevant where a permanent difficult-to-revoke long-term job commitment is being made to the applicant for tenure" (864 F. Supp. at 329). In other words, the court viewed "cooperation" as a component of the service criterion.

(For an analysis of judicial reaction to challenges to the use of collegiality in tenure decisions, see Mary Ann Connell & Frederick G. Savage, "The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions," 27 *J. Coll. & Univ. Law* 833 (2001). See also Piper Fogg, "Do You Have to Be a Nice Person to Win Tenure?" *Chron. Higher Educ.*, February 1, 2002, A8.)

Another controversial criterion for tenure that has been reviewed in court is "academic politics," which is closely related to "collegiality." In *Kumbhojkar v. University of Miami*, 727 So. 2d 275 (Ct. App. Fla. 1999), a state appellate court



rejected the plaintiff's claim that his tenure denial was inappropriately based on personal animosity between himself and his department head because the department head was not the ultimate decision maker in the case. The plaintiff had also claimed that the negative decision was inappropriately based on "prior internal disputes within his department." Characterizing these disputes as "academic politics," the court rejected the plaintiff's claim that "academic politics" was an inappropriate grounds for tenure denial, noting that academic politics was a fact of life on campus.

A similar result was reached in *Slatkin v. University of Redlands*, 88 Cal. App. 4th 1147 (Ct. App. Cal. 4th Dist. 2001), where the court ruled that academic politics could be viewed as a legitimate nondiscriminatory reason for denying a professor tenure. The professor had made negative comments about a departmental colleague; the court ruled that the "inability of colleagues to forgive her" for making these comments was the motive for the negative tenure recommendation, and that such a motive was not discriminatory.

Other colleges have faced challenges to tenure denials made on the basis of declining enrollments or concerns about the financial health of the institution. There is strong judicial support for the removal of tenured faculty due to documented financial difficulties of the institution (Section 6.8), and unless an institution has somehow limited its authority to use financial reasons or enrollment declines as a criterion for denying tenure, courts usually will affirm its discretion to do so. (See, for example, *Hudson v. Wesley College*, 1998 Del. Ch. LEXIS 235 (Ct. Chancery, Del., December 23, 1998) (unpublished); see also *Roklina v. Skidmore College*, 702 N.Y.S.2d 161 (N.Y. App. Div. 2000), *appeal denied*, 95 N.Y.2d 758 (N.Y. 2000) (unpublished).) In *Spuler v. Pickar*, 958 F.2d 103 (5th Cir. 1992), a federal appellate court upheld the authority of the University of Houston to deny tenure to a faculty member for financial reasons, even though the university hired a new faculty member in the same department shortly after Spuler was denied tenure. The court found that Spuler was not qualified to teach upper-level courses that the department needed, and that legitimate financial considerations motivated the tenure denial.

But if the institution has promised not to use enrollment stability as a criterion for determining tenure, it cannot do so, even in a time of enrollment downturn, without first changing its written policy. In *In Re Bennett v. Wells College*, 641 N.Y.S.2d 929 (N.Y. App. Div. 1996), the college's faculty manual stated that if the college determined that a tenure-track position was necessary at the time of hiring a faculty member, the status of enrollment would not be used at the time of the tenure decision. Because the dean and president used a criterion that the college's own policies forbid them to use, the court ruled that the tenure decision had to be repeated without consideration of enrollment issues.

Some institutions have implemented "tenure caps" that limit the proportion of tenured faculty in a particular department. In *Roufaiel v. Ithaca College*, 660 N.Y.S.2d 595 (N.Y. App. Div. 1997), Ithaca College had a tenure cap of 75 percent, a figure that was included in offer letters to faculty and in the faculty handbook. When Professor Roufaiel was hired as an accounting instructor, she was

advised of the tenure cap in writing. But at the time that Roufaiel was evaluated for tenure, the provost told the dean of the business school that the tenure cap would not be applied to the accounting department, assuming that enrollment remained stable. Roufaiel was recommended for tenure, but the provost rejected the recommendation, stating that enrollment considerations precluded a favorable decision. Roufaiel filed breach of contract, estoppel, and fraudulent misrepresentation claims.

The court denied the college's summary judgment motion because the parties disagreed about the enrollment numbers, an issue that was central to the college's defense. But the court dismissed the estoppel and fraudulent misrepresentation claims because the plaintiff could not provide evidence that she had been promised tenure.

These cases suggest that, if an institution can articulate a reasonable justification for a particular tenure criterion, and if it has not explicitly prevented itself from using that criterion, the courts will typically defer to the institution even if it has not expressly stated the criterion in its tenure policies. Of course, the institution will still have to demonstrate that it applies the criterion evenhandedly and reasonably, and that the criterion furthers the institutional interest in providing high-quality teaching, research, or service to its students or the wider community. The better practice, however, will be to expressly and clearly articulate each tenure criterion in the institution's written policies, and to maintain mechanisms for systematically evaluating tenure candidates against these criteria. To the extent the institution does so, litigation should be either reduced or, at a minimum, more easily defended against.

**6.6.4. Post-tenure review.** Many institutions have decided to establish regular evaluations of tenured faculty through a system of post-tenure review. Although the American Association of University Professors initially adopted a policy on post-tenure review that was sharply critical of the concept ("On Post-Tenure Review," November 1983), quoted in "Post Tenure Review: An AAUP Response," the AAUP issued a second report in 1999 ("Post-Tenure Review: An AAUP Response," *AAUP Policy Documents and Reports* (2001), 50). The more recent AAUP report suggests guidelines that should be followed in order to protect faculty members' academic freedom and to ensure that the process is fair.

Post-tenure review programs may be created by collective bargaining agreements or faculty handbooks (the contractual approach), by state statute or administrative regulation (such as Ark. Code Ann. § 6-63-104(a) (2001) and S.C. Code Ann. § 59-103-30 (2001), both of which explicitly include post-tenure review in statutory language regarding review of faculty performance generally), by regulations or policies of state systems of higher education (such as those of Arizona, Wisconsin, and Oregon), or by institutional policies. (A review of various approaches to post-tenure review programs is in Cheryl A. Cameron, Steven G. Olswang, & Edmund Kamai, "Tenure, Compensation and Productivity: A Select Review of Post-Tenure Personnel Issues," National Association of College and University Attorneys Conference Outline, 2002, available at <http://nacua.org>.)

Challenges to post-tenure review programs have been unsuccessful. A faculty member at Colorado State University challenged the authority of the state board of agriculture to implement a post-tenure review system as an unconstitutional retrospective change to the tenure contract. In *Johnson v. Colorado State Board of Agriculture*, 15 P.3d 309 (Colo. Ct. App. 2000), the court rejected the request for a declaratory judgment against the board, stating that the faculty were already subject to periodic review and the new policy did not “remove or impair vested rights” nor “create a new obligation.” The court characterized the policy as procedural, for it merely changed the process by which a faculty member would be subject to discipline for poor performance.

Individual faculty challenging dismissals have attempted to assert the post-tenure review process to *protect them* from termination. For example, in *Barham v. University of Northern Colorado*, 964 P.2d 545 (Colo. Ct. App. 1997), a tenured faculty member who had taught at the university for twenty-nine years was accused of “harassment, misuse and/or misappropriation of government property, conduct detrimental to the efficient and productive operation of the school, unacceptable job performance, and violations of the standards of professional conduct,” according to the court. The dean had received numerous complaints from students, faculty, and staff. Just before the plaintiff was due for a regularly scheduled post-tenure review, the dean suspended him and initiated termination proceedings. Although the plaintiff argued that he was entitled to the post-tenure review prior to any determination with respect to his termination, the court disagreed, saying that the faculty dismissal proceedings operated separately from the post-tenure review policies, and that the university was justified in proceeding through the de-tenuring process.

Similarly, another state appellate court rejected the claim of a tenured professor terminated for incompetence that he was entitled to the remedial benefits of the post-tenure review process prior to termination. In *Wurth v. Oklahoma City University*, 907 P.2d 1095 (Okla. Ct. App. 1995), the court distinguished between “failure to maintain the level of competence necessary for tenure” and unsatisfactory performance. For the former, said the court, the termination process was sufficient. For a termination based on unsatisfactory performance, however, said the court, the university would have been required to provide the faculty member with an evaluation and an opportunity to improve his performance prior to termination. The court did not elaborate on the differences between these two concepts.

According to a variety of sources (collected in Gabriella Montell, “The Fallout From Post-Tenure Review,” *Chron. Higher Educ.*, October 17, 2002, available at <http://chronicle.com/jobs/2002/10/2002101701c.htm>), the number of faculty who have received unsatisfactory evaluations is very small. This result may explain the low number of legal challenges to terminations made subsequent to post-tenure reviews, and the unusual legal strategy of attempting to use post-tenure review to protect a faculty member against termination. Despite the infrequent use of post-tenure review to identify tenured faculty for termination, institutions should be careful to specify how the information from the review will be used and which individuals or groups will conduct the evaluation. If

post-tenure review results are used to discipline or dismiss faculty, then the procedural safeguards discussed in Section 6.6 should be followed.

(For further information on post-tenure review, see Christine Licata & Joseph Morreale, *Post-Tenure Review: Policies, Practices, Precautions*, New Pathways Inquiry no. 2 (American Association for Higher Education, 1997).)

## ***Sec. 6.7. Procedures for Faculty Employment Decisions***

**6.7.1. General principles.** Postsecondary educational institutions have established varying procedural requirements for making and internally reviewing faculty personnel decisions. Administrators should look first at these requirements when they are attempting to resolve procedural issues concerning appointment, retention, promotion, and tenure. Whenever such requirements can reasonably be construed as part of the faculty member's contract with the institution (see Section 6.2), the law will usually expect both public and private institutions to comply with them. In *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3d Cir. 1976), for instance, a nonrenewed professor alleged that the institution had not complied with a college policy statement providing for hearings in academic freedom cases. The appellate court held that the college would have to follow the policy statement if, on remand, the lower court found that the statement granted a contractual right under state law and that the professor's case involved academic freedom within the meaning of the statement. Upon remand and a second appeal, the court held that the professor did have a contractual right to the procedures specified in the statement and that the college had violated this right (590 F.2d 470 (3d Cir. 1978)). Similarly, in *Zuelsdorf v. University of Alaska, Fairbanks*, 794 P.2d 932 (Alaska 1990), the court held that a notice requirement in the university's personnel regulations was part of the faculty contract, and that the university had breached the contract by not giving the plaintiffs timely notice of nonrenewal.

Public institutions will also often be subject to state statutes or administrative regulations that establish procedures applicable to faculty personnel decisions. In *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126 (8th Cir. 1975), for example, the court determined that a state statute requiring a public pretermination hearing for public school teachers applied to the termination of a community college faculty member as well. The institution had, however, complied with the statutory requirements. In a "turnabout" case, *Rutcosky v. Board of Trustees of Community College District No. 18*, 545 P.2d 567 (1976), the court found that the plaintiff faculty member had not complied with a state procedural requirement applicable to termination-of-employment hearings and therefore refused to grant him any relief.

Institutional procedures and/or state laws also control the conditions under which a faculty member acquires tenured status. Many institutions have adopted policies that state that only the trustees can grant tenure, and courts have denied an award of *de facto* tenure in those cases. For example, in *Hill v. Talladega College*, 502 So. 2d 735 (Ala. 1987), the court refused to award

*de facto* tenure to a faculty member employed at the college for ten years because the faculty handbook specifically stated that only the trustees could grant tenure and that tenure could not be acquired automatically at the college. And in *Gray v. Board of Regents of University System of Georgia*, 150 F.3d 1347 (11th Cir. 1999), the court ruled that, absent evidence of either a custom of awarding *de facto* tenure or some established institutional understanding that *de facto* tenure existed, an assistant professor employed under annual contracts for nine years did not acquire tenure simply by being so employed for more than the seven-year probationary period.

In other cases, however, faculty members have claimed that, by virtue of longevity, they had acquired tenure *de facto*, even though no official action was taken to grant tenure. For example, in *Dugan v. Stockton State College*, 586 A.2d 322 (N.J. Super. Ct. App. Div. 1991), a faculty member who had been employed at a state college for thirteen years, during several of which she was in a nonfaculty status, claimed that her years of service entitled her to tenure. The court examined the state law in effect at the time of her hiring, which stated that any individual consecutively employed for five years in a state college was tenured. Although the state board of higher education had issued regulations providing that only the board could confer tenure, the court noted that the regulations were contrary to the clear language of the statute, and thus beyond the power of the board to promulgate.

The procedures used by a state institution or other institution whose personnel decision is considered state action (see Section 1.5.2) are also subject to constitutional requirements of procedural due process. These requirements are discussed in Section 6.7.2.

Since private institutions are not subject to these constitutional requirements, or to state procedural statutes and regulations, contract law may be the primary or sole basis for establishing and testing the scope of their procedural obligation to faculty members. In *Johnson v. Christian Brothers College*, 565 S.W.2d 872 (Tenn. 1978), for example, an associate professor instituted suit for breach of his employment contract when the college did not grant him tenure. The college, a religiously affiliated institution in Memphis, had a formal tenure program detailed in its faculty handbook. The program included a seven-year probationary period, during which the faculty member worked under a series of one-year contracts. After seven years, on the prior recommendation of the tenure committee and approval of the president, the faculty member either received tenure along with the award of the eighth contract or was dismissed. The plaintiff claimed that, once he had reached the final probationary year and was being considered for tenure, he was entitled to the formal notice and hearing procedures utilized by the college in terminating tenured faculty. The Supreme Court of Tennessee held that nothing in the terms of the one-year contracts, the published tenure program, or the commonly used procedure of the college evidenced an agreement or practice of treating teachers in their final probationary year as equivalent to tenured faculty. The college therefore had no express or implied contractual obligation to afford the professor notice and an opportunity to be heard.

As discussed in Section 6.2, institutional policies and other documents may become part of the faculty member's contract of employment. Interesting legal questions may arise when the institution attempts to enforce its policy against sexual harassment and uses that policy to discipline or terminate a faculty member when other institutional policies on discipline or termination exist that may provide greater procedural or substantive protections to faculty.

In *Chan v. Miami University*, 652 N.E.2d 644 (Ohio 1995), Professor Chan asserted that the university had breached his contract by terminating him under the rule prohibiting sexual harassment rather than under the rule that governed the termination of tenured faculty members. Although Miami University is a public institution, the plaintiff did not bring constitutional claims, but rather focused on the due process rights provided by the university's rule concerning the termination of tenured faculty. Chan did not dispute the university's right to determine the validity of the sexual harassment charge against him using its harassment policy and procedure; his argument was that after this determination was made, he was entitled to the benefits of the university's procedure for the termination of tenured faculty members prior to his separation from the university. Although the university argued that the sexual harassment complaint process provided sufficient procedural safeguards for respondents, nothing in that policy superseded the more general termination regulations. Furthermore, while the more general regulations provided for representation by counsel, the harassment policy did not. The court held that terminating Chan under the harassment policy and procedures, without using the more general regulations, constituted a breach of contract that denied him due process.

A Maryland appellate court rejected the claims of two professors that Johns Hopkins University hired them with tenure in *The Johns Hopkins University v. Ritter*, 689 A.2d 91 (Ct. App. Md. 1996). Professors Ritter and Snider were recruited from tenured positions at Cornell and Duke universities, respectively, to join the department of pediatrics at Johns Hopkins. The department chair, Professor Oski, assured them that they would be hired at the full professor rank; consequently, both resigned tenured professorships at their respective institutions and joined the faculty at Johns Hopkins. Oski had told them, both orally and in writing, that their rank and salary had to be formally approved by a faculty committee and by the dean. The professors began work at Johns Hopkins in January 1994 as visiting professors, but their rank and tenure review had not been completed by the end of spring semester, and, thus, was held over until the fall of 1994. During the spring and summer of 1994, many disagreements arose between Ritter and Snider and their new colleagues, and many faculty and staff complained about the new professors to the dean of the medical school. The dean decided to terminate the appointments of the pair before the medical school's advisory board, the dean, or the university's board of trustees had acted on their appointments.

Ritter and Snider brought a contract claim against the university, asserting that Oski had promised them tenure, and that they had resigned their tenured positions at other institutions in reliance on his representations in letters and oral communications to the pair. A jury found for the plaintiffs, but the appellate court overturned those verdicts.

The appellate court addressed the nature of the contract and Oski's authority to alter the university's written tenure procedures. Although the court agreed with the plaintiffs that both the letters and the conversations with Oski were included in the contract, it found that Oski had no authority to abrogate the university's written tenure procedures. He did not have actual authority to do so because there was no evidence that the board of trustees or the advisory board of the medical school (both of which had to approve a faculty personnel decision) had authorized Oski to make a commitment on their behalf. Nor did Oski have apparent authority to bind the university, for no one at a higher level than Oski met with or told the plaintiffs that Oski was authorized to promise tenure. The court also rejected the plaintiffs' estoppel claim, noting that no one, including Oski, had ever represented that he had the authority to bypass the written tenure procedure.

This case is important for private institutions that are subject primarily to common law contract challenges, particularly in *de facto* tenure claims such as that against Johns Hopkins. It also suggests that deans or other officials should oversee contractual negotiations and be the ones to offer letters in order to avoid the misunderstandings that led to this litigation.

**6.7.2. The public faculty member's right to constitutional due process.** In two landmark cases, *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the U.S. Supreme Court established that faculty members have a right to a fair hearing whenever a personnel decision deprives them of a "property interest" or a "liberty interest" under the Fourteenth Amendment's due process clause. The "property" and "liberty" terminology is derived from the wording of the Fourteenth Amendment itself, which provides that states shall not "deprive any person of life, liberty, or property, without due process of law." (The identification of property and liberty interests is also important to many procedural due process questions concerning students; see Sections 8.3.1, 8.3.8.1, 8.6.1, and 9.4.2.)

In identifying these property and liberty interests, one must make the critical distinction between faculty members who are under continuing contracts and those whose contracts have expired. It is clear, as *Roth* notes, that "a public college professor dismissed from an office held under tenure provisions . . . and college professors and staff members dismissed during the terms of their contracts . . . have interests in continued employment that are safeguarded by due process" (408 U.S. at 576–77). But the situation is not clear with respect to faculty members whose contracts are expiring and are up for renewal or a tenure review. Moreover, when a personnel decision would infringe a property or liberty interest, as in tenure termination, other questions then arise concerning the particular procedures that the institution must follow.

**6.7.2.1. Nonrenewal of contracts.** *Roth* and *Perry* (above) are the leading cases on the nonrenewal of faculty contracts. The respondent in *Roth* had been hired as an assistant professor at Wisconsin State University for a fixed term of one year. A state statute provided that all state university teachers would be employed for one-year terms and would be eligible for tenure only after four years of continuous service. The professor was notified before February 1 that

he would not be rehired. No reason for the decision was given, nor was there an opportunity for a hearing or an appeal.

The question considered by the Supreme Court was “whether the [professor] had a constitutional right to a statement of reasons and a hearing on the university’s decision not to rehire him for another year.” The Court ruled that he had no such right because neither a “liberty” nor a “property” interest had been violated by the nonrenewal. Concerning liberty interests, the Court reasoned:

The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case. For “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard is essential” (*Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)) [other citations omitted]. In such a case, due process would accord an opportunity to refute the charge before university officials. In the present case, however, there is no suggestion whatever that the respondent’s “good name, reputation, honor, or integrity” is at stake.

Similarly, there is no suggestion that the state, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The state, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. . . .

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of “liberty” when he simply is not rehired in one job but remains as free as before to seek another [408 U.S. at 573–74, 575].

The Court also held that the respondent had not been deprived of any property interest in future employment:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . .

Respondent’s “property” interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment, [which] specifically provided that the respondent’s employment was to terminate on June 30. They did not provide for contract renewal absent “sufficient cause.” Indeed, they made no provision for renewal whatsoever. . . . In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment [408 U.S. at 578].



Since the professor had no protected liberty or property interest, his Fourteenth Amendment rights had not been violated, and the university was not required to provide a reason for its nonrenewal of the contract or to afford the professor a hearing on the nonrenewal.

In the *Perry* case, the respondent had been employed as a professor by the Texas state college system for ten consecutive years. While employed, he was actively involved in public disagreements with the board of regents. He was employed on a series of one-year contracts, and at the end of his tenth year the board elected not to rehire him. The professor was given neither an official reason nor the opportunity for a hearing. Like Roth, Perry argued that the board's action violated his Fourteenth Amendment right to procedural due process.

But in the *Perry* case, unlike the *Roth* case, the Supreme Court ruled that the professor had raised a genuine claim to *de facto* tenure, which would create a constitutionally protected property interest in continued employment. The professor relied on tenure guidelines promulgated by the coordinating board of the Texas College and University System and on an official faculty guide's statement that:

Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work [408 U.S. at 600].

According to the Court:

We have made clear in *Roth* . . . that "property" interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. . . . In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." . . . [W]e agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." . . . [S]uch proof would obligate officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency [408 U.S. at 603].

One other Supreme Court case should be read together with *Roth* and *Perry* for a fuller understanding of the Court's due process analysis. *Bishop v. Wood*, 426 U.S. 341 (1976), concerned a policeman who had been discharged, allegedly on the basis of incorrect information, and orally informed of the reasons in a private conference. With four Justices strongly dissenting, the Court held that the discharge infringed neither property nor liberty interests of the policeman. Regarding property, the Court, adopting a stilted lower-court interpretation of

the ordinance governing employment of policemen, held that the ordinance created no expectation of continued employment but only required the employer to provide certain procedural protections, all of which had been provided in this case. Regarding liberty, the Court held that the charges against an employee cannot form the basis for a deprivation of liberty claim if they are privately communicated to the employee and not made public. The Court also held that the truth or falsity of the charges is irrelevant to the question of whether a liberty interest has been infringed.

Under *Roth*, *Perry*, and *Bishop*, there are three basic situations in which courts will require that a nonrenewal decision be accompanied by appropriate procedural safeguards:

1. The existing rules, policies, or practices of the institution, or “mutually explicit understandings” between the faculty member and the institution, support the faculty member’s claim of entitlement to continued employment. Such circumstances would create a property interest. In *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), for example, the court held that a nonrenewed, nontenured mathematics professor had such a property interest because voting and retirement plan privileges had been extended to him and he had been told that he could expect his contract to be renewed.

2. The institution, in the course of nonrenewal, makes charges against the faculty member that could seriously damage his or her reputation, standing, or associations in the community. Such circumstances would create a liberty interest.<sup>13</sup> *Roth*, for instance, suggests that charges of dishonesty or immorality accompanying nonrenewal could infringe a faculty member’s liberty interest. And in *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973), the court held that charges of racism deprived the faculty member of a liberty interest.

The *Bishop* case makes clear that charges or accusations against a faculty member must in some way be made public before they can form the basis of a liberty claim. Although *Bishop* did not involve faculty members, a pre-*Bishop* case, *Ortwein v. Mackey*, 511 F.2d 696 (5th Cir. 1975), applies essentially the same principle in the university setting. Under *Ortwein* the institution must have made, or be likely to make, the stigmatizing charges “public ‘in any official or intentional manner, other than in connection with the defense of [related legal] action’” (511 F.2d at 699; quoting *Kaprelian v. Texas Woman’s University*, 509 F.2d 133, 139 (5th Cir. 1975)). Thus, there are still questions to be resolved concerning when a charge has become sufficiently “public” to fall within *Ortwein* and *Bishop*.

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<sup>13</sup>In *Paul v. Davis*, 424 U.S. 693 (1976), the U.S. Supreme Court held that “defamation, standing alone” does not infringe a liberty interest. But defamation can still create a liberty infringement when combined with some “alteration of legal status” under state law, and termination or nonrenewal of public employment is such a change in status. Defamation “in the course of declining to rehire” would therefore infringe a faculty member’s liberty interest even under *Paul v. Davis*.

3. The nonrenewal imposes a “stigma or other disability” on the faculty member that “foreclose[s] his freedom to take advantage of other employment opportunities.” Such circumstances would create a liberty interest. *Roth*, for instance, suggests that a nonrenewal that bars the faculty member from other employment in the state higher education system would infringe a liberty interest. Presumably, charges impugning the faculty member’s professional competence or integrity could also infringe a liberty interest if the institution keeps records of the charges and if the contents of these records could be divulged to potential future employers of the faculty member. But if the faculty member’s contract is merely not renewed, the fact that it may be difficult for an individual to locate another teaching position does not mean that the nonrenewal creates a liberty interest. In *Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003), the court ruled that a nonrenewed faculty member accused of misappropriating funds and planning musical events with “inappropriate sexual overtones” had a liberty interest and was entitled to a hearing on his nonrenewal decision. The court determined that these charges stigmatized the plaintiff, and had been made known to other faculty and staff members at the college, thus entitling him to a hearing to clear his name.

A liberty or property interest might also be infringed when the nonrenewal is based on, and thus would penalize, the faculty member’s exercise of freedom of expression. The Supreme Court dealt with this issue briefly in a footnote in the *Roth* case (408 U.S. at 575 n.14), appearing to suggest that a hearing may be required in some circumstances where the nonrenewal “would directly impinge upon interests in free speech or free press.” In the *Putnam* case, discussed above, the college had banned Professor Putnam from the campus, an act that resulted in a free speech and freedom of association claim by the plaintiff in addition to his liberty interest claim. Again, the court ruled in Putnam’s favor, stating that the campus is a public forum, thus giving Putnam the same right of access to the campus as any other citizen enjoys.

A case in which a public university prevailed in a constitutional challenge to a nonrenewal decision is instructive because of the care taken by various administrators to provide procedural due process to the accused professor. In *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), the University of Illinois refused to reappoint Trejo, an assistant professor of psychology, after investigating the complaints of several students about Trejo’s behavior at an out-of-state scholarly conference that Trejo and the students had attended. Several female graduate students complained that at a dinner they attended with Trejo and other faculty, Trejo made lengthy comments of a sexual nature, some of which were directed at the students and included vulgar hand gestures. According to the court, “every other man and woman seated at the table that evening was offended by Trejo’s speech, concluding that he was ‘out of control’ and that his remarks were little more than thinly veiled sexual solicitations directed at the female graduate students in the group.” Apparently the sexual innuendo and solicitations toward the graduate students continued when the group returned to campus. The students complained to the department chair, who investigated their complaints and obtained corroborating information from others who had

attended the dinner. The investigation also revealed the Trejo had behaved inappropriately toward other female graduate students from the beginning of his employment at Illinois, and also that similar problems had taken place at Trejo's previous place of employment.

The chair provided the dean with a written report, which recommended that Trejo not be reappointed. The dean provided the report to Trejo and met with him, as well as providing Trejo with the opportunity to provide a written response to the report. The dean met with a faculty advisory committee, conducted an independent review of the department chair's findings, and recommended that Trejo not be reappointed.

Trejo sued, claiming due process violations and also arguing that his discussion at the conference was protected speech under the First Amendment. The trial court disagreed, and the appellate court affirmed that ruling. Said the court: "[T]he statements were simply parts of a calculated type of speech designed to further Trejo's private interests in attempting to solicit female companionship . . ." (319 F.3d at 887) rather than matters of public concern (see further discussion of the case in Sections 7.4.3, 7.5.2, & 9.3.4). Furthermore, ruled the court, the university complied with due process requirements because the chair, dean, and provost all met with Trejo to seek his side of the story, and allowed him to provide a written response to the chair's report.

Whenever a nonrenewed faculty member has a basis for making a liberty or property interest claim (see Sections 7.2–7.5), administrators should consider providing a hearing. Properly conducted, a hearing may not only vitiate any subsequent procedural due process litigation by the faculty member but may also resolve or defuse First Amendment claims that otherwise might be taken to court. And as seen in *Trejo*, the hearing may be informal, as long as the institution follows its own procedures and provides the accused faculty member with notice of the charges and an opportunity to respond to them.

In 1971, the American Association of University Professors adopted a "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments" (in *AAUP Policy Documents and Reports* (AAUP, 2001), 15–20). The procedures include notice of criteria for reappointment, periodic review of the performance of probationary faculty, notice of reasons for nonreappointment, and an appeal process for decisions that allegedly involved academic freedom violations or gave inadequate consideration to the department's recommendation.

**6.7.2.2. Denial of tenure.** Denials of tenure, like contract nonrenewals, must be distinguished analytically from terminations of tenure. Whereas a tenure termination always infringes the faculty member's property interests, a tenure denial may or may not infringe a property or liberty interest, triggering due process protections. The answer in any particular case will depend on application of the teachings from *Roth* and *Perry* (Section 6.7.2.1) and their progeny. Denials of promotions, for due process purposes, are generally analogous to denials of tenure and thus are subject to the general principles developed in the tenure denial cases below. For a leading illustration, see *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979), where the court held that an associate professor had no right to an evidentiary hearing upon denial of promotion to full professor.

In 1978, a West Virginia court determined that a faculty member denied tenure had been deprived of a property interest (*McLendon v. Morton*, 249 S.E.2d 919 (W. Va. 1978)). Parkersburg Community College published eligibility criteria for tenure, which included six years as a teaching member of the full-time faculty and attainment of the rank of assistant professor. Having fulfilled both requirements, McLendon applied for tenure. After her tenure application was rejected on grounds of incompetence, McLendon filed suit, claiming that the institution's failure to provide her a hearing abridged her due process rights. The court held that (1) satisfying "objective eligibility standards gave McLendon a sufficient entitlement, so that she could not be denied tenure on the basis of her competence without some procedural due process"; and (2) minimal due process necessitates notice of the reasons for denial and a hearing before an unbiased tribunal, at which the professor can refute the issues raised in the notice. This decision thus extends the *Roth* doctrine to include, among persons who have a property interest in continued employment, faculty members who teach at public institutions and have met specified objective criteria for tenure eligibility (assuming that the institution uses objective criteria). In West Virginia and any other jurisdiction that may accept the *McLendon* reasoning, institutions must give such faculty members notice and an opportunity for a hearing before any final decision to deny tenure. Most institutions, however, use subjective criteria, or a combination of objective and subjective criteria, for making tenure decisions, and thus would not be bound by *McLendon*.

In contrast to *McLendon*, the court in *Beitzel v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981), held that a professor hired as a "probationary employee" did not have a sufficient property interest at stake under *Roth* to challenge his denial of tenure on due process grounds. The standards for the granting or denial of tenure were outlined in the university handbook; but, unlike those in *McLendon*, these standards were subjective. The court determined that the professor had no basis for the expectation that he would be granted tenure automatically. Similarly, in *Goodisman v. Lytle*, 724 F.2d 818 (9th Cir. 1984), the court rejected a professor's claim that he had a property interest in the university's procedures and guidelines for making tenure decisions. The court concluded that the procedures and guidelines "do not significantly limit university officials' discretion in making tenure decisions. They provide only an outline of relevant considerations. They do not enhance a candidate's expectation of obtaining tenure enough to establish a constitutionally protected interest" (724 F.2d at 821).

In *Davis v. Oregon State University*, 591 F.2d 493 (9th Cir. 1978), the same court that later decided *Goodisman* rejected a different type of professorial claim to a hearing prior to tenure denial. The plaintiff had been an associate professor in the university's department of physics. He alleged that the department chairman had assured him at the time of his appointment that he would be granted tenure "as a matter of course." In 1972 and again in 1973, under the university's published tenure policy, the university tenure committee reviewed Davis's case and on both occasions obtained insufficient votes to either grant or deny tenure. Davis was thereafter terminated at the end of the 1973-74

academic year and brought suit, contending that he had *de facto* tenure arising from an oral contract with the department chairman. The court ruled that the university's written tenure policy defeated any claim to a contractual tenure agreement, since the policy vested no authority to grant tenure in department chairmen, and Davis was fully aware of this fact. The court thus held that Davis had no property interest that would support his claim to a hearing.

Institutional procedures for making a tenure decision do not themselves create a property interest, according to *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984). Siu was denied tenure by George Mason University, a public institution, despite the positive recommendation of her departmental colleagues. Citing language in the faculty handbook that "the faculty is primarily responsible for recommendations involving appointments, reappointments, promotions, [and] the granting of tenure" (748 F.2d at 241) (although the final decision was explicitly afforded to the board or president), Siu asserted that the university's written procedures for making tenure decisions created a constitutionally protected property interest, and that the institution's failure to defer to the peer evaluation violated that property interest. The court stated that most untenured faculty were at-will employees and thus had no legitimate expectation of reemployment.

The court then turned to Siu's contention that detailed procedures for making tenure decisions created a property interest in having those procedures followed. The court responded:

Put this way the claim is a circular one: the state's detailed procedures provide the due process guarantees which create the very property interest protected by those guarantees. This is conceptually unacceptable. Its logical effect would be to "constitutionalize" all state contractual provisions respecting the continuation of public employment [748 F.2d at 244].

The court then provided guidance regarding the analysis of whether a property interest exists, noting that the decision-making procedures used are not coextensive with the property right, which, in this case, was created by state law.

The special relevance of the procedures to this limited inquiry is their indication of the general nature of the decisional process by which it is contemplated that the "interest" may be terminated. In particular, the procedures will likely indicate whether the decisional process is intended to be essentially an objective one designed to find facts establishing fault, or cause, or justification or the like, or instead to be essentially a subjective, evaluative one committed by the sources to the professional judgment of persons presumed to possess special competence in making the evaluation [748 F.2d at 244].

Concluding that the process in tenure decisions was subjective rather than objective, the court held that:

the process due one subject to this highly subjective evaluative decision can only be the exercise of professional judgment by those empowered to make the final decision in a way not so manifestly arbitrary and capricious that a

reviewing court could confidently say of it that it did not in the end involve the exercise of professional judgment [748 F.2d at 245].

The court then turned to Siu's claim that the institution's refusal to defer to the faculty's judgment violated its tenure procedures, an alleged violation of substantive, rather than procedural, due process:

Required deference to "working" faculty judgments in evaluating the professional qualifications of their peers may . . . be a proper subject for vigorous faculty associational efforts, for negotiated contractual ordering, or for voluntary conferral by sufficiently enlightened and secure academic institutions. But we are not prepared to hold that it is an essential element of constitutionally guaranteed due process, whether or not it is contractually ordered or otherwise observed as a matter of custom in a particular institution [748 F.2d at 245].

In another case a federal district court concluded that the tenure decision-making criteria and policies at Rutgers University created neither a property nor a liberty interest. The faculty union and a class of individuals denied tenure by Rutgers had asserted that probationary faculty had a legitimate expectation of being evaluated under the same standards that were in effect when currently tenured faculty were evaluated (in other words, that raising the standards for achieving tenure infringed the probationary faculty members' property interests). In an unpublished opinion, *Varma v. Bloustein*, Civ. No. 84-2332 (D.N.J. 1988), the trial judge granted summary judgment for the university, ruling that the tenure criteria and procedures did not "provide the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest." Furthermore, she wrote, previous patterns of tenure decisions did not bind the university to similar outcomes in the future, particularly in light of the very general nature of the tenure criteria and their reliance on subjective assessments of faculty performance.

As evidence of the existence of a liberty interest, the plaintiffs cited prisoners' rights cases in which the U.S. Supreme Court analyzed the factors that establish a liberty interest in state regulations or procedures. In *Olin v. Wakinekona*, 461 U.S. 238 (1983), the Court noted that "a state creates a protected liberty interest by placing substantive limitations on official discretion." When a state's regulations contain such substantive limitations, the plaintiff may have a protected liberty interest (*Hewitt v. Helms*, 459 U.S. 460 (1983)). The judge rejected the application of *Olin* and *Hewitt* to tenure decisions at Rutgers, stating that a liberty interest arises only when there are "particularized standards or criteria." The university's tenure standards did not restrict its discretion to award or deny tenure, and thus no liberty interest was created.

The court in *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), rejected yet another argument for procedural protections prior to denial of tenure. The plaintiff, a nontenured faculty member at East Carolina University, argued that his employment contract incorporated a provision of the faculty manual requiring department chairmen to apprise nontenured faculty—both by personal

conference and written evaluation—of their progress toward tenure. Although Kilcoyne received a letter from the department chairman and had a follow-up conference toward the end of each of his first two years at the university, he argued that these procedures did not conform to the faculty manual. University guidelines also mandated a tenure decision following a three-year probationary period. At the beginning of his third year, Kilcoyne was notified that he would be rehired for a fourth year; later in the third year, however, he was informed that he would not be granted tenure or employed beyond the fourth year. After his claim of “de facto tenure” was summarily dismissed by the courts (405 F. Supp. 828 (E.D.N.C. 1975), *affirmed*, 530 F.2d 968 (4th Cir. 1975)), Kilcoyne argued that the alleged failure of the university to conform precisely to the faculty manual procedures incorporated into his contract deprived him of procedural due process. The court held that Kilcoyne lacked any *Roth* property interest in further employment at the university; denial of tenure would thus have been constitutionally permissible even if accompanied by no procedural safeguards. According to the court, if a state university gratuitously provides procedural safeguards that are not constitutionally mandated, deviations from such procedures will not violate due process even if the procedures are enumerated in the faculty contract. Although the contract may provide a basis for a breach of contract action, the mere fact that the state is a contracting party does not raise the contract problem to the status of a constitutional issue.

Other potential sources of property interests relevant to tenure denials (as well as to terminations of tenured faculty, discussed in Section 6.6.2.3) are the fair employment laws enacted by the states. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the U.S. Supreme Court ruled that a former employee challenging his dismissal had a property interest in the adjudicatory processes of the Illinois Fair Employment Practices Commission. The commission had failed to schedule a hearing on Logan’s timely complaint of discriminatory dismissal, and the Illinois courts had ruled that the commission’s procedural error deprived the commission of jurisdiction and thus extinguished Logan’s cause of action. The court, in an opinion written by Justice Blackmun, disagreed. Justice Blackmun wrote: “[Logan’s] right to use the [state law] adjudicatory procedures is a species of property protected by the Due Process Clause. . . . The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except for cause” (455 U.S. at 431). The statute created a property interest because it gave Logan an entitlement to use the state’s enforcement process; the state’s own error deprived Logan of this protected property interest, and no due process protections had been afforded him.

Although a few courts have ordered a college to grant tenure to a faculty member who has prevailed in a constitutional or civil rights challenge to a tenure denial (see the discussion in Section 6.4.1), it is much more common for a court to remand the decision to the university for a new tenure review that avoids the procedural violations found by the court to have prejudiced the review process. For example, in *Sugano v. University of Washington*, 2000 Wash. App. LEXIS 504 (Ct. App. Wash., March 27, 2000) (unpublished), a state appellate court determined that an untenured professor of romance languages had



not been properly mentored, and also ruled that the university had not followed the appropriate process in the plaintiff's tenure review. Although the plaintiff was subsequently denied tenure after a second review, the court awarded her back pay and ordered the university to pay her attorney's fees.

In *Skorin-Kapov v. State University of New York at Stony Brook*, 722 N.Y.S.2d 576 (N.Y. App. Div. 2001), *appeal denied*, 96 N.Y.2d 720 (N.Y. 2001), a state appellate court reversed the order of a trial court to grant the plaintiff tenure after a finding that the tenure denial was arbitrary, capricious, and "without a sound basis in reason." Although the appellate court agreed with the trial court's findings of fact, it rejected its remedy and remanded the matter to the university to conduct a new tenure evaluation. (For a case with similar facts and the same remedy, see *Aievoli v. State University of New York*, 694 N.Y.S.2d 156 (N.Y. App. Div. 1999).)

Procedural protections for public college faculty may also be found in faculty handbooks or other college policies that have contractual significance. For example, the faculty handbook at Washington State University requires that tenured faculty members conduct annual evaluations of untenured faculty. In *Trimble v. Washington State University*, 993 P.2d 259 (Wash. 2000), a faculty member denied tenure filed a breach of contract claim, stating that the failure of the mentoring process caused his tenure denial. The state's supreme court affirmed a summary judgment ruling for the university, stating that the tenured faculty members' failure to provide written evaluations of an untenured faculty member during his probationary period did not constitute a breach of contract. One justice dissented, stating that the failure to provide feedback to the untenured faculty member from tenured faculty in his department prevented him from making the kind of changes in his research program that could have led to a positive tenure decision.

Carefully drafted contract language can help colleges deflect contractual claims to tenure as a result of defective procedures. For example, in *University of Nevada v. Stacey*, 997 P.2d 812 (Nev. 2000), the state's highest court rejected a breach of contract claim brought by a professor who had received excellent evaluations during his employment at the university. The court interpreted the language of the professor's contract as stating that a decision to grant tenure was discretionary; therefore, denial of tenure was not a breach of contract.

With the exception of *McLendon*, which addressed issues not usually present in challenges to tenure denials, the courts have clearly stated that denial of tenure is not a "termination" per se, and affords no constitutional due process guarantees (although state statutes or regulations may provide procedural guarantees, which, if violated, could form the basis for a claim under state law). As is the case with nonreappointment, however, if the faculty member alleges that the tenure denial was grounded in unconstitutional reasons (retaliation for constitutionally protected speech, for example), then liberty interests would arguably have been infringed and procedural due process protections would therefore apply.

**6.7.2.3. Termination of tenure.** Whenever an institution's personnel decision would infringe a property or liberty interest, constitutional due process requires that the institution offer the faculty member procedural safeguards

before the decision becomes final. The crux of these safeguards is notice and opportunity for a hearing. In other words, the institution must notify the faculty member of the reasons for the decision and provide a fair opportunity for him or her to challenge these reasons in a hearing before an impartial body.

Decisions to terminate tenured faculty members must always be accompanied by notice and opportunity for a hearing, since such decisions always infringe property interests. The cases in this Section provide specific illustrations of the procedural due process requirements applicable to tenure termination cases. Decisions to terminate a nontenured faculty member during the contract term are generally analogous to tenure terminations and thus are subject to principles similar to those in the cases below; the same is true for nonrenewal and denial-of-tenure decisions when they would infringe property or liberty interests.

Because of the significance of the property interest, a pretermination hearing is required. The standards for the pretermination hearing that must be provided to a discharged faculty member were developed by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Prior to making the final termination decision, the institution should hold a pretermination hearing, according to the *Loudermill* opinion. “The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story” (470 U.S. at 546). If the pretermination hearing is as informal as the *Loudermill* criteria suggest is permissible, then a post-termination hearing is necessary to permit the individual to challenge the decision in a manner designed to protect his or her rights to due process. The nature of the hearing and the degree of formality of the procedures have been the subjects of much litigation by tenured faculty who were discharged.

Although there is no requirement that the termination hearing have all the elements of a judicial hearing (*Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972)), such hearings must meet minimal constitutional standards. A federal appeals court set forth such standards in *Levitt v. University of Texas*, 759 F.2d 1224 (5th Cir. 1985):

1. The employee must be given notice of the cause for dismissal.
2. The employee must be given notice of the names of witnesses and told what each will testify to.
3. The employee must be given a meaningful opportunity to be heard.
4. The hearing must be held within a reasonable time.
5. The hearing must be conducted before an impartial panel with appropriate academic expertise.

Many institutions, however, have adopted the procedures recommended by the American Association of University Professors. Formal adoption of the AAUP’s 1958 “Statement on Procedural Standards in Faculty Dismissal Proceedings” (in *AAUP Policy Documents and Reports* (AAUP, 2001), 15–20) will require the institution to follow them.

A federal trial court developed a set of carefully reasoned and articulated due process standards in *Potemra v. Ping*, 462 F. Supp. 328 (E.D. Ohio 1978). In that case, a tenured member of the economics department at Ohio University claimed that he was denied due process when the university dismissed him for failure to perform his faculty duties and inability to communicate with students. The court ruled that the teacher's minimum due process safeguards included (1) a written statement of the reasons for the proposed termination prior to final action, (2) adequate notice of a hearing, (3) a hearing at which the teacher has an opportunity to submit evidence to controvert the grounds for dismissal, (4) a final statement of the grounds for dismissal if it does occur. The court held that the university had complied with these requirements and had not infringed the faculty member's due process rights.

In a similar case, *Bowling v. Scott*, 587 F.2d 229 (5th Cir. 1979), a tenured English professor at the University of Alabama filed suit after the university terminated his tenure. The court enunciated a minimum due process standard similar to that used in *Potemra* and ruled that no deprivation of procedural due process had occurred, since the university had served Bowling with a list of charges; informed him that formal proceedings would commence; given advance notice of each of fourteen hearing sessions, all of which the faculty member had attended with his lawyer; and subsequently issued a twelve-page report stating the grounds for dismissal.

In another case, *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), the court upheld the university's dismissal of a tenured faculty member for neglect of his teaching responsibilities and lack of scholarship. The university had provided the following due process protections:

1. Frequent communications with King concerning his poor teaching, his unexcused absences, and his refusal to cooperate with the department.
2. A departmental vote, with King present, to remove him from the department because of his history of poor performance.
3. Notice to King of the charges against him and the university's intent to initiate removal proceedings.
4. A hearing panel of tenured faculty and the right to object to any of the individual members (which King did for one member, who was replaced).
5. Representation by counsel and substantial documentary discovery, including depositions of administrators.
6. A prehearing conference in which the parties exchanged issue lists, witness lists, and exhibit lists.
7. A hearing occurring over a two-week period, during which King was represented by counsel, who cross-examined witnesses, presented witnesses and documentary evidence, and made oral and written arguments.
8. Review of the entire record by the university president.

9. Review by the regents of the panel's findings, the president's recommendation, and briefs from each of the parties.
10. An opportunity for King to appear before the regents before they made the termination decision.

The appellate court characterized the procedural protections that King received as "exhaustive" and determined that they satisfied constitutional requirements (774 F.2d at 228).

In *Frumkin v. Board of Trustees, Kent State*, 626 F.2d 19 (6th Cir. 1980), the court focused particularly on the type of hearing an institution must provide prior to a decision to terminate tenure. The university had slated the professor for dismissal after federal funding for his position was cut. In support of the recommendation for dismissal, the university charged the professor with "unsatisfactory performance as grant director, recurring unproven charges against faculty members, unprofessional conduct, false charges against the department, and violation of university policy." When the professor chose to contest his dismissal, the university scheduled a hearing. The professor was permitted to have a lawyer present at the hearing, but the lawyer's role was limited. He was permitted to consult and advise his client and to make closing arguments in his client's behalf. But he was prohibited from conducting any cross-examination or direct examination of witnesses or from raising objections.

Reasoning that this limited hearing was well suited to the type of decision to be made, the court held that the university had not violated the professor's due process rights. The court examined the ruling in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which the U.S. Supreme Court had established guidelines for procedural due process. In *Mathews*, the Court had identified three factors which must be considered:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail [626 F.2d at 21].

Using these criteria, the court rejected Frumkin's contention that his counsel's inability to cross-examine witnesses was a violation of procedural due process. Despite the fact that the administrative burden on the university would have been "comparatively slight" should Frumkin's attorney have been permitted to examine witnesses, said the court, the institution's interest in avoiding a "full-fledged adversary trial" was reasonable and there was no showing that Frumkin had been prejudiced by the limited role played by his attorney.

As long as reviewing courts believe that the fundamental protections articulated in *Loudermill* have been provided, the procedures for making the termination decision need not be elaborate. In *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), the court reversed a jury finding on behalf of the professor, ruling that the college should have been awarded summary judgment. *McDaniels*, a

tenured professor at Delaware County Community College, had been warned, after two male students complained that McDaniels had sexually harassed them, that he would be disciplined or terminated if he repeated the behavior. The following year, another student filed a harassment complaint against McDaniels. After investigating the charges, the college decided to discharge him. He was told to attend a meeting with the college's personnel director and the dean to "discuss a student problem." He was not advised that the "problem" was a charge of sexual harassment until he arrived at the meeting, at which time he was also advised that the college would begin termination proceedings. Later, the personnel director confirmed this information in writing.

The college's policies provided for a pretermination appeal to the president, of which McDaniels took advantage. The president, after investigating the allegations, recommended to the board of trustees that they proceed with the termination. The trustees voted unanimously to terminate McDaniels. The college's collective bargaining agreement also provided for post-termination arbitration. Although McDaniels began arbitration proceedings, he also filed an action under 42 U.S.C. Section 1983 (see Section 3.5 of this book), claiming that the college had violated his Fourteenth Amendment due process rights. The arbitration was stayed pending the results of the litigation.

The college filed a motion for summary judgment, but the trial judge denied the motion and held a trial. Although the jury found that the college had adequately informed McDaniels of the charges against him, it determined that the college had not given him an opportunity to respond fully to the charges before it made the termination decision. The judge ordered McDaniels reinstated with back pay.

The appellate court reversed the trial court's ruling. Evaluating the college's actions in light of *Loudermill*, the appellate court made short work of McDaniels's claim that, because he was a tenured professor of twenty years' standing, he was due more procedural protection than that provided by *Loudermill*:

It is true that McDaniels has a property interest in his continued employment and perhaps a liberty interest in clearing his reputation of sexual harassment charges. But McDaniels appears to argue that because he is a professor and has been at the college for 20 years, his property interest in continued employment is constitutionally greater than those held by the employees in *Loudermill*. Yet he has not offered any basis on which we could or should distinguish reasonably between the interest of a tenured employee who has worked 20 years and the interest of one who has worked only one year for the same employer and we can conceive of no principled way to distinguish between the two. Arguably, the interest in continued employment may be greater for younger employees who have started only recently because they have potentially more years of employment ahead [59 F.3d at 455].

The court also rejected McDaniels's assertion that he should have received the procedural safeguards approved by that same appellate court in *Skehan v. Board of Trustees of Bloomsburg State College* and *Chung v. Park* (discussed in Section 6.7.4 below). Although that court in those opinions had approved a

six-step pretermination procedure as consistent with due process requirements, the *McDaniels* court stated that in neither case had it ruled that all of these steps were required prior to the termination, and that some of the steps could be provided after termination.

The court rejected the jury's finding that McDaniels had not been afforded an opportunity to respond to the charges. He had denied the charges at the initial meeting with the personnel director, had provided additional written information, and was given nearly a month to prepare for his appeal to the president. The president read and responded to McDaniels's submissions, said the court, and that was a sufficient opportunity for the college to consider his side of the story.

The court rejected McDaniels's claim that his due process rights were denied because he was never given a copy of the allegations against him. "[P]retermination notice of the charges and evidence against an employee need not be in great detail as long as it allows the employee 'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges'" (59 F.3d at 457, citations omitted). The fact that, at the initial meeting, McDaniels was asked specific questions about the allegations gave him an opportunity to respond meaningfully to the charges, said the court.

McDaniels also argued that the pretermination procedure was a sham because the administrators were biased against him, knew that the harassment allegations were false, and were simply trying to rid the college of a highly paid tenured professor. The court stated: "In the case of an employment termination case, 'due process [does not] require the state to provide an impartial decision maker at the pre-termination hearing. The state is obligated only to make available 'the means by which [the employee] can receive redress for the deprivations'" (59 F.3d at 459, quoting *Schaper v. City of Huntsville*, 813 F.2d 709, 715-16 (5th Cir. 1987)). Because the board of trustees provided McDaniels with a neutral decision maker at the post-termination stage, the due process protections were sufficient.

One judge dissented, agreeing with McDaniels's assertion that the lack of notice of the charges prior to the pretermination meeting violated his due process rights. But the majority responded that McDaniels was not terminated at the end of the meeting; the board of trustees terminated him three weeks later after an appeal to the president, which the majority believed gave McDaniels sufficient time and opportunity to respond to the charges.

*McDaniels* probably represents the minimum due process that institutions must afford tenured professors or other employees who have a property right in continued employment. Despite the favorable outcome for the college in this case, most public institutions will very likely continue to follow a version of the termination procedure described in *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975) (discussed in Section 6.7.4), or a similar procedure.

*Clarke v. West Virginia Board of Regents*, 279 S.E.2d 169 (W. Va. 1981) provides particularly useful guidance to administrators and counsel in developing a written decision based on the record upon which a reviewing court may rely. In this case, the court considered the reasons and evidence an institution must provide to support a decision terminating tenure. Clarke, a tenured professor at

Fairmont State College, had been dismissed following a hearing before a hearing examiner. The hearing examiner made a written report, which merely cited the testimony of witnesses who supported dismissal and did not state any specific reasons or factual basis for affirming the dismissal. The professor argued in court that this report did not comply with due process requirements. Although the court's analysis is based on the state constitution, the opinion relied on federal constitutional precedents and is indicative of federal constitutional analysis as well.

As a starting point for determining what a hearing examiner's report must contain, the court consulted a policy bulletin of the West Virginia Board of Regents. The policy bulletin did not require the hearing examiner to make findings of fact and conclusions of law, but did require the hearing examiner "enter such recommendations as the facts justify and the circumstances may require" and to "state the reasons for his determination and indicate the evidence he relied on" (279 S.E.2d at 177). The court stressed the importance of an adequate report to give a reviewing court a basis for review and to give the affected individual a basis for identifying grounds for review:

The need for an adequate statement of the hearing examiner's reasons for his determination and the evidence supporting them is obvious. Our function as a reviewing court is to review the record to determine if the evidence adduced at the hearing supports the findings of the hearing examiner and whether his conclusions follow from those findings. We must rely on the facts and logic upon which the hearing examiner ruled . . . and determine whether he erroneously applied them in reaching his final determination. If the record of the administrative proceeding does not reveal those facts which were determinative of the ruling or the logic behind the ruling, we are powerless to review the administrative action. We are thrust into the position of a trier of fact and are asked to substitute our judgment for that of the hearing examiner. That we cannot do [279 S.E.2d at 178].

The court also noted that the party appealing a hearing examiner's ruling needed a statement of findings and the evidence which the examiner relied upon in making those findings in order to develop an appropriate appeal.

On the basis of its review of the regents' bulletin and applicable constitutional principles, the court held that the hearing examiner's report did not meet due process standards:

In the report of findings and recommendations, a hearing examiner should list the specific charges found to be supported by the evidence adduced at the hearing and provide some reference to the evidence supporting those findings. In view of our discussion above, we conclude that the failure of the hearing examiner to state on the record the charges against Dr. Clarke which were found to be supported by the evidence constitutes reversible error [279 S.E.2d at 178].

In termination proceedings, questions may arise as to whether defects in one segment of the proceeding constitute a sufficient violation of due process to invalidate the entire proceeding. In *Fong v. Purdue University*, 692 F. Supp. 930 (N.D. Ind. 1988), for example, Professor Fong had asked for several delays in

the scheduling of the hearing on his dismissal. The faculty hearing committee granted one delay, but decided to proceed on the rescheduled date. Although Fong was available on that date, he refused to attend the hearing because his attorney was not present. The hearing panel recorded and had transcribed the proceedings; and Fong later appeared with his attorney and presented his own witnesses and cross-examined the university's witnesses. In appealing the university's decision to dismiss him, Fong asserted that his absence from part of the hearing was a denial of due process. The court found that Fong had been given, and had taken advantage of, ample opportunity to present his side of the case and that no due process denial had occurred.

Any problems that might have arisen in this regard from the fact that the university panel proceeded without Dr. Fong and without his counsel at the early stages, were adequately obviated by permitting him to call witnesses at a time when counsel was present. He was afforded an opportunity to cross-examine witnesses and to present his own witnesses. He was provided full and complete notice of the charges against him, and had an opportunity to confront and challenge those charges. Considering the record in its totality, and not in isolated segments, it is difficult to imagine what other procedural due process the officials at Purdue University could have provided to Dr. Fong [692 F. Supp. at 957].

In addition to claims of procedural due process violations, a substantive due process claim may be brought by a faculty plaintiff who claims that the termination decision was made for arbitrary, irrational, or improper reasons. In a claim of substantive due process violation, the plaintiff must demonstrate that the interest at stake is "fundamental" under the U.S. Constitution. Federal courts have been reluctant to create a substantive due process right in continued public employment, following the reasoning of Justice Powell's concurring opinion in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (discussed in Section 9.3.1). See, for example, *Nicholas v. Pennsylvania State University*, 227 F.3d 133 (3d Cir. 2000), in which a federal appellate court upheld a jury finding of procedural due process violations but rejected the plaintiff's substantive due process claims, stating that a property right in public employment was not a fundamental constitutional right.

In *Dismissal Proceedings Against Huang*, 431 S.E.2d 541 (N.C. Ct. App. 1993), a tenured faculty member was dismissed as a result of several assaults. Because the assaults had occurred as long as fifteen years earlier, the professor claimed that the use of "old" misconduct violated his substantive due process rights. Although the appellate court agreed, characterizing the university's actions as arbitrary and capricious, the state's supreme court reversed (441 S.E.2d 696 (1994)), finding ample evidence that the professor had engaged in conduct that constituted just cause for dismissal. Although the university ultimately prevailed, the case underscores the importance of prompt administrative response to faculty misconduct.

A federal appellate court ruled that substantial procedural compliance, rather than full compliance, with an institution's de-tenuring procedures was sufficient to pass constitutional muster. In *de Llano v. Berglund*, 282 F.3d 1031



(8th Cir. 2002), the appellate court upheld a trial court's award of summary judgment to North Dakota State University. De Llano, a tenured professor of physics, had a troubled history at the university. He had been hired to chair the department, but was removed five years later at the request of the departmental faculty to improve departmental morale. After being removed as chair, de Llano began a letter-writing campaign, critical of faculty colleagues and discussing various intradepartmental conflicts. Some of these letters were sent to the press. Students disliked de Llano as well—one semester more than 90 percent of the students in his introductory physics class requested a transfer to a different section. The university decided to terminate de Llano on six grounds: (1) lack of collegiality, (2) harassment of departmental staff, (3) refusal to process complaints through proper channels, (4) making false accusations about the department chair and dean, (5) failure to correct problem behavior after several reprimands, and (6) excessive filing of frivolous grievances.

A faculty review committee concluded that the charges were insufficient to support his termination. After the president rejected the findings of that committee, at de Llano's request a second faculty committee held a hearing and concluded that there was adequate cause for his dismissal. The president accepted the findings of this committee and terminated de Llano. De Llano appealed to the state board of higher education, which upheld the dismissal. The lawsuit followed, claiming due process violations (for not following university procedures) and First Amendment violations (for punishing him for his oral and written statements of criticism).

The court looked to *Cleveland Board of Education v. Loudermill*, cited above, for the type of due process protections to which an individual with a property interest in his job is entitled. The court concluded that the university had afforded de Llano notice of the charges against him (the multiple reprimands as well as the final notice of charges), an explanation of those charges, and an opportunity to respond to those charges (two hearings). Despite the fact that de Llano claimed that there were several violations of university procedure, the court concluded that "federal law, not state law or NDSU policy, determines what constitutes adequate procedural due process" (282 F.3d at 1035).

With respect to de Llano's claim that his First Amendment rights had been violated, the court determined that the subject of his letters was his personal grievances against his colleagues and the administration. The court concluded that the subjects of these letters were not matters of public concern and thus were unprotected by the First Amendment.

If a long-tenured professor is dismissed for a single incident, the failure to use progressive discipline may be construed as an unconstitutional procedural violation. In *Trimble v. West Virginia Board of Directors, Southern West Virginia Community & Technical College*, 549 S.E.2d 294 (Ct. App. W. Va. 2001), the court reversed the termination of a tenured assistant professor of English on the grounds of alleged insubordination. Trimble had claimed that the termination violated his First Amendment rights, and that his property right to continued employment required the college administration to provide progressive discipline before terminating him.

Trimble's performance had been acceptable for nearly twenty years. When a new president took office at the college, Trimble helped organize a faculty labor union and became its president. Trimble and several faculty colleagues objected to the new president's insistence that all faculty use a particular type of software to generate course syllabi and to evaluate student achievement. Trimble refused to attend four "mandatory" meetings about the software, and was terminated for insubordination.

The court found that, given Trimble's nineteen years of satisfactory service to the college, and the lack of any criticism of his teaching or relationships with students, the dismissal was arbitrary and capricious. "Because of Mr. Trimble's property interest in continued employment with the College and his previously unblemished record, due process required the College to utilize progressive disciplinary measures against Mr. Trimble" (549 S.E.2d at 305). The court ordered Trimble reinstated with back pay and retroactive benefits. One judge dissented, commenting that the majority was "micro managing" the college's employment decisions and applying its "own subjective notions of justice."

Procedural due process may also be required for a faculty member whose employment contract has been rescinded. In *Garner v. Michigan State University*, 462 N.W.2d 832 (Mich. Ct. App. 1990), the university, without holding a hearing, rescinded the contract of a tenured professor who allegedly lied to the dean about allegations of unprofessional conduct in his prior faculty position. When the dean discovered that serious charges had been made against the professor at his former place of employment, the university rescinded the professor's tenured contract of employment. The professor denied that he had lied about the charges. Although the university asserted its right to rescind an employment contract because of the employee's misrepresentations, citing *Morgan v. American University*, 534 A.2d 323 (D.C. 1987) (see Section 4.3.2), the court disagreed, distinguishing *Morgan* on two grounds. First, the plaintiff in *Morgan* had admitted the misrepresentation, meaning that there was no factual dispute. Second, *Morgan* involved a private institution. The court noted that the plaintiff, as a tenured professor, had a property interest in continued employment and must be afforded the same due process protections that he would be entitled to if the university had terminated him.

Due process protections are not necessary, however, if a tenured professor abandons his position and permits several years to elapse before reclaiming it. In *Osborne v. Stone*, 536 So. 2d 473 (La. Ct. App. 1988), a state court applied the doctrine of laches (a doctrine that says the individual has abandoned his or her rights by failing to assert those rights in a timely manner) in determining that a tenured law professor at Southern University who failed to report for class for an entire academic year had abandoned his position and thus was deemed to have resigned. Since Southern University did not discharge Professor Osborne, the university owed him no hearing or other due process protections.

Taken together, these cases provide a helpful picture of how courts will craft procedural requirements for tenure termination decisions. When reviewing such decisions, courts will generally look for compliance with basic elements of due process, as set out in *Potemra*. When an institution fails to accord the faculty

member one or more of these basic elements, *Clarke*, *Garner*, and *Trimble* indicate that courts will invalidate the institution's decision. But *Bowling* and *Frumkin* illustrate judicial reluctance to provide more specific checklists of procedures mandated by due process. Beyond the minimum requirements, such as those in *Potemra*, courts will usually defer to institutional procedures that appear suited to the needs and expectations of the faculty member and the institution.

**6.7.2.4. Other personnel decisions.** Courts interpreting *Roth* and *Sindermann* have made it clear that in only a narrow range of employment decisions will the claim that the faculty member has a property interest in the decision apply. For example, in *Swartz v. Scruton*, 964 F.2d 607 (7th Cir. 1992), a professor sued Ball State University, alleging a constitutionally defective failure to follow the proper procedures in determining the recipients of merit salary raises. The court ruled that there was no constitutionally protected property interest in the process of determining merit raises that would support a substantive due process claim, and that the faculty member's procedural interests were not themselves property rights (in other words, the purpose of due process was to protect a property interest, had one existed, but the process itself was not a property interest). Furthermore, the professor had no property interest in a specific pay increase, and even if the professor could have demonstrated a contractual right to the use of proper procedures, this right would not equal a property interest.

Although courts have found that tenured faculty have a property right in continued employment, they do not have such a right in either promotion or other employment decisions. For example, in *Herold v. University of South Florida*, 806 So. 2d 638 (Ct. App. Fla. 2d Dist. 2002), the court rejected the plaintiff's contention that the university's failure to promote him to full professor did not implicate either procedural or substantive due process protections, and thus no hearing regarding the denial of promotion was required.

On the other hand, if institutional policies or contracts provide protections beyond those implicated by the Constitution, additional protections may be required for demotion decisions. For example, in *Moosa v. State Personnel Board*, 102 Cal. App. 4th 1379 (Ct. App. Cal. 3d Dist. 2002), a tenured full professor was demoted to associate professor because of his alleged unprofessional conduct. The dean, concerned about what he believed to be Moosa's poor teaching performance, had directed Moosa to submit a plan for improving his teaching performance. Instead, Moosa submitted a peer evaluation report stating that his performance was acceptable. The dean then demoted Moosa for five years on the basis of "unprofessional conduct." The court ruled that under the collective bargaining agreement that dealt with faculty employment, the dean could request, but not require, that Moosa submit a performance improvement plan. Thus, Moosa's insubordination did not rise to the level of unprofessional conduct, and thus the dean lacked the authority to demote Moosa.

Courts have similarly refused to find a protected property interest in other decisions related to faculty employment—for instance, decisions to transfer faculty members to other departments or to less desirable office space within a

department. In *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988), the plaintiffs, all of whom were tenured professors, were transferred from the mechanical engineering department to other engineering departments at Auburn University. (The professors also asserted academic freedom claims, discussed in Section 7.4.2.) The plaintiffs claimed that they were denied due process in the transfer decision, but the court concluded that their claim was unfounded.

Considering first whether the property interests that they asserted were sufficient to satisfy the Fourteenth Amendment's due process clause, the court determined that "[t]ransfers and reassignments have generally not been held to implicate a property interest" (858 F.2d at 1550). It indicated that, in this case, neither the faculty handbook nor state law contained any provision protecting a professor from transfer to another department without his or her consent, and such decisions apparently were left to the discretion of university administrators. Thus rejecting the professors' property interest claim, the court also summarily rejected their liberty interest claim, because they had not suffered any loss of rank or salary, could still teach in their areas of specialization, and could not show any stigma resulting from the transfers that would damage their professional reputations or foreclose them from other employment opportunities (858 F.2d at 1550-51, n.5 and accompanying text).

The court held further that, even if the transfer had infringed a property or liberty interest, the professors still would not have been denied procedural due process. The professors had been given notice of the transfers, and the grievance procedures in the faculty handbook were available to them to challenge the transfers (an opportunity that the professors did not pursue).

Another federal court, asked to determine whether a tenured professor had a property interest in a particular position, ruled that no property interest existed in the position itself and that the faculty member's only property interest was in receiving his full compensation (*Huang v. Board of Governors of the University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990)). Furthermore, the court ruled that the university had afforded the plaintiff ample due process because he had had an opportunity to present his grievances to a faculty committee during a nine-day hearing. The procedures used were sufficient, the court ruled, to ensure that the transfer decision was not arbitrary and that it was reached impartially.

In a departure from what appears to be the majority view, another federal appellate court found that a tenured professor had a property right in his tenured position in the accounting department, based upon "contract, confirmed by [the institution's] customs and practices." But the court rejected the professor's claim that his involuntary transfer to a different department did not comply with due process requirements. In *Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003), the court ruled that the extensive correspondence between the professor and the dean concerning the transfer, the professor's utilization of the grievance procedure, and the lack of evidence of significant financial or career harm satisfied procedural due process requirements. The court commented: "We reject the suggestion that Dr. Hulen was entitled to a formal . . . evidentiary hearing before being laterally transferred. It would be remarkable if such a hearing were

constitutionally required, since the Constitution does not even require such a hearing before an employee is *fired*" (322 F.3d at 1247, citing *Loudermill*).

Another faculty member unsuccessfully attempted to assert a property interest in the number of credits assigned to his course and to his entitlement to serve on a search committee. He filed a variety of claims against his departmental colleagues, including alleged constitutional deprivation of his due process rights. In *Hollister v. Tuttle*, 210 F.3d 1033 (9th Cir. 2000), the court rejected these claims. The professor claimed that he had been retaliated against for criticizing curriculum decisions and the research of his fellow departmental faculty because his colleagues reduced the number of credits assigned to his course from nine to eight and left him off a search committee. The court stated that the number of credits assigned to a course is "an academic decision," and furthermore, that "a place on a college search committee is not property."

Unless an administrative position is explicitly identified as a tenured position, incumbents have no property interest in retaining their administrative positions. In *Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988), the former head of the speech and theater department at the University of Tennessee argued that his removal from that position (to a position as a tenured faculty member) without a hearing violated his rights to due process. The court disagreed. The faculty handbook stated clearly that positions as department heads were not tenured; furthermore, a letter appointing the plaintiff as head stated that he would serve at the pleasure of the chancellor. To the plaintiff's claim that removal as department head violated his liberty interests because "rumors" accompanied the removal, the court determined that, since the plaintiff returned to a tenured faculty position, he could not demonstrate the kind of interference with career opportunities that would normally give rise to a liberty interest.

The U.S. Supreme Court has issued a ruling that establishes the due process rights of a tenured public employee who is suspended without pay. In *Gilbert v. Homar*, 520 U.S. 924 (1997), Richard Homar, a police officer at East Stroudsburg University, was arrested by the state police in a drug raid. He was charged with possession of marijuana and other drug-related crimes that constitute felonies under Pennsylvania law. When the state police notified Homar's supervisor of the arrest, the supervisor notified the director of human resources, who had been delegated authority by the president to discipline employees. The director immediately suspended Homar without pay, and sent him a letter advising him of the suspension and the university's intention to investigate the charges.

The criminal charges were dropped approximately one week later; two weeks after that, the director of human resources and Homar's supervisor met with him to give him the chance to explain his side of the story. Homar was not told that university officials had the police report, which contained a confession that he had allegedly made. Six days later, Homar received a copy of the police report and a letter from the director of human resources, advising him that he had been demoted to a groundskeeper, and that he would receive back pay at the groundskeeper rate from the date of his suspension. (He eventually received full

back pay at the rate of a police officer.) Homar requested a meeting with the university president. After giving Homar an opportunity to respond to the charges made by the university officials, the president sustained the demotion.

Homar filed a Section 1983 claim (see Section 4.7.4 of this book), contending that his suspension without pay prior to meeting with university officials violated his due process rights. Although the U.S. Court of Appeals for the Third Circuit had ruled that the university's failure to provide Homar with a presuspension hearing violated due process guidelines, the Supreme Court reversed in a unanimous opinion written by Justice Scalia. Noting that the extent of due process clause protections for discipline short of termination was an issue of first impression for the Court, the opinion emphasized the flexible nature of due process, particularly in situations such as Homar's, where the employer believed it needed to act quickly to protect the public's confidence in the integrity of law enforcement personnel. Evaluating the university's actions against the standard of *Mathews v. Eldridge*, the Court distinguished between an employee's interest in remaining employed and his interest in the temporary loss of pay, characterizing the loss in this case as "insubstantial." On the other hand, said the Court, the university had a strong interest in acting quickly, given that felony charges had been filed against Homar. Furthermore, there was little need for a presuspension hearing, since the felony charges that had been filed against Homar provided a reasonable basis for suspending him.

The lower courts had not addressed the issue of whether the university violated Homar's due process rights because of the lapse of time between the dropping of the felony charges and his meeting to explain his side of the story (sixteen days). As a consequence, the Court remanded the case to the appellate court for consideration of this issue.

The Court's focus on the university's need to act quickly suggests that this case may not have general applicability to the suspension of tenured faculty members. Unless a college could demonstrate that it needed to remove a tenured faculty member quickly because he or she was a potential threat to the health or safety of others, or because the faculty member had committed some act that rendered him or her unfit to continue teaching pending a disciplinary hearing, it would probably be difficult for a public college to justify suspension without the panoply of presuspension due process protections. On the other hand, in *Simonson v. Iowa State University*, 603 N.W.2d 557 (Iowa 1999), the Iowa Supreme Court ruled that placing a tenured professor on paid administrative leave pending the completion of an investigation of sexual harassment claims against him did not violate constitutional protections. The court ruled that the professor suffered no economic loss, and thus no deprivation of property interest, and similarly rejected his liberty interest claim. Because no university official had publicly discussed the reason for placing the professor on paid leave, said the court, no liberty interest was at risk.

Some medical centers affiliated with universities are implementing new salary policies for their tenured faculty, in many cases as a result of the changes brought by managed health care. In *Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (5th Cir. 1993), a tenured professor at the medical

school challenged his reduction in salary as a violation of his due process rights, alleging that he should have been provided a hearing before the decision was made. His salary had been reduced because, according to his department chair, Williams had not generated the expected amount of grant income. Williams was given six months' notice of the salary reduction, which was from \$68,000 to \$46,500.

Although the court did not explicitly find that Williams had a property interest in the former salary amount, it determined that he received sufficient due process protections. Citing the U.S. Supreme Court decision in *Mathews v. Eldridge* (Section 6.7.2.3), the court noted that *Mathews* provided that the individual must be given notice of the reasons for the proposed deprivation of a property right and an opportunity to respond to the decision maker. In this situation, said the court, the letter provided Williams with notice and with the opportunity to seek grant funding to supplement his salary. Williams responded to the letter. Nothing more was required to be done, according to the court, noting that state institutions needed substantial discretion to administer their educational programs and to make budgetary decisions. Furthermore, said the court, Williams's interest in attaining a specific income does not outweigh the state's interest. The court affirmed the trial court's summary judgment for the university.

A federal appellate court has rejected the claim of department chairs at the University of the District of Columbia that because the university had given them summer contracts for the previous ten years, they had a property interest in their summer pay. A decision had been made near the end of spring semester to withhold summer contracts because of budget limitations; the chairs asserted that they were denied due process. The court rejected the property interest claim outright. In addition, the court ruled that, because the chairs had not used the university grievance system, any lack of due process protections was the result of their own inaction. The court affirmed the trial court's award of summary judgment for the university (*UDC Chairs Chapter, American Association of University Professors v. Board of Trustees of the University of the District of Columbia*, 56 F.3d 1469 (D.C. Cir. 1995)).

**6.7.3. The private faculty member's procedural rights.** The rights of faculty employed by private colleges and universities are governed primarily by state contract law and, where applicable, by state constitutions. Although the lack of constitutional protections for faculty at private institutions gives the institution more flexibility in fashioning its decision-making procedures and in determining what procedural protections it will afford faculty, written policies, faculty handbooks, and other policy documents are interpreted as binding contracts in many states (see Section 6.2), and "academic custom and usage" (see Section 1.4.3.3) may also be used by judges to evaluate whether a private institution afforded a faculty member the appropriate protections. Because challenges to negative employment decisions brought by faculty against private institutions are interpreted under state law, the outcomes and reasoning of any particular case must be applied with care to institutions in states other than the state in which the litigation occurred.

Many private institutions have adopted, either in whole or in part, policy statements promulgated by the American Association of University Professors with regard to reappointment and dismissal of tenured faculty. Formal adoption of these policy statements, or consistent adherence to their terms (which could create an implied contract, as discussed in Section 6.2.1), will require the private institution to follow them. Failure to follow these policies can result in breach of contract claims.

The term of the contract, the conditions under which it may be renewed, and the individual's right to certain procedures in the renewal decision are all matters of contract law. If the contract states a specific term (one year, three years), then language to the contrary in other documents may not afford the faculty member greater protection. For example, in *Upadhyaya v. Langenburg*, 834 F.2d 661 (7th Cir. 1987), a faculty member was employed under several one-year contracts, which stated that the tenure evaluation would take place during the fifth year of employment. The faculty member was notified that he would not be given a fourth one-year contract. Asserting that language in the contracts guaranteed him five years of employment, the faculty member sued for breach of contract. The court disagreed with the plaintiff's interpretation, stating that the language regarding a fifth-year tenure review was not contractually binding on the college and that the contract was clearly intended to be issued for only a one-year period. Furthermore, the faculty handbook stated that there was no guaranteed right to renewal for probationary faculty members.

The written terms of the contract will generally prevail, even if the faculty member can demonstrate that oral representations were made that modified the written contract. In *Baker v. Lafayette College*, 504 A.2d 247 (Pa. Super. Ct. 1986), the plaintiff argued that the head of his department had promised him a full four-year probationary period. When Baker's two-year contract was not renewed, he sued for breach of contract. Pointing to language in the faculty handbook that gave the faculty member a right to *consideration* for reappointment, rather than an absolute right to reappointment, the court denied the claim.

Even handbook language that appears to afford probationary faculty members rights to reappointment may not bind the institution. In *Brumbach v. Rensselaer Polytechnic Institute*, 510 N.Y.S.2d 762 (N.Y. App. Div. 1987), the plaintiff, an assistant professor of public archaeology, was given a three-year contract. Her work was evaluated formally each year and was found to be satisfactory. Just before the contract's expiration, the department faculty decided to change the plaintiff's position to one in computer archaeology, a position for which the plaintiff was not qualified. The department offered the plaintiff a one-year terminal contract. At its expiration, the plaintiff instituted an action for breach of contract, asserting that the faculty handbook's statement, "If the result of the evaluation is satisfactory, it is normal for an assistant professor to be re-employed for a second three-year period," obligated the institution to reappoint her.

The court disagreed, stating that, upon expiration of the contract, the plaintiff became an employee at will. The handbook's language regarding evaluation did not amount to a promise to dismiss a probationary faculty member only for



just cause, and there was no showing that the decision to modify the plaintiff's position was arbitrary or capricious. For those reasons, the trial court's grant of summary judgment to the institution was affirmed.

An often-litigated issue in nonreappointment decisions is the timeliness of notice. Depending on the wording of the contract, faculty handbook, or policy document, failure to notify a faculty member of a nonrenewal decision in a timely manner may give rise to contractual damages and, in some cases, to tenure. In *Howard University v. Best*, 547 A.2d 144 (D.C. 1988), a trial court and an appellate court considered the issue of timeliness of notice—specifically, whether a faculty member was entitled to “indefinite tenure” if timely notice of nonreappointment was not given—and the meaning of the term “prior appointment.”

Marie Best had initially held a three-month nonfaculty appointment at Howard University. She was then given a three-year faculty appointment but was not given the one-year notice of nonrenewal of that appointment in a timely manner. Best sued for breach of contract, arguing that the university's failure to notify her of the nonrenewal entitled her to tenure. Alternatively, she argued that the three-year faculty appointment was really a reappointment, since she had previously held a position at Howard, and that the faculty handbook's provision that faculty received tenure upon reappointment after a previous appointment entitled her to tenure.

The court attempted to determine whether it was Howard University's “custom and practice” to grant tenure to a faculty member who had served in a part-time, nonfaculty position. Finding no evidence of a pattern of such tenure awards, the court ruled against Best's theory of tenure on reappointment. With regard to Best's theory that late notice of nonreappointment entitled her to tenure, or at least to an additional three-year appointment without tenure, the court found evidence that the university had given other faculty additional appointments in situations where reappointment notices were late. For that reason, the appellate court affirmed the jury verdict for a second three-year appointment without tenure, and \$155,000 in damages.

Faculty contesting denial of tenure at private colleges have asserted that procedural violations materially altered the outcome of the tenure decision. In most cases, courts have ruled that substantial compliance with the college's policies is sufficient to defend against such claims. For example, a state supreme court ruled that, although the dean violated the faculty handbook provisions by not providing a formal written annual evaluation of an untenured faculty member prior to the tenure evaluation, the informal annual evaluation provided the faculty member gave her notice that her performance did not meet the requirements for tenure, and thus there was no procedural violation (*Karle v. Board of Trustees/Marshall University*, 2002 W. Va. LEXIS 212 (W. Va., December 2, 2002)).

Similarly, informal means of complying with the procedures may be sufficient. For example, a state appellate court ruled that, although the university did not follow its written procedures that required notification of the plaintiff in writing that he was being considered for tenure, the professor knew about the meetings at which his tenure candidacy was discussed, he was invited to

several meetings to respond to questions about his performance, and he was informed in writing about the department's concerns. The court ruled that the lack of procedural compliance did not prejudice his application for tenure (*Galiatsatos v. University of Akron*, 2001 Ohio App. LEXIS 4051 (Ct. App. Ohio 10th Dist., September 13, 2001), *appeal denied*, 761 N.E.2d 47 (Ohio 2002)).

A state appellate court ruled that New York University substantially complied with its rules and procedures in a remanded tenure review of the plaintiff. The dean's failure to include the department chair on the ad hoc review committee and the university's determination not to follow the advice of the grievance committee concerning the conduct of the remanded evaluation did not render the dean's or the university's actions arbitrary or capricious. Simply because some faculty disagreed with the dean's conclusions and recommendations did not make them arbitrary, according to the court (*In re Loebel v. New York University*, 680 N.Y.S.2d 495 (N.Y. App. Div. 1998)).

On the other hand, providing misleading information to an untenured faculty member concerning his or her progress toward tenure has been found to be a major procedural violation that will sustain a breach of contract claim. For example, a state supreme court ruled that a college's deviation from its tenure standards was a breach of contract, and the misleading assurances of the candidate's department chair that she was performing adequately supported her claim for negligent misrepresentation, although she did not prevail in her discrimination claims (*Craine v. Trinity College*, 791 A.2d 518 (Conn. 2002), discussed in Section 6.4.2).

In addition to procedural claims, faculty denied tenure may assert that the criteria used, or the basis for the decision, were arbitrary and capricious (a substantive rather than a procedural violation of the contract). Courts are most reluctant to entertain these claims, as they require the court to substitute its judgment for the decisions of faculty and administrators. For example, in *Daley v. Wesleyan University*, 772 A.2d 725 (Ct. App. Ct. 2001), *appeal denied*, 776 A.2d 1145 (Ct. 2001), a professor denied tenure claimed that the department's report to the vice president mischaracterized the evaluations of his scholarly work by external evaluators. The court rejected the breach of contract claim, ruling that the plaintiff was required to prove by a preponderance of the evidence that the tenure denial decision was made arbitrarily, capriciously, or in bad faith, and upheld the jury's verdict for the college.

The importance of carefully drafting tenure revocation policies is highlighted in cases involving breach of contract claims. The case of *Murphy v. Duquesne University of the Holy Ghost*, 777 A.2d 418 (Pa. 2001) is instructive. Murphy, a tenured professor of law, was terminated after the university determined that he had violated its sexual harassment policy. Murphy challenged his dismissal, asserting, among other claims, that his conduct did not meet the standard for "serious misconduct" as articulated in the faculty handbook, and that the university had not followed its tenure revocation processes, also contained in the faculty handbook.

The state supreme court upheld the judgment of the state appellate court that the university had not breached the terms of the faculty handbook, but

chastised the appellate court for using a “substantial evidence” standard rather than traditional principles of contract interpretation. The court then explained the extent of its role when reviewing the decisions of private parties under contract law.

[P]rivate parties, including religious or educational institutions, may draft employment contracts which restrict review of professional employees’ qualifications to an internal process that, if conducted in good faith, is final within the institution and precludes or prohibits review in a court of law. . . . When a contract so specifies, generally applicable principles of contract law will suffice to insulate the institution’s internal, private decisions from judicial review [777 A.2d at 428].

The court then turned to the language of the faculty handbook, and determined that it reserved to the faculty and the university the determination of whether a faculty member’s conduct met the definition of “serious misconduct” such that it justified a decision to dismiss a tenured faculty member. The handbook required the university to demonstrate to the faculty hearing body by clear and convincing evidence that the individual had engaged in serious misconduct. It provided that the president could disagree with the faculty hearing body, and that if that occurred, the individual could appeal that decision to the board of trustees. Given the specificity of the process and the clear allocation of the decision-making authority to the president and the trustees, the court ruled, Murphy was not entitled to have a jury “re-consider the merits of his termination.”

Faculty and administrators can help ensure that judges and juries do not second-guess the judgments of academics by ensuring that written policies are clear, that the criteria applicable to faculty employment decisions are stated clearly, that the procedures for making these decisions are followed carefully, and that written justifications are given for recommendations or decisions made under the faculty handbook or other policies. Because these documents are the source of employment rights at private colleges, they should reflect the consensus of the academic community with respect to both the criteria and procedures that will be used to make these critical employment decisions.

**6.7.4. Implementing procedural requirements.** An institution’s procedures for making and internally reviewing faculty personnel decisions should be put in writing and made generally available. Public institutions must, at a minimum, comply with the constitutional due process requirements in Section 6.7.2 of this book and may choose to provide additional procedures beyond those required by the Constitution. Private institutions are not required to comply with constitutional requirements but may wish to use these requirements as a guide in establishing their own procedures.

Though personnel procedures can be administratively burdensome, that is not the whole story. They can also help the institution avoid or rectify mistaken assessments, protect the academic freedom of the faculty, foster faculty confidence in the institution, and encourage the resolution of nonrenewal and

termination disputes in-house rather than in the courts. When effective personnel procedures do exist, courts may require, under the “exhaustion-of-remedies” doctrine (see Section 2.2.2.4), that the faculty member “exhaust” those procedures before filing suit. This may be the case for either private or public colleges. For example, in *Rieder v. State University of New York*, 366 N.Y.S.2d 37 (N.Y. App. Div. 1975), *affirmed*, 351 N.E.2d 747 (N.Y. 1976), employees at a state institution were covered by a collective bargaining agreement containing a four-step grievance procedure. When some employees filed suit while awaiting a determination at step 2, the appellate courts ordered the suit dismissed for failure to exhaust administrative remedies.<sup>14</sup>

In cases such as *Rieder* (and see also *Beck v. Board of Trustees of State Colleges*, Section 2.2.2.4), where public institutions are involved, the administrative law of the state provides the source of the exhaustion doctrine. Such administrative law principles do not apply to private institutions, since they are not agencies of the state. Private institutions may be subject to a comparable exhaustion doctrine, however, stemming from the common law of “private associations” (see Section 9.4.4). Or the contract may require exhaustion of remedies by its own terms. Depending on the wording of the faculty handbook or other institutional policy, the courts may apply contract law in cases involving either a public or a private institution, and may refuse to review a tenure denial if the plaintiff has not followed the grievance processes prescribed within the handbook or policy. For example, in *Neiman v. Yale University*, 851 A.2d 1165 (Conn. 2004), the Connecticut Supreme Court, interpreting Yale University’s faculty handbook, granted the university’s motion to dismiss a faculty member’s breach of contract claim because she had not used the internal grievance process to challenge her denial of tenure. The court ruled that the handbook’s language, stating that an aggrieved faculty member “may” file a grievance (rather than “shall”), meant that use of the grievance process was mandatory. The court ruled that the handbook gave the plaintiff a choice between filing a grievance or accepting the university’s decision without complaint.

In some states, such as California and New York, state law provides that challenges to the final decisions of certain private entities not involving claims of discrimination may be brought only under state administrative code procedures, rather than in civil court as breach of contract claims. Such procedures provide for a narrower scope of review than common law breach of contract claims in that the judge is limited to evaluating whether the college followed its policies and procedures and, if there were deviations, whether those deviations influenced the outcome of the tenure decision. The typical standard used in such proceedings is whether the decision of the college was arbitrary and capricious, and whether discretion was properly exercised (*Sackman v. Alfred University*, 717 N.Y.S.2d 461 (Sup. Ct. N.Y. 2000)). (See generally Section 2.2.3.5.)

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<sup>14</sup>Plaintiffs filing civil rights claims under Section 1983, the federal civil rights statute, need not exhaust state administrative remedies (see *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), discussed in Section 2.2.2.4).

For example, in *Pomona College v. The Superior Court of Los Angeles County*, 45 Cal. App. 4th 1716 (Ct. App. Cal. 2d Dist. 1996), a professor denied tenure by Pomona College filed a breach of contract claim in a state trial court. The trial court rejected the college's assertion that the professor's sole remedy was through an administrative proceeding. The college appealed, seeking a writ of mandate from the appellate court to direct the trial court to set aside its rejection of the college's motion.

The court first addressed whether the state law, Section 1094.5 of the California Code of Civil Procedure,<sup>15</sup> applied to the final decisions of a private university. Previous state court decisions had applied this law to the final decisions of a private hospital, a private dental insurance plan, and a private manufacturer. Although the faculty member argued that Section 1094.5 did not apply to Pomona College because the college was not "required by law" to hold a hearing prior to its final decision (a requirement of the statute), the court disagreed. Noting that the faculty handbook provided for a grievance procedure involving a hearing and the consideration of evidence provided by the grievant, the court ruled that because the handbook was a contract, and its provisions required a hearing, the preconditions for Section 1094.5 had been met. Said the court: "Because the Handbook governed [the grievant's] employment relationship with Pomona, the college was required by law to provide the hearing described therein" (45 Cal. App. 4th at 1727, n.10), and a mandamus action under the statute was thus the proper remedy to pursue.

In the state of New York, Article 78 of the state's civil practice code provides the opportunity for an individual aggrieved by the action (or inaction) of a government body or a private corporation chartered by the state to have that decision reviewed in the state courts. If the institution has an internal grievance process, an employee may be required to use that process (to exhaust his or her remedies, as discussed in Section 2.2.2.4) prior to seeking judicial review of the negative decision. However, if this grievance process is voluntary rather than mandatory, the statute of limitations for filing a claim in court may not be tolled. For example, in *Bargstedt v. Cornell University*, 757 N.Y.S.2d 646 (N.Y. App. Div. 2003), an employee terminated for dishonesty attempted to use the state's C.P.L.R. Article 78 to challenge her termination. Under New York's C.P.L.R. law, an aggrieved party has only four months from the time of the final decision to file a claim in state court. The court ruled that the grievance process in question at Cornell University was voluntary, not mandatory, and thus the lawsuit, which was brought more than four months after the termination, was time barred.

A contrary result was reached in *Sackman v. Alfred University*, 717 N.Y.S.2d 461 (Sup. Ct. N.Y. 2000). A professor of music challenged his denial of tenure, which was based primarily on a determination by his department chair that

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<sup>15</sup>Section 1094.5 provides that challenges to "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer" must be made through a mandamus action rather than through a common law contract claim.

his teaching performance was inadequate. The professor appealed the university's denial of tenure, and a faculty appeals committee concluded that his rights had been violated because the department chair had observed his teaching only once, and had not observed Sackman's teaching of two ensembles, a responsibility that made up two-thirds of his teaching load.

Sackman filed a complaint under New York C.P.L.R. Article 78 seeking to set aside the negative tenure decision. The court concluded that the department chair's failure to observe more than one of Sackman's classes violated the faculty handbook and constituted arbitrary and capricious behavior. The court remanded the case to the university for a new tenure review of Sackman. The court rejected Sackman's breach of contract claim, however, stating that the handbook did not create a tenure contract, but created the criteria and procedures for obtaining tenure. Sackman's contract with the university, said the court, was for a tenure-track appointment, not for tenure.

Other states have laws that limit public employees, such as faculty of public colleges and universities, to administrative law challenges rather than breach of contract claims when contesting employment decisions. See, for example, *Gaskill v. Ft. Hays State University*, discussed in Section 12.5.4.

In devising or reviewing procedures, administrators should carefully consider what procedural safeguards they should provide *before* making a personnel decision or suspending or terminating job benefits, as opposed to *after*. In public institutions, for example, a full-scale hearing need not be provided before the personnel decision is tentatively made. Some courts, however, require a hearing before an institution actually implements the decision by terminating the faculty member's pay or other substantial employment benefits. In *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3d Cir. 1974), for instance, the plaintiff had been relieved of his duties, dismissed, and removed from the payroll for almost three months before he was afforded a hearing. The court held that the hearing, because of its timing, did not meet due process requirements. In *Peacock v. Board of Regents of University and State Colleges of Arizona*, 510 F.2d 1324 (9th Cir. 1975), however, the court upheld a post-termination hearing where the faculty member had been removed only from a nonpaying position as department head; and in *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975), the court ruled for the institution because the hearing had been provided after the decision to terminate was made but before job benefits were actually terminated.

The question of when and in what detail statements of reasons for personnel decisions are to be given must also be carefully considered. The question of who shall preside over hearings is likewise important, with impartiality being the key consideration. Other critical issues are the confidentiality of the statements of reasons—and of any proceedings in which the faculty member challenges these reasons—and the question of what permanent records should be kept of adverse personnel decisions and who should have access to them. While the legal principles in Sections 6.7.1 and 6.7.2 create some limits on administrative discretion in these areas, considerable flexibility remains for administrators to make wise policy choices.

## **Sec. 6.8. Closure, Merger, and Reduction in Force**

**6.8.1. Overview.** The financial difficulties that began for postsecondary education in the late 1960s created a new and particularly sensitive faculty personnel issue, an issue with equal salience today.<sup>16</sup> In an era of inflation and shrinking resources, what are the legal responsibilities of an institution that must terminate an academic program or otherwise initiate a reduction in force? What are its obligations to faculty and students? And is there a difference between the institution's legal obligations during financial exigency and its obligations when it decides to close or reduce an academic program? On these questions, which should continue to stalk postsecondary education for the foreseeable future, the law is still developing. But enough judicial ink has been spilled to give administrators a fair idea of how to prepare for the unwelcome necessity of terminating faculty jobs in a financial crunch.

**6.8.2. Contractual considerations.** The faculty contract (Section 6.2) is the starting point for determining both a public and a private institution's responsibilities regarding staff reductions. Administrators should consider several questions concerning the faculty contract. Does it, and should it, provide for termination due to financial exigency or program discontinuance? Does it, and should it, specify the conditions that will constitute a financial exigency or justify discontinuance of a program and stipulate how the institution will determine when such conditions exist? Does it, and should it, set forth criteria for determining which faculty members will be released? Does it, and should it, require that alternatives be explored (such as transfer to another department) before termination becomes permissible? Does it, and should it, provide a hearing or other recourse for a faculty member chosen for dismissal? Does it, and should it, provide the released faculty member with any priority right to be rehired when other openings arise or the financial situation eases?

Whenever the faculty contract has any provision on financial exigency or program discontinuance, the institution should follow it; failure to do so will likely be a breach of contract. Whether such contractual provisions exist may depend on whether the AAUP guidelines<sup>17</sup> have been incorporated into the faculty contract. In *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir.

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<sup>16</sup>This Section is limited to financial exigency and program discontinuance problems concerning faculty. But such problems also affect students, and an institution's response may occasionally give students a basis on which to sue. See *Eden v. Board of Trustees of State University*; *Beukas v. Board of Trustees of Fairleigh Dickinson University*; and *Unger v. National Residents Matching Program*, discussed in Section 8.2.3; see also *Aase v. South Dakota Board of Regents*, 400 N.W.2d 269 (S.D. 1987). See generally Section 8.2.3, concerning an institution's contractual obligation to students.

<sup>17</sup>See "Recommended Institutional Regulations on Academic Freedom and Tenure," Regulation 4 (in *AAUP Policy Documents and Reports* (AAUP, 2001), 21), and "On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines" (in *AAUP Policy Documents and Reports*, 230). An earlier (1968) version of the "Recommended Institutional Regulations"—specifically the 1968 version of Regulation 4(c)—was interpreted in the *Browzin* case, discussed in the text in this Section. The court concluded that the defendant university had not violated the requirement that it "make every effort" to place terminated faculty members "in other suitable positions."

1975), for instance, the parties stipulated that the AAUP guidelines had been adopted as part of the faculty contract, and the court noted that such adoption was “entirely consistent with the statutes of the university and the university’s previous responses to AAUP actions.” As in *Browzin*, it is important for administrators to understand the legal status of AAUP guidelines within their institutions; any doubt should be resolved by consulting counsel.

The contract provisions for tenured and nontenured faculty members may differ, and administrators should note any differences. Nontenured faculty members generally pose far fewer legal problems, since administrators may simply not renew their contracts at the end of the contract term (see Section 6.7.2.1). If the faculty contract is silent regarding financial exigency or program discontinuance, in relation to either tenured or nontenured faculty members, the institution still may have the power to terminate. Under the common law doctrine of “impossibility,” the institution may be able to extricate itself from contractual obligations if unforeseen events have made it impossible to perform those obligations (see J. D. Calamari & J. M. Perillo, *Contracts* (4th ed., West, 1998), § 13-1).

The first major contract case on financial exigency was *AAUP v. Bloomfield College*, 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974), *affirmed*, 346 A.2d 615 (App. Div. 1975). On June 29, 1973, Bloomfield College, a private school, notified thirteen tenured faculty members that their services would not be needed as of June 30, 1973. The college gave financial exigency as the reason for this action. The college also notified the remaining faculty members, tenured and nontenured, that they would be put on one-year terminal contracts for 1973–74, after which they would have to negotiate new contracts with the school.

The thirteen fired faculty members brought suit based on their contracts of employment. Paragraph C(3) of the “policies” enumerated in the contract provided that “a teacher will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the institution.” Paragraph C(6) provided that “termination of continuous appointment because of financial exigency of the institution must be demonstrably bona fide. A situation which makes drastic retrenchment of this sort necessary precludes expansion of the staff at other points at the same time, except in extraordinary circumstances.”

The faculty members alleged that no bona fide financial exigency existed and that the hiring of twelve new staff members three months after the plaintiffs were dismissed violated the requirement that during a financial exigency new staff persons would be hired only “in extraordinary circumstances.” Thus, the court had to determine whether there was a “demonstrably bona fide” financial exigency and whether there were such extraordinary circumstances as would justify the hiring of new faculty members.

The trial court analyzed the college’s finances and determined that no bona fide financial exigency existed because the college owned a large piece of valuable property that it could have sold to meet its needs. The appellate court, however, disagreed, finding that there was ample evidence that the college was facing financial exigency in terms of its operating budget and endowment.



[I]t was improper for the judge to rest his conclusion in whole or in part upon the failure of the college to sell the knoll property which had been acquired several years before in anticipation of the creation of a new campus at a different locale. . . . Whether such a plan of action to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation [346 A.2d at 617].

Though the appellate court thus held that the college was in a state of financial exigency, it was unwilling to find that the faculty members were fired because of the college's financial condition. The trial court had determined that the reason for the terminations was the college's desire to abolish tenure, and the appellate court found ample evidence to support this finding.

On the question of whether extraordinary circumstances existed sufficient to justify the hiring of twelve new faculty members, the trial court also held in favor of the plaintiffs. The college had argued that its actions were justified because it was developing a new type of curriculum, but the court noted that the evidence put forth by the college was vague and did not suggest that any financial benefit would result from the new curriculum. The appellate court did not disturb this part of the trial court's decision, nor did it even discuss the issue.

A major overarching issue of the case concerned the burden of proof. Did the college have the burden of proving that it had fulfilled the contract conditions justifying termination? Or did the faculty members have the burden of proving that the contractual conditions had not been met? The issue has critical practical importance; because the evidentiary problems can be so difficult, the outcome of financial exigency litigation may often depend on who has the burden of proof. The trial court assigned the burden to the college, and the appellate court agreed:

It is manifest that under the controlling agreement among the parties the affected members of the faculty had attained the protection of tenure after completing a seven-year probationary service. This was their vested right which could be legally divested only if the defined conditions occurred. The proof of existence of those conditions as a justifiable reason for terminating the status of the plaintiffs plainly was the burden of the defendants [346 A.2d at 616].

Since the college had not proven that it had met the contract conditions justifying termination, the courts ordered the reinstatement of the terminated faculty members.

A similar result occurred in *Pace v. Hymas*, 726 P.2d 693 (Idaho 1986). The University of Idaho's faculty handbook stated that a tenured faculty member's service could be terminated for cause or for financial exigency. The handbook defined financial exigency as "a demonstrably bona fide, imminent financial crisis which threatens the viability of an agency, institution, office or department as a whole or one or more of its programs . . . and which cannot be adequately alleviated by means other than a reduction in the employment force" (726 P.2d at 695).

Pace, a professor of home economics, was laid off after the State Board of Education issued a declaration of financial exigency. Relying on *Bloomfield College*, as well as on more recent cases, the Idaho Supreme Court ruled that the university had the burden of proof regarding the existence of financial exigency, and that it had not carried that burden.

Although the university had sustained a budget shortfall in the Agricultural Extension Service, the unit to which Pace was appointed, the university had received an increased appropriation from the state, it had received funds for a 7 percent salary increase for faculty, and it had a surplus of uncommitted funds at the end of its fiscal year. No alternatives to laying off faculty—including salary freezes, reduction in travel and other expenses, or other cost-saving practices—had been considered prior to Pace’s layoff. Because the university had not determined if the financial crisis could be alleviated by less drastic means than firing tenured faculty, the court ruled that the university had not met the faculty handbook’s definition of a bona fide financial exigency.

In *Pace*, the faculty handbook explicitly mentioned financial exigency as a permissible reason for termination of a tenured faculty member. Two U.S. Court of Appeals cases upheld institutional authority to terminate tenured faculty members even in the absence of any express contractual provision granting such authority. The first case, *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978), concerned a termination due to bona fide financial exigency; the second case, *Jimenez v. Almodovar*, 650 F.2d 363 (1st Cir. 1981), concerned a termination due to discontinuance of an academic program. Both cases resort to academic custom and usage (Sections 1.4.3.3 & 6.2.3) to imply terms into the faculty contract. Both cases also identify implicit rights of tenured faculty members that limit the institution’s termination authority. The opinion in *Krotkoff* is discussed at some length as an illustration of the type of showing that, in this court’s opinion, attested to the good faith of the college’s actions.

Krotkoff was a tenured professor of German at Goucher College, a private liberal arts college for women. After having taught at the college for thirteen years, she was notified in June 1975 that she would be terminated on the grounds of financial exigency. Her performance had been at all times acceptable. Since her contract was silent on the question of financial exigency, the professor argued that the termination was a breach of contract. The college argued that it had implied authority to terminate in order to combat a bona fide financial exigency.

The college had sustained budget deficits each year from 1968 through 1975, and the trustees decided not to renew the contracts of eleven untenured faculty members and to terminate four tenured faculty members. A faculty committee had made recommendations concerning curricular changes, one of which was to eliminate all but introductory courses in German. Krotkoff had taught advanced German literature courses, while another tenured faculty member had taught introductory German. The department chair and dean recommended that the other faculty member be retained because she was experienced in teaching introductory German and because she could also teach French. The president concurred and notified Krotkoff that she would be laid off.

Although a faculty committee reviewing Krotkoff's ensuing grievance recommended her retention, it did not recommend that the other faculty member be discharged, nor did it consider how the college could retain both professors. The president rejected the committee's recommendation, and the trustees concurred. The committee had made an alternate recommendation that Krotkoff teach German courses and the other professor replace an assistant dean, who would be dismissed. This suggestion was also rejected by the president.

The college provided Krotkoff with a list of all positions available for the next year, and Krotkoff suggested that she assume a position in the economics department at her present faculty rank and salary and with tenure. The college refused her suggestion because she had no academic training in economics and terminated her appointment.

In a four-part opinion, the appellate court analyzed the facts regarding the college's overall retrenchment program and the particular termination at issue. It concluded that the faculty contract, read in light of "the national academic community's understanding of the concept of tenure," permitted termination due to financial exigency; that a bona fide financial exigency existed; and that the college had used reasonable standards in selecting which faculty to terminate and had taken reasonable measures to afford the plaintiff alternative employment. The well-reasoned and organized opinion not only discusses the difficult legal issues but also touches on practical considerations, such as the complexities of relying on faculty committees to recommend candidates for termination.

Since the college's policy statements and bylaws did not specify financial exigency as a reason for the discharge of a tenured professor, the court first turned to "academic custom and usage" to determine whether such a reason for discharge was subsumed within the concept of tenure. The court, with the help of an expert witness, examined the AAUP's 1940 "Statement of Principles on Academic Freedom and Tenure," which included financial exigency as a permissible reason for terminating tenured faculty.<sup>18</sup> The court also reviewed previous cases involving the termination of tenured faculty for financial exigency, concluding that none had established "a right to exemption from dismissal for financial reasons." Furthermore, the court concluded that, given the college's financial problems, academic freedom was not threatened by Krotkoff's dismissal because she was not being dismissed for her ideas or speech, nor would she be replaced by a newly hired faculty member with views more compatible with those of the administration.

After the court determined that the contract between Krotkoff and Goucher permitted termination on the basis of financial exigency, it then considered Krotkoff's claim that a jury should have determined whether the college had breached its

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<sup>18</sup>The statement (in *AAUP Policy Documents and Reports* (AAUP, 2001), 3, 4) reads, in pertinent part: "After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

"In the interpretation of this principle, it is understood that the following represents acceptable academic practice:

...

"(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide."

contract. In particular, Krotkoff argued that the court should submit for the jury's determination the question of whether the trustees' belief that financial exigency existed was reasonable. The court disagreed, stating that Krotkoff had not asserted that the trustees had acted in bad faith, and that the existence of financial exigency should be determined based upon "the adequacy of a college's operating funds rather than its capital assets" (585 F.2d at 681).

Finally, the court considered whether Goucher had used reasonable standards to determine that Krotkoff's appointment should be terminated, and whether the college had made reasonable efforts to find her another position. Although Goucher had argued that neither of these subjects was appropriate for judicial review, the court disagreed. The court ruled that she was "contractually entitled to insist (a) that the college use reasonable standards in selecting which faculty appointments to terminate and (b) that it take reasonable measures to afford her alternative employment" (585 F.2d at 682). First, said the court, there was no contractual requirement that the college retain Krotkoff and discharge another professor of German. And, given the evidence that the only vacancy was one for which Krotkoff was not qualified, the court ruled that the college had complied with its contractual obligations.

*Krotkoff* provides an instructive analysis of postsecondary institutions' authority and obligations when terminating tenured faculty because of financial exigency. The case also provides an outstanding example of judicial reliance on academic custom and usage to resolve postsecondary education contractual disputes.

Somewhat different issues arise when the reduction is caused by a program closure, which may be done either on "educational" grounds or because of financial exigency. The plaintiffs in *Jimenez v. Almodovar*, cited above, were two professors who had been appointed to a pilot program in physical education and recreation at a regional college of the University of Puerto Rico. Their teaching positions were eliminated as a result of low enrollment and an unfavorable evaluation of the program. The court had to resolve some contractual questions in ruling on the plaintiffs' claim of deprivation of property without procedural due process (see Section 6.7.2). The parties stipulated that the plaintiffs had property interests established by their letters of appointment, but the letters did not detail the extent of these interests. Therefore, in order to determine the scope of procedures required by due process, the court had to determine the extent of the plaintiffs' contractual rights.

According to the court:

American courts and secondary authorities uniformly recognize that, unless otherwise provided in the agreement of the parties, or in the regulations of the institution, or in a statute, an institution of higher education has an implied contractual right to make in good faith an unavoidable termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in academic program. . . . That the [institution's] implied right of bona fide unavoidable termination due to changes in academic program is wholly different from its right to termination for cause or on other personal grounds is plainly recognized in the following definition of tenure of the [AAUP/AAC] Commission on Academic Tenure in Higher Education [in] *Faculty Tenure: A Report and Recommendations* [Jossey-Bass, 1973]:

An arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or disability, subject to dismissal for adequate cause or unavoidable termination on account of financial exigency or change of institutional program (emphasis in original omitted).

The foregoing authorities lead to the conclusion that, unless a Puerto Rican statute or a university regulation otherwise provides, the instant contracts should be interpreted as giving the University of Puerto Rico an implied right of bona fide unavoidable termination on the ground of change of academic program [650 F.2d at 368; footnotes omitted].

Finding no Puerto Rican statute or university regulation to the contrary, the court confirmed the university's implied contractual right to terminate tenured faculty. The court then analyzed the procedures available to the plaintiffs to challenge their terminations and concluded that they met procedural due process requirements.

The *Jimenez* decision is consistent with earlier precedents and AAUP policy in recognizing, first, a distinction between dismissals for causes personal to the individual and dismissals for impersonal institutional reasons and, second, a distinction between institutional reasons of financial exigency and reasons of program discontinuance. AAUP policy on the latter distinction, however, is found not in the 1940 Statement cited by the court but in the 1976 "Recommended Institutional Regulations on Academic Freedom and Tenure" (*AAUP Policy Documents and Reports* (AAUP, 2001), 21), which authorize program discontinuances "not mandated by financial exigency" when "based essentially upon educational considerations" and implemented according to AAUP specifications. Under this policy, if the institution adheres to it, or under the precedent now established by *Jimenez*, postsecondary institutions may, if they follow prescribed standards and procedures for doing so, terminate tenured faculty because of a bona fide academic program change.

The merger of two institutions may create complicated contractual issues that require courts to determine which contractual rights remain after the two institutions become one. Litigation related to the merger of Loyola University and Mundelein College provides an instructive example of legal issues that may accompany mergers.

Although faculty handbooks may deal clearly with the reasons for terminating a tenured faculty member while the institution is still operating, they may be either silent or ambiguous on the issue of whether tenure rights survive a merger or assimilation by another institution. In *Gray v. Mundelein College*, 695 N.E.2d 1379, *appeal denied*, 705 N.E.2d 436 (Ill. 1998), the court was asked to address the obligations to tenured faculty at Mundelein College when it entered an affiliation agreement with Loyola University. Mundelein was facing severe financial difficulties, and entered an agreement with Loyola in which Loyola acquired Mundelein's assets and assumed some of Mundelein's financial obligations. The agreement provided that Mundelein would remain in existence as a separate college governed and administered by Loyola. Loyola offered tenured positions to twenty-six of Mundelein's tenured faculty members; it offered another eleven tenured faculty five-year appointments without tenure; and it

offered three tenured faculty two years of salary as severance. Three of the faculty who were not offered tenured positions sued both institutions, claiming that their contract rights had been breached.

The trial and appellate courts adopted the view that the faculty handbook was contractually binding on the parties. The handbook listed four reasons for termination of tenured faculty: (1) financial exigency, (2) program discontinuance, (3) health, or (4) cause. There was no provision for the termination of tenured faculty in the event of a merger or affiliation. The trial court ruled that because the board of trustees had never declared the existence of financial exigency, the termination of the tenured faculty was unlawful. Furthermore, ruled the trial court, because the college still had valuable assets, a bona fide financial exigency did not exist. It ruled that Mundelein had breached the plaintiffs' contract, and ordered damages to be paid to the two plaintiffs who had been given severance. The third, who had accepted a five-year contract, was denied damages because the trial court viewed her acceptance of the contract as a waiver of tenure.

On appeal, the college argued that academic custom and usage should control the outcome of the case, and that AAUP policies and guidelines provide that tenure does not survive an affiliation or merger unless the parties have specifically agreed that it would. The court did not rule on whether tenure survives affiliation or merger; a custom and usage analysis is only necessary, said the court, when a court must interpret uncertain or ambiguous contract terms. In this situation, the court believed that the terms of the faculty handbook were clear. "Mundelein could have taken whatever course was necessary to remedy its financial difficulties without continued obligation to tenured faculty if it had followed the procedures set out in its manual" (695 N.E.2d at 1387).

The court affirmed the rulings for the terminated plaintiffs and reversed the trial court's ruling against the plaintiff who had accepted a five-year contract, ruling that this act was not a waiver of tenure, but an appropriate attempt to mitigate damages. Furthermore, said the court, if Loyola had intended to terminate the plaintiff's tenure claim against Mundelein by offering her a five-year contract, it could have included that provision in the terms of the contract. The Illinois Supreme Court denied review.

The effect of an institution's failure to declare financial exigency was also at issue in *Board of Community College Trustees for Baltimore County—Essex Community College v. Adams*, 701 A.2d 1113 (Ct. App. Md.), cert. denied, 702 A.2d 290 (Md. 1997). In the early 1990s, both the state and the county reduced their appropriations to Essex Community College. College officials developed a process for determining which programs would be reduced or terminated. Faculty were represented on the committee that made recommendations about program termination. Seven programs were selected for termination, one of which was the Office Technology program. The plaintiffs were tenured faculty in that program who were dismissed when the program was terminated. They pursued a grievance through the internal system that culminated in the trustees denying their grievance.

The terminated faculty filed a motion for mandamus relief, in which they asked the court to order the college to reinstate them because, under the terms

of the faculty handbook, they could only be terminated for “immorality, dishonesty, misconduct in office, incompetency [sic], insubordination, or willful neglect of duty.” There was no language in the contract about program reduction or closure, or the rights of the faculty should that occur. There had been no finding that the faculty were terminated for any of these reasons; the stated reason for the termination was program closure. This reason, said the faculty, was not provided for in the contract and therefore their terminations were unlawful.

The court reviewed legal authority in Maryland and other states, and determined that “the great weight of authority supports a holding that tenured professors may be terminated for reasons unrelated to them personally” (701 A.2d at 1117). To the plaintiffs’ claim that the financial crisis was a pretext for a breach of contract, the court responded that the clear weight of the evidence indicated that the financial crisis was real. And although the trial judge had ruled in the plaintiffs’ favor because the trustees had never declared a state of financial exigency, the appellate court reversed, stating that “the actions taken by the College were designed to avoid the necessity of declaring an ‘exigency.’ They were, nonetheless, indicative of attempts to resolve the present and anticipated financial shortfall in order to solve the financial problems without the necessity of taking the last step” (701 A.2d at 1140). The court remanded, however, on the plaintiffs’ due process claim, in which they claimed that the process of selecting tenured members for termination was flawed.

Significant to the outcome of this case was the court’s review of other litigation against the State of Maryland concerning budget cuts and the state’s authority to reduce personnel. The fact that the defendant college was public rather than private may provide part of the reason for the difference between this case and *Mundelein*.

If faculty handbooks, collective bargaining agreements, or other institutional policy documents specify a faculty role in determining how program reductions or closures, or the criteria for selecting faculty, will be accomplished, then excluding faculty from this process will invite breach of contract claims. But in some instances, despite the fact that handbooks and policy documents did not specify a faculty role in the process, breach of contract claims have been brought. For example, when Mercer University closed its Atlanta College of Arts and Sciences, the faculty asserted that excluding them from participating in the closure decision breached their contract because in the academic community the term “bona fide discontinuance of a program,” used in the faculty handbook, meant that faculty must be involved in the decision (Corinne Houpt, “The Age of Austerity: Downsizing for the 90s,” in *Academic Program Closures: A Legal Compendium*, Ellen M. Babbitt, ed. (2d ed., National Association of College and University Attorneys, 2002)).

Students have also asserted contract claims against a college or university for reducing or eliminating an academic program. These cases are discussed in Section 8.1.3.

**6.8.3. Constitutional considerations.** Public institutions must be concerned not only with contract considerations relating to financial exigency and

program termination but also with constitutional considerations under the First and Fourteenth Amendments. Even if a termination (or other personnel decision) does not violate the faculty contract or any applicable state statutes or administrative regulations, it will be subject to invalidation by the courts if it infringes the faculty member's constitutional rights.

Under the First Amendment, a faculty member may argue that financial exigency was only a pretext for termination and that termination was actually a retaliation for the faculty member's exercise of First Amendment rights (see Note, "Economically Necessitated Faculty Dismissal as a Limit on Academic Freedom," 52 *Denver L.J.* 911 (1975); and see generally Chapter 7). The burden of proof on this issue is primarily on the faculty member (see the *Mt. Healthy* case discussed in Section 7.6). *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976), is illustrative. The defendant college had not renewed the appointment of a non-tenured philosophy instructor. The instructor argued that the nonrenewal was due to an argument he had had with other faculty members in an academic senate meeting and that his argument was a protected First Amendment activity. The college argued that this activity was not protected under the First Amendment and that, at any rate, the nonrenewal was also due to overstaffing in the philosophy department. In remanding the case to the trial court for further fact finding, the appellate court noted:

We emphasize that the trier [of fact] must be alert to retaliatory terminations. . . . Whenever the state terminates employment to quell legitimate dissent or punishes protected expressive behavior, the termination is unlawful. . . .

We stress that this holding does not shield those who are legitimately not reappointed. Where the complainant . . . does not meet his burden of proof that the state acted to suppress free expression, . . . the termination will stand [537 F.2d at 1045].

Under the Fourteenth Amendment, a faculty member whose job is terminated by a public institution may argue that the termination violated the due process clause. To proceed with this argument, the faculty member must show that the termination infringed a "property" or "liberty" interest, as discussed in Section 6.7.2.1. If such a showing can be made, the questions then are (1) What procedural protections is the faculty member entitled to?, and (2) What kinds of arguments can the faculty member raise in his or her "defense"? A case that addresses both issues is *Johnson v. Board of Regents of University of Wisconsin System*, 377 F. Supp. 227 (W.D. Wis. 1974), *affirmed without opinion*, 510 F.2d 975 (7th Cir. 1975).

In this case the Wisconsin legislature had mandated budget reductions for the university system. To accommodate this reduction, as well as a further reduction caused by lower enrollments on several campuses, the university officials devised a program for laying off tenured faculty. The chancellor of each campus determined who would be laid off, after which each affected faculty member could petition a faculty committee for "reconsideration" of the proposed layoff. The faculty committee could consider only two questions: whether the layoff decision was supported by sufficient evidence, and whether the



chancellor had followed the procedures established for identifying the campus's fiscal and programmatic needs and determining who should be laid off. Thirty-eight tenured professors selected for layoff sued the university system.

The court determined that the due process clause required the following minimum procedures in a financial exigency layoff:

[F]urnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay off; furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at; making a reasonably adequate disclosure to each plaintiff of the information and data on which the decision makers had relied; and providing each plaintiff the opportunity to respond [377 F. Supp. at 240].

Measuring the procedures actually used against these requirements, the court held that the university system had not violated procedural due process. The most difficult issue was the adequacy of information disclosure (the third requirement above), about which the court said:

Plaintiffs have shown in this court that the information disclosed to them was bulky and some of it amorphous. They have shown that it was not presented to the reconsideration committees in a manner resembling the presentation of evidence in court. They have shown that in some situations . . . they encountered difficulty in obtaining a coherent explanation of the basis for the initial layoff decisions, and that, as explained in some situations, the basis included judgments about personalities. But as I have observed, the Fourteenth Amendment does not forbid judgments about personalities in this situation, nor does it require adversary proceedings. The information disclosed was reasonably adequate to provide each plaintiff the opportunity to make a showing that reduced student enrollments and fiscal exigency were not in fact the precipitating causes for the decisions to lay off tenured teachers in this department and that; and it was also reasonably adequate to provide each plaintiff the opportunity to make a showing that the ultimate decision to lay off each of them, as compared with another tenured member of their respective departments, was arbitrary and unreasonable. I emphasize the latter point. On this record, plaintiffs' allegations about the inadequacy and imprecision of the disclosure related principally to those stages of the decision making which preceded the ultimate stage at which the specific teachers, department by department, were selected.

Had the disclosure as it was made not been "reasonably adequate," it is possible that it could have been made adequate by permitting plaintiffs some opportunity to confront and even to cross-examine some of the decision makers. But I hold that the opportunity to confront or to cross-examine these decision makers is not constitutionally required when the disclosure is reasonably adequate, as it was here [377 F. Supp. at 242].

The court also determined that the university system could limit the issues which the faculty members could address in challenging a termination under the above procedures:

I am not persuaded that, after the initial decisions had been made, the Fourteenth Amendment required that plaintiffs be provided an opportunity to

persuade the decision makers that departments within their respective colleges, other than theirs, should have borne a heavier fiscal sacrifice; that non-credit-producing, nonacademic areas within their respective campus structures should have borne a heavier fiscal sacrifice; that campuses, other than their respective campuses, should have borne a heavier fiscal sacrifice; or that more funds should have been appropriated to the university system. However, I believe that *each plaintiff was constitutionally entitled to a fair opportunity to show: (1) that the true reason for his or her layoff was a constitutionally impermissible reason; or (2) that, given the chain of decisions which preceded the ultimate decision designating him or her by name for layoff, that ultimate decision was nevertheless wholly arbitrary and unreasonable.* I believe that each plaintiff was constitutionally entitled to a fair opportunity to make such a showing in a proceeding within the institution, in order to permit prompt reconsideration and correction in a proper case. Also, if necessary, each plaintiff was and is constitutionally entitled to a fair opportunity to make such a showing thereafter in a court [377 F. Supp. at 239–40; emphasis added].

Although the Constitution requires that institutions avoid terminations for a “constitutionally impermissible reason” and “wholly arbitrary” terminations, the court made clear that the Constitution does not prescribe any particular bases for selection of the faculty members to be terminated. The court stated that there was no constitutional requirement that the selection criteria be related to seniority or performance, and that the institution retained the discretion to develop appropriate criteria for selecting those to be laid off.

A federal appellate court found constitutional violations in the treatment of two professors who were laid off without being granted a hearing on the criteria for selecting faculty for layoff. In *Johnson-Taylor v. Gannon*, 907 F.2d 1577 (6th Cir. 1990), the trustees of Lansing Community College determined that financial exigency required the layoff of several faculty members. Under the collective bargaining agreement with the faculty, the trustees had the right to make the ultimate decision about how many faculty were to be laid off, but the union had the right to recommend criteria for selecting faculty and the procedure to be used.

Two faculty who were laid off argued that they were denied due process because no hearing had been held regarding their selection for layoff. Both asserted that they had been chosen to be laid off because of their criticisms of the institution and their union activity. Although both had filed grievances under the collective bargaining agreement, an arbitrator had concluded that they had been afforded all the protections that the contract required.

The court first examined whether the professors had a property or liberty interest at stake. Finding that the collective bargaining agreement provided for continued employment, the court concluded that the professors, indeed, had a property interest, which required the college to afford them due process. Furthermore, one of the professors was tenured, and thus had a second basis for a protected property interest.

The court concluded that the professors’ due process rights had been violated because neither had been afforded a hearing at which they were informed

why they were selected for layoff, nor had they had an opportunity to challenge the existence of financial exigency. The court remanded the matter to the trial court for an evidentiary hearing on both of these issues.

In *Milbouer v. Keppler*, 644 F. Supp. 201 (D. Idaho 1986), the plaintiff, a tenured professor of German, was laid off because of financial exigency and charged Boise State University with constitutional violations of her substantive and due process rights under the Fourteenth Amendment. A federal district court sketched out the basic due process rights to which a tenured faculty member is entitled when financial exigency requires termination.

First, said the court, the institution must demonstrate that a genuine financial exigency exists. It can do so by submitting evidence of budget shortfalls, legislative or executive branch reductions in funding, or other financial data indicating that funds are limited or may not be used to retain the faculty member.

With regard to the substantive due process claim, the court stated, the institution must demonstrate that uniform procedures were used to determine how the reduction would be effected and which faculty members would be terminated. In this case the institution had used enrollment trends, faculty/student ratios, and historical data on the number of majors in the foreign language department. The elimination of the department was justified, the judge ruled, by the small number of majors and low enrollments.

The plaintiff had been offered a part-time position teaching in the English department, which she had refused. She had also been offered retraining as a linguistic specialist in the business education department, but did not avail herself of that opportunity either. Although the plaintiff argued that a one-month notice prior to her termination was insufficient, the court ruled that that period of time was long enough to permit the plaintiff to write a detailed letter of appeal and to have her appeal heard by a hearing committee, which had been done.

Despite the fact that the university hired fifteen new faculty members for other “viable” programs at the same time that it closed its foreign language department, the judge ruled that the institution had demonstrated that a genuine financial exigency existed, and that its procedures afforded the plaintiff both substantive and procedural due process.

If faculty members have property interests in their jobs, the cases make it clear that the institution must provide a hearing for those selected for layoff, so that they can be told the reasons for their selection and given an opportunity to challenge the sufficiency of those reasons. But must faculty members be given a hearing when the institution decides to reduce or eliminate an academic program?

This question was considered in *Texas Faculty Association v. University of Texas at Dallas*, 946 F.2d 379 (5th Cir. 1991). The deans of the Education School and the School of Natural Sciences and Mathematics at University of Texas at Dallas (UTD) decided to eliminate two academic programs because of low enrollment and the desire to reallocate the resources devoted to those programs. The university was not facing a situation of financial exigency. The faculty teaching in those programs were told that their employment would be terminated.

The tenured faculty asserted that they had a right to a hearing on the merits of the decision to eliminate the two programs. They also asserted a right to a hearing to determine whether their employment should be terminated. No hearings were held, although the university counsel sent the faculty a letter stating that they could meet with the deans informally to discuss the reasons for the program elimination. The faculty responded by filing a lawsuit claiming denial of procedural due process with respect to both the closure decision and their terminations.

The court refused to require the university to hold adversarial hearings on the decision to eliminate academic programs. The court stated that such a requirement would “seriously impair the university’s significant interest in administering its educational programs in the manner it deems best” (946 F.2d at 385). Noting that courts are typically deferential to decisions based on academic judgments (citing *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), discussed in Section 9.4.3), the court concluded that the judicial system was poorly equipped to review the substance of academic decisions, stating that “only the barest procedural protections of notice and an opportunity to be heard need be afforded the individual faculty member” (946 F.2d at 387). Because the faculty had been given nearly two years’ notice and had been invited on several occasions to discuss the matter with their dean, the institution had met this portion of its due process obligation.

With regard to the propriety of decisions to terminate individual faculty, however, the court’s attitude differed:

[W]e perceive the risk that a particular faculty member will be terminated erroneously to be somewhat greater [than the risk of incorrectly deciding to eliminate a program] under the rather unusual facts of this case. Unlike many, if not most, institutions of higher learning, faculty in the University of Texas system are tenured to their particular component *institution* rather than to a particular school or program within that institution [citing regulations of the board of regents]. . . . Consequently, UTD faculty had a right of continuing appointment to the University of Texas at Dallas as a *whole*, and not merely to their particular schools or academic programs [946 F.2d at 386; emphasis in original].

The court noted that many of the faculty were qualified to teach in other programs within the university. “Unless the procedures afforded appellants meaningfully considered whether each appellant should be retained at UTD in *some* teaching capacity, then the risk that a given faculty member could be terminated erroneously seems to us patent” (946 F.2d at 386; emphasis in original).

The court concluded that the university had failed to provide due process with regard to the termination decisions:

Because UTD faculty are tenured to the *institution*, each appellant was entitled to a meaningful opportunity to demonstrate that, even if his or her program was to be discontinued and the number of faculty positions associated with that program eliminated, he or she should nevertheless be retained to teach in a field in which he or she is qualified.

We do not believe affording faculty such an opportunity would unduly interfere with the university’s interest in academic freedom. A procedure ensuring

that (1) an instructor was not terminated for constitutionally impermissible reasons, (2) the administration's actions were taken in good faith, and (3) objective criteria were employed and fairly applied in determining whom, from *among the faculty at large*, to terminate, is all that the Fourteenth Amendment requires [946 F.2d at 387; emphasis in original].

The court elaborated on the practical consequences of its ruling, saying that not all faculty would need to be afforded adversarial hearings:

Initially, the administration probably need only consider, in good faith, a written submission from each affected faculty member setting out why he or she deserves to be retained. Only if a particular faculty member makes a colorable showing that, under the objective criteria the university employs, he or she deserves to be retained in another academic program, must any sort of "hearing" be offered. Otherwise, a brief written statement from the decision maker of the reasons why the faculty member does not deserve to be retained would suffice. The "hearing" offered need only be an opportunity for the aggrieved faculty member to meet with the ultimate decision maker, to present his or her case orally, and to explore with the decision maker the possible alternatives to termination. If the decision maker nevertheless decides not to retain the faculty member, a written statement of reasons is required. Of course, if the retention of one faculty member results in the displacement of another, the displaced faculty member is equally entitled to due process [946 F.2d at 388].

The court discussed the faculty members' contention that they were entitled to a full-blown adversarial hearing, with counsel, before an official other than the one who made the initial termination decision; the right to cross-examination; and a written record. Absent clear evidence of bias on the part of the decision maker, said the court, the official responsible for the termination decision may conduct the hearing. Because the termination was not for performance reasons, the presence of counsel, the right to cross-examine, and a written record were not necessary. But the court agreed that the plaintiffs did have a right to present documentary evidence and to receive a written statement of the hearing officer's conclusions. Because the faculty had not been afforded the type of due process outlined by the court, the court remanded the case for further proceedings.

In some cases, faculty also allege that the termination is related to statements they have made or to expressive conduct, a free speech claim. In *Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996), the university's decision to eliminate its dental hygiene program was challenged on constitutional and civil rights grounds. Three tenured associate professors in the Dental Hygiene program were reassigned to faculty positions in the College of Dentistry. They filed sex discrimination, First and Fourteenth Amendment claims, and state statutory and constitutional claims, asserting that because all of the faculty and students in the Dental Hygiene program were women, the university's decision to terminate the program was both intentionally discriminatory and also had a disparate effect on women (Section 5.2.1). They also alleged that the university retaliated against them for objecting to the program closure. In a mixed bench

and jury trial, the jury and judge rejected most of the plaintiffs' claims, but the judge allowed the jury's verdict for the plaintiffs on the retaliation claim to stand, and the plaintiffs were awarded damages and attorney's fees.

The appellate court affirmed all of the lower court's rulings in favor of the university, and reversed the ruling on the retaliation claim (and attorney's fees award). The plaintiffs had claimed that they had been excluded from the committees that reviewed the recommendations for program closure, that the department of dental hygiene had been abolished a year before the program actually ended, and that the former chair of the dental hygiene department had been retaliated against by being demoted to a program director position with less autonomy. The court found that the plaintiffs had no right to participate in the process, that the university had the discretion to abolish the department at the time of its choice, and that the department chair's demotion was an "inevitable consequence" of the decision to close the department. Furthermore, said the university, the program closure decision was made in concert with the university's strategic plan, and despite the fact that the university gave different reasons at different times for selecting the Dental Hygiene program (cost, lack of centrality to the university's mission), the reasons were not a pretext for sex discrimination. And finally, because the plaintiffs produced insufficient evidence of salary discrimination, they could not demonstrate that they had suffered an adverse employment action.

The UTD and *Brine* cases are very helpful to administrators at public institutions seeking guidance about program reduction or closure. Unless the institution has adopted procedures that require additional due process protections, or unless state statutes or regulations require more, the due process protections described in the UTD case should satisfy the institution's constitutional obligations to tenured faculty.

**6.8.4. Statutory considerations.** A public institution's legal responsibilities during financial exigency or program discontinuance may be defined not only by contract and by constitutional considerations but also by state statutes or their implementing administrative regulations. The case of *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822 (Iowa 1978), illustrates how important statutory analysis can be.

In *Hartman*, a community college had dismissed a faculty member as part of a staff reduction occasioned by declining enrollment and a worsening financial condition. For authority for its action, the institution relied on a state statute authorizing it to discharge faculty "for incompetency, inattention to duty, partiality, or any good cause" (Iowa Code of 1973 § 279.24). The institution's position was that the phrase "good cause" supported its action because it is a broad grant of authority encompassing any rational reason for dismissal asserted by the board of directors in good faith. The appellate court disagreed and invalidated the dismissal. It reasoned that "good cause," interpreted in light of the statute's legislative history and in conjunction with other related Iowa statutes, "refer[s] only to factors personal to the teacher"; that is, factors that can be considered the teacher's own "personal fault" (see Section 6.7.2.3 for a consideration of such personal factors).

While *Hartman* deals only with substantive standards for staff reduction, state statutes or administrative regulations may also establish procedures with which institutions must comply. In *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976), for instance, a college did not renew an instructor's contract, in part because his department was overstaffed. The instructor challenged the nonrenewal, arguing that the college had followed the wrong procedures in reaching its decision. The court rejected the challenge, agreeing with the college that the applicable procedures were found in the statutes dealing with tenure and non-reappointment rather than in the statutes dealing with separation for "lack of work or lack of funds."

Statutory analysis was important to the outcome of a claim by tenured faculty members terminated during a reduction in force (RIF) that the college should have applied its RIF policy to part-time as well as full-time faculty. In *Ackerman v. Metropolitan Community College Area*, 575 N.W.2d 181 (Neb. 1998), nine tenured faculty were dismissed when the college reorganized its Office Skills and Technology program. According to the RIF policy that the board had adopted, faculty were selected for dismissal on the basis of their previous evaluations, their level of placement, diversity issues, and their length of service. The faculty selected for dismissal were given the opportunity to participate in a hearing concerning the method for selecting faculty to be dismissed.

The court examined the Nebraska statutes applicable to the employment and termination of public employees. It concluded that these statutes were intended to apply to full-time employees who had employment contracts with a public employer. Part-time faculty were employed on a semester basis, said the court, and these laws did not apply to them. The court affirmed the ruling of the trial court, which had upheld the board's decision in all respects.

Public institutions considering staff reductions must identify not only the applicable substantive standards but also the applicable procedures specified by state law. The procedures may be contained in a legal source different from that setting out the standards (see, for example, *Council of New Jersey State College Locals v. State Board of Higher Education*, 449 A.2d 1244 (N.J. 1982) (substantive criteria from state board policy on financial exigency applicable despite collective bargaining agreement, but some procedures derived from board policy bargainable); *Board of Trustees of Ohio State University v. Department of Administrative Services*, 429 N.E.2d 428 (Ohio 1981) (state administrative procedure act applicable to termination of nonfaculty personnel)).

**6.8.5. Preparing for closures and reductions in force.** Everyone agrees that institutions, both public and private, should plan ahead to avoid the legal difficulties that can arise if financial or programmatic pressures necessitate staff reductions. Much can be done to plan ahead. Faculty contracts should be reviewed in light of the questions raised in Section 6.8.1. Where the contract does not clearly reflect the institution's desired position concerning staff

reductions, its provisions should be revised to the extent possible without breaching existing contracts.

For institutional planning purposes, administrators should carefully distinguish between the two alternative approaches to faculty termination—financial exigency and program discontinuance:

1. When drafting or amending contracts for nontenured, tenure-track faculty, the institution should consider specific provisions on both alternatives. Public institutions should consult state law (Section 6.8.3 above) to determine whether it permits use of both alternatives. If the institution chooses, the AAUP's recommended regulations on either alternative (see Section 6.8.2, n.18) may be incorporated by reference into its faculty contracts. The institution may also draft provisions altogether different from the AAUP's, although it will want to give close attention to the competing policy considerations.

2. When interpreting existing tenure contracts, the institution should determine whether it has already, either expressly or by institutional custom, adopted AAUP policy for either alternative; or whether, in the face of institutional silence, courts would likely fill the gap with AAUP policy (see Section 6.8.2 above). In such circumstances the institution should consider itself bound to follow AAUP requirements and thus not free under existing contracts to strike out unilaterally on a different course.

3. When faced with circumstances mandating consideration of tenured faculty terminations, and when authorized to follow either alternative approach, the institution should carefully consider its choice. Which alternative—institution-wide financial exigency or discontinuance of specific programs—can better be substantiated by existing circumstances? Which would better serve the institution's overall mission? If the institution decides to pursue one of the alternatives, it should be careful to identify and follow the particular decision-making requirements and protections for faculty specified for that alternative.

When the institution does have authority for staff reductions necessitated by financial exigency, it should have a policy and standards for determining when a financial exigency exists and which faculty members' positions will be terminated. It should also specify the procedures by which the faculty member can challenge the propriety of his or her selection for termination. Before administrators make a termination decision, they should be certain (1) that a financial exigency does actually exist under the institution's policy, (2) that the terminations will alleviate the exigency, and (3) that no other motivation for a particular termination may exist. After dismissing faculty members, administrators should be extremely careful in hiring new ones, to avoid the impression, as in the *Bloomfield* case (see Section 6.8.2), that the financial exigency was a pretext for abolishing tenure or otherwise replacing old faculty members with new. Similar considerations would apply in implementing program discontinuations.

Finally, administrators should remember that, in this sensitive area, some of their decisions may wind up in court despite careful planning. Administrators should thus keep complete records and documentation of their staff reduction



policies, decisions, and internal review processes for possible use in court and should work closely with counsel both in planning ahead and in making the actual termination decisions.

## Selected Annotated Bibliography

### Sec. 6.1 (Overview)

- American Association of University Professors. *AAUP Policy Documents and Reports* (the "Redbook") (9th ed., AAUP, 2001). A collection of the AAUP's major policy statements on academic freedom, tenure, collective bargaining, professional ethics, institutional governance, sexual harassment, part-time faculty, and other topics. Includes a discussion of the role and usefulness of AAUP policy statements and an appendix with selected judicial decisions and articles referring to AAUP statements.
- American Association of University Professors/Association of American Colleges, Commission on Academic Tenure in Higher Education. *Faculty Tenure: A Report and Recommendations* (Jossey-Bass, 1973). An evaluation of the status and limitations of tenure. Includes special essays on "Legal Dimensions of Tenure" by Victor Rosenblum and "Faculty Unionism and Tenure" by W. McHugh.
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- Chait, Richard P., & Ford, Andrew T. *Beyond Traditional Tenure: A Guide to Sound Policies and Practices* (Jossey-Bass, 1982). Includes chapters on "Tenure in Context," "Institutions Without Tenure," "Life Without Tenure," "Tenure and Nontenure Tracks," "Extended Probationary Periods and Suspension of 'Up-or-Out' Rule," "Tenure Quotas," "Sound Tenure Policy," "Evaluating Tenured Faculty," "Distributing Rewards and Applying Sanctions," and "Auditing and Improving Faculty Personnel Systems." Based on authors' survey and analysis of tenure options in existence at various institutions around the country. Provides case studies of leading examples. For extended reviews of the book, see 10 *J. Coll. & Univ. Law* 93–112 (1983–84).
- Finkin, Matthew W. "Regulation by Agreement: The Case for Private Higher Education," 65 *Iowa L. Rev.* 1119 (1980), reprinted in 67 *AAUP Bulletin* no. 1 (Parts I and II of the article), no. 2 (Part III), and no. 3 (Part IV) (1981). Provides a multifaceted review of various problems unique to employment relations in higher education. Part I of the article serves as a general introduction; Part II discusses the nature of the contract of academic employment and various questions that arise in contract litigation; Part III discusses the continued relevance of academic organization by collective agreement, notwithstanding *NLRB v. Yeshiva University*; Part IV sets out a proposal for an alternative system of self-regulation of employment matters.
- Furniss, W. Todd. "The Status of AAUP Policy," 59 *Educ. Record* 7 (1978). Reviews the role that AAUP policy statements play in the university employment scheme. Notes the increasing use of such statements in employment litigation and urges institutions of higher education to clarify the extent to which they accept AAUP policy

statements as their own institutional policy. The arguments raised in this article are challenged in a companion article: Ralph S. Brown, Jr., & Matthew W. Finkin, "The Usefulness of AAUP Policy Statements," 59 *Educ. Record* 30 (1978).

McCarthy, Jane, Ladimer, Irving, & Sirefman, Josef. *Managing Faculty Disputes: A Guide to Issues, Procedures, and Practices* (Jossey-Bass, 1984). Addresses the problem of faculty disputes on campus and proposes processes for resolving them. Covers both disputes that occur regularly and can be subjected to a standard dispute resolution process, and special disputes that occur irregularly and may require a resolution process tailored to the circumstances. Includes model grievance procedures, case studies of actual disputes, and worksheets and checklists to assist administrators in implementing dispute-resolution processes.

### **Sec. 6.2 (Faculty Contracts)**

Biles, George E., & Tuckman, Howard P. *Part-Time Faculty Personnel Management Policies* (ACE/Macmillan, 1986). Chapters include discussions on how to define a part-time faculty member, equal employment opportunity and affirmative action issues, appointment and reappointment practices, salaries and benefits for part-timers, tenure eligibility, the professional obligations of part-time faculty, evaluation of part-time faculty, and due process and collective bargaining issues. Also included are suggestions for a handbook for part-time faculty.

McKee, Patrick W. "Tenure by Default: The Non-Formal Acquisition of Academic Tenure," 7 *J. Coll. & Univ. Law* 31 (1980–81). Analyzes the impact of *Board of Regents v. Roth* and *Perry v. Sindermann* on the concept of nonformal tenure. Distinguishes among "automatic tenure," "tenure by grant," "nonformal or *de facto* tenure," and "tenure by default." To resolve confusion in lower court opinions applying *Roth* and *Perry* to nonformal tenure claims, the article develops a common law analysis covering employment relationships in both private and public institutions.

### **Sec. 6.3 (Faculty Collective Bargaining)**

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### **Sec. 6.4 (Application of Nondiscrimination Laws to Faculty Employment Decisions)**

"The Academy in the Courts: A Symposium on Academic Freedom," 16 *U. Cal. Davis L. Rev.* 831 (1983). A two-part article. The second part is titled "Discrimination in the Academy" (for a description of the first part, see "Academy in the Courts" entry in bibliography for Section 7.1). This part contains three articles: Christine Cooper, "Title VII in the Academy: Barriers to Equality for Faculty Women"; John D. Gregory, "Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom"; and Harry F. Tepker, "Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference."

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- Cole, Elsa Kircher, & Hustoles, Thomas P. *How to Conduct a Sexual Harassment Investigation* (National Association of College and University Attorneys, 1997). Provides a checklist of suggestions for conducting an appropriate and timely sexual harassment investigation. Suggests questions to be asked at each step of the investigation, and offers alternatives for resolving harassment complaints.
- DiGiovanni, Nicholas. *Age Discrimination: An Administrator's Guide* (College and University Personnel Association, 1989). Written for campus administrators. Includes an overview of the ADEA, a discussion of how an age discrimination lawsuit is conducted and defended, and suggestions for minimizing the risk of liability. Additional chapters discuss planning for retirement (including the EEOC guidelines for retirement incentives), practical considerations in evaluating and counseling older workers, waivers and releases, and a table of state laws prohibiting age discrimination. (This book predates the passage of the Older Workers Benefit Protection Act, discussed in Section 5.2.6, this volume.)
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### **Sec. 6.5 (Affirmative Action in Faculty Employment Decisions)**

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attitudes toward affirmative action and provides suggestions for organizations that wish to strengthen their affirmative action programs. Includes a brief legal history of affirmative action, as well as philosophical and ethical perspectives on affirmative action.

### ***Sec. 6.6 (Standards and Criteria for Faculty Employment Decisions)***

American Association of University Professors. *Post-Tenure Review: An AAUP Response* (AAUP, 1999). Offers “practical recommendations for faculty at institutions where post-tenure review is being considered or put into effect”; argues that the purpose of post-tenure review should be developmental, not for accountability or dismissal purposes; provides guidelines for faculty in deciding whether or not to support the development of a post-tenure review process; and lists “minimum standards for good practice” for post-tenure review systems. Available at <http://www.aaup.org/postten.htm>.

Copeland, John D., & Murray, John W Jr. “Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance,” 61 *Missouri L. Rev.* 233 (1996). Discusses legal issues related to faculty performance evaluation, including post-tenure review.

Finkin, Matthew W. (ed.). *The Case for Tenure* (Cornell University Press, 1996). A collection of writings by several eminent scholars on academic freedom and tenure. Also includes selected court opinions and commentary on reductions in force, faculty retirement, and post-tenure review.

Olswang, Steven G., & Fantel, Jane I. “Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles,” 7 *J. Coll. & Univ. Law* 1 (1980–81). Examines the “separate concepts of tenure and academic freedom and their relation to one form of accountability measure: systematic reviews of the performance of tenured faculty.” Identifies the “differences between tenure and academic freedom” and the purposes and uses of periodic performance reviews “in an overall system of faculty personnel management.” Includes discussion of tenure terminations for cause based on incompetence, immorality, insubordination, and other such factors.

See the Centra entry for Section 6.4.

### ***Sec. 6.8 (Closure, Merger, and Reduction in Force)***

Babbitt, Ellen M. (ed.). *Academic Program Closures: A Legal Compendium* (2d ed., National Association of College and University Attorneys, 2002). A comprehensive resource for administrators, faculty, and legal counsel. Included are six chapters and law review articles discussing legal issues and planning issues, such as the roles of trustees, administrators, faculty, students, and other constituencies in planning for and implementing program closures. Also included are AAUP guidelines, policies from five institutions on faculty reductions and program termination, and documents on related issues, as well as a list of relevant books and articles.

Johnson, Annette B. “The Problems of Contraction: Legal Considerations in University Retrenchment,” 10 *J. Law & Educ.* 269 (1981). Examines the financial circumstances that justify retrenchment, how and by whom retrenchment decisions should be made, and the procedures to follow after the decision in order to preserve the legal rights of individuals affected by the retrenchment.

Ludolph, Robert Charles. "Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance," 63 *U. Detroit L. Rev.* 609 (1986). Reviews faculty property rights (for both tenured and untenured faculty), discusses constitutional requirements for reductions in force and program closures, and analyzes contractual issues related to faculty terminations. Author proposes an analytical model that helps counsel develop an appropriate defense to challenges to program closures, reductions based on financial exigency, and the closing of a campus or an institution.

Martin, James, Samels, James E., & Associates. *Merging Colleges for Mutual Growth* (Johns Hopkins University Press, 1993). Provides practical and theoretical advice, by college administrators and legal counsel experienced in these matters, about merging colleges to avoid bankruptcy. Discusses a typology of models of mergers, the role of trustees and governing boards, the role of administrators and faculty, and financial planning. Attention is also given to planning for the effects of mergers on students and alumni, as well as academic support concerns, such as the merging of libraries.

Mingle, James R., & Associates. *Challenges of Retrenchment: Strategies for Consolidating Programs, Cutting Costs, and Reallocating Resources* (Jossey-Bass, 1981). Describes the actual retrenchment efforts of public and private institutions through an extensive set of case studies. Analyzes the complex organizational, legal, and political issues that arise when colleges and universities lay off faculty and cut back programs and departments because of rising inflation, declining enrollments, or both.

Olswang, Steven G. "Planning the Unthinkable: Issues in Institutional Reorganization and Faculty Reductions," 9 *J. Coll. & Univ. Law* 431 (1982-83). Examines the legal and policy issues inherent in institutional reorganization and faculty reduction. Analyzes the "three primary alternatives"—"financial exigency declarations, program eliminations, and program reductions"—for achieving reorganization and reduction. Also provides policy guidelines for determining which faculty to lay off and discusses faculty members' rights and prerogatives when they are designated for removal.



# 7

## Faculty Academic Freedom and Freedom of Expression

### *Sec. 7.1. General Concepts and Principles*

**7.1.1. Faculty freedom of expression in general.** Whether they are employed by public or by private institutions of higher education, faculty members as citizens are protected by the First Amendment from governmental censorship and other governmental actions that infringe their freedoms of speech, press, and association. When the restraint on such freedoms originates from a governmental body external to the institution (see subsection 7.1.5 below), the First Amendment protects faculty members in both public and private institutions. When the restraint is internal, however (for example, when a provost or dean allegedly infringes a faculty member's free speech), the First Amendment generally protects only faculty members in public institutions. Absent a finding of state action (see Section 1.5.2), an internal restraint in a private institution does not implicate government, and the First Amendment therefore does not apply. The protection accorded to faculty expression and association in private institutions is thus usually a matter of contract law (see Section 1.5.3).

While faculty contracts may distinguish between tenured and nontenured faculty, as may state statutes and regulations applicable to public institutions, tenure is immaterial to most freedom of expression claims. Other aspects of job status, such as tenure track versus non-tenure track and full time versus part time, are also generally immaterial to freedom of expression claims. In *Perry v. Sindermann*, 408 U.S. 593 (1972), discussed in Section 6.6.2.1, the U.S. Supreme Court held that a nonrenewed faculty member's "lack of a contractual or tenure right to reemployment . . . is immaterial to his free speech claim" and that "regardless of the . . . [teacher's] contractual or other claim to a job," government

cannot “deny a benefit to a person because of his constitutionally protected speech or associations.”<sup>1</sup>

When faculty members at public institutions assert First Amendment free speech claims, these claims are usually subject to a line of U.S. Supreme Court cases applicable to all public employees: the “*Pickering/Connick*” line. The foundational case in this line, *Pickering v. Board of Education*, 391 U.S. 563 (1968), concerned a public high school teacher who had been dismissed for writing the local newspaper a letter in which he criticized the board of education’s financial plans for the high schools. *Pickering* brought suit, alleging that the dismissal violated his First Amendment freedom of speech. The school board argued that the dismissal was justified because the letter “damaged the professional reputations of . . . [the school board] members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment ‘controversy, conflict, and dissension’ among teachers, administrators, the board of education, and the residents of the district.”

The U.S. Supreme Court determined that the teacher’s letter addressed “a matter of legitimate public concern,” thus implicating his free speech rights as a citizen. The Court then balanced the teacher’s free speech interests against the state’s interest in maintaining an efficient educational system, using the following considerations: (1) Was there a close working relationship between the teacher and those he criticized? (2) Is the substance of the letter a matter of legitimate public concern? (3) Did the letter have a detrimental impact on the administration of the educational system? (4) Was the teacher’s performance of his daily duties impeded? (5) Was the teacher writing in his professional capacity or as a private citizen? The Court found that *Pickering* had no working relationship with the board, that the letter dealt with a matter of public concern, that *Pickering*’s letter was greeted with public apathy and therefore had no detrimental effect on the schools, that *Pickering*’s performance as a teacher was not hindered by the letter, and that he wrote as a citizen, not as a teacher. Based on these considerations and facts, the Court concluded that the school administration’s interest in limiting teachers’ opportunities to contribute to public debate was not significantly greater than its interest in limiting a similar contribution by any member of the general public, and that “in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”

The *Pickering* balancing test was further explicated in later Supreme Court cases. The most important of these cases are *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Connick v. Myers*, 461 U.S. 138 (1983); and *Waters v. Churchill*, 511 U.S. 661 (1994). They are discussed *seriatim* below.

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<sup>1</sup>The *Perry* Court also held, in contrast, that the professor’s job status, “though irrelevant to his free speech claim, is highly relevant to his procedural due process claim” (408 U.S. at 599). The Fourteenth Amendment due process clause is the one constitutional basis for an academic freedom claim (see subsection 7.1.4 below) that distinguishes among faculty members on the basis of job status.

In *Givhan*, the issue was whether *Pickering* protects public school teachers who communicate their views in private rather than in public. In a series of private meetings with her school principal, the plaintiff teacher in *Givhan* had made complaints and expressed opinions about school employment practices that she considered racially discriminatory. When the school district did not renew her contract, the teacher filed suit, claiming an infringement of her First Amendment rights. The trial court found that the school district had not renewed the teacher's contract primarily because of her criticisms of school employment practices, and it held that such action violated the First Amendment. The U.S. Court of Appeals reversed, reasoning that the teacher's expression was not protected by the First Amendment because she had expressed her views privately. The U.S. Supreme Court, in a unanimous opinion, disagreed with the appeals court and remanded the case to the trial court for further proceedings. According to the Supreme Court, "[N]either the [First] Amendment itself nor our decisions indicate that . . . freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public" (439 U.S. at 415–16). Rather, private expression, like public expression, is subject to the same balancing of factors that the Court utilized in *Pickering*. The Court did suggest in a footnote, however, that private expression may involve some different considerations:

Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally" (*Pickering v. Board of Education*, 391 U.S. at 572–73). Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered [439 U.S. at 415 n.4].

In *Connick v. Myers*, the issue was whether *Pickering* protects public employees who communicate views to office staff about office personnel matters. The plaintiff, Myers, was an assistant district attorney who had been scheduled for transfer to another division of the office. In opposing the transfer, she circulated a questionnaire on office operations to other assistant district attorneys. Later on the same day, she was discharged. In a 5-to-4 decision, the Court declined to apply *Givhan*, arguing that *Givhan*'s statements about employment practices had "involved a matter of public concern." In contrast, the various questions in Myers's questionnaire about office transfer policy and other office practices, with one exception, "[did] not fall under the rubric of matters of 'public concern.'" The exception, a question on whether office personnel ever felt pressured to work in political campaigns, did "touch upon a matter of public concern." In the overall context of the questionnaire, which otherwise

concerned only internal office matters, this one question provided only a “limited First Amendment interest” for Myers. Therefore, applying *Pickering* factors, the Court determined that Myers had spoken “not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest”; and that circulation of the questionnaire interfered with “close working relationships” within the office. The discharge thus did not violate the plaintiff’s freedom of speech.

*Givhan* and *Connick* emphasize the need to distinguish between communications on matters of public concern and communications on matters of private or personal concern—a distinction that, under *Givhan*, does not depend on whether the communication is itself made in public or in private. The dispute between the majority and dissenters in *Connick* reveals how slippery this distinction can be. The majority did, however, provide a helpful methodological guideline for drawing the distinction. “Whether an employee’s speech addresses a matter of public concern,” said the Court, “must be determined by the *content, form, and context* of a given statement, as revealed by the whole record” (461 U.S. at 147–48; emphasis added). Because the “content, form, and context” will depend on the specific circumstances of each case, courts must remain attentive to the “enormous variety of fact situations” that these cases may present. In a more recent case, *City of San Diego v. Roe*, 543 U.S. 77 (2004), the Court reiterated this aspect of *Connick* and added that “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication” (543 U.S. at 83–84).

In *Waters v. Churchill*, 511 U.S. 661 (1994), the third key case explicating *Pickering*, a public hospital had terminated a nurse because of statements concerning the hospital that she had made to a coworker. In remanding the case to the trial court for further proceedings, the Justices filed four opinions displaying different perspectives on the First Amendment issues. Although there was no majority opinion, the plurality opinion by Justice O’Connor and two concurring opinions (by Justice Souter and Justice Scalia) stressed the need for courts to be deferential to employers when applying the *Pickering/Connick* factors. In particular, according to these Justices, it appears that (1) in evaluating the impact of the employee’s speech, the public employer may rely on its own reasonable belief regarding the content of the speech, even if that belief later proves to be inaccurate;<sup>2</sup> and (2) in evaluating the disruptiveness of the employee’s speech, a public employer does not need to determine that the speech actually disrupted operations, but only that the speech was potentially disruptive.

Under the first of these points from *Waters*—the “reasonable belief” requirement—the employer’s belief concerning the content of the employee’s

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<sup>2</sup>As with other cases in the *Pickering/Connick* line, there is potentially a related question whether the employer terminated the employee because of unprotected (disruptive) speech or conduct, or because of other, protected, speech. See Section 7.6 below. In *Waters*, the Court raised this issue but did not resolve it, instead remanding the case to the lower courts for further fact determinations (511 U.S. at 682 (opinion of O’Connor, J.)).

speech apparently must be an actual or real belief arrived at in good faith. Justice O'Connor's plurality opinion, for instance, indicates that the employer must "really . . . believe" (511 U.S. at 679) the version of the facts on which it relies. In addition, the employer's belief must also be objectively reasonable in the sense that it is based on "an objectively reasonable investigation" of the facts (511 U.S. at 683; opinion of Souter, J.) or based on a standard of care that "a reasonable manager" would use under the circumstances (511 U.S. at 678; plurality opinion of O'Connor, J.). This aspect of *Waters* is discussed further in Section 7.6 below.

Under the second point from *Waters*—the potential disruption requirement—the employer may prevail by showing that it made a "reasonable prediction of disruption, to the effect" that "the [employee's] speech is, in fact, likely to be disruptive" (511 U.S. at 674; O'Connor J.). The reasonableness of the prediction would likely be evaluated under an objective standard much like that which Justice O'Connor would use to determine the reasonableness of the employer's belief about the facts. Even if the predicted harm "is mostly speculative," the Court apparently will be deferential to the employer's interests and give the employer's finding substantial weight (511 U.S. at 673; opinion of O'Connor, J.). In *Waters* itself, for instance, "the potential disruptiveness of the [nurse's] speech as reported was enough to outweigh whatever First Amendment value it might have had" (511 U.S. at 680; opinion of O'Connor, J.). This aspect of *Waters* was discussed and relied on in *Jeffries v. Harleston*, a U.S. Court of Appeals case examined in Section 7.5 below.

In various cases, lower courts have questioned whether there are circumstances in which they should not apply the *Pickering/Connick/Waters* analysis to public employees' free speech claims. In *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), for instance, the issue was whether there must be an "adverse employment action" by the employer before the *Pickering/Connick* line will apply. The plaintiffs were tenured law school professors at Texas Southern University who challenged the amount of the salary increases the dean had awarded them. The professors did not claim censorship, but rather claimed retaliation—that the dean had lowered the amount of their salary increases in retaliation for critical statements they had made concerning the dean. The appellate court declined to apply the *Pickering/Connick* public concern analysis and rejected the professors' free speech retaliation claim because they had "failed to show that they suffered an adverse employment action."

The professors in *Harrington* had alleged two possible adverse actions: first, that the dean had evaluated one of the plaintiffs as "counterproductive"; and second, that the dean had perennially discriminated against the plaintiffs in awarding salary increases. As to the first, the court held that "an employer's criticism of an employee, without more, [does not constitute] an actionable adverse employment action. . . . [M]ere criticisms do not give rise to a constitutional deprivation for purposes of the First Amendment." As to the second alleged adverse action, the court emphasized that each of the professors had received salary increases each year and that the professors' complaint "amounted to nothing more than a dispute over the quantum of pay increases." The court then

limited its holding to these facts: “If Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion.”

The appellate court in *Power v. Summers*, 226 F.3d 815 (7th Cir. 2000), however, disagreed with the *Harrington* analysis and ruled that proof of an adverse employment action is not a prerequisite for a faculty member’s free speech claim against the institution. The case concerned a claim by three professors that they had received reduced bonuses in retaliation for their criticisms of institutional policies. The district court dismissed the case on grounds that the award of smaller bonuses was not an adverse employment action; the appellate court, in an opinion by Judge Posner, reversed. The court’s opinion explained that proof of an adverse employment action is an appropriate component of a Title VII employment discrimination claim but not of a First Amendment free speech claim; employees asserting free speech claims need only show that some institutional action had inhibited their exercise of free expression: “Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable . . . if the circumstances are such as to make a refusal an effective deterrent to the exercise of a fragile liberty” (226 F.3d at 820). This “deterrence” test is apparently objective in that it depends on whether, in the particular circumstances of the case, the average reasonable person would be deterred by the challenged action—not on whether the person asserting First Amendment rights was or would have been deterred in the particular circumstances (see, for example, *Davis v. Goord*, 320 F.3d 346, 352–54 (2d Cir. 2003)).

In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (the *NTEU* case), the U.S. Supreme Court itself carved out a category of public employee speech cases to which *Pickering/Connick* does not apply. In the course of invalidating a federal statute that prohibited federal employees from receiving honoraria for writing and speaking activities undertaken on their own time, the Court developed an important distinction between: (1) cases involving “a *post hoc* analysis of one employee’s speech and its impact on that employee’s professional responsibilities,” and (2) cases involving a “sweeping statutory impediment to speech that potentially involves many employees.” In the first type of case, the employee challenges an employer’s “adverse action taken in response to actual speech,” while in the second type of case the employee challenges a statute or administrative regulation that “chills potential speech before it happens” (513 U.S. at 459–60). The *Pickering/Connick* balancing test applies to the first type of case but not to the second. This is because the second type of case “gives rise to far more serious concerns” than does the first. Thus, “the Government’s burden is greater with respect to [a] statutory restriction on expression” (the second type of case), than it is “with respect to an isolated disciplinary action” (the first type of case). To meet this greater burden of justification, the Government must take into account the interests of “present and future employees in a broad range of present and future expression,” as well as the interests of “potential audiences” that have a “right to read and hear what

the employees would otherwise have written and said” (513 U.S. at 468, 470); and must demonstrate that those interests “are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government” (513 U.S. at 468, quoting *Pickering*, 391 U.S. at 571).

The critical distinction that the Court made in the *NTEU* case—the distinction between a “single supervisory decision” and a “statutory impediment to speech”—seems compatible with the Court’s earlier analysis in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (discussed in subsection 7.1.4 below). Both *NTEU* and *Keyishian* are concerned with statutes or administrative regulations that limit the speech of a broad range of government employees, rather than with a particular disciplinary decision of a particular administrator. Both cases also focus on the meaning and application of the statute or regulation itself, rather than on the motives and concerns of a particular employer at a particular workplace. And both cases focus on the special problems that arise under the First Amendment when a statute or regulation “chills potential speech before it happens” (513 U.S. at 468). Given these clear parallels, the *NTEU* case has apparently laid the foundation for a merger of the *Keyishian* case and the *Pickering/Connick* line of cases as they apply to large-scale faculty free expression disputes, particularly academic freedom disputes. The two cases, in tandem, would apply particularly to external conflicts arising under a state or federal statute or administrative regulation that is alleged to impinge upon the free expression, or academic freedom, of many faculty members at various institutions (see subsection 7.1.5 below). But they would also appear to apply to internal conflicts involving a college’s or university’s written policy that applies broadly to all or most faculty members of the institution. The case of *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004), provides an example of the latter type of application of *NTEU*. There the court majority applied *NTEU* analysis to invalidate a chancellor’s “preclearance directive” applicable to all faculty and staff of the institution (370 F.3d at 678–80); while a dissenting judge argued that the *Pickering/Connick* line, and not *NTEU*, provided the applicable test (370 F.3d at 682–88). (For discussion of *Crue v. Aiken*, see Section 10.4.3.)

In addition to the *Pickering/Connick* line of cases and *NTEU*, the cases on the “public forum” doctrine might also be invoked as a basis for some faculty free speech claims. While the public forum doctrine is often applied to free speech problems concerning students (see Section 9.5.2), however, it will only occasionally apply to the analysis of faculty free speech rights on campus. The mere fact that campus facilities are open to employees as workspace does not make the space a designated public forum or limited designated forum. In *Tucker v. State of California Department of Education*, 97 F.3d 1204, 1209, 1214–15, the court held that employer offices and workspaces are not public forums. Similarly, in *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991), and *Linnemeir v. Board of Trustees, Indiana University-Purdue University*, 260 F.3d 757, 759–60 (7th Cir. 2001), the courts declined to consider classrooms to be public forums during class time; and in *Piarowski v. Illinois Community College District*, 759 F.2d 625 (7th Cir. 1985), the court declined to apply public forum analysis to a campus art gallery used for displaying the works of faculty members. On the

other hand, for certain other types of property, the institution may have opened the property for faculty members, the academic community, or the general public to use for their own personal expressive purposes. In such circumstances, the institution will have created a designated forum, and faculty members will have the same First Amendment rights of access as other persons to whom the property is open. In *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001), for example, the court considered certain bulletin boards on a state university's campus to be designated public forums open to the public.

In addition to their free expression rights, faculty members at public institutions also have a right to freedom of association under the First Amendment. Public employees, for example, are free to join (or not join) a political party and to adopt whatever political views and beliefs they choose (*Branti v. Finkel*, 445 U.S. 507 (1980)). They cannot be denied employment, terminated, or denied a promotion or raise due to their political affiliations or beliefs (*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)). Nor are these associational rights limited to political organizations and viewpoints; public employees may also join (or not join), subscribe to the beliefs of, and participate in social, economic, and other organizations (see *NAACP v. Button*, 371 U.S.415 (1963)). Since these rights extend fully to faculty members (see *Jirau-Bernal v. Agrait*, 37 F.3d. 1 (1st Cir. 1994)), they may—like other public employees—join organizations of their choice and participate as private citizens in their activities. Moreover, public employers, including institutions of higher education, may not require employees to affirm by oath that they will not join or participate in the activities of particular organizations. (See generally, William Van Alstyne, “The Constitutional Rights of Teachers and Professors,” 1970 *Duke L.J.* 841.) In *Cole v. Richardson*, 405 U.S. 676 (1972), however, the U.S. Supreme Court did uphold an oath that included a general commitment to “uphold and defend” the U.S. Constitution and a commitment to “oppose the overthrow of the government . . . by force, violence, or by any illegal or unconstitutional method.” The Court upheld the second commitment's constitutionality only by reading it narrowly as merely “a commitment not to use illegal and constitutionally unprotected force to change the constitutional system.” So interpreted, the second commitment “does not expand the obligation of the first [commitment].”

Public employees and faculty members also have other constitutional rights that are related to and supportive of their free expression and free association rights under the First Amendment. The petition clause of the First Amendment,<sup>3</sup> for example, may protect faculty members from retaliation if they file grievances or lawsuits against the institution or its administrators. (See *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994).) And the Fourth Amendment search and seizure clause provides faculty members some protection for teaching and research materials, and other files, that they keep in their offices. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), for example, the Court used the Fourth Amendment to protect an employee who was in charge of training physicians in the

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<sup>3</sup>The petition clause prohibits government from “abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”



psychiatric residency program at a state hospital. Hospital officials had searched his office. The Court determined that public employees may have reasonable expectations of privacy in their offices, desks, and files; and that these expectations may, in certain circumstances, be protected by the Fourth Amendment. A plurality of the Justices, however, asserted that an employer's warrantless search of such property would nevertheless be permissible if it is done for "noninvestigatory, work-related purposes" or for "investigations of work-related misconduct," and if it meets "the standard of reasonableness under all the circumstances."<sup>4</sup>

**7.1.2. Academic freedom: Basic concepts and distinctions.** Faculty academic freedom claims are often First Amendment freedom of expression claims; they thus may draw upon the same free expression principles as are set out in subsection 7.1.1 above. Academic freedom claims may also be based, however, on unique applications of First Amendment free expression principles, on constitutional rights other than freedom of expression, or on principles of contract law. The distinction between public and private institutions applicable to free expression claims (subsection 7.1.1 above) applies equally to academic freedom claims. Similarly, as is also the case for First Amendment freedom of expression claims, neither tenure, nor a particular faculty rank, nor even full-time status, is a legal prerequisite for faculty academic freedom claims. (See generally Ralph Brown & Jordan Kurland, "Academic Tenure and Academic Freedom," 53 *Law & Contemp. Probs.* 325 (1993); J. Peter Byrne, "Academic Freedom of Part-Time Faculty," 27 *J. Coll. & Univ. Law* 583 (2001).)

Academic freedom traditionally has been considered to be an essential aspect of American higher education. (See generally Walter Metzger, *The American Concept of Academic Freedom in Formation* (Arno, 1977).) It has been a major determinant of the missions of higher educational institutions, both public and private, and a major factor in shaping the roles of faculty members as well as students. Yet the concept of academic freedom eludes precise definition. It draws meaning from both the world of education and the world of law. In the education, or professional, version of academic freedom, educators usually use the term with reference to the custom and practice, and the aspirations, by which faculties may best flourish in their work as teachers and researchers (see, for example, the "1940 Statement of Principles on Academic Freedom and Tenure" of the American Association of University Professors (AAUP), discussed below in this section and found in *AAUP Policy Documents and Reports* (9th ed., 2001), 3–10). In the law, or legal version, lawyers and judges usually use "academic freedom" as a catchall term to describe the legal rights and responsibilities of the teaching profession, and courts usually attempt to define these rights by reconciling basic constitutional law or contract law principles with prevailing views of academic freedom's intellectual and social role in American life.

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<sup>4</sup>Related cases are collected in Ralph V. Seep, Annot., "Warrantless Search by Government Employer of Employee's Workplace, Locker, Desk, or the Like as Violation of Fourth Amendment Privacy Rights—Federal Cases," 91 A.L.R. Fed. 226.

(See generally Walter P. Metzger, “Profession and Constitution: Two Definitions of Academic Freedom in America,” 66 *Texas L. Rev.* 1265 (1988).)

More broadly, academic freedom refers not only to the prerogatives and rights of faculty members but also to the prerogatives and rights of students. Student academic freedom is explored in Section 8.1.4 of this book.<sup>5</sup> In addition, especially for the legal version of academic freedom, the term increasingly is used to refer to the rights and interests of institutions themselves, as in “institutional academic freedom” or “institutional autonomy.” This third facet of academic freedom is explored in subsection 7.1.6 below.<sup>6</sup>

In the realm of law and courts (the primary focus of this chapter), yet another distinction regarding academic freedom must be made: the distinction between constitutional law and contract law. Though courts usually discuss academic freedom in cases concerning the constitutional rights of faculty members, the legal boundaries of academic freedom are initially defined by contract law. (See generally Jim Jackson, “Express and Implied Contractual Rights to Academic Freedom in the United States,” 22 *Hamline L. Rev.* 467 (1999).) Faculty members possess whatever academic freedom is guaranteed them under the faculty contract (see Section 6.1)—either an individual contract or (in some cases) a collective bargaining agreement. The “1940 Statement of Principles on Academic Freedom and Tenure,” AAUP’s 1970 “Interpretive Comments” on this Statement, and AAUP’s 1982 “Recommended Institutional Regulations on Academic Freedom and Tenure” (all included in *AAUP Policy Documents and Reports*, 3–10, 21–30) are sometimes incorporated-by-reference into faculty contracts, and it is crucial for administrators to determine whether this has been done—or should be done—with respect to all or any of these documents. For any document that has been incorporated, courts will interpret and enforce its terms by reference to contract law principles. Even when these documents have not been incorporated into the contract, they may be an important source of the “academic custom and usage” that courts will consider in interpreting unclear contract terms (see generally Section 6.2.3).

Contract law limits both public and private institutions’ authority over their faculty members. Public institutions’ authority is also limited by constitutional concepts of academic freedom, as discussed below, and sometimes also by state statutes or administrative regulations on academic freedom. But in private institutions, the faculty contract, perhaps supplemented by academic custom and usage, may be the only legal restriction on administrators’ authority to limit faculty academic freedom. In private religious institutions, the institution’s special religious mission may add additional complexities to contract law’s application to academic freedom problems (see, for example, the *Curran* case discussed in Section 6.1.5 and the *McEnroy* case discussed in Section 7.8 below). For instance, the establishment and free exercise clauses of the First Amendment

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<sup>5</sup>For students, as for faculty members, there is both an education version of academic freedom and a law, or legal, version.

<sup>6</sup>As discussed in subsection 7.1.6, “institutional academic freedom” is in some circumstances a misnomer and an inappropriate usage.

may limit the capacity of the courts to entertain lawsuits against religious institutions brought by faculty members alleging breach of contract (see, for example, the *Welter* and *Alicea* cases discussed in Section 6.1.5).

Constitutional principles of academic freedom have developed in two stages, each occupying a distinct time period and including distinct types of cases. The earlier stage, in the 1950s and 1960s, included the cases on faculty and institutional freedom from interference by external (extramural) governmental bodies. These earlier cases pitted faculties and their institutions against a state legislature or state agency—the external conflict paradigm of academic freedom (see subsection 7.1.5 below). In the later stage, covering the 1970s and 1980s, the cases focused primarily on faculty freedom from institutional intrusion—the internal conflict paradigm. (See generally William Van Alstyne, “Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review,” 53 *Law & Contemp. Probs.* 79 (1990).) These later cases pitted faculty members against their institutions—thus illustrating the clash between faculty academic freedom and institutional prerogatives often referred to as “institutional academic freedom” or “institutional autonomy.” Both lines of cases have continued to the present, and both retain high importance, but the more recent academic freedom cases based on the second stage of developments (internal conflicts) have been much more numerous than those based on the first stage of developments (external conflicts). Developments in the first years of the twenty-first century suggest, however, that the external conflicts cases are becoming more numerous and are attracting much more attention than they have since the 1950s and 1960s (see subsection 7.1.5 below).

### ***7.1.3. Professional versus legal concepts of academic freedom.***

The education, or professional, version of academic freedom is based on “professional” concepts, as distinguished from the “legal” concepts discussed later in this subsection. The professional concept of academic freedom finds its expression in the professional norms of the academy, which are in turn grounded in academic custom and usage. The most recognized and most generally applicable professional norms are those promulgated by the American Association of University Professors. Most of these norms appear in AAUP standards, statements, and reports that are collected in *AAUP Policy Documents and Reports* (2001). This publication, called “The Redbook,” is available in a print version and also online on the AAUP’s Web site, at <http://www.aaup.org/statements/Redbook/>.

The national academic community’s commitment to academic freedom as a core value was formally documented in the “1915 Declaration of Principles on Academic Freedom and Academic Tenure,” promulgated by the AAUP and currently reprinted in *AAUP Policy Documents and Reports*, pages 292–301. (See generally Neil Hamilton, “Academic Tradition and the Principles of Professional Conduct,” 27 *J. Coll. & Univ. Law* 609, 625–28 (2001).) The 1915 Declaration emphasized the importance of academic freedom to higher education and recognized two components of academic freedom: the teachers’ freedom to teach and the students’ freedom to learn. Twenty-five years later, the concept of

academic freedom was further explicated, and its critical importance reaffirmed, in the “1940 Statement of Principles on Academic Freedom and Tenure” (*AAUP Policy Documents and Reports*, 3–10), developed by the AAUP in conjunction with the Association of American Colleges and Universities and subsequently endorsed by more than 185 educational and professional associations. (See generally Walter P. Metzger, “The 1940 Statement of Principles on Academic Freedom and Tenure,” 53 *Law & Contemp. Probs.* 3 (1990).) The 1940 Statement emphasizes that “[i]nstitutions of higher education are conducted for the common good. . . . The common good depends upon the free search for the truth and its free exposition. Academic freedom is essential to these purposes . . .” (*AAUP Policy Documents and Reports*, 3).

The 1940 Statement then identifies three key aspects of faculty academic freedom: the teacher’s “freedom in research and in the publication of the results”; the teacher’s “freedom in the classroom in discussing [the subject matter of the course]”; and the teacher’s freedom to speak or write “as a citizen,” as “a member of a learned profession,” and as “an officer of an educational institution.” These freedoms are subject to various “duties correlative with rights” and “special obligations” imposed on the faculty member (*AAUP Policy Documents and Reports*, 3, 4; see generally Hamilton, above, at 634–52).

In 1970, following extensive debate within the American higher education community, the AAUP reaffirmed the 1940 Statement and augmented it with a series of interpretive comments (1970 “Interpretive Comments,” *AAUP Policy Documents and Reports*, 4–9). In addition, in 1957 the AAUP promulgated and adopted the first version of its “Recommended Institutional Regulations on Academic Freedom and Tenure,” subsequently revised at various times, most recently in 1999 (*AAUP Policy Documents and Reports*, 21–30). Regulation No. 9, on academic freedom, provides that “[a]ll members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure* . . .” (*AAUP Policy Documents and Reports*, 28).

The AAUP documents articulate academic national norms that evidence *national* custom and usage on academic freedom. Professional norms, however, are also embodied in the regulations, policies, and custom and usage of individual institutions. These institutional norms may overlap or coincide with national norms, especially if they incorporate or track AAUP statements. But institutional norms may also be local norms adapted to the particular institution’s character and mission or that of some particular organization with which the institution is affiliated. Whether national or local, professional academic freedom norms are enforced through the internal procedures of individual institutions. In more egregious or intractable cases, or cases of broad professional interest that implicate national norms, AAUP investigations and censure actions (see generally Section 14.5 of this book) may also become part of the enforcement process.

The legal version of academic freedom, in contrast to the professional version, is based on legal concepts that find their expression in legal norms enunciated by the courts. These legal norms, by definition, have the force of law and

thus are binding on institutions and faculty members in a way that professional norms are not.<sup>7</sup> In this sense, the distinction between legal norms of academic freedom and professional norms is similar to the broader distinction between law and policy (see Section 1.7). The primary source of legal norms of academic freedom is the decisions of the federal and state courts. These decisions are based primarily on federal constitutional law and on the common law of contract of the various states. (The foundational constitutional law principles are outlined in subsection 7.1.4 below.) Legal norms are enforced through litigation and court orders, as well as through negotiations that the parties undertake to avoid the filing of a lawsuit or to settle a lawsuit before the court has rendered any decision.

Trends from the 1970s to the present suggest that, overall, there has been relatively too little emphasis on the professional norms of academic freedom within individual institutions and relatively too much emphasis on the legal norms. The time may be ripe for faculty members and their institutions to reclaim the classical heritage of professional academic freedom and recommit themselves to elucidating and supporting the professional norms within their campus communities. (See Neil Hamilton, “Buttressing the Neglected Traditions of Academic Freedom,” 22 *Wm. Mitchell L. Rev.* 549 (1996).) Such developments would increase the likelihood that litigation could be reserved for more extreme cases where there has been recalcitrance and adamant refusals to respect academic customs and usages, national or institutional; and for cases where there is deep conflict between faculty academic freedom and “institutional” academic freedom, or between faculty academic freedom and student academic freedom. (See Robert O’Neil, “. . . But Litigation Is the Wrong Response,” *Chron. Higher Educ.*, August 1, 2003, B9; and Robert O’Neil, “Academic Freedom and the Constitution,” 11 *J. Coll. & Univ. Law* 275, 289–90 (1984).) The law and the courts could then draw the outer boundaries of academic freedom, providing correctives in extreme cases (see, for example, Section 7.1.4 below); while institutions and the professoriate would do the day-by-day and year-by-year work of creating and maintaining an environment supportive of academic freedom on their own campuses.

**7.1.4. The foundational constitutional law cases.** In a series of cases in the 1950s and 1960s, the U.S. Supreme Court gave academic freedom constitutional status under the First Amendment freedoms of speech and association, and to a lesser extent under the Fourteenth Amendment guarantee of procedural due process. The opinions in these cases include a number of ringing declarations on the importance of academic freedom. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), both Chief Justice Warren’s plurality opinion and Justice Frankfurter’s concurring opinion lauded academic freedom in the course of reversing a contempt judgment against a professor who had refused to answer the state attorney general’s questions concerning a lecture delivered

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<sup>7</sup>As suggested above in this subsection, professional norms may sometimes be converted into legal norms by being incorporated into a faculty contract or by being used as academic custom and usage that fills in gaps in a faculty contract.

at the state university. The Chief Justice, writing for a plurality of four Justices, stated that:

to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which the government should be extremely reticent to tread.

The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die [354 U.S. at 250].

Justice Frankfurter, writing for himself and Justice Harlan, made what has now become the classical statement on “the four essential freedoms” of the university:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study [354 U.S. at 263, quoting a conference statement issued by scholars from the Union of South Africa].

In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court invalidated a state statute that compelled public school and college teachers to reveal all organizational affiliations or contributions for the previous five years. In its reasoning, the Court emphasized:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. “By limiting the power of the states to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers” [364 U.S. at 487, quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)].

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court majority of six, in an opinion by Justice Douglas, stated that:

the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to

distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those *peripheral rights* the specific rights would be less secure [381 U.S. at 482–83; emphasis added].

This statement is particularly important, not only for its comprehensiveness, but also because it focuses on “peripheral rights” under the First Amendment. These rights—better termed “correlative rights” or “ancillary rights”—are based on the principle that the express or core rights in the First Amendment are also the source of other included rights that correlate with or are ancillary to the express or core rights, and without which the core rights could not be fully protected. This principle is an important theoretical underpinning for the concept of academic freedom under the First Amendment. Academic freedom correlates to the express rights of free speech and press in the specific context of academia. The rights of speech and press, in other words, cannot be effectively protected in the college and university environment unless academic freedom, as a corollary of free speech and press, is also recognized. This correlative rights argument is closely related to the argument for implied rights under the First Amendment and other constitutional guarantees. Since it is generally accepted that the First Amendment is the source of an implied right of freedom of association (see, for example, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)), and since implied rights are recognized under other constitutional guarantees (see, for example, *Zablocki v. Redhail*, 434 U.S. 374 (1978), recognizing the right to marry as an implied right under the due process clause), there is considerable support, beyond *Griswold*, for a correlative or implied right to academic freedom under the First Amendment.

And in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court quoted both *Sweezy* and *Shelton*, and added:

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. . . . The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection” . . . [385 U.S. at 603; emphasis added].<sup>8</sup>

*Keyishian* is the centerpiece of the formative 1950s and 1960s cases. The appellants were State University of New York faculty members who refused to

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<sup>8</sup>These strong statements of support for academic freedom did not stop with *Keyishian*, and they are not merely relics of the past. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), for example, and again in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court issued glowing statements on the importance of academic freedom to American higher education. See 515 U.S. at 835–36; 539 U.S. at 329.

sign a certificate (the “Feinberg Certificate”) stating that they were not and never had been Communists. This certificate was required under a set of laws and regulations designed to prevent “subversives” from obtaining employment in the state’s educational system. The faculty members brought a First Amendment challenge against the certificate requirements and the underlying law barring employment to members of subversive organizations, as well as other provisions authorizing dismissal for the “utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act,” and for “by word of mouth or writing wilfully and deliberately advocating, advising, or teaching the doctrine of forceful overthrow of the government.”

The Court held that the faculty members’ First Amendment freedom of association had been violated by the existence and application of this series of laws and rules that were both vague and overbroad (see Section 6.6.1 regarding the vagueness and overbreadth doctrines). The word “seditious” was held to be unconstitutionally vague, even when defined as advocacy of criminal anarchy:

[T]he possible scope of “seditious utterances or acts” has virtually no limit. For under Penal Law § 161, one commits the felony of advocating criminal anarchy if he “publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence, or other unlawful means.” Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? . . . The teacher cannot know the extent, if any, to which a “seditious” utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between “seditious” and nonseditious utterances and acts [385 U.S. at 598–99].

The Court also found that the state’s entire system of “intricate administrative machinery” was

a highly efficient *in terrorem* mechanism. . . . It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. . . . The result may be to stifle “that free play of the spirit which all teachers ought especially to cultivate and practice” [385 U.S. at 601, quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (Frankfurter, J., concurring)].

Noting that “the stifling effect on the academic mind from curtailing freedom of association in such a manner is manifest,” the Court rejected the older case of *Adler v. Board of Education*, 342 U.S. 485 (1951), which permitted New York to bar employment to teachers who were members of listed subversive organizations. In its place, the Court adopted this rule:

Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants. . . . Legislation which sanctions



membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations [385 U.S. at 606, 608].

One year after *Keyishian*, the Supreme Court decided *Pickering v. Board of Education*, 391 U.S. 563 (1968), and thus stepped gingerly into a new line of cases that would become the basis for the second stage of academic freedom's development in the courts. This line of cases, now called "the *Pickering/Connick* line," centers on the free speech rights of all public employees, not merely faculty members, and is therefore addressed in subsection 7.1.1 above.

In addition to its reliance on free speech and press, and procedural due process, the U.S. Supreme Court has also tapped into the First Amendment's religion clauses to develop supplementary protection for academic freedom. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), and again in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court used the establishment clause (see Section 1.6 of this book) to strike down state statutes that interfered with public school teachers' teaching of evolution. (See A. Morris, "Fundamentalism, Creationism, and the First Amendment," 41 *West's Educ. Law Rptr.* 1 (1987).) And in *O'Connor v. Ortega*, discussed in subsection 7.1.1 above, the U.S. Supreme Court used the Fourth Amendment's search and seizure clause in protecting an academic employee's office and his papers from warrantless searches. Similar Fourth Amendment issues are increasingly arising concerning electronic and digital records (see Martha McCaughey, "Windows Without Curtains: Computer Privacy and Academic Freedom," *Academe*, September–October 2003, 39–42). If faculty members' academic writings, research results, or other research materials are stored in their offices or laboratories on their own computer disks or on the hard drive of a computer they own, there may be an expectation of privacy, and thus a level of Fourth Amendment protection, similar to that in *O'Connor v. Ortega*. But if the writings or materials are stored on the hard drive of a computer that the institution (or the state) owns, or stored on the institution's network, the expectation of privacy and the Fourth Amendment protection will likely depend on the terms of the institution's computer use policies. (See, for example, Robert O'Neil, "Who Owns Professors' E-Mail Messages?" *Chron. Higher Educ.*, June 25, 2004, B9 (special legal issues supp.))<sup>9</sup>

The lower federal and state courts have had many occasions to apply U.S. Supreme Court precedents to a variety of academic freedom disputes pitting faculty members against their institutions. The source of law most frequently invoked in these cases is the First Amendment's free speech clause, as interpreted in the *Pickering/Connick* line of cases. Some cases have also relied on *Keyishian* and its forerunners, either in lieu of or as a supplement to the *Pickering/Connick* line. The legal principles that the courts have developed based on these two lines of

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<sup>9</sup>The Web site of the Electronic Privacy Information Center, available at <http://www.epic.org/privacy/workplace>, contains current information on electronic privacy in the workplace and numerous sources to consult for further information.

cases, however, are not as protective of faculty academic freedom as the Supreme Court's declarations in the 1950s and 1960s cases might have suggested. As could be expected, the courts have focused on the specific facts of each case and have reached varying conclusions based on the facts, the particular court's disposition on liberal versus strict construction of First Amendment protections, and its sensitivities to the nuances of academic freedom. Sections 7.2 through 7.5 below provide analysis and case examples in four broad areas of concern, and Sections 7.6 through 7.8 address some additional special problems.

### ***7.1.5. External versus internal restraints on academic freedom.***

As indicated in subsection 7.1.2 above, there are two paradigms for academic freedom conflicts: they may be either external ("extramural") or internal ("intramural"). The first type of conflict occurs when a government body *external* to the institution has allegedly impinged upon the institution's academic freedom or that of its faculty or students (see Robert O'Neil, "Academic Freedom and the Constitution," 11 *J. Coll. & Univ. Law* 275, 276–83 (1984)). The second type of conflict occurs when the institution or its administrators have allegedly impinged upon the academic freedom of one or more of the institution's faculty members or students.<sup>10</sup> The means of infringement, the competing interests, and, to some extent, the applicable law may differ from one type of conflict to the other. The first type of conflict, or case, is usually controlled by the *Keyishian* line of cases (see subsection 7.1.4 above) or by the *NTEU* case that is an offshoot of *Pickering/Connick* analysis (see subsection 7.1.1 above); the second type of conflict is usually controlled by the *Pickering/Connick* line of cases.

The primary source of law involved in external conflicts is likely to be the First Amendment—not only free speech and free press, but also freedom of association and freedom of religion. If the conflict were between a government body and a private institution, the institution would have its own First Amendment rights to assert against the government, as would its faculty members (and its students, as the case may be). If the conflict were between a government body and a public institution, the institution's faculty members (and students, as the case may be) could assert their First Amendment rights against the government; but the public institution itself would not have its own constitutional rights to assert, since it is an arm of government. (It could, however, assert and support the rights of its faculty members and/or students.)

The government body that allegedly interferes with academic freedom could be: (1) a state legislature, as in the *Keyishian* case and the *Epperson* and *Edwards* cases (see subsection 7.1.4 above) and *Urofsky v. Gilmore* (discussed in Section 7.3 below); (2) a state legislative committee; (3) a state attorney general, as in the

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<sup>10</sup>Such infringement can occur in overt and formal ways, as in most of the cases in Sections 7.2 to 7.5 below, or in covert and informal ways that may be too amorphous to be legally redressable. For examples of the latter type of impingement, see Alison Schneider, "The Academic Path to Pariah Status: Personal Disputes and Controversial Research Lead Some Scholars to Be Shunned by Colleagues," *Chron. Higher Educ.*, July 2, 1999, A12.

*Sweezy* case (see subsection 7.1.4 above); (4) a grant-making agency, such as the National Institutes of Health in *Board of Trustees of Stanford University v. Sullivan* (see Section 7.7.2 below) or the National Endowment for the Arts in the *Finley* case (see Section 13.4.6; and see generally Christopher Myers, “Many Colleges Deplore Anti-obscenity Pledge, but Most Accept U.S. Arts Grants Anyway,” *Chron. Higher Educ.*, July 11, 1990, A1); (5) a regulatory agency, such as the federal Equal Employment Opportunity Commission (EEOC) in *University of Pennsylvania v. EEOC* (see Section 7.7.1 below); (6) a grand jury, as in *Hammond v. Brown*, 323 F. Supp 326 (N.D. Ohio 1971), *affirmed* 450 F.2d 480 (6th Cir. 1971); (7) a city police department, as in *White v. Davis*, 533 P.2d 222 (Cal. 1975) (see Section 11.5); or (8) a court, as in some of the cases discussed in Section 7.7 below (see also *Kay v. Board of Higher Education*, 18 N.Y.S.2d 821 (N.Y. 1940) (the Bertrand Russell case)).

External or extramural academic freedom conflicts may also involve *private* bodies external to the institution that allegedly interfere with the academic freedom of the institution or its faculty members (or students). The external private body may be a foundation or other funding organization (see, for example, Erin Strout, “Provosts Object to Language Added to Foundations’ Grant Agreements,” *Chron. Higher Educ.*, May 14, 2004, A29); a religious organization or informal group of religious persons, as in the *Linnemeir* case discussed below; a political interest group, as in some of the “political correctness” examples discussed below; or a group of taxpayers as in the *Yacovelli* case discussed below. If it is a private body that infringes upon academic freedom, neither the institution nor its faculty members may assert constitutional claims against that body, except in the unusual case where the private body is engaged in state actions (see Section 1.5.2).

From the 1970s through the end of the twentieth century, internal academic freedom conflicts arose much more frequently than did external conflicts, at least in terms of litigation that resulted in published opinions of the courts. This ascendance of internal conflicts, at least in public institutions, was probably fueled by the U.S. Supreme Court’s decision in the *Pickering* case (see subsection 7.1.1), which provided a conceptual base upon which faculty members could assert free expression claims against their institutions. In the early years of the twenty-first century, however, external conflicts became more frequent and more visible, and commanded considerably more attention from practitioners, scholars, courts, and the media. (See, for example, Mary Burgan, “Academic Freedom in a World of Moral Crises,” *Chron. Higher Educ.*, September 6, 2002, B20.) The impetus for this reemergence apparently came primarily from two developments. One was the escalating terrorism marked by the disasters of September 11, 2001, which led to the USA PATRIOT Act, 115 Stat. 272 (2001), and other federal statutes and regulations that substantially impact America’s campuses. (See generally “Academic Freedom and National Security in a Time of Crisis: A Report of the AAUP’s Special Committee,” *Academe*, November–December 2003, 34–59.) The other development was a resurgence of the “political correctness” phenomenon,<sup>11</sup> in particular emphasizing allegations of political, ethnic, and religious bias or favoritism, on America’s campuses.

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<sup>11</sup>For background, see generally Paul Berman (ed.), *Debating P.C.: The Controversy over Political Correctness on College Campuses* (Dell, 1992).

Regarding the first development, the PATRIOT Act has been a focal point of concern. (See Section 13.2.4 of this book for a general discussion of the PATRIOT Act.) The Act permits federal investigators to access various private communications, including those of faculty members, undertaken by way of telephones or computer networks; and permits access into certain library records kept by libraries, including those on America's campuses. (For this aspect of the Act, see Section 13.2.12.2 of this book and "Academic Freedom and National Security," above, 38–41.) The Act also places certain restrictions on foreign students wishing to study at American colleges and universities and foreign scholars seeking to visit American colleges and universities. It has frequently been argued that some uses of these federal powers on American campuses would, by interfering with the privacy of academic communications, interfere with faculty academic freedom and institutional autonomy. (See, for example, Jonathan Cole, "The Patriot Act on Campus: Defending the University Post-9/11," *Boston Review*, Summer 2003; available at <http://bostonreview.net/BR.3/cole.html>.)

Another concern post-9/11 has been various federal government initiatives that restrict or potentially restrict scientific research undertaken at American colleges and universities. Some of these restrictions are in the PATRIOT Act itself; others are in regulations promulgated by various government agencies. (See Jamie Keith, "The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations, and Policies That Apply to Colleges and Universities," 30 *J. College & Univ. Law* 239 (2004).) It has frequently been argued that several of these restrictions on university research, including restrictions imposed upon the granting of federal research funds, can limit research and publication in ways that interfere with faculty academic freedom and institutional autonomy. (See, for example, Julie Norris, *Restrictions on Research Awards: Troublesome Clauses, A Report of the AAU/COGR Task Force* (March 2004), available at <http://www.cogr.edu> and at <http://www.aau.edu>; and see also "Academic Freedom and National Security," above, 34–59.)

Regarding the second development mentioned above, claims regarding racial and religious bias, there have been various challenges to college programs, events, or decisions that are said to reflect such bias. In *Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne*, 260 F.3d 757 (7th Cir. 2001), for example, state taxpayers and individual state legislators challenged the planned performance of a play that a student had selected for his senior thesis and his departmental faculty had approved. The plaintiffs argued that the play, which presented a critique of Christianity, would violate the First Amendment's establishment clause and would be offensive to many Christians. The federal district court denied the plaintiffs' motion for a preliminary injunction (155 F. Supp. 2d 1034 (N.D. Ind. 2001)), and the appellate court affirmed the denial (260 F.3d 757 (7th Cir. 2001)). Similarly, in *Yacovelli v. Moeser*, taxpayers and students challenged an orientation reading program planned for incoming students at the University of North Carolina/Chapel Hill. The plaintiffs claimed that use of the assigned book, which concerned the early history of the Islamic faith, would violate the federal establishment clause and would also be an

exercise in "political correctness." At around the same time, a legislative appropriations committee of the North Carolina legislature sought to block the use of public funds for the planned orientation program. In the lawsuit, the U.S. District Court for the Middle District of North Carolina rejected the plaintiffs' challenge (August 15, 2002), and the U.S. Court of Appeals for the Fourth Circuit affirmed (August 19, 2002). (See Donna Euben, "Curriculum Matters," *Academe*, November–December 2002, 86, for discussion of this case.) Subsequently, the district court also rejected the plaintiffs' alternative argument that the program violated students' free exercise rights under the First Amendment (2004 WL 1144183 (M.D.N.C. 2004) and 324 F. Supp. 2d 760 (M.D.N.C. 2004)).

There have also been various challenges to professors' or departmental faculties' decisions regarding courses, course materials, classroom discussions, and grades. The challengers typically cite particular decisions that they claim foster indoctrination or otherwise reflect a political (usually liberal) bias. The challengers often claim that such decisions violate student academic freedom, thus adding an additional dimension of conflict to the situation—a dimension that is illustrated by the *Yacovelli* case above. For additional examples of student academic freedom claims, and challenges to faculty academic freedom, in the context of political bias disputes, see the discussion of the proposed "Academic Bill of Rights" in Section 8.1.4.

**7.1.6. "Institutional" academic freedom.** As academic freedom developed, originally in Europe and then later in the United States, it had two branches: faculty academic freedom and student academic freedom. (See generally Richard Hofstadter & Walter Metzger, *The Development of Academic Freedom in the United States* (Columbia University, 1955), 386–91.) But in modern parlance, articulated primarily in court decisions beginning in the early 1980s, a third type of academic freedom has joined the first two: that of the colleges and universities themselves, or "institutional academic freedom." (See, for example, *Feldman v. Ho* and *Edwards v. California University of Pennsylvania* in Section 7.2.2; *Urofsky v. Gilmore* in Section 7.3; and *University of Pennsylvania v. EEOC* in Section 7.7.) Consequently, there are now three sets of beneficiaries of academic freedom protections: faculty members, students, and individual higher educational institutions. Obviously the interests of these three groups are not always compatible with one another, therefore assuring that conflicts will arise among the various claimants of academic freedom. As the court stated in *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985):

[T]he term [academic freedom] is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict . . . [759 F.2d at 629].

(See generally David Rabban, "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment," 53 *Law & Contemp. Probs.* 227 (1990); and David Rabban, "Academic Freedom, Individual or Institutional?" *Academe*, November–December 2001, 16.)

Institutional academic freedom (or institutional autonomy) entails the freedom to determine who may teach, the freedom to determine what may be taught, the freedom to determine how the subject matter will be taught, and the freedom to determine who may be admitted to study. In American law and custom, these four freedoms are usually traced to Justice Felix Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (discussed in subsection 7.1.4 above). But it was not until the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (further discussed in Section 9.3.2), that the U.S. Supreme Court explicitly distinguished between an institution's academic freedom and that of its faculty and students.<sup>12</sup> "Academic freedom," said the Court, "thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself" (474 U.S. at 226 n.12). This statement on institutional academic freedom, however, is not free from ambiguity. Although the Court did recognize the "academic freedom" of "state and local educational institutions," in the very same paragraph it also focused on "the multitude of academic decisions that are made daily by faculty members of public educational institutions . . ." (474 U.S. at 226). Thus the Court may not have intended to juxtapose the interests of the institution against those of its faculty, and was apparently assuming that the defendant university was either acting through its faculty members or acting in their interest.<sup>13</sup> The Court's distinction between institutional academic freedom and faculty (or student) academic freedom thus does not entail a separation of the institution's interests from those of its faculty members, nor does it suggest that institutional interests must prevail over faculty interests if the two are in conflict. (See Richard Hiers, "Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy," 29 *J. Coll. & Univ. Law* 35, 56–57, 81–82 (2002).)

The same might be said of the Court's later statement on institutional academic freedom in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the University of Michigan affirmative action case (see Section 8.2.5). As in *Ewing*, the Court in *Grutter* spoke of the academic freedom or autonomy interests of the institution (539 U.S. at 324, 329).<sup>14</sup> But, as in *Ewing*, the Court did not separate those interests from the

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<sup>12</sup>Prior to *Ewing*, Justice Powell had drawn a similar distinction in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), but he was speaking only for himself, not for the Court.

<sup>13</sup>Indeed, in academic matters, institutions do not operate separately from their faculties. It is "the traditional role of deans, provosts, department heads, and faculty [to make] academic decisions," and they make "discretionary choices . . . in the contexts of hiring, tenure, curriculum selection, grants, and salaries" (*Urofsky v. Gilmore*, 216 F.3d 401, 432–33 (Wilkinson, Ch. J., concurring in result)).

<sup>14</sup>Interestingly, the defendant in both *Ewing* and *Grutter*, the University of Michigan, happens to be a "constitutionally based institution" (see Section 12.2.3) with the constitutional status under Michigan's state constitution. This status provides the university considerable institutional autonomy (perhaps one might also say institutional academic freedom) as a matter of state law. It was apparently *not* this type of autonomy that the Court had in mind in *Ewing* and *Grutter*; and there is no indication that the Court would distinguish between constitutionally based and statutorily based state institutions in applying its rulings in *Ewing* and *Grutter/Gratz*.

interests of the faculty, or pit the two sets of interests against one another, or suggest that the institutional academic freedom claims would necessarily prevail over faculty academic freedom claims. (See Richard Hiers, “Institutional Academic Freedom—A Constitutional Misconception: Did *Grutter v. Bollinger* Perpetuate the Confusion?” 30 *J. Coll. & Univ. Law* 531, 568–77 (2004).)

Had the Court in *Ewing* or *Grutter* recognized institutional academic freedom as a First Amendment right separate from that of faculty members, additional conceptual difficulties would have arisen. The institution in these cases is a public institution that, like many other public colleges and universities, is an arm of the state government. States and state governmental entities do not have federal constitutional rights (see, for example, *Native American Heritage Commission v. Board of Trustees of the California State University*, 59 Cal. Rptr.2d. 402 (1996)). According to constitutional theory, persons (that is, private individuals and private corporations)—not governments—have rights; and rights are limits on governmental power to be asserted against government, rather than extensions of government power to be asserted on the government’s own behalf. (See William Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004), 38–40, 42–44.) Public institutions’ claims of institutional academic freedom therefore cannot be federal constitutional rights claims as such. These claims are better understood as claims based on interests—“governmental interests”—that can be asserted by public institutions to defend themselves against faculty members’ or students’ claims that the institution has violated their individual constitutional rights. This is the actual setting in which institutional academic freedom is discussed in both *Ewing* and *Grutter*. In this context, “institutional autonomy” is a more apt descriptor of the institution’s interests than is “institutional academic freedom,” since the former does not have the “rights” connotation that the latter phrase has.

Public colleges and universities may assert these institutional autonomy interests not only in internal or intramural academic freedom disputes with their faculties (or students) but also in external or extramural disputes with other governmental bodies or private entities that seek to interfere with the institution’s internal affairs. In the context of an external dispute, there may be no conflict between the institution’s interests and those of its faculty (or its students), in which case the institution may assert its faculty’s (or student body’s) academic interests as well as its own autonomy interests. If the institution is a private institution, however, and it is in conflict with an agency of government, it may also assert its own First Amendment constitutional right to academic freedom (see subsection 7.1.5 above). A rights claim fits this context because a private college or university is a corporate person within the meaning of the federal Constitution and therefore may assert the same constitutional rights as a private individual may assert. This is the only context in which institutional academic freedom makes sense as a constitutional rights claim.

## ***Sec. 7.2. Academic Freedom in Teaching***

**7.2.1. In general.** Courts are generally reticent to become involved in academic freedom disputes concerning course content, teaching methods, grading practices, classroom demeanor, and the assignment of instructors to particular

courses, viewing these matters as best left to the competence of the educators themselves and the administrators who have primary responsibility over academic affairs. Academic custom also frequently leaves such matters primarily to faculty members and their deans and department chairs (see “1940 Statement of Principles on Academic Freedom and Tenure,” in *AAUP Policy Documents and Reports* (9th ed., 2001), 3–7; and “Statement on Government of Colleges and Universities,” in *AAUP Policy Documents and Reports*, 217). Subsections 7.2.2 and 7.2.3 below explore the circumstances in which courts may intervene in such disputes, particularly in public institutions. Subsection 7.2.4 identifies and critiques the various types of analysis that courts may use in academic freedom cases concerning teaching. The concluding subsection (7.2.5) considers the sources and extent of protections for the freedom to teach in private institutions.

**7.2.2. *The classroom.*** Two classical cases from the early 1970s illustrate the traditional posture of judicial deference concerning classroom matters. *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), concerned a state university’s refusal to renew a nontenured faculty member’s contract. The faculty member’s troubles with the university administration apparently began when unnamed students and the parents of one student complained about certain of her in-class activities. To illustrate the “irony” and “connotative qualities” of the English language, for example, the faculty member once told her freshman students, “I am an unwed mother.” At that time she was a divorced mother of two, but she did not reveal that fact to her class. On occasion she also apparently discussed the war in Vietnam and the military draft with one of her freshman classes.

The faculty member sued the university, alleging an infringement of her First Amendment rights. The court ruled that the university had not based the non-renewal on any statements the faculty member had made but rather on her “pedagogical attitude.” The faculty member believed that her students should be free to organize assignments in accordance with their own interests, while the university expected her to “go by the book.” Thus, viewing the case as a dispute over teaching methods, the court refused to equate the teaching methods of professors with constitutionally protected speech:

We do not accept plaintiff’s assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous “academic freedom” guaranteed to our Nation’s teachers and students . . . it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors . . . just because her methods and philosophy are considered acceptable somewhere in the teaching profession [480 F.2d at 709].

*Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), also involved a state university’s refusal to rehire a nontenured instructor due to his teaching methods and classroom behavior. Clark had been told that he could be rehired if he was willing to remedy certain deficiencies—namely, that he “counseled an excessive



number of students instead of referring them to [the university's] professional counselors; he overemphasized sex in his health survey course; he counseled students with his office door closed; and he belittled other staff members in discussions with students." After discussions with his superiors, in which he defended his conduct, Clark was rehired; but in the middle of the year he was told that he would not teach in the spring semester because of these same problems.

Clark brought suit, claiming that, under the *Pickering* case (see Section 7.1 above), the university had violated his First Amendment rights by not rehiring him because of his speech activities. The court, disagreeing, refused to apply *Pickering* to this situation: (1) Clark's disputes with his colleagues about course content were not matters of public concern, as were the matters involved in *Pickering*; and (2) Clark's disputes involved him as a teacher, not as a private citizen, whereas the situation in *Pickering* was just the opposite. The court then held that the institution's interest as employer overcame any academic freedom interests the teacher may have had:

But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case (*Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); *Healy v. James*, 408 U.S. 169 (1972)). The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent upon him for grades and recommendations. . . .

Furthermore, *Pickering* suggests that certain legitimate interests of the state may limit a teacher's right to say what he pleases: for example, (1) the need to maintain discipline or harmony among coworkers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employer and his superiors, where that relationship calls for loyalty and confidence [474 F.2d at 931].

Most of the more recent cases are consistent with *Hetrick* and *Clark*. In *Wirsing v. Board of Regents of the University of Colorado*, 739 F. Supp. 551 (D. Colo. 1990), *affirmed without opinion*, 945 F.2d 412 (10th Cir. 1991), for example, a tenured professor of education taught her students "that teaching and learning cannot be evaluated by any standardized test." Consistent with these beliefs, the professor refused to administer the university's standardized course evaluation forms for her classes. The dean denied her a pay increase because of her refusal. The professor sought a court injunction ordering the regents to award her the pay increase and to desist from requiring her to use the form. She argued that standardized forms were "contrary to her theory of education" and that by forcing her to administer the forms, the university was "interfering arbitrarily with her classroom method, compelling her

speech, and violating her right to academic freedom.” The court rejected her argument:

Here, the record is clear that Dr. Wirsing was not denied her merit salary increase because of her teaching methods, presentation of opinions contrary to those of the university, or otherwise presenting controversial ideas to her students. Rather, she was denied her merit increase for her refusal to comply with the University’s teacher evaluation requirements. . . . [A]lthough Dr. Wirsing may have a constitutionally protected right under the First Amendment to disagree with the University’s policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment. *Shaw v. Board of Trustees*, 396 F. Supp. 872, 886 (D.C. Md. 1975), *aff’d*, 549 F.2d 929 (4th Cir. 1976) [739 F. Supp. at 553].

Since the professor remained free to “use the form as an example of what not to do . . . [and to] criticize openly both the [standardized] form and the University’s evaluation form policy,” the university’s requirement was “unrelated to course content [and] in no way interferes with . . . academic freedom.” Moreover, according to the court, adoption of a method of teacher evaluation “is part of the University’s own right to academic freedom.” Thus, in effect, the court reasoned that the university’s actions did not interfere with *faculty* academic freedom and that, at any rate, the university’s actions were protected by *institutional* academic freedom.<sup>15</sup> (See Section 7.1.6 above for more on institutional academic freedom.)

In *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986), the court upheld the dismissal of an economics instructor at Midland College in Texas, ruling that the instructor’s use of profane language in a college classroom did not fall within the scope of First Amendment protection. Applying *Connick v. Myers* (Section 7.1 above), the court held that the instructor’s language did not constitute speech on “matters of public concern.” The court also acknowledged the professor’s claim that, apart from *Connick*, he had “a first amendment right to ‘academic freedom’ that permits use of the language in question,” but the court summarily rejected this claim because “such language was not germane to the subject matter in his class and had no educational function” (805 F.2d at 584 n.2). In addition, the court used an alternative basis for upholding the dismissal. Applying elementary/secondary education precedents (see *Bethel School District v. Fraser*, 478 U.S. 675 (1986)), it held that the instructor’s use of the language was unprotected because “it was a deliberate, superfluous attack on a ‘captive audience’ with no academic purpose or justification.”

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<sup>15</sup>In other situations, rather than challenging a requirement that he or she administer the student evaluation forms, a faculty member may challenge the institution’s use of student evaluations as a means of reviewing the faculty member’s classroom teaching. Assuming that the evaluations are adequately constructed and administered, and the results are accurately tabulated, a claim that use of student evaluation data infringes the faculty member’s academic freedom is likely to fail. (See *Yarcheski v. Reiner*, 669 N.W.2d 487 (S.D. 2003), in which the court rejected such a claim; and see generally Section 6.6 of this book.)

In a separate opinion, a concurring judge agreed with the court majority's *Connick v. Myers* analysis but disagreed with its alternative "captive audience" analysis, on the grounds that the elementary/secondary precedents the court had invoked should not apply to higher education. The concurring judge also agreed with the majority's rejection of the professor's argument based on an independent "first amendment right to 'academic freedom.'" Like the majority, the concurring judge acknowledged the possibility of a First Amendment academic freedom argument independent of the *Pickering/Connick* line of cases (Section 7.1 above) but rejected the notion that the professor's language was within the bounds of academic freedom.<sup>16</sup> According to the concurring judge: "While some of [the professor's] comments arguably bear on economics and could be viewed as relevant to Martin's role as a teacher in motivating the interest of his students, his remarks as a whole are unrelated to economics and devoid of any educational function."

*Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), continued the trend toward upholding institutional authority over faculty members' classroom conduct while raising new issues concerning religion and religious speech in the classroom. An exercise physiology professor, as the court explained, "occasionally referred to his religious beliefs during instructional time. . . . Some of his references concerned his understanding of the creative force behind human physiology. Other statements involved brief explanations of a philosophical approach to problems and advice to students on coping with academic stresses." He also organized an optional after-class meeting, held shortly before the final examination, to discuss "Evidences of God in Human Physiology." But "[h]e never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time." Some students nevertheless complained about the in-class comments and the optional meeting. The university responded by sending the professor a memo requiring that he discontinue "(1) the interjection of religious beliefs and/or preferences during instructional time periods and (2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." The professor challenged the university's action as violating both his freedom of speech and his freedom of religion (see generally Section 1.6.2) under the First Amendment. The district court emphasized that "the university has created a forum for students and their professors to engage in a free interchange of ideas" and granted summary judgment for the professor (732 F. Supp. 1562 (N.D. Ala. 1990)). The U.S. Court of Appeals disagreed and upheld the university's actions.

With respect to the professor's free speech claims, the appellate court, like the majority in *Martin* (above), applied recent elementary/secondary education

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<sup>16</sup>For earlier appearances of this academic freedom or "germaneness" analysis, see *State Board for Community Colleges v. Olson*, 687 P.2d 429, 437 (Colo. 1984), and two classic elementary/secondary cases: *Pred v. Board of Instruction of Dade County, Florida*, 415 F.2d 851, 857 n.17 (5th Cir. 1969); and *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *affirmed on other grounds*, 448 F.2d 1242 (1st Cir. 1971). For related analysis, focusing on the problem of hate speech in the classroom, and also distinguishing between germane and nongermane comments, see J. Weinstein, "A Constitutional Roadmap to the Regulation of Campus Hate Speech," 38 *Wayne L. Rev.* 163, 192-214 (1991).

precedents that display considerable deference to educators—relying especially on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a secondary education case involving student rights.<sup>17</sup> Without satisfactorily justifying *Hazelwood*'s extension either to higher education in general or to faculty members, the court asserted that “educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (926 F.2d at 1074, citing *Hazelwood*, 484 U.S. at 272–73). Addressing the academic freedom implications of its position, the court concluded:

Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom [926 F.2d at 1075].

In upholding the university's authority in matters of course content as superior to that of the professor, the court accepted the validity and applicability of two particular institutional concerns underlying the university's decision to limit the professor's instructional activities. First was the university's “concern . . . that its courses be taught without personal religious bias unnecessarily infecting the teacher or the students.” Second was the concern that optional classes not be conducted under circumstances that give “the impression of official sanction, which might [unduly pressure] students into attending and, at least for purposes of examination, into adopting the beliefs expressed” by the professor. Relying on these two concerns, against the backdrop of its general deference to the institution in curricular matters, the court concluded:

In short, Dr. Bishop and the University disagree about a matter of content in the course he teaches. The University must have the final say in such a dispute. Though Dr. Bishop's sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments. By its memo to Dr. Bishop, the University seeks to prevent him from presenting his religious viewpoint during instructional time, even to the extent that it represents his professional opinion about his subject matter. We have simply concluded that

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<sup>17</sup>*Hazelwood* was also relied on in the *Silva* case, discussed below in this section. For other applications of *Hazelwood* to higher education, see *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), both discussed in Section 8.1.4. For a more general discussion on applying lower education precedents to higher education, see Section 1.4.4.

the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings [926 F.2d at 1076–77].

Though the appellate court’s opinion may seem overly deferential to the institution’s prerogatives as employer, and insufficiently sensitive to the particular role of faculty academic freedom in higher education (see generally Robert O’Neil, “*Bishop v. Aronov*: A Comment,” 18 *J. Coll. & Univ. Law* 381 (1992)), the court did nevertheless demarcate limits on its holding. These limits are very important. Regarding the professor’s classroom activities, the court clearly stated that the university’s authority applies only “to the classroom speech of [the professor]—wherever he purports to conduct a class for the University.” Even in that context, the court conceded that “[o]f course, if a student asks about [the professor’s] religious views, he may fairly answer the question.” Moreover, the court emphasized that “the university has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit him.” Similarly, regarding the optional meetings, the court noted that “[t]he University has not suggested that [the professor] cannot organize such meetings, make notice of them on campus, or request University space to conduct them; nor could it so prohibit him.” As long as the professor “makes it plain to his students that such meetings are not mandatory, not considered part of the coursework, and not related to grading, the university cannot prevent him from conducting such meetings.”

With respect to the professor’s freedom of religion claims, the court’s analysis was much briefer than its free speech analysis but just as favorable for the university. The professor had claimed that the university’s restrictions on his expression of religious views violated his rights under the free exercise clause and also violated the establishment clause, because only Christian viewpoints, but not other religious viewpoints, were restricted.

The court rejected the professor’s free exercise claim because he “has made no true suggestion, much less demonstration, that any proscribed conduct of his impedes the practice of religion. . . . [T]he university’s restrictions of him are not directed at his efforts to practice religion, per se, but rather are directed at his practice of teaching.” In similar summary fashion, the court rejected the establishment clause claim because “the University has simply attempted to maintain a neutral, secular classroom by its restrictions on Dr. Bishop’s expressions.”<sup>18</sup> Moreover, the university’s restrictions affected only Christian speech

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<sup>18</sup>For another classroom case in which the court rejected a professor’s freedom of religion claims, see *Lynch v. Indiana State University Board of Trustees*, 378 N.E.2d 900 (Ind. 1978). For cases involving the establishment clause, see *Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne*, 260 F.3d 757 (7th Cir. 2001), discussed in Donna Euben, “The Play’s the Thing,” *Academe*, November–December 2001 (rejecting an establishment clause challenge to a student-selected and faculty-approved play challenging conventional Christianity); and *Calvary Bible Presbyterian Church of Seattle v. University of Washington*, 436 P.2d 189 (Wash. S. Ct. 1967) (rejecting an establishment clause challenge to teaching the Bible as literature).

because that was the only speech at issue in the situation the university was addressing; “[s]hould another professor express [other] religious beliefs in the classroom,” presumably the university would impose similar restrictions.<sup>19</sup> (For a suggested framework for analyzing the religion claims in *Bishop* and related cases, see O’Neil, above.)

More recent cases have served to enhance institutional authority to determine the content of particular courses and assign instructors to particular courses. For example, in *Webb v. Board of Trustees of Ball State University*, 167 F.3d 1146 (7th Cir. 1999) (further discussed in Section 7.2.2), the court relied on the distinction between institutional academic freedom and faculty academic freedom (see Section 7.1.6 above) to reject a professor’s claimed right to teach certain classes. Quoting from Justice Frankfurter’s concurrence in *Sweezy* (Section 7.1.4 above), the court asserted that recognizing such a claim would “impose costs . . . on the University, whose ability to set a curriculum is as much an element of academic freedom as any scholar’s right to express a point of view” (167 F.3d at 1149). Moreover, said the court, “when deciding who to appoint as a leader or teacher of a particular class, every university considers speech (that’s what teaching and scholarship consists in) without violating the Constitution.”

Similarly, in *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), perhaps the most far-reaching and deferential case to date, the court rejected the free speech claims of a tenured professor who was disciplined for failing to conform his course content to the syllabus provided by the departmental chair and faculty. The court held flatly that “the First Amendment does not place restrictions on a public university’s ability to control its curriculum,” and therefore “a public university professor does not have a First Amendment right to decide what will be taught in the classroom” (156 F.3d at 491). In its result, and in its reliance on the university’s own academic freedom to decide what shall be taught, the *Edwards* case is consistent with the *Hetrick* and *Clark* cases above. But *Edwards* also introduces new and potentially far-reaching reasoning based on the U.S. Supreme Court decision in *Rosenberger v. Rector & Visitors of University of Virginia* (Sections 10.1.4 & 10.3.2 of this book). Relying on the *Rosenberger* concept of the public university or the state as a “speaker,” the *Edwards* court concluded that a university acts as a “speaker” when it enlists faculty members to convey the university’s own message or preferred course content to its students, and that the university was thus “entitled to make content-based choices in restricting Edwards’ syllabus.” (For criticism of *Edwards*, see the discussion of *Brown v. Armenti* in Section 7.2.3 below.)

A third case, *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996), *affirmed on other grounds*, 1997 WL 33077 (4th Cir. 1997) (unpublished), differs from *Webb* and *Edwards* in that the district court determined that an instructor’s

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<sup>19</sup>There was also an establishment clause issue concerning whether the professor’s religious speech was proselytizing or support for religion that could be attributed to the university and would violate the establishment clause. The court declined to resolve this issue because “[t]he university can restrict speech that falls short of an establishment violation, and we have already disposed of the university’s restrictions of [the professor] under the free speech clause.”

choices of course content could be considered speech on matters of public concern. The issue was whether a business school instructor's classroom materials and discussions on increasing racial and gender diversity in the business community were protected speech. Using the *Pickering/Connick* analysis, the court first determined that this speech did involve matters of public concern:

[I]t appears unassailable that [the instructor's] advocacy of diversity, through the materials he taught in class, relate to matters of public concern. Debate is incessant over the role of diversity in higher education, employment and government contracting, just to name a few spheres. Indeed, political debate over issues such as affirmative action is inescapable [911 F. Supp. at 1014].

In reaching this conclusion, the court rejected the university's argument that the instructor "was simply discharging his duties as an employee [of the business school] when he made his classroom remarks." Rather, said the court, a classroom instructor "routinely and necessarily discusses issues of public concern when *speaking as an employee*. Indeed, it is part of his educational mandate" (911 F. Supp. at 1013).

Nevertheless, the court ultimately sided with the university by concluding that the instructor's free speech interest was overridden by the business school's "powerful interest in the content of the [departmental] curriculum and its coordination with the content of other required courses." The school could restrict the classroom materials and discussions of its instructors when this speech "disrupt[ed], or sufficiently threaten[ed] to disrupt, [the school's] educational mandate in a significant way." The instructor's speech did so in this case because it "hamper[ed] the school's ability effectively to deliver the [required writing and speech] course to its students . . . ; created divisions within the [departmental] faculty"; and raised concerns among faculty members outside the department about the instructor's class "trenching upon their own." (Interestingly, the instructor had raised diversity issues in faculty meetings that were comparable to the issues he had addressed in class. In that different context, the court held that the speech was protected "because the defendants offer no competing interest served by stifling that speech" (see Section 7.4 below)).

Another later case, *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), like *Martin* (above), arose from student complaints about a professor's vulgar and profane classroom speech. The appellate court sought to pattern its decision after *Martin v. Parrish* and, like *Martin*, the *Bonnell* case resulted in a victory for the college. After a female student in Professor Bonnell's English class had filed a sexual harassment complaint against him, the college disciplined him for using language in class that created a "hostile learning environment." The language, according to the court, included profanity such as "shit," "damn," and "fuck," and various sexual allusions such as "blow job," used to describe the relationship between a U.S. President (now former President) and a female Washington intern. The college determined that these statements were "vulgar and obscene," were "not germane to course content," and were used "without reference to assigned readings."

The professor disagreed and claimed that disciplining him for this reason violated his First Amendment free speech rights.<sup>20</sup>

The appellate court accepted the college's characterization of the professor's statements and rejected the professor's free speech claims:

Plaintiff may have a constitutional right to use words such as . . . “fuck,” but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. . . . This is particularly so when one considers the unique context in which the speech is conveyed—a classroom where a college professor is speaking to a captive audience of students (see *Martin [v. Parrish]*, 805 F.2d at 586) who cannot “effectively avoid further bombardment of their sensibilities simply by averting their [ears]” [241 F.3d at 820–821, quoting *Hill v. Colorado*, 530 U.S. 703, 753 n.3 (2000)].

The court's result seems correct, and its “germaneness” and captive audience rationales seem relevant to the analysis, but in other respects the court's reasoning is shaky in ways that other courts and advocates should avoid. *First*, although the court grounded its analysis on the crucial characterization of the professor's speech as “not germane to course content,” the court neither made its own findings on this issue nor reviewed (or even described) whether and how the college made and supported its findings. *Second*, the court relied on the college's sexual harassment policy without quoting it or considering whether it provided fair warning to the professor and a comprehensible guideline by which to gauge his classroom speech (see the *Cohen* and *Silva* cases below). *Third*, the court relied heavily on the captive audience rationale for restricting speech without asking the questions pertinent to making a well-founded captive audience determination. Such questions would include whether the course was a required or an elective course; whether there were multiple sections with different instructors that the students could choose from; whether the students could withdraw from the course or transfer to another section without penalty; and whether the professor had given full and fair advance notice of the content and style of his class sessions. *Fourth*, the court began its discussion with lengthy references to the public concern/private concern distinction drawn in the *Pickering/Connick* line of cases but did not apply this distinction specifically to the classroom speech. It is therefore unclear whether the court assumed that the professor's speech was not on a matter of public concern, or whether the court assumed that the public/private concern distinction was not relevant to its analysis. And *fifth*, the court asserted that the college's case was strengthened because “it was not the content of Plaintiff's speech itself which led to the disciplinary action. . . .” This statement apparently ignores the U.S. Supreme Court's opinion in *Cohen v. California*, 403 U.S. 15 (1971), in which

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<sup>20</sup>The *Bonnell* case is quite similar to the *Cohen v. San Bernardino Valley College* case, which is discussed below in this subsection. The court's reasoning in *Bonnell* can usefully be compared with the district court's reasoning in the *Cohen* case.



the Court determined that a punishment for using profanity was based on the content of the speech, and also made clear that courts must protect the “emotive” as well as the “cognitive” content of speech (see Section 9.6 of this book).

Although the above cases strongly support institutional authority over professors’ instructional activities, it does not follow that institutions invariably prevail in instructional disputes. The courts in *Wirsing*, *Martin*, *Bishop*, *Scallet*, and *Bonnell*, in limiting their holdings, all suggest situations in which faculty members could prevail. Other cases also include strong language supportive of faculty rights. In *Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990), for instance, the court acknowledged the legal sufficiency, under the First Amendment, of a former assistant professor’s allegations that the university had denied him tenure due to a public controversy that had arisen concerning his course in “The Politics of Race” and the views on Zionism that he had expressed in the course. Relying on the *Sweezy*, *Shelton v. Tucker*, and *Keyishian* cases, and quoting key academic freedom language from these opinions (see Section 7.1.4 above), the court emphasized that “for decades it has been [clear] that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation ‘that cast a pall of orthodoxy’ over the free exchange of ideas in the classroom”; and “that, assuming the defendants retaliated against [the professor] based on the content of his classroom discourse,” such facts would support a claim that the defendants had violated the professor’s free speech rights.

Moreover, in other cases, faculty members—and thus faculty academic freedom—have prevailed over institutional authority. In *DiBona v. Matthews*, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990), for example, the court provided a measure of protection for a professor’s artistic and literary expression as it relates to the choice of class content and materials. Specifically, the court held that San Diego Community College District administrators violated a teacher’s free speech rights when they canceled a controversial play production and a drama class in which the play was to have been performed. The play that the instructor had selected, entitled *Split Second*, was about a black police officer who, in the course of an arrest, shot a white suspect after the suspect had subjected him to racial slurs and epithets. The play’s theme closely paralleled the facts of a criminal case that was then being tried in San Diego. The court determined that the college administrators had canceled the class because of the content of the play. While the First Amendment free speech clause did not completely prevent the college from considering the play’s content in deciding to cancel the drama class, the court held that the college’s particular reasons—that the religious community opposed the play and that the subject was controversial and sensitive—were not valid reasons under the First Amendment. Moreover, distinguishing the present case from those involving minors in elementary and secondary schools, the court held that the college could not cancel the drama class solely because of the vulgar language included in the play.

In two other cases later in the 1990s, *Cohen v. San Bernardino Valley College* and *Silva v. University of New Hampshire*, courts also sided with the faculty member rather than the institution in disputes regarding teaching methods and classroom demeanor. Both cases, like *Bonnell*, above, arose in the context of

alleged sexual harassment in the classroom, thus presenting potential clashes among the faculty's interest in academic freedom, the institution's interest in enforcing sexual harassment policies, and the students' interest in being protected against harassment.

In the *Cohen* case, 92 F.3d 968 (9th Cir. 1996), *reversing* 883 F. Supp. 1407 (C.D. Cal. 1995), the appellate court used the constitutional "void for vagueness" doctrine to invalidate a college's attempt to discipline a teacher for classroom speech. The plaintiff, Professor Dean Cohen, was a tenured professor at San Bernardino Valley College who was the subject of a sexual harassment complaint made by a student in his remedial English class. According to the court:

One student in the class . . . became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner. During [one] class Cohen began a class discussion on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. Cohen has for many years typically assigned provocative essays such as Jonathan Swift's "A Modest Proposal" and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a "devil's advocate" style. During classroom discussion on pornography in the remedial English class . . . Cohen stated in class that he wrote for *Hustler* and *Playboy* magazines and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, [the student] asked for an alternative assignment but Cohen refused to give her one. [The student] stopped attending Cohen's class and received a failing grade for the semester [92 F.3d at 970].

The student filed a grievance against Cohen, alleging that his behavior violated the college's new sexual harassment policy, which provided that:

[s]exual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to, circumstances in which:

. . .

- (2) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment . . . [92 F.3d at 971].

After a hearing and appeal, the college found that Cohen had violated part (2) of the policy and ordered him to:

- (1) Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair . . . ; (2) Attend a sexual harassment seminar . . . ; (3) Undergo a formal evaluation procedure . . . ; and (4) Become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it

becomes apparent that his techniques create a climate which impedes the students' ability to learn [92 F.3d at 971].

The district court rejected Cohen's claim that application of the sexual harassment policy violated his right to academic freedom:

The concept of academic freedom . . . is more clearly established in academic literature than it is in the courts . . . [and] judicial application of this doctrine is far from clear. [Furthermore], a review of the case law shows that, despite eloquent rhetoric on "academic freedom," the courts have declined to cede all classroom control to teachers [883 F. Supp. at 1412, 1414].

The district court also rejected Cohen's claim that, under *Connick v. Myers*, the college had violated his free speech rights as a public employee. The court divided Cohen's speech into two categories: (1) vulgarities and obscenities, and (2) comments related to the curriculum and focusing on pornography and other sexual topics. It concluded that the speech in the first category was not on matters of public concern, but that the speech in the second category was, because Cohen did not speak merely to advance some purely private interest. Thus, under *Connick*, the college could regulate the first type of speech but could regulate the second only if it could justify a restriction in terms of the professor's job duties and the efficient operation of the college. The court agreed that the college had demonstrated sufficient justification:

[A]lthough there is evidence in the record that Cohen's teaching style is effective for at least some students [and that] Cohen's colleagues have stated that he is a gifted and enthusiastic teacher . . . [whose] teaching style is within the range of acceptable academic practice . . . the learning process for a number of students was hampered by the hostile learning environment created by Cohen. According to one peer evaluator who observed a class in which Cohen discussed . . . the topic of consensual sex with children, Cohen's "specific focus impedes academic success for some students" [883 F. Supp. at 1419].

In an important qualification, however, the district court addressed the problem of the "thin-skinned" student:

In applying a "hostile environment" prohibition, there is the danger that the most sensitive and the most easily offended students will be given veto power over class content and methodology. Good teaching should challenge students and at times may intimidate students or make them uncomfortable. . . . Colleges and universities . . . must avoid a tyranny of mediocrity, in which all discourse is made bland enough to suit the tastes of all the students. However, colleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professorial whim. Universities must be able to ensure that the more vulnerable as well as the more sophisticated students receive a suitable

education. . . . Within the educational context, the university's mission is to effectively educate students, keeping in mind students' varying backgrounds and sensitivities. Furthermore, the university has the right to preclude disruption of this educational mission through the creation of a hostile learning environment. . . . The college's substantial interest in educating all students, not just the thick-skinned ones, warrants . . . requiring Cohen to put potential students on notice of his teaching methods [883 F. Supp. at 1419–21].

Thus, although the court ruled in the college's favor, at the same time it sought to uphold the proposition that the college "must avoid restricting creative and engaging teaching, even if some over-sensitive students object to it" (883 F. Supp. at 1422). Moreover, the court cautioned that "this ruling goes only to the narrow and reasonable discipline which the College seeks to impose. A case in which a professor is terminated or directly censored presents a far different balancing question."

On appeal, the U.S. Court of Appeals for the Ninth Circuit unanimously overruled the district court's decision, but did so on different grounds than those explored by the lower court. The appellate court emphasized that neither it nor the U.S. Supreme Court had yet determined the scope of First Amendment protection for a professor's classroom speech. Rather than engage in this analysis, the court focused its opinion and analysis on the vagueness of the college's sexual harassment policy and held that "the Policy's terms [are] unconstitutionally vague as applied to Cohen in this case." The court did not address whether or not the "College could punish speech of this nature if the policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy."

In its analysis, the appellate court noted three objections to vague college policies:

First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms [92 F.3d at 972].

Guided by these concerns, the court reasoned that:

Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style—a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College [92 F.3d at 972].

(See generally Sonja Smith, “*Cohen v. San Bernadino Valley College: The Scope of Academic Freedom Within the Context of Sexual Harassment Claims and In-Class Speech*,” 25 *J. Coll. & Univ. Law* 1 (1998).)

Since the appellate court’s reasoning is different from the district court’s, and since the appellate court does not disagree with or address the issues that were dispositive for the district court, the latter’s analysis remains a useful illustration of how other courts may handle such issues when they arise under policies that are not unconstitutionally vague.

In the second case, *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994), a tenured faculty member at the University of New Hampshire (UNH) challenged the university’s determination that he had created a hostile or offensive academic environment in his classroom and therefore violated the university’s sexual harassment policy. Seven women students had filed formal complaints against Silva. These complaints alleged that, in a technical writing class, he had compared the concept of focus to sexual intercourse: “Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects the experience and language. You and the subject become one” (888 F. Supp. at 299). The complaints also alleged that two days later in the same class, Silva made the statement “[b]elly dancing is like jello on a plate with a vibrator under the plate” to illustrate the use of metaphor. In addition, several female students reported that Silva had made sexually suggestive remarks to them, both in and out of the classroom. For example, there were allegations that Silva told a female student, whom he saw in the library kneeling down to look through a card catalog, that “it looks like you’ve had a lot of experience down there”; that he gave a spelling test to another student in which every third word had a “sexual slant”; that he had asked two of his female students how long they had been together, implying a lesbian relationship; that he had asked another female student, “How would you like to get an A?”; and that he had physically blockaded a student from exiting a vending machine room and complained to her about students’ actions against him (888 F. Supp. at 310–11).

These complaints were presented to Silva in two “informal” meetings with university administrators, after which he was formally reprimanded. Silva then challenged the reprimand through the university’s “formal” grievance process, culminating in hearings before a hearing panel and an appeals board. (The court reviewed these procedures and some potential flaws in them in its opinion (888 F. Supp. At 319–26).) Finding that Silva’s language and innuendos violated the university’s sexual harassment policy, the hearing panel emphasized that a reasonable female student would find Silva’s comments and behavior to be offensive; that this was the second time in a two-year period that Silva had been formally notified “about his use of inappropriate and sexually explicit remarks in the classroom”; and that Silva had given the panel “no reason to believe that he understood the seriousness of his behavior” or its impact on the students he taught. The university thereupon suspended Silva without pay for at least one year, required him to undergo counseling at his own expense, and prohibited him from attempting to contact or retaliate against the complainants.

In court, prior to trial, Silva argued that the university's actions violated his First Amendment free speech rights. The court agreed that he was "likely to succeed on the merits of his First Amendment claims" and entered a preliminary injunction against the university. In its opinion, the court pursued three lines of analysis to support its ruling. First, relying on the U.S. Supreme Court's decision in the *Keyishian* case (Section 7.1.4), the court reasoned that the belly dancing comment was "not of a sexual nature," and the sexual harassment policy therefore did not give Silva adequate notice that this statement was prohibited—thus violating the First Amendment requirement that teachers be "clearly inform[ed]" of the proscribed conduct in order to guard against a "chilling effect" on their exercise of free speech rights. Second, relying in part on *Hazelwood v. Kuhlmeier* (see above), the court determined that the sexual harassment policy was invalid under the First Amendment, as applied to Silva's speech, because it "fails to take into account the nation's interest in academic freedom" and therefore is not "reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment . . ." (888 F. Supp. at 314). In reaching this conclusion, the court reasoned that (1) the students were "exclusively adult college students . . . presumed to have possessed the sophistication of adults"; (2) "Silva's classroom statements advanced his valid educational objective of conveying certain principles related to the subject matter of his course"; and (3) "Silva's classroom statements were made in a professionally appropriate manner . . ." (888 F. Supp. at 313).

For its third line of analysis, the court resorted to the *Pickering* and *Connick* cases. Purporting to apply the public concern/private concern dichotomy, the court determined that "Silva's classroom statements . . . were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course." Thus, these statements "were related to matters of public concern" and, on balance, "Silva's First Amendment interest in the speech at issue is overwhelmingly superior to UNH's interest in proscribing [the] speech" (888 F. Supp. at 316).<sup>21</sup>

Yet another, and more recent case, in which the faculty member (and faculty academic freedom) prevailed over institutional authority is the important case of *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001). In this case, the U.S. Court of Appeals for the Sixth Circuit held that an adjunct instructor's classroom speech was protected because it was on a matter of public concern and was germane to the subject matter of the course. The instructor had claimed that the community college's refusal to rehire him violated his "rights of free speech and academic freedom," and the appellate court agreed.

The instructor, Hardy, was teaching a summer course on Introduction to Interpersonal Communication when the incident prompting his nonrenewal occurred. He gave a lecture on "how language is used to marginalize minorities." Along with his lecture, he conducted a group exercise in which he asked students to suggest examples of words that had "historically served the interests

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<sup>21</sup>For another interesting example of a case in which the court used the *Pickering/Connick* line of cases to protect a faculty member's in-class speech, see *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994).

of the dominant culture.” Their suggestions included “the words ‘girl,’ ‘lady,’ ‘faggot,’ ‘nigger,’ and ‘bitch.’” A student in the class who was offended by the latter two words raised her concerns with the instructor and college administrators, and the instructor apologized to the student. But the student took her complaint to a vocal religious leader in the community, who subsequently met with college administrators to discuss the incident. The administrators then met with the instructor to discuss the classroom exercise and, in the course of the discussion, informed him “that a ‘prominent citizen’ representing the interests of the African-American community had . . . threatened to affect the school’s already declining enrollment if corrective action was not taken.” After this meeting, Hardy completed his summer course without further incident and received positive student evaluations from all students except the one who had complained about the class exercise. Nevertheless, Hardy was informed that he would not be teaching the following semester; he then filed suit against the college, the president, the former acting dean, and the state community college system.

The appellate court used a *Pickering/Connick* analysis to determine whether the instructor’s speech was on a matter of public concern and, if so, whether the employee’s interest in speaking outweighed the college’s interest in serving the public. Applying the first prong of the *Pickering/Connick* test, the court found that the instructor’s speech “was germane to the subject matter of his lecture on the power and effect of language” and “was limited to an academic discussion of the words in question.” The court also distinguished Hardy’s speech from the unprotected speech at issue in its previous ruling in *Bonnell v. Lorenzo* (above); Bonnell’s speech, unlike Hardy’s, was “gratuitous” and “not germane to the subject matter of his course.” Thus, in considering “the content, form, and context” of Hardy’s speech, as the *Connick* case requires, the court emphasized the academic “content” and “form” of the speech and its higher education classroom “context.” This same emphasis was apparent in the court’s conclusion that Hardy’s speech was on a matter of public concern:

Because the essence of a teacher’s role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court’s broad conception of “public concern.” . . . Hardy’s lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy’s in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern—race, gender, and power conflicts in our society. . . .

Hardy has thus satisfied the first prong of the two-part test set forth in *Pickering* [260 F.3d at 679].

A similar emphasis on the academic context of the dispute also marked the court’s application of the second prong of the *Pickering/Connick* test, in which it balanced Hardy’s interest in speaking on a matter of public concern against the college’s interest in efficiently providing services to its students and the community. Citing *Keyishian* and *Sweezy*, the court in *Hardy* asserted that “[i]n balancing the competing interests involved, we must take into account the robust

tradition of academic freedom in our nation's post-secondary schools" (260 F.3d at 680). The college had presented no evidence that Hardy's speech had "undermined [his] working relationship within his department, interfered with his duties, or impaired discipline." In fact, Hardy had successfully completed his summer course and received favorable student course evaluations (see above). Nor did the concerns about the religious leader's threat to affect the college's enrollment weigh in the college's favor. Such concerns represented no more than the college administrators' "undifferentiated fear of disturbance" that, under the *Tinker* case (see Section 7.1.1 above), cannot "overcome the right to freedom of expression." The instructor's interests, supported by the tradition of academic freedom, therefore outweighed the interests of the college.

The court's analysis in *Hardy* draws upon both the *Pickering/Connick* line of cases and the germaneness approach to faculty academic freedom. The germaneness analysis follows the pathway that the court had previously sketched in *Bonnell*. *Hardy*, however, unlike *Bonnell*, places the germaneness analysis within the *Pickering/Connick* analysis, using it as a crucial component of its consideration of the content, form, and context of the speech, rather than as a separate analysis providing an alternative to *Pickering/Connick*. In doing so, the Sixth Circuit seems to have corrected much of the weaknesses of its reasoning in *Bonnell* (see above) and to have crafted an approach to faculty academic freedom claims that merges the better aspects of *Pickering/Connick* with the better aspects of the germaneness test.

Most of the cases discussed in this subsection concern the "classroom" as a physical, on-campus, location where the faculty member instructs students. In contemporary settings, however, instruction may often take place in varying locations that are not as fixed, and not as tied to the campus, as the traditional classroom, and some instructional activities may be optional rather than required. Such new settings may create new academic freedom issues. In the case of *Bishop v. Aranov* (above), for example, the court addressed the extent to which faculty members are free to have optional instructional meetings with students that they are currently teaching in a formal course. In *DiBona v. Matthews* (above), the court considered an issue involving a drama course that centered on the public performance of a play. A more recent case, *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005), considers the scope of a faculty member's right to arrange optional field trips for her students. The court found that such activities implicate both freedom of association and freedom of speech but ruled, applying the *Pickering* balancing test (see Section 7.1.1), that the institution's interests prevailed over the instructor's on the particular facts of the case.

**7.2.3. Grading.** Grading is an extension of the teaching methods that faculty members use in the classroom and is an essential component of faculty members' evaluative functions. Just as courts are reluctant to intervene in disputes regarding the classroom (subsection 7.2.2 above), they are hesitant to intervene in grading disputes among professors, students, and the administration. While the administration (representing the institution) usually prevails



when the court rules on such disputes, there are circumstances in which faculty members may occasionally prevail.

In a case concerning grading policies in general, *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), the court upheld institutional authority over grading in much the same way that other courts had done in classroom cases. The university had declined to renew a faculty member's contract after he had rejected administration requests to lower the academic standards he used in grading his students. The faculty member claimed that the university's action violated his free speech rights. Citing *Hetrick* and *Clark* (subsection 7.2.2 above), the court rejected the professor's claim because the university itself had the freedom to set its own grading standards, and "the first amendment does not require that each nontenured professor be made a sovereign unto himself." According to the court:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision [793 F.2d at 425–26].

(For a more recent case to the same effect, see *Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001).)

When the dispute concerns an individual grade rather than general grading policies, however, different considerations are involved that may lead some courts to provide limited protection for the faculty member who has assigned the grade. The case of *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989), provides an example. The defendant, dean of the school in which the plaintiff was a nontenured professor, ordered the plaintiff, over his objections, to execute a grade-change form raising the final grade of one of his students. The plaintiff argued that this incident, and several later incidents alleged to be in retaliation for his lack of cooperation regarding the grade change, violated his First Amendment academic freedom. Relying on the free speech clause, the court agreed that "[b]ecause the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection" (868 F.2d at 827). The court reasoned (without reliance on the *Pickering/Connick* methodology) that:

the professor's evaluation of her students and assignment of their grades is central to the professor's teaching method. . . . Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign. . . . Thus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university

officials' action to compel the professor to alter that grade would severely burden a protected activity [868 F.2d at 828].

Thus, the defendant's act of ordering the plaintiff to change the grade, contrary to the plaintiff's professional judgment, violated the First Amendment. The court indicated, however, that had university administrators changed the student's grade themselves, this action would not have violated the plaintiff's First Amendment rights. The protection that *Parate* accords to faculty grading and teaching methods is therefore quite narrow—more symbolic than real, perhaps, but nonetheless an important step away from the deference normally paid institutions in these matters. (For a more extended critique and criticism of *Parate*, see D. Sacken, "Making No Sense of Academic Freedom: *Parate v. Isibor*," 56 *West's Educ. Law Rptr.* 1107 (January 4, 1990).)

The narrow protection accorded faculty members in *Parate* does not necessarily mean that administrators in public institutions can never direct a faculty member to change a grade, or that faculty members can always refuse to do so. As in other free speech cases, the right is not absolute and must be balanced against the interests of the institution. The professor's free speech rights in *Parate* prevailed, apparently, because the subsequent administrative change could fulfill whatever interests the administration had in the professor's grading of the student whose grade was at issue. If, however, the administration or a faculty or faculty-student hearing panel were to find a professor's grade to be discriminatory or arbitrary, the institution's interests would be stronger, and perhaps a directive that the professor change the grade would not violate the professor's free speech rights. In *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992), for example, the court upheld the demotion of a professor due to unprofessional conduct regarding his grading of a student. The professor had argued that "the grade he gave [the student is] protected by the First Amendment under the concept of academic freedom." In rejecting the argument, the court explained:

As this case reveals, the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor. . . . Even if we were to assume that the First Amendment applies [to the professor's grading of the student], it would not be dispositive, because we would then balance Keen's First Amendment right against the University's interest in ensuring that its students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments [970 F.2d at 257–58].

On the other hand, once a court accepts the propriety of balancing interests in grading cases, it is also possible that some *post hoc* administrative changes of grades could violate a faculty member's academic freedom rights. Such might be the case, for instance, if the faculty member could show that an administrator's change of a grade was itself discriminatory or arbitrary (see generally Section 9.3.1).

Some courts will avoid such a balancing of interests, and refuse to engage in reasoning such as that in the Sixth Circuit's *Parate* opinion, by emphasizing institutional academic freedom in grading (see the *Lovelace* case above) or by

positing that the faculty member grades students as an “agent” of, and thus a “speaker” for, the institution. *Brown v. Armenti*, 247 F.3d 69 (3rd Cir. 2001), is the leading example of this judicial viewpoint. The professor (Brown) alleged that he had assigned an F to a student who had attended only three of the fifteen class sessions for his practicum course; that the university president (Armenti) had instructed him to change this student’s grade from an F to an Incomplete; that he had refused to comply; and that he was therefore suspended from teaching the course. The professor claimed that the university had retaliated against him for refusing to change the student’s grade, thus violating his right to “academic free expression.” In an appeal from the district court’s denial of the defendants’ motion for summary judgment, the U.S. Court of Appeals for the Third Circuit sought to determine whether the facts alleged amounted to a violation of the professor’s First Amendment rights.

The *Armenti* court declined to follow *Parate* and instead applied its own prior case of *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), discussed in Section 7.2.2 above. The court drew from *Edwards* the proposition that “in the classroom, the university was the speaker and the professor was the agent of the university for First Amendment purposes” (*Armenti*, 247 F.3d at 74). Using this “university-as-speaker” theory, the *Edwards* court had asserted that, as the university’s agent or “proxy,” the professor in the classroom fulfills one of the university’s “four essential freedoms” set out in Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. at 263 (Section 7.1.4 above). Thus, relying on *Edwards*, the court in *Armenti* reasoned that “[b]ecause grading is pedagogic, the assignment of the grade is subsumed under [one of the four essential freedoms], the university’s freedom to determine how a course is to be taught.” Since this freedom is the university’s and not the professor’s, the professor “does not have a First Amendment right to expression via the school’s grade assignment procedures.” The change of a grade from an F to an Incomplete, according to the court, is thus not a matter that warrants “intrusive oversight by the judiciary in the name of the First Amendment” (247 F.3d at 75, quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

Even though its opinion is in direct conflict with the Sixth Circuit’s earlier opinion in *Parate*, the court in *Brown v. Armenti* does not explain or document why its reasoning based on *Edwards* is superior to the *Parate* reasoning. It makes the conclusory statement that the “*Edwards* framework . . . offers a more realistic view of the university-professor relationship” but provides neither empirical data nor expert opinion to support this conclusion. Nor does the *Armenti* court consider the broader implications of its global reasoning and conclusion. If the professor in the classroom—or its technological extensions—were merely the university’s agent subject to the university’s micromanagement, there would be no room at all for faculty academic freedom, and the full range of professors’ academic judgment and professional discretion would be subject to check at the mere whim of university officials. These potential broader implications of *Armenti* (and the earlier *Edwards* case) seem discordant with the past seventy-five years’ development of academic freedom in the United States, as

well as with the spirit of the *Sweezy* and *Rosenberger* cases on which the *Armenti* court (and the *Edwards* court) rely.

**7.2.4. Methods of analyzing academic freedom in teaching claims.** Taken together, the cases in subsections 7.2.2 and 7.2.3 illustrate and confirm five alternatives for analyzing First Amendment faculty academic freedom claims involving teaching: (1) “institution-as-speaker” analysis and the related institutional academic freedom analysis; (2) *Pickering/Connick* analysis; (3) vagueness analysis; (4) “pedagogical concerns” analysis; and (5) germaneness analysis.<sup>22</sup> These alternatives are discussed under numbers 1–5 below, followed by a discussion of other miscellaneous alternatives under number 6. As will be seen, more than one of the alternatives may be applicable to a particular problem; judges may disagree on which alternative fits best or may combine two or more of the various alternatives together to enhance the power of the analysis.

1. “*Speaker*” analysis and institutional academic freedom analysis. Speaker analysis—the newest alternative—is exemplified by *Edwards v. California University of Pennsylvania* (Section 7.2.2) and *Brown v. Armenti* (Section 7.2.3). The key point of this analysis is to determine whether, in the circumstances, the institution is itself acting as a speaker seeking to convey its own message through the instructors and materials it selects. If so, and if the institution’s message conflicts with that of the faculty member, the institution’s prerogatives as speaker will take precedence over the faculty member’s academic freedom. As noted in Section 7.2.2 above, the concept of the institution as a speaker—rather than a facilitator or regulator of the speech of others—arises from the U.S. Supreme Court’s decision in the *Rosenberger* case. The Court’s later decision in *Finley v. National Endowment for the Arts* (Section 13.4.5) also develops this concept, and it is referenced as well in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 234–35 (2000)

Reliance on institution-as-speaker analysis would generally yield the same result, for much the same reason, as would heavy reliance on the concept of institutional academic freedom. The *Webb* case (Section 7.2.2 above), in which the court ruled strongly in the university’s favor based on its institutional academic freedom, illustrates this parallelism. That case’s distinction between the institution’s and the faculty member’s academic freedom parallels the distinction between the institution as speaker and the faculty member as speaker; in effect, institutional academic freedom trumps faculty academic freedom when the institution, in the circumstances, is acting as a speaker seeking to convey a message inconsistent with that of the faculty member. The *Wirshing* case, in Section 7.2.2 above, also uses institutional academic freedom analysis in this

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<sup>22</sup>The second and third of these analytical approaches, *Pickering/Connick* and vagueness, and the institutional academic freedom branch of the first approach, may also be used to resolve the types of academic freedom claims that arise under Sections 7.3, 7.4, and 7.5 below. The other three approaches seem adaptable primarily to academic freedom claims concerning teaching functions.

manner, although its reasoning is not as strongly stated or as developed as that in *Webb*.

Of the five modes of analysis, the institution-as-speaker and institutional academic freedom mode provides the greatest protection for institutions and the least protection for faculty members. Indeed, this approach tilts so much in favor of the institution that it leaves almost no room in the teaching context for faculty academic freedom or for accommodation of faculty members' interests with those of the institution. (For further criticism of the institution-as-speaker analysis, see the discussion of *Brown v. Armenti* in Section 7.2.3 above.)

2. *Pickering/Connick analysis*. This analysis is addressed at length in the *Scaliet v. Rosenblum* opinion, as well as in the *Cohen* district court opinion and the *Silva* opinion (all in Section 7.2.2 above). The earlier opinion in *Martin v. Parrish* (Section 7.2.2) also uses this analysis, as does the court in *Blum v. Schlegel* (Section 7.2.2, fn.21). The central issue in this analysis is whether the faculty member's classroom statements were on "matters of public concern" or on "matters of private concern" (see Section 7.1.1 above; and see also Chris Hoofnagle, "Matters of Public Concern and the Public University Professor," 27 *J. Coll. & Univ. Law* 669 (2001)). This distinction is difficult to draw in many contexts, but perhaps especially so in the context of classroom speech. The district court in *Scaliet* does a creditable job with this distinction when it relates the classroom speech to societal issues currently the subject of broad public debate. The *Cohen* district court also does a creditable job discerning the nuances of this distinction, particularly when it sorts out the various types of comments made by the professor. The *Silva* opinion, on the other hand, does not reflect these nuances and appears to expand the public concern category beyond the U.S. Supreme Court's boundaries (see Todd De Mitchell & Richard Fossey, "At the Margin of Academic Freedom and Sexual Harassment: An Analysis of *Silva v. University of New Hampshire*," 111 *West's Educ. Law Rptr.* 13 (September 19, 1996)). *Silva*, therefore, is not a helpful example of this type of analysis.

3. *Vagueness analysis*. This analysis is exemplified by the appellate court's opinion in *Cohen*. The argument that the court accepted is that the college's policy was unconstitutionally vague *as applied to* Cohen under the particular facts of that case. The court in *Silva* accepted a similar argument. The court in *Bishop*, however, rejected a vagueness argument (926 F.2d at 1071-72). Another, broader, version of the vagueness argument would be that a policy is unconstitutionally vague *on its face*, that is, in all or most of its possible applications rather than only as applied to the particular plaintiff's circumstances.

Vagueness analysis as in *Cohen* and *Silva* is derived not from the speech clause alone but from that clause in conjunction with the Fourteenth Amendment's due process clause. Vague policies are invalidated by the courts in part because they "trap the innocent by not providing fair warning" (*Cohen*, 92 F.3d at 972) to the speaker subjected to the policy or clear guidelines for the decision makers applying the policy, and can therefore result in a "legalistic ambush" (*Cohen*, 92 F.3d at 972); that is the problem to which the due process clause speaks. Vague policies are also invalidated in part because they

“discourage” speakers from exercising their rights (*Cohen*, 92 F.3d at 972) or, in other words, because they have a “chilling effect” on the exercise of free speech rights (*Silva*, 888 F. Supp. at 312); that is the problem to which the free speech clause speaks. The *Keyishian* case (see Section 7.1 above), which the *Silva* court relied upon, is the classic U.S. Supreme Court precedent upon which to base a vagueness argument and, in particular, a chilling effect argument. In *Keyishian*, and in various other higher education cases, vagueness analysis is yoked with “overbreadth” analysis to emphasize the additional “chill” that may result from a policy so broadly worded that it covers a substantial amount of activity protected by the free speech clause. (For more on overbreadth and vagueness as applied to regulations of faculty conduct, see Section 6.6.1.)<sup>23</sup>

4. “Pedagogical concerns” analysis. This type of analysis derives from the case of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), in which the U.S. Supreme Court upheld the validity of a high school’s regulation of a student newspaper because the regulation was “reasonably related to legitimate pedagogical concerns” (484 U.S. at 273). The Court has never applied this standard to higher education (as opposed to elementary/secondary education) or to faculty members (as opposed to students), but some lower courts have done so. The court in *Bishop v. Aronov* used this standard (or a modified version of it), as did the court in *Silva*.<sup>24</sup> The standard, as applied in *Hazelwood*, is a highly deferential standard that affords elementary and secondary school administrators broad discretion regarding the “school-sponsored” speech activities of their students. Because this deference appears to be justified in large part by the immaturity of elementary and secondary education students, and because the deference is so extensive that it does not leave room for higher education’s traditions of faculty and student academic freedom (see Sections 7.1, 7.2.2, & 8.1.4), the *Hazelwood* standard should not be applied unmodified to higher education (see generally *Scallett v. Rosenblum*, 911 F. Supp., 999, 1010–11 (W.D. Va. 1996)). The *Bishop* court and the *Silva* court both adopted modest modifications of the standard (*Bishop* at 1074–76; *Silva* at 313). With any such modification, the extent of deference should be less for higher education than what the U.S. Supreme Court provides for elementary/secondary education. This would necessitate that the “reasonably related” requirement and the “legitimate” requirement take on a different meaning in the higher education context, such that more weight is given to the faculty member’s own pedagogical interests and a greater burden is imposed on the institution to produce proof of its “pedagogical concerns” and the threat to its interests that the professor’s speech poses.

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<sup>23</sup>The *Silva* court used a version of vagueness analysis in accepting the argument that, since *Silva*’s statement about a vibrator did not violate the university’s policy, *Silva* could not have been on notice that his statement was impermissible, and he therefore could not be penalized for it. Thus, as *Silva* illustrates, this type of analysis, focusing on the lack of notice to the professor, can be used not only in situations where the policy is vague and the court cannot determine whether it covers the particular behavior at issue, but also in situations where the court determines that the particular behavior is not covered by the policy.

<sup>24</sup>For another example, where the court applied the *Hazelwood* standard in a higher education faculty case but did not “definitively” decide whether the standard is appropriate for this context, see *Vanderbilt v. Colorado Mountain College District*, 208 F.3d 908, 913–15 (10th Cir. 2000).

5. *Germaneness analysis*. This analysis is used prominently in *Silva*, providing the first extended example of a court implementing germaneness analysis in a higher education academic freedom case. Germaneness was also used, briefly, by both the majority and the concurrence in *Martin v. Parrish* (Section 7.2.2 above). The best example to date of germaneness analysis, however, is provided by two cases decided by the Sixth Circuit U.S. Court of Appeals in 2001, *Bonnell* and *Hardy*, both discussed in Section 7.2.2 above. In *Bonnell*, in determining that a professor's classroom speech was not protected, the court emphasized that the speech was "not germane to the subject matter." In *Hardy*, in the course of protecting the professor's classroom speech, the court emphasized that it "was germane to the subject matter and advance[d] an academic message." In both cases, the court also recognized "the robust tradition of academic freedom in our nation's post-secondary schools" (*Hardy*, 260 F.3d at 680; see also *Bonnell*, 241 F.3d at 823) and used the germaneness test as an adjunct to this tradition of academic freedom. So used, germaneness analysis differs from pedagogical concerns analysis (number 4 above) because it focuses first on the *faculty member's* rather than the *institution's* pedagogical interests. Both sets of interests are pertinent to germaneness analysis, as well as to pedagogical concerns analysis; but germaneness analysis gives more immediate and direct attention, and greater weight, to the faculty interests.<sup>25</sup>

The germaneness approach does not provide that faculty members will always prevail if their classroom speech is germane to the subject matter, since this analysis must take account of institutional pedagogical interests as well as faculty pedagogical interests. It is therefore necessary to supplement the germaneness analysis by borrowing from one of the other approaches that consider both institutional and faculty interests. The two approaches that could fit this bill are the *Pickering/Connick* approach (number 2 above) and the pedagogical concerns approach (number 4 above). The *Silva* court's opinion provides a modest example of a merger of pedagogical concerns analysis and germaneness analysis. More important, the Sixth Circuit's opinion in the *Hardy* case provides a highly instructive example of a merger of germaneness analysis and *Pickering/Connick* analysis. (See Section 7.2.2 above for further discussion of this "merger.")

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<sup>25</sup>A germaneness or "germane speech" test was also at issue in *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) (see Sections 10.1.3 & 8.1.4)—a case raising questions pertinent to student academic freedom and institutional autonomy. Although the Court had used this test in other contexts (see 529 U.S. at 227, 230–32), including a faculty rights case, it rejected the test as "unworkable" and "unmanageable in the public university setting" (*Id.* at 231–32) when applied to extracurricular student speech such as that in *Southworth*. The circumstances of *Southworth*, however, are clearly distinguishable from those in the academic freedom in teaching cases discussed in this Section. In *Southworth*, the Court would have had to address numerous abstract questions of whether particular types of speech content were germane to the university's mission and "the whole universe of speech and ideas" (*Id.* at 232). It was this "vast extent of permitted expression" that made "the test of germane speech inappropriate . . ." (*Id.*). In contrast, in the faculty academic freedom cases, there are "discernable limits" (see 529 U.S. at 232) to the speech pertinent to a particular course or class session. Moreover, the germaneness issues arising in the classroom cases are amenable to testimony by deans, department chairs, faculty colleagues, and outside academic experts in ways that the issues in *Southworth* were not.

The germaneness approach, supplemented by *Pickering/Connick* analysis or a modified pedagogical concerns analysis, is the approach most likely to take suitable account of the unique circumstances of academic life. The professor's "freedom of germane speech" would be based directly on a "freedom to teach" that can be considered a correlative or implied right emanating from the free speech clause (see *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), as discussed in Section 7.1 above). The freedom of germane speech would also be compatible with AAUP policies on academic freedom (see Section 7.1 above)—in particular the 1940 Statement, which declares that faculty members have a freedom to teach in the classroom but cautions that this freedom does not extend to "teaching controversial matter which has no relation to [the] subject"; the 1970 Interpretive Comments, which add that "the intent of [the 1940 Statement] is not to discourage what is 'controversial' [but] to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject"; and the 1995 statement on "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," which provides that speech or conduct is not considered sexual harassment "in the teaching context" unless it is "persistent, pervasive, and not germane to the subject matter" (*AAUP Policy Documents and Reports*, 3, 6, 172; see also Robin Wilson, "Wisconsin Scales Back Its Faculty Speech Code: Professors Will Now Have Blanket Protection for All Comments That Are 'Germane' to a Course," *Chron. Higher Educ.*, March 12, 1999, A10.) This fifth approach, then, bears careful watching and could become the preferred approach in most circumstances (see, for example, *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996)). While this would be a welcome development, it would be imperative that the germaneness analysis be applied with considerable reliance on internal peer review of teaching and, in especially difficult cases, on outside expert opinion regarding learning theory, teaching methodology, and the academic parameters of particular subjects.

6. *Other (miscellaneous) types of analysis.* *Clark v. Holmes*, *Martin v. Parrish*, and *Bonnell v. Lorenzo* (Section 7.2.2 above) all include abbreviated versions of "captive audience" analysis. (See the analysis of *Bonnell* for examples of factors to consider in determining whether students in a particular course may be considered a "captive audience.") While this approach may be useful in some situations concerning classroom speech, it is better viewed as an adjunct to the other approaches rather than as a separate and independent alternative. In particular, under the *Pickering/Connick* approach, "captive audience" considerations could be relevant to the "form" and "context" of the speech under the first prong of the test; and protecting a "captive audience" from discomfort and embarrassment could be a relevant interest on the institution's side of the scale under the second prong of the test. Also, under the germaneness approach, "captive audience" considerations could be relevant in determining how much leeway a court should provide for "nongermane" speech in the classroom; a court may be less tolerant of arguably nongermane speech, and less willing to protect the faculty member, when the faculty member has a "captive audience" for his classes. If captive audience analysis is used, however, serious attention



must be given to whether the class is actually “captive.” The pertinent questions to ask are set out in the *Bonnell* discussion (Section 7.2.2 above).

*Parate v. Isibor* (Section 7.2.3 above) includes an example of “compelled speech” analysis. This analysis may apply when a faculty member is penalized for what he or she *would not say*, or said only under protest, rather than for what he or she did say or did not object to saying. The basic argument is that the free speech clause protects individuals from being compelled by government to express ideas or opinions with which they disagree. As such, this type of analysis could be pertinent to grading disputes like that in *Parate*, as well as to classroom situations in which an instructor is directed to express others’ ideas or opinions as if they were his or her own, or to support ideas and opinions to which he or she is conscientiously opposed. Like germaneness analysis (number 5 above), however, compelled speech analysis should not be applied in a manner that ignores the institution’s legitimate academic interests. When government is regulating its citizens in general, there are usually no governmental interests that would justify compelled speech (*Wooley v. Maynard*, 430 U.S. 705 (1977)); and this is also usually the case when government is regulating members of the academic community (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)). But in the specific context of the classroom and teaching, if the institution’s academic interests are genuinely at stake, there may be an occasional situation in which courts will find an institution’s interests to be sufficiently strong to justify a regulation of speech that includes an element of compulsion. (For an example of such a case, and a court opinion that provides an extended example of compelled speech analysis, see *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), discussed in Section 8.1.4.)

Another possibility is the “material and substantial disruption” and the “undifferentiated fear of disturbance” analysis that comes from the *Tinker* case (see Section 9.5.1 of this book) (or a similar standard that can be implied from the *Pickering* case’s consideration of whether the teacher’s speech had a disruptive effect on the operation of the public schools (see Section 7.1.1 of this book)). In *Bishop v. Aronov* (Section 7.2.2), the appellate court declined to apply the *Tinker* case or the material and substantial disruption standard to the classroom speech at issue there. In the *Hardy* case, however, the court did use the “undifferentiated fear” part of the *Tinker* analysis in a secondary, supporting role: to determine whether the college’s interests were based on “undifferentiated fear of disturbance” and thus insufficient to overcome the faculty member’s free speech interests. Used in this way, the *Tinker* analysis becomes an addendum to the second prong of the *Pickering/Connick* test rather than an independent line of analysis.

Finally, in *Bishop*, the federal district court used public forum analysis (see Section 9.5.2 of this book) to decide the case in the professor’s favor. The appellate court disagreed and, appropriately, declined to treat the classroom as a public forum (926 F.2d at 1071; and see also Section 7.1.1 of this book).

**7.2.5. Private institutions.** Since First Amendment rights and other federal constitutional rights generally do not apply to or limit private institutions, as

explained in Section 1.5.2 of this book, legal arguments concerning the freedom to teach in private institutions are usually based on contract law. The sources, scope, and terms of faculty contracts are discussed in Section 6.1 of this book, and the contractual academic freedom rights of faculty members are discussed more specifically in Section 7.1.3. When the “1940 Statement of Principles on Academic Freedom” is incorporated into the faculty contract or relied upon as a source of custom and usage (see Section 7.1.3 above), it will usually provide the starting point for analyzing the faculty member’s freedom in teaching. The 1940 Statement provides that “[t]eachers are entitled to freedom in the classroom in discussing their subject,” but also contains this limitation: “[Teachers] should be careful not to introduce into their teaching controversial matter which has no relationship to their subject . . .” (*AAUP Policy Documents and Reports*, 3).

The case of *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) (discussed further in Sections 2.2.5 & 6.6.2) is an instructive example of a dispute in a private institution about contractual protections for the freedom to teach. In *McConnell*, a professor had been discharged after challenging his university’s handling of an in-class conflict that arose between him and a student in one of his classes. The professor brought a breach of contract action, and the appellate court was sympathetic to the professor’s argument that the university’s actions breached the contract between the professor and the university. In reversing a summary judgment for the university, and remanding the case for a trial *de novo*, the appellate court declined to adopt traditional contract principles so as to accord deference to the judgments of the university’s administrators. The court’s reasoning indicates that, in some circumstances, contract law will protect the teaching freedom of faculty members in private institutions and that contract claims may sometimes be more promising vehicles for faculty members than federal constitutional claims.

Contractual freedom to teach issues may arise in private religious institutions as well as private secular institutions (as in *McConnell*), in which case additional complexities may be present (see Section 7.8 below). The unusual case of *Curran v. Catholic University of America* (discussed in Section 6.2.5) is an instructive example of this type of case.

### ***Sec. 7.3. Academic Freedom in Research and Publication***

Academic freedom protections clearly extend to the research and publication activities of faculty members.<sup>26</sup> Such activities are apparently the most ardently protected of all faculty activities. In the “1940 Statement of Principles on Academic Freedom and Tenure” (see Section 7.1.3 above), “full freedom in research and in the publication of the results” is presented as the first of three essential

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<sup>26</sup>Research and publication also includes artistic creation, and the performance and display of artistic works. See generally Robert O’Neil, “Artistic Freedom and Academic Freedom,” 53 *Law & Contemp. Probs.* 177 (1993). The freedom to research and publish would also apparently include a freedom to seek and obtain funds to support such efforts. For an example, see Julie Nicklin, “Arbitrator Tells U. of Delaware to Allow Grant Requests to ‘Racist’ Fund,” *Chron. Higher Educ.*, September 4, 1991.

aspects of faculty academic freedom, and this “full freedom” does not include any limitation regarding subject matter, as does the freedom in the classroom that is listed second (*AAUP Policy Documents and Reports* (9th ed., 2001), 3). The courts, moreover, tend to distinguish between research and teaching and to provide stronger protection for the former. In *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (discussed in Section 7.2.2 above), for example, the court upheld university limitations on the content of a professor’s classroom speech. At the same time, however, the court emphasized that “[t]he University has not suggested that [the professor] cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them, nor could it so prohibit him”; and that the professor’s “educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent . . . researcher” (926 F.2d at 1076–77, emphasis added). The case of *Levin v. Harleston*, discussed below, illustrates this broad protection for faculty research and publication.

As colleges and universities have moved further into the age of information technology—and faculty members employ new means of researching, storing research, and disseminating their views—new questions have arisen about the freedom of research and publication. One example concerns research that faculty members do on computers supplied by the institution and the extent to which the institution or (in the case of public institutions) the state might impose limitations on faculty members’ research using such equipment. The case of *Urofsky v. Gilmore*, discussed at length below, illustrates the issues that may arise if the state or a public institution restricts the content of the materials that faculty members may access or store on state-owned computers. In other situations, issues could arise if an institution seeks access to research or communications faculty members have stored on their office computers (see Martha McCaughey, “Windows Without Curtains: Computer Privacy and Academic Freedom,” *Academe*, September–October 2003, 39–42). Another example concerns faculty members’ use of the institution’s Web page and server to display research or communicate personal viewpoints, and the extent to which the institution might impose limits on such use. Issues might arise, for instance, if an institution orders a faculty member to remove controversial or offensive content from a Web log that he or she maintains on the university’s Web site (see Robert O’Neil, “Controversial Weblogs and Academic Freedom,” *Chron. Higher Educ.*, January 16, 2004, B16). In most cases, such issues—though tinged with new technological implications—can nevertheless be resolved by careful application of traditional legal principles and sensitive consideration of the traditional attributes of the college and university environment, as addressed in the discussion below.

*Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *affirmed in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992), involves traditional media, not new technology, for faculty members’ publication of views and features the application of classical First Amendment and academic freedom principles. A philosophy professor at City College of the City University of New York had opined in certain writings and publications that blacks are less intelligent on average

than whites. In addition, he had opposed all use of affirmative action quotas. As a result of these writings, he became controversial on campus.<sup>27</sup> Student groups staged demonstrations; documents affixed to his door were burned; and students distributed pamphlets outside his classroom. On several occasions, groups of students made so much noise outside his classroom that he could not conduct the class. The college's written regulations prohibited student demonstrations that have the effect of disrupting or obstructing teaching and research activities. Despite this regulation and the professor's repeated reports about the disruptions, the university took no action against the student demonstrators. The college did, however, take two affirmative steps to deal with the controversy regarding the professor. First, the college dean (one defendant) created "shadow sections" (alternative sections) for the professor's required introductory philosophy course. Second, the college president (another defendant) appointed an ad hoc faculty committee "to review the question of when speech both in and outside the classroom may go beyond the protection of academic freedom or become conduct unbecoming a member of the faculty."

To implement the shadow sections, the college dean sent letters to the professor's students, informing them of the option to enroll in these sections. The dean stated in the letter, however, that he was "aware of no evidence suggesting that Professor Levin's views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students." After implementation of the shadow sections, enrollment in the professor's classes decreased by one-half. The college had never before used such sections to allow students to avoid a particular professor because of his views.

To implement the ad hoc committee, the president charged the members "to specifically review information concerning Professor Michael Levin . . . and to include in its report its recommendations concerning what the response of the College should be." The language of the charge tracked certain language in college bylaws and professional contracts concerning the discipline of faculty members and the revocation of tenure. Three of the seven committee members had previously signed a faculty petition condemning the professor. Moreover, although the committee met more than ten times, it never extended the professor an opportunity to address it. The committee's report, as summarized by the district court, stated "that Professor Levin's writings constitute unprofessional and inappropriate conduct that harms the educational process at the college, and that the college has properly intervened to protect his students from his views by creating the shadow sections."

The professor sought declaratory and injunctive relief, claiming that the defendants' failure to enforce the student demonstration regulations, the creation of the shadow sections, and the operation of the ad hoc committee violated his rights under the federal Constitution's free speech and due process clauses. After trial, the district court issued a lengthy opinion agreeing with the

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<sup>27</sup>The *Levin* case is often compared with the later case of *Jeffries v. Harleston*—not only because the two cases involve the same university but also because both cases involve derogatory speech regarding particular minority groups. *Jeffries* is discussed in Section 7.5.2 below.

professor. Relying on *Keyishian* (see Section 7.1.4), the court noted the chilling and stigmatizing effect of the ad hoc committee's activities, as demonstrated by the fact that, during the time the committee was meeting, the professor had declined more than twenty invitations to speak or write about his controversial views. The court held that the professor had "objectively reasonable bases" to fear losing his position, and that the effects on him were "exactly that predicted in *Keyishian*. . . . Professor Levin was forced to 'stay as far away as possible from utterances or acts which might jeopardize his living.'" To determine whether this infringement on the professor's speech was nonetheless legitimate, the court then undertook a *Pickering/Connick* analysis. It held that there was "no question" that the professor's speech was "protected expression," since his writings and statements addressed matters that were "quintessentially 'issues of public importance.'" The only justification advanced by the defendants for the ad hoc committee and shadow sections was the need to protect the professor's students from harm that could accrue "if they thought, because of the expression of his views, that he might expect less of them or grade them unfairly." The court, however, rejected this justification because City College had presented no evidence at trial to support it. Consequently, the trial court granted injunctive relief, compelling the defendants to investigate the alleged violations of the college's student demonstration regulations and prohibiting the defendants from any further use of the shadow sections or the ad hoc committee.

The appellate court generally agreed with the district court's reasoning regarding the shadow sections and the ad hoc committee. The court noted that the "formation of the alternative sections would not be unlawful if done to further a legitimate educational purpose that outweighed the infringement on Professor Levin's First Amendment rights." But the defendants had presented no evidence to support their contention that the professor's expression of his ideas outside the classroom harmed the educational process within the classroom. In fact, "none of Professor Levin's students had ever complained of unfair treatment on the basis of race." The court concluded that the defendants' "encouragement of the continued erosion in the size of Professor Levin's class if he does not mend his extracurricular ways is the antithesis of freedom of expression." The appellate court also agreed that the operation of the ad hoc committee had a "chilling effect" on the professor's speech and thus violated his First Amendment rights. Affirming that "governmental action which falls short of direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech," the court determined that, when the president "deliberately formed the committee's inquiry into Levin's conduct to mirror the contractual standard for disciplinary action, he conveyed the threat that Levin would be dismissed if he continued voicing his racial theories."

The appellate court disagreed, however, with the district court's conclusion regarding the college's failure to enforce its student demonstration regulations. Since the college generally had not enforced these regulations, and there was no evidence that "the college treated student demonstrations directed at Professor Levin any differently than other student demonstrations," the defendants'

inaction could not be considered a violation of the professor's constitutional rights.

To implement its conclusions, the appellate court affirmed the portion of the trial court's injunction prohibiting the defendants from using the shadow sections. Regarding the ad hoc committee, the appellate court modified the relief ordered by the trial court. Since the ad hoc committee had recommended no disciplinary action and had no further investigations or disciplinary proceedings pending, the injunction was unnecessary. It was sufficient to issue an order that merely declared the unconstitutionality of the defendants' use of the committee, since such declaratory relief would make clear that "disciplinary proceedings, or the threat thereof, predicated solely upon Levin's continued expression of his views outside of the classroom" would violate his free speech rights. Regarding the student demonstration regulations, the appellate court vacated the portion of the trial court's injunction ordering the defendants to investigate the alleged violations of the regulations.

*Levin* is an important case for several reasons. It painstakingly chronicles a major academic freedom dispute centering on faculty publication activities; it demonstrates a relationship between academic freedom and the phenomenon of "political correctness";<sup>28</sup> and it strongly supports faculty academic freedom in research by using the federal Constitution as a basic source of protection. The courts' opinions do not break new legal ground, however, since they use established principles and precedents applicable to public employees generally and do not emphasize the unique circumstances of academic freedom on the college campus. But these opinions do provide a very useful response to the particular facts before the court. The case dealt with traditionally protected faculty speech—writing and outside publication expressing opinions on matters of public concern—and not with opinions expressed in classroom lectures or in course materials. Not only is such publication given the highest protection, but the defendants produced no evidence that the professor's writings and views had any adverse impact on his classroom performance or his treatment of students. The college had never before created shadow sections and had advanced no "legitimate educational interest" in using them in this circumstance. Finally, the numerous procedural flaws in the establishment and operation of the ad hoc committee strongly supported, if only circumstantially, the professor's claims that his constitutional rights were being chilled.

In *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (*en banc*), the full twelve-member bench of the Fourth Circuit issued a ruling that contrasts starkly with *Levin* and is deeply inhospitable to faculty academic freedom in research. The case concerned a Virginia statute, codified as "Restrictions on State Employee Access to Information Infrastructure," that restricts the Internet-based research

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<sup>28</sup>According to the trial court, "[t]his case raises serious constitutional questions that go to the heart of the current national debate on what has come to be denominated as 'political correctness' in speech and thought on the campuses of the nation's colleges and universities" (footnote omitted). See generally Paul Berman (ed.), *Debating P.C.: The Controversy over Political Correctness on College Campuses* (Dell, 1992).

of state employees, including faculty members at the state's higher educational institutions. The relevant codified language states:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content [Va. Code Ann. § 2.2-2827(B)(2001); an earlier version of this statute, in force during the *Urofsky* litigation, was cited as Va. Code Ann. §§ 2.1-804 to 806 (1996), as amended in 1999)].

The statute defines “informational infrastructure” as including the various types of computer files and the modes of accessing and securing these files (that is, computer networks and the Internet). “Computer equipment” is not defined.

The statute prohibits state employees from using state-owned or state-leased computers to access information with “sexually explicit content” without prior approval from the head of the agency for which the employee works. The plaintiffs, who were professors at various Virginia state colleges and universities, argued that the statute interfered with their ability to do research concerning sexuality and the human body in various fields such as art, literature, psychology, history, and medicine. Specifically, the professors made two claims: (1) that the statute was unconstitutional on its face, since it restricted the content of the speech of public employees speaking on matters of public concern; and (2) that the statute was unconstitutional as applied to “academic employees,” since it burdened their First Amendment “right to academic freedom” in research. The state responded that the statute restricted only employee speech, not the speech of citizens addressing matters of public concern, and that this restriction served state interests in “maintain[ing] operational efficiency in the workplace” and “prevent[ing] the creation of a sexually hostile work environment” (995 F. Supp. at 639).

The district court, using the *Pickering/Connick* standards (see Section 7.1.1), invalidated the statute as an impermissible restriction on speech on matters of public concern (*Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998)). In applying *Pickering/Connick*, the court emphasized various factors regarding the statute that served to increase the state's burden of justifying the statute's restrictions on speech. *First*, the statute is broad in scope, deterring a large number of potential speakers and covering a broad category of speech. *Second*, the statute has a substantial capacity to “chill” speakers in advance because of their concern that their speech activities may violate the statute. *Third*, the statute has a substantial adverse impact on the general public's right to receive information, an impact exacerbated by the fact that the information suppressed is that of state employees who have special expertise of particular benefit to the public. *Fourth*, the statutory restriction on speech is explicitly content based, targeting sexual speech, but not any other speech that could impinge on state interests in the workplace. *Fifth*, the statute restricts the use of the Internet, “arguably the most powerful tool for sharing information ever developed,” thus enhancing the burden the statute places on speech (see generally *Reno v.*

*American Civil Liberties Union*, 521 U.S. 844, 849–53 (1997), discussed in Section 13.2.12.2).

On appeal, a three-judge panel of the Fourth Circuit reversed the district court, reasoning that the professors were speaking (and were restricted by the statute) only in their capacities as state employees, not as citizens commenting upon matters of public interest, and therefore had no First Amendment protection (*Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999)). The full appellate court (all twelve judges) then reviewed the case *en banc*. The majority agreed with the panel’s decision but issued a majority opinion that is much more expansive than the panel’s and even more inhospitable to faculty academic freedom. The full Fourth Circuit thus upheld the panel decision, ruling that the Virginia statute did not violate the First Amendment. Seven judges joined in the majority opinion (two of whom also wrote concurring opinions); one judge (Chief Justice Wilkinson) wrote an opinion concurring only in the judgment, and four judges joined in a dissenting opinion.

The *en banc* majority relied on an abbreviated *Pickering/Connick* analysis based on the reasoning of the three-judge panel to conclude that the statute did not violate the free speech rights of public employees (that is, it was facially constitutional). The majority then undertook a lengthy review of the theory and practice of academic freedom to conclude that the statute did not violate faculty members’ First Amendment rights regarding their research projects (that is, the statute was constitutional as applied to the plaintiffs). Under the majority’s reasoning, therefore, faculty members, like all public employees, do have free speech rights, and these rights protect them in the same way and to the same extent as other public employees; they do not have any additional or different free speech rights, beyond those of other public employees, that accrue to them because they work in academia.

In the *Pickering/Connick* part of its analysis (addressing the statute’s facial constitutionality), the *en banc* court in *Urofsky* first reviewed the scope and application of the Virginia statute. The critical threshold question, according to the court, is whether the statute regulates employees “primarily in [their] role as citizen[s] or primarily in [their] role as employee[s].” Only in the former circumstance, according to the majority, do public employees enjoy the First Amendment protections articulated in the *Pickering/Connick* line of cases. The *Urofsky* court therefore focused only on the status or “role” of the person speaking—whether he or she is speaking as a citizen or as an employee—and did not consider the type of speech being regulated—whether the speech addresses a matter of public concern or a matter of private concern:

This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. . . . [T]he government is entitled to control the content of the speech because it has, in a meaningful sense, “purchased the speech at issue” through . . . payment of a salary [216 F.3d at 407 and 408 n.6].



Having declared its preference for using the role or status of the speaker as the litmus test for employee speech protections, the court then determined that the professors were speaking only as employees and not as citizens. As a result, the court did not analyze whether the speech at issue—access to and dissemination of sexually explicit materials for particular professional research projects—could rise to the level of public concern speech. Nor did the majority balance the professors’ free speech interests against the state’s interest in maintaining an efficient and nonhostile workplace. Instead, the majority simply determined that:

The speech at issue here—access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties—is clearly made in the employee’s role as employee. [T]he challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. . . . Because . . . the challenged aspect of the Act does not affect speech by [faculty members] in their capacity as private citizens speaking on matters of public concern, it does not infringe the First Amendment rights of state employees [216 F.3d at 408–9].

By adopting this strained view of the public concern test and thereby avoiding the *Pickering/Connick* balancing test, the *en banc* court also conveniently avoided the impact of *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (discussed in Section 7.1 of this book). This case requires a different and stronger showing of government interest when the speech of a large group of employees is limited by statute or administrative regulation. The case also warns of the burdens placed on employee speech by a “ban” that “deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government’s interests” (513 U.S. at 467 n.11). The dissenting opinion in *Urofsky* provides an example of how the *NTEU* case’s balancing analysis would apply to the Virginia statute (216 F.3d at 439–41 (Murnaghan, J. dissenting)). In addition, by taking the position it did on the public concern test, the court majority avoided the “overbreadth” and “vagueness” analysis often applied to statutes regulating speech and thus also avoided any application of the *Keyishian* case (see Section 7.1), which employed such analysis and warned against statutes that exert a “chilling effect” on free speech.

In his concurring opinion, Chief Judge Wilkinson criticized the *en banc* majority’s use of the *Pickering/Connick* line of cases<sup>29</sup> because:

[B]y placing exclusive emphasis on the fact that the statute covers speech of “state employees in their capacity as employees . . .” the majority rests its conclusions solely on the “form” of the speech. The public concern inquiry, however, does not cease with form. The majority fails to examine the “content” of the speech, which surely touches on matters of political and social importance.

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<sup>29</sup>The Wilkinson opinion, in turn, was criticized by another judge writing a concurring opinion (216 F.3d at 416–25 (Luttig, J., concurring)).

It also fails to examine the “context” of the speech, which can occur in a variety of settings, including the public university. As this case was brought by public university professors, I consider the statute’s application to academic inquiry as a useful illustration of how the statute restricts material of public concern [216 F.3d at 426–27].

Regarding “context,” for instance, Chief Judge Wilkinson made these points that, in his view, are central to the first prong of the *Pickering/Connick* analysis but are ignored by the majority:

[T]he context of the affected speech is unique. In the university setting “the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Internet research, novel though it be, lies at the core of that tradition. These plaintiffs are state employees, it is true. But these particular employees are hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern. A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. See William W. Van Alstyne, “Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review,” 53 *Law & Contemp. Probs.* 79, 87 (1990). Provocative comment is endemic to the work of a university faculty whose “function is primarily one of critical review.” *Id.*

Furthermore, state university professors work in the context of considerable academic independence. The statute limits professors’ ability to use the Internet to research and to write. But in their research and writing university professors are not state mouthpieces—they speak mainly for themselves. See generally David M. Rabban, “Functional Analysis of ‘Individual’ and ‘Institutional’ Academic Freedom Under the First Amendment,” 53 *Law & Contemp. Probs.* 227, 242–44 (1990). It is not enough to declare, as the majority does, “The speech at issue here . . . is clearly made in the employee’s role as employee.” No one assumes when reading a professor’s work that it bears the imprimatur of the government or that it carries the approval of his or her academic institution [216 F.3d at 428–29].

By failing to consider the “content” and “context” of the prohibited speech, the Chief Judge said, the majority has reached a result under which:

even the grossest statutory restrictions on public employee speech will be evaluated by a simple calculus: if speech involves one’s position as a public employee, it will enjoy no First Amendment protection whatsoever. My colleagues in the majority would thus permit any statutory restriction on academic speech and research, even one that baldly discriminated on the basis of social perspective or political point of view [216 F.3d at 434].

The dissenting opinion (joined by four judges) also criticizes the majority’s use of *Pickering/Connick*, arguing that “the majority has adopted an unduly restrictive interpretation of the ‘public concern’ doctrine” and that its “formalistic focus on the ‘role of the speaker’ in employee speech cases . . . runs directly

contrary to Supreme Court precedent” (216 F.3d at 435–39). Even one of the judges joining in the majority opinion wrote a separate concurrence indicating that he had joined the majority because he felt bound by a prior Fourth Circuit case in which he had dissented, and that were he “left to [his] own devices,” he “would hold that the [professors’] speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the *Connick/Pickering* balancing test” (216 F.3d at 425–26 (Hamilton, J., dissenting)).<sup>30</sup>

In the academic freedom part of its analysis (addressing the Virginia statute’s application to “academic employees’ right to academic freedom”), the *Urofsky* majority acknowledged that the U.S. Supreme Court, in various cases, has addressed and supported a constitutional concept of academic freedom. The Supreme Court’s focus, however—according to the *Urofsky* majority—was always on the institution’s own academic freedom, and not on the academic freedom of individual faculty members: “the Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right to self-governance in academic affairs” (216 F.3d at 412). (See Section 7.1.6 above for discussion of “institutional academic freedom.”) The *Urofsky* majority then determined that faculty members do not have any constitutional right to academic freedom, under the First Amendment, whether in regard to research or to other faculty functions. The majority therefore rejected the professors’ academic freedom claim because its “review of the law” led it “to conclude that to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . .” (216 F.3d at 410).<sup>31</sup>

Although it rejected the professors’ free speech and academic freedom claims, the *Urofsky* majority did acknowledge that other claims might validly arise when the Virginia statute’s provision on prior approval for research with sexually explicit content (Va. Code Ann. § 2.2-2827(B)) is applied to individual cases: “[A] denial of an application under the Act based upon a refusal to approve a particular research project might raise genuine questions—perhaps even constitutional ones—concerning the extent of the authority of a university to control the work of its faculty. . . .” But, said the majority, “such questions

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<sup>30</sup>The majority, having rejected the professors’ claim under the first prong of the *Pickering/Connick* analysis (the public concern test), did not consider the second prong (the balancing test) mentioned in Judge Hamilton’s concurring opinion. Both the Wilkinson concurring opinion and the dissent, however, did reach the second prong of the analysis. The Wilkinson opinion concluded that the state’s interests, on balance, outweighed the professors’ speech interests (216 F.3d at 431–34 (Wilkinson, Ch. J., concurring in judgment)); the dissent reached the opposite conclusion. The Chief Judge relied extensively on the unique circumstances of higher education and academic freedom; the dissenters relied on more general factors that would be common to most public employee speech. Both opinions provide useful (though divergent) illustrations of how to do the balancing analysis in faculty speech cases.

<sup>31</sup>Neither the Wilkinson opinion, the Hamilton opinion, nor the dissent directly addresses the majority’s broad rejection of the plaintiffs’ second claim. The Wilkinson opinion does contain extended and supportive discussion of academic freedom (see 216 F.3d at 428, 431–35) that seems to acknowledge both faculty and institutional academic freedom, and also applies the *Pickering/Connick* test with particular reference to faculty members’ freedom of inquiry.

are not presented here” (216 F.3d at 415 n.17). Thus the majority did recognize that other legal issues may arise if a faculty member who seeks prior approval is refused permission; but at the same time the majority determined that this possibility of future violations was not sufficient to invalidate the statute either on its face or as applied to the plaintiffs (who had not sought prior approvals).

The dissenters, on the other hand, echoed the district court’s opinion in arguing that the Virginia statute is unconstitutional because it gives institutions broad, virtually unfettered, discretion as the sole arbiters for approving prior requests for accessing and disseminating sexually explicit materials used for professional purposes.<sup>32</sup> In rejecting the statute as both overinclusive and underinclusive in restricting broad categories of speech used for beneficial public purposes, the *Urofsky* dissent determined that the statute’s prior approval requirement could lead to arbitrary decisions that could “chill” faculty members’ speech:

The danger of arbitrary censorship is particularly relevant in the instant case, given the differing views on the merits of research and discussion into sexually-related topics. . . . [T]he mere existence of the licenser’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused [216 F.3d at 441].

Faculty members subject to the Virginia statute, or a similar statute or regulation in another state, apparently have two options for avoiding such strictures on computer-based research. First, a faculty member may conduct the research using personally owned computer equipment; and second, the faculty member may seek the institution’s prior approval for a professional research project that will utilize the restricted materials. The first option is available because the statute addresses only a professor’s use of “agency-owned or agency-leased computer equipment”; thus, as the majority acknowledged, “state employees remain free to access sexually explicit materials from their personal or other computers not owned or leased by the state.” Presumably, faculty members could use personal computers in their faculty offices to access or store sexually explicit research material. But the statute may prohibit the use of personal computers to access the university’s Internet connections or search engines, or to store sexually explicit materials on the university’s network, since they may be considered to be “computer equipment” within the meaning of Section 2-2.2827.

The second option is available under the statute’s prior approval clause just discussed. This option requires that faculty members be aware of how their institutions have interpreted and implemented this clause. The option will be more meaningful if faculty members, collectively and individually, become involved in their institution’s policy making and decision making on prior approvals. The institution could, apparently, adopt a blanket approval policy or

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<sup>32</sup>Judge Wilkinson, in his concurrence, takes a quite different tack. He viewed the prior approval requirement as a feature of the statute that preserved academic freedom and helped secure the Virginia statute’s constitutionality (216 F.3d at 432–34 (Wilkinson, Ch. J., concurring in result)).

an “advance permission” policy for faculty members in particular disciplines or departments—or perhaps all faculty members—thus minimizing the statute’s restraint on faculty research. (See the district court’s discussion of this point; 995 F. Supp. at 642–43.) If an institution establishes more rigorous criteria for gaining prior approval to access the restricted materials, then it would be important to assure that the criteria are clear, that there is a tight time frame for making decisions on approval requests, and that any faculty member whose request is denied will receive a full statement of the reasons for the denial. In the case of a denial, the decision may apparently be challenged in court, the *Urofsky* court having left the door open for such challenges (216 F.3d at 415 n.17; see also 216 F.3d at 441 (Murnaghan, J., dissenting)).

When the *en banc* majority opinion in *Urofsky* is viewed together with the concurrences and dissents, and with the district’s court’s opinion, the case provides a highly instructive debate on faculty academic freedom, especially (but not only) with respect to academic research. While the majority opinion is the controlling law in the Fourth Circuit, there is good reason to question whether its abrupt rejection of public employee speech rights and faculty academic freedom rights will, or should, become the prevailing legal view. The seven judges in the *Urofsky* majority were strongly criticized by the remaining five judges: Chief Judge Wilkinson concurring in the result (216 F.3d at 426–35) and Judge Murnaghan and the other three judges joining in his dissenting opinion (216 F.3d at 435–41). The Wilkinson opinion and the dissent both make important points worth serious consideration, as does the district court’s opinion in the same case (995 F. Supp. 634). The majority’s reasoning has also been strongly criticized in the legal literature (see, for example, Richard Hiers, “Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy,” 29 *J. Coll. & Univ. Law* 35 (2002); J. Peter Byrne, “Constitutional Academic Freedom in Scholarship and in Court,” *Chron. Higher Educ.*, January 5, 2001, B13). Moreover, the *Urofsky en banc* majority opinion for the Fourth Circuit appears to be inconsistent with the Second Circuit’s opinion in the *Levin* case, discussed above, and with many other faculty academic freedom cases (see Sections 7.2 above & 7.4 below). The *Levin* opinion, the district court opinion in *Urofsky*, the Wilkinson concurrence in *Urofsky*, and the Murnaghan dissent in *Urofsky* all differ from one another in their reasoning in certain respects, and present four somewhat different views of the law, but all are united in their insistence that faculty members at public institutions do have First Amendment protections that extend to their research and writing activities. That is the better view of the law and is a view that can be well supported by a combination of the points made in these four sources.

## ***Sec. 7.4. Academic Freedom in Institutional Affairs***

**7.4.1. In general.** Faculty members are not only teachers and scholars; they are also participants in the governance of their academic programs, departments, and schools, and of the institution itself (see generally William G. Tierney & James T. Minor, *Challenges for Governance: A National Report* (Center

for Higher Education Policy Analysis, 2003), available at <http://www.usc.edu/dept/chepa/gov/survey.shtml>). Just as a faculty member's duties extend beyond instruction and research to governance, so do the possibilities for academic freedom disputes.

Although faculty members do not have any federal constitutional right to participate in the governance of their institutions (*Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), discussed in Section 6.2.2), “[f]aculty involvement in academic governance has much to recommend it as a matter of academic policy,” (465 U.S. at 288) and academic policy considerations have supported “a strong, if not universal or uniform, tradition of faculty participation in school governance” (465 U.S. at 287). In many institutions, moreover, faculty members’ governance responsibilities and rights have been set out, at least in part, in institutional bylaws, faculty handbooks, or other documents that are part of the faculty member’s contract with the institution. In addition to such formal or official participation in governance—at the institutional, school, department, and program levels—faculty members may also involve themselves informally in institutional affairs at any of these levels.

In both circumstances—formal participation in governance and informal involvement in institutional affairs—freedom of expression issues may arise, particularly issues concerning the faculty member’s freedom to criticize the institution, or its trustees or officers, without fear of reprisal. In both public and private institutions, such issues may be dealt with using AAUP policy statements (in particular the “Statement on Government of Colleges and Universities,” in *AAUP Policy Documents and Reports* (9th ed., 2001), 217), the statements of other associations,<sup>33</sup> or the policies and customs of the institution where the dispute arises. Principles of contract law may also be pertinent (see Section 7.1.3 above). In public institutions, issues about faculty expression may also be, and often are, dealt with using the federal Constitution’s First Amendment. As the cases below illustrate, disputes about governance and institutional affairs that implicate the First Amendment are usually the most controversial and the most likely to result in litigation.

Many, but not all, faculty freedom of expression claims concerning governance and institutional affairs may also be considered academic freedom claims. The claim may properly be characterized as an academic freedom claim, and the dispute as an academic freedom dispute, if the opinions and ideas that the faculty member expresses implicate the *academic* operations of a program, department, or school; or if the faculty member’s expression results in some administrative penalty that adversely affects his or her teaching or research opportunities or “chills” the expression of other faculty members on academic matters. When such connections to academic affairs are not apparent, the dispute may only concern free speech in general; in this situation, the faculty member’s rights are essentially the same as those of any other public employee. If

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<sup>33</sup>See, for example, the “AGB Statement on Institutional Governance” (Association of Governing Boards of Universities and Colleges, 1998); and see Neil Hamilton, “Are We Speaking the Same Language? Comparing AAUP and AGB,” *Liberal Education*, Fall 1999, 24–31.

the dispute is genuinely an academic freedom dispute, however, questions may arise concerning whether the faculty member's constitutional rights to speak out regarding institutional affairs differ in kind or degree from those of other public employees. (See generally, Matthew Finkin, "A Higher Order of Liberty in the Workplace': Academic Freedom and Tenure in the Vortex of Employment Practices and Law," 53 *Law & Contemp. Probs.* 357 (1990).)

In either situation, the interests that faculty members seek to protect, and those that institutions seek to protect, are different from interests relating to instruction or research. The institution may be concerned primarily with maintaining faculty members' focus on their contractual duties, promoting harmonious working relationships among faculty and administration, or maintaining the public's confidence in the institution. In contrast, the faculty member may be concerned about meaningful participation in governance, the freedom to criticize administrators, officers, and trustees as warranted, and more generally, the freedom to express views or personality on campus without fear of reprisal.

**7.4.2. *Speech on governance matters.*** In the cases discussed in this subsection, the First Amendment free speech clause is the primary focus of analysis, and courts have increasingly resorted to the *Pickering/Connick* line of cases (see Section 7.1.1) as the governing authority. From that line the lower courts have extracted a three-stage decision-making methodology. At the first stage, as explained in *Connick*, the question is whether the faculty member's speech is on a "matter of public concern." If it is not, the inquiry ends, and the faculty member is afforded no First Amendment protection. If the speech is on a matter of public concern, the court moves to the second stage and applies the *Pickering/Connick* balancing test. If the balance of interests weighs in favor of the institution, the inquiry ends, and the faculty member again obtains no First Amendment protection. If the balance of interests weighs in favor of the faculty member, however, the court will either protect the faculty member or proceed to a third stage of analysis, where questions of motivation and causation are considered. At this stage, if the faculty member cannot show that his protected statements were a "motivating factor" in the institution's decision to penalize him, or if the institution can show that, even though it may have considered the protected speech it would have nevertheless taken adverse action against the faculty member for reasons independent of the speech, the court will afford no First Amendment protection to the faculty member even if the speech was on a matter of public concern and the balance of interests weighed in the faculty member's favor. This potential third stage of the analysis is the focus of Section 7.6 below.

With some notable exceptions, the trend in the cases concerning institutional affairs has been to deny First Amendment protection to faculty speech. In many cases, courts accomplish this result by finding that the speech activities at issue were not "matters of public concern" (stage 1); in other cases, courts acknowledge that the speech addressed matters of public concern but then deny protection by applying the balancing analysis in a manner that favors the institution (stage 2); and occasionally a court will find no causation (stage 3). The following cases are illustrative.

*Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir. 1991), involved an Egyptian-born professor, originally hired in 1968, who made repeated complaints that his starting salary was low and that, as a result, his salary in each succeeding year remained too low. In 1985, the professor's interim department head reviewed the salary and recommended no raise for the professor (as well as for four other professors who were white U.S. citizens), and the college dean also determined that the salary was appropriate. Later in 1985, the new department head attempted to move the professor's office to a different building, allegedly because of complaints other department members had made about his disruptiveness. The professor then initiated legal action, "alleging that his civil rights had been violated when his office was relocated in retaliation against his complaints about the University's past discriminatory pay scale."

The court recognized the difficulty in distinguishing between public and private concerns, as required by *Connick* (Section 7.1.1), "because almost anything that occurs within a public agency could be of concern to the public." The court's role

[is] "not [to] focus on the inherent interest or importance of the matters discussed by the employee [but instead] to decide whether the speech at issue in a particular case was made *primarily* in the plaintiff's role as a citizen or *primarily* in his role as employee. In making this distinction, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment" [927 F.2d at 837; emphasis added, quoting *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)].

Applying this test, the court determined that the professor had spoken primarily as an employee, because his speech "involved only his personal situation." Only after the professor filed suit did he "characterize his complaint in terms of a 'two-tier' system perpetuated by the University, whereby foreign-born professors were paid less than white, native-born professors." Nor was there any evidence that the professor "ever uttered such a protest at any time before the alleged retaliatory acts by the defendants." Thus, even if his comments were viewed "in terms of a disparate, 'two-tier' pay system, the record is absolutely clear that he only complained about its application to him." Consequently, the court concluded that the professor

consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest. . . . [T]here is no evidence that [he] expressed concern about anything other than his own salary. Although pay discrimination based on national origin can be a matter of public concern, in the context in which it was presented in this case by [the professor] it was a purely personal and private matter [927 F.2d at 837-38].

In *Dorsett v. Board of Trustees for State Colleges and Universities*, 940 F.2d 121 (5th Cir. 1991), a tenured mathematics professor at a state university claimed that he had been retaliated against because he had "challenged several departmental decisions and [had] publicly supported another professor who had been



attacked by the administration for refusing to lower academic standards.” The departmental decisions he challenged concerned teaching assignments, pay increases, and other administrative and procedural matters. The appellate court held that “the alleged harms suffered by Dorsett [did] not rise to the level of a constitutional deprivation” and that, even if they did, nothing in the content, form, or context of the speech indicated an intent to address an issue of public concern, as required by *Connick*. The court specifically noted that the professor’s complaints had been directed to persons within the university and had not arisen in the context of a public debate about academic standards or about the administration of the university or the mathematics department. The court did not reach the *Pickering/Connick* balancing test because the speech in question was a matter of personal rather than public concern.

*Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992), involved two nontenured sociology professors employed under one-year renewable contracts. Their department had for several years been split into two contending factions. The majority faction controlled the department’s primary committee, which constituted the first level of review for all promotion and tenure decisions. The two professors, members of the minority faction, each wrote a letter to university officials asserting that the “department was so divided that individual careers, and the effective functioning of the department, were being threatened,” and requesting an external review of the sociology department’s internal peer review system for professional advancement. University officials responded to the letters by urging the department to resolve its conflict internally. The primary committee continued to be controlled by the majority faction, however, and the two professors, along with the other members of the minority faction, wrote to the department chair describing “the deplorable and intolerable [situation], especially for junior members of the department who face discrimination by the now unchallenged dominant group.” Each professor subsequently nominated himself for promotion, but the primary committee recommended against promotion. The committee also recommended that one of the plaintiffs not be reappointed, noting that his “written and verbal comments to people outside the department have hurt the image of the Sociology faculty and undermined the integrity of the peer review process.” The second professor was also considered for tenure; although he received a favorable recommendation from the committee, the recommendation of the department chair was negative, and he was ultimately denied not only tenure but reappointment as well.

The two professors challenged these actions in court, charging that the university had retaliated against them for engaging in expression protected by the First Amendment. The trial court granted summary judgment for the university, finding that the professors’ speech was not on matters of public concern. On appeal, the professors advanced four arguments for classifying their speech as a matter of public concern. The appellate court rejected each argument and affirmed the trial court’s judgment.

First, the professors argued that “their letters were not simply an internal matter, but revealed that the integrity of the university was being threatened.”

The court recognized that “[e]xposing wrongdoing within a public entity may be a matter of public concern,” and that there is “[n]o doubt [that] the public would be displeased to learn that faculty members at a public university were evaluating their colleagues on personal biases.” The court asserted, however, that “the fact the issue could be ‘interesting’ to the community does not make it an issue of public concern.” The court viewed the plaintiffs’ letters as “principally an attempt to seek intervention in a clash of hostile personalities” rather than an “attempt to expose some malfeasance that would directly affect the community at large.”

Second, the professors argued that the “division in the department fell along the lines of membership and non-membership in the faculty union, and that pressures to join a union make the faculty clashes of deep public concern.” Again, the court recognized that “[s]peech which is related to collective activity may be a matter of public concern.” In this case, however,

[a]lthough union affiliation may have been a factor in determining membership in one of the two competing groups, pressure to join the union was not the central reason for the request for review of the department, nor were [the plaintiffs] attempting to inform the public that faculty members were being pushed into union membership. . . . [T]he point of their speech . . . was to highlight how the department’s in-fighting had affected them and would affect their futures at the university [973 F.2d at 587].

Third, the professors argued that “simply because they had some personal interest in calming the tensions in the department does not prevent their requests for review from being matters of public concern.” The court recognized that:

[s]peech is not unprotected simply because it raises complaints or other issues personal to the speaker. . . . However, where the overriding reason for the speech is the concern of a few individuals whose careers may be on the line, the speech looks much more like an internal personal dispute than an effort to make the public aware of wrongdoing [973 F.2d at 587].

Although the plaintiffs “emphasize[d] that they did not speak simply to further their own career interests but everyone in the department’s interest,” the court believed that the department’s “deterioration was principally of importance to the few faculty members who had to tolerate the bickering.”

Fourth, the professors argued that “the forum in which [they] raised their concerns is relevant to whether their statements should be characterized as a matter of public concern.” The court recognized that “[e]mployee speech does not go unprotected simply because the chosen forum is private and addressed solely to others in the workplace. . . . But statements made privately in the workplace themselves must be of some public concern in order to be protected.” The fact that the plaintiffs had communicated their concerns to only a few university officials “underscores the internal nature of the dispute.”

Thus, the court concluded, consistent with the trial court, that the professors’ letters and statements “are most reasonably characterized as relating to

matters of personal interest. Plaintiffs were not speaking primarily as citizens, but as faculty members concerned about the private matter of the processes by which they were evaluated.”

Taken together, these cases illustrate how lower courts have adapted the U.S. Supreme Court’s directives in *Pickering* and *Connick* to the particular circumstances of higher education. Most important, these cases establish a framework for determining whether the speech at issue was on a matter of public concern. As discussed below, this framework, and much of the courts’ reasoning under *Pickering* and *Connick*, is insensitive to the shared governance context of higher education and may be criticized on numerous grounds.

First, these cases accord relatively little weight to the particular “context” of the speech. According to *Connick*, “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, *and context* of a given statement, as revealed by the whole record” (461 U.S. at 147–48) (emphasis added). The courts have generally used the same analysis in faculty cases that they use in cases involving other types of public employees, thereby attaching no significance to the special context of higher education. While there are many similarities between college and university employees and other public employees, there are also important differences. Primary among them are the special governance structure of higher education and the special status of academic freedom. When courts are inattentive to such matters, the strictness of the “public concern” test and the fact sensitivity and malleability of the balancing test may combine to chill the faculty member’s willingness to participate forthrightly in departmental and institutional debate.

Similarly, these cases employ a cramped version of the *Connick* distinction between speaking out as a “private citizen” and as a “public employee.” This distinction is useful in the general employment context, as in *Connick*, but in the higher education context it ignores the fact that shared governance requires professors to speak out as professionals on matters of institutional concern. Those who do so may enhance rather than threaten the operation of the institution. When a court ends its inquiry because the speech is not a matter of public concern, as strictly conceived in *Ayoub*, *Colburn*, and *Dorsett*, it never considers the vital participatory role professors may play in shared-governance systems or the constructive impact that speech about “institutional concerns” may have on institutional operations over the long run.

Perhaps most problematic, these cases assign excessive weight to whether the speech was communicated to the general public. The *Ayoub* opinion relied on a previous case (*Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1982)), in which the court, holding that First Amendment protections did not apply to a diary, “emphasized that [the claimant] made no effort to communicate its contents to the public.” Applying this reasoning to the professor’s claims, the *Ayoub* court noted that “[c]ertainly, [he] never attempted to air his complaints in a manner that would call the public’s attention to the alleged wrong.” Similarly, the *Colburn* court considered the fact that the professors had brought their concerns only to the attention of university officials and viewed this fact as underscoring the private, internal character of the speech.

This heavy emphasis on the audience of the speech, along with precious little emphasis on the subject matter, appears to conflict with the U.S. Supreme Court's holding in *Givhan* (Section 3.7.1). There, the Court made clear that the determination of whether speech is a matter of public concern does not depend on whether the communication itself was made in public or private. As an appeals court explained in *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988):

Although an employee's efforts to communicate his or her concerns to the public are relevant to a determination of whether or not the employee's speech relates to a matter of public concern, focusing solely on such behavior, or on the employee's motivation, does not fully reflect the Supreme Court's directive that the content, form, and context of the speech must all be considered. The content of the speech is notably overlooked in such an analysis. . . . Moreover, such a focus overlooks the Court's holding in *Givhan* . . . [855 F.2d at 727].

When courts ignore the nature of the higher education context while focusing on the "private citizen/public employee" distinction and the public/private context of the speech, they undercut the concepts of shared governance and collegiality. In the cases described above, the professors who followed administrative channels and did not communicate their criticisms to persons outside the institution did not receive First Amendment protection. Those professors who did communicate outside the institution, specifically to accrediting agencies, were afforded at least threshold First Amendment protections. These results seem to suggest that, to guarantee themselves protection under the First Amendment, faculty members should bypass internal administrative procedures and go directly to persons or agencies outside the institution. A First Amendment rule that would encourage, if not require, such behavior would conflict with the best interests and the customs of institutions that protect shared governance and collegiality.

In contrast to cases like *Ayoub*, *Dorsett*, and *Colburn*, other courts have occasionally applied the *Pickering/Connick* analysis in a manner that is more sensitive to the uniqueness of higher education and more hospitable to faculty members' academic freedom and free speech claims. One highly instructive example is *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985)—a case that avoids the problems characteristic of the cases above, and could serve as a model for later judicial developments. In declining to side with the university, the court found that the faculty member's speech was on matters of public concern; and although it then remanded the case to the trial court to apply the *Pickering/Connick* balancing test, the appellate court clearly signaled its inclination to give great weight to the faculty member's free speech interests.

The *Johnson* plaintiff was a chemistry professor challenging the termination of his tenure. The lawsuit grew out of a dispute within the university that began in 1977. At that time the university decided to make substantial reductions in its faculty. Led in part by the professor, the faculty responded with sharp criticism of both the university and its president. An initial lawsuit ensued, in which the faculty asserted that "various disciplinary actions had been taken in order to suppress

faculty criticism of university policy.” That case eventually was settled out of court. Four months later, the chemistry department chair initiated dismissal proceedings against the professor. The charges were based primarily on events related to the “rancorous, longstanding dispute within the chemistry department.” After a hearing, the presiding committee recommended the termination of the professor’s tenure. The university president accepted the committee’s recommendation, and the board of trustees upheld his decision. The professor thereupon sued in federal court, challenging the termination of his tenure on several grounds, including the ground that the termination was in retaliation for his statements about university policies and academic standards. The trial court focused both on the professor’s speech regarding disputes within the chemistry department and on letters he had written to the Middle States Association of Colleges and Schools regarding the university’s academic standards in general. Reasoning that disputes within the chemistry department were of interest only to those within the department and that the professor’s letters were “merely an outgrowth of his personal dispute with the university,” the trial court held that each of these speech activities concerned matters of “purely private concern” and therefore were not protected.

The appellate court vacated the trial court’s judgment, holding that it had erred as a matter of law in determining that the professor’s speech activities did not involve matters of public concern. First the court emphasized “that the mere fact that an employee’s statement is an ‘outgrowth of his personal dispute’ does not prevent some aspect of it from touching upon matters of public concern.” While the controversies within the department may have some personal aspects, other aspects are “concerned [with] questions of educational standards and academic policy of a scope broader than their application within the department.” As an example, the court quoted from a memorandum written by the professor regarding departmental standards: “I believe such grade inflation is a kind of crime against students, Lincoln University, and Black people. Standards of Black Colleges are always suspect and it took 50–60 years for Lincoln to earn a high reputation for quality education and high standards. . . . What [the department chair] has done is to encourage non-quality education and non-quality character. . . . A good reputation for academic quality was the only thing of value Lincoln ever had or ever will have” (776 F.2d at 452).

Commenting on this passage, the court asserted that “[i]t is difficult to imagine a theme that touches more upon matters of public concern.” The court then noted that the same theme was present in the professor’s letters to the Middle States Association, in which he criticized the standards of a master’s degree program at Lincoln because it did not require a bachelor’s degree. In these letters the professor “proceeded to connect the decline of academic standards at Lincoln with the demoralization caused by the suppression of academic freedom during the [prior] controversy, and encouraged the Middle States Association to investigate Lincoln.” The professor specifically emphasized “the vital importance of high educational standards to the future of mankind—and the special circumstances that make it a kind of crime to allow lower standards at Black institutions” (776 F.2d at 452).

Tracking the language of *Connick*, the court declared that “questions of academic standards are of ‘apparent . . . interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.’” As to the letters, the court stated that “it is difficult to see any distinguishing features between these letters and the one which the *Pickering* court held to be protected activity.”

The appellate court also found that the trial court erred in limiting its inquiry to the two types of speech activities identified above. The professor’s claims also included “his role in [the prior] litigation [against the university], his role in the underlying activities leading up to that litigation, his longstanding criticisms of [the current] administration’s academic policy, his newspaper articles proposing that Lincoln eliminate the F grade, his attempts to have other faculty members censured for allowing students to take advanced courses without passing the prerequisites, and his criticisms of his department chairman over academic standards.” The court observed that whether these items “touch[ed] upon matters of public concern seems hardly open to question.”

In remanding the case to the trial court so that it could undertake the *Pickering* balancing analysis, the appellate court provided considerable guidance. Quoting one of its own prior decisions, it noted that “‘even if there were some evidence of disruption caused by plaintiff’s speech, such a finding is not controlling. . . . *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scales.’” The appellate court further cautioned that “a stronger showing [of the employer’s justification] may be necessary if the employee’s speech more substantially involved matters of public concern.”

Of special interest, and in marked contrast to *Ayoub*, *Colburn*, and *Dorsett*, the *Johnson* court placed significant importance on the circumstances of the academic environment. It began by declaring that “[d]espite the inappropriateness of this forum for resolving issues of academic policy and academic freedom, we find ourselves reviewing charges [of wrongful] termination of tenure.” Then, after asserting the importance of context, and tracking the language of *Tinker v. Des Moines School District* (see Section 9.5.1 of this book), the court stated:

[It] is particularly important that in cases dealing with academia, the standard applied in evaluating the employer’s justification should be the one applicable to the rights of teachers and students “in light of the special characteristics of the school environment.” . . . In an academic environment, suppression of speech or opinion cannot be justified by an “undifferentiated fear or apprehension of disturbance,” . . . nor by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” [776 F.2d at 453–54, quoting *Tinker*; other citations omitted].

Some other courts after *Johnson* have similarly adopted a more sensitive approach to institutional affairs cases and have classified particular faculty speech within the “public concern” category. In *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988), for example, five disgruntled tenured professors in the mechanical

engineering department at Auburn University had continually opposed the personnel and administrative decisions of their department head. In anticipation of an accreditation review by the American Board of Education Technology, the professors distributed a survey to departmental faculty and students, to some alumni and administrators, and to the accreditation board. The professors compiled the data from these surveys into a report that discussed departmental problems, especially a morale problem, and was highly critical of the department head. Largely as a result of this report and related events that preceded and followed it, the university reassigned the five professors to other engineering departments, without loss of pay or rank.

The professors argued that reassigning them for having published the report violated their rights to freedom of speech. The district and appellate courts disagreed, upholding the reassignment. Applying *Connick*, the appellate court concluded that a portion of the professors' report was speech on matters of public concern because it would influence the public's perception of the quality of education at the university. The court then used the *Pickering* balancing test to weigh the professors' free speech interests in publishing the report against the report's "disruptive impact on the workplace." The report had "distracted both students and faculty from the primary academic tasks of education and research"; it was "produced in an atmosphere of tension created by the authors' longstanding grievance" against the department's administration; and the report's publication "contributed to a lack of harmony among the faculty and . . . severely hampered communication between the members of the faculty and the Department Head." The court therefore concluded that the report's "interference with the efficient operation of the [Mechanical Engineering] Department at Auburn was sufficient to justify the transfer[s]" and outweighed the professors' need to speak on matters of public concern.

In *Mumford v. Godfried*, 52 F.3d 756 (8th Cir. 1995), the appellate court relied on the U.S. Supreme Court's opinions in *Connick* and *Givhan* (Section 7.1.1 above) to reverse a trial court determination that a professor's speech was not on a matter of public concern. The professor had criticized his own department, the Department of Architecture at the University of Iowa. Speaking at various times with his colleagues, he had openly expressed his opinion that the department maintained a potentially unethical link with the Des Moines architectural professional community. In remanding the case to the trial court, the appellate court emphasized that the professor's statements did not lose their First Amendment protection merely because they were "only expressed to his colleagues," and that a speaker need not reach or intend to reach a "public audience" in order to be "acting as a concerned public citizen speaking on a matter of public interest."

In *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996), *affirmed on other grounds*, 1997 WL 33077 (4th Cir. 1997), the court relied on *Mumford* to conclude that an instructor's faculty meeting comments on the importance of addressing "diversity" in the classroom were "related to matters of public concern." The speech, "although curricular in nature, cannot be said to relate to matters solely of institutional or personal concern since it also speaks to the general

debate on multiculturalism that currently thrives in all quarters of American society” (911 F. Supp. at 1017).

Similarly, in *Bloch v. Temple University*, 939 F. Supp. 387 (E.D. Pa. 1996), the court held that a professor’s complaints about the condition of his physics laboratory “embodied matters of public concern.” The professor had made statements about “improper storage of toxic and unidentified materials” in the laboratory. The university argued that the speech was not protected because the professor was speaking as an employee and was not seeking to inform the public. In rejecting the university’s contention, the court emphasized that the professor’s statements could be public concern speech even though he “undeniably had a personal stake in the cleanup” of the laboratory and even though the statements “may have been the outgrowth of personal disputes within the department.”

Even when courts determine that a faculty member’s speech is not on a matter of public concern, they can do a better job of elucidating the distinction between public concern and private concern than courts have done in cases like *Ayoub, Dorsett, and Colburn. Clinger v. New Mexico Highlands University, Board of Regents*, 215 F.3d 1162 (10th Cir. 2000), is an instructive example. The plaintiff, an assistant professor, claimed she was denied tenure partly in retaliation for four exercises of free speech: first, her “advocacy before the Faculty Senate of a ‘no confidence’ vote with respect to four members of the Board of Regents in light of their purported failure to comply with an internal policy on the appointment of a new president”; second, her “comments before the Faculty Senate criticizing [a] Regent. . . as untrustworthy based on the presidential appointment process”; third, her “criticism of Selimo Rael for accepting the position of University President”; and fourth, her “criticism of a proposed academic reorganization purportedly in conflict with the Faculty Handbook and the Board of Regents policy manual.”

The appellate court agreed with the trial court that the professor’s speech was not on matters of public concern. According to the appellate court: “Speech concerning individual personnel disputes or internal policies will typically not involve public concern. However, speech that exposes improper operations of the government or questions the integrity of government officials clearly concerns vital public interests” (215 F.3d at 1166 (internal citations omitted)). Using these guidelines, the court found that the professor’s speech did not challenge “the integrity, qualifications, [or] alleged misrepresentations of a public official.” Rather, “plaintiff simply differed with the Board of Trustees on the internal process they followed in selecting a president and reorganizing the University. Rather than challenging the president’s actual credentials, the professor “merely faulted him for taking part in an allegedly unsatisfactory process.” The statements relating to the Regent’s integrity did not concern vital public interests because they were based solely on his role in the internal decision-making process. The court therefore held that the professor’s statements only challenged internal structures and governance and did not “transcend the internal workings of the university to affect the political or social life of the community” (quoting the court’s previous decision in *Bunger v. University*



of *Okla. Bd. of Regents*, 95 F.3d 987, 992 (10th Cir. 1996)) and that “[t]he First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate.”

More recent cases have raised cutting-edge issues concerning free speech claims arising in the context of heated or prolonged internal disputes. These cases follow upon and build upon the earlier *Johnson v. Lincoln University* and *Maples v. Martin* cases, both of which also involved protracted internal disputes. In *Webb v. Board of Trustees of Ball State University*, 167 F.3d 1146 (7th Cir. 1999), for example, a professor and former department chair was involved in ongoing disputes within his department. The court described the disputes as “internecine warfare” and the department as one “suffer[ing] a collapse of cooperation and decorum.” The professor claimed that the university had retaliated against him by stripping him of his departmental chairship, in violation of the First Amendment, for views he had expressed in the context of the departmental disputes. The appellate court affirmed the trial court’s denial of a preliminary injunction for the professor. Accepting both the trial court’s refusal to “disentangle the public and private aspects of the speech” and the trial court’s conclusion that the plaintiff’s speech had become “disruptive,” the appellate court announced this guideline for cases involving internal disputes:

Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting goals such as research and teaching. When the bulk of a professor’s time goes over to fraternal warfare, students and the scholarly community alike suffer, and the university may intervene to restore decorum and ease tensions. . . . Under the circumstances, the University’s right as employer to achieve the organization’s goals must prevail . . . [167 F.3d at 1150].

In another case decided by the same Circuit shortly after *Webb*, *Feldman v. Ho*, 171 F.3d 494 (7th Cir. 1999), the court rejected the free speech claim of a former professor whose contract was not renewed after he had precipitated an internal dispute by making accusatory statements about a departmental colleague. Like the court in *Webb*, and somewhat like the court in the earlier *Maples v. Martin* case, the court in *Feldman* held that the professor’s free speech interests were overcome by the university’s interests in protecting other faculty members from the distractions of an internal dispute. But the court added a significant, and potentially far-reaching, new twist to its analysis by asserting that the professor’s claims did not even deserve to be submitted to a jury:

[I]t does not follow that a jury rather than the faculty determines whether Feldman’s accusation was correct. . . . [T]he Constitution does not commit to decision by a jury every speech-related dispute. If it did, that would be the end of a university’s ability to choose its faculty—for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.

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If the kind of decision Southern Illinois University made about Feldman is mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech [171 F.3d at 495, 496, 497].

The court did take care to note, however, that its deference to the university's judgments "is limited to the kind of speech that is part of the [university's] mission":

Feldman's speech was neither unrelated to his job . . . nor unrelated to mathematics. . . . Feldman objected to the way the Mathematics Department handled its core business of choosing and promoting scholars. That task is both inevitably concerned with speech and so central to a university's mission that the university's role as employer dominates [171 F.3d at 497-498].

In contrast, in *de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002), the court sorted out various statements that a professor had made after he was removed as chair of the physics department at North Dakota State University (NDSU). The statements appeared in numerous letters that the professor wrote to the local newspaper, to the school newspaper, and to officers of the university, criticizing the university administration and various faculty members. These letters "expressed [the professor's] dissatisfaction with a variety of ongoing conflicts he was having with the department." Prior to his removal as chair, there had been, in the court's words, "several years of acrimonious relations between de Llano, the NDSU administration and his Physics Department colleagues." After the professor sent the letters, further events transpired, including a censure of the professor by his department, followed by his dismissal from the faculty. Challenging this dismissal in court, he argued that six of his letters constituted public concern speech protected under the *Pickering/Connick* line of cases. The court found that most of the statements in these letters were not on matters of public concern and therefore were not protected by the First Amendment:

[A]lthough couched in general terms, [these comments] related specifically to the ongoing feuds he was having with the defendants. His letters essentially amounted to publicly airing his dissatisfaction with his removal as chair of the physics department and the department's undervaluation of his strong commitment to research. . . . These are just a few examples of de Llano's pattern of publicly complaining about private disputes that were unique to him and not a matter of public concern [282 F.3d at 1036-37].

On the other hand, some of the statements in the letters "are properly characterized as issues of public concern." Examples included statements "criticiz[ing] the growing percentage of non-academic staff at NDSU" and statements "citing the rising salaries of NDSU administrators as evidence that money was being poorly spent." These statements qualified for protection, said the court, because "[w]e generally have held that speech about the use of public funds touches upon a matter of public concern" (282 F.3d at 1037). Despite this

finding in his favor, however, the professor did not prevail in his lawsuit because he had not proven that the public concern statements were “a substantial factor in the decision to terminate him.” (For discussion of this part of the case, see Section 7.6 below.)

Subsequently, another Circuit weighed in on the application of the *Pickering/Connick* line to speech issues arising from acrimonious internal disputes. *Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003), was actually the fourth in a line of helpful Tenth Circuit cases concerning the *Pickering/Connick* line’s application to intramural faculty speech.<sup>34</sup> Hulen was a tenured faculty member in the accounting and tax department at Colorado State University (CSU). According to the dean’s characterization, there had been “more than six years of divisiveness and dysfunction” within this department. In this context, Professor Hulen and other faculty members had sought to bring charges against another tenured faculty member in the department (“Dr. M.”), had pressed for an investigation of the charges, and had called for termination of Dr. M.’s tenure. The charges included “plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, [and] misuse of state funds” (322 F.3d at 1233). Hulen made statements supportive of an investigation and of the termination of Dr. M.’s tenure to various members of the university administration, in particular to his department chair and the university provost. When an investigation did take place, Hulen made statements criticizing its inadequacy. When Hulen and his colleagues allegedly received threats delivered to them by the “then-Accounting Department Chair, . . . who advised that his message was from the CSU Administration” (322 F.3d at 1233), Hulen wrote memos to the university president requesting an investigation of the alleged threats. Subsequently, Hulen was transferred to another department against his wishes. In his lawsuit, Hulen claimed that this transfer was in retaliation for various statements he had made in the context of the dispute concerning Dr. M., and that such retaliation for an exercise of free speech violated the First Amendment.

Beginning its analysis, the appellate court set forth this guideline: “Speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of [state] officials, in terms of content, clearly concerns matters of

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<sup>34</sup>The first of these cases is *Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 991–92 (10th Cir. 1996), in which the court determined that two untenured professors’ complaint about the exclusion of untenured faculty members from the graduate school’s administrative council was not public concern speech. The second case is *Gardetto v. Mason (Eastern Wyoming College)*, 100 F.3d 803 (10th Cir. 1996), in which the court held that a female professor’s speech regarding a no-confidence vote against the institution’s president and speech criticizing the president’s plan for reduction in force were matters of public concern. The third case is *Clinger v. New Mexico Highlands University Board of Regents*, 215 F.3d 1162 (10th Cir. 2000), in which the court distinguished *Gardetto* and determined that the faculty speech at issue was not on matters of public concern. (*Clinger* is discussed more fully earlier in this section.) A fifth case, decided after *Hulen*, is *Schrier v. University of Colorado*, 427 F.3d 1253 (10th Cir. 2005), in which the court determined that a department chair’s comments on a proposed relocation of the university’s health sciences center were on matters of public concern (427 F.3d at 1262–63). A careful comparison of these five cases and their facts should yield very useful insights concerning the difficult lines to be drawn between public and private concern speech in the arena of institutional affairs.

public import” (322 F.3d at 1237, quoting *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1998)). Applying this guideline to the facts in the record, the court determined that:

The speech in this case fairly relates to charges at a public university that plainly would be of interest to the public, e.g., plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and a claimed inadequate investigation of the allegations and alleged retaliation against those who made the allegations [322 F.3d at 1238, citing *Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988)].

The court thus ruled, at the first stage of the *Pickering/Connick* analysis, that Hulen’s speech was on matter of public concern. Furthermore, the court explained: “The fact that Dr. Hulen might receive an incidental benefit of what he perceived as improved working conditions does not transform his speech into purely personal grievances. Moreover, speech which touches on matters of public concern does not lose protection merely because some personal concerns are included” (322 F.3d at 1238).

At the second stage of the *Pickering/Connick* analysis, the court was unable to complete its analysis because the facts in the record were not yet sufficiently developed. The court did acknowledge, however, in a statement favorable to the professor, that “at this point in the proceedings, the evidence is far too general to link the actual disruption of the accounting department to Dr. Hulen’s protected speech.” The court also instructed that, in considering the university’s claims regarding disruption of the efficient operation of the department, the trial court should take into account “the inherent autonomy of tenured professors and the academic freedom that they enjoy” (citing Chief Justice Warren’s opinion and Justice Frankfurter’s concurrence in the *Sweezy* case, discussed in Section 7.1.4 above, as well as the “1940 Statement of Principles on Academic Freedom and Tenure,” discussed in Section 7.1.3 above).

All four of these cases—*Webb*, *Feldman*, *de Llano*, and *Hulen*—add to an understanding of *Pickering/Connick*’s application to free speech in the context of prolonged faculty-administration disputes. The *Webb* case provides a good general guideline on the threat to institutional interests that arises when a faculty member’s time is spent more on “fraternal warfare” than on teaching and scholarship duties. This guideline is useful only as a *general* guideline, however. In particular cases, postsecondary administrators, as well as the courts, must be on the alert not only for genuinely disruptive circumstances, but also for situations where discipline is selectively imposed upon some of the faculty members involved in a dispute but not others, based on the sides taken or the viewpoints expressed in the dispute. In such circumstances, the institution’s rationale of alleviating disruption may not be weighty enough to prevail in the *Pickering/Connick* balance.

The *Feldman* case, like *Webb*, provides a useful reminder of the important interests of the institution that may be at stake in divisive disputes. In *Feldman*, however, unlike *Webb*, the institution’s interest was not focused on the faculty

member's diversion of his own time and energy to the dispute at the expense of other faculty duties, but rather to the need to protect other faculty members from the distraction of a prolonged dispute. *Feldman* seems to overstate the case in this regard by its dictum that many faculty free speech claims arising from internal disputes do not even deserve to go to a jury. Surely there are faculty free speech claims, even in the Seventh Circuit, that deserve to go to a jury for various reasons—the primary one probably being that there are entrenched factual disputes about the causes, extent, and effects of the disruption; but the dictum in the *Feldman* case provides no basis for determining which claims deserve to go to a jury and which do not. Moreover, the *Feldman* court, in its second dictum set out above, suggests that the more related the professor's speech is to his or her professional job functions and expertise, the less protection his or her statements will have. This seems to turn an academic freedom claim on its head; it is usually when there is a close connection to the professor's professional duties and professional expertise that the academic freedom claim has the most credibility. Given these two difficulties with the court's reasoning, it is likely that the *Feldman* decision is best understood only as a decision that, in total, suggests that "institutional" academic freedom (or autonomy) will trump faculty academic freedom most, if not all, of the time in the area of institutional affairs.

The guidelines in the *Hulen* case are probably the most useful of any in the more recent cases about divisive internal disputes. The *Hulen* case is particularly helpful when compared with the earlier *Clinger* case, decided by the same circuit (*Clinger* is discussed above). In comparing the facts of those two cases, the court had to make fine judgments about the line between public concern and private concern speech in the context of internal faculty-administration disputes. The two cases together, therefore, provide an instructive illustration of how and where to draw that line in the difficult situations that typically arise in cases about prolonged disputes.

In all three of these cases, there appeared to be statements of private concern mixed in with the public concern statements that provided the basis for the faculty member's free speech claim. The three courts dealt with this problem in different ways. The *Webb* court, for instance, refused to "disentangle" the public and private concern aspects of the statements at issue in that case, apparently determining that the speech was sufficiently disruptive that the university would prevail at any rate in the second stage of the *Pickering/Connick* analysis. In contrast, the *de Llano* court carefully sorted through the various statements, but then asked whether the public concern statements were a cause of the university's action against the professor. The *Hulen* court, in a more nuanced opinion, also sorted the statements, determining that the public concern statements were the primary statements that the professor had made and were representative of the professor's primary motivation. Thus, the public concern statements would prevail, and the faculty member's claim would not fail simply because there would be some private benefit, or there had occasionally been some private motivation, for the faculty member's various statements made in the context of the heated dispute.

The case of *Sholvin v. Univ. of Medicine and Dentistry of New Jersey*, 50 F.Supp.2d 297 (D.N.J. 1998), provides another useful illustration consistent with *Hulen*. In this case, a tenured professor in the dental school had engaged in disputes with the school's administration that extended over several years and focused on various issues. Characterizing the case as one "where a faculty member during continuing disagreement with his department's administration and administrators addressed matters both of public and private concern," the court undertook to review and sort "the different categories of statements at issue here." The court also made clear that statements of public concern do not lose their protected character because they are made in the context of heated disputes or motivated in part by self-interest:

Plaintiff's apparent enmity for Buchanan, Catalanotto and other members of the NJDS [New Jersey Dental School] administration does not preclude a finding that some of this evidence was of public concern. Nor is it determinative that plaintiff was politically and/or otherwise allied with the Slomiany group. Many of his statements and expressions are in the realm of public concern and therefore may be entitled to First Amendment protection notwithstanding the personal disputes and interests which in part motivated plaintiff [50 F. Supp. 2d at 313, citing *Johnson*, 776 F.2d at 452].

On balance, nevertheless, the court determined that the disruptiveness of the plaintiff's expressive activities outweighed his interest in free speech.

Other cutting-edge issues about faculty intramural speech were raised in *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001). This case was different from most of the others above because it did not involve a faculty member's grievance about wages, benefits, or working conditions (as did cases like *Ayoub* and *Bloch* above) or a protracted internal dispute (as did cases like *Webb*, *Feldman*, *de Llano*, and *Hulen* above); instead it involved a faculty member's intramural speech in the context of one of the institution's official governance functions—the processing of student grievances. The only other cases above to focus on a particular governance process or particular structure of governance are the *Clinger* case, which focused on debates in the faculty senate, and the *Scallett* case, which involved a faculty member's statements during faculty meetings.<sup>35</sup> Different institutional interests may be implicated in such cases, compared to the interests articulated in most of the other cases above.

In *Bonnell*, a female student alleged that a male professor had used language in his English class that constituted sexual harassment. (See Section 7.2.2 above for this aspect of the case.) The student filed a letter of complaint with college officials, who then scheduled a meeting with the professor and provided him a copy of the complaint. According to the court, the professor "made copies of the Complaint and passed them out to the students in all six of his classes after redacting the complaining student's name, and also posted a copy of the Complaint on the bulletin board outside of his classroom." In addition, the

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<sup>35</sup>For another example of a case involving a faculty member's statements at a faculty meeting, see *Hall v. Kutztown University*, 1998 WL 10233, 75 Fair Empl. Prac. Cases 1440 (E.D. Pa. 1998).

professor “distributed copies of the Complaint to the more than two hundred College faculty members” along with his response to the charges in the form of “an eight-page essay entitled ‘An Apology: Yes Virginia, There is a Sanity Clause.’” (The “sanity clause” was a reference to the First Amendment’s free speech clause.)

After the college had disciplined the professor for distributing these materials, the professor filed suit, claiming that his distribution of the materials was protected by the First Amendment. The court first addressed the distribution of the complaint and then addressed the distribution of the “Apology,” in each instance agreeing that the distributions were “acts of expression” and then applying the *Pickering/Connick* analysis (see Section 7.1.1 above). Both the complaint and the apology, according to the court, covered matters of public concern. Regarding the complaint, “it is well-settled that allegations of sexual harassment, like allegations of racial harassment, are matters of public concern.” As to the apology:

[S]peech which sets forth the type of remarks that served as the catalyst to a sexual harassment complaint lodged against a college professor, and the professor’s reaction thereto, is speech which can “fairly be considered as relating to any matter of political, social, or other concern to the community.” *Connick*, 461 U.S. at 146 & 147–48. Said differently, the subject of profane classroom language which precipitates a sexual harassment complaint lodged against the instructor for his use of this language in relation to the First Amendment, as well as the sanctity of the First Amendment in preserving an individual’s right to speak, involves a matter of public import. . . . Stated more broadly, there is a public interest concern involved in the issue of the extent of a professor’s independence and unfettered freedom to speak in an academic setting [241 F.3d at 816–17].

Since the professor’s speech was on matters of public concern, the court proceeded to apply the *Pickering/Connick* “balancing” test. The court acknowledged that the professor’s interests in free speech and academic freedom on campus are “paramount,” but are nevertheless limited by the institution’s own academic autonomy (see Section 7.1.6 above). The college’s interests at stake were also strong and varied; the most important apparently were (1) “maintaining the confidentiality of student sexual harassment complaints,” (2) “prohibiting retaliation against students who file sexual harassment complaints,” and (3) “preserving a learning environment free of sexual harassment” and a “hostile-free learning environment.” Undertaking this “delicate” balance, the court determined that the college’s interests prevailed in the particular fact circumstances of this case.

**7.4.3. Intramural speech on extramural public affairs.** Whereas all the cases above concerned “intramural” speech, *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972), *affirmed in pertinent part*, 512 F.2d 109 (9th Cir. 1975), presents a different type of academic freedom problem. The case involved institutional affairs not in the sense that the speech concerned campus issues but rather in the sense that the professor’s on-campus speech

activities allegedly conflicted with his institutional responsibilities. Although the speech at issue did take place on campus, it concerned external public affairs rather than internal institutional operations. The case illustrates that, when campus speech regarding external affairs is at issue, the “public concern” test is easily met (compare *Jeffries v. Harleston* in Section 7.5.2 below) and the analysis will focus either on the *Pickering/Connick* balancing test (see Section 7.1.1 above) or on the *Keyishian* case’s concepts of “chilling effect” and “pall of orthodoxy” (see Section 7.1.4).

The plaintiff in *Starsky* was a philosophy professor who had taught at Arizona State for six years before the university dismissed him on a series of charges, some involving on-campus activity and others involving off-campus activity. (The charges in the latter category are discussed in Section 7.5 below.) After several incidents, generally involving the professor’s dissemination on campus of information about socialism, the board of regents directed the president to institute proceedings against him. The Committee on Academic Freedom and Tenure then held hearings and filed a report that concluded that the charges and evidence did not provide an adequate basis for dismissal. The board nevertheless terminated the professor’s employment, and the professor sought redress in the courts.

The federal district court held that the dismissal violated the professor’s constitutional right to free speech. One of the charges against the professor concerned his peaceful distribution of leaflets to other faculty members at the entrance to a faculty meeting. The leaflet was an “open letter” by a Columbia University student containing a philosophical and political discussion of activity taking place at Columbia. The university charged that the professor, in distributing the leaflet, had “failed to exercise appropriate restraint or to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge” (353 F. Supp. at 907). The court, quoting the academic freedom declaration from the *Keyishian* case, stated:

There is a serious constitutional question as to whether speech can be stifled because the ideas or wording expressed upset the “austere” faculty atmosphere [as one faculty member had complained]; certainly the board has no legitimate interest in keeping a university in some kind of intellectual austerity by an absence of shocking ideas. Insofar as the plaintiff’s words upset the legislature or faculty because of the contents of his views, and particularly the depth of his social criticism, this is not the kind of detriment for which plaintiff can constitutionally be penalized [353 F. Supp. at 920].<sup>36</sup>

A case from the Seventh Circuit, *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), illustrates the limits on judicial protection for intramural speech on external issues. The professor’s statements were made at an off-campus function involving the professor’s official duties rather than on the campus itself; but the

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<sup>36</sup>For a more recent problem concerning faculty speech on extramural affairs, arising in the aftermath of 9/11, see Robin Wilson, “CUNY Leaders Question Faculty Comments of Terror Attacks,” *Chron. Higher Educ.*, October 19, 2001, A11.



court's analysis would apparently have been the same if the statements had been made in a similar context on campus. The university had declined to renew the contract of the professor, a probationary assistant professor of psychology. The nonrenewal was due in part to certain complaints about the professor's behavior at an academic conference that he attended with several of his graduate students. Of primary concern were statements the professor had made at a late-night dinner while in the company of his graduate students and other conference attendees. According to the court, the professor "attempted to regale his dinner companions with a discussion of a documentary recently aired on a local television station concerning the sexual behavior of primates. [He] vociferously opined that there is a relationship between pregnancy, orgasms, and extramarital affairs and went on to advocate sex outside marriage and extramarital affairs" (319 F.3d at 881). The court declined to provide First Amendment protection for these statements under either the *Keyishian* case or the *Pickering/Connick* line of cases. Regarding the latter, the professor claimed that "his intent was to foster an academic debate over socio-biological theories of mating," and that his statements were therefore protected as matters of public concern. The court disagreed:

These statements were simply parts of a calculated type of speech designed to further [the professor's] private interests in attempting to solicit female companionship and, at the same time, possibly to irritate the other graduate students to whom he was speaking. . . . [T]he individuals seated at the table all agreed that [the professor's] off-color remarks were delivered in a flirtatious manner peppered with double entendres and ribald references [319 F.3d at 887].

Thus, the professor's statements regarding the sexual behavior of primates "failed to address an issue of public concern."

## ***Sec. 7.5. Academic Freedom in Private Life***

**7.5.1. In general.** Faculty members would seem most insulated from institutional interference when they are engaging in private activities or practices. These activities and practices may be purely personal, or may be of a professional nature but not part of or related to the faculty member's responsibilities as an employee of the institution. In such circumstances, especially the former, the faculty member may be acting as an ordinary citizen, protected by rights that an ordinary citizen may claim or that any public employee may claim. Disputes concerning a faculty member's private life may thus often be viewed more as "personal freedom" than "academic freedom" disputes. "Personal freedom" disputes may have ramifications for academic freedom, however, if the faculty member's private activity has a negative effect on the fulfillment of his or her teaching or research responsibilities, or if the institution imposes a penalty on the faculty member that infringes upon his academic freedom or "chills" the academic freedom of other faculty members. A 1987 AAUP report on the case of Jeannette Quilichini Paz, a tenured professor who had been dismissed from the Pontifical Catholic University of Puerto Rico (CUPR), is illustrative.

In this case, the university administration had dismissed Quilichini when it learned that she had remarried, even though her previous Catholic marriage had ended in civil divorce and had not been ecclesiastically annulled (“Academic Freedom and Tenure: The Catholic University of Puerto Rico,” *Academe*, May–June 1987, 33–38). Relying on church law, under which the remarriage was considered sinful, the university administration insisted that their Catholic faculty members must adhere to the laws of the church in both their academic and their private lives. In disapproving the dismissal, the AAUP investigating committee emphasized that “[t]he issue of direct concern in Professor Quilichini’s case, however, is not academic freedom but personal freedom. It was her private conduct rather than her conduct as a teacher and researcher or any intramural or extramural statements she may have made that was the administration’s ground for dismissal.” Yet the university administration’s action affected the academic freedom of all the university’s faculty members:

The administration of CUPR, in basing the dismissal of Professor Quilichini from her tenured position on vaguely stated religious standards not demonstrably related to professional performance, has placed in question the academic freedom of all faculty members at CUPR. The statement in the faculty manual that a faculty member is expected to “conduct himself in accordance with the values and ethical principles of the Catholic Church (both within and without the University) . . .” is subject to such broad interpretation that it would allow the administration to dismiss almost any faulty member at will [*Academe*, May–June 1987, 38].<sup>37</sup>

Because a faculty member’s private life may involve activities not traditionally thought of as academic freedom concerns, rights other than free speech rights may be implicated in this type of dispute. In *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), for instance, the court considered a state college’s authority to enforce faculty grooming regulations. The college had dismissed the plaintiff, a professor, when he refused to shave his beard. Relying on the due process clause and the equal protection clause, the court ruled in favor of the professor. In its analysis, the court first distinguished faculty members from certain other government employees with respect to grooming regulations: “Teachers even at public institutions such as San Jacinto Junior College simply do not have the exposure or community-wide impact of policemen and other employees who deal directly with the public. Nor is the need for discipline as acute in the educational environment as in other types of public service.”

The court then enunciated this rule for institutions seeking to impose grooming regulations on their teachers:

School authorities may regulate teachers’ appearance and activities only when the regulation has some relevance to legitimate administrative or educational functions. . . .

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<sup>37</sup>The professor subsequently sued the university, but the Puerto Rico courts ruled in the university’s favor (Docket No. RE-90-578, Supreme Court of Puerto Rico, June 27, 1997). The appellate court declined to rule on the professor’s claim concerning personal privacy, since it involved religious matters in which the court could not intervene.

The mere subjective belief in a particular idea by public employers is, however, an undeniably insufficient justification for the infringement of a constitutionally guaranteed right. . . . [It] is illogical to conclude that a teacher's bearded appearance would jeopardize his reputation or pedagogical effectiveness with college students [519 F.2d at 277].

Another aspect of faculty freedom in private life, and another application of the equal protection clause, is illustrated by *Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969).<sup>38</sup> The plaintiffs were part-time faculty members who also worked at a legal services office of the federal Office of Economic Opportunity (OEO). University administrators warned them that they would lose their jobs at the university if they continued to work at OEO. There was no evidence that the OEO jobs consumed any more time than the part-time jobs of other faculty members. The court ruled that it was unconstitutional for a state law school to prohibit some part-time faculty members from working part-time at outside legal jobs while allowing other faculty members to do so. In upholding the plaintiffs' right to work at the OEO office, the court used the equal protection clause in this way:

We are not willing to take the position that plaintiffs have a constitutional right to participate in the legal services program of the OEO, or in any other program. Nor do they have a constitutional right to engage in part-time employment while teaching part time at the Law School. No such right exists in isolation. Plaintiffs, however, do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class, i.e., members of the faculty of the University of Mississippi School of Law [420 F.2d at 502].

While this narrow reasoning was sufficient to uphold the plaintiffs' claim, other courts may be more willing to find a limited constitutional right to certain types of outside employment, as an aspect of First Amendment freedom of association or Fourteenth Amendment due process privacy rights, where such employment does not interfere with any substantial interest of the institution.

Other issues may arise concerning a faculty member's private behavior that offends the academic community's or broader community's conceptions of morality or propriety. The *Quilichini* case, discussed above, provides an example of this type of dispute. Other examples might involve allegations of extramarital sexual relationships, sexual "perversions," displays of racial or ethnic prejudices, sexual harassment not involving the campus community, or lying or misrepresentations in personal affairs—especially when such allegations, if proven, may constitute crimes. Such disputes about private behavior are more likely to arise in private institutions, especially religious institutions (as in the *Quilichini* case), than in public institutions. This is because private, and especially religious, institutions are more likely to have institutional missions that

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<sup>38</sup>For an AAUP report on this matter, see "Academic Freedom and Tenure: The University of Mississippi," *AAUP Bulletin* (now *Academe*), Spring 1970, 75–86.

arguably implicate matters of private conduct; and because private institutions have more legal leeway to regulate the private conduct of their faculties and staffs. Private institutions are not bound by the federal constitutional rights clauses that substantially limit public institutions' authority to regulate such matters. The Fourteenth Amendment's due process clause, for example, limits a public (but not a private) institution's authority to use moral judgments as a basis for regulating a person's "liberty" to live a private personal life (see generally *Lawrence v. Texas*, 539 U.S. 558 (2003)). Similarly, the First Amendment's establishment and free exercise clauses limit a public (but not a private) institution's authority to regulate a person's private religious practices or to regulate other aspects of a faculty member's private life in the name of religion (see generally Michael Perry, "Religion, Politics, and the Constitution," 7 *J. Contemp. Legal Issues* 407, 412–17 (1996)).<sup>39</sup> For such disputes in private institutions, then, any legal issues that arise are likely to be cast in terms of contract law (see Section 7.1.3 above and Section 7.8 below). AAUP policies will also be relevant, either as part of the faculty contract or (as in the *Quilichini* case) as the basis for an AAUP investigation.

**7.5.2. Extramural speech.** When a faculty member at a public institution engages in "extramural" speech in his or her private life and is penalized by the institution for this speech, the dispute is likely to implicate the First Amendment's free speech clause. The applicable legal principles will therefore be more like those used in Sections 7.2 through 7.4 than those immediately above in subsection 7.5.1; but the rights at stake may often be generic free speech rights rather than academic freedom rights. In *Starsky v. Williams*, for example (also discussed in Section 7.4.3 above), a faculty member at Arizona State University had made a television appearance in which he criticized the board of regents, calling its actions hypocritical, and had also issued a press release in which he criticized the board. These acts provided part of the basis for dismissing him from the university.<sup>40</sup> The district court, finding for the professor, stated:

In each of these communications, plaintiff spoke or wrote as a private citizen on a public issue, and in a place and context apart from his role as faculty member. In none of these public utterances did he appear as a spokesman for the University, or claim any kind of expertise related to his profession. He spoke as any citizen might speak, and the Board was, therefore, subject to its own avowed standard that when a faculty member "speaks or writes as a citizen, he should be free from institutional censorship or discipline" [353 F. Supp. at 920].

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<sup>39</sup>A private institution's authority would be limited to some extent, however, by the Title VII employment discrimination statute (see Section 5.2.1 of this book). But religious private institutions would be exempted from some of these Title VII requirements (see Section 5.5 of this book).

<sup>40</sup>The professor had also been charged with deliberately cutting a class in order to speak at a campus rally at another university. The court determined that he had broken no specific regulation by canceling the class and that such matters were usually handled informally within the department. The court chastised the board for selectively enforcing its general attendance policy against the professor in this particular instance and dismissed the charge.

The results may be different from those in *Starsky*, however, if the faculty member's extramural speech is not on a matter of public concern. In *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003) (also discussed in Section 7.4.3), for example, a university had denied reappointment to a professor and, in making this decision, had considered "all the facts and circumstances dealing with [the professor's] conduct during his three years as a non-tenured probationary employee at the University. . . ." Among these facts and circumstances were various charges and complaints about "boorish" and "unprofessional" behavior, often including statements or comments as a primary part of the behavior (319 F.3d at 883). One set of concerns, as the court described it, involved "off-color comments [the professor] made while he was attending parties, playing cards, or frequenting taverns around the University—such as his comment that he wanted to 'get his hands' on one graduate student and 'get naked' or 'drink some good beer' with another . . ." (319 F.3d at 887). The professor claimed that these comments were protected freedom of speech. The court disagreed, asserting that such comments were "casual, idle, and flirtatious chit-chat that may not form the basis of a First Amendment claim."

Moreover, under more recent precedents, the results in extramural speech cases may also differ from that in *Starsky* when the institution can make a connection between the extramural speech and an identifiable harm to the institution. The protracted litigation in *Jeffries v. Harleston* provides a leading example. A tenured professor and chair of the Black Studies Department at the City University of New York (CUNY) had made a controversial off-campus speech in the capacity of "an appointed consultant of the State Education Commissioner." While addressing the topic of reforming the educational system to promote diversity, the professor "made strident attacks against particular individuals, and made derogatory comments about specific ethnic groups" (828 F. Supp. at 1073). When CUNY subsequently removed the professor from his position as department chair, he claimed a violation of the First Amendment. The district court upheld a jury verdict in the professor's favor (820 F. Supp. 741 (S.D.N.Y. 1993), *motion to set aside jury verdict granted in part and denied in part, and permanent injunction granted*, 828 F. Supp. 1066 (S.D.N.Y. 1993)). Relying on *Pickering* and *Connick* (see Section 7.1.1), the court held that the speech was on a matter of public concern and that "Professor Jeffries's statements, when spoken outside the classroom, remain under the umbrella of constitutional protection, as long as those statements do not impede the efficient and effective operation of the College or University." Relying on the *Mt. Healthy* case (see Section 7.6 below), the court determined that the speech was "a substantial or motivating factor" in the university's decision to remove him as department chair. The court thus concluded that "[w]hile there may have been compelling and legitimate grounds upon which to discipline Professor Jeffries, the University chose to act upon illegitimate and unconstitutional grounds, specifically upon [the off-campus speech] and the publicity surrounding it." The appellate court affirmed the district court in all pertinent respects, remanding the case, however, for further proceedings regarding punitive damages (21 F.3d 1238 (2d Cir. 1994)).

The U.S. Supreme Court then granted the university's petition for review of the appellate court's opinion and, upon review (513 U.S. 996 (1994)), remanded the case to the lower courts for reconsideration in light of the Court's 1994 decision in *Waters v. Churchill* (see Section 7.1.1). After reconsideration, and relying on the Supreme Court's ruling in *Waters*, the appellate court reversed its earlier decision and ordered the district court to enter judgment for the defendants (*Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995)). (For contrasting critiques of the case, see Richard Hiers, "New Restrictions on Academic Free Speech: *Jeffries v. Harleston II*," 22 *J. Coll. & Univ. Law* 217 (1995); and Stephen Newman, "At Work in the Marketplace of Ideas: Academic Freedom, the First Amendment, and *Jeffries v. Harleston*," 22 *J. Coll. & Univ. Law* 281 (1995); and see also Michael Sherman, "The Leonard Jeffries Problem: Public University Professor/Administrators, Controversial Speech, and Constitutional Protection for Public Employees," 30 *Loyola U. Chi. L.J.* 651 (1999).)

In reversing its earlier decision, the appellate court in *Jeffries* did not revise its determination that the professor's speech was on a matter of public concern. Instead the court focused on the *Pickering/Connick* balancing test, determined that *Waters* had clarified this test in a way favorable to employers, and then reworked its balance of factors. According to the appellate court:

Even when the speech is squarely on public issues—and thus earns the greatest constitutional protection—*Waters* indicates that the government's burden is to make a substantial showing of *likely* interference and not an *actual* disruption. [W]hittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. By stressing that *actual* disruption is not required, *Waters* pulls a crucial support column out from under our earlier *Jeffries* opinion [52 F.3d at 13 (emphasis in original)].

Guided by this reading of *Waters*, the appellate court reviewed the jury's findings in the trial record and concluded that a majority of the defendants had "a reasonable expectation that the [off-campus] speech would harm CUNY"; and that a majority of the defendants were motivated by this "reasonable prediction of disruption," and not by a "retaliatory animus," when they demoted Jeffries. The court struck the balance in favor of the university by concluding (without any elaboration) that the university's concern about the potential disruptiveness of the speech was sufficient to outweigh Jeffries's interest in free speech.

The court did not mention academic freedom until the conclusion of its analysis. In a cryptic and enigmatic paragraph, the court noted that Jeffries's position as department chair was "ministerial" and "provided no greater public contact than an ordinary professorship," and that the university has not tried to silence "or otherwise limit [Jeffries's] access to the 'marketplace of ideas' in the classroom." Jeffries therefore did not have a viable "academic freedom" claim (52 F.3d at 14–15).

The *Jeffries* court’s reasoning provides precious little guidance on how to make the various sensitive determinations required by its analysis. To reach its ultimate conclusion, the court had to determine that university officials’ beliefs or predictions about the impact of Jeffries’s speech were reasonable (rather than unreasonable), that university officials took action against Jeffries because of the potential impact his speech would have on university operations (rather than because of their dislike of the content of the speech), and that the potential disruptiveness of the speech outweighed its First Amendment value (rather than the speech outweighing the potential disruptiveness). The opinion sets forth neither a methodology for making these determinations nor a substantive justification for the court’s conclusions—other than statements on the need to defer to the university.

It is especially difficult to determine how the *Jeffries* court distinguished between reasonable concerns about disruption and improper retaliatory motives. The problem seems to be with the court’s formulation of the issues: the university could not constitutionally discipline Jeffries for the content of his speech, yet it would not have had reason to discipline him without the speech. It was the speech that created the potential disruption. At most large universities, it would be hard to imagine “public concern” speech that would not stir any concerns regarding potential disruption of some university interest. The point at which mere offense at a particular message moves to a reasonable concern for university operations is not altogether clear. It is also not clear what types of impacts would be considered disruptions. Certainly the more extreme cases are imaginable—for example, the loss of substantial financial support directly attributable to the speech could be a disruption—but what of smaller financial losses, or losses attributable to a mix of factors? Or a small potential decline in student applications to a particular department? Or a student demonstration in reaction to the speech?

As used in *Jeffries*, the *Waters* concept of “potential” disruption seems to give colleges and universities wide discretion in controlling faculty members’ extramural speech. Even if the university concluded that Professor Jeffries had engaged in hate speech off campus, why was it reasonable to believe that this speech would disrupt university operations? And, if it was reasonable to conclude that Jeffries’s speech would disrupt university operations, then would it be reasonable to believe that all unpopular speech has a similar potential to disrupt? Neither *Waters* nor *Jeffries* provides any sound guidance on where and how to draw these lines, suggesting only the cursory standard of “reasonable belief.”

Some structure could be added to the analysis if the issues regarding retaliatory motives were treated as analogous to the causation issues addressed in the *Mt. Healthy* line of cases (see Section 7.6 below). When the case concerns a single speech or a related pattern of speeches on matters of public concern, and the faculty member has been terminated for this speech, the court must determine whether the speech can be separated into disruptive (unprotected) and nondisruptive (protected) portions. If the nondisruptive portions of the speech are the cause of—or motivation for—the termination, then the termination is

invalid. If the court can identify portions of the speech that were disruptive, however, the university should have to show a causal link between these particular statements and some particular (potential) disruption. Absent any such link, it would be reasonable to conclude that the university was motivated by its disagreement with, or its taking offense at, the speech, and that the termination was an act of retaliation rather than a well-considered attempt to protect university interests from disruption.

In *Waters*, Justice O'Connor, citing *Mt. Healthy*, used a similar analysis that provides helpful guidance for recognizing and resolving retaliation issues in cases like *Waters* and *Jeffries*. According to Justice O'Connor:

Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation. Churchill had criticized the [hospital's] cross-training policy in the past; management had exhibited some sensitivity about the criticisms; Churchill pointed to some other conduct by hospital management that, if viewed in the light most favorable to her, would show that they were hostile to her because of her criticisms. A reasonable factfinder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier. If this is so, then the court will have to determine whether those statements were protected speech, a different matter than the one before us now [511 U.S. at 681–82].

The opinions in *Scaliet v. Rosenblum*, discussed in Section 7.6 below, also develop a helpful relationship between retaliation analysis and the *Mt. Healthy* analysis.

Not all courts will be as deferential to a university's predictions of disruption as was the court in *Jeffries*. For instance, in *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*), the court issued this warning:

The government employer must make a substantial showing that the speech is, in fact, disruptive before the speech may be punished. *Waters v. Churchill*, 511 U.S. 661, at 674 (1994). We recognize that the government, as an employer, has broader powers in suppressing free speech than the government as a sovereign. Indeed, we have given some deference to an employer's predictions of workplace disruption. *Id.* However, we have never granted any deference to a government supervisor's bald assertions of harm based on conclusory hearsay and rank speculation.

Even if we were to attempt [in this case] to balance the plaintiffs' free speech rights against the purported disruption of the pedagogical tasks of [the university], it is clear that the impact of the speech on [the university's] mission is totally unproven and unaddressed except in the most conclusory fashion. There is simply no evidence that establishes a nexus between the [speech] and an exacerbated climate of fear on the campus or, more importantly, that establishes a relationship between the [speech] and a decrease in the efficiency and effectiveness of [the university's] educational mission [119 F.3d at 680].



### ***Sec. 7.6. Administrators' Authority Regarding Faculty Academic Freedom and Freedom of Expression***

The discussions in Sections 7.1 through 7.5 above make clear that academic freedom and freedom of expression are areas in which the law provides few firm guidelines for college and university administrators—particularly those in private institutions, since the decided cases are mostly constitutional decisions applicable only to public institutions. The constitutional cases themselves are sometimes incompletely reasoned or difficult to reconcile with one another. Moreover, because these cases often depend heavily on a balancing of faculty and institutional interests in light of the peculiar facts of the case, it may be difficult to generalize from one case to another. Thus, institutions need to develop their own regulations on academic freedom and free expression, and their own internal systems for protecting academic freedom and free expression in accordance with institutional policy and the applicable law. The AAUP's guidelines (see Sections 7.1.3 & 14.5 of this book) often can be of assistance in this endeavor.

As the discussions in Sections 7.1.4 and 7.2.4 above suggest, administrators and counsel at public institutions must ensure that the institution's academic freedom policy and its faculty conduct regulations avoid the constitutional dangers of "overbreadth" and "vagueness" (see generally Section 6.6.1). Institutional policies and regulations should also protect faculty members from penalties imposed on the basis of their viewpoints (that is, viewpoint discrimination). In addition, policies and regulations must provide for procedural due process protections in situations where their application would deprive a faculty member of a "liberty" or "property" interest (see Section 6.7.2). Although these constitutional requirements bind only public institutions, they may provide useful guidance for private institutions as well.

For both public and private institutions, faculty handbooks and related documents may provide some guidance for administrators, and contract law will likely impose some limitations on administrators' authority to regulate academic freedom (see Section 7.1.3 above). The importance and usefulness of those limits, however, will depend on the particular terms of the institution's contract with its faculty members (see Section 6.1). Express academic freedom clauses, or clauses incorporating AAUP guidelines, may create substantial limits on administrative authority—and also substantial guidance for resolving disputes. So may contract clauses establishing procedural safeguards that must precede adverse personnel actions (see Sections 6.7.1, 6.7.3, & 6.7.4) and clauses establishing "for-cause" standards that limit administrative discretion to terminate the contract (see Sections 6.6.1 & 6.6.2).

For public institutions, the constitutional law cases, for all their difficulties, do provide other guidance and also further restrict administrators' authority to limit faculty academic freedom. Despite continuing disagreements among courts, there are cases that protect faculty academic freedom and that recognize limits on that freedom in all three internal arenas of concern: teaching (Section 7.2 above), research and publication (Section 7.3), and institutional affairs

(Section 7.4 above). Beyond these three internal arenas, faculty members have considerable freedom in external arenas to express themselves on public issues as private citizens, to associate with whom they please, and to engage in outside activities of their choice on their own time. In general, whether in an internal or external arena, administrative authority over faculty members' behavior or activities increases as their job-relatedness increases and as their negative impact on the educational process or other institutional functions increases.

Using all these contractual and constitutional, internal and external, sources of guidance, administrators should carefully avoid any reliance on an activity or behavior protected by academic freedom whenever they are deciding to terminate or discipline a faculty member or to deny tenure, promotion, or a contract renewal. Sticky problems can arise when the faculty member has engaged in possibly protected activities but has also engaged in unprotected activities that might justify an adverse personnel decision. Suppose, for instance, that a faculty member up for renewal has made public statements critical of state policy on higher education (probably protected) and has also often failed to hold his classes as scheduled (unprotected). What must an administrator do to avoid later judicial reversal of a decision not to renew?

The U.S. Supreme Court addressed this problem in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a constitutional case binding on public institutions but providing guidance for private institutions as well. The plaintiff schoolteacher had made statements regarding school policy to a radio broadcaster, who promptly broadcast the information as a news item. A month later the school board informed the teacher that he would not be rehired and gave the radio broadcast as one reason. It also gave several other reasons, however, including an incident in which the teacher made an obscene gesture to two students in the school cafeteria. The Supreme Court determined that the radio communication was protected by the First Amendment and had played a substantial part in the nonrenewal decision, but that the nonrenewal was nevertheless valid if the school board could prove that it would have declined to rehire the teacher even if the radio incident had never occurred:

Initially, in this case, the burden was properly placed upon . . . [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. [The teacher] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by preponderance of the evidence that it would have reached the same decision as to . . . [the teacher's] reemployment even in the absence of the protected conduct [429 U.S. at 287].

Numerous court decisions have applied the *Mt. Healthy* test to public post-secondary education in situations where both proper and improper considerations are alleged to have contributed to a particular personnel decision. In an early case, *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), the plaintiff, a junior college instructor, claimed that her contract had not been renewed because of her political and union activities, which were protected

activities under the First Amendment. The college responded that the instructor had not been rehired because of declining enrollment and poor evaluation of her work. After a jury trial, the jury agreed with the instructor and awarded her \$23,400 in back pay. In affirming the jury verdict, the federal appeals court issued an opinion illustrating what administrators should *not* do if they wish to avoid judicial invalidation of their personnel decisions:

There was ample evidence to support the jury finding that Mrs. Goss had not been rehired “because of her political and/or professional activities.” Dr. Spencer [the president of the college] testified that, when Mrs. Goss sought to organize a local chapter of the National Faculty Association, he distributed by campus mail a faculty newsletter expressing his concern about the organization, while denying proponents of the National Faculty Association the privilege of distributing literature by campus mail. Mrs. Goss testified that, after her husband had filed a petition to run for a seat on the Board of Regents, Dr. Carl Burney, chairman of the Division of Social and Behavioral Sciences, advised her to have her husband withdraw from the election. In deposition testimony, Dr. O. W. Marcom, Academic Dean, stated that, when Mrs. Goss presided at an organizational meeting of a local chapter of the Texas Junior College Teachers Association in the spring of 1971, he attended and voiced his objection to the group. Dr. Spencer himself testified by deposition that he had recommended the nonrenewal of Mrs. Goss’s contract to discipline her for “creating or trying to create ill will or lack of cooperation . . . with the administration.”

There was sufficient evidence to support the jury finding that “matters other than Mrs. Goss’s political and/or professional activities” were not responsible for the Board of Regents’ action. Appellants justified the nonrenewal of Mrs. Goss’s contract on the grounds that declining enrollment necessitated a staff reduction and that Mrs. Goss received a poor evaluation from Dr. Edwin Lehr, Chairman of the History Department, and Dr. Burney. Although Dr. Spencer had recommended a reduction of three faculty members in the History Department, Mrs. Goss was one of four faculty members in the History Department in 1971–72 who did not teach at San Jacinto Junior College in 1972–73.

Furthermore, Dr. Lehr’s evaluation of Mrs. Goss, upon which Dr. Spencer allegedly relied in making his recommendation to the Board of Regents, was inconsistent with the objective criteria established for the rating. The criteria by which the teachers were rated include the number of years of teaching at San Jacinto Junior College, enrollment in a doctoral program, the number of doctoral-level courses completed, the percentage of the teacher’s students earning credits, and other factors. Mrs. Goss was not awarded five points to which she was entitled on the objective scale for academic courses she had taken while employed as an instructor. Thus, she was assigned eighty points, rather than eighty-five. If she had been awarded the points to which she was entitled, she would have ranked in the middle of the seventeen history instructors rather than in the bottom three [588 F.2d at 99–100].

Evidence of an intrusion into academic freedom is not always as clear as it was to the court in *Goss*, however, and postsecondary institutions have often emerged victorious in court. In *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. 1981), for example, the court considered whether a university president had denied

merit raises to a group of tenured professors because they had lobbied for increased salary appropriations at the state legislature (protected) or because of their lack of merit (unprotected). Only one of the eight original plaintiffs ultimately prevailed on appeal. In *Hillis v. Stephen F. Austin State University*, 665 F.2d 547 (5th Cir. 1982), the court considered whether the contract of a non-tenured faculty member had not been renewed because of his private criticism of his superiors (apparently protected) or his insubordination and uncooperativeness (unprotected). After losing at trial, the university prevailed on appeal. In *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979), *appeal after remand*, 662 F.2d 439 (6th Cir. 1981) (further discussed in Section 2.2.1), the court considered whether a faculty member had been denied tenure because of his criticism of the department's curriculum (protected), his election to the departmental advisory committee (protected), or his unsuitability for the multidisciplinary emphasis of the department (unprotected). After extended litigation, the university eventually emerged victorious. In *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *affirmed*, 704 F.2d 139 (4th Cir. 1983), the court considered whether the University of Maryland refused to appoint the plaintiff as department chair, after his selection by a search committee, because he held Marxist political views (protected) or because he lacked the necessary qualifications to develop the department according to the university's plans (unprotected). The university prevailed at trial and on appeal. (Compare *Cooper v. Ross*, 472 F. Supp. 802 (D. Ark. 1979).) In *Harden v. Adams*, 841 F.2d 1091 (11th Cir. 1988), the court considered whether a professor's tenure had been terminated because he helped maintain discrimination charges against the university and helped organize a chapter of a state education association (protected) or because he quarreled with supervising faculty members and sought to draw students into the disputes, caused dissension within the faculty, neglected faculty duties, and violated minor institutional rules (unprotected). The court concluded that the latter reasons had been the basis for the termination. And in *Nicholas v. Pennsylvania State University*, 227 F.3d 133 (3d Cir. 2000), the court considered whether a tenured faculty member had been terminated because of his criticisms of his supervisor (possibly protected) or because of his excessive outside consulting work (unprotected). The appellate court upheld a jury verdict in favor of the university.<sup>41</sup>

As these cases illustrate, and as *Mt. Healthy* provides, there are two ways in which public postsecondary institutions can win their cases even if the faculty member has engaged in speech on a matter of public concern. First, the institution

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<sup>41</sup>The *Nicholas* case, like the *Goss* case discussed above, illustrates the important role that juries may play in litigation raising issues of "causation" (the "cause" of the institution's adverse action against the faculty member) or "motive" (the institution's "motive" for its adverse action). Causation and motive are largely fact determinations and thus within the province of the jury. The respective burdens of proof imposed upon the parties by *Mt. Healthy* (above) is therefore a critical consideration, as is the means available to the parties to prove or disprove causation or motive. The trial judge's instructions to the jury are also a critical consideration. On appeal in the *Nicholas* case, the professor challenged the accuracy of the jury instructions, but the appellate court rejected the challenge and upheld the instructions.

will prevail if the faculty member fails to meet his or her burden of proving that the public concern speech was “a substantial factor” or “motivating factor” in the institution’s decision; and second, the institution will prevail if it carries its burden of proving “that it would have reached the same decision [regarding the faculty member] even in the absence of the protected [speech]” (*Mt. Healthy*, above). The first alternative is illustrated by *de Llano v. Berglund*, and the second alternative is illustrated by *Scaliet v. Rosenblum*, both of which are discussed below.

In *de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002), the professor demonstrated that some of the comments in letters he wrote were on matters of public concern (see Section 7.4, above, for this aspect of the case), but he nevertheless lost because “there is no evidence in the record that these few comments on matters of public concern were a substantial or motivating factor in the decision to terminate him.” According to the court:

We are unable to ascertain any evidence that [de Llano] was terminated because of the letters he wrote to the various venues. The dismissal notice given to de Llano outlines a number of reasons for his termination, and those reasons were substantiated in two separate hearings. Not one of the reasons stated for his termination related to de Llano’s letters. . . . We conclude that as a matter of law, even when viewed in the light most favorable to the plaintiff, the record establishes that de Llano failed to meet his burden of showing that his letters were a substantial factor in the decision to terminate him [283 F.3d at 1037].

In *Scaliet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996), *affirmed*, 197 WL 33077 (4th Cir. 1997) (unpublished), an instructor at the University of Virginia’s Darden Graduate School of Business (Darden) claimed that the university refused to renew his contract in retaliation for speaking out on matters of public concern. Three categories of speech were at issue: (1) the professor’s classroom discussions on the importance of “diversity” in education programs and in the corporate world; (2) the professor’s advocacy in faculty meetings regarding diversity issues and concerns; and (3) articles and cartoons the professor had placed on his office door. The district court determined that only the latter two categories were protected speech (see Sections 7.2.2 & 7.4). The instructor then had to demonstrate, as required by the *Mt. Healthy* case above, that the speech in these two categories was a “motivating factor or played a substantial role” in the contract nonrenewal; the court apparently accepted that the instructor’s evidence did show “some . . . illegal motivation.” Nevertheless, the defendants had demonstrated that the speech at issue “was not the ‘but for’ cause of his nonrenewal.” Rather, the reasons for the nonrenewal were the instructor’s “[f]ailure to observe and follow [the] institutional determination of which courses should embrace which matters within the particular course curriculum,” which led to “disaffections of the other [departmental] instructors” and “strong complaints about [the instructor’s] personal interrelations with those instructors.”

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision. The appellate court noted that there had been various complaints to the effect that the instructor had “a confrontational style that made the other writing teachers feel physically and emotionally threatened, and

that did, as the district court said, border on sexual harassment.” This, the appellate court determined, was the reason for the discharge, and not the desire to retaliate against the instructor for the protected speech.

By placing burdens on faculty members who assert violations of academic freedom or freedom of expression, *Mt. Healthy* and its progeny give administrators at public institutions breathing space to make sound personnel decisions in situations where faculty members may have engaged in protected activity. Administrators in private institutions already have such breathing space, and more, since they are not limited by the First Amendment; but they may nevertheless wish to use their breathing space in the way that is suggested below.

The goal for administrators, of course, is to make personnel decisions untainted by any consideration of protected expression or other illegitimate factors implicating academic freedom. But in the real world, that goal is not always attainable, either because under current legal standards it is difficult to determine whether particular expression is protected or because events involving conduct protected by academic freedom are so widely known that administrators cannot claim to have been unaware of them at the time they made their decision. In situations where both protected and unprotected conduct has occurred, administrators can still avoid judicial invalidation if they make sure that strong and dispositive grounds, independent of any grounds impinging academic freedom, exist for every adverse decision, and that such independent grounds are considered in the decision-making process and are documented in the institution’s records.

Administrators should also consider what procedures they will use in investigating situations that could give rise, or have given rise, to a claim of an academic freedom violation. The need to investigate in order to resolve factual disputes, and to clarify the nuances of what may be subtle and complex circumstances, may be especially great when the institution is contemplating disciplinary action against a faculty member because of activities that he or she may claim are protected by academic freedom. The U.S. Supreme Court’s decision in *Waters v. Churchill*, 511 U.S. 661 (1994) (discussed in Section 7.1.1 above), underscores the need for caution in such situations and provides some (although murky) guidance to public employers regarding investigations in cases with First Amendment overtones. In *Waters*, a hospital had discharged a nurse based on a third-party report that she had made disruptive statements concerning the hospital to a coworker. There was a fact dispute about the content of these statements; in the nurse’s version, the statements were on matters of public concern protected under the *Connick* case (Section 7.1.1 above). Although the Justices were splintered, a majority apparently did agree that, in these circumstances, the employer had a duty to conduct a “reasonable” investigation of the facts and could not dismiss the employee unless it had a “reasonable” belief that the third party’s or the employer’s version of the facts was accurate (see 511 U.S. at 682–86 (concurring opinion of Justice Souter)).

While the *Mt. Healthy* case and the *Waters* case, as First Amendment precedents, bind only public institutions, they can guide private institutions in establishing review standards for their own internal investigations of personnel

disputes; and they may, by analogy, assist courts in reviewing academic freedom claims based on a contract theory (see Section 7.1.3).

In addition to fair and probative investigatory processes, both public and private institutions will want to have well-conceived and well-drafted dispute resolution processes, such as grievance mechanisms and mediation, for resolving conflicts concerning academic freedom (see generally Section 2.3). Such dispute resolution mechanisms must be accompanied and supported by sound written policy statements and regulations on academic freedom—that is, policies that are both respectful of national and local custom and usage on academic freedom and sensitive to the particular needs of the institution. A key to the success of dispute resolution mechanisms and accompanying policies is the ability to accommodate the mix of legitimate interests that are likely to be at stake in academic freedom disputes. Interests of faculty members, students, and the institution, for instance, may all be involved in the same dispute; similarly, both the rights and the responsibilities of these stakeholders are likely to be involved. Successful dispute resolution and successful accommodation, in short, require recognition that all interests at stake must to some extent be limited to allow some room for the other legitimate interests; and that freedom entails both rights and responsibilities, each of which must be accounted for in resolving disputes. Thus institutions should strive for policies and processes that provide vigorous protection of the faculty’s (and students’) academic freedom as well as acceptance of the “duties correlative with rights” that accompany academic freedom (see the “1940 Statement of Principles on Academic Freedom and Tenure,” in *AAUP Policy Documents and Reports* (9th ed., 2001), 3–4, 5 (under comment 1)).

### ***Sec. 7.7. Protection of Confidential Academic Information: The “Academic Freedom Privilege”***

**7.7.1 Overview.** A difficult and divisive academic freedom problem for post-secondary faculty members and administrators is whether courts or administrative agencies may compel faculty members or their institutions to disclose confidential academic information if such information is relevant to issues in litigation. Faculty members may confront this problem if they are asked to provide a deposition, to answer interrogatories, or to be a witness in ongoing litigation, or if they are served with a subpoena or a contempt citation or are otherwise ordered by a court or administrative agency to surrender information within their control.

Administrators may become entwined in the problem if the institution seeks to assist a faculty member with such matters or, more generally, if the institution seeks to monitor institutional affairs so as to avoid litigation. Although faculty members and administrators may disagree on how best to respond to demands for confidential information, the primary clash is not between members of the academic community—as in the cases in Sections 7.2 through 7.6—but between the academic community, on the one hand, and the courts, administrative agencies, and opposing litigants on the other.

Issues related to the protection of confidential information tend to arise in two contexts: (1) requests to disclose the views of individual evaluators of faculty performance at the time that reappointment, promotion, or tenure decisions are made; and (2) the demand that unpublished data or research findings be released against the will of the researcher. These issues are examined in Sections 7.7.2 and 7.7.3.

**7.7.2. Personnel issues.** Many colleges and universities rely on the judgments of a faculty member's peers—either colleagues within the institution or experts in the faculty member's discipline from other institutions—to assess the quality of that individual's scholarship, teaching, and service and to recommend whether reappointment, promotion, or tenure should be conferred. Historically, candidates have not been given access to peer evaluations at many institutions; in fact, many external reviewers have been willing to provide candid judgments about a faculty member only if the institution provided assurances that the candidate would not have access to the evaluation. Institutions, their faculty, and external evaluators have argued that confidentiality is essential to encourage candor. On the other hand, candidates denied reappointment, promotion, or tenure have argued that refusing to give them access to the confidential evaluations upon which a negative decision may have been based is unfair and restricts their ability to challenge what may be an unlawful decision in court. Although this latter view prevailed in a decision of the U.S. Supreme Court, which required a university to disclose “confidential” evaluations to the Equal Employment Opportunity Commission (EEOC) (*University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990)), it took ten years of litigation and a sharp division among the federal appellate courts to obtain an answer to this dilemma.<sup>42</sup>

The official beginning of judicial attention to this issue occurred when a trial court had ordered a University of Georgia professor serving on a faculty review committee to reveal and explain his vote on a promotion and tenure application that the committee had rejected. The professor refused, citing an “academic freedom privilege.” The appellate court (in *In re Dinnan*, 661 F.2d 426 (11th Cir. 1981)) rejected the professor's claim to an academic freedom privilege, stating that no constitutional issues were involved, and that Professor Dinnan was claiming a privilege that had never been recognized by any court.

While recognizing the significance of academic freedom, the court characterized Dinnan's claim as seeking to suppress information, and stressed the potential for frustrating the plaintiff's attempt to ascertain the reasons for her tenure denial. “This possibility is a much greater threat to our liberty and academic freedom than the compulsion of discovery in the instant case” (661 F.2d at 431).

The opinion demonstrates apparent irritation with Dinnan's claim that forcing disclosure of votes and evaluations will harm colleges and universities:

We fail to see how if a tenure committee is acting in good faith, our decision today will adversely affect its decision-making process. Indeed, this opinion should work to reinforce responsible decision-making in tenure questions as it

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<sup>42</sup>Cases are collected in Martin J. McMahon, Annot., “Academic Peer Review Privilege in Federal Court,” 85 A.L.R. Fed. 691.



sends out a clear signal to would-be wrongdoers that they may not hide behind “academic freedom” to avoid responsibility for their actions. . . . Society has no strong interest in encouraging timid faculty members to serve on tenure committees [661 F.2d at 431–32].

The court therefore affirmed the trial court’s orders that Dinnan answer deposition questions about his committee vote and that he be fined and jailed for contempt if he continued to refuse. Dinnan again refused, and the court ordered him jailed. He arrived at the jail dressed in full academic regalia.

Although the point of view expressed in *Dinnan* foreshadowed the unanimous opinion of the U.S. Supreme Court in the *University of Pennsylvania* decision, nine years would elapse and several more appellate decisions would consider this issue before the high court resolved it.

The following year, another court, in *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), reached the same result as *Dinnan*, but on much narrower grounds, and left the door open for the creation of such a privilege under appropriate circumstances. Because the plaintiff, Gray, had not been given a reason for his tenure denial, the court ruled that he must be provided the “confidential” documents he sought; had he been given a reason, the court suggested, the university might have been able to withhold them. By leaving room for recognition of an academic freedom privilege in other cases, the court in effect adopted a middle-ground position earlier espoused by the AAUP (see “A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments,” *Academe*, February–March 1981, 27).

The U.S. Court of Appeals for the Seventh Circuit created and applied an academic freedom privilege in *EEOC v. University of Notre Dame*, 715 F.2d 331 (7th Cir. 1983), ordering the EEOC to accept redacted documents from which information identifying the writer had been removed, and asserting that the identity of the evaluators was protected by an “academic freedom privilege.” The court also accepted the university’s argument that the EEOC should be required to sign a nondisclosure agreement before it obtained the files of faculty who were not parties to the lawsuit. But the U.S. Court of Appeals for the Third Circuit rejected the attempt of Franklin and Marshall College to assert an academic freedom privilege when the EEOC requested “confidential” evaluative information in order to investigate a professor’s claim that his denial of tenure was a result of national origin discrimination. In *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), the court, while recognizing the importance of confidentiality in obtaining candid evaluations, nevertheless ruled that the plaintiff’s need for information relevant to his discrimination claim outweighed the college’s interests in confidentiality.

Given the sharp differences among the four federal appellate courts that had addressed this issue, the U.S. Supreme Court granted review of a case in which Rosalie Tung, a professor in the University of Pennsylvania’s business school, sued the university for race, sex, and national origin discrimination in denying her tenure. The EEOC had subpoenaed the confidential peer evaluations on which the university had relied to make its negative decision. Although the university complied with much of the EEOC’s request, it refused to submit

confidential letters written by Tung's evaluators, letters from the department chair, and accounts of a faculty committee's deliberations. It also refused to submit similar materials for five male faculty in the business school who were granted tenure during that year, which the EEOC wanted to review for comparison purposes. The EEOC filed an action to enforce the subpoena; both the district court and the U.S. Court of Appeals for the Third Circuit ordered the university to produce the documents, relying on *Franklin and Marshall*. Still refusing to produce the materials, the university appealed the ruling to the U.S. Supreme Court. The university argued that quality tenure decisions require candid peer evaluations, which in turn require confidentiality. It asserted that requiring such disclosure would "destroy collegiality" and that either a common law privilege or a constitutionally based privilege should be created. The Court agreed to determine whether a qualified "academic freedom privilege" should be created or whether a balancing test should be used that would require the EEOC to show "particularized need" for the information before it was disclosed.

Writing for a unanimous court, Justice Harry Blackmun upheld the EEOC's need for peer evaluations and refused either to create a privilege or to require the EEOC to show "particularized need" (*University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990)). Justice Blackmun first noted that Title VII contains no language excluding peer evaluations from discovery and that the EEOC's need for relevant information was not diminished simply because the defendant in this case was a university.

The Court gave the following reasons for its refusal to create a common law privilege:

1. Congress, in amending Title VII in 1972 to extend its protections to employees of colleges and universities, had not included such a privilege.
2. Title VII confers upon the EEOC a broad right of access to relevant evidence, and peer evaluations were clearly relevant.
3. Title VII includes sanctions for the disclosure of confidential information by EEOC staff.
4. Evidence of discrimination is particularly likely to be "tucked away in peer review files" (493 U.S. at 193).
5. Requiring the EEOC to show particularized need for the information could frustrate the purpose of Title VII by making the EEOC's investigatory responsibilities more difficult.

The Court also rejected the university's request that a constitutionally based academic freedom privilege be created. While acknowledging academe's strong interest in protecting academic freedom, the Court viewed the EEOC's request as an "extremely attenuated" infringement on academic freedom, characterizing it as a "content-neutral" government action to enforce a federal law rather than a government attempt to suppress free speech (493 U.S. at 198–99).

It was clear that the Court regarded the potential injury to academic freedom as speculative, and the argument that academe deserved special treatment as inappropriate:

We are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers [493 U.S. at 200].

The result in this case appears to require an institution, when confronted with an EEOC subpoena, to produce relevant information, whether or not the institution has promised to keep it confidential. Although the Supreme Court did not address the issue of whether an institution could provide peer review materials with identifying information redacted, the Court's very broad language upholding the need of the EEOC for relevant information suggests that, should the EEOC assert that identifying information is relevant to a particular claim, the information would have to be provided. And although this case involves access to information by the EEOC, rather than by a private plaintiff, it is likely that the case will be interpreted to permit faculty plaintiffs in discrimination cases to see letters from outside evaluators, written recommendations of department or other committees, and other information relevant to a negative employment decision. (For analysis of the *University of Pennsylvania* case's implications for faculty personnel decisions, see B. Lee, *Peer Review Confidentiality: Is It Still Possible?* (National Association of College and University Attorneys, 1990).)

Discovery requests in litigation challenging tenure denials since the *University of Pennsylvania* case have returned to the principles of relevance and burdensomeness that courts apply in nonacademic settings. For example, in *Kern v. University of Notre Dame du Lac*, 1997 U.S. Dist. LEXIS 21158 (N.D. Ind., August 12, 1997), a female professor denied tenure in the School of Business sought to obtain the promotion file of a male colleague who had been promoted to full professor the same year that she was denied tenure. Although the university objected on the grounds that the standards for promotion to associate professor with tenure were different from the standards for promotion to full professor, the court ordered the university to produce the dossier. There was no discussion of an academic freedom privilege. (For an unusual ruling barring a plaintiff from discovering the individual votes of faculty on a university-wide promotion and tenure committee, see *Staton v. Miami University*, 2001 Ohio App. LEXIS 1421 (Ct. App. Ohio, 10th App. Dist., March 27, 2001).<sup>43</sup>)

For public institutions (and some private ones as well) in states with open records laws, the result in *University of Pennsylvania* may have little significance,

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<sup>43</sup>The court ruled that, because the institution's tenure policies specified that members of the university-wide promotion and tenure committee were not allowed to divulge the committee's decision-making process, that was a contractual requirement binding on both the committee members and all candidates for tenure.

because several of these laws have been interpreted to apply to faculty personnel decisions. For example, in *Pennsylvania State University v. Commissioner, Department of Labor and Industry*, 536 A.2d 852 (Pa. Commw. Ct. 1988), a state court interpreted the open records law as permitting faculty to see peer evaluations solicited for promotion or tenure decisions, calling them “performance evaluations” (for which the state law requires disclosure) rather than “letters of reference” (which are exempted from the law’s disclosure requirements). The state law was applied in the same manner when a faculty member at a private college sought access to peer evaluations after he was denied tenure (*Lafayette College v. Commissioner, Department of Labor and Industry*, 546 A.2d 126 (Pa. Commw. Ct. 1988)). Similarly, the Supreme Court of Alaska ruled that promotion and tenure decisions are subject to the state’s “sunshine law” (*University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983)).

But a Michigan court exempted some peer evaluations from disclosure in *Muskovitz v. Lubbers*, 452 N.W.2d 854 (Mich. Ct. App. 1990), ruling that a letter from a dean to the provost regarding a faculty member’s performance was exempt from the Michigan Employee Right-to-Know Act (Mich. Comp. Laws § 423.501 *et seq.*). The court characterized the letter as a “staff planning document” (one of the law’s exemptions). It also ruled that the names of persons who prepared the evaluations, and specific words used in them (if those words would reveal the identity of the writer), were exempt under the law as “employee references supplied to an employer” and could be removed from documents submitted to a plaintiff. The court noted the Supreme Court’s ruling in *University of Pennsylvania* but stated that it did not control interpretation of the Michigan law. Similarly, a state appellate court in Florida, in interpreting that state’s open-records law, ruled that tenure committee votes are exempt from disclosure (*Cantanese v. Ceros-Livingston*, 599 So. 2d 1021 (Fla. Dist. Ct. App. 1992)).

But the Supreme Court of Ohio read its own state open records law differently and refused to create a privilege for “confidential” materials in a tenure file. In *State ex. rel. James v. Ohio State University*, 637 N.E.2d 911 (Ohio 1994), an assistant professor of geology requested copies of records in his tenure and promotion file and the files of other faculty, as well. Although the dean informed James that he would give him a redacted version of the information in his tenure file, he rejected James’s request for the contents of other faculty members’ promotion and tenure files. He also refused to give James the letter from his department chair regarding the chair’s evaluation of James’s performance, and withheld the identity of individuals who had evaluated James’s work. James brought a mandamus action in the Supreme Court of Ohio, seeking a court order to force the university to disclose the information.

The university asserted that the tenure file documents were protected by a confidentiality exception in the Ohio Public Records Act, and also claimed that disclosure would violate the university’s academic freedom. The court rejected both defenses. To the first defense, the court noted that the confidentiality exemption in the public records law was limited to law enforcement investigatory records, and did not cover tenure files. Furthermore, said the court, the

university had admitted in its tenure guidelines that internal and external letters of evaluation were not exempted from the public records act. Regarding the second defense, the court cited *University of Pennsylvania v. EEOC* as authority for rejecting the university's argument. The court held that "promotion and tenure records maintained by a state-supported institution of higher education are 'public records'" under Ohio law, and ordered the university to provide the records sought by James.

Faculty in California attempted to use that state's education laws to seek access to their confidential peer evaluations, but without success. Section 92612 of the state's Education Code guarantees a faculty member access to material in his or her personnel files (although the name and affiliation of the writer may be redacted). In *Scharf v. Regents of the University of California*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991), the plaintiffs—six faculty members who had been denied tenure and the American Federation of Teachers—asserted that the state's Education Code gave them the right to review letters from outside reviewers and other confidential material in their personnel files. The university had given the faculty members summaries of the material but refused to provide the actual letters. The appellate court, citing Article IX, Section 9 of the California constitution, noted that the University of California has constitutional autonomy and that the provision in the state Education Code giving faculty access to confidential evaluations was, in its application to the university, unconstitutional. Distinguishing the *University of Pennsylvania* decision, the court noted that the faculty were not involved in litigation regarding their promotion or tenure decisions and that the reasoning of that case did not bind the California court in this case.

In light of the *University of Pennsylvania* decision and the proliferation of open records laws at the state level, the American Association of University Professors developed a policy on access to faculty personnel files. The report provides a thoughtful discussion of the two conflicting interests—preserving confidentiality in order to ensure complete candor, and ensuring access to evaluative material in order to encourage responsible and careful evaluation and to ascertain whether inappropriate grounds for a negative employment decision exist. The report, "Access to Faculty Personnel Files," is published in *AAUP Policy Documents and Reports* (9th ed., 2001), pages 41–46. It is a joint report of Committee A on Academic Freedom and Tenure and Committee W on the Status of Women in the Academic Profession, and reaches the following conclusions:

1. Faculty members should, at all times, have access to their own files, including unredacted letters, both internal and external.
2. A faculty member should be afforded access upon request to general information about other faculty members such as is normally contained in a *curriculum vitae*. . . .
3. Files of a faculty complainant and of other faculty members, for purposes of comparison, should be available in unredacted form to faculty appeals committees to the extent such committees deem the information relevant and necessary to the fair disposition of the case before them.

4. A faculty appeals committee should make available to the aggrieved faculty member, in unredacted form and without prejudging the merits of the case, all materials it deems relevant to the complaint, including personnel files of other faculty members, having due regard for the privacy of those who are not parties to the complaint [pp. 44–45].

The report acknowledges that these recommendations “go beyond the practices regarding access to personnel files that are common in many colleges and universities” (p. 46).

Given the broadened access of candidates for reappointment, promotion, and tenure to formerly confidential evaluative information, college and university administrators and faculty should assess their policies and practices regarding peer evaluation and access of candidates to such information. Particularly in those states where access is afforded by state law, faculty evaluators should be well informed about the institution’s criteria for such decisions and should be trained to provide appropriate documentation to support their recommendations. Given the heightened judicial scrutiny of institutions’ denials of tenure to faculty (see Sections 5.2, 6.7.2.2, & 6.7.3), time spent ensuring that peer evaluations and the ensuing employment decisions are amply supported by evidence is an excellent investment.

**7.7.3. Research findings.** Researchers are asked from time to time to provide their findings for a variety of lawsuits, the most common of which are products liability and regulatory actions. In some of these cases, the data have not been fully analyzed and the researcher is unwilling to make them public at that time. In other cases, the type of disclosure required would violate the confidentiality of research subjects. The legal question presented in these cases is whether, under evidence law or under the First Amendment, the information can be said to be privileged—protected from disclosure by a “researcher’s privilege.”

Judges, lawyers, and legal scholars disagree on the propriety of creating a “researcher’s privilege.” According to Robert O’Neil, compelling the disclosure of research has four “devastating effects”:

1. The researcher loses control over how and to whom the data are reported;
2. The process of responding to a subpoena and compiling the data requested “may severely hamper the research process” by either delaying or terminating the project;
3. Compelled discovery may lead to the use or publication of unverified information;
4. If the researcher has promised confidentiality to the research subjects, this confidentiality may be compromised (Robert M. O’Neil, “A Researcher’s Privilege: Does Any Hope Remain?” 59 *Law & Contemp. Probs.* 35, 36 (1996)).

On the other hand, “judges operate within a system that places a high priority upon obtaining relevant evidence that will aid in the truth-finding process” (Barbara B. Crabb, “Judicially Compelled Disclosure of Researchers’ Data: A Judge’s View,” 59 *Law & Contemp. Probs.* 9 (1996)). Because of these tensions, the cases are fact sensitive and the outcomes are inconsistent.

In *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), the court looked to the First Amendment rather than creating an absolute privilege, and balanced the interests of the researchers in confidentiality of the data and in freedom from intrusion into their research against the needs of the parties for the sought-after data. The court refused to enforce subpoenas issued by an administrative law judge presiding over a hearing convened by the Environmental Protection Agency to consider canceling the registration of certain herbicides manufactured by Dow:

[The researchers had] stated, without contradiction by Dow [the company seeking the information], that public access to the research data would make the studies an unacceptable basis for scientific papers or other research; that peer review and publication of the studies was crucial to the researchers’ credibility and careers and would be precluded by whole or partial public disclosure of the information; that loss of the opportunity to publish would severely decrease the researchers’ professional opportunities in the future; and that even inadvertent disclosure of the information would risk total destruction of months or years of research. . . .

We think it clear that whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom. . . . Of course, academic freedom, like other constitutional rights, is not absolute and must on occasion be balanced against important competing interests. . . . [W]hat precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited. . . .

In the present case, the . . . subpoenas by their terms would compel the researchers to turn over to Dow virtually every scrap of paper and every mechanical or electronic recording made . . . [and] to continually update Dow on “additional useful data” which became available during the course of the proceedings. These requirements threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom. To begin with, the burden of compliance certainly would not be insubstantial. More important, enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. . . . In addition, the researchers could reasonably fear that additional demands for disclosure would be made in the future. If a private corporation can subpoena the entire work product of months of study, what is to say further down the line the company will not seek other subpoenas to determine how the research is coming along? To these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data could jeopardize both the studies and their careers.

Clearly, enforcement of the subpoenas carries the potential for chilling the exercise of First Amendment rights.

We do not suggest that facts could not arise sufficient to overcome respondents' academic freedom interests in the . . . studies. . . . If, for example, Dr. Allen, Mr. Van Miller, or other researchers were likely to testify about the . . . studies at the [Environmental Protection Agency] hearing, there might well be justification for granting at least partial or conditional enforcement of the subpoenas. Of course, we need not decide that question now [672 F.2d at 1273-76; footnotes omitted].

In an earlier case, *Richards of Rockford, Inc. v. Pacific Gas and Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976), a federal district court judge reached a similar conclusion in an opinion that identified and balanced the various competing interests at stake. But in *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982), decided seven months after *Allen*, a federal district court rejected a privilege claim and enforced a subpoena requiring a University of Michigan professor to produce research data from a study that was apparently completed (unlike the study in *Allen*).<sup>44</sup>

Products liability cases involving research by scientists working for federal agencies have also relied on *Allen* and its progeny. In *Farnsworth v. The Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985), the company sought the names and addresses of women who participated in a study of Toxic Shock Syndrome, a disease linked to the company's products. The study was conducted by scientists working for the Center for Disease Control, a federal agency. The court, citing *Allen*, *Richards of Rockford*, and *Wright*, ruled that the agency's interests in protecting the research subjects' identity outweighed the company's interest in contacting the women individually to confirm their medical histories. The court noted that the agency's purpose is the protection of public health, and that forced disclosure of confidential information could damage the agency's ability to conduct other studies that were important to the protection of public health.

*Allen* was again cited by a scholar attempting to protect the confidentiality of his data, but without success this time. In *Deitchman v. E. R. Squibb & Sons, Inc.*, 740 F.2d 556 (9th Cir. 1984), the drug company was a defendant in a products liability lawsuit by women whose mothers had taken diethylstilbestrol (DES) and who had contracted cancer, allegedly as a result of their prenatal exposure to DES. Herbst, a professor at the University of Chicago medical school, maintained a registry of individuals suffering from certain forms of cancer. Herbst had promised confidentiality to all patients whose records had been submitted to the registry, and also conducted research using information from the registry.

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<sup>44</sup>In a second case involving the same University of Michigan professor and the same research data, *Buchanan v. American Motors Corp.*, 697 F.2d 151 (6th Cir. 1983), the appellate court refused to decide the privilege issue, instead holding that to compel an "expert who has no direct connection with the litigation" to testify was "unreasonably burdensome." The court therefore quashed a subpoena seeking the professor's appearance.



Squibb asked Herbst to produce the entire registry, and Herbst, citing both the confidentiality issue and his “academic freedom” not to release research results before they had undergone peer review, refused. Although a trial judge quashed the subpoena, the appellate court required the parties to negotiate about the scope of discovery and the methods to be used to protect the patients’ confidentiality. The court stated that, although Squibb’s discovery demand was far too broad, the company had a legitimate need for some of the information contained in the registry. The court suggested that the parties consider redaction, a protective order, and other measures calculated to minimize the burden on Herbst and to protect the confidentiality of the patients.

Another federal appellate court enforced a subpoena for unpublished data in *In re Mt. Sinai School of Medicine v. American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989). The tobacco company was a defendant in a products liability lawsuit. The company had asked a researcher at the medical school to produce research data on the effects of smoking on asbestos workers. The researcher was not a party to the lawsuit and refused to produce the data, saying that he had promised the subjects confidentiality and that redacting the data would be very expensive and would take thousands of hours of his time. A motion to compel production of the evidence, filed in state court, was quashed.

The tobacco company filed a second motion in federal court, this time seeking only the data from already published scientific papers, covering two years of the study, and offering to pay the costs of deleting the confidential information. The court agreed to enforce the subpoena and issued a protective order to guard the identities of the research subjects.

The Second Circuit denied that there was an “absolute privilege for scholars,” noting that the researcher’s interest in avoiding disruption of his ongoing research is only one factor that the court considers in applying a balancing test; another factor would be the public’s interest in accurate information. The court concluded that it was not unreasonable for the tobacco company to wish to examine the data that formed the basis for the articles, upon which expert witnesses (but not the researcher) were expected to testify on the plaintiffs’ behalf. No qualified privilege was used in this case; instead, the court used the usual criteria for determining whether a discovery request is appropriate: relevance, burdensomeness, and the party’s need for the information.

This case differs from *Allen* in that the data sought had already been published, so the researcher could not make the premature disclosure argument that the court considered so important in *Allen*. Also, the tobacco company was not seeking to compel the researcher to testify, so the privilege against compelled testimony was not an issue in this case. The interest in *Mt. Sinai* was primarily the researcher’s time, the effect on his ongoing research program, and the potential for disclosure of the names of research subjects. The court applied a balancing test, weighing the tobacco company’s need for the information against the adverse effect on the researcher and the research subjects. The court apparently concluded that these interests did not outweigh the tobacco company’s need for the information, primarily because redaction would preserve the subjects’ confidentiality.

Federal courts have been particularly unsympathetic to researchers when their data are required for criminal, rather than civil, proceedings. In *In re Grand Jury Subpoena*, 583 F. Supp. 991 (E.D.N.Y. 1984), *reversed*, 750 F.2d 223 (2d Cir. 1984), a doctoral student was conducting “participant observation” research for his dissertation at a restaurant on Long Island. When a suspicious fire and explosion destroyed the restaurant, the student’s observations and notes on his conversations at the restaurant were subpoenaed by a grand jury. The student moved to quash the subpoena, claiming a “scholar’s privilege” because he had promised confidentiality to his research subjects. The federal trial judge quashed the subpoena, comparing the student’s interest in confidentiality to that of a news reporter’s, as recognized in *Branzburg v. Hayes*, 408 U.S. 665 (1972). A federal appellate court reversed the trial judge’s ruling and sent the case back to the trial judge for further analysis in light of the criteria specified by the appellate court.

The appellate court was not convinced that a “scholar’s privilege” exists or that one should be applied under these circumstances. First the court discussed the showing that an individual claiming a scholar’s privilege would need to make:

Surely the application of a scholar’s privilege, if it exists, requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality [750 F.2d at 225].

The court explained further that no evidence had been presented about

the nature of the work or of its role in the scholarly literature of sociology. One need not quip that “You can’t tell a dissertation by its title” to conclude that the words “The Sociology of the American Restaurant” afford precious little information about the subject matter of [the student’s] thesis [750 F.2d at 225].

The opinion suggests that the student would have been required to present testimony from recognized scholars justifying the seriousness of the subject and the appropriateness of the methodology. This requirement appears to be based upon the individual’s status as a student rather than a holder of a Ph.D. The opinion describes the showing that must be made before a scholar’s privilege could be considered:

What exactly [the student’s] role is, what kinds of material he hopes to collect, and how that role and that material relate to a need for confidentiality . . . , evidence of a considered research plan, conceived in light of scholarly requirements or standards, contemplating assurances of confidentiality for certain parts of the inquiry [750 F.2d at 225].

The court then discussed the limited nature of the scholar’s privilege (if it exists), which would cover only those portions of the research material that

required confidentiality. The court also noted that the scholar would be required to permit inspection of the material by a judge and redaction under the judge's supervision. The broad privilege claimed by the student, that all his research notes and journals were included, was roundly rejected by the court.

Another federal appeals court extended the trend against a "scholar's privilege" in *In re: Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993). Scarce, a doctoral student in sociology at Washington State University, had been asked to testify about conversations with some of his friends, animal rights activists who were accused of breaking into and damaging animal research facilities at the university. Scarce, who was conducting research on the animal rights movement and had written a book on the radical environmental movement, refused to testify and was jailed for six months. (For an account of this matter, see P. Monaghan, "Free After 6 Months: Sociologist Who Refused to Testify Is Released," *Chron. Higher Educ.*, November 3, 1993, A14–A15.) The court rejected the concept of a "scholar's privilege," stating that no cases had recognized the right of a scholar to withhold information from a grand jury where the information was relevant to a legitimate grand jury inquiry and was sought in good faith.

It appears that judges are increasingly hostile to claims of a researcher's or scholar's privilege, especially when the information is sought for a criminal, rather than a civil, proceeding. Absolute privileges appear to be unavailable to scholars, because judges have several strategies for protecting confidentiality and reducing the burden on the researcher. In light of these developments, faculty and administrators need to understand that promises of absolute confidentiality to research subjects may not be enforceable. Additional cases in which courts compelled discovery of research data include *Southwest Center for Biological Diversity v. U.S.D.A.*, 170 F. Supp. 2d 931 (D. Ariz. 2000); *Proctor & Gamble Co. v. Swilly*, 462 So. 2d 1188 (Ct. App. Fla. 1985); and *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). Courts refused to compel production of research data on the grounds that the requests were unduly burdensome in *Anker v. G. D. Searle & Co.*, 126 F.R.D. 515 (M.D.N.C. 1989), and *In re Snyder*, 115 F.R.D. 211 (D. Ariz. 1987).

Given judicial hostility to a "researcher's privilege," faculty or institutions facing compelled disclosure of research may fare better using the First Amendment argument that was successful in the *Dow Chemical* case. For example, in *In re Cusumano and Yoffie [U.S. v. Microsoft]*, 162 F.3d 708 (1st Cir. 1998), Microsoft, which was facing antitrust litigation brought by the U.S. Department of Justice, sought confidential research notes from two professors who were not parties to the litigation. Professors Cusumano and Yoffie had interviewed executives of Netscape, a Microsoft competitor whose allegations of unfair competitive practices had led to the antitrust litigation. Those interviews, with additional data, had formed the basis for a book about Netscape. Microsoft sought to compel the two professors to produce the notes from their interviews, asserting that the notes were significant for Microsoft's defense against the antitrust litigation. The professors had interviewed more than forty current and former Netscape employees, promising that they would disclose no proprietary information and would verify with the informant all interview information that would be used in the book. The professors turned over some

correspondence, but they refused to provide tapes or transcripts of the interviews and moved to quash Microsoft's subpoena.

A federal trial judge held a hearing and denied Microsoft's motion to compel production of the research. Using a balancing test, the court determined that Microsoft could have obtained the information it sought directly from the individuals whom the researchers had interviewed, and that its primary use of the information would be for impeachment of witnesses. The court also found that the researchers had a substantial interest in keeping the subpoenaed information confidential, and that significant First Amendment values favored its protection. The trial court retained jurisdiction to review individual items *in camera* (in chambers) to determine whether they were material to Microsoft's defense and stated that, should Microsoft be able to show particularized need for a particular item of information, the judge would order it to be produced. Microsoft appealed.

The U.S. Court of Appeals for the First Circuit affirmed the reasoning and the ruling of the trial court. Given the assurances made by the researchers, and the fact that, at the time the interviews were conducted, the antitrust case against Microsoft had not been filed, the interest of the researchers in maintaining the confidentiality of the interviews deserved "significant protection." The balancing test used by the trial court—Microsoft's need for the information versus the researchers' interest in confidentiality—was the proper standard, according to the court, citing an earlier First Circuit case, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980). (The court rejected Microsoft's argument that this case was irrelevant because it involved journalists rather than academic researchers.) Microsoft had access to a prepublication copy of the manuscript, which identified quoted individuals by name. Therefore, said the court, Microsoft could accomplish its purpose through deposing these individuals. With respect to the interests of the researchers:

The opposite pan of the scale is brim-full. Scholars studying management practices depend upon the voluntary revelations of industry insiders to develop the factual infrastructure upon which theoretical conclusions and practical predictions may rest. These insiders often lack enthusiasm for divulging their management styles and business strategies to academics, who may in turn reveal that information to the public. Yet, pathbreaking work in management science requires gathering data from those companies and individuals operating in the most highly competitive fields of industry, and it is in these cutting-edge areas that the respondents concentrate their efforts. Their time-tested interview protocol, including the execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed, gives chary corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate. Thus . . . the interviews are "carefully-bargained for" communications which deserve significant protection [162 F.3d at 717].

Allowing Microsoft access to the notes, tapes, and transcripts would "hamstring not only the respondents' future research efforts but also those of other

similarly situated scholars” (162 F.3d at 717). “Even more important, compelling the disclosure of such research materials would [chill] the free flow of information to the public, thus denigrating a fundamental First Amendment value” (162 F.3d at 717). The trial court’s decision to retain jurisdiction to review materials *in camera* protected Microsoft’s interests adequately, according to the appellate court.

This case is interesting and important because both the trial and appellate courts were willing to extend First Amendment protection to confidential research findings. The case appears to have been decided solely on First Amendment grounds. The trial and appellate courts applied precedent from cases involving journalists without discussion of whether academicians deserve greater or lesser protection than their colleagues in the media; in fact, the appellate court appeared to equate the confidentiality concerns of academics and journalists. No claim was made that the material was protected by an “academic freedom” privilege; hence, that concept was not discussed; and there was no reference to the earlier cases involving confidentiality of research data.

Close attention should be paid to the particular context in which potential issues arise. Especially important are (1) the procedural and evidentiary rules of the court or administrative agency that would entertain the litigation and (2) the impact that disclosure of the requested information would have on academic freedom. (Suggestions for ways in which administrators and researchers can limit access to or interest in their research findings are found in N. Miller, “Subpoenas in Academe: Controlling Disclosure,” 17 *J. Coll. & Univ. Law* 1 (1990); and in Diane E. Lopez, “The Compelled Disclosure of Research Data,” National Association of College and University Attorneys Annual Conference Outline, June 26, 2002 (available at <http://www.nacua.org>.)

A second major issue involving confidentiality of research results is the requirement of some funding sources, both governmental and private, that research results be kept secret. Although this requirement presents the opposite dilemma of compelled disclosure, it is no less troubling from an academic freedom perspective.

When it is the government imposing the secrecy restrictions, the Constitution is asserted as the source of protection for the researcher’s academic freedom right to publish research results. The regulations of several federal agencies authorize officials to prohibit release of certain findings without the funding agency’s permission (see, for example, 48 C.F.R. §§ 324.70, 352.224–70 (1991), which authorize contract officers from the Department of Health and Human Services to place restrictions on disclosure of preliminary findings). At least one court has rejected the attempt of a government agency to prevent the publication of federally funded research without its permission. In *Board of Trustees of Leland Stanford Junior University v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991), the university argued that this restriction violated the First Amendment. Applying strict scrutiny to the federal regulation, the trial judge rejected as noncompelling the National Institutes of Health’s argument that secrecy was required in order to protect prospective patients from “unwarranted hope” that could be raised by the release of preliminary findings (773 F. Supp. at 477, n.16).

But constitutional protections would typically not apply to funding restrictions imposed by private funding sources, such as corporations or foundations. Such restrictions, if incorporated into the contract, could be removed only if the funding source agreed. And unless certain state constitutions or cases decided under their authority included free speech guarantees that applied to private entities as well as the government (see, for example, *State v. Schmid*, discussed in Sections 1.5.2 and 11.6.3), it is not clear that a faculty member or an institution would have a cause of action against a private funding source that withdrew funding after the faculty member refused to agree to secrecy requirements.

(For an extended discussion of secrecy and university research in the context of government restrictions on disclosure, see “Focus on Secrecy and University Research,” 19 *J. Coll. & Univ. Law* 199 (1993). This special issue of the journal includes four articles devoted to this subject.)

### ***Sec. 7.8. Academic Freedom in Religious Colleges and Universities***

In general, academic freedom disputes in religious institutions<sup>45</sup> are governed by the same contract law principles that govern such disputes in other private institutions (see Section 7.1.3 above). (These principles, as applied to academic freedom in teaching, are discussed in Section 7.2.5 above.) But the religious missions of religious institutions, and their affiliations with churches or religious denominations, may give rise to contract law issues that are unique to religious institutions. In addition, religious institutions may have First Amendment defenses to litigation that secular institutions do not have. Both of these matters are discussed in Section 6.2.5, and a more general discussion of First Amendment defenses is in Section 1.6.2. The *McEnroy* case below, and the case of *Curran v. Catholic University of America*, discussed in Section 6.2.5, illustrate how these matters may play out in academic freedom disputes between faculty members and religious institutions.

Academic freedom customs or professional norms in religious institutions may also vary from those in secular private institutions—particularly in situations where a faculty member takes positions or engages in activities that are contrary to the institution’s religious mission or the religious principles of a sponsoring religious denomination. This type of problem, and the potential for clashes between *faculty* academic freedom and *institutional* academic freedom, are illustrated by the debate concerning *Ex Corde Ecclesiae*, issued by Pope John Paul II in 1990, and *Ex Corde Ecclesiae: The Application to the United States* (<http://www.nccbuscc.org/bishops/excorde.htm>), subsequently adopted by the U.S. Conference of Catholic Bishops. (For commentary on this debate, see James Gordon III, “Individual and Institutional Academic Freedom at Religious Colleges and Universities,” 30 *J. Coll. & Univ. Law* 1, 20–25 (2003).)

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<sup>45</sup>“Religious,” when used in this section to refer to a college or university, covers institutions that are sponsored by or otherwise related to a particular church or denomination, as well as institutions that are nondenominational and independent of any particular church body.

To account for possible differences in academic freedom norms at religious institutions, the “1940 Statement of Principles on Academic Freedom and Tenure” includes a “limitations clause” specifying that “[l]imitations on academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of [a faculty member’s] appointment” (*AAUP Policy Documents and Reports* (9th ed., 2001), 3). The meaning of this clause, its implementation, and its wisdom have been debated over the years (see, for example, the “1970 Interpretive Comments,” comment no. 3, in *AAUP Policy Documents and Reports*, 6; and see generally Gordon, above, at 16–20). In 1999, the AAUP issued “operating guidelines” for applying the clause (“The ‘Limitations’ Clause in the 1940 Statement of Principles on Academic Freedom and Tenure: Some Operating Guidelines,” in *AAUP Policy Documents and Reports*, 96).

When a religious institution invokes the limitations clause and imposes limits on the scope of academic freedom, contract law issues may arise concerning the interpretation of these limits as expressed in faculty appointment documents, the faculty handbook, or other institutional regulations; in addition, issues may arise concerning the extent of the religious institution’s prerogative, under AAUP policies, to limit its faculty’s academic freedom. When a religious institution adopts AAUP policies but does not invoke the limitations clause, issues may still arise concerning whether religious law governing the institution can justify limits on academic freedom or affect the analysis of contract law issues. In either situation, if an institution’s personnel action appears to conflict with AAUP policy or to breach a faculty member’s contract, the aggrieved faculty member may seek the protection of the AAUP in lieu of or in addition to resorting to the courts. The case of Carmel McEnroy, then a professor at the Saint Meinrad School of Theology in Saint Meinrad, Indiana, is illustrative. (See “Report: Academic Freedom and Tenure: Saint Meinrad School of Theology (Indiana),” in *Academe*, July–August 1996, 51–60.)

The school’s administration had dismissed Professor McEnroy after it learned, and she admitted, that she had “signed an open letter to Pope John Paul II asking that continued discussion be permitted concerning the question of ordaining women to the priesthood” (*Id.* at 51). McEnroy, a “member of the Congregation of Sisters of Mercy of Ireland and South Africa,” signed the letter “without citing her academic or religious affiliations” (*Id.* at 52). She was one of more than fifteen hundred signatories. At the time of the dismissal, the “1940 Statement of Principles on Academic Freedom and Tenure was adopted as institutional policy [and] printed in full in the Faculty Handbook, without specification of any limitations on academic freedom . . .” (*Id.* at 51). McEnroy contended that, in signing the letter, “she was exercising her right as a citizen as outlined in the 1940 Statement of Principles” (*Id.* at 55). Church and school officials, in contrast, contended “that she had publicly dissented from the teaching of the church and was therefore disqualified from continuing in her faculty position” (*Id.*)—thus, in effect, asserting that McEnroy was dismissed on “ecclesial grounds” rather than “academic grounds” (*Id.* at 60), and that the 1940 Statement therefore did not apply (*Id.* at 56). The AAUP’s investigating committee concluded that the 1940 Statement did apply and that Saint Meinrad’s administration had “failed to meet its obligation to demonstrate that

[Professor McEnroy's] signing of the letter to Pope John Paul II rendered her unfit to retain her faculty position," as required by the 1940 Statement, thereby "violat[ing] her academic freedom" (*Id.* at 58, 59). (The committee also concluded that Saint Meinrad's administration had violated the due process principles in the 1940 Statement when it dismissed McEnroy.)

The AAUP's Committee A on Academic Freedom and Tenure accepted the investigating committee's report and recommended that the university be placed on the AAUP's list of censured administrations. At the AAUP's eighty-third annual meeting, the membership approved Committee A's recommendation (available at <http://www.aaup.org/com-a/devcen.htm>). (For a discussion of the AAUP censuring process, see Section 14.5 of this book.)

McEnroy subsequently filed suit against Saint Meinrad's and two of its administrators, claiming breach of contract. The trial court dismissed the case, and the Indiana appellate court affirmed (*McEnroy v. Saint Meinrad School of Theology*, 713 N.E.2d 334 (Ind. 1997)). Resolving an ambiguity in the professor's contract, the appellate court reasoned that, in addition to its academic freedom and due process terms, the contract also included terms regarding the Roman Catholic Church's jurisdiction over the school. Thus "resolution of Dr. McEnroy's claims would require the trial court to interpret and apply religious doctrine and ecclesiastical law," which would "clearly and excessively" entangle the trial court "in religious affairs in violation of the First Amendment."

A different type of academic freedom problem arises when a government agency seeks to investigate or penalize a religious college or university or one of its faculty members. Such disputes are "extramural" rather than "intramural" (see Section 7.1.5 above). The institution may claim, in defense, that the government's planned action would violate its institutional academic freedom; or the faculty member may claim, in defense, that the action would violate faculty academic freedom. Since the dispute concerns government action, both the religious institution and the faculty member may assert constitutional rights against the government. Sometimes the rights will be the same as secular private institutions and their faculty members would assert—for example, the free speech and press rights asserted in the "academic freedom privilege" cases in Section 7.7 above. At other times the rights will belong only to religious institutions and their faculty members; these are the rights protected by the establishment and free exercise clauses of the First Amendment (see generally Section 1.6.2).<sup>46</sup> Examples would include the cases in which an institution argues that federal or state court review of its religious practices would violate the establishment clause (see the *McEnroy* case above; and see also Section 6.2.5 of this book); and the cases in which the institution challenges the authority of a government agency, such as the EEOC, to investigate or regulate its religiously based practices (see Section 5.5).

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<sup>46</sup>Faculty members at private secular institutions could also invoke free exercise and establishment clause rights if the challenged government action interfered with their personal religious beliefs or practices. A private secular institution itself could also invoke these clauses if government were to require that the institution involve itself in religious matters or prohibit it from doing so.



## Selected Annotated Bibliography

### Sec. 7.1 (General Concepts and Principles)

- “Academic Freedom and Responsibility Symposium,” 27 *J. Coll. & Univ. Law* 565–707 (2001). The first part of this symposium focuses on a proposed “Academic Freedom Policy and Procedures” document drafted by Martin Michaelson (567–71). There are three commentaries on this document, by Robert O’Neil, J. Peter Byrne, and Richard De George, followed by a response from Mr. Michaelson. The second part of the symposium contains two additional articles: “Academic Tradition and the Principles of Professional Conduct” by Neil Hamilton, and “Matters of Public Concern and the Public University Professor” by Chris Hoofnagle.
- “Academic Freedom Symposium,” 22 *Wm. Mitchell L. Rev.* 333–576 (1996). Contains twelve commentaries preceded by a foreword by Neil Hamilton. Commentaries are (1) Irving Louis Horowitz, “Contrasts and Comparisons Among McCarthyism, 1960s Student Activism, and 1990s Faculty Fundamentalism: Culture Politics and McCarthyism a Retrospective from the Trenches”; (2) Lionel Lewis, “McCarthyism and Academic Freedom: The 1950s and 1990s: Similarities and Noteworthy Differences”; (3) Wagner Thielens, “McCarthyism and Academic Freedom: Why Wasn’t the Damage Worse? Some Answers from the Academic Mind”; (4) Seymour Martin Lipset, “1960s Student Activism and Academic Freedom: From the Sixties to the Nineties: A Double Edged Sword at Work”; (5) Todd Gitlin, “1960s Student Activism and Academic Freedom: Evolution of the Student Movement of the Sixties and Its Effect”; (6) David Horowitz, “1960s Student Activism and Academic Freedom: Leftwing Fascism and the American Dream”; (7) Nathan Glazer, “1990s Faculty Fundamentalism and Academic Freedom: Academic Freedom in the 1990s”; (8) Daphne Patai, “1990s Faculty Fundamentalism and Academic Freedom: There Ought to Be a Law”; (9) John Wilson, “1990s Faculty Fundamentalism and Academic Freedom: Myths and Facts: How Real Is Political Correctness?”; (10) Jordan Kurland, “1990s Faculty Fundamentalism and Academic Freedom: Commentary on Buttressing the Defense of Academic Freedom”; (11) Neil Hamilton, “Buttressing the Defense of Academic Freedom: Buttressing the Neglected Traditions of Academic Freedom”; and (12) Rita Simon, “Buttressing the Defense of Academic Freedom: What Should Professors Do?”
- “The Academy in the Courts: A Symposium on Academic Freedom,” 16 *U. Cal. Davis L. Rev.* 831 (1983). A two-part symposium. (The second part, “Discrimination in the Academy,” is described in the “Academy in the Courts” entry for Section 6.4.) The first part, “The First Amendment in the Academy,” contains three articles: Robert O’Neil, “Scientific Research and the First Amendment: An Academic Privilege”; Katheryn Katz, “The First Amendment’s Protection of Expressive Activity in the University Classroom: A Constitutional Myth”; and Martin Malin & Robert Ladenson, “University Faculty Members’ Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection.” Symposium also includes a foreword by John Poulos, which briefly recounts the history of institutional academic autonomy and reviews each article’s critique of this concept.
- Byrne, J. Peter. “Academic Freedom: A ‘Special Concern of the First Amendment,’” 99 *Yale L.J.* 251 (1989). Develops a framework and foundation for the academic freedom that is protected by the First Amendment. Traces the development of academic freedom as construed by both academics and the courts and then espouses a new

theory of “academic freedom based on the traditional legal status of academic institutions and on the appropriate role of the judiciary in academic affairs.”

Byrne, J. Peter. *Academic Freedom Without Tenure?* (American Association for Higher Education, 1997). Part of AAHE’s New Pathways Working Paper Series. Discusses the relationship between academic freedom and tenure, and suggests alternative methods of protecting academic freedom. Considers the “elements” that would be needed to protect academic freedom without a tenure system and whether such “elements” can protect academic freedom more efficiently than a tenure system does.

Byrne, J. Peter, “The Threat to Constitutional Academic Freedom,” 31 *J. Coll. & Univ. Law* 79 (2004). Reviews the development of academic freedom as an academic norm; analyzes post-1990 judicial decisions that “threaten the demise of academic freedom as a constitutional right”; considers the counterbalance that may be provided by the Court’s reliance on institutional academic freedom in *Grutter v. Bollinger*; and reviews “intellectual and demographic changes [that] argue for continuing judicial protection of colleges and universities from outside interference.”

De George, Richard T. *Academic Freedom and Tenure: Ethical Issues* (Rowman & Littlefield, 1997). This book focuses on the question of whether academic tenure, as it commonly exists today, is an appropriate and efficient method for protecting academic freedom. Defends the existing tenure system while at the same time noting concerns and ethical issues about the system and suggesting improvements. Includes a section that reproduces pertinent documents and readings. A review of this book by John Cary Sims may be found at 25 *J. Coll. & Univ. Law* 443 (1998).

Doumani, Beshara (ed.). *Academic Freedom After September 11* (MIT Press/Zone Books, 2006). A diverse collection of essays by seven scholars. Against the backdrop of post-World War II developments, examines post 9-11 political interventions, their affects on academic freedom, and the conflicts that have arisen concerning the meaning of academic freedom.

Hamilton, Neil. *Zealotry and Academic Freedom: A Legal and Historical Perspective* (Transaction, 1996). Covers 125 years of the ongoing struggle for academic freedom, including discussion of new issues such as political correctness, racism, and gender discrimination. Also provides a frank look at the politics of higher education. Contains a comprehensive bibliography and a list of relevant cases.

Menand, Louis (ed.). *The Future of Academic Freedom* (University of Chicago Press, 1996). A collection of lectures by noted scholars from various disciplines, who debate the cutting-edge issues of academic freedom. This collection is the product of a lecture series sponsored by the AAUP.

O’Neil, Robert. *Is Academic Freedom a Constitutional Right?* Monograph 84-7 (Institute for Higher Education Law and Governance, University of Houston, 1984), reprinted (under title “Academic Freedom and the Constitution”) in 11 *J. Coll. & Univ. Law* 275 (1984). An argument on behalf of the continued vitality of constitutionally based claims of academic freedom. Examines the current status of and conceptual difficulties regarding such claims and makes suggestions for faculty members and other academics to consider before submitting such claims to the courts for vindication.

Symposium, “Academic Freedom and Tenure Symposium,” 15 *Pace L. Rev.* 1 (1994). Contains five articles that explore the foundations of academic tenure, contemporary criticisms of the system of academic tenure, and contemporary threats to the

system. Articles are by Ernest van den Haag, Burton Leiser, Deborah Post, Robert Spitzer, and Irwin Polishook.

“Symposium on Academic Freedom,” 66 *Tex. L. Rev.*, issue no. 7 (1988). Contains eighteen commentaries and responses preceded by a lengthy foreword by Julius Getman and Jacqueline Mintz. Commentaries include, among others, (1) Walter P. Metzger, “Profession and Constitution: Two Definitions of Academic Freedom in America”; (2) Matthew W. Finkin, “Intramural Speech, Academic Freedom, and the First Amendment”; (3) Charles E. Curran, “Academic Freedom and Catholic Universities”; (4) Lonnie D. Kliever, “Academic Freedom and Church-Affiliated Universities”; (5) Phoebe A. Haddon, “Academic Freedom and Governance: A Call for Increased Dialogue and Diversity”; (6) Rebecca S. Eisenberg, “Academic Freedom and Academic Values in Sponsored Research”; (7) David M. Rabban, “Does Academic Freedom Limit Faculty Autonomy?”; and (8) Douglas Laycock & Susan E. Waelbroeck, “Academic Freedom and the Free Exercise of Religion.”

Van Alstyne, William W. (special ed.). “Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles,” 53 *Law & Contemp. Probs.*, issue no. 3 (1990); also published as a separate book, *Freedom and Tenure in the Academy* (Duke University Press, 1993). A symposium containing nine articles: (1) Walter P. Metzger, “The 1940 Statement of Principles on Academic Freedom and Tenure”; (2) William W. Van Alstyne, “Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review”; (3) Judith Jarvis Thomson, “Ideology and Faculty Selection”; (4) Robert M. O’Neil, “Artistic Freedom and Academic Freedom”; (5) Rodney A. Smolla, “Academic Freedom, Hate Speech, and the Idea of a University”; (6) David M. Rabban, “A Functional Analysis of ‘Individual’ and ‘Institutional’ Academic Freedom Under the First Amendment”; (7) Michael W. McConnell, “Academic Freedom in Religious Colleges and Universities”; (8) Ralph S. Brown & Jordan E. Kurland, “Academic Tenure and Academic Freedom”; and (9) Matthew W. Finkin, “A Higher Order of Liberty in the Workplace: Academic Freedom and Tenure in the Vortex of Employment Practices and Law.” Also includes a helpful bibliography of sources: Janet Sinder, “Academic Freedom: A Bibliography,” listing 174 journal articles, books, and reports; and three appendices containing the 1915 AAUP “General Report,” the “1940 Statement of Principles,” and the 1967 “Joint Statement on Rights and Freedoms of Students.”

See entry for Finkin in Selected Annotated Bibliography for Chapter 1, Section 1.2.

### ***Sec. 7.2 (Academic Freedom in Teaching)***

Braxton, John, & Bayer, Alan. *Faculty Misconduct in Collegiate Teaching* (Johns Hopkins University Press, 1999). Against a backdrop of survey data, the authors examine professional norms regarding teaching and conduct in the classroom, factors that influence teaching behavior and the development of professional norms, and the mechanisms by which institutions address faculty misconduct and by which professional norms are enforced. The authors recommend adoption of codes of ethics for college teaching.

Olivas, Michael. “Reflections on Professorial Academic Freedom: Second Thoughts on the Third ‘Essential Freedom,’” 45 *Stan. L. Rev.* 1835 (1993). Presents the author’s perspective on faculty academic freedom, with particular emphasis on conflicts that

arise in the classroom. Considers and interrelates professional norms, First Amendment case law, and recent scholarly commentary.

O'Neil, Robert M. *Free Speech in the College Community* (Indiana University Press, 1997). Presents an array of free speech problems and their implications for the campus. Chapter 2, "The Outspoken University Professor," discusses dilemmas involving academic freedom in the classroom; and Chapter 8, "Academic Research and Academic Freedom," discusses dilemmas involving faculty research and publication. Leading cases are highlighted.

Smith, Sonya G. "Cohen v. San Bernadino Valley College: The Scope of Academic Freedom Within the Context of Sexual Harassment Claims and In-Class Speech," 25 *J. Coll. & Univ. Law* 1 (1998). Reviews the potential clash between a professor's First Amendment claims to academic freedom and students' claims to an academic setting devoid of sexual harassment. Article presents the issue through a discussion of the *Cohen* case, a 1996 Ninth Circuit case. Also presents a history and analysis of the *Connick/Pickering* test as it has been applied in other cases. Title VII and Title IX concepts of sexual harassment are compared along with supporting case law.

### ***Sec. 7.3 (Academic Freedom in Research and Publication)***

See entry for O'Neil in the Selected Annotated Bibliography for Section 7.2 above.

See O'Neil article listed under entry for Van Alstyne, "Freedom and Tenure in the Academy," in Selected Annotated Bibliography for Section 7.1 above.

See Eisenberg article listed under entry for "Symposium on Academic Freedom" in Selected Annotated Bibliography for Section 7.1 above.

### ***Sec. 7.4 (Academic Freedom in Institutional Affairs)***

See entry for Hamilton in Selected Annotated Bibliography for Section 7.1 above.

See Finkin article listed under entry for "Symposium on Academic Freedom" in Selected Annotated Bibliography for Section 7.1 above.

### ***Sec. 7.5 (Academic Freedom in Private Life)***

O'Neil, Robert. "The Private Lives of Public Employees," 51 *Or. L. Rev.* 70 (1971). Discusses the types of problems that can arise in the interaction of lifestyle and public employment. Symbolic expression, hair length, homosexual and heterosexual association, extracurricular writing, and other questions are examined. Although written primarily for the lawyer, the article is also useful for administrators of public postsecondary institutions.

See entry for DeChiara in Selected Annotated Bibliography for Section 7.6 below.

### ***Sec. 7.6 (Administrators' Authority Regarding Faculty Academic Freedom and Freedom of Expression)***

DeChiara, Peter. "The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students," 21 *Columbia J.L. & Soc. Probs.* 137 (1988). Reviews the issue of faculty-student sexual relationships and possible

responses by universities. Reports on the author's survey of thirty-eight institutions. Discusses constitutional right-to-privacy implications of regulation. Author asserts that regulation is needed because consensual sexual relationships between faculty and students can create problems of pressured decisions, sexual harassment, and favoritism.

### ***Sec. 7.7 (Protection of Confidential Academic Information: The "Academic Freedom Privilege")***

- Baez, Benjamin. "Confidentiality and Peer Review: The Paradox of Secrecy in Academia," 25 *Rev. Higher Educ.* 163 (2002). An essay that criticizes confidentiality in the peer review process, arguing that confidentiality benefits only the reviewer, and how it may inhibit a reviewer's critical analysis.
- Cecil, Joe S., & Wetherington, Gerald T. (eds.). "Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law," 59 *Law & Contemp. Probs.* 1 (1996). A Symposium issue on this topic, including articles by Barbara B. Crabb, "Judicially Compelled Disclosure of Researchers' Data: A Judge's View"; Robert M. O'Neil, "A Researcher's Privilege: Does Any Hope Remain?"; Elizabeth C. Wiggins & Judith A McKenna, "Researchers' Reactions to Compelled Disclosure of Scientific Information"; Sheila Jasanoff, "Research Subpoenas and the Sociology of Knowledge"; Michael Traynor, "Countering the Excessive Subpoena for Scholarly Research"; and Bert Black, "Research and Its Revelation: When Should Courts Compel Disclosure?"; among others.
- Rap, Rebecca E. "In re *Cusumano* and the Undue Burden of Using the Journalist Privilege as a Model for Protecting Researchers from Discovery," 29 *J. Law & Educ.* 285 (2000). Reviews the *Cusumano* case, and concludes that the researcher's privilege should be based upon academic freedom rather than modeled after the journalist's privilege.

### ***Sec. 7.8 (Academic Freedom in Religious Colleges and Universities)***

- Bramhall, Eugene H., & Ahrens, Ronald Z. "Academic Freedom and the Status of the Religiously Affiliated University," 37 *Gonzaga L. Rev.* 227 (2001-02). Authors argue that religious institutions may reasonably limit academic freedom and still be considered legitimate universities to the same extent that secular universities with full academic freedom are considered legitimate. Article evaluates the philosophical justifications for academic freedom, acceptable limits on academic freedom based on these justifications, and factors other than academic freedom that characterize a legitimate university.
- Curran, Charles E. "Academic Freedom and Catholic Universities," 66 *Texas L. Rev.* 1441 (1998). Author discusses academic freedom's history and importance at Catholic universities, and considers the impact of the 1979 Vatican document, *Sapientia Christiana*, canon 812 of the 1985 Code of Canon Law, and the 1985 Proposed Schema for a Pontifical Document on Catholic Universities. Author concludes that academic freedom for Catholic universities benefits the Roman Catholic Church. In response, see Lonnie D. Kliever, "Academic Freedom and Church-Affiliated Universities," 66 *Texas L. Rev.* 1477 (1988), which critiques Curran's articulation of academic freedom and advocates a broader concept of academic freedom than that which Curran sets out; see also the Laycock & Waelbroeck article below.

Laycock, Douglas. "The Rights of Religious Academic Communities," 20 *J. Coll. & Univ. Law* 15 (1993). Author evaluates the role of religious universities and law schools and endorses religious universities' right to limit academic freedom in cases of supreme importance to the school. Addresses constitutional protections for religious institutions, and the difficulties religious universities face in communicating the justifications for their limits on academic freedom.

Laycock, Douglas, & Waelbroeck, Susan E. "Academic Freedom and the Free Exercise of Religion," 66 *Texas L. Rev.* 1455 (1988). Authors utilize the dispute between Father Curran and the Catholic University of America to illustrate the right of churches to settle their own disputes, as well as to highlight the delicate balance between academic freedom and the tenets of faith at religious universities. Article also considers the civil contract law aspects of professors' relationships to religious universities.

McConnell, Michael W. "Academic Freedom in Religious Colleges and Universities," 53 *Law & Contemp. Probs.* 303 (1990; also reprinted in William W. Van Alstyne (ed.), *Freedom and Tenure in the Academy* (Duke University Press, 1993)). Argues that secular concepts of academic freedom should not be applied to faculty employment decisions at religious institutions. Addresses academic freedom in seminaries and theological schools, behavioral restrictions on faculty in religious colleges and universities, and the applicability of laws against discrimination on religious grounds. In response, see Judith Jarvis Thomson & Matthew W. Finkin, "Academic Freedom and Church-Related Higher Education: A Reply to Professor McConnell," in William W. Van Alstyne (ed.), *Freedom and Tenure in the Academy* (Duke University Press, 1993).

"A Symposium on the Implementation of *Ex Corde Ecclesiae*," 25 *J. Coll. & Univ. Law* 645 (1999) (Introduction by John H. Robinson). A collection of articles offering various interpretations and examples of the legal consequences of adopting *Ex Corde Ecclesiae*, the papal constitution on Catholic higher education. Article topics include the political context from which *Ex Corde Ecclesiae* emerged, a comparative study of Catholic Universities under *Ex Corde Ecclesiae* and Brigham Young University under the Church of Jesus Christ of Latter-Day Saints; an evaluation of whether it is prudent to subject American educational institutions to oversight such as that provided for in *Ex Corde Ecclesiae*; and the tension between academic freedom and religious oversight, including the theological "mandate" to which Catholic theologians are subject.

PART FOUR

THE COLLEGE AND  
ITS STUDENTS





# 8

## The Student-Institution Relationship

### *Sec. 8.1. The Legal Status of Students*

**8.1.1. Overview.** The legal status of students in postsecondary institutions changed dramatically in the 1960s, changed further near the end of the twentieth century, and is still evolving. For most purposes, students are no longer second-class citizens under the law. They are recognized under the federal Constitution as “persons” with their own enforceable constitutional rights. They are recognized as adults, with the rights and responsibilities of adults, under many state laws. And they are accorded their own legal rights under various federal statutes. The background of this evolution is traced in Section 1.2; the legal status that emerges from these developments, and its impact on postsecondary administration, is explored throughout this chapter.

Perhaps the key case in forging this shift in student status was *Dixon v. Alabama State Board of Education* (1961), discussed further in Section 9.4.2. The court in this case rejected the notion that education in state schools is a “privilege” to be dispensed on whatever conditions the state in its sole discretion deems advisable; it also implicitly rejected the *in loco parentis* concept, under which the law had bestowed on schools all the powers over students that parents had over minor children. The *Dixon* approach became a part of U.S. Supreme Court jurisprudence in cases such as *Tinker v. Des Moines School District* (see Section 9.5.1), *Healy v. James* (Sections 9.5.1 & 10.1.1), and *Goss v. Lopez* (Section 9.4.2). The impact of these public institution cases spilled over onto private institutions, as courts increasingly viewed students as contracting parties having rights under express and implied contractual relationships with the institution. Thus, at both public and private institutions, the failure to follow institutional policies, rules, and regulations has led to successful litigation by

students who claimed that their rights were violated by this noncompliance (see subsection 8.1.3 below and Sections 9.2 & 9.4).

Congress gave students at both public and private schools rights under various civil rights acts and, in the Family Educational Rights and Privacy Act (FERPA; Section 9.7.1 of this book), gave postsecondary students certain rights that were expressly independent of and in lieu of parental rights. State statutes lowering the age of majority also enhanced the independence of students from their parents and brought the bulk of postsecondary students, even undergraduates, into the category of adults.

Now another stage in the evolution of students' legal status has been emerging. Developments at this new stage suggest a renewed emphasis on the *academic freedom* of students. In classical thought on academic freedom, the student's freedom to learn is clearly recognized and considered to be at least as important as the faculty member's freedom to teach. In more modern legal developments, courts have occasionally recognized the concept of student academic freedom; in *Piarowski v. Illinois Community College*, 759 F.2d 625, 629 (7th Cir. 1985), for instance, the court noted that the term "academic freedom" is "used to denote" not only "the freedom of the individual teacher" but also "the [freedom of] the student." But most academic freedom cases have been brought by faculty members, and most academic freedom rights that courts have protected have belonged to faculty members (see especially Section 7.2). Student academic freedom issues are discussed in subsection 8.1.4 below.

**8.1.2. *The age of majority.*** The age of majority is established by state law in all states. There may be a general statute prescribing an age of majority for all or most business and personal dealings in the state, or there may be specific statutes or regulations establishing varying ages of majority for specific purposes. Until the 1970s, twenty-one was typically the age of majority in most states. But since the 1971 ratification of the Twenty-Sixth Amendment, lowering the voting age to eighteen, most states have lowered the age of majority to eighteen or nineteen for many other purposes as well. Some statutes, such as those in Michigan (Mich. Comp. Laws Ann. § 722.52), set age eighteen as the age of majority for all purposes; other states have adopted more limited or more piecemeal legislation, sometimes using different minimum ages for different purposes. Given the lack of uniformity, administrators and counsel should carefully check state law in their own states.

The age-of-majority laws can affect many postsecondary regulations and policies. For example, students at age eighteen may be permitted to enter binding contracts without the need for a cosigner, give consent to medical treatment, declare financial independence, or establish a legal residence apart from the parents. But although students' legal capacity enables institutions to deal with them as adults at age eighteen, it does not necessarily require that institutions do so. Particularly in private institutions, administrators may still be able as a policy matter to require a cosigner on contracts with students, for instance, or to consider the resources of parents in awarding financial aid, even though the parents have no legal obligations to support the student. An institution's legal

capacity to adopt such policy positions depends on the interpretation of the applicable age-of-majority law and the possible existence of special state law provisions for postsecondary institutions. A state loan program, for instance, may have special definitions of dependency or residency that may not conform to general age-of-majority laws.

Administrators will thus confront two questions: What do the age-of-majority laws require that I do in particular areas? And should I, where I am under no legal obligation, establish age requirements higher than the legal age in particular areas, or should I instead pattern institutional policies on the general legal standard?

**8.1.3. *The contractual rights of students.*** Both public and private institutions often have express contractual relationships with students. The most common examples are probably the housing contract or lease, the food service contract, and the loan agreement. In addition, courts are increasingly inclined to view the student handbook or college catalog as a contract. When problems arise in these areas, the written contract, including institutional regulations incorporated by reference in the contract, is usually the first source of legal guidance.

The contractual relationship between student and institution, however, extends beyond the terms of express contracts. There also exists the more amorphous contractual relationship recognized in *Carr v. St. John's University, New York*, 187 N.E.2d 18 (N.Y. 1962), the modern root of the contract theory of student status. In reviewing the institution's dismissal of students for having participated in a civil marriage ceremony, the court based its reasoning on the principle that "when a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought." Construing a harsh and vague regulation in the university's favor, the court upheld the dismissal because the students had failed to comply with the university's prescribed terms.

Although *Carr* dealt only with a private institution, a subsequent New York case, *Healy v. Larsson*, 323 N.Y.S.2d 625, *affirmed*, 318 N.E.2d 608 (N.Y. 1974) (discussed below in this Section), indicated that "there is no reason why . . . the *Carr* principle should not apply to a public university or community college."

Other courts have increasingly utilized the contract theory for both public and private institutions, as well as for both academic and disciplinary disputes. The theory, however, does not necessarily apply identically to all such situations. A public institution may have more defenses against a contract action. *Eden v. Board of Trustees of State University*, 374 N.Y.S.2d 686 (N.Y. App. Div. 1975), for instance, recognizes both an *ultra vires* defense and the state's power to terminate a contract when necessary in the public interest. (*Ultra vires* means "beyond authority," and the defense is essentially "You can't enforce this contract against us because we didn't have authority to make it in the first place.") And courts may accord both public and private institutions more flexibility in drafting and interpreting contract terms involving academics than they do contract terms involving discipline. In holding that Georgia State University had not breached its contract with a student by withholding a master's degree, for example, the court in *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976),

recognized the “wide latitude and discretion afforded by the courts to educational institutions in framing their academic requirements.”<sup>1</sup>

In general, courts have applied the contract theory to postsecondary institutions in a deferential manner. Courts have accorded institutions considerable latitude to select and interpret their own contract terms and to change the terms to which students are subjected as they progress through the institution. In *Mahavongsanan*, for instance, the court rejected the plaintiff student’s contract claim in part because an institution “clearly is entitled to modify [its regulations] so as to properly exercise its educational responsibility.” Nor have institutions been subjected to the rigors of contract law as it applies in the commercial world (see, for example, *Slaughter v. Brigham Young University*, discussed in Sections 9.2.3 and 9.4.4).

In some instances, courts have preferred to use quasi-contract theory to examine the relationship between an institution and its students, and may hold the institution to a good-faith standard. In *Beukas v. Fairleigh Dickinson University*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *affirmed*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992), former dental students sued the university for closing its dental school when the state withdrew its subsidy. The university pointed to language in the catalog reserving the right to eliminate programs and schools, arguing that the language was binding on the students. But instead of applying a contract theory, the trial court preferred to analyze the issue using quasi-contract theory, and applied an arbitrariness standard:

[T]his court rejects classic contract doctrine to resolve this dispute. . . . [T]he “true” university-student “contract” is one of mutual obligations implied, not in fact, but by law; it is a quasi-contract which is “created by law, for reasons of justice without regard to expressions of assent by either words or acts” [citing *Borough of West Caldwell v. Borough of Caldwell*, 26 N.J. 9 (1958)]. . . . This theory is the most efficient and legally-consistent theory to resolve a university-student conflict resulting from an administrative decision to terminate an academic or professional program. The inquiry should be: “did the university act in good faith and, if so, did it deal fairly with its students?” [605 A.2d at 783, 784].

Citing *AAUP v. Bloomfield College* (Section 6.8.2), the court explained its reasoning for using a good-faith standard rather than contract law:

This approach will give courts broader authority for examining university decisionmaking in the administrative area than would a modified standard of judicial deference and will produce a more legally cohesive body of law than will application of classic contract doctrine with its many judicially created exceptions, varying as they must from jurisdiction to jurisdiction [605 A.2d at 784–85].

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<sup>1</sup>Courts have also reviewed student challenges to academic or disciplinary decisions by colleges under the law of private associations. (See, for example, *Boehm v. University of Pennsylvania School of Veterinary Medicine*, 573 A.2d 575 (Pa. Super. 1990); *Clayton v. Trustees of Princeton University*, 519 F. Supp. 802 (D.N.J. 1981); and *Tedeschi v. Wagner College*, 404 N.E.2d 1302 (N.Y. 1980); and see generally Section 14.2 of this book.) But most of the cases continue to focus on breach of contract claims and other claims of a contractual nature.

The state's appellate court upheld the result and the reasoning, but stated that if the catalog was a contract (a question that this court did not attempt to answer), the reservation of rights language would have permitted the university to close the dental school.

Similarly, another New Jersey appellate court refused to characterize the student-institution relationship as contractual in a student's challenge to his dismissal on academic (as opposed to disciplinary) grounds. In *Mittra v. University of Medicine and Dentistry of New Jersey*, 719 A.2d 693 (N.J. Ct. App. 1998), the court stated that when the institution's action was taken for academic reasons,

the relationship between the university and its students should not be analyzed in purely contractual terms. As long as the student is afforded reasonable notice and a fair hearing in general conformity with the institution's rules and regulations, we defer to the university's broad discretion in its evaluation of academic performance. . . . Rigid application of contract principles to controversies concerning student academic performance would tend to intrude upon academic freedom and to generate precisely the kind of disputes that the courts should be hesitant to resolve [719 A.2d at 695, 697].

Since the student had not identified any specific rule or regulation alleged to have been violated, the appellate court affirmed the trial court's award of summary judgment to the university.

In addition to challenging the application of curricular or other requirements, students have also asserted contract claims when challenging dismissals or other sanctions. Traditionally, courts have typically been more deferential to institutional decisions in dismissals for academic rather than for disciplinary reasons. For example, in a misconduct case, *Fellheimer v. Middlebury College*, 869 F. Supp. 238 (D. Vt. 1994), a federal court ruled that the student handbook of a private institution was contractually binding on the college and provided the basis for a breach of contract claim. In *Fellheimer*, a student challenged the fairness of the college's disciplinary process because he was not informed of all of the charges against him. (This case is discussed more fully in Section 9.4.4.) The court rejected the college's claim that the handbook was not a contract: "While [prior cases caution courts to] keep the unique educational setting in mind when interpreting university-student contracts, they do not alter the general proposition that a College is nonetheless contractually bound to provide students with the procedural safeguards that it has promised" (869 F. Supp. 243). The court ruled that Middlebury had breached its contract with the student because the disciplinary hearing had been flawed.

The existence of a contractual relationship between student and institution is significant if the student wishes to assert constitutional claims based on a property interest. In *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3d Cir. 1991), the plaintiff, admitted to Temple University's residency program in dermatology, challenged the university's decision to terminate the program five months before she was to enroll. Unger claimed constitutional violations of both liberty and property interests. The court rejected the liberty

interest claim, stating that Unger was inconvenienced by Temple's actions but was not precluded from seeking other training.

To Unger's claim that Temple's decision deprived her of a property interest, based on her contract with the university, the court replied that the claim failed for two reasons. First, Unger had no legitimate expectation that she would continue her graduate medical training; second, she had no entitlement to the training provided by the program. The court did find that Temple's offer of admission was a contract; but it was not the type of contract that created a property interest enforceable under federal civil rights law (see Section 3.5).

Although various courts have applied contract law principles when an institution's written materials make certain representations, they may be more hesitant to do so if the promise relied upon is oral. In *Ottgen v. Clover Park Technical College*, 928 P.2d 1119 (Wash. Ct. App. 1996), a state appellate court affirmed the trial court's dismissal of contract and state consumer fraud claims against the college. Five students who had enrolled in the college's Professional Residential Real Estate Appraiser program sued the college when a promise made by a course instructor, who was subsequently dismissed by the college, did not materialize. Although the instructor had promised the students that they would receive appraisal experience as well as classroom instruction, the opportunity for on-the-job experience did not occur. The court ruled that there was no contract between the college and the students to offer them anything but classroom education. College documents discussed only the classroom component and made no representations about the eligibility for licensure of individuals who had completed the program.

Despite the generally deferential judicial attitude, the contract theory has become a source of meaningful rights for students as well as for institutions, particularly when faculty or administrators either fail to follow institutional policies or apply those policies in an arbitrary way. Students have claimed, and courts have agreed, that student handbooks, college catalogs, and other policy documents are implied-in-fact contracts, and that an institution's failure to follow these guidelines is a breach of an implied-in-fact contract (see, for example, *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 502 (Ct. App. Cal. 1972)). Other cases have involved student claims that the totality of the institution's policies and oral representations by faculty and administrators create an implied contract that, if the student pays tuition and demonstrates satisfactory academic performance, he or she will receive a degree.<sup>2</sup> And although some public institutions have escaped liability in contract claims under the sovereign immunity doctrine (see Section 3.4), not all states apply this doctrine to public colleges (see, for example, *Stratton v. Kent State University*, 2003 Ohio App. LEXIS 1206 (Ct. App. Ohio, March 18, 2003) (unpublished)).

The U.S. Court of Appeals for the First Circuit, applying Rhode Island law, provided an explicit recognition of the contractual relationship between a

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<sup>2</sup>Students have also sought to state claims of educational malpractice against colleges and their administrators and faculty. Courts have rejected these tort claims, but some have agreed to entertain breach of contract claims based upon institutional representations regarding licensure or accreditation that were alleged to be false. These cases are discussed in Section 3.3.3.

student and a college. In *Mangla v. Brown University*, 135 F.3d 80 (1st Cir. 1998), the court stated:

The student-college relationship is essentially contractual in nature. The terms of the contract may include statements provided in student manuals and registration materials. The proper standard for interpreting the contractual terms is that of “reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it” [135 F.3d at 83].

And in *Goodman v. President and Trustees of Bowdoin College*, 135 F. Supp. 2d 40 (D. Maine 2001), a federal district court, applying Maine law, ruled that even though the college had reserved the right to change the student handbook unilaterally and without notice, this reservation of rights did not defeat the contractual nature of the student handbook.

Nevertheless, a reservation of rights clause or disclaimer in the college catalog or other policy document can provide protection against breach of contract claims when curricular or other changes are made. For example, in *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988), the court rejected a student’s claim that deviations from the stated curriculum breached his contractual rights. The college’s handbook had specifically reserved the right to change degree requirements, and the college had uniformly applied curricular changes to current students in the past. Therefore, the court ruled that the changes were neither arbitrary nor capricious, and dismissed the student’s contract claim.

Similarly, an express disclaimer in a state university’s catalog defeated a student’s contract claim in *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. Ct. App. 1989). Although the catalog stated that the student would be entitled to a diploma if he successfully completed required courses and met other requirements, the express disclaimer that the catalog was not an enforceable contract and was subject to change without notice convinced the court to dismiss the student’s challenge to his academic dismissal.

A reservation of rights clause was also present, but less important, in *Beukas v. Fairleigh Dickinson University*, discussed above. The court ruled that no express contract existed between the dental students and the university and that, under principles of “quasi-contract,” the university could close the dental school as long as it acted in good faith.

In *Coddington v. Adelphi University*, 45 F. Supp. 2d 211 (E.D.N.Y. 1999), a student claimed that the private university and several individual administrators had violated the Americans With Disabilities Act (ADA; see Section 9.3.5) and breached his contract with the university by failing to accommodate his learning disabilities. Although the court dismissed the student’s ADA claim and the contract claims against individual administrators, the court rejected the university’s motion to dismiss the contract claim against the university itself. Noting that the student had paid the required tuition and had claimed to have relied upon “admission bulletins and other materials regarding Adelphi’s programs and policies regarding students with learning disabilities” and the representations of

certain administrators of his right to untimed tests and note takers, the court ruled that the student had sufficiently pleaded “the existence of a contractual agreement” with the university (but not with the individual administrators).

A case brought by a student against Yale University and his faculty advisors provides an interesting example of the use of contract law to challenge alleged professional misconduct by a graduate student’s faculty mentors. In *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (D. Conn. 2000), the student claimed that several professors had appropriated his ideas and used them in publications without his consent and without acknowledgment. The court refused to dismiss the student’s breach of contract claims because the plaintiff stated that he had relied upon specific promises contained in university catalogs and documents, including “express and implied contractual duties to safeguard students from academic misconduct, to investigate and deal with charges of academic misconduct, and to address charges of academic misconduct in accordance with its own procedures” (119 F. Supp. 2d at 96). Although the university argued that judicial review of the student’s claims involved inappropriate involvement in academic decisions, the court disagreed. Explaining that Johnson’s claims did not allege that he was provided a poor-quality education, but that the university breached express and implied contractual duties that it had assumed, the court said that its review would be limited to “whether or not Yale had a contractual duty to safeguard its students from faculty misconduct, and, if so, whether that duty was breached in Johnson’s case” (119 F. Supp. 2d at 96).

The court also allowed the plaintiff’s negligence claim to be heard, ruling that he should be allowed to attempt to demonstrate that Yale had a duty to protect its students against faculty misconduct. This is an unusual ruling, given the typical rejection by courts of students’ attempts to state claims of negligence in cases involving academic issues rather than personal injury claims (see Section 3.3.3).

The case of *Harwood v. Johns Hopkins*, 747 A.2d 205 (Ct. App. Md. 2000) provides an interesting example of an institution’s successful use of a contract theory as a defense to a student lawsuit. Harwood, a student at Johns Hopkins University, had completed all of his degree requirements, but the degree had not yet been conferred when Harwood murdered a fellow student on the university’s campus. The university notified Harwood that it would withhold his diploma pending the resolution of the criminal charges. Harwood pleaded guilty to the murder and was incarcerated. He then brought a declaratory judgment action against the university, seeking the conferral of his degree. The university argued that its written policies required students not only to complete the requirements for their degree, but to adhere to the university’s code of conduct. The court ruled that, because the murder violated the university’s code of conduct, the university had a contractual right to withhold the diploma.

Although courts are increasingly holding institutions of higher education to their promises and representations in catalogs and policy documents, they have rejected students’ attempts to claim that only the material in the written documents is binding on the *student*. For example, the Supreme Court of Alaska ruled in favor of a nursing professor at the University of Alaska who required a student who had failed a required course to take a course in “critical thinking.” When the student complained to the dean of the School of Nursing and Health



Sciences, the dean backed the professor, stating that because the requirement of this additional course was a condition of the plaintiff's remaining in the nursing program rather than removal from the program, her decision was final and could not be appealed within the university. The student then filed a breach of contract claim in state court, asserting that the student handbook did not list the course in critical thinking as required for the nursing degree.

In *Bruner v. Petersen*, 944 P.2d 43 (Alaska 1997), the state's highest court affirmed a trial court's ruling that there was no breach of contract, and also affirmed that court's award of attorney's fees to the university. Explicit language in the student handbook stated that it was not a contract, and allowed for the possibility of establishing conditions for reenrollment in any required course that a student had failed. Furthermore, said the court, the student had received all of the appeal rights provided by the catalog.

The nature of damages in a successful breach of contract claim was addressed in a case brought under Florida law. In *Sharick v. Southeastern University of the Health Sciences, Inc.*, 780 So. 2d 136 (Ct. App. Fla. 2000), a fourth-year medical student was dismissed for failing his last course in medical school. He sued the university for breach of contract, and a jury found that the university's decision to dismiss Sharick was arbitrary, capricious, and "lacking any discernable rational basis." Sharick had sought damages for future lost earning capacity as well as reimbursement of the tuition he had paid, but the trial judge would allow the jury only to consider damages related to the tuition payments. Sharick appealed the trial court's ruling on the issue of future lost earnings. The university did not appeal the jury verdict.

The appellate court reversed the trial court's limitation of damages to tuition reimbursement. Since previous cases had established that other contractual remedies, such as specific performance and *mandamus* to grant a degree were unavailable to plaintiffs suing colleges, the court stated that damages could properly include the value of the lost degree with respect to Sharick's future earnings. The Supreme Court of Florida first agreed to review the appellate court's ruling, then changed its mind, leaving the appellate decision in force (*Southeastern University of the Health Sciences, Inc. v. Sharick*, 822 So. 2d 1290 (Fla. 2002)). (For an analysis of the "lessons" of *Sharick*, see Scott D. Makar, "Litigious Students and Academic Disputes," *Chron. Higher Educ.*, November 8, 2002, B20.)

The contract theory is still developing. Debate continues on issues such as the means for identifying the terms and conditions of the student-institution contract, the extent to which the school catalog constitutes part of the contract, and the extent to which the institution retains implied or inherent authority (see Section 3.1) not expressed in any written regulation or policy. For example, in *Prusack v. State*, 498 N.Y.S.2d 455 (N.Y. App. Div. 1986), the court rejected the student's claim that a letter of admission from the university that had quoted a particular tuition rate was an enforceable contract, since other university publications expressly stated that tuition was subject to change. In *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. Ct. App. 1989), reservation of rights language in a catalog for the University of Texas Medical School at Galveston absolved the institution of contractual liability. The catalog stated: "The provisions of this catalogue are subject to change without notice and do not constitute an irrevocable contract

between any student . . . and the University.” Furthermore, the catalog gave the faculty the right to determine whether a student’s performance was satisfactory, and stated that “the Faculty of the School of Medicine has the authority to drop any student from the rolls . . . if circumstances of a legal, moral, health, social, or academic nature justify such a request” (764 S.W.2d at 838). The court said: “Given the express disclaimers in the document alleged to be a contract here, it is clear that no enforceable ‘contract’ existed” (764 S.W.2d at 838).

Also still debatable is the extent to which courts will rely on certain contract law concepts, such as “unconscionable” contracts and “contracts of adhesion.” An unconscionable contract is one that is so harsh and unfair to one of the parties that a reasonable person would not freely and knowingly agree to it. Unconscionable contracts are not enforceable in the courts. In *Albert Merrill School v. Godoy*, 357 N.Y.S.2d 378 (Civ. Ct. N.Y. City 1974), the school sought to recover money due on a contract to provide data-processing training. Finding that the student did not speak English well and that the bargaining power of the parties was uneven, the court held the contract unconscionable and refused to enforce it.

A “contract of adhesion” is one offered by one party (usually the party in the stronger bargaining position) to the other party on a “take it or leave it” basis, with no opportunity to negotiate the terms. Ambiguities in contracts of adhesion will be construed against the drafting party (in these cases, the institution) because there was no opportunity for the parties to bargain over the terms of the contract (see, for example, *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984)). See also *K.D. v. Educational Testing Service*, 386 N.Y.S.2d 747 (N.Y. Sup. Ct. 1976), where the court viewed the plaintiff’s agreement with Educational Testing Service (ETS) to take the Law School Admissions Test (LSAT) as a contract of adhesion, but ruled it valid because it was not “so unfair and unreasonable” that it should be disregarded by use of the available “pretexts,” such as a declaration that it violated public policy.

The case of *Kyriazis v. University of West Virginia*, discussed in Section 2.5.5, is an example of a contract of adhesion that a court invalidated as contrary to public policy. In particular, the court’s opinion suggests factors relevant to determining whether the bargaining powers of the parties are substantially uneven. In *Kyriazis*, the court found that the university had a “decisive bargaining advantage” over the student because (1) the student had to sign the release as a condition of sports participation and thus had no real choice; (2) the release was prepared by counsel for the university, but the student had no benefit of counsel when he signed the release; and (3) the university’s student code required students to follow the directions of university representatives.

Since these contract principles depend on the weak position of one of the parties, and on overall determinations of “fairness,” courts are unlikely to apply them against institutions that deal openly with their students—for instance, by following a good-practice code, operating grievance mechanisms for student complaints (see Sections 9.1.2–9.1.4), and affording students significant opportunity to participate in institutional governance.

Although a promise to treat the other party to the contract fairly and in good faith is part of every contract (*Restatement (Second) of Contracts* 205 (1981)),

most claims by students using this theory have been unsuccessful. For example, in *Napolitano v. Trustees of Princeton University* (discussed in section 9.4.4), the court rejected a student's claim that withholding her degree for one year as punishment for plagiarism was a breach of the covenant of good faith and fair dealing. Said the court: "To upset Princeton's decision here, this court would have to find that Princeton could not in good faith have assessed the penalties it did against the plaintiff" (453 A.2d at 284). Other examples of judicial rejection of these claims are *Coveney v. President and Trustees of the College of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983), and *Seare v. University of Utah School of Medicine*, 882 P.2d 673 (Utah Ct. App. 1994).

Although student attempts to argue that the institution has a fiduciary duty toward its students have typically been unsuccessful (Hazel Glenn Beh, "Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing," 59 *Maryland L. Rev.* 183, 202 (2000)), at least one court has ruled that a university and several of its faculty may have assumed a fiduciary duty to its graduate students. In *Johnson v. Schmitz*, discussed earlier in this Section, a federal trial court refused to dismiss a doctoral student's claim that the university breached its fiduciary duty toward the student by not protecting him from alleged academic misconduct by his faculty advisors. Said the court: "Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student" (119 F. Supp. 2d at 97–98). The court also ruled that the plaintiff might be able to demonstrate that a fiduciary relationship existed between himself and his dissertation committee, and that the dissertation committee would need to demonstrate "fair dealing by clear and convincing evidence" because "the dissertation committee was created for no other purpose than to assist Johnson" (119 F. Supp. 2d at 98). The court ruled that the case should proceed to trial. (For more on fiduciary theories, see generally A. L. Goldman, "The University and the Liberty of Its Students—A Fiduciary Theory," 54 *Kentucky L.J.* 643 (1966).)

Other contractual issues may arise as a result of the action of institutional or state-level actors. For example, in *Arriaga v. Members of Board of Regents*, 825 F. Supp. 1 (D. Mass. 1992), students challenged the constitutionality of retroactive tuition increases ordered by the state board of regents after the state legislature, responding to a fiscal crisis, passed a law increasing tuition for nonresident students. Claiming that the institution's statements about the amount of tuition for nonresident students was a contract, the students argued that the regents' action impaired their contractual rights in violation of the U.S. Constitution's contracts clause, Article I, Section 10 (see Section 6.2.2).

The regents filed a motion to dismiss the lawsuit, arguing that they had the unilateral power to impose tuition increases, and thus it was not the legislature's action that was dispositive of the constitutional claim. The court was required to determine whether it was the action of the legislature or the regents that resulted in the tuition increase, for the contracts clause would apply only to the

acts of the legislature unless it had delegated its power to the executive branch (here, the regents). The court concluded that, although the regents determined that tuition increases were necessary before the legislature formally passed the law, their action was in anticipation of the law and thus was controlled by the provisions of the contracts clause.

Students enrolled in programs that are terminated or changed prior to the students' graduation have found some state courts to be receptive to their claims that promotional materials, catalogs, and policy statements are contractually binding on the institution. An illustrative case is *Craig v. Forest Institute of Professional Psychology*, 713 So. 2d 967 (Ala. Ct. App. 1997), in which four students filed state law breach of contract and fraud claims against Forest. Forest, whose main campus was located in Wheeling, Illinois, opened a satellite campus in Huntsville, Alabama, and offered a doctoral degree program in psychology. Although the Huntsville campus was not accredited by the American Psychological Association (APA), a regional accrediting association, or the state, Forest's written materials allegedly implied that its graduates were eligible to sit for licensing examinations and to be licensed in Alabama. The Alabama Board of Examiners would not allow Forest graduates to sit for a licensing examination because its regulations provided that only graduates of accredited institutions were eligible to take the examination.

The Alabama campus proved to be a financial drain on Forest, and it closed the campus before the students had completed their doctorates. Because the college was not accredited, the students were unable to transfer credits earned at Forest to other doctoral programs.

The students' claims were based on the college's alleged promises that they could obtain a doctorate at the Huntsville campus and be eligible for licensure in Alabama. The trial court granted summary judgment to the college, but the appellate court reversed. Disagreeing with a ruling by the South Dakota Supreme Court in an earlier case, *Aase v. State*, 400 N.W.2d 269 (S.D. 1987), the court ruled that "it is not clear that Forest fulfilled all of its contractual obligations to the students merely by providing them with instruction for which they had paid tuition on a semester-by-semester basis" (713 So. 2d at 973). The scope of the contract could not be determined without a trial, said the court; although Forest had pointed to language in one publication that reserved its right to modify or discontinue programs, the court stated that this language was not "dispositive" and that all relevant documents needed to be considered. The court also ruled that a trial was necessary on the plaintiffs' fraud claims.

Contract law has become an important source of legal rights for students. Postsecondary administrators should be sensitive to the language used in all institutional rules and policies affecting students. Language suggestive of a commitment (or promise) to students should be used only when the institution is prepared to live up to the commitment. Limitations on the institution's commitments should be clearly noted where possible, and reservation of rights language should be used wherever appropriate. Administrators should consider the adoption of an official policy, perhaps even a "code of good practice," on fair dealing with students, and provide avenues for internal appeal of both academic and disciplinary decisions.

**8.1.4. Student academic freedom.** Student academic freedom is not as well developed as faculty academic freedom (the focus of Chapter Seven), either in terms of custom or in terms of law. Nevertheless, like faculty academic freedom, student academic freedom has important historical antecedents and is widely recognized in the academic community. Moreover, since the early 1990s, developments in academia and in the courts have focused attention on the academic freedom of students and raised new questions about its status and role.

The concept of student academic freedom was imported into the United States from Europe, where, in German universities, it was known as *Lernfreiheit*, the freedom to learn. (See H. S. Commanger, “The University and Freedom: ‘Lehrfreiheit’ and ‘Lernfreiheit,’” 34 *J. Higher Educ.* 361 (1963); Richard Hofstadter & Walter Metzger, *The Development of Academic Freedom in the United States* (Columbia University Press, 1955), 386–91.) In 1915, in its foundational “General Declaration of Principles,” the American Association of University Professors (AAUP) recognized *Lernfreiheit*, the student’s freedom to learn, as one of the two components of academic freedom—the other being *Lehrfreiheit*, the teacher’s freedom to teach. (*AAUP Policy Documents and Reports* (the “Redbook”) (9th ed., 2001), 291–301). In the classic “1940 Statement of Principles on Academic Freedom and Tenure,” the AAUP and the Association of American Colleges and Universities, eventually joined by more than 150 other higher education and professional associations as endorsers, specifically acknowledged “the rights of the . . . student to freedom in learning” (*AAUP Policy Documents and Reports*, 3). Subsequently, in its “Statement on Professional Ethics” (promulgated in 1966 and revised in 1987), the AAUP emphasized professors’ responsibility to “encourage the free pursuit of learning in their students” and to “protect their academic freedom” (*AAUP Policy Documents and Reports*, 133).

In 1967, representatives of the AAUP, the Association of American Colleges and Universities, the U.S. Student Association, the National Association of Student Personnel Administrators, and the National Association for Women in Education promulgated a “Joint Statement on Rights and Freedoms of Students” that was endorsed by all five organizations and various other higher education and professional associations. The Joint Statement recognizes the “freedom to learn” and the freedom to teach as “inseparable facets of academic freedom” and emphasizes that “students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth” (*AAUP Policy Documents and Reports*, 261). The Statement then elucidates “the minimal standards of academic freedom of students” that apply “in the classroom, on the campus, and in the larger community” (*Id.* at 264). This very helpful listing and exposition includes the freedom of “discussion, inquiry, and expression” in the classroom and in conferences with the instructor (*Id.* at 262); the freedom “to organize and join associations” of students, “to examine and discuss” issues and “express opinions publicly and privately” on campus, and “to invite and to hear” guest speakers (*Id.* at 263–64); the freedom “individually and collectively [to] . . . express views on issues of institutional policy” and “to participate in the formulation and application

of institutional policy affecting academic and student affairs” (*Id.* at 264); the “editorial freedom of student publications,” that is, “sufficient editorial freedom and financial autonomy . . . to maintain their integrity of purpose as vehicles for free inquiry . . . in an academic community” (*Id.*); and the freedom, “[a]s citizens,” to “exercise the rights of citizenship,” such as “freedom of speech, peaceful assembly, and right of petition,” both on and off campus (*Id.* at 265). In 1992, the Joint Statement was reviewed, updated (with interpretive footnotes), and reaffirmed by an interassociation task force.

Beginning in the 1950s, the U.S. Supreme Court has gradually, but increasingly, recognized student academic freedom. In one of the earliest and most influential academic freedom cases, *Sweezy v. New Hampshire*, Chief Justice Warren’s plurality opinion declared that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die” (354 U.S. 234, 250 (1957) (emphasis added)). In subsequent years, the Court decided various cases in which it protected students’ rights to freedom of speech, press, and association on campus (see, for example, *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed in Section 10.1.5, and *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), discussed in Section 10.3.5). These cases typically were based on generic First Amendment principles that apply both outside and within the context of academia (for example, the “public forum” principles used in *Widmar*) and did not specifically rely on or develop the concept of student academic freedom. In one of these cases, however, *Healy v. James*, 408 U.S. 169 (1972) (Section 9.5.1 & 10.1.1 of this book), the Court did emphasize that, in upholding the students’ right to freedom of association, it was “reaffirming this Nation’s dedication to safe-guarding academic freedom” (408 U.S. at 180–81, citing *Sweezy*). Then, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court, citing both *Sweezy* and *Healy*, further linked student free expression rights with student academic freedom and provided historical context for the linkage.

*Rosenberger* involved a university’s refusal to provide student activities funds to a student organization that published a Christian magazine. The Court determined that the refusal was “viewpoint discrimination” that violated the students’ right to freedom of expression. (For discussion of this aspect of *Rosenberger*, see Section 10.1.5.) In supporting its conclusion, the Court reasoned that:

[t]he danger [of chilling expression] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180–181 (1972); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses *for students to speak and to write and to learn*. See generally R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of *student intellectual life* to this day remains a vital measure of a school’s influence and

attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech *and creative inquiry* in one of the vital centers for the Nation's *intellectual life*, its college and university campuses [515 U.S. at 835–36 (emphasis added)].

Thus, although *Rosenberger* is based on free speech and press principles like those the Court used in the earlier students' rights cases, it goes further than these cases in stressing the academic freedom context of the dispute and in emphasizing the student's freedom to learn as well as the student's more generic right to speak.

The case of *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), a mandatory student fees case coming five years after *Rosenberger*, can also be seen as a student academic freedom case. (*Southworth* is discussed in Section 10.1.2.) Justice Kennedy's majority opinion in *Southworth* did not specifically invoke academic freedom, as did his previous majority opinion in *Rosenberger*, and the students did not prevail in *Southworth* to the extent that they had in *Rosenberger*. Nevertheless, the Court made clear that the justification for subsidizing student organizations through mandatory fee allocations is to provide students "the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall" (529 U.S. at 233). A university that subsidizes student speech for this purpose, however, has a "corresponding duty" to avoid infringing "the speech and beliefs" of students who object to this use of their student fees—a duty that may be fulfilled by assuring that the mandatory fee system is "viewpoint-neutral" (*Id.* at 231–33). Thus, the overall justification for the viewpoint-neutral mandatory fee system is, in effect, the promotion of student academic freedom; the university's "duty" to protect objecting students is, in effect, a duty to protect their academic freedom; and the students' right to insist on such protection is, in effect, a First Amendment academic freedom right.

The three concurring Justices in *Southworth*, unlike the majority, did specifically invoke First Amendment academic freedom (*Id.* at 236–39). In an opinion by Justice Souter, these three Justices argued that the Court's prior opinions on academic freedom (see generally Section 7.1.4 of this book) provide the legal principles that the Court should have considered in resolving the case, even though these prior precedents would not "control the result in this [case]." While the concurring Justices emphasized the "academic freedom and . . . autonomy" of the institution more than student academic freedom, they did make clear that institutional academic freedom or autonomy does not obliterate student academic freedom. From the concurring Justices' perspective, then, the objecting students' claims could be cast as student academic freedom claims, and the university's defense could be considered an institutional academic freedom or autonomy defense. (Institutional academic freedom is discussed in Section 7.1.6 of this book.)

Before *Rosenberger* and *Southworth*, as suggested above, most student academic freedom claims were based on generic free expression principles. If academic freedom was mentioned by advocates or by the courts, it was as an

add-on that gave nuance and additional weight to the traditional free expression claim. *Rosenberger* itself is perhaps the best example of this use of academic freedom arguments. The interests at stake in the earlier cases (and in *Rosenberger* itself), moreover, were traditional First Amendment interests in the right to speak rather than specific interests in the freedom to learn. Some of the cases after *Rosenberger* and *Southworth*, however, can be viewed differently; they are cast as (or are subject to being recast as) freedom to learn cases, that is, true student academic freedom cases. The *Southworth* case, as explained above, provides a kind of transitional example, combining elements of traditional free speech claims and elements of contemporary freedom to learn arguments.

Two post-*Southworth* cases, *Brown v. Li* in 2002 and the *Axson-Flynn* case in 2004, provide instructive examples of the “newer” type of student academic freedom claim.<sup>3</sup> Each of these novel U.S. Court of Appeals cases is discussed immediately below.

In *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), a master’s degree candidate at the University of California at Santa Barbara added a “Disacknowledgments” section in his master’s thesis in which he crudely criticized the graduate school’s dean, university library personnel, a former governor of the state, and others. Because the thesis contained this section, the student’s thesis committee did not approve it, resulting in the student exceeding the time limit for completing his degree requirements and being placed on academic probation. Although the university did award the degree several months later, it declined to place the thesis in the university library’s thesis archive. When the student (now a graduate) sued the dean, the chancellor, the professors on his thesis committee, and the library director in federal court, claiming that their actions violated his First Amendment free speech rights, both the trial court and the appellate court rejected his claim. The appellate court resolved the case by identifying and considering the academic and curricular interests at stake, taking into account the “university’s interest in academic freedom,” the “First Amendment rights” of the faculty members, and the “First Amendment rights” of the student. To guide its decision making, the court relied on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a U.S. Supreme Court precedent granting elementary/secondary school teachers and administrators extensive discretion to make curricular decisions, and expressly adopted the case’s reasoning for use in higher education. (See 308 F.3d at 947–52; and see Section 1.4.3 of this book for discussion of transferring lower education precedents to higher education.) Under *Hazelwood*, the appellate court explained, the defendants would prevail if their rejection of the plaintiff’s thesis “was reasonably related to a legitimate pedagogical objective” (as the court ruled it was); and in applying this standard, the court would generally “defer[ ] to the university’s expertise in defining academic standards and teaching students to meet them” (which the court did).

To supplement this mode of analysis, the court also briefly considered the relationship between the faculty members’ academic freedom under the First

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<sup>3</sup>For another example from the post-*Southworth* era, see the *Hayut* case discussed in Section 9.3.4; and for two interesting and quite different pre-*Southworth* examples, see *Salehpour v. University of Tennessee*, discussed in Section 9.5.3, and *Levin v. Harleston*, discussed in Section 7.3.



Amendment and that of the student. Describing a faculty member’s right as “a right to . . . evaluate students as determined by his or her independent professional judgment” (see generally Section 7.2.3), the court determined that “the committee members had an affirmative First Amendment right not to approve Plaintiff’s thesis.” “The presence of [the faculty members’] affirmative right,” the court emphasized, “underscores [the student’s] lack of a First Amendment right to have his nonconforming thesis approved.”

While one may question the court’s willingness to apply *Hazelwood* with full force to higher education, as well as the court’s stark manner of according faculty academic rights supremacy over student academic rights, *Brown v. Li* nevertheless provides a good description of basic limits on student academic freedom. As a general rule, said the court, faculty members and institutions, consistent with the First Amendment, may “require that a student comply with the terms of an academic assignment”; may refuse to “approve the work of a student that, in [the educator’s] judgment, fails to meet a legitimate academic standard”; may limit a “student’s speech to that which is germane to a particular academic assignment”; and may “require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose” (308 F.3d at 949, 951, 953). The court provided this example of the latter point:

For example, a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write “opinions” showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question. . . . Such requirements are part of the teachers’ curricular mission to encourage critical thinking . . . and to conform to professional norms . . . [308 F.3d at 953].

*Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), concerned a former student in the University of Utah’s Actor in Training Program (ATP) who had objected to reciting certain language that appeared in the scripts she was assigned to perform in her classes. The student’s involvement with the ATP had begun with an audition for acceptance into the program. At the audition, she stated that “she would not remove her clothing, ‘take the name of God in vain,’ ‘take the name of Christ in vain’ or ‘say the four-letter expletive beginning with the letter F.’” Despite her stipulations, she was admitted to the ATP and began attending classes. The student maintained that she informed her instructors that her stipulations were grounded in her Mormon faith.

When the student performed her first monologue, she omitted two instances of the word “goddamn” but still received an A for her performance. Later in the fall semester, she again sought to omit words that were offensive to her, but her instructor, Barbara Smith, advised her that she “would have to ‘get over’ her language concerns” and that she could “‘still be a good Mormon and say these words.’” Smith delivered an ultimatum that either the student perform the scene as written or receive a zero on the assignment. The instructor eventually relented, however, and the student omitted the offensive words and received a high grade

on the assignment. For the rest of the semester, the student continued to omit language that she found offensive from the scripts that she performed.

At the student's end-of-semester review, Smith and two other instructors addressed her omission of profane language from her performances. They advised her that "her request for an accommodation was 'unacceptable behavior'" and "recommended that she 'talk to some other Mormon girls who are good Mormons, who don't have a problem with this.'" The instructors then left the student with this choice: "You can choose to continue in the program if you modify your values. If you don't, you can leave." When the student appealed to the ATP coordinator, he supported the instructors' position. Soon thereafter, the student withdrew from the program (and from the university) because she believed that she would be asked to leave.

Subsequently, the student filed suit against the ATP instructors and the ATP coordinator, alleging violations of her First Amendment rights. She claimed that (1) "forcing her to say the offensive words constitutes an effort to compel her to speak in violation of the First Amendment's free speech clause," and (2) "forcing her to say the offensive words, the utterance of which she considers a sin, violates the First Amendment's free exercise clause." Although the student did not explicitly base her claims on academic freedom principles, it is clear that she considered the defendants' actions to be a restriction on her freedom to learn. The defendants, on the other hand, did rely on academic freedom principles, and claimed that "requiring students to perform offensive scripts advances the school's pedagogical interest in teaching acting . . ." (356 F.3d at 1291). In response to the defendants' academic freedom arguments, the appellate court decided to apply the "principle of judicial restraint in reviewing academic decisions" but explained that it did not "view [academic freedom] as constituting a separate right apart from the operation of the First Amendment within the university setting" (356 F.3d at 1293, n.14).<sup>4</sup>

For her free speech claim, the student relied both on the public forum doctrine (see Section 9.5.2) and on U.S. Supreme Court precedents on "compelled speech" (see *Wooley v. Maynard*, 430 U.S. 705 (1977); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)). The appellate court considered her argument to be that the ATP classrooms were a "public forum" in which the student had a right to be free from content restrictions on her speech, and that the state defendants had compelled her to speak (that is, to recite the profane words in the scripts), which government may not do. The public forum argument could not itself carry the day for the plaintiff, according to the court, since "[n]othing in the record leads us to conclude that . . . the ATP's classrooms could reasonably be considered a traditional public forum [or a] designated public forum" (356 F.3d at 1284–85). The classrooms were therefore a "nonpublic forum" in which instructors and administrators can regulate student speech "in

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<sup>4</sup>For more extensive judicial comment on the relationship between academic freedom principles and the First Amendment, see, for example, *Martin v. Parrish* and *Hardy v. Jefferson Community College*, Section 7.2.2 of this book; and see generally Peter Byrne, "Academic Freedom: A 'Special Concern' of the First Amendment," 99 *Yale L.J.* 251 (1989).

any reasonable manner.” Neither could the compelled speech argument necessarily carry the day for the plaintiff because students’ First Amendment rights, in the school environment, “are not automatically coextensive with the rights of adults in other settings,” especially “in the context of a school’s right to determine what to teach and how to teach it in its classrooms” (356 F.3d at 1284, quoting *Hazelwood v. Kuhlmeier* (below)). In establishing these baselines for the analysis, the appellate court, like the court in the earlier *Brown v. Li* case, relied expressly on the U.S. Supreme Court’s decision in *Hazelwood School District v. Kuhlmeier*, the elementary/secondary education case.

The *Axson-Flynn* court’s analysis did not end there, however, nor should it have. Following *Hazelwood*, the court determined that the student’s speech was “school-sponsored speech.” This is speech that a school “affirmatively promote[s]” as opposed to speech that it merely “tolerate[s]” and that may fairly be characterized as a part of the school curriculum (whether or not it occurs in a traditional classroom setting) because the speech activities are supervised by faculty members and “designed to impart particular knowledge or skills to student participants and audiences” (356 F.3d at 1286, quoting *Hazelwood* at 271). Regarding such speech, the “school may exercise editorial control ‘so long as its actions are reasonably related to legitimate pedagogical concerns’” (*Id.* at 1286, quoting *Hazelwood* at 273). Under this standard, the school’s restriction of student speech need not be “necessary to the achievement of its [pedagogical] goals,” or “the most effective means” or “the most reasonable” means for fulfilling its goals; it need only be a reasonable means (or one among a range of reasonable means) for accomplishing a pedagogical objective.

In determining whether the defendants’ compulsion of the student’s classroom speech was “reasonably related to legitimate pedagogical concerns,” the court gave “substantial deference to [the defendants’] stated pedagogical concern” (356 F.3d at 1290) and declined to “second-guess the pedagogical wisdom or efficacy of [their] goal.” In extending this deference, the court noted the generally accepted propositions that “schools must be empowered at times to restrict the speech of their students for pedagogical purposes” and that “schools also routinely require students to express a viewpoint that is not their own in order to teach the students to think critically.” As support for these propositions, the court cited *Brown v. Li* (above) and the example from that case (quoted above).

The *Axson-Flynn* court emphasized, however, that the judicial deference accorded to educators’ pedagogical choices is not limitless. In particular, courts may and must inquire “whether the educational goal or pedagogical concern was *pretextual*” (emphasis added). The court may “override an educator’s judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive” (356 F.3d at 1292).<sup>5</sup> Thus courts will not interfere

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<sup>5</sup>The court in *Brown v. Li*, above, also made a brief reference to the problem of pretext, suggesting that it too would engraft a “no-pretext” requirement onto the basic *Hazelwood* analysis. Specifically, the court left open the possibility that a student might have a claim if the reasons for the rejection of the thesis were not “pedagogical”—as, for instance, if the committee had rejected the thesis because its members were offended by the opinions or ideas expressed in the “Disacknowledgments” section (*Brown v. Li*, 308 F.3d at 953–54).

“[s]o long as the teacher limits speech or grades speech in the classroom in the name of learning,” but they may intervene when the limitation on speech is “a pretext for punishing the student for her race, gender, economic class, religion or political persuasion” (356 F.3d at 1287, quoting *Settle v. Dickson County School Bd.*, 53 F.3d 152, 155–56 (6th Cir. 1995)). Using these principles, the student argued that her instructors’ insistence that she speak the words of the script exactly as written was motivated by an “anti-Mormon sentiment” and that their pedagogical justification for their action was merely a pretext. The court was sympathetic to this argument, pointing to the instructors’ statements that the student should speak to other “good Mormon” girls who would not omit words from the script, and indicating that these statements “raise[ ] concern that hostility to her faith rather than a pedagogical interest in her growth as an actress was at stake in Defendants’ behavior.” The appellate court therefore remanded the case to the district court for further examination of the pretext issue.

On the student’s second claim, based on the free exercise of religion, the appellate court framed the issue as whether adherence to the script was a “neutral rule of general applicability” and therefore would not raise “free exercise concerns,” or a “rule that is discriminatorily motivated and applied” and therefore would raise free exercise concerns (see generally Section 1.6.2 of this book). The possibility of pretext based on anti-Mormon sentiment, which the court relied on in remanding the free speech claim, also led it to remand the free exercise issue to the district court for a determination of “whether the script adherence requirement was discriminatorily applied” to the student based on her religion.

Alternatively, regarding free exercise, the student argued and the court considered whether the ATP had a system of “individual exemptions” from the script adherence requirement. In circumstances “in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason” (356 F.3d at 1297, quoting *Employment Division v. Smith*, 494 U.S. 872, 884 (1990)). If the ATP instructors or the coordinator could make exceptions to class assignment requirements “on a case-by-case basis” by examining the “specific, personal circumstances” of individual students, said the court, this would be “a system of individualized exemptions.” If ATP personnel furthermore granted exemptions for nonreligious but not for religious hardships, or discriminated among religions in granting or refusing exceptions, substantial free exercise issues would arise even if the class assignment requirements themselves were neutral and nondiscriminatory as to religion. Since there was evidence that one other ATP student, a Jewish student, had received an exception due to a religious holiday, and there was no other clarifying information in the record concerning individualized exemptions, the appellate court remanded the case for further proceedings on this issue as well.<sup>6</sup>

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<sup>6</sup>The district court did not get the opportunity to develop the issues that the court of appeals had framed in this unusual case. After the appellate court’s decision, the parties settled the case. As part of the settlement, the university agreed to implement a policy on religious accommodations for students. See Elizabeth Neff, “Script v. Scripture: U. Settles Case Over Student’s Rights on Stage,” *Salt Lake Tribune*, July 7, 2004.

The *Axson-Flynn* case therefore provides no definitive dispositions of the various issues raised, but it does provide an extended and instructive look at a contemporary “freedom to learn” problem. The court’s analysis, once parsed as suggested above, contains numerous legal guidelines regarding the freedom to learn. These guidelines, combined with the more general guidelines found in the *Brown v. Li* case (above), will provide substantial assistance for administrators and counsel, and for future courts.

In addition to the judicial developments in *Brown v. Li* and *Axson-Flynn v. Johnson*, and *Rosenberger* and *Southworth* before them, there have been various other developments in academia that have reflected or stimulated greater emphasis on student academic freedom and what it entails. One major example is the concern about “hostile (learning) environments” (see Section 9.3.4). Most of the cases thus far have been brought by faculty members asserting violations of their own academic freedom.<sup>7</sup> These cases have made clear that, although faculty members’ academic freedom may be “paramount in the academic setting,” the faculty members’ rights “are not absolute to the point of compromising a student’s right to learn in a hostile-free environment” (*Bonnell v. Lorenzo*, 241 F.3d 800, 823–24 (6th Cir. 2001)). Thus the faculty cases have had an important impact on the academic freedom of students, and students have had an increasingly important stake in the disputes between faculty members and their institutions. Indeed, students have lodged some of the complaints that have precipitated such disputes. (See, for example, the *Cohen* case, the *Silva* case, the *Bonnell* case, and the *Hardy* case in Section 7.2.2.) A faculty member’s actions may have hindered the students’ freedom to learn, for instance, by demeaning certain groups of students, ridiculing certain students’ answers, or using the classroom to indoctrinate or proselytize. If the faculty member prevails in such a dispute, student academic freedom may be diminished, and if the institution prevails it may be enhanced (see, for example, the *Bonnell* case and the *Bishop* case in Section 7.2.2). Or a faculty member may have used methods or materials that intrude upon other student interests in learning—for example, their interests in fair grading practices or in freedom from harassment. If the faculty member prevails, such student interests may receive less protection, and if the institution prevails they may receive more (see, for example, the *Bonnell* case in Section 7.2.2). Conversely, a faculty member may have acted in a way that guarded the students’ freedom to learn or promoted related student interests; if the faculty member prevails in this situation, the students win too, and if the institution prevails they lose (see, for example, the *Hardy* case in Section 7.2.2). Such faculty cases thus have the potential to focus attention on student academic freedom and to influence the protection of student academic freedom through judicial acceptance or rejection of particular claims of faculty members.

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<sup>7</sup>The leading exceptions are *Hayut v. State University of New York*, discussed in Section 9.3.4, which was brought by a student against the institution and a classroom instructor; and *Kelly v. Yale University*, 2003 WL 1563424 (D. Conn.), discussed in subsection 8.1.5 below, which was brought by a student at the Yale Divinity School who claimed that she was sexually assaulted by another student.

Another contemporary development implicating the freedom to learn is the continuing concern about “speech codes” and their effects on students (see Section 9.6), along with related concerns about the “political correctness” phenomenon on campus (see, for example, P. Berman (ed.), *Debating P.C.: The Controversy over Political Correctness on College Campuses* (Dell, 1992)). Required readings and exercises for student orientation programs have also raised concerns (see, for example, Erin O’Connor, “Misreading What Reading Is For,” *Chron. Higher Educ.*, September 5, 2003),<sup>8</sup> as have diversity training programs for students (see, for example, Gary Pavela, “Thinking About the UVA ‘Diversity Exercise,’” *Synfax Weekly Report*, September 23, 2003, 3179). In addition, there have been various claims (from within and outside the campus) about politicization and liberal bias in faculty hiring, selection of outside speakers for campus events, development of curriculum, selection of course materials, and the teaching methods, classroom remarks, and grading practices of instructors. (See Sara Hebel, “Patrolling Professors’ Politics,” *Chron. Higher Educ.*, February 13, 2004, A18.)

In the first years of the twenty-first century, such allegations and concerns led interested parties to draft and sponsor an “Academic Bill of Rights” for consideration by colleges and universities, and state boards and legislatures. The text of the Academic Bill of Rights (ABOR), commentary on the document, information on the author (David Horowitz), and background information on the matters addressed in the document can all be found on the Web site of Students for Academic Freedom, a primary sponsor of ABOR (<http://www.studentsforacademicfreedom.org>). For information on this organization, see Sara Hebel, “Students for Academic Freedom: A New Campus Movement,” *Chron. Higher Educ.*, February 9, 2004, A18.

Bills or resolutions supporting ABOR principles have been introduced in a number of state legislatures, including those of California, Colorado, Florida, Georgia, Indiana, Ohio, and Pennsylvania. Two resolutions have been adopted, one in Georgia and one in Pennsylvania. (See, for example, General Assembly of Pennsylvania, House Resolution No. 177, Session of 2005, which establishes a “select committee” to investigate “academic freedom and intellectual diversity” in Pennsylvania state colleges and universities and community colleges.) A resolution supporting ABOR was also introduced in Congress (House Congressional Resolution 318, October 2003), and a similar provision was added to a House bill (H.R. 4283, May 2004). Legislative developments concerning ABOR are tracked on the Students for Academic Freedom Web site, above.

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<sup>8</sup>At least one controversy regarding a student orientation reading assignment has resulted in litigation. In *Yacovelli v. Moeser*, Case No. 02-CV-596 (M.D.N.C. 2002), *affirmed*, Case No. 02-1889 (4th Cir. 2002), a case concerning the University of North Carolina/Chapel Hill, both the U.S. district court and the U.S. Court of Appeals rejected an establishment clause challenge to the reading program brought by various students and state taxpayers. The case is discussed in Donna Euben, “Curriculum Matters,” *Academe*, November–December 2002, 86. In a later ruling, 324 F. Supp. 2d 760 (2004), the district court also rejected the plaintiffs’ free exercise clause challenge to the reading program. The case is discussed in Section 7.1.5 of this book.

Higher education associations and commentators in and out of academia have also vigorously debated the Academic Bill of Rights and its underlying ideas. The debate has focused on the empirical basis for some of the expressed concerns, the nature and extent of the problems that such concerns may present, the extent to which student academic freedom (or faculty academic freedom) may be endangered by the alleged developments addressed by ABOR, and the extent to which ABOR and other suggested solutions for the perceived problems may themselves endanger student, faculty, or “institutional” academic freedom. (See, for example, AAUP, “For the Record: Academic Bill of Rights,” in *Academe*, January–February 2004, 79–81); David Horowitz, “In Defense of Intellectual Diversity,” *Chron. Higher Educ.*, February 13, 2004, B12; and Stanley Fish, “Intellectual Diversity: The Trojan Horse of a Dark Design,” *Chron. Higher Educ.*, February 13, 2004, B13.) Subsequently, in June 2005, the American Council on Education and other higher educational organizations released a statement titled “Academic Rights and Responsibilities” that served as a response to much of the debate surrounding the Academic Bill of Rights (see Sara Hebel, “Higher Education Groups Issue Statement on Academic Rights and Intellectual Diversity on Campuses,” *Chron. Higher Educ.*, July 1, 2005, A16). The statement, containing “five central or overarching principles” concerning “intellectual pluralism and academic freedom” on campus, is available at <http://www.acenet.edu>, under News Room/Press Releases.

This continuing debate on the Academic Bill of Rights and intellectual diversity, and the legislative developments and lobbying efforts that fuel the debate, are serving to raise new policy and legal issues concerning the customary and legal protections that academic freedom affords students as well as faculty. (For related discussion of faculty academic freedom, see Sections 7.1.5 and 7.2 through 7.4 of this book.) In addition, the legislative and lobbying developments regarding ABOR are raising new issues concerning so-called institutional academic freedom. (For further discussion of the latter, see Section 7.1.6 of this book.)

**8.1.5. Students' legal relationships with other students.** Students have a legal relationship not only with the institution, as discussed in many Sections of this book, but also with other students, with faculty members, and with staff members. These legal relationships are framed both by external law (see Section 1.4.2), especially tort law and criminal law (which impose duties on all individuals in their relationships with other individuals), and by the internal law of the campus (see Section 1.4.3). For students' peer relationships, the most pertinent internal law is likely to be found in student conduct codes, housing rules, and rules regarding student organizations. Since such rules are created and enforced by and in the name of the institution, colleges and universities (as legal entities) are also typically implicated in student-student relationships, and in the resolution of disputes between and among students. In addition, institutions may become implicated in student-student relationships because aggrieved students may sometimes claim that their institution is liable for particular acts of other students. Although students generally do not act as

agents of their institutions in their relationships with other students (see generally Sections 2.1.3 & 3.2.3), there are nevertheless various circumstances in which institutions may become liable for acts of students that injure other students.

In *Foster v. Board of Trustees of Butler County Community College*, 771 F. Supp. 1122 (D. Kan. 1991), for example, the institution was held liable for the acts of a student whom the court considered to be a “gratuitous employee” of the institution. In *Morse v. Regents of the University of Colorado*, 154 F.3d 1124 (10th Cir. 1998), the court ruled that the institution would be responsible, under Title IX (see Section 13.5.3 of this book), for the acts of a Reserve Officer Training Corps (ROTC) cadet who allegedly sexually harassed another cadet if the first cadet was “acting with authority bestowed by” the university’s ROTC program. And in *Brueckner v. Norwich University*, 730 A.2d 1086 (Vt. 1999), the institution was held liable for certain hazing actions of its upper-class cadets because the university had authorized the cadets to orient and indoctrinate the first-year students and was thus vicariously liable for the damage the cadets caused by hazing even though written university policy forbade hazing activity.

Students themselves can also become liable for harm caused to other students. In some of the fraternity hazing cases, for instance, fraternity members have been held negligent and thus liable for harm to fraternity pledges (see Section 10.2.4). In defamation cases, students—especially student newspaper editors—could become liable for defamation of other students. *Mazart v. State* (discussed in Sections 3.3.1 & 10.3.6) illustrates the type of dispute that could give rise to such liability. In other cases, relationships between students may occasion criminal liability. In *State v. Allen*, 905 S.W.2d 874 (Mo. 1995), for example, a student was prosecuted for hazing activities resulting in the death of a fraternity pledge, and the highest court of Missouri upheld the constitutionality of the state’s anti-hazing criminal statute. Another possibility for student liability could arise under Section 1983, which creates individual liability for violation of persons’ constitutional rights (see Section 4.7.4 of this book). This possibility is more theoretical than practical, however, since students, unlike faculty members, usually do not act under “color of law” or engage themselves in state action, as Section 1983 requires. (See *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (students), and compare *Hayut v. State Univ. of New York*, 352 F.3d 733, 743–45 (2d. Cir. 2003) (faculty members), both discussed in Section 1.5.2.)

One of the most serious contemporary problems concerning student relationships is the problem of peer harassment, that is, one student’s (or a group of students’) harassment of another student (or group of students). The harassment may be on grounds of race, national origin, ethnicity, sex, sexual orientation, religion, disability, or other factors that happen to catch the attention of students at particular times on particular campuses. Such behavior may create disciplinary problems that result in student code of conduct proceedings; and more generally it may compromise the sense of community to which most institutions aspire. (See generally *Peer Harassment: Hassles for Women on Campus* (Center for Women’s Policy Studies, 1992); Thomas Mayes,



“Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers,” 29 *Fordham Urban L.J.* 641 (2001).)

In addition, peer harassment may sometimes result in legal liabilities: the harasser may become liable to the victim of the harassment, or the institution may become liable to the victim. Tort law—for instance, assault, battery, and intentional infliction of emotional distress—usually forms the basis for such liability. In more severe cases, the student perpetrator may also become subject to criminal liability—for instance, under a stalking law, a sexual assault law, a rape law, a hate crime law, or a criminal anti-hazing law. Some laws, especially federal and state civil rights laws, may also make the institution liable to the student victim in some circumstances in which the institution has supported, condoned, or ignored the harassment. Under the federal Title VI statute (see Section 13.5.2), for example, the Tenth Circuit held that a victim of peer racial harassment has a private cause of action against the school if the school “intentionally allowed and nurtured a racially hostile educational environment” by being deliberately indifferent to incidents of peer harassment of which it was aware (*Bryant v. Independent School District No. 1-38 of Gavin County*, 334 F.3d 928 (10th Cir. 2003)). And under the federal Title IX statute (see Section 13.5.3 of this book), another court held that a peer harassment victim had a cause of action against the institution where she was raped by another student if she remained “vulnerable” to possible future harassment by the perpetrator due to the institution’s unwillingness to provide “academic and residential accommodations” pending the perpetrator’s disciplinary hearing (*Kelly v. Yale University*, 2003 WL 1563424, 2003 U.S. Dist. LEXIS 4543 (D. Conn. 2003)).

The rest of this subsection focuses on peer sexual harassment under Title IX, the statute under which most of the litigation regarding peer harassment has occurred. This material should be read in conjunction with the material in Section 9.3.4 on faculty harassment of students. The definitions, examples, legal standards, and types of challenges addressed in that Section apply, for the most part, to peer harassment as well. As Section 9.3.4 indicates, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), was the U.S. Supreme Court’s first look at student sexual harassment claims under Title IX. But since *Franklin* concerned a faculty member’s harassment of a student, it did not address or resolve issues concerning peer sexual harassment or an educational institution’s liability to victims of such harassment. These questions were extensively discussed in the lower courts after *Franklin*, however; and as with questions about an institution’s liability for faculty harassment, the courts took varying approaches to the problem, ranging from no liability at all (see *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*)) to liability whenever the institution “knew or should have known” of the harassment (see *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996)). The U.S. Department of Education (ED) also addressed peer harassment and related liability issues in its document, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034 (March 13, 1997). Regarding peer sexual harassment, this Guidance stated that an institution would be liable under Title IX for a student’s sexual

harassment of another student if: “(i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action” (62 Fed. Reg. at 12039). The Guidance also addressed how a school or college may avoid Title IX liability for peer harassment:

[I]f, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. . . . Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice [62 Fed. Reg. at 12039–40].

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), in a hotly contested 5-to-4 decision, the U.S. Supreme Court established an “actual knowledge” and “deliberate indifference” standard of liability for faculty harassment of a student. (For further discussion of this case, see Section 9.3.4.) It was not clear whether this standard would also apply to an institution’s liability for peer harassment. One year later, in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court relieved the uncertainty. In another 5-to-4 decision, the Court majority held that an educational institution’s Title IX damages liability for peer harassment is based upon the same standard that the Court had established in *Gebser* to govern liability for faculty harassment:

We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does [526 U.S. at 643].

The Court took considerable pains to develop the “limited circumstances” that must exist before a school will be liable for peer sexual harassment. First, the school must have “substantial control over both the harasser and the context in which the known harassment occurs” (526 U.S. at 645). Second, the sexual harassment must be “severe, pervasive, and objectively offensive”:

[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities. Cf. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 57, 67 (1986).

\* \* \* \*

Moreover, the [Title IX requirement] that the discrimination occur “under any education program or activity” suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe

one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored [526 U.S. at 651, 652–53].

Speaking for the four dissenters, Justice Kennedy issued a sharply worded and lengthy dissent. In somewhat overblown language, he asserted:

I can conceive of few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the State and its citizens than the one the Court creates today by its own hand. Trusted principles of federalism are superseded by a more contemporary imperative. . . .

Today's decision mandates to teachers instructing and supervising their students the dubious assistance of federal court plaintiffs and their lawyers and makes the federal courts the final arbiters of school policy and of almost every disagreement between students. [526 U.S. at 685, 686 (Kennedy, J., dissenting)].

By highlighting the “limiting circumstances” that confine a school’s liability, and adding them to those already articulated in *Gebser*, the Court in *Davis* appears to create a four-part standard for determining when an educational institution would be liable in damages for peer sexual harassment. The four elements are:

1. The institution must have “actual knowledge” of the harassment;
2. The institution must have responded (or failed to respond) to the harassment with “deliberate indifference,” which the *Davis* Court defines as a response that is “clearly unreasonable in light of the known circumstances” (526 U.S. at 648);
3. The institution must have had “substantial control” over the student harasser and the context of the harassment; and
4. The harassment must have been “severe, pervasive, and objectively offensive” to an extent that the victim of the harassment was in effect deprived of educational opportunities or services.

The Court in *Davis* did not address the question of who within the institution must have received notice of the harassment or whether this individual must have authority to initiate corrective action—both factors emphasized in *Gebser*. Presumably, however, these factors would transfer over from *Gebser* to the peer harassment context and become part of the actual knowledge element—the first part of the four-part *Davis* standard.

The *Davis* standard of liability, therefore, is based upon but is not identical to the *Gebser* standard. The Court has added additional considerations into the *Davis* analysis that tend to make it even more difficult for a victim to establish a claim of peer harassment than to establish a claim of faculty harassment. As the Court noted near the end of its opinion in *Davis*:

The fact that it was a teacher who engaged in harassment in . . . *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment [526 U.S. at 653].

The *Davis* Court's emphasis on *control* also suggests that peer harassment claims will be even more difficult to establish in higher education litigation than they are in elementary/secondary litigation. The majority opinion indicates that institutional control over the harasser and the context of the harassment is a key to liability, that the control element of the liability standard "is sufficiently flexible to account . . . for the level of disciplinary authority available to the school," and that "[a] university [would not] . . . be expected to exercise the same degree of control over its students" as would elementary schools (526 U.S. at 649). It should follow that colleges and universities, in general, have less risk of money damages liability under Title IX for peer harassment than do elementary and secondary schools because they exert less control over students and over the educational environment.

*Davis* and the lower court litigation that has followed, however, is not the last or only word for institutions regarding peer sexual harassment under Title IX. Subsequent to *Davis* (and *Gebser*), the U.S. Department of Education reconsidered and reaffirmed the Title IX guidelines on sexual harassment that it had originally promulgated in 1997. (See *Revised Sexual Harassment Guidance: Harassment of Students by School Employers, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (January, 19, 2001), also available at <http://www.wd.gov/offices/OCR/archives/shguide/index.html>.) This Revised Guidance, which applies to all the department's Title IX enforcement activities involving sexual harassment, was accompanied by substantial commentary (including commentary on the case law) prepared by the department. The Guidance and commentary provide colleges and universities with a detailed blueprint for complying with their Title IX responsibilities regarding peer sexual harassment.

## **Sec. 8.2. Admissions**

**8.2.1. Basic legal requirements.** Postsecondary institutions have traditionally been accorded wide discretion in formulating admissions standards. The law's deference to institutional decision making stems from the notion that tampering with admissions criteria is tampering with the expertise of educators. In the latter part of the twentieth century, however, some doorways were

opened in the wall of deference, as dissatisfied applicants successfully pressed the courts for relief, and legislatures and administrative agencies sought to regulate certain aspects of the admissions process.

Institutions are subject to three main constraints in formulating and applying admissions policies: (1) the selection process must not be arbitrary or capricious; (2) the institution may be bound, under a contract theory, to adhere to its published admissions standards and to honor its admissions decisions; and (3) the institution may not have admissions policies that unjustifiably discriminate on the basis of characteristics such as race, sex, disability, age, residence, or citizenship. These constraints are discussed in subsections 8.2.2 to 8.2.4 below.

Although institutions are also constrained in the admissions process by the Family Education and Privacy Rights Act (FERPA) regulations on education records (Section 9.7.1), the regulations have only limited applicability to admissions records. The regulations do not apply to the records of persons who are not or have not been students at the institution; thus, admissions records are not covered until the applicant has been accepted and is in attendance at the institution (34 C.F.R. §§ 99.1(d), 99.3 (“student”). The institution may also maintain the confidentiality of letters of recommendation if the student has waived the right of access; such a waiver may be sought during the application process (34 C.F.R. § 99.12). Moreover, when a student from one component unit of an institution applies for admission to another unit of the same institution, the student is treated as an applicant rather than as a student with respect to the second unit’s admissions records; those records are therefore not subject to FERPA until the student is in attendance in the second unit (34 C.F.R. § 99.5).

Students applying to public institutions may also assert constitutional claims based on the due process clause of the Fourteenth Amendment. In *Phelps v. Washburn University of Topeka*, 634 F. Supp. 556 (D. Kan. 1986), for example, the plaintiffs asserted procedural due process claims regarding a grievance process available to rejected applicants. The court ruled that the plaintiffs had no property interest in being admitted to the university, thus defeating their due process claims. And in *Martin v. Helstad*, 578 F. Supp. 1473 (W.D. Wis. 1983), the plaintiff sued a law school that had revoked its acceptance of his application when it learned that he had neglected to include on his application that he had been convicted of a felony and incarcerated. The court held that, although the applicant was entitled to minimal procedural due process to respond to the school’s charge that he had falsified information on his application, the school had provided him sufficient due process in allowing him to explain his nondisclosure. (For a more recent example of the withdrawal of admission for an otherwise qualified applicant for failure to report a criminal offense, see Fox Butterfield, “Woman Who Killed Mother Denied Harvard Admission,” *New York Times*, April 8, 1995, p. 1.)

Falsification of information on an application may also be grounds for later discipline or expulsion. In *North v. West Virginia Board of Regents*, 332 S.E.2d 141 (W. Va. 1985), a medical student provided false information on his application concerning his grade point average, courses taken, degrees, birth date,

and marital status. The court upheld the expulsion on two theories: that the student had breached the university's disciplinary code (even though he was not a student at the time) and that the student had committed fraud.

**8.2.2. Arbitrariness.** The "arbitrariness" standard of review is the one most protective of the institution's prerogatives. The cases reflect a judicial hands-off attitude toward any admissions decision arguably based on academic qualifications. Under the arbitrariness standard, the court will overturn an institution's decision only if there is no reasonable explanation for its actions. *Lesser v. Board of Education of New York*, 239 N.Y.S.2d 776 (N.Y. App. Div. 1963), provides a classic example. Lesser sued Brooklyn College after being rejected because his grade point average was below the cut-off. He argued that the college acted arbitrarily and unreasonably in not considering that he had been enrolled in a demanding high school honors program. The court declined to overturn the judgment of the college, stating that discretionary decisions of educational institutions, particularly those related to determining the eligibility of applicants, should be left to the institutions.

The court in *Arizona Board of Regents v. Wilson*, 539 P.2d 943 (Ariz. Ct. App. 1975), expressed similar sentiments. In that case a woman was refused admission to the graduate school of art at the University of Arizona because the faculty did not consider her art work to be of sufficiently high quality. She challenged the admissions process on the basis that it was a rolling admissions system with no written guidelines. The court entered judgment in favor of the university:

This case represents a prime example of when a court should not interfere in the academic program of a university. It was incumbent upon appellee to show that her rejection was in bad faith, or arbitrary, capricious, or unreasonable. The court may not substitute its own opinions as to the merits of appellee's work for that of the members of the faculty committee who were selected to make a determination as to the quality of her work [539 P.2d at 946].

Another court, in considering whether a public university's refusal to admit a student to veterinary school involved constitutional protections, rejected arbitrariness claims based on the due process and equal protection clauses. In *Grove v. Ohio State University*, 424 F. Supp. 377 (S.D. Ohio 1976), the plaintiff, denied admission to veterinary school three times, argued that the use of a score from a personal interview introduced subjective factors into the admissions decision process that were arbitrary and capricious, thus depriving him of due process. Second, he claimed that the admission of students less well qualified than he deprived him of equal protection. And third, he claimed that a professor had told him he would be admitted if he took additional courses.

Citing *Roth* (Section 6.7.2), the court determined that the plaintiff had a liberty interest in pursuing veterinary medicine. The court then examined the admissions procedure and concluded that, despite its subjective element, it provided sufficient due process protections. The court deferred to the academic judgment of the admissions committee with regard to the weight that should be given to the interview score. The court also found no property interest, since

the plaintiff had no legitimate entitlement to a space in a class of 130 when more than 900 individuals had applied.

The court rejected the plaintiff's second and third claims as well. The plaintiff had not raised discrimination claims, but had asserted that the admission of students with lower grades was a denial of equal protection. The court stated: "This Court is reluctant to find that failure to adhere exactly to an admissions formula constitutes a denial of equal protection" (424 F. Supp. at 387), citing *Bakke* (see Section 8.2.5). Nor did the professor's statement that the plaintiff would be reconsidered for admission if he took additional courses constitute a promise to admit him once he completed the courses.

The review standards in these cases establish a formidable barrier for disappointed applicants to cross. But occasionally someone succeeds. *State ex rel. Bartlett v. Pantzer*, 489 P.2d 375 (Mont. 1971), arose after the admissions committee of the University of Montana Law School had advised an applicant that he would be accepted if he completed a course in financial accounting. He took such a course and received a D. The law school refused to admit him, claiming that a D was an "acceptable" but not a "satisfactory" grade. The student argued that it was unreasonable for the law school to inject a requirement of receiving a "satisfactory grade" after he had completed the course. The court agreed, saying that the applicant was otherwise qualified for admission and that to make a distinction between "acceptable" and "satisfactory" was an abuse of institutional discretion.

All these cases involve public institutions; whether their principles would apply to private institutions is unclear. The "arbitrary and capricious" standard apparently arises from concepts of due process and administrative law that are applicable only to public institutions. Courts may be even less receptive to arbitrariness arguments lodged against private schools, although common law may provide some relief even here. In *Levine v. George Washington University* and *Paulsen v. Golden Gate University* (Section 8.2.6), for example, common law principles protected students at private institutions against arbitrary interpretation of institutional policy.

The cases discussed in this Section demonstrate that, if the individuals and groups who make admissions decisions adhere carefully to their published (or unwritten) criteria,<sup>9</sup> give individual consideration to every applicant, and provide reasonable explanations for the criteria they use, judicial review will be deferential.

**8.2.3. The contract theory.** Students who are accepted for admission, but whose admission is reversed by the institution through no fault of the student,

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<sup>9</sup>A case from the Alaska Supreme Court suggests that an institution may use additional admissions criteria if they are supported by an appropriate academic rationale. In *Hunt v. University of Alaska at Fairbanks*, 52 P.3d 739 (Alaska 2002), the court rejected a student's claim that requiring him to take a standardized test (which he did not pass) in addition to fulfilling all published admission requirements was arbitrary and capricious. The court disagreed, stating that, because the student could not meet the published criteria, the university had given him an additional mechanism to demonstrate that he was qualified for admission.

have met with some success in stating breach of contract claims. For example, the plaintiffs in *Eden v. Board of Trustees of the State University*, 374 N.Y.S.2d 686 (N.Y. App. Div. 1975), had been accepted for admission to a new school of podiatry being established at the State University of New York (SUNY) at Stony Brook. Shortly before the scheduled opening, the state suspended its plans for the school, citing fiscal pressures in state government. The students argued that they had a contract with SUNY entitling them to instruction in the podiatry school. The court agreed that SUNY's "acceptance of the petitioners' applications satisfies the classic requirements of a contract." Though the state could legally abrogate its contracts when necessary in the public interest to alleviate a fiscal crisis, and though "the judicial branch . . . must exercise restraint in questioning executive prerogative," the court nevertheless ordered the state to enroll the students for the ensuing academic year. The court found that a large federal grant as well as tuition money would be lost if the school did not open, that the school's personnel were already under contract and would have to be paid anyway, and that postponement of the opening therefore would not save money. Since the fiscal crisis would not be alleviated, the state's decision was deemed "arbitrary and capricious" and a breach of contract.

An Illinois appellate court ruled that a combination of oral promises, past practice, written promises, and a lack of notice about a change in admission standards constituted an implied promise to admit ten students to the Chicago Medical School. In *Brody v. Finch University of Health Sciences/Chicago Medical School*, 698 N.E.2d 257 (Ill. App. 1998), the plaintiffs had enrolled in a master's degree program in applied physiology because they had been promised, both orally and in the college's written documents, that they would be admitted to the medical school if they earned a 3.0 average or better. They had also been told that the college had followed this practice for several years. The year that the plaintiffs applied to the medical school, however, the school changed its practice of accepting all qualified graduates from the applied physiology program, and instead admitted only the top fifty. Six of the plaintiffs had received letters stating that they had been admitted, while the remaining plaintiffs had been told orally that they would be admitted. But the plaintiffs were not admitted and were not advised of this until shortly before the program was to begin. Some of the plaintiffs had resigned from their jobs and moved to Chicago; many had signed housing leases; and several had given up opportunities for study at other medical colleges.

The trial court ruled that the combination of the written statements, the oral promises, and the college's past practice created an implied contract, and that the college's determination two weeks prior to the beginning of the program to admit only fifty students from the applied physiology program was arbitrary and capricious. The college had made no effort to contact the students who were not admitted, and they had reasonably relied on the representations of college employees, written documents from previous years, and the college's past practice of admitting all applicants with a 3.0 or better grade point average. The appellate court affirmed, endorsing the trial court's analysis. (The applicants' state law consumer fraud cause of action had been rejected by the trial court



because they had not addressed consumer protection issues in their complaint; the appellate court affirmed on this claim as well.)

But students relying on alleged promises by a faculty member that their admission is assured have been less successful. In *Keles v. Yale University*, 889 F. Supp. 729 (S.D.N.Y. 1995), *affirmed without opinion*, 101 F.3d 108 (2d Cir. 1996), the plaintiff sought admission to the graduate program in mechanical engineering at Yale University. He was rejected twice. He then contacted a professor in the department, seeking his assistance. The professor agreed to give the plaintiff a position as a research assistant and, “if things worked out,” to write a letter of support for his third attempt to be admitted to the program. At the time of this agreement, the professor advised the student, who had been admitted to a graduate program at another university, to accept that offer rather than to take his chances on an uncertain outcome at Yale.

The plaintiff worked as a research assistant for the professor, who became dissatisfied with the plaintiff’s work and refused to write the letter of support. He did, however, continue the plaintiff’s appointment as a research assistant and paid the tuition for a course the plaintiff enrolled in, although he again recommended that the plaintiff seek admission to programs at other institutions. In the interim, the plaintiff applied to the Yale program and was rejected two more times. He filed claims for breach of contract and fraudulent inducement, claiming that the promises made by the professor were an oral contract promising to admit him to the graduate program.

The court noted that the professor had twice recommended that the plaintiff apply to other graduate programs and ruled that the breach of contract claims were clearly refuted by documentary evidence. Given the clarity of the professor’s written agreements with the plaintiff, the court ruled that it was unreasonable for the plaintiff to believe that he had been admitted to the program. Determining that the professor and other Yale representatives had acted reasonably, the court rejected the plaintiff’s claim that their actions had been arbitrary or in bad faith. The court granted summary judgment on all but one of the claims, and dismissed the remaining claim because the damages sought were less than \$50,000, which is the jurisdictional threshold for diversity jurisdiction. The court also sanctioned the plaintiff’s attorney for bringing frivolous claims. The appellate court affirmed without comment.

Despite the positive outcome for the university, this case serves as a warning to faculty and administrators concerning offers of assistance with admission, or representations about admission, that are made to students or potential students. It is important that admissions materials and student catalogs make clear who has the authority to admit students to a program, and the criteria that will be used to make admissions decisions. Offers to write letters of support or provide other assistance with admission should be carefully stated and limited as the Yale professor did. The temporary nature of an employment relationship with a potential student, such as the plaintiff in this case, should be made clear in a letter or similar document that specifies the terms of the individual’s appointment; and in states where oral promises are contractually binding, faculty and administrators should specify that the written agreement is the entire

agreement between the parties. A statement in the college catalog or other official policy document that offers of admission are only official when made in writing by the institution will help prevent claims by disappointed applicants that oral representations by faculty or staff should be binding on the institution.

Thus, the contract theory clearly applies to both public and private schools, although, as *Eden* suggests, public institutions may have defenses not available to private schools. While the contract theory does not require administrators to adopt or to forgo any particular admissions standard, it does require that administrators honor their acceptance decisions once made and honor their published policies in deciding whom to accept and to reject. Administrators should thus carefully review their published admissions policies and any new policies to be published. The institution may wish to omit standards and criteria from its policies in order to avoid being pinned down under the contract theory. Conversely, the institution may decide that full disclosure is the best policy. In either case, administrators should make sure that published admissions policies state only what the institution is willing to abide by. If the institution needs to reserve the right to depart from or supplement its published policies, such reservation should be clearly inserted, with counsel's assistance, into all such policies.

#### **8.2.4. The principle of nondiscrimination**

**8.2.4.1. Race.** It is clear under the Fourteenth Amendment's equal protection clause that, in the absence of a "compelling state interest" (see Section 8.2.5), no public institution may discriminate in admissions on the basis of race. The leading case is *Brown v. Board of Education*, 347 U.S. 483 (1954), which, although it concerned elementary and secondary schools, clearly applies to post-secondary education as well. The Supreme Court affirmed its relevance to higher education in *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956). Cases involving postsecondary education have generally considered racial segregation within a state postsecondary system rather than within a single institution, and suits have been brought under Title VI of the Civil Rights Act of 1964 as well as the Constitution. These cases are discussed in Section 13.5.2.

Although most of the racial segregation cases focus on a broad array of issues, a decision by the U.S. Supreme Court addressed admissions issues, among others. In *United States v. Fordice*, 505 U.S. 717 (1992), private plaintiffs and the U.S. Department of Justice asserted that the Mississippi public higher education system was segregated, in violation of both the U.S. Constitution and Title VI of the Civil Rights Act of 1964. Although a federal trial judge had found the state system to be in compliance with both Title VI and the Constitution, a federal appellate court and the U.S. Supreme Court disagreed. (This case is discussed in Section 13.5.2.)

Justice White, writing for a unanimous Court, found that the state's higher education system retained vestiges of its prior *de jure* segregation. With regard to admissions, Justice White cited the state's practice (initiated in 1963, just prior to Title VI's taking effect) of requiring all applicants for admission to the three flagship universities (which were predominantly white) to have a

minimum composite score of 15 on the American College Testing (ACT) Program. Testimony had demonstrated that the average ACT score for white students was 18, and the average ACT score for African American students was 7. Justice White wrote: “Without doubt, these requirements restrict the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation” (505 U.S. at 734).

These admissions standards were particularly revealing of continued segregation, according to Justice White, when one considered that institutions given the same mission within the state (regional universities) had different admissions standards, depending on the race of the predominant student group. For example, predominantly white regional universities had ACT requirements of 18 or 15, compared to minimum requirements of 13 at the predominantly black universities. Because the differential admissions standards were “remnants of the dual system with a continuing discriminatory effect” (505 U.S. at 736), the state was required to articulate an educational reason for those disparities, and it had not done so.

Furthermore, the institutions looked only at ACT scores and did not consider high school grades as a mitigating factor for applicants who could not meet the minimum ACT score. The gap between the grades of African American and white applicants was narrower than the gap between their ACT scores, “suggesting that an admissions formula which included grades would increase the number of black students eligible for automatic admission to all of Mississippi’s public universities” (505 U.S. at 737). Although the state had argued that grade inflation and the lack of comparability among high schools’ course offerings and grading practices made grades an unreliable indicator, the Court dismissed that argument:

In our view, such justification is inadequate because the ACT was originally adopted for discriminatory purposes, the current requirement is traceable to that decision and seemingly continues to have segregative effects, and the State has so far failed to show that the “ACT-only” admission standard is not susceptible to elimination without eroding sound educational policy [505 U.S. at 737–38].

The use of high school grades as well as scores on standardized tests is common in higher education admissions decisions, and the state’s attempt to rely solely on ACT scores was an important element of the Court’s finding of continued segregation.

Although most challenges to allegedly discriminatory admissions requirements have come from African American students, Asian and Latino students have filed challenges as well. In *United States v. League of United Latin American Citizens*, 793 F.2d 636 (5th Cir. 1986), African American and Latino college students raised Title VI and constitutional challenges to the state’s requirement that college students pass a reading and mathematics skills test before enrolling in more than six hours of professional education courses at Texas public institutions. Passing rates on these tests were substantially lower for minority students than for white, non-Latino students.

Although the trial court had enjoined the practice, the appellate court vacated the injunction, noting that the state had validated the tests and that they were

appropriate: “The State’s duty . . . to eliminate the vestiges of past discrimination would indeed be violated were it to thrust upon minority students, both as role models and as pedagogues, teachers whose basic knowledge and skills were inferior to those required of majority race teachers” (793 F.2d at 643).

In response to the students’ equal protection claim, the court found that the state had demonstrated a compelling interest in teacher competency and that the test was a valid predictor of success in the courses. Because the students could retake the test until they passed it, their admission was only delayed, not denied. In response to the students’ liberty interest claim, the court found a valid liberty interest in pursuing a chosen profession, but also found that the state could require a reasonable examination for entry into that profession.

Latino students and civil rights groups also challenged the state’s funding for public colleges and universities located near the Mexican border, arguing that they were more poorly funded because of their high proportion of Latino students. A jury, applying the state constitution’s requirement of equal access to education, found that the state higher education system did not provide equal access to citizens in southern Texas, although it also found that state officials had not discriminated against these persons (K. Mangan, “Texas Jury Faults State on Equal Access to Top Universities,” *Chron. Higher Educ.*, November 27, 1991, A25). A state court judge later ordered the state to eliminate the funding inequities among state institutions (K. Mangan, “9 State Colleges in South Texas to Get Massive Budget Increase,” *Chron. Higher Educ.*, June 23, 1993, A23). But in *Richards v. League of United Latin American Citizens*, 868 S.W.2d 306 (Tex. 1993), the Texas Supreme Court ruled later that year that allegedly inequitable resource allocation to predominantly Hispanic public colleges did not violate students’ equal protection rights.

Asian students have challenged the admissions practices of several institutions, alleging that the institutions either have “quotas” limiting the number of Asians who may be admitted or that they exclude Asians from minority admissions programs. Complaints filed with the Education Department’s Office for Civil Rights (OCR), which enforces Title VI (see Section 13.5.2), have resulted in changes in admissions practices at both public and private colleges and universities. (For a discussion of this issue, see Note, “Assuring Equal Access of Asian Americans to Highly Selective Universities,” 90 *Yale L.J.* 659 (1989).)

In addition to the Constitution’s equal protection clause and the desegregation criteria developed under Title VI, there are two other major legal bases for attacking racial discrimination in higher education. The first is the civil rights statute called “Section 1981” (42 U.S.C. § 1981) (discussed in Section 5.2.4 of this book). A post-Civil War statute guaranteeing the freedom to contract, Section 1981 has particular significance because (like Title VI) it applies to private as well as public institutions. In the leading case of *Runyon v. McCrary*, 427 U.S. 160 (1976), the U.S. Supreme Court used Section 1981 to prohibit two private, white elementary schools from discriminating against blacks in their admissions policies. Since the Court has applied Section 1981 to discrimination against white persons as well as blacks (*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)), this statute would also apparently prohibit predominantly minority

private institutions from discriminating in admissions against white students. (For an example of a challenge to a denial of admission to graduate school brought under both Title VI and Section 1981, see *Woods v. The Wright Institute*, 1998 U.S. App. LEXIS 6012 (9th Cir., March 24, 1998) (using subjective judgments as one of several criteria for admissions is not racially discriminatory).)

Section 1981 was used in a successful challenge to the racially exclusive policy of the Kamehameha Schools in Hawaii. The schools had been established under the will of Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I. Her will directed that private, nonsectarian schools be established, and three such schools now exist, none of which receives federal funds. Although the will did not direct that applicants of Hawaiian descent be preferred, the trustees of the trust created by her will directed that native Hawaiians be preferred, which meant that, unless there were space available, only individuals of Hawaiian descent would be admitted to the schools. In *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005), a white student challenged the admissions policy of the schools under Section 1981, suing the schools, the estate, and the trustees. Using the burden-shifting theory of the *McDonnell-Douglas* case (discussed in Section 5.2.1), the court ruled that the schools' policy acted as an absolute bar to admission on the basis of race, and thus violated Section 1981. Because the will had not specified racial criteria for admissions, the court upheld the lower court's award of summary judgment for the estate and the trustees.

Another mechanism for attacking race discrimination in admissions is federal income tax law. In Revenue Ruling 71-447, 1971-2 C.B. 230 (*Cumulative Bulletin*, an annual multivolume compilation of various tax documents published by the Internal Revenue Service (IRS)), the IRS revised its former policy and ruled that schools practicing racial discrimination were violating public policy and should be denied tax-exempt status. Other IRS rulings enlarged on this basic rule. Revenue Procedure 72-54, 1972-2 C.B. 834, requires schools to publicize their nondiscrimination policies. Revenue Procedure 75-50, 1975-2 C.B. 587, requires that a school carry the burden of "show[ing] affirmatively . . . that it has adopted a racially nondiscriminatory policy as to students" and also establishes record-keeping and other guidelines through which a school can demonstrate its compliance. And Revenue Ruling 75-231, 1975-1 C.B. 158, furnishes a series of hypothetical cases to illustrate when a church-affiliated school would be considered to be discriminating and in danger of losing tax-exempt status. The U.S. Supreme Court upheld the basic policy of Revenue Ruling 71-447 in *Bob Jones University v. United States*, 461 U.S. 574 (1983), discussed in Section 13.3.2, footnote 38 of this book.<sup>10</sup> A private institution must certify that it has adopted and is following a policy of nondiscrimination in order for contributions to that institution to be tax deductible. However, the Internal Revenue Service has exempted organizations that provide instruction in a skilled trade to American Indians from the nondiscrimination requirement, ruling that limiting

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<sup>10</sup>Cases and materials are collected in Jean F. Rydstrom, Annot., "Allowability of Federal Tax Benefits to a Private, Racially Segregated School or College," 7 A.L.R. Fed. 548.

access to the training to American Indians was not the type of discrimination that federal law intended to prevent (Revenue Ruling 77-272, 1977-2 CB 191).

The combined impact of these various legal sources—the equal protection clause, Title VI, Section 1981, and IRS tax rulings—is clear: neither public nor private postsecondary institutions may maintain admissions policies (with a possible exception for affirmative action policies, as discussed in Section 8.2.5) that discriminate against students on the basis of race, nor may states maintain plans or practices that perpetuate racial segregation in a statewide system of postsecondary education.

**8.2.4.2. Sex.** Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) (see Section 13.5.3 of this book) is the primary law governing sex discrimination in admissions policies. While Title IX and its implementing regulations, 34 C.F.R. Part 106, apply nondiscrimination principles to both public and private institutions receiving federal funds, there are special exemptions concerning admissions. For the purposes of applying these admissions exemptions, each “administratively separate unit” of an institution is considered a separate institution (34 C.F.R. § 106.15(b)). An “administratively separate unit” is “a school, department, or college . . . admission to which is independent of admission to any other component of such institution” (34 C.F.R. § 106.2(p)). Private undergraduate institutions are not prohibited from discriminating in admissions on the basis of sex (20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d)). Nor are public undergraduate institutions that have always been single-sex institutions (20 U.S.C. § 1681(a)(5); 34 C.F.R. § 106.15(e)); but compare the *Hogan* case, discussed later in this Section). In addition, religious institutions, including all or any of their administratively separate units, may be exempted from nondiscrimination. The remaining institutions, which are prohibited from discriminating in admissions, are (1) graduate schools; (2) professional schools, unless they are part of an undergraduate institution exempted from Title IX’s admissions requirements (see 34 C.F.R. § 106.2(n)); (3) vocational schools, unless they are part of an undergraduate institution exempted from Title IX’s admissions requirements (see 34 C.F.R. § 106.2(o)); and (4) public undergraduate institutions that are not, or have not always been, single-sex schools.<sup>11</sup>

Institutions subject to Title IX admissions requirements are prohibited from treating persons differently on the basis of sex in any phase of admissions and recruitment (34 C.F.R. §§ 106.21–106.23). Specifically, Section 106.21(b) of the regulations provides that a covered institution, in its admissions process, shall not

- (i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

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<sup>11</sup>The admissions exemption for private undergraduate institutions in the regulations may be broader than that authorized by the Title IX statute. For an argument that “administratively separate” professional and vocational components of private undergraduate institutions should not be exempt and that private undergraduate schools that are primarily professional and vocational in character should not be exempt, see W. Kaplin & M. McGillicuddy, “Scope of Exemption for Private Undergraduate Institutions from Admissions Requirements of Title IX,” memorandum printed in 121 *Cong. Rec.* 1091 (94th Cong., 1st Sess., 1975).

- (ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
- (iii) Otherwise treat one individual differently from another on the basis of sex.

Section 106.21(c) prohibits covered institutions from treating the sexes differently in regard to “actual or potential parental, family, or marital status”; from discriminating against applicants because of pregnancy or conditions relating to childbirth; and from making preadmission inquiries concerning marital status. Sections 106.22 and 106.23(b) prohibit institutions from favoring single-sex or predominantly single-sex schools in their admissions or recruitment practices if such practices have “the effect of discriminating on the basis of sex.”

Institutions that are exempt from Title IX admissions requirements are not necessarily free to discriminate at will on the basis of sex. Some will be caught in the net of other statutes or of constitutional equal protection principles. A state statute such as the Massachusetts statute prohibiting sex discrimination in vocational training institutions may catch other exempted undergraduate programs (Mass. Gen. Laws Ann. ch. 151C, § 2A(a)). More important, the Fourteenth Amendment’s equal protection clause places restrictions on public undergraduate schools even if they are single-sex schools exempt from Title IX.

After a period of uncertainty concerning the extent to which equal protection principles would restrict a public institution’s admissions policies, the U.S. Supreme Court considered the question in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). In this case, the plaintiff challenged an admissions policy that excluded males from a professional nursing school. Ignoring the dissenting Justices’ protestations that Mississippi provided baccalaureate nursing programs at other state coeducational institutions, the majority of five struck down the institution’s policy as unconstitutional sex discrimination. In the process, the Court developed an important synthesis of constitutional principles applicable to sex discrimination claims. These principles would apply not only to admissions but also to all other aspects of a public institution’s operations:

Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the equal protection clause of the Fourteenth Amendment. . . . That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. . . . Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. . . . The burden is met only by showing at least that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives” [citations omitted].

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because

they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. . . .

If the state's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women [458 U.S. at 723–24].

Applying the principles regarding the legitimacy and importance of the state's objective, the Court noted that the state's justification for prohibiting men from enrolling in the nursing program was to compensate for discrimination against women. On the contrary, the Court pointed out, women had never been denied entry to the nursing profession, and limiting admission to women actually perpetuated the stereotype that nursing is "women's work." The state had made no showing that women needed preferential treatment in being admitted to nursing programs, and the Court did not believe that that was the state's purpose in discriminating against men. And even if the state had a valid compensatory objective, said the Court, the university's practice of allowing men to audit the classes and to take part in continuing education courses offered by the school contradicted its position that its degree programs should only be available to women.

The Court's opinion on its face invalidated single-sex admissions policies only at the School of Nursing at Mississippi University for Women (MUW) and, by extension, other public postsecondary nursing schools. It is likely, however, that this reasoning would also invalidate single-sex policies in programs other than nursing and in entire institutions. The most arguable exception to this broad reading would be a single-sex policy that redresses the effects of past discrimination on a professional program in which one sex is substantially underrepresented. But even such a compensatory policy would be a form of explicit sexual quota, which could be questioned by analogy to the racial affirmative action cases (this book, Section 8.2.5).

Whatever the remaining ambiguity about the scope of the *Hogan* decision, it will not be resolved by further litigation at the Mississippi University for Women. After the Supreme Court decision, MUW's board of trustees—perhaps anticipating a broad application of the Court's reasoning—voted to admit men to all divisions of the university.

The *Hogan* opinion provided important guidance in a challenge to the lawfulness of male-only public military colleges. In *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, *vacated*, 976 F.2d 890 (4th Cir. 1992), the U.S. Department of Justice challenged the admissions policies of the Virginia Military Institute (VMI), which admitted only men. The government claimed that those policies violated the equal protection clause (it did not include a Title IX claim, since military academies and historically single-sex institutions are exempt from Title IX). Equal protection challenges to sex discrimination require the state to demonstrate "an exceedingly persuasive justification" for the classification (*Hogan*, 458 U.S. at 739). In this case the state argued that enhancing



diversity by offering a distinctive single-sex military education to men was an important state interest. The district court found that the single-sex policy was justified because of the benefits of a single-sex education, and that requiring VMI to admit women would “fundamentally alter” the “distinctive ends” of the educational system (766 F. Supp. at 1411).

The appellate court vacated the district court’s opinion, stating that Virginia had not articulated an important objective sufficient to overcome the burden on equal protection. While the appellate court agreed with the trial court’s finding that the admission of women would materially affect several key elements of VMI’s program—physical training, lack of privacy, and the adversative approach to character development—it was homogeneity of gender, not maleness, that justified the program (976 F.2d at 897). The appellate court also accepted the trial court’s findings that single-sex education has important benefits. But these findings did not support the trial court’s conclusion that VMI’s male-only policy passed constitutional muster. Although VMI’s single-gender education and “citizen-soldier” philosophy were permissible, the state’s exclusion of women from such a program was not, and no other public postsecondary education institution in Virginia was devoted to educating only one gender.

The appellate court did not order VMI to admit women, but remanded the case to the district court to give Virginia the option to (1) admit women to VMI, (2) establish parallel institutions or programs for women, or (3) terminate state support for VMI. On appeal, the U.S. Supreme Court refused to hear the case (508 U.S. 946 (1993)). Following that action, the trustees of VMI voted to underwrite a military program at a neighboring private women’s college, Mary Baldwin College (“Virginia Military Institute to Establish Courses at Women’s College,” *New York Times*, September 26, 1993, p. A26).

The U.S. Department of Justice challenged the plan, saying that it is “based on gender stereotypes,” and asked the trial court to order VMI to admit women and to integrate them into its full program. After the trial judge approved the parallel program at Mary Baldwin College, a divided panel of the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that providing single-gender education was a legitimate objective of the state, and that the leadership program at Mary Baldwin College was “sufficiently comparable” to the VMI program to satisfy the demands of the equal protection clause (44 F.3d 1229 (4th Cir. 1995)). The dissenting judge argued that the state’s justification for excluding women from VMI was not “exceedingly persuasive,” and that the women’s leadership program at Mary Baldwin College did not provide substantially equal tangible and intangible educational benefits; he thus concluded that maintaining VMI as a single-sex public institution violated the equal protection clause. A petition for rehearing *en banc* was denied.

The United States again asked the Supreme Court to review the appellate court’s ruling, and this time the Court agreed. In a 7-to-1 decision (Justice Thomas did not participate), the Court ruled that VMI’s exclusion of women violated the equal protection clause (518 U.S. 515 (1996)). Since strict scrutiny is reserved for classifications based on race or national origin, the Court used intermediate scrutiny—which Justice Ginsburg, the author of the majority

opinion, termed “skeptical scrutiny”—to analyze Virginia’s claim that single-sex education provides important educational benefits. Reviewing the state’s history of providing higher education for women, the Court concluded that women had first been excluded from public higher education, and then admitted to once all-male public universities, but that no public single-sex institution had been established for women, and thus the state had not provided equal benefits for women. With regard to the state’s argument that VMI’s adversative training method provided important educational benefits that could not be made available to women and thus their admission would “destroy” VMI’s unique approach to education, the Court noted that both parties had agreed that some women could meet all of the physical standards imposed upon VMI cadets. Moreover, the experience with women cadets in the military academies suggested that the state’s fear that the presence of women would force change upon VMI was based on overbroad generalizations about women as a group, rather than on an analysis of how individual women could perform.

The Court then turned to the issue of the remedy for VMI’s constitutional violation. Characterizing the women’s leadership program at Mary Baldwin College as “unequal in tangible and intangible facilities” and offering no opportunity for the type of military training for which VMI is famous, the Court stressed the differences between the two programs and institutions in terms of the quality of the faculty, the range of degrees offered, athletic and sports facilities, endowments, and the status of the degree earned by students. Criticizing the Fourth Circuit for applying an overly deferential standard of review that the Court characterized as one “of its own invention,” the Court reversed the Fourth Circuit’s decision and held that the separate program did not cure the constitutional violation.

Chief Justice Rehnquist voted with the majority but wrote a separate concurring opinion because he disagreed with Justice Ginsburg’s analysis of the remedy. The “parallel program” at Mary Baldwin College was “distinctly inferior” to VMI, said Justice Rehnquist, but the state could cure the constitutional violation by providing a public institution for women that offered the “same quality of education and [was] of the same overall calibre” as VMI. Justice Rehnquist’s opinion thus differs sharply from that of Justice Ginsburg, who characterized the exclusion of women as the constitutional violation, while Justice Rehnquist characterized the violation as the maintenance of an all-male institution without providing a comparable institution for women.

Justice Scalia, the sole dissenter, attacked the Court’s interpretation of equal protection jurisprudence, saying that the Court had used a higher standard than the intermediate scrutiny that is typically used to analyze categories based on gender. Furthermore, stated Justice Scalia, since the Constitution does not specifically forbid distinctions based upon gender, the political process, not the courts, should be used to change state behavior. Finding that the maintenance of single-sex education is an important educational objective, Justice Scalia would have upheld the continued exclusion of women from VMI.

The only other all-male public college, the Citadel, was ordered by a panel of the U.S. Court of Appeals for the Fourth Circuit to admit a female applicant

whom that college had admitted on the mistaken belief that she was male (*Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993)). The court ordered that she be admitted as a day student, and remanded to the district court the issue of whether she could become a full member of the college's corps of cadets. On remand the trial judge ordered that she become a member of the corps of cadets. The college appealed this ruling.

The U.S. Court of Appeals for the Fourth Circuit ruled that the Citadel's refusal to admit women violated the equal protection clause, and despite the state's promise to create a military-type college for women students, the court ordered the Citadel to admit women as students (51 F.3d 440 (4th Cir. 1995), affirming the order of the trial court in 858 F. Supp. 552 (D.S.C. 1994)). Ms. Faulkner began attending classes at the Citadel, but withdrew after a few days; other women students are attending the college.

Important as *Hogan* and the VMI cases may be to the law regarding sex discrimination in admissions, they are only part of the bigger picture, which already includes Title IX. Thus, to view the law in its current state, one must look both to *Hogan/Virginia* and to Title IX. *Hogan, Virginia*, and their progeny have at least limited, and apparently undermined, the Title IX exemption for public undergraduate institutions that have always had single-sex admissions policies (20 U.S.C. § 1681(a)(5); 34 C.F.R. § 106.15(e)). Thus, the only programs and institutions that are still legally free to have single-sex admissions policies are (1) private undergraduate institutions and their constituent programs and (2) religious institutions, including their graduate, professional, and vocational programs, if they have obtained a waiver of Title IX admission requirements on religious grounds (20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12).

The use of standardized tests in admissions decisions has been attacked as a form of sex discrimination. Some of the standardized tests used to make admission decisions—the Scholastic Aptitude Test (SAT), for example—have been challenged because of the systematic gender differences in scores. When these test scores are used as the sole criterion for decisions about admissions or awarding scholarships, they may be especially vulnerable to legal challenge. In *Sharif v. New York State Education Department* (discussed in Section 8.3.3), a federal district court ruled that this practice violated Title IX and the Fourteenth Amendment's equal protection clause. If, however, the test score is one of several criteria that are considered in admissions decisions, the courts have upheld their use, despite the gender differences in scores (see, for example, *El-Attar v. Mississippi State University*, 1994 U.S. Dist. LEXIS 21182 (N.D. Miss., September 13, 1994)). (For analysis of the potential discriminatory effects of standardized testing, see K. Connor & E. Vargyas, "The Legal Implications of Gender Bias in Standardized Testing," *Berkeley Women's L.J.* 13 (1992). See also L. Silverman, "Unnatural Selection: A Legal Analysis of the Impact of Standardized Test Use on Higher Education Resource Allocation," 23 *Loyola L.A. L. Rev.* 1433 (1990).)

In addition to Title IX, other laws include prohibitions on sex discrimination in admissions. For example, one section of the Public Health Service Act's provisions on nurse education (42 U.S.C. § 296g) prohibits the Secretary of Health

and Human Services from making grants, loan guarantees, or interest subsidy payments to schools of nursing unless the schools provide “assurances satisfactory to the Secretary that the school will not discriminate on the basis of sex in the admission of individuals to its training programs.”

Recent trends in student enrollment suggest that rates of undergraduate enrollment for women have bypassed those of men among low-income and several minority groups. A report published in 2003 by the American Council on Education, *Gender Equity in Higher Education*, concluded that, although men were the majority in doctoral and professional programs, and also outnumbered women in master’s programs in business and engineering, white women undergraduates outnumbered white men in the 1999–2000 academic year, as did women from African American, Hispanic, and Native American ethnicities with respect to their male counterparts.

**8.2.4.3. Disability.** Two federal laws—Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Americans With Disabilities Act (ADA) (42 U.S.C. § 12101 *et seq.*)—prohibit discrimination against individuals with disabilities (see Section 5.2.5 of this book). Before those laws were passed, these individuals had been the subject of a few scattered federal provisions (such as 20 U.S.C. § 1684, which prohibits discrimination against blind persons by institutions receiving federal funds) and a few constitutional equal protection cases (such as *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), which challenged discrimination against disabled students by public elementary and secondary schools). But none of these developments have had nearly the impact on postsecondary admissions that Section 504 and the ADA have.

As applied to postsecondary education, Section 504 generally prohibits discrimination on the basis of disability in federally funded programs and activities (see this book, Section 13.5.4). Section 104.42 of the implementing regulations, 34 C.F.R. Part 104, prohibits discrimination on the basis of disability in admissions and recruitment. This section contains several specific provisions similar to those prohibiting sex discrimination in admissions under Title IX (see this book, Section 8.2.4.2). These provisions prohibit (1) the imposition of limitations on “the number or proportion of individuals with disabilities who may be admitted” (§ 104.42(b)(1)); (2) the use of any admissions criterion or test “that has a disproportionate, adverse effect” on individuals with disabilities, unless the criterion or test, as used, is shown to predict success validly and no alternative, nondiscriminatory criterion or test is available (§ 104.42(b)(2)); and (3) any preadmission inquiry about whether the applicant has a disability, unless the recipient needs the information in order to correct the effects of past discrimination or to overcome past conditions that resulted in limited participation by people with disabilities (§§ 104.42(b)(4) & 104.42(c)).

These prohibitions apply to discrimination directed against “qualified” individuals with disabilities. A disabled person is qualified, with respect to postsecondary and vocational services, if he or she “meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity” (§ 104.3(l)(3)). Thus, while the regulations do not

prohibit an institution from denying admission to a person with a disability who does not meet the institution's "academic and technical" admissions standards, they do prohibit an institution from denying admission on the basis of the disability as such. (After a student is admitted, however, the institution can make confidential inquiry concerning the disability (34 C.F.R. § 104.42(b)(4)); in this way the institution can obtain advance information about disabilities that may require accommodation.)

In addition to these prohibitions, the institution has an affirmative duty to ascertain that its admissions tests are structured to accommodate applicants with disabilities that impair sensory, manual, or speaking skills, unless the test is intended to measure these skills. Such adapted tests must be offered as often and in as timely a way as other admissions tests and must be "administered in facilities that, on the whole, are accessible" to people with disabilities (§ 104.42(b)(3)).

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the U.S. Supreme Court issued its first interpretation of Section 504. The case concerned a nursing school applicant who had been denied admission because she is deaf. The Supreme Court ruled that an "otherwise qualified handicapped individual" is one who is qualified *in spite of* (rather than *except for*) his disability. Since an applicant's disability is therefore relevant to his or her qualification for a specific program, Section 504 does not preclude a college or university from imposing "reasonable physical qualifications" on applicants for admission, where such qualifications are necessary for participation in the school's program. The Department of Education's regulations implementing Section 504 provide that a disabled applicant is "qualified" if he or she meets "the academic and technical standards" for admission; the Supreme Court has made it clear, however, that "technical standards" may sometimes encompass reasonable physical requirements. Under *Davis*, an applicant's failure to meet such requirements can be a legitimate ground for rejection.

The impact of *Davis* is limited, however, by the rather narrow and specific factual context in which the case arose. The plaintiff, who was severely hearing impaired, sought admission to a nursing program. It is important to emphasize that *Davis* involved admission to a professional, clinical training program. The demands of such a program, designed to train students in the practice of a profession, raise far different considerations from those involved in admission to an undergraduate or a graduate academic program, or even a nonclinically oriented professional school. The college denied her admission, believing that she would not be able to perform nursing duties in a safe manner and could not participate fully in the clinical portion of the program.

While the Court approved the imposition of "reasonable physical qualifications," it did so only for requirements that the institution can justify as necessary to the applicant's successful participation in the particular program involved. In *Davis*, the college had shown that an applicant's ability to understand speech without reliance on lip reading was necessary to ensure patient safety and to enable the student to realize the full benefit of its nursing program. For programs without clinical components, or without professional training

goals, it would be much more difficult for the institution to justify such physical requirements. Even for other professional programs, the justification might be much more difficult than in *Davis*. In a law school program, for example, the safety factor would be lacking. Moreover, in most law schools, clinical training is offered as an elective rather than a required course. By enrolling only in the nonclinical courses, a deaf student would be able to complete the required program with the help of an interpreter.

Furthermore, the Court did not say that affirmative action is never required to accommodate the needs of disabled applicants. Although the Court asserted that Section 504 does not require institutions “to lower or to effect substantial modifications of standards” or to make “fundamental alteration[s] in the nature of a program,” the Court did suggest that less substantial and burdensome program adjustments may sometimes be required. The Court also discussed, and did not question, the regulation requiring institutions to provide certain “auxiliary aids,” such as interpreters for students with hearing impairments, to qualified students with disabilities (see Sections 8.7.3 & 13.5.4). This issue was addressed in *United States v. Board of Trustees for the University of Alabama*, 908 F.2d 740 (11th Cir. 1990), in which the court ordered the university to provide additional transportation for students with disabilities. Moreover, the Court said nothing that in any way precludes institutions from voluntarily making major program modifications for applicants who are disabled.

Several appellate court cases have applied the teachings of *Davis* to other admissions problems. The courts in these cases have refined the *Davis* analysis, especially in clarifying the burdens of proof in a discrimination suit under Section 504. In *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), the court affirmed the district court’s decision that the plaintiff, a medical doctor suffering from multiple sclerosis, had been wrongfully denied admission to the university’s psychiatric residency program. Agreeing that *Davis* permitted consideration of disabilities in determining whether an applicant is “otherwise qualified” for admission, the court outlined what the plaintiff had to prove in order to establish his case of discrimination:

1. The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from* his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap.
2. Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person—that is, one who is able to meet all of the program’s requirements *in spite of* his handicap—or that his rejection from the program was for reasons other than his handicap.
3. The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants’ reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself [658 F.2d at 1387].

In another post-*Davis* case, *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981), the court held that the university had not violated Section 504 when it denied readmission to a woman with a long history of “borderline personality” disorders. This court also set out the elements of the case a plaintiff must make to comply with the *Davis* reading of Section 504:

Accordingly, we hold that in a suit under Section 504 the plaintiff may make out a *prima facie* case by showing that he is a handicapped person under the Act and that, although he is qualified apart from his handicap, he was denied admission or employment because of his handicap. The burden then shifts to the institution or employer to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant to qualifications for the position sought (cf. *Dothard v. Rawlinson*, 433 U.S. 321 . . . (1977)). The plaintiff must then bear the ultimate burden of showing by a preponderance of the evidence that in spite of the handicap he is qualified and, where the defendant claims and comes forward with some evidence that the plaintiff’s handicap renders him less qualified than other successful applicants, that he is at least as well qualified as other applicants who were accepted [666 F.2d at 776–77].

The *Doe* summary of burdens of proof is articulated differently from the *Pushkin* summary, and the *Doe* court disavowed any reliance on *Pushkin*. In contrast to the *Pushkin* court, the *Doe* court determined that a defendant institution in a Section 504 case “does not have the burden, once it shows that the handicap is relevant to reasonable qualifications for readmission (or admission), of proving that . . . [the plaintiff is not an otherwise qualified handicapped person]” (666 F.2d at 777, n.7).

The *Doe* case is also noteworthy because, in deciding whether the plaintiff was “otherwise qualified,” the court considered the fact that she had a recurring illness, even though it was not present at the time of the readmission decision. This was an appropriate factor to consider because the illness could reappear and affect her performance after readmission. *Doe* is thus the first major case to deal directly with the special problem of disabling conditions that are recurring or degenerative. The question posed by such a case is this: To what extent must the university assume the risk that an applicant capable of meeting program requirements at the time of admission may be incapable of fulfilling these requirements at a later date because of changes in his or her disabling conditions?

*Doe* makes clear that universities may weigh such risks in making admission or readmission decisions and may consider an applicant unqualified if there is “significant risk” of recurrence (or degeneration) that would incapacitate the applicant from fulfilling program requirements. This risk factor thus becomes a relevant consideration for both parties in carrying their respective burdens of proof in Section 504 litigation. In appropriate cases, where there is medical evidence for doing so, universities may respond to the plaintiff’s *prima facie* case by substantiating the risk of recurrence or degeneration that would render the applicant unqualified. The plaintiff would then have to demonstrate that his

condition is sufficiently stable or, if it is not, that any change during his enrollment as a student would not render him unable to complete program requirements.

In *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988), a federal appellate court considered the relationship between Section 504's "otherwise qualified" requirement and the institution's duty to provide a "reasonable accommodation" for a student with a disability. The plaintiff—a student with retinitis pigmentosa (RP), which restricted his field of vision, and a neurological condition that affected his motor skills—asserted that the college should exempt him from recently introduced proficiency requirements related to the operation of optometric instruments. The student could not meet these requirements and claimed that they were a pretext for discrimination on the basis of disability, since he was "otherwise qualified" and therefore had the right to be accommodated.

In ruling for the school, the district court considered the "reasonable accommodation" inquiry to be separate from the "otherwise qualified" requirement; thus, in its view, the institution was obligated to accommodate only a student with a disability who has already been determined to be "otherwise qualified." The appeals court disagreed, indicating that the "inquiry into reasonable accommodation is one aspect of the 'otherwise qualified' analysis" (862 F.2d at 577). To explain the relationship, the court quoted from *Brennan v. Stewart*, 834 F.2d 1248, 1261–62 (5th Cir. 1988):

"[I]t is clear that the phrase 'otherwise qualified' has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the [institution]: but on the other, it cannot refer only to those already capable of meeting all the requirements—or else no reasonable requirement could ever violate Section 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it. This means that we can no longer take literally the assertion of *Davis* that 'an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.' The question . . . is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the [institution] and the handicapped person" [862 F.2d at 575].

The appellate court's interpretation did not change the result in the case; since the proficiency requirements were reasonably necessary to the practice of optometry, waiver of these requirements would not have been a "reasonable accommodation." But the court's emphasis on the proper relationship between the "otherwise qualified" and "reasonable accommodation" inquiries does serve to clarify and strengthen the institution's obligation to accommodate the particular needs of students with disabilities.

Students alleging discrimination on the basis of disability may file a complaint with the Education Department's Office for Civil Rights, or they may file a private lawsuit and receive compensatory damages (*Tanberg v. Weld County Sheriff*, 787 F. Supp. 970 (D. Colo. 1992)). Section 504 does not, however, provide a private right of action against the Secretary of Education, who enforces Section 504 (*Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986)).



The provisions of the ADA are similar in many respects to those of Section 504, upon which, in large part, it was based. In addition to employment (see this book, Section 5.2.5), Title II of the ADA prohibits discrimination in access to services or programs of a public entity (such as a public college or university), and Title III prohibits discrimination in access to places of public accommodation (such as private and public colleges and universities). A rejected applicant could file an ADA claim under either Title II (against a public college) or Title III (against both public and private colleges).

The ADA specifies ten areas in which colleges and universities may not discriminate against a qualified individual with a disability: eligibility criteria; modifications of policies, practices, and procedures; auxiliary aids and services; examinations and courses; removal of barriers in existing facilities; alternatives to barriers in existing facilities; personal devices and services; assistive technology; seating in assembly areas; and transportation services (28 C.F.R. §§ 36.301–10). The law also addresses accessibility issues for new construction or renovation of existing facilities (28 C.F.R. §§ 36.401–6). The law is discussed more fully in Section 13.5.4 of this book.

The law's language regarding "eligibility criteria" means that in their admissions or placement tests or other admission-related activities, colleges and universities must accommodate the needs of applicants or students with disabilities. For example, one court held that, under Section 504, the defendant medical school must provide a dyslexic student with alternate exams unless it could demonstrate that its rejection of all other testing methods was based on rational reasons (*Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991), discussed in Section 9.3.5).

Students with learning disabilities are protected by both Section 504 and the ADA, and legal challenges by such students are on the rise. For example, in *Fruth v. New York University*, 2 A.D. Cases 1197 (S.D.N.Y. 1993), a student with learning disabilities challenged the university's decision to rescind his acceptance because he had failed to attend a required summer orientation session for students with learning disabilities. Relying heavily on *Doe v. New York University* (discussed above), the court ruled that, since the student's grades were lower than the university's required grade point average, the university's insistence that the student attend the summer program was reasonable and not in violation of the ADA.

State courts have looked to ADA jurisprudence in interpreting state law prohibitions against disability discrimination. An illustrative case is *Ohio Civil Rights Commission v. Case Western Reserve University*, 666 N.E.2d 1376 (Ohio 1996). The plaintiff, Cheryl Fischer, an applicant to the Case Western Reserve (CWR) medical school, had become totally blind during her junior year at CWR. CWR had provided Fischer with several accommodations as an undergraduate, including lab assistants and readers, oral examinations instead of written ones, extended exam periods, and books on tape. Fischer graduated *cum laude* from CWR.

All U.S. medical schools belong to the Association of American Medical Colleges (AAMC), which requires candidates for a medical degree to be able to

“observe” both laboratory demonstrations and patient appearance and behavior. Despite Fischer’s excellent academic record, CWR’s medical school admissions committee determined that she did not meet the AAMC requirements because she was unable to see, and that she would be unable to complete the requirements of the medical school curriculum. Fischer reapplied the following year and again was denied admission. She filed a complaint under the Ohio nondiscrimination law with the Ohio Civil Rights Commission (OCRC), which found probable cause to believe that CWR had discriminated against Fischer. A county court affirmed the OCRC, but a state appellate court reversed, holding that CWR would be required to modify its program in order to accommodate Fischer’s disability, which the law did not require. The Supreme Court of Ohio affirmed.

The Ohio Civil Rights Commission, which had found for Fischer, had placed great weight on the experience of a blind doctor who had received his training at Temple University Medical School. The court noted that he had been trained twenty years earlier, and that the faculty and students at the Temple medical school had devoted a substantial amount of time to working individually with that student. Furthermore, the court rejected the findings of the commission and trial court that, because Fischer could have completed the first two years of medical school training with minimal modifications of the program, the more substantial modifications of the rest of the medical school program (such as having others read X-rays and patient charts, and waiving the requirement that she learn how to draw blood or insert an intravenous tube) would not be an undue hardship for CWR. A number of medical educators had testified that it would be impossible to modify the methods of training a medical student to accommodate a blind individual. In addition, said the court, requiring CWR to admit Fischer would impose an undue burden upon the faculty because of the extensive individual attention she would require from them.

Furthermore, the court indicated that the design of curriculum and teaching methods are matters of academic judgment and are deserving of deference “unless it is shown that the standards serve no purpose other than to deny an education to the handicapped.” It was irrelevant that Fischer intended to practice psychiatry rather than general medicine; the purpose of a medical school education was to produce general practitioners, not specialists.

In sum, postsecondary administrators should still proceed very sensitively in making admission decisions concerning disabled persons. *Davis* can be expected to have the greatest impact on professional and paraprofessional health care programs; beyond that, the circumstances in which physical requirements for admission may be used are less clear. Furthermore, while *Davis* relieves colleges and universities of any obligation to make substantial modifications in their program requirements, a refusal to make lesser modifications may in some instances constitute discrimination. Furthermore, interpretation of Section 504’s requirements has evolved since *Davis*, as evidenced by the *Doherty* case; and in some cases the ADA provides additional protections for students.

A federal appellate court has ruled that “flagging” scores on standardized tests that have been taken with accommodations does not violate the ADA. In *Doe v. National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999), a medical student with multiple sclerosis requested, and obtained, additional time to take the U.S. Medical Licensing Examination, a standardized examination developed and administered by the National Board of Medical Examiners (NBME). The NBME’s practice when reporting scores was to indicate that the examination had been taken with accommodations. The student asked the NBME to omit the “flagging” from his score report, but the organization refused. The student then sought a preliminary injunction, claiming that the practice of flagging test scores violated Title III of the ADA.

Although the trial court granted Doe a preliminary injunction, the appellate panel reversed. The NBME only flagged those scores when the test taker had been granted an accommodation that the board’s psychometric experts believed could affect the validity of the test score. Additional time, which was the accommodation that Doe received, could affect the validity of his score; the score of another test taker who only received a large-print version of the exam would not be flagged because this accommodation would not affect the validity of the score. The court ruled that, in order to be entitled to an injunction, Doe would have to demonstrate that the validity of his test score as a predictor of success in further medical training was comparable to the validity of the scores of test takers who had not been accommodated. Because the ADA does not bar the flagging of test scores, and because Doe had not demonstrated that the additional time had no effect on the validity of his score, the court vacated the preliminary injunction. To Doe’s claim that he would be discriminated against by residency and internship programs to which he would apply, the court responded that such potential discrimination could not be attributed to the NBME, and that such a claim was speculative.

Subsequent to the ruling in *Doe*, the College Board announced that, effective October 2003, it would no longer “flag” the test scores for individuals who were given extra time or other accommodations when taking the SAT. The Educational Testing Service has also halted the practice of flagging scores on the Graduate Management Admission Test (GMAT) and the Graduate Record Examination (GRE) (Eric Hoover, “Removing the ‘Scarlet Letter’: The College Board Will No Longer Flag the SAT-Score Reports of Students Granted Extra Time Because of Disabilities,” *Chron. Higher Educ.*, July 26, 2002, A41).

**8.2.4.4. Age.** In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the U.S. Supreme Court held that age discrimination is not subject to the high standard of justification that the equal protection clause of the Constitution requires, for instance, for race discrimination. Rather, age classifications are permissible if they “rationally further” some legitimate governmental objective. The Court confirmed the use of the “rational basis” standard for age discrimination cases in *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), saying that this standard is “the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause” (490 U.S. at 26).

In *Miller v. Sonoma County Junior College District*, No. C-74-0222 (N.D. Cal. 1974) (an unpublished opinion decided before *Murgia*), two sixteen-year-old students won the right to attend a California junior college. The court held that the college's minimum age requirement of eighteen was an arbitrary and irrational basis for exclusion because it was not related to the state's interest in providing education to qualified students.

In *Purdie v. University of Utah*, 584 P.2d 831 (Utah 1978), a case that can usefully be compared with *Miller*, the court considered the constitutional claim of a fifty-one-year-old woman who had been denied admission to the university's department of educational psychology. Whereas the *Miller* plaintiffs were allegedly too young for admission, Purdie was allegedly too old. But in both cases the courts used the equal protection clause to limit the institution's discretion to base admission decisions on age. In *Purdie* the plaintiff alleged, and the university did not deny, that she exceeded the normal admissions requirements and was rejected solely because of her age. The trial court held that her complaint did not state a viable legal claim and dismissed the suit. On appeal, the Utah Supreme Court reversed, holding that rejection of a qualified fifty-one-year-old would violate equal protection unless the university could show that its action bore a "rational relationship to legitimate state purposes." Since the abbreviated trial record contained no evidence of the department's admissions standards or its policy regarding age, the court remanded the case to the trial court for further proceedings.

In *Tobin v. University of Maine System*, 62 F. Supp. 2d 162 (D. Maine 1999), a sixty-five-year-old law school applicant who was denied admission sued under Section 1983, claiming a denial of equal protection. After examining the law school's admissions criteria (LSAT scores and grade point averages for the applicant's baccalaureate degree), the court concluded that the plaintiff had not established that his rejection was motivated by age discrimination, and awarded summary judgment to the university. The same court had earlier dismissed Tobin's claims of emotional distress, breach of contract, and breach of an implied covenant of good faith and fair dealing (59 F. Supp. 2d 87).

Both public and private institutions that receive federal funds are subject to the federal Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*). Section 6101 of the Act, with certain exceptions listed in Sections 6103(b) and 6103(c), originally prohibited "unreasonable discrimination on the basis of age in programs or activities receiving federal financial assistance." In 1978, Congress deleted the word "unreasonable" from the Act (see this book, Section 13.5.5), thus lowering the statute's tolerance for discrimination and presumably making its standards more stringent than the Constitution's "rationality" standard used in *Purdie*. As amended and interpreted in the implementing regulations (45 C.F.R. Part 90), the Age Discrimination Act clearly applies to the admissions policies of postsecondary institutions.

The age discrimination regulations, however, do not prohibit all age distinctions. Section 90.14 of the regulations permits age distinctions that are necessary to the "normal operation" of, or to the achievement of a "statutory objective" of, a program or activity receiving federal financial assistance (see Section 13.5.5

of this book). Moreover, Section 90.15 of the regulations permits recipients to take an action based on a factor other than age—“even though that action may have a disproportionate effect on persons of different ages”—if the factor has a “direct and substantial relationship” to the program’s operation or goals. The explanatory commentary accompanying the regulations provides examples of how the Office of Civil Rights would evaluate selection criteria that may bear a relationship to age (44 Fed. Reg. 33773–74 (June 12, 1979)).

State law also occasionally prohibits age discrimination against students. In its Fair Educational Practices statute, for example, Massachusetts prohibits age discrimination in admissions to graduate programs and vocational training institutions (Mass. Gen. Laws Ann. ch. 151C, §§ 2(d), 2A(a)).

Taken together, the Constitution, the federal law and regulations, and occasional state laws now appear to create a substantial legal barrier to the use of either maximum- or minimum-age policies in admissions. The federal Age Discrimination Act, applicable to both public and private institutions regardless of whether they receive federal funds, is the most important of these developments; administrators should watch for further implementation of this statute.

**8.2.4.5. Residence.** Public colleges and universities may provide preferences for state residents because of the high cost (subsidized by state taxpayers) of education and because it is more likely that in-state students will remain in the state after graduation and use their education to benefit the state and its residents (see generally *Rosenstock v. Board of Governors of the University of North Carolina*, 423 F. Supp. 1321, 1326–27 (M.D.N.C. 1976)). This is particularly true for professional training. In *Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487 (10th Cir. 1998), the court considered an equal protection challenge to a medical school admissions policy that favored long-term residents of the state over short-term residents. The district court had invalidated this preference as a burden on the fundamental right to travel (see Section 8.3.5 of this book). In remanding the case to the district court, the appellate court determined that the preference in favor of longer-term state residents served an interest in public health that “is not only legitimate but also compelling.” This interest, as characterized by the court, is an interest in “selecting those candidates [for admission] likely to return to the state of New Mexico and supply needed medical care to underserved areas of the state” (159 F.3d at 498).

The plaintiff in the *Buchwald* case also presented a second type of challenge to residency preferences in admissions: that they burden the interstate movement of people and thus burden interstate commerce in violation of the federal Constitution’s commerce clause (see generally Section 12.4). The appellate court quickly dispatched this argument by invoking the so-called market participant exception to the commerce clause:

[P]laintiff argues that defendant’s actions violate the dormant Commerce Clause. This claim fails to state a constitutional violation that could abrogate qualified immunity. The University of New Mexico’s educational activities constitute participation in the market for educational services, not regulation of that

market. Thus the policies in question fall under the “market participant” exception to the dormant Commerce Clause. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–39 (1980) [159 F.3d at 496].

The U.S. Supreme Court’s decision in *Saenz v. Roe*, 526 U.S. 489 (1999), discussed in Section 8.3.5, suggests that state residency preferences and requirements for admission, when used by a public institution, could be challenged not only under the equal protection clause of the Fourteenth Amendment, but also under that amendment’s “privileges or immunities” clause and its “citizenship” clauses. The case also suggests, however, that such admissions preferences or requirements could withstand challenge when there is a “danger” that “citizens of other states” will “establish residency for just long enough to acquire . . . [their] college education,” the benefit of which “will be enjoyed after they return to their original domicile” (526 U.S. 505).

**8.2.4.6. Immigration status.** The eligibility of aliens for admission to U.S. colleges and universities has received heightened attention since the terrorist attacks of September 11, 2001. Although the Supreme Court ruled on equal protection grounds in 1982 that states could not deny free public education to undocumented alien children (*Plyler v. Doe*, 457 U.S. 202 (1982)), litigation related to alien postsecondary students has more often involved their eligibility for in-state tuition in state institutions than their eligibility for admission as such. The in-state tuition cases are discussed in Section 8.3.6 below.

As discussed in the Supreme Court’s *Nyquist* case (Section 8.3.6.1 below), alienage is a suspect classification for purposes of postsecondary education benefits. A public institution’s refusal to admit permanent resident aliens would therefore likely violate the federal equal protection clause. Private institutions are not bound by the equal protection clause, but could face liability for refusing to admit qualified resident aliens if the institution was engaged in some cooperative education program with the federal or state government that would be considered “state action” (see Section 1.5.2).

Temporary or nonimmigrant aliens have less protection under the federal Constitution. For example, in *Ahmed v. University of Toledo*, discussed in Section 8.3.6.1, the court distinguished between permanent resident aliens and temporary nonresident (nonimmigrant) aliens, refusing to subject a university policy that affected only nonresident aliens to strict scrutiny review under the equal protection clause. Under the lower “rational relationship” standard used by the court in *Ahmed*, a university policy that singled out nonresident aliens in order to meet a reasonable goal of the university would be constitutionally permissible. If a public institution were to deny admission only to aliens from a particular country, however, courts could view such a policy as national origin discrimination subject to strict scrutiny (see *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D.N.M. 1980)).

More complicated are the legal issues that arise with respect to undocumented aliens. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, codified in scattered Sections of 8 and 18 U.S.C.). One IIRIRA provision

(8 U.S.C. § 1621(c)) declares that aliens who are not “qualified aliens”<sup>12</sup> are ineligible for certain public benefits, including public postsecondary education. However, the same section of the law also allows a state, after August 22, 1996, to enact laws that specifically confer a public benefit on aliens.

It is not yet clear whether admission to a public college or university is a “public benefit,” and thus whether the IIRIRA applies to admissions policies. Although the court in the *Merton* case, discussed below, concluded that the IIRIRA was not intended to apply to college admissions, there have been no definitive rulings on whether college admission is a “benefit,” and the views of commentators differ. (For a discussion of the application of the IIRIRA to admission to public colleges and universities, see Michael A. Olivas, “IIRIRA, the DREAM Act, and Undocumented College Student Residency,” 30 *J. Coll. & Univ. Law* 435 (2004).)

In 2002, the Attorney General of Virginia sent a memo to all public postsecondary institutions in the state stating that they should not admit undocumented aliens. The memo also encouraged officials of the institutions to report the presence of any undocumented students on campus to the federal authorities. When the public colleges and universities in Virginia followed the dictates of the memorandum with respect to admissions policies, an association that advocates for undocumented workers, as well as several undocumented individuals, filed a lawsuit against the boards of visitors of these colleges and universities, asserting that their refusal to admit undocumented alien applicants violated the U.S. Constitution’s supremacy, foreign commerce, and due process clauses. (For a discussion of supremacy clause principles, see Section 8.3.6 of this book.) The supremacy clause claim was based on the plaintiffs’ assertion that the restrictive admissions policies of the institutions regulated immigration and thus interfered with federal immigration law. The plaintiffs’ foreign commerce clause claim was based on the assertion that state policies denying admission to undocumented aliens burdened interstate commerce by precluding potential applicants from earning higher wages and sending funds to relatives living outside the United States. The due process claim was based on the plaintiffs’ assertion that the policy of denying admission to undocumented aliens deprived them of a property interest in receiving a public education in Virginia community colleges, as well as a property interest in receiving fair and impartial admissions decisions based on review of their applications. The defendants moved for dismissal of all claims.

In *Equal Access Education v. Merton*, 305 F. Supp. 2d 585 (E.D. Va. 2004) (*Merton I*), the court first addressed the issue of standing. Several of the named plaintiffs were high school students whose academic achievement would have made them competitive for admission to Virginia universities, except for the fact that they were not citizens or lawful permanent residents. One plaintiff was a high school student who had temporary legal status, but who had been denied

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<sup>12</sup>Section 1641 of the IIRIRA provides seven categories of aliens who are considered to be “qualified” and thus eligible for public benefits. In addition to documented aliens, the category includes political refugees, aliens granted asylum, and Cuban and Haitian refugees (8 U.S.C. § 1641(b)).

admission to a public university; he alleged that the denial was based on an inaccurate assumption that he did not have a lawful immigration status. The court found that the individual plaintiffs had standing to bring the suit, as did the association that had been formed to further the interests of undocumented high school students in attending public colleges and universities in Virginia.

In addressing the plaintiffs' supremacy clause claim, the court looked to *DeCanas v. Bica*, 424 U.S. 351 (1976), in which the U.S. Supreme Court upheld a California statute forbidding employers to hire undocumented aliens if such employment would have an adverse effect on lawful resident workers. The Supreme Court rejected a claim that the state law was preempted by federal law and set forth a three-part test for determining whether a state statute, action, or policy related to immigration was preempted by federal law. Under this test, federal law will preempt the state when: (1) the state statute, action, or policy is an attempt to regulate immigration; (2) the subject matter of the state law, action, or policy is one that Congress intended to prevent states from regulating, even if the state law does not conflict with federal law; or (3) the state statute, action, or policy poses an obstacle to the execution of congressional objectives, or conflicts with federal law, making compliance with both federal and state law impossible.

Applying the *DeCanas* tests, the court determined, with one exception noted below, that the Virginia policy to deny admission to undocumented applicants did not meet any of the conditions under which federal law would preempt the policy. Specifically, the court determined that, in passing the IIRIRA, Congress did not intend to regulate the admission of undocumented aliens to college, leaving that issue to the states. The IIRIRA merely dictated that, if undocumented aliens were admitted to public colleges and universities, they would have to be charged the same out-of-state tuition paid by U.S. citizens (8 U.S.C. § 1623(a)). As long as the college officials used "federal immigration status standards" rather than creating different state standards for determining whether an applicant was undocumented or not a lawful resident, there was no violation of the supremacy clause. But because no trial had been held to determine whether the colleges had created an alternate set of "state standards" to evaluate applicants' citizenship status, the court declined to dismiss that part of the plaintiffs' supremacy clause claim.

The court then turned to the plaintiffs' foreign commerce clause claim, which asserted that the admissions policies relegated the plaintiffs to low-wage jobs by denying them access to postsecondary education, thus limiting their ability to send funds to relatives living outside the United States. The court rejected this claim, noting that there was no allegation that the plaintiffs made or intended to make such payments and that, since undocumented aliens are not eligible under federal law to work in the United States, it was unlikely that they would be able to earn the type of salaries that would result in significant payments to foreign nationals.

The court rejected the plaintiffs' due process claim, stating that they did not have a property right in admission to Virginia community colleges because admission was discretionary on the part of the colleges. And because public



colleges and universities may deny admission to any applicant for any constitutionally permissible reason, said the court, there is no entitlement to any particular procedures or criteria for admission. In *Merton I*, therefore, the court dismissed all of the plaintiffs' claims except for the one portion of the supremacy clause claim.

In *Equal Access Education v. Merton*, 325 F. Supp. 2d 655 (E.D. Va. 2004) (*Merton II*), the court granted the defendant universities' motion for summary judgment on that claim. The court did not rule on the merits of the claim, however; instead it reconsidered the plaintiffs' standing in light of its rulings in *Merton I* and determined that the plaintiffs no longer had standing to continue the action.

During 2003 and 2004, bills were introduced in both houses of Congress that would allow certain undocumented students to attend college in the United States and to begin the process of legalization of the student's immigration status. The bills, S. 1545 (the DREAM Act) and H.R. 1684 in the 108th Congress, had not been voted upon as of late 2005 (see S. 2075 (109th Cong.)). (For a discussion of these bills and their potential impact on the postsecondary education opportunities of undocumented students, see the Olivas article cited above.)

**8.2.5. Affirmative action programs.** Designed to increase the number of minority persons admitted to academic programs, affirmative action policies pose delicate social, pedagogical, and legal questions. Educators and public policy makers have agonized over the extent to which the goal of greater minority representation, or diversity in general, justifies the admission of less or differently qualified applicants, particularly in professional programs. Courts have grappled with the complaints of qualified but rejected nonminority applicants who claim to be victims of "reverse discrimination" because minority applicants were admitted in preference to them. Four cases have reached the U.S. Supreme Court: *DeFunis* in 1973, *Bakke* in 1978, and *Grutter* and *Gratz* in 2003, all of which are discussed below.

There are two types of affirmative action plans: "remedial" or "mandatory" plans and "voluntary" plans.<sup>13</sup> The former are ordered by a court or government agency. There is only one justification that the courts have accepted for this type of affirmative action plan: remedying or dismantling the present effects of past discrimination that the institution has engaged in or supported. "Voluntary" affirmative action plans, on the other hand, are adopted by the conscious choice of the institution. As the law has developed, there are two justifications for this type of plan. The first parallels the justification for remedial or mandatory affirmative action: alleviating the present effects of the institution's own past discrimination. The second—newer and more controversial—justification is achieving and maintaining the diversity of the student body.

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<sup>13</sup>An affirmative action plan embodied in a consent decree, voluntarily accepted by the parties as a basis for settling a case, would apparently be considered a voluntary rather than a mandatory plan. See *Local No. 93, Int'l. Ass'n. of Firefighters v. City of Cleveland*, 478 U.S. 501, 516–17 (1986).

Just as there is a basic dichotomy between remedial and voluntary plans, there is also a basic distinction—developed in cases concerning race and ethnicity—between “race-conscious” voluntary affirmative action plans and “race-neutral” voluntary affirmative action plans. The former take race into account in decision making by providing some type of preference or advantage for members of identified minority groups. Race-neutral plans, on the other hand, do *not* use race as a factor in making decisions about particular individuals. Some allegedly race-neutral plans may have the foreseeable *effect* of benefiting certain racial or ethnic minorities, but this characteristic alone does not convert the neutral plan into a race-conscious plan, so long as the race of particular individuals is not itself considered in making decisions about them. Genuinely race-neutral plans raise fewer legal issues than race-conscious plans and are less amenable to challenge. If the plan is adopted for the purpose of benefiting some minorities over some nonminorities, however, and does have this intended effect, the plan could be subject to challenge as reverse discrimination and could be treated as a race-conscious plan. (See, for example, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Rogers v. Lodge*, 458 U.S. 613 (1982); and see generally Section 13.5.7.2 of this book.)

The legal issues concerning affirmative action can be cast in both constitutional and statutory terms and apply to both public and private institutions. The constitutional issues arise under the Fourteenth Amendment’s equal protection clause, which generally prohibits discriminatory treatment on the basis of race, ethnicity, or sex, including “reverse discrimination,” but applies only to *public* institutions (see Section 1.5.2 of this book). The statutory issues arise under Title VI of the Civil Rights Act of 1964 (prohibiting “race,” “color,” and “national origin” discrimination), and Title IX of the Education Amendments of 1972 (prohibiting sex discrimination), which apply to discrimination by both public and private institutions receiving federal financial assistance (see generally Sections 13.5.2 & 13.5.3 of this book); and under 42 U.S.C. § 1981, which has been construed to prohibit race discrimination in admissions by private schools whether or not they receive federal assistance (see Section 8.2.4.1 of this book).<sup>14</sup> In the *Bakke* case, a majority of the Justices agreed that Title VI uses constitutional equal protection standards for determining the validity of affirmative action programs (438 U.S. 265 at 284–87 (Powell, J.), 328–41 (Brennan, J., concurring in judgment), 412–18 (Stevens, J., concurring in judgment)). Standards

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<sup>14</sup>The cases discussed below, and all of the major cases on affirmative action in admissions, involved race and/or ethnicity discrimination. Sex discrimination claims, however, are also a realistic possibility. A Georgia case provides a concrete example. Several rejected female applicants filed a lawsuit against the University of Georgia, challenging its practice of using gender preferences to make admission decisions in borderline cases. The U.S. district court ruled in the plaintiffs’ favor. See *Johnson v. University System of Georgia*, 106 F. Supp. 2d 1362, 1375–76 (S.D. Ga. 2000). Because far more female than male students would have been admitted if gender had not been considered, the university had applied a lower standard to male applicants in an attempt to narrow the gap between the proportions of female and male students. The university then eliminated consideration of gender in making admissions decisions. See Dan Carnevale, “Lawsuit Prompts U. of Georgia to End Admissions Preferences for Male Applicants,” *Chron. Higher Educ.*, September 3, 1999, A68.

comparable to those of the equal protection clause would also apparently be used for affirmative action issues arising under 42 U.S.C. § 1981, as suggested by the *Grutter* and *Gratz* cases, at least for public institutions and private institutions that receive federal financial assistance.<sup>15</sup> For Title IX affirmative action issues, equal protection standards would also apply; but it is not clear whether it would be the “intermediate scrutiny” standard that courts use when reviewing equal protection claims of sex discrimination (see *United States v Virginia*, 518 U.S. 515 (1996), discussed in subsection 8.2.4.2 above) or the “strict scrutiny” standard applicable to race claims under Title VI. (See *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994); *Johnson v. University System of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).) Thus, *Bakke*, *Grutter*, and *Gratz*, taken together, establish a core of comparable legal parameters for affirmative action, applicable to public and private institutions alike.

Both the Title VI and the Title IX administrative regulations also address the subject of affirmative action. These regulations preceded *Bakke* and are brief and somewhat ambiguous. After *Bakke*, the U.S. Department of Health, Education, and Welfare (HEW, now the U.S. Department of Education) issued a “policy interpretation” of Title VI, indicating that the department had reviewed its regulations in light of *Bakke* and “concluded that no changes . . . are required or desirable” (44 Fed. Reg. 58509, at 58510 (October 10, 1979)). This policy interpretation, however, did set forth guidelines for applying the Title VI affirmative action regulations consistent with *Bakke*.

When an institution has discriminated in the past, the Title VI and Title IX regulations require it to implement affirmative action programs to overcome the effects of that discrimination—a kind of remedial or mandatory affirmative action (34 C.F.R. §§ 100.3(b)(6)(i) & 100.5(i); 34 C.F.R. § 106.3(a)).<sup>16</sup> When the institution has not discriminated, the regulations nevertheless permit affirmative action to overcome the present effects of past societal discrimination—a type of voluntary affirmative action (34 C.F.R. §§ 100.3(b)(6)(ii) & 100.5(i); 34 C.F.R. § 106.3(b)). Under more recent judicial interpretations, however, these regulations and the 1997 Policy Interpretation could not validly extend to voluntary race-conscious or gender-conscious plans designed to remedy societal discrimination apart from the institution’s own prior discrimination. (See the discussion in guideline 1 below in this subsection.)

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<sup>15</sup>One appellate court has held, in a post-*Grutter* and *Gratz* case involving Section 1981, that Title VII standards (see Section 5.2.1 of this book), rather than equal protection standards, would apply with respect to “the order and nature of the proof” of intentional discrimination for a Section 1981 claim against a private school that does not receive federal funds; see *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005).

<sup>16</sup>The department, however, cannot require the institution to use admissions quotas as part of an affirmative action plan. Section 408 of the Education Amendments of 1976 (20 U.S.C. § 1232i(c)) provides that:

It shall be unlawful for the Secretary [of Education] to defer or limit any federal assistance on the basis of any failure to comply with the imposition of quotas (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education or community college receiving Federal financial assistance.

The first case to confront the constitutionality of affirmative action admissions programs in postsecondary education was *DeFunis v. Odegaard*, 507 P.2d 1169 (Wash. 1973), *dismissed as moot*, 416 U.S. 312 (1974), *on remand*, 529 P.2d 438 (Wash. 1974). After DeFunis, a white male, was denied admission to the University of Washington's law school, he filed suit alleging that less-qualified minority applicants had been accepted and that, but for the affirmative action program, he would have been admitted. The law school admissions committee had calculated each applicant's predicted first-year average (PFYA) through a formula that considered the applicant's LSAT scores and junior-senior undergraduate average. The committee had attached less importance to a minority applicant's PFYA and had considered minority applications separately from other applications. DeFunis's PFYA was higher than those of all but one of the minority applicants admitted in the year he was rejected.

The state trial court ordered that DeFunis be admitted, and he entered the law school. The Washington State Supreme Court reversed the lower court and upheld the law school's affirmative action program under the equal protection clause as a constitutionally acceptable admissions tool justified by several "compelling" state interests. Among them were the "interest in promoting integration in public education," the "educational interest . . . in producing a racially balanced student body at the law school," and the interest in alleviating "the shortage of minority attorneys—and, consequently, minority prosecutors, judges, and public officials." When DeFunis sought review in the U.S. Supreme Court, he was permitted to remain in school pending the Court's final disposition of the case. Subsequently, in a *per curiam* opinion with four Justices dissenting, the Court declared the case moot because, by then, DeFunis was in his final quarter of law school, and the university had asserted that his registration would remain effective regardless of the case's final outcome. The Court vacated the Washington State Supreme Court's judgment and remanded the case to that court for appropriate disposition.

Though the *per curiam* opinion in *DeFunis* does not discuss the merits of the case, Justice Douglas's dissent presents a thought-provoking analysis of affirmative action in admissions. He discussed both "uniform" (or "race-neutral" plans) and "differential" (or "compensatory") plans (both further discussed below in this subsection) and then gave this assessment of the University of Washington law school's plan:

[Under the] policy . . . presented by this case the [admissions] committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race. To be sure, the racial preference here was not absolute—the committee did not admit all applicants from the four favored groups. But it did accord all such applicants a preference by applying, to an extent not precisely ascertainable from the record, different standards by which to judge their applications, with the result that the committee admitted minority applicants who, in the school's own judgment, were less promising than other applicants who were rejected. Furthermore, it is apparent that because the admissions committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them,

even if at the outset a precise number of places were not set aside. That proportion, apparently 15% to 20%, was chosen because the school determined it to be “reasonable,” although no explanation is provided as to how that number rather than some other was found appropriate. Without becoming embroiled in a semantic debate over whether this practice constitutes a “quota,” it is clear that given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete—solely on account of his race [416 U.S. at 332–33].

Justice Douglas did not conclude that the university’s policy was therefore unconstitutional but, rather, that it would be unconstitutional unless, after a new trial, the court found that it took account of “cultural standards of a diverse rather than a homogeneous society” in a “racially neutral” way.

Five years after it had avoided the issue in *DeFunis*, the Supreme Court considered the legality of affirmative action in the now-famous *Bakke* case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The plaintiff, a white male twice rejected from the medical school of the University of California at Davis, had challenged the school’s affirmative action plan under which it had set aside 16 places out of 100 for minority applicants whose applications were considered separately from other applicants. According to Justice Powell’s description of the plan, with which a majority of the Justices agreed:

[T]he faculty devised a special admissions program to increase the representation of “disadvantaged” students in each medical school class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process. . . .

[C]andidates were asked to indicate whether they wished to be considered as . . . members of a “minority group,” which the Medical School apparently viewed as “Blacks,” “Chicanos,” “Asians,” and “American Indians.” [If so], the application was forwarded to the special admissions committee. . . . [T]he applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicant. . . .

From [1971] through 1974, the special program resulted in the admission of twenty-one black students, thirty Mexican-Americans, and twelve Asians, for a total of sixty-three minority students. Over the same period, the regular admissions program produced one black, six Mexican-Americans, and thirty-seven Asians, for a total of forty-four minority students. Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process [438 U.S. at 272–76].

The university sought to justify its program by citing the great need for doctors to work in underserved minority communities, the need to compensate for the effects of societal discrimination against minorities, the need to reduce the historical deficit of minorities in the medical profession, and the need to diversify the student body. In analyzing these justifications, the California Supreme Court had applied a “compelling state interest” test, such as that used by the state court in *DeFunis*, along with a “less objectionable alternative test.” Although it

assumed that the university's interests were compelling, this court determined that the university had not demonstrated that the program was the least burdensome alternative available for achieving its goals. (This analysis of possible alternatives is comparable to the "narrow tailoring" test that appeared in later litigation and was used by the Court in *Grutter* and *Gratz*.) The California court therefore held that the program operated unconstitutionally to exclude Bakke on account of his race and ordered that Bakke be admitted to medical school. It further held that the Constitution prohibited the university from giving any consideration to race in its admissions process and enjoined the university from doing so (*Bakke v. Regents of the University of California*, 553 P.2d 1152 (Cal. 1976)).

The U.S. Supreme Court affirmed the first part of this decision and reversed the second part. The Justices wrote six opinions (totaling 157 pages), none of which commanded a majority of the Court. Three of these opinions deserve particular consideration: (1) Justice Powell's opinion—in some parts of which various of the other Justices joined; (2) Justice Brennan's opinion—in which three other Justices joined (referred to below as the "Brennan group"); and (3) Justice Stevens's opinion—in which three other Justices joined (referred to below as the "Stevens group").

A bare majority of the Justices—four (the "Stevens group") relying on Title VI and one (Justice Powell) relying on the Fourteenth Amendment's equal protection clause—agreed that the University of California at Davis program unlawfully discriminated against Bakke, thus affirming the first part of the California court's judgment (ordering Bakke's admission). A different majority of five Justices—Justice Powell and the "Brennan group"—agreed that "the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin" (438 U.S. 265, 320 (1978)), thus reversing the second part of the California court's judgment (prohibiting the consideration of race in admissions). In summary, then, the Court invalidated the medical school's affirmative action plan by a 5-to-4 vote; but by a different 5-to-4 vote, the Court ruled that some consideration of race is nevertheless permissible in affirmative action admissions plans. Justice Powell was the only Justice in the majority for both votes.

In their various opinions in *Bakke*, the Justices debated the issues of what standard of review applies under the equal protection clause, what the valid justifications for affirmative action programs are, and the extent to which such programs can be race conscious, and whether the Title VI requirements for affirmative action are the same as those under the equal protection clause. No majority agreed fully on any of these issues, and they continued to be debated in the years following *Bakke*. Nevertheless, a review and comparison of opinions reveals three basic principles established by *Bakke* that were followed by later courts.

*First*, racial preferences that partake of quotas—rigid numerical or percentage goals defined specifically by race—are impermissible. *Second*, separate systems for reviewing minority applications—with procedures and criteria different from those used for nonminority applications—are impermissible. *Third*, Title VI embodies Fourteenth Amendment principles of equal protection and applies to race discrimination in the same way as the equal protection clause.

In addition to these principles that a majority of the Court adhered to in their various opinions, the Powell opinion in *Bakke* also includes important additional guidance for affirmative action plans. This guidance focuses primarily on the concept of student body diversity, and on the importance of individualized comparisons of all applicants. In addition, the Powell opinion (picking up on the Douglas opinion in *DeFunis*) addresses the concept of *differential* or compensatory affirmative action plans.

The core of Justice Powell’s guidance on student body diversity is that:

the state interest that would justify consideration of race or ethnic background . . . is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element [438 U.S. at 315 (Powell, J.).]

The crux of Justice Powell’s guidance on individualized comparisons of applicants is that:

race or ethnic background may be deemed a “plus” in a particular applicant’s file, yet it [may] not insulate the individual from *comparison with all other candidates for the available seats*. The file of a particular black applicant may be examined for his potential contribution to diversity *without the factor of race being decisive* when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial education pluralism. . . . In short, an admissions program operated in this way is flexible enough to *consider all pertinent elements of diversity in light of the particular qualifications of each applicant*, and to place them on the same footing for consideration, although not necessarily according to them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class [438 U.S. at 317–18 (Powell, J.) (emphasis added)].

And regarding differential admissions plans, Powell stated:

Racial classifications in admissions conceivably could serve a . . . purpose . . . which petitioner does not articulate: fair appraisal of each individual’s academic promise in light of some bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no “preference” at all [438 U.S. at 306 (Powell, J.)].

In completing his analysis in *Bakke*, Justice Powell used a “strict scrutiny” standard of review. The Brennan group, in contrast, used an “intermediate scrutiny” standard; and the Stevens group, relying on Title VI, did not directly confront the standard-of-review issue. Cases after *Bakke* but before *Grutter* and *Gratz* did resolve this issue, however—in particular *City of Richmond v. J. A. Croson Co.*,

488 U.S. 469 (1989), and *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 220–21 (1995), both discussed in Section 5.4.2 of this book. Under these cases, a race-conscious affirmative action plan will be constitutional only if the institution can prove that its use of race is: (1) “narrowly tailored” to (2) further “compelling governmental interest.” This “strict scrutiny” standard of review had previously been used in equal protection race discrimination cases that did not involve reverse discrimination; it is also the standard that was used by Justice Powell in *Bakke* (see 438 U.S. at 290–91) and by the state supreme courts in *DeFunis* and *Bakke*.

After the *Bakke* case, absent any consensus on the Court, most colleges and universities with affirmative action admissions plans followed the Powell guidelines. As the Court later explained in *Grutter*: “Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views . . .” (539 U.S. at 307). In early challenges to the Powell type of race-conscious plan, the institutions usually prevailed. Two important state court decisions upholding affirmative action programs of state professional schools provide examples. In *McDonald v. Hogness*, 598 P.2d 707 (Wash. 1979), the court relied heavily on the Powell opinion as well as the Brennan opinion in *Bakke* in upholding the University of Washington medical school’s race-conscious admissions policy. And in *DeRonde v. Regents of the University of California*, 625 P.2d 220 (Cal. 1981), another state court relied heavily on the Powell and Brennan opinions, and on the Washington court’s ruling in *McDonald*, to uphold the University of California at Davis law school’s affirmative action policy. Both courts accepted student body diversity as a constitutionally sufficient justification for race-conscious admissions policies. A federal district court in New York did so as well in *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991).

After a period of relative quiet, however, a new round of court challenges to race-conscious admissions plans began in the 1990s, with several leading cases using reasoning and reaching results different from the earlier post-*Bakke* cases. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), for instance, four rejected applicants sued the state and the University of Texas (UT) under the equal protection clause and Title VI, claiming that they were denied admission to the UT law school on the basis of their race. The plaintiffs challenged the continuing vitality of Justice Powell’s opinion in the *Bakke* case and more generally challenged the authority of colleges and universities to use “diversity” as a rationale for considering race, gender, or other such characteristics as a “plus” factor in admissions. The law school’s affirmative action admissions program gave preferences to African American and Mexican American applicants only and used a separate committee to evaluate their applications. “Cut-off scores” used to allocate applicants to various categories in the admissions process were lower for blacks and Mexican Americans than for other applicants, resulting in the admission of students in the “minority” category whose college grades and LSAT scores were lower than those of some white applicants who had been rejected.

The trial and appellate courts used the strict scrutiny standard of review, requiring the defendant to establish that it had a “compelling interest” in using



racial preferences and that its use of racial preferences was “narrowly tailored” to achieve its compelling interest. The law school had presented five justifications for its affirmative action admissions program, each of which, it argued, met the compelling state interest test: (1) to achieve the law school’s mission of providing a first-class legal education to members of the two largest minority groups in Texas; (2) to achieve a diverse student body; (3) to remedy the present effects of past discrimination in the Texas public school system; (4) to comply with the 1983 consent decree with the Office of Civil Rights, U.S. Department of Education, regarding recruitment of African American and Mexican American students; and (5) to comply with the standards of the American Bar Association and American Association of Law Schools regarding diversity. The federal district court ruled that the portions of the law school’s admissions program that gave “minority” applicants a separate review process violated the Fourteenth Amendment—following Justice Powell’s reasoning on this point in his *Bakke* opinion. The district court also held, however, that the affirmative action plan furthered the compelling interest of attaining diversity in the student body (the law school’s second justification) and that it served to remedy prior discrimination by the State of Texas in its entire public school system, including elementary and secondary schools (the law school’s third justification). A three-judge panel of the appellate court rejected these justifications and invalidated the law school’s program. Addressing the diversity rationale first, the Fifth Circuit panel specifically rejected Justice Powell’s reasoning about diversity and ruled that “achieving a diverse student body is not a compelling interest under the Fourteenth Amendment” (78 F.3d at 944). The appellate court then addressed the rationale of remedying prior discrimination. Although the court recognized that the state of Texas had discriminated on the basis of race and ethnicity in its public education system, the law school’s admission program was not designed to remedy that prior unlawful conduct because the program gave preferences to minorities from outside Texas and to minorities who had attended private schools. Furthermore, said the court, in order for the admissions program to comply with constitutional requirements, the law school would have had to present evidence of a history of its own prior unlawful segregation. “A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny” (78 F.3d at 951). Once prior discrimination had been established, the law school would then have to trace present effects from the prior discrimination, to establish the size of those effects, and to develop a limited plan to remedy the harm. The “present effects” cited by both the law school and the district court—a bad reputation in the minority community and a perceived hostile environment in the law school for minority students—were insufficient, said the court, citing the Fourth Circuit’s earlier opinion in *Podberesky v. Kirwan*, 38 F.3d at 147 (4th Cir. 1994) (discussed in Section 8.3.4).<sup>17</sup> One appellate judge, although concurring

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<sup>17</sup>Another federal circuit court used reasoning similar to *Hopwood*’s to invalidate the University of Georgia’s undergraduate admissions policy (*Johnson v. Board of Regents of the University of Georgia*, 263 F. 3d 1234 (11th Cir. 2001)).

in the result reached by the panel, disagreed with the majority's statement that diversity could never be a compelling state interest and—foreshadowing *Grutter*—asserted that it was an open question whether diversity could provide a compelling interest for a public graduate school's use of racial preferences in its admissions program.<sup>18</sup>

After *Hopwood*, but before *Grutter* and *Gratz*, various important developments took place outside the courts. In Texas, the state legislature passed a statute providing alternative means by which to foster diversity in the undergraduate programs of public colleges and universities in the state. The statute reads:

(a) Each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission and the applicant graduated from a public or private high school in this state accredited by a generally recognized accrediting organization or from a high school operated by the United States Department of Defense. . . .

(b) After admitting an applicant under this section, the institution shall review the applicant's record, and any other factor the institution considers appropriate, to determine whether the applicant may require additional preparation for college-level work or would benefit from inclusion in a retention program . . . [Tex. Educ. Code Title 3, Ch. 51, § 51.803].

Florida and California also adopted “percentage plans.” (For analysis of these plans, see Michelle Adams, “Isn't It Ironic? The Central Paradox at the Heart of

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<sup>18</sup>In another Texas case challenging racial preferences—decided after *Hopwood* but before the U.S. Supreme Court's decisions in *Grutter* and *Gratz*—the Court provided guidance on how to resolve an institution's claims that the plaintiff would not have been admitted even if no racial preferences had been used. In *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998), a three-judge appellate panel reversed the district court's summary judgment for the plaintiff because the decision to reject Lesage had been made prior to consideration of the applicants' race, and Lesage would not have been admitted irrespective of any racial considerations that might later have been used. Even if Lesage would not have been admitted absent racial preferences, said the appellate court, that issue was relevant only to the amount of damages, not to the determination of whether the university acted unlawfully by considering race and ethnicity in the preliminary application review process. If the university did employ racial preferences in the application screening process, then all applicants were not competing on an “equal footing,” and this fact itself, whether or not any particular applicant would ultimately have been admitted, constituted an injury to nonminority applicants. The U.S. Supreme Court then disagreed with the reasoning of the appellate court (*Texas v. Lesage*, 528 U.S. 18 (1999)). Relying on the *Mt. Healthy* case (Section 7.6), the Court's *per curiam* opinion reasoned that, if a public institution could establish that it would have made the same decision without using the “forbidden consideration” (here, the applicants' race), then it could not be liable for that particular decision. The Court credited the university's argument that Lesage would not have been admitted even if the admissions process had been completely race neutral because seventy-three rejected applicants had higher grade point averages and higher Graduate Record Examination scores. On the other hand, said the Court, if a plaintiff challenged an ongoing program of race-conscious admissions, rather than a particular admissions decision, and sought “forward-looking” relief, there was no need to establish that he or she would have been admitted. Cases and authorities on these issues are collected in Annot., “Standing to Challenge College or Professional School Admissions Program Which Gives Preference to Minority or Disadvantaged Applicants,” 60 A.L.R. Fed. 612.

‘Percentage Plans,’” 62 *Ohio St. L.J.* 1729 (2001).) In the state of Washington, voters passed Initiative Measure 200 (I-200) (codified as Wash. Rev. Code § 49.60.400(1)), which prohibited discrimination or preferential treatment on the basis of race (and other suspect classes) in the state’s “operation of public employment, public education or public contracting.”<sup>19</sup> Similarly, the voters of California approved Proposition 209, an amendment to their state constitution that outlawed voluntary affirmative action. The California measure, passed in 1996, states that “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” (Cal. Const., Art. I, § 31(a)). Several civil rights groups challenged the measure on constitutional grounds, arguing that the provision violated the equal protection clause of the Fourteenth Amendment. The trial court entered a preliminary injunction and temporary restraining order to stop the state from enforcing the law. In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), the U.S. Court of Appeals overturned the ruling of the trial court. According to the appellate court, Proposition 209 imposed no burden on racial or gender minorities, since it forbade discrimination against them. Since there is no constitutional right to preferential treatment, said the court, forbidding preferential treatment on the basis of race or gender did not injure these groups. Characterizing the law as “neutral,” and concluding that the plaintiffs had “no likelihood of success on the merits,” the court vacated the preliminary injunction and remanded the case to the trial court. (For further discussion of the appellate court’s opinion, see Jill Bodensteiner, “Discrimination Against Students in Higher Education: A Review of the 1997 Judicial Decisions,” 25 *J. Coll. & Univ. Law* 331, 342–46 (1998).)

In 2003, the U.S. Supreme Court heard and decided the two University of Michigan cases together as “companion cases.” In *Grutter v. Bollinger*, 539 U.S. 306 (2003), rejected white applicants challenged the law school’s plan for affirmative action in admissions; in *Gratz v. Bollinger*, 539 U.S. 244 (2003), rejected white applicants challenged a plan of the university’s undergraduate College of Literature, Science, and the Arts (LSA). Both plans were voluntary, race-conscious plans, but they were quite different in their particulars, as explained below. In each case, the plaintiffs alleged that the affirmative action plan violated not only the equal protection clause but also Title VI (42 U.S.C. § 2000d) and Section 1981 (42 U.S.C. § 1981). In *Grutter*, the Court upheld the law school plan by a 5-to-4 vote; in *Gratz*, the Court invalidated the undergraduate plan by a 6-to-3 vote. Justice O’Connor, who authored the majority opinion in *Grutter*, was the only Justice

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<sup>19</sup>The passage of I-200 resulted in the dismissal of the prospective relief claims in a major lawsuit challenging the University of Washington law school’s race-conscious affirmative action plan. See *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000). Since the new state law prohibited the law school from continuing to use its admissions policy, the plaintiff’s claim was moot. The court allowed the case to continue, however, with regard to plaintiff’s claims for damages for having been denied admission under the law school’s pre-I-200 policy. In 2004, subsequent to the U.S. Supreme Court’s rulings in *Grutter* and *Gratz* (below, this subsection), the appellate court decided this part of the case in the university’s favor (*Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004)).

in the majority in both cases. All together, the Justices issued thirteen opinions in the two cases. (See generally *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* (2003), a report by the Harvard Civil Rights Project, available at <http://www.civilrightsproject.harvard.edu>.) The *Grutter* majority reaffirmed the two basic points upon which a majority of the Justices in *Bakke* agreed: that rigid racial quotas are impermissible, and that other, more flexible forms of racial preferences are permissible. Further, the *Grutter* majority explicitly approved and adopted Justice Powell's reasoning in the *Bakke* case (539 U.S. at 323–25) and for the most part the *Gratz* majority did so as well (539 U.S. at 270–74). Justice Powell's principles regarding affirmative action in admissions, adhered to only by Justice Powell in *Bakke*, thus have now become the principles of the Court.

Like Justice Powell, both the *Grutter* and *Gratz* majorities applied a strict scrutiny standard of review. As explained by the *Gratz* majority, "strict scrutiny" review means that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny" (*Gratz*, 539 U.S. at 270, quoting *Adarand*, 515 U.S. at 224). The *Grutter* majority used the same strict scrutiny standard but tempered its application to race-conscious admissions policies by emphasizing that courts should defer to the institution's own judgments about its educational mission. Both the law school policy (*Grutter*) and the undergraduate college policy (*Gratz*) met the "compelling interest" component of strict scrutiny (see below), but only the law school plan met the second, "narrow tailoring" prong.<sup>20</sup> Analytically, that is the difference between the two cases and the reason for the differing results.

In *Grutter*, the lead plaintiff, a white Michigan resident, sued university president Lee Bollinger and others, seeking damages, an order requiring her admission to the law school, and an injunction prohibiting continued racial discrimination by the law school. The plaintiff alleged that the law school used race "as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups'" (539 U.S. at 306). The law school's admissions policy, drafted and adopted by a faculty committee in 1992, expresses the law school's interest in "achiev[ing] that diversity which has the potential to enrich everyone's education. . . ." The policy recognizes "many possible bases for diversity admissions" and provides that all such "diversity contributions are eligible for 'substantial weight' in the admissions process." While diversity therefore is not defined "solely in terms of racial and ethnic status," the policy does reaffirm a commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups that have been historically discriminated against, like African-Americans, Hispanics and Native

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<sup>20</sup>"Narrow tailoring" is a technical term, and its meaning is not immediately obvious. To enhance clarity, it is important to note that the term applies to the *means* by which an institution seeks to achieve the *end* of student body diversity—and in particular to the *race-conscious means* by which the institution seeks to achieve the *end* of racial and ethnic diversity.

Americans.” (See 539 U.S. at 315–16, quoting from the trial court record.) The significance of race in admissions decisions “varies from one applicant to another;” while race may play no role in the decision to admit some students, for others “it may be a ‘determinative’ factor.” The law school’s goal is to include a “critical mass of under-represented minority students” in each class. “Meaningful numbers” rising to the level of a “critical mass” do not indicate a particular “number, percentage, or range of numbers or percentages,” but only “numbers such that the under-represented minority students do not feel isolated or like spokespersons for their race.” (See 539 U.S. at 314–16, quoting and paraphrasing testimony of the university’s witnesses.)

The Court majority in *Grutter* (Justice O’Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer), adopting the reasoning of Justice Powell’s *Bakke* opinion, rejected the plaintiffs’ arguments. First, the *Grutter* majority held that “student body diversity is a compelling state interest that can justify the use of race in University admissions” (539 U.S. at 325). This is because “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide . . . the training and education necessary to succeed in America” (539 U.S. at 332–33). Race and ethnicity, however, are not the only factors pertinent to student body diversity. Rather, student body diversity, as a compelling interest, entails a “broad range of qualities and experiences that may be considered valuable contributions” and “a wide variety of characteristics besides race and ethnicity . . .” (*Grutter*, 539 U.S. at 338–39). Moreover, the majority indicated that courts should “defer” to universities’ judgments about “the educational benefits that diversity is designed to produce.” “The institution’s educational judgment that [student body] diversity is essential to its educational mission,” said the Court, “is one to which we defer” (539 U.S. at 328).

Next, the majority in *Grutter* held that the law school’s admissions policy was “narrowly tailored” to the interest in student body diversity. The policy’s stated goal of “attaining a critical mass of underrepresented minority students” did not constitute a prohibited quota (539 U.S. at 335–36). Instead, the admissions process was “flexible enough” to ensure individual treatment for each applicant without “race or ethnicity” becoming “the defining feature” of the application (539 U.S. at 337). It was particularly important to the Court, regarding narrow tailoring, that “the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”; that “the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity” (as had occurred in the program at issue in *Gratz*); that the law school “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions” (as the Harvard plan approved by Justice Powell in *Bakke* had done); that the “Law School does not . . . limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity” and “seriously considers each ‘applicant’s promise of making a

notable contribution to the class by way of a particular strength, attainment, or characteristic’”; that all “applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School”; and that, in practice, “the Law School actually gives substantial weight to diversity factors besides race, . . . frequently accept[ing] nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected . . .” (539 U.S. at 337–39).

Completing its narrow tailoring analysis, the Court in *Grutter* determined that the “holistic review” provided for by the policy does not “unduly” burden individuals who are not members of the favored racial and ethnic groups. The law school, moreover, had “sufficiently considered workable race-neutral alternatives” before adopting any racial preferences. Since the law school’s policy therefore met both components of strict scrutiny review, the Court upheld the policy.

In *Gratz v. Bollinger*, the case involving the University of Michigan’s undergraduate College of Literature, Science, and the Arts, the plaintiffs sought damages, declaratory relief, and an injunction prohibiting continued discrimination by the university. They argued that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly tailored means” (539 U.S. at 268, quoting Brief for Petitioners) and, further, that the university’s admissions policy was not narrowly tailored to achieve the end of student body diversity.

According to the Court, the university’s “Office of Undergraduate Admissions [oversaw] the . . . admissions process” and promulgated “written guidelines for each academic year.” Under its admissions policy, the undergraduate college considered African Americans, Hispanics, and Native Americans to be “underrepresented minorities.” The admissions policy employed a “selection index” under which each applicant could score up to a maximum of 150 points. Applicants received points in consideration of their “high school grade point average, standardized text scores, academic quality and curriculum strength of applicant’s high school, in-state residency, alumni relationship, personal essay, and personal achievement or leadership” (539 U.S. at 254–55). Under an additional “miscellaneous” category, “an applicant was entitled to 20 points based upon . . . membership in an under-represented racial or ethnic minority group.” An Admissions Review Committee provided an additional level of review for certain applicants flagged by admissions counselors. To be flagged, the applicant must have achieved “a minimum selection index score” and “possess a quality or characteristic important to the University’s composition of its freshman class,” examples of which included “socioeconomic disadvantage” and “underrepresented race, ethnicity or geography.” While the evidence did not reveal “precisely how many applications [were] flagged for this individualized consideration . . . , it [was] undisputed that such consideration [was] the exception and not the rule . . .” (539 U.S. at 274).

The *Gratz* majority (Chief Justice Rehnquist, joined by Justices Scalia, O’Connor, Kennedy, and Thomas) held that “the admissions policy violates the

Equal Protection Clause of the Fourteenth Amendment” (as well as Title VI and Section 1981) because it fails to provide “individualized consideration” of each applicant and therefore is not “narrowly tailored” to achieve the compelling interest in student body diversity. Specifically:

The LSA’s policy automatically distributes 20 points to every single applicant from an “underrepresented minority” group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell’s example, where the race of a “particular black applicant” could be considered without being decisive, see *Bakke*, 438 U.S., at 317, 98 S. Ct. 2733, the LSA’s automatic distribution of 20 points has the effect of making “the factor of race . . . decisive” for virtually every minimally qualified underrepresented minority applicant [539 U.S. at 271–72].

The undergraduate plan, therefore, was “not narrowly tailored to achieve the LSA’s compelling interest in student body diversity” and therefore failed strict scrutiny review.

Because Title VI and the equal protection clause embody the same legal standards, the *Grutter* and *Gratz* principles are applicable to both public institutions and private institutions that receive federal financial assistance. These principles are also likely to apply, in general, to institutions’ race-conscious decision making in areas beyond admissions (for example, financial aid (as discussed in Section 8.3.4), student orientation programs, or student housing). The principles of Justice Powell’s opinion in *Bakke* also apply, since the Court approved and adopted them in *Grutter* and *Gratz*. These various principles, according to the Court, must be followed “in practice as well as in theory” (*Grutter*, 539 U.S. at 338).

Read against the backdrop of *Bakke*, the *Grutter* and *Gratz* cases have brought some clarity to the law of affirmative action in admissions. The legal and policy issues remain sensitive, however, and administrators should involve legal counsel fully when considering the adoption or revision of any affirmative action admissions policy. The following seventeen guidelines—the last twelve of which apply specifically to race-conscious plans—can assist institutions in their deliberations.<sup>21</sup>

1. As a threshold matter, an institution may wish to consider whether it has ever discriminated against minorities or women in its admissions policies. If any such unlawful discrimination has occurred in the past, and its existence could be demonstrated with evidence sufficient to support a judicial finding of unlawful discrimination, the law requires that the institution use affirmative action to the extent necessary to overcome any present effects of the past discrimination.

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<sup>21</sup>As for the other parts of this book that set out guidelines or suggestions for institutions or others, the seventeen guidelines here are not intended as legal advice. For legal advice on the matters covered in these guidelines or elsewhere in this Section, institutional administrators should consult their institution’s legal counsel.

(See the discussion in the *Bakke* opinions, 438 U.S. at 284, 328, & 414; see also the *Hopwood* case (above); and *Podberesky v. Kirwan*, discussed in Section 8.3.4.) The limits that *Grutter*, *Gratz*, and *Bakke* place on the voluntary use of racial preferences for diversity purposes do not apply to situations in which the institution itself has engaged in prior unlawful discrimination whose effects continue to the present. At least since *Bakke*, it has been clear that, when “an institution has been found, by a court, legislature, or administrative agency, to have discriminated on the basis of race, color, or national origin[,] [r]ace-conscious procedures that are impermissible in voluntary affirmative action programs may be required [in order] to correct specific acts of past discrimination committed by an institution or other entity to which the institution is directly related” (U.S. Dept. HEW, Policy Interpretation of Title VI, 44 Fed. Reg. 58509 at 58510 (October 10, 1979)). (For an example of a case applying this principle, see *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986).) If a court or administrative agency makes such a finding and orders the institution to remedy the present effects of the past discrimination, the institution’s plan will be a *mandatory* (or remedial) affirmative action plan (see discussion at the beginning of this subsection). Absent any such finding and order by a government body, the institution may nevertheless implement a *voluntary* affirmative action plan designed to remedy the present effects of past discrimination, if it makes its own findings on past discrimination and its present effects, and these findings are supportable with evidence of discrimination of the type and extent used by courts in affirmative action cases.

With respect to voluntary affirmative action, it is clear that institutions have a “compelling interest in remedying past and present discrimination” (*United States v. Paradise*, 480 U.S. 149, 167 (1987)). But this rationale may be used only when the institution seeks to remedy its own prior discrimination or that of other entities whose discrimination the institution has supported (or perhaps, for a public institution, the discrimination of the higher education system of which it is a constituent part). Remedying prior *societal* discrimination does not provide justification for the use of racial preferences—at least not unless the institution has been a participant or “passive participant” in such discrimination (see *City of Richmond v. Croson Co.*, 488 U.S. 469, 485–86, 492 (1989)). *Croson* and *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995), taken together, make this point in cases that are not about education but whose reasoning would extend to education admissions. (For an education case that makes the same point, see *Wygant v. Jackson*, 476 U.S. 267, 274 (1986) (plurality opinion of Powell, J.).)

2. In considering whether to adopt or revise an affirmative action policy for admissions, an institution should rely demonstrably on the educational expertise of its faculty and academic administrators and involve policy makers at the highest levels of authority within the institution. These planners and decision makers should exercise special care in determining the institution’s purposes and objectives in light of its educational mission, making their decisions in the context of these purposes and objectives. A lower court made these points clearly in a case decided two years before *Bakke* and more than twenty-five years before



*Grutter and Gratz*. In this case, *Hupart v. Board of Higher Education of the City of New York*, 420 F. Supp. 1087 (S.D.N.Y. 1976), the court warned:

[E]very distinction made on a racial basis . . . must be justified. . . . It cannot be accomplished thoughtlessly or covertly, then justified after the fact. The defendants cannot sustain their burden of justification by coming to court with an array of hypothetical and *post facto* justifications for discrimination that has occurred either without their approval or without their conscious and formal choice to discriminate as a matter of official policy. It is not for the court to supply a . . . compelling basis . . . to sustain the questioned state action [420 F. Supp. at 1106].

3. An institution may consider one or a combination of two basic approaches to voluntary affirmative action: the *race-neutral* or *uniform* approach, and the *race-conscious* or *preferential* approach (see guidelines 4 and 6 below). An institution might also consider a third possible approach, falling between the other two, which may be called a *differential*, or *compensatory*, approach (see guideline 5 below). While all three approaches can be implemented lawfully, the potential for legal challenge increases as the institution proceeds from a race-neutral to a differential to a race-conscious approach. The potential for substantially increasing minority enrollment also increases, however, so that an institution that is deterred by the possibility of legal action may also be forsaking part of the means to achieve its educational and societal goals.

4. A *race-neutral* or *uniform* affirmative action policy involves revising or supplementing the institution's general admissions standards or procedures so that they are more sensitively attuned to the varying qualifications and potential contributions of all applicants, including minority and disadvantaged applicants. These changes are then applied uniformly to all applicants. For example, all applicants might be eligible for credit for working to help put themselves through school, for demonstrated commitment to living and working in a blighted geographical area, for being the first in one's family to attend college, for residing in an inner-city area from which the institution typically draws very few students, or for overcoming handicaps or disadvantages. Or institutions might cease using preferences for "legacies," or for members of a particular religious denomination whose membership includes relatively few minorities. Or institutions may use test scores from additional tests that supplement traditional standardized tests and test abilities beyond what the standardized test measures (for an example, see Robert Sternberg, "Accomplishing the Goals of Affirmative Action—With or Without Affirmative Action," *Change*, January–February 2005, 6, 10–13). Such changes would allow all candidates—regardless of race, ethnicity, or sex—to demonstrate particular pertinent qualities that may not be reflected in grades or scores on traditional tests. Numerical cutoffs could still be used if the institution determines that applicants with grades or test scores above or below a certain number should be automatically accepted or rejected.

In the *DeFunis* case in the U.S. Supreme Court (discussed above), Justice Douglas described aspects of such a policy (416 U.S. at 331–32), as did the

California Supreme Court in *Bakke* (553 P.2d at 1165–66). Justice Douglas gave this explanation of a uniform plan:

The Equal Protection Clause did not enact a requirement that law schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would be offered admission not because he is black but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the admissions committee that can predict such possibilities with assurance, but the committee may nevertheless seek to gauge it as best it can and weigh this factor in its decisions. Such a policy would not be limited to blacks, or Chicanos, or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second-generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the Committee [416 U.S. at 331–32].

(For an example of a more recent case in which the court upheld such “uniform” criteria for admissions as well as a related recruitment process, see *Weser v. Glen*, 190 F. Supp. 2d 384, 387–88, 395–406 (E.D.N.Y. 2000), *affirmed summarily without published opinion*, 168 *West's Educ. Law. Rptr.* 132 (2d Cir. 2002).)

5. A *differential* or *compensatory* affirmative action policy would be based on the concept that equal treatment of differently situated individuals may itself create inequality. Different or supplementary standards for such individuals would become appropriate when use of uniform standards would in effect discriminate against them. In *Bakke*, Justice Powell referred to a differential system by noting:

Racial classifications in admissions conceivably could serve a . . . purpose . . . which petitioner does not articulate: fair appraisal of each individual's academic promise in light of some bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no “preference” at all [438 U.S. at 306 n.43].

(See also the California Supreme Court's discussion of this point in *Bakke*; 553 P.2d at 1166–67.) Justice Douglas's *DeFunis* opinion also referred extensively to differential standards and procedures:

The Indian who walks to the beat of Chief Seattle of the Muckleshoot tribe in Washington has a different culture than examiners at law schools. . . .

[Minority applicants may] have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities . . . [416 U.S. at 334].

Justice Douglas went on to assert that the goal of a differential system is to assure that race is not “a subtle force in eliminating minority members because of cultural differences” and “to make certain that racial factors do not militate *against an applicant or on his behalf*” (416 U.S. at 335–36).

Using such a rationale, the institution might, for example, apply psychometric measures to determine whether a standardized admissions test that it uses is less valid or reliable as applied to its minority or disadvantaged applicants. If it is, the institution might consider using another supplementary test or some other criterion in lieu of or in addition to the standardized test (see Sternberg, above). Or if an institution provided preferences for “legacies,” or for adherents of a particular religion or graduates of schools affiliated with a particular denomination, the institution may consider whether such a criterion discriminated in effect against applicants from particular minority groups; if it does, the institution may consider using other compensating criteria for the minority applicants who are disadvantaged by the institution’s use of the discriminatory criterion. Since the institution would be revising its policies in order to advantage minority applicants, having determined that they are disadvantaged by the current policy, it is unlikely that such a revision would be considered race neutral, as a uniform system would be.

To remain true to the theory of a differential system, an institution can modify standards or procedures only to the extent necessary to counteract the discriminatory effect of applying a particular uniform standard or standards; and the substituted or supplementary standards or procedures must be designed to select only candidates whose qualifications and potential contributions are comparable to those of other candidates who are selected for admission. The goal, in other words, would be to avoid a disadvantage to minority applicants rather than to create a preference for them.<sup>22</sup>

6. A *race-conscious or preferential* affirmative action policy explicitly provides some form of advantage or preference available only to minority applicants. The admissions policies at issue in the cases discussed above, for the most part, fit within this category. It is the advantage available only to minorities that creates the reverse discrimination claim. For some institutions, especially highly selective institutions and large institutions with graduate and professional programs, some form of racial preference may indeed be necessary for the institution (or a particular school within the institution) to achieve

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<sup>22</sup>Separate standards or procedures for minority applicants are generally impermissible when used in a way that provides a preference for such applicants (see guideline 8 below). Since a true differential plan does not provide any preference, it should follow that some separate treatment would be permissible when it serves the purposes of such a plan.

its educational and societal objectives. In *Bakke*, the four Justices in the Brennan group agreed that:

[t]here are no practical means by which . . . [the university] could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level. . . . Moreover, while race is positively correlated with differences in . . . [grades and standardized test] scores, economic disadvantage is not [438 U.S. at 376–77].

Race-conscious policies may thus fulfill objectives broader than those of differential policies. As the discussion in this subsection indicates, there are two leading objectives for which race-conscious policies may be used: alleviating the effects of past institutional discrimination (see guideline 1 above) and diversifying the student body (see guidelines 11 and 12 below).

7. An institution opting for a voluntary, race-conscious policy must assure that its racial preferences do not constitute a “quota.” In *Bakke*, the Court ruled, by a 5-to-4 vote, that explicit racial or ethnic quotas constitute unlawful reverse discrimination. The Court in *Grutter* and *Gratz* affirmed this basic point. As the majority in *Grutter* explained, a quota “is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups’” (539 U.S. at 335, quoting *Croson*, 488 U.S. at 496). Quotas “‘impose a fixed number or percentage, which must be attained, or which cannot be exceeded’” and thus “‘insulate the individual from comparison with all other candidates for the available seats’” (539 U.S. at 335, quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring and dissenting), and *Bakke*, 438 U.S. at 317 (Powell, J.)). Such a policy would violate the equal protection clause as well as Title VI. A goal, on the other hand, “‘require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself,’ and permits consideration of race as a ‘plus’ factor in any given case while still ensuring that each candidate ‘compete[s] with all other qualified applicants’” (539 U.S. at 335, citing and quoting *Sheet Metal Workers v. EEOC*, 478 U.S. at 495, and *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987)). “[A] court would not assume that a university [employing such a policy] would operate it as a cover for the functional equivalent of a quota system” (*Bakke*, 438 U.S. at 317–18) (Powell, J.).

8. An institution using race-conscious policies should avoid using separate admissions committees, criteria, or cutoff scores for minority applicants. Such mechanisms are vulnerable to legal challenge, as the Court suggested in *Bakke* and directly held in *Grutter*. “[U]niversities cannot . . . put members of [certain racial] groups on separate admissions tracks. . . . Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission” (*Grutter*, 539 U.S. at 334, citing *Bakke*, 438 U.S. at 315–16) (Powell, J.). The district court in *Hopwood* (above) invalidated part of the

University of Texas law school’s plan on this basis (861 F. Supp. at 577–79). This does not necessarily mean, however, that any difference in treatment is always impermissible. In *Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004), for instance, the court upheld a law school’s use of a letter of inquiry that went only to some minority applicants, as well as a procedure for expedited review of certain minority applications done for recruitment purposes (392 F.3d at 376–78, 380–81).

9. Institutions may wish to clarify exactly why and how they use racial and ethnic preferences, distinguishing between the remedying-past-discrimination rationale and the student body diversity rationale. If employing the remedial rationale, the institution should identify and document the particular present effects of past institutional discrimination that the institution seeks to remedy. For the diversity rationale, the institution should define its diversity objectives and identify the particular values of diversity for its academic environment (see guideline 11 below). The institution may also wish to justify its choices of which minority groups it covers. (For discussion of the use of preferences for Asian American applicants, see *Smith v. University of Washington* in guideline 8 above, 392 F.3d at 378–79 (upholding a “slight plus” for Asian American applicants); and for discussion of possible pitfalls in limiting affirmative action programs to selected minority groups, see Gabriel Chin, “*Bakke* to the Wall: The Crisis of Bakkean Diversity,” 4 *Wm. & Mary Bill Rts. J.* 881 (1996)).

10. An institution that has, or is considering, a voluntary, race-conscious admissions plan should be familiar with *state* law in its state regarding such plans. Some states have amended their state statutes or state constitutions to prohibit state institutions from using such plans. California and Washington, as discussed above, are leading examples. Other states may reach the same result through administrative regulations or through state court interpretations of the state constitution. Florida is a leading example (Fla. Admin. Code Ann. R. 6C-6.002(7)).

11. An institution relying on student body diversity as the justification for a voluntary, race-conscious admissions plan should consider clearly elucidating the importance of such diversity to the institution or to particular schools within the institutions and connecting student body diversity to the institution’s or school’s educational mission. The institution will likely want to make these judgments at a high level of authority and with substantial faculty participation (see guideline 2 above).

12. A race-conscious admissions policy should broadly define student body diversity to include numerous factors beyond race and ethnicity, and the policy in operation should result in substantial weight being given to such additional factors. “[A]n admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant . . .” (*Grutter*, 539 U.S. at 334). The policy must take into account “a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body” (*Grutter*, 539 U.S. at 339) and must “ensure that all factors that

may contribute to student body diversity are . . . fully considered alongside race in admissions decisions” (*Grutter*, 539 U.S. at 337). The admissions staff and committee must “giv[e] serious consideration to all the ways an applicant might contribute to a diverse educational environment” (*Grutter*, 539 U.S. at 337), so that these factors are taken into account and weighted appropriately “in practice as well as in theory” (*Grutter*, 539 U.S. at 338).

13. Race-conscious admissions policies must provide for “individualized consideration” of applicants. According to Justice Powell, the key to a permissible racial preference is “a policy of individual comparisons” that “assures a measure of competition among all applicants” (438 U.S. at 319, n.53) and that uses “race or ethnic background only as a ‘plus’ in a particular applicant’s file” (438 U.S. at 317). Following Justice Powell, the *Grutter* majority specified that “race [must] be used in a flexible, nonmechanical way . . . as a ‘plus’ factor in the context of individualized consideration of each . . . applicant” (539 U.S. at 334, citing *Bakke*, 438 U.S. at 315–18) (Powell, J.). The institution’s policy must “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount . . .” (*Grutter*, 539 U.S. at 337).

14. Consistent with guideline 13, an institution should avoid using “automatic” points or bonuses that are awarded to all applicants from specified minority groups. There may be no “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity” (*Grutter*, 539 U.S. at 337). Such mechanisms are prohibited whenever the “automatic distribution of . . . points has the effect of making ‘the factor of race . . . decisive’ for . . . qualified minority applicants” (*Gratz*, 539 U.S. at 272, citing *Bakke*, 438 U.S. at 317) (Powell, J.).

15. When devising, revising, or reviewing a race-conscious affirmative action policy, an institution should give serious, good faith consideration to “race-neutral alternatives” for attaining racial diversity.<sup>23</sup> Race-conscious provisions may be utilized only if no “workable” race-neutral alternatives are available. Institutions have no obligation, however, to exhaust “every conceivable race-neutral alternative,” or to adopt race-neutral alternatives that “would require a dramatic sacrifice of [other types of] diversity, the academic quality of all admitted students, or both” (*Grutter*, 539 U.S. at 340).

16. An institution with a race-conscious affirmative action policy should monitor the results it obtains under its policy. In particular, the institution should determine whether its policy in practice is in fact achieving the goal of student body diversity, broadly defined. In addition, the institution should periodically

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<sup>23</sup>The Office for Civil Rights of the U.S. Department of Education has issued two sets of suggestions on possible race-neutral alternatives: “Achieving Diversity: Race-Neutral Alternatives in American Education” (2004), and “Race-Neutral Approaches in Postsecondary Education: Innovative Approaches to Diversity” (2003). Both documents are available on OCR’s Web site at <http://www.ed.gov/OCR>.

determine whether consideration of race and ethnicity remains necessary to the achievement of racial and ethnic diversity. In doing so, institutions should monitor new developments regarding race-neutral alternatives and seriously consider any new alternatives that could prove “workable.” Universities “can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop” in other institutions and other states (*Grutter*, 539 U.S. at 342).

17. Institutions may not use race-conscious admissions policies as a *permanent* means for achieving racial and ethnic diversity. The Court in *Grutter* stated its belief that, in time (perhaps in twenty-five years, the Court predicted), societal conditions will progress to the point where such policies will no longer be needed. Thus, “race-conscious admissions policies must be limited in time” and must provide for “a logical end point” for the use of such policies. This limitation may be implemented “by sunset provisions . . . and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity” (*Grutter*, 539 U.S. at 342; see also guideline 16 above).

These seventeen guidelines can help postsecondary institutions, working with the active involvement of legal counsel, to expand the legal space they have to make their own policy choices about affirmative action in admissions. By carefully considering, justifying, documenting, and periodically reviewing their choices, especially choices involving racial and ethnic preferences, as suggested in these guidelines, institutions may increase the likelihood that their policies will meet constitutional and statutory requirements.

**8.2.6. Readmission.** The readmission of previously excluded students can pose additional legal problems for postsecondary institutions. Although the legal principles in Section 8.2 apply generally to readmissions, the contract theory (Section 8.2.3) may assume added prominence, because the student-institution contract (see Section 8.1.3) may include provisions concerning exclusion and readmission. The principles in Sections 9.2 through 9.4 may also apply generally to readmissions where the student challenges the validity of the original exclusion. And the nondiscrimination laws provide additional theories for challenges to institutional refusals to readmit students.

Institutions should have an explicit policy on readmission, even if that policy is simply “Excluded students will never be considered for readmission.” An explicit readmission policy can give students advance notice of their rights, or lack of rights, concerning readmission and, where readmission is permitted, can provide standards and procedures to promote fair and evenhanded decision making. If the institution has an explicit readmissions policy, administrators should take pains to follow it, especially since its violation could be considered a breach of contract. Similarly, if administrators make an agreement with a student concerning readmission, they should firmly adhere to it. *Levine v. George Washington University*, C.A. (Civil Action) 8230-76 (D.C. Super. Ct. 1976), for instance, concerned a medical student who had done poorly in his first year but was allowed to repeat the year, with the stipulation that he would be excluded

for a “repeated performance of marginal quality.” On the second try, he passed all his courses but ranked low in each. The school excluded him. The court used contract principles to overturn the exclusion, finding that the school’s subjective and arbitrary interpretation of “marginal quality,” without prior notice to the student, breached the agreement between student and school. In contrast, the court in *Giles v. Howard University*, 428 F. Supp. 603 (D.D.C. 1977), held that the university’s refusal to readmit a former medical student was not a breach of contract, because the refusal was consistent with the “reasonable expectations” of the parties.

Although institutions must follow their written readmission policies, the burden of demonstrating that readmission is warranted is on the student. In *Organiscak v. Cleveland State University*, 762 N.E.2d 1078 (Ohio 2001), a student dismissed from a master’s program in speech-language pathology sued the university when it rejected her petition for readmission. The court rejected the student’s claim that it was the university’s responsibility to collect evidence of an improvement in her clinical skills; the burden was on the student to convince the university that her prior academic performance was an inappropriate indicator of her present ability to complete the program.

Another case illustrates the importance of carefully considering the procedures to be used in making readmission decisions. In *Evans v. West Virginia Board of Regents*, 271 S.E.2d 778 (W. Va. 1980), a student in good standing at a state school of osteopathic medicine had been granted a one-year leave of absence because of illness. When he sought reinstatement two months after termination of the leave, he was informed that because of his lateness he would have to reapply for admission. He did so but was rejected without explanation. The West Virginia Supreme Court of Appeals found that the student was “not in the same class as an original applicant to a professional school.” Nor was he in the same position as a student who had been excluded for academic reasons, since “nothing appears of record even remotely suggesting his unfitness or inability to complete the remainder of his education.” Rather, since he had voluntarily withdrawn after successfully completing two and a half years of his medical education, the student had a “reasonable expectation that he would be permitted to complete his education.” He thus had “a sufficient property interest in the continuation and completion of his medical education to warrant the imposition of minimal due process protections.”

The court prescribed that the following procedures be accorded the student if the school again sought to deny him readmission:

- (1) a formal written notice of the reasons should he not be permitted to continue his medical education;
- (2) a sufficient opportunity to prepare a defense to the charges;
- (3) an opportunity to have retained counsel at any hearings on the charges;
- (4) a right to confront his accusers and present evidence on his own behalf;
- (5) an unbiased hearing tribunal; and
- (6) an adequate record of the proceedings [271 S.E.2d at 781].

Given the fact that a readmission decision is an academic judgment, the extent of the procedural protections required by the court are especially rigorous.



The appellate court in *Evans* did not indicate the full terms of the school's policies regarding leave of absence and readmission or the extent to which these policies were put in writing. Other schools in the defendant's position may avoid legal hot water by having a clear statement of their policies, including any procedural protections that apply and the consequences of allowing a leave of absence to expire.

Although private institutions would not be subject to the Fourteenth Amendment due process reasoning in *Evans*, they should nevertheless note the court's assertion that readmission decisions encompass different considerations and consequences than original admission decisions. Even private institutions may therefore choose to clothe readmission decisions with greater procedural safeguards than they apply to admission decisions. Moreover, private institutions, like public institutions, should clearly state their readmission policies in writing and coordinate them with their policies on exclusion and leaves of absence.

Once such policies are stated in writing, or if the institution has a relatively consistent practice of readmitting former students, contract claims may ensue if the institution does not follow its policies. (For discussion of an unsuccessful contract claim by a student seeking readmission to medical school, see *North v. State of Iowa*, discussed in Section 8.2.1.)

Students may also allege that denials of readmission are grounded in discrimination. In *Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988), a black former law student sued the university when it refused to readmit him for a third time because of his low grade point average. To the student's race discrimination claim, the court replied that the law school had consistently readmitted black students with lower grades than those of whites it had readmitted; thus, no systemic race discrimination could be shown against black students. With regard to the plaintiff's claim that the law school had refused to readmit him, in part, because of his alcoholism, the court determined that Section 504 requires a plaintiff to demonstrate that he is "otherwise qualified" before relief can be granted. Given the plaintiff's inability to maintain the minimum grade point average required for retention, the court determined that the plaintiff was not "otherwise qualified" and ruled that "[l]aw schools may consider academic prospects and sobriety when deciding whether an applicant is entitled to a scarce opportunity for education" (841 F.2d at 742). (For analysis of this case, see Comment, "*Anderson v. University of Wisconsin*: Handicap and Race Discrimination in Readmission Procedures," 15 *J. Coll. & Univ. Law* 431 (1989).)

A federal appellate court allowed a challenge to a denial of readmission to go to trial on a gender discrimination theory. In *Gossett v. State of Oklahoma ex rel. Board of Regents*, 245 F.3d 1172 (10th Cir. 2001), a male nursing student was required to withdraw from the program after receiving a D grade in a course. The student had presented evidence to the trial court that female students were treated more leniently than their male counterparts when they encountered academic difficulty. Although the trial court had rejected the evidence and had entered a summary judgment in favor of the university, the appellate court

reversed, ruling that the student's evidence had raised material issues of fact that needed to be resolved at trial.

In *Carlin v. Trustees of Boston University*, 907 F. Supp. 509 (D. Mass. 1995), a student enrolled in a graduate program in pastoral psychology had requested a one-year leave of absence (later extended to two years) so that she could obtain treatment for a psychiatric disorder. Her academic performance prior to the leave had been satisfactory. The university denied her application for readmission, stating that she lacked the "psychodynamic orientation" for pastoral psychology. The student filed a Section 504 (Rehabilitation Act) claim against the university. Determining that the student was academically qualified and possessed the required clinical skills, and that the university's action was closely related to its knowledge that the student had been hospitalized, the court denied the university's summary judgment motion.

In contrast, in *Gill v. Franklin Pierce Law Center*, 899 F. Supp. 850 (D.N.H. 1995), the court denied the student's Section 504 claim. Gill was dismissed from the law school at the end of his first year for failure to maintain satisfactory academic performance. He applied for readmission, but a faculty committee denied his request. In his lawsuit, he asserted that, in the personal statement that accompanied his application, he had stated that he was the child of an alcoholic parent. The court rejected Gill's argument that this statement put the law school on notice that he suffered from posttraumatic stress disorder, ruling that schools need accommodate only those disabilities of which they are aware.

The U.S. Court of Appeals for the Sixth Circuit rejected the claim of a former student that a decision not to readmit him was motivated by disability discrimination. In *Doe v. Vanderbilt University*, 1997 U.S. App. LEXIS 34104 (6th Cir. 1997) (unpublished), the plaintiff had been placed on academic probation after his first year at Vanderbilt's school of medicine because of a combination of poor academic performance and "behavioral and attitudinal problems." At the end of his second year of medical school, a faculty committee recommended that the student be dismissed. At that point he disclosed to his advisor that he had bipolar disorder, a condition that caused severe mood swings. The committee reconsidered the student's case in light of the new information and gave the student an opportunity to address them. The committee voted a second time to recommend dismissal, and the student withdrew voluntarily before the faculty as a whole acted on the recommendation.

After obtaining medication for his disorder, the plaintiff sought readmission on two occasions. He was rejected twice. The first time, the one position open in the second-year class was awarded to a transfer student with better qualifications. The second time he applied, the school replied that there were no spaces remaining in the second-year class. The student filed claims under the ADA and the Rehabilitation Act, alleging that the denial of readmission was based on his disability. A trial court granted the university's motion for summary judgment, and the plaintiff appealed.

The appellate court affirmed, stating that the plaintiff had not demonstrated that he was qualified to be readmitted, nor that the reason he was denied

readmission was his disability. The court said that the plaintiff had not shown that the medical school had excluded him even though it would have readmitted a student “whose academic performance and prospects were as poor but whose difficulties did not stem from a ‘handicap’” (1997 U.S. App. LEXIS 34104 at \*6). Furthermore, said the court, courts should respect the academic judgment of university faculties (citing *Ewing*; see Section 9.3.1).

At the time an institution suspends or expels a student either for problematic academic performance or behavior, the institution may specify conditions that a student must meet in order to be considered for readmission. In *Rosenthal v. Webster University*, 2000 U.S. App. LEXIS 23733 (8th Cir. 2000) (unpublished), a federal appellate court backed a private university’s refusal to readmit a former student with bipolar disorder after it expelled him for carrying a gun and threatening to use it. A condition of Rosenthal’s readmission was that he conduct himself appropriately during the period of suspension. Because the plaintiff had been charged with harassment after his suspension, he had failed to meet the conditions of his readmission, and the court ruled that the university was justified in refusing to readmit him.

Since the U.S. Supreme Court’s *Garrett* decision (see Section 5.2.5), federal courts have struggled with the question of whether public universities can be sued under Title II of the ADA (see Section 13.2.11) for money damages (*Garrett* involved Title I of the ADA). In *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001), the U.S. Court of Appeals for the Second Circuit ruled that the teachings of *Garrett* applied to cases brought under Title II, and that a student’s attempt to challenge a denial of readmission under the ADA failed because he had not asserted that the readmission was motivated by discriminatory animus or ill will due to disability, but simply because the institution had refused to accommodate him by readmitting him. With respect to Garcia’s Section 504 claim, the court ruled that the state had not waived sovereign immunity against suit under Section 504 by accepting federal funds, because at the time it did so, it was believed that Congress had abrogated sovereign immunity through enactment of the ADA. Federal courts in other jurisdictions do not agree with this interpretation of Section 504, and thus this issue awaits resolution by the U.S. Supreme Court. Students seeking readmission under disability discrimination theories, however, could still maintain claims against public institutions if they merely seek injunctive relief and do not seek money damages.

Other special problems may arise in the readmission process if a student seeking readmission claims that he or she withdrew to avoid sexual (or other) harassment by a faculty or staff member, or that the student was excluded due to low evaluations or grades from a faculty member whose sexual advances the student had rejected. In *Bilut v. Northwestern University*, 645 N.E.2d 536 (Ill. Ct. App. 1994) (also discussed in Section 9.3.1), for example, a graduate student who had been denied an extension of time to complete her dissertation claimed that she had rejected the advances of her dissertation director. The court rejected her claims because her “testimony is inconclusive evidence of quid pro quo sexual harassment” and because other professors reviewing the

student's work had "made his or her own independent scholarly and academic judgments" (645 N.E.2d at 543). In other cases, however, where the evidence of harassment is stronger and there is evidence that the harasser's evaluations infected the institution's academic judgments, the institution could be in jeopardy of both viable breach of contract claims (see *Bilut*) and Title IX claims (see Section 9.3.4).

Students may also raise tort claims in challenging denials of readmission. For example, in *Mason v. State of Oklahoma*, 23 P.3d 964 (Ct. Civil Apps. Okla. 2000), a law student, Perry Mason, was expelled for dishonesty in applying for financial aid. Mason claimed negligent and intentional infliction of emotional distress, denial of due process, violation of public policy, and breach of an implied contract. The court rejected all of the claims, affirming the trial court's dismissal of Mason's lawsuit.

The readmission cases demonstrate that colleges that specify the procedures for readmission (and follow them), use reasonable and relevant criteria for making readmission decisions, and can link those criteria to programmatic needs should prevail in challenges to negative readmission decisions.

### **Sec. 8.3. Financial Aid**

**8.3.1. General principles.** The legal principles affecting financial aid have a wide variety of sources. Some principles apply generally to all financial aid, whether awarded as scholarships, assistantships, loans, fellowships, preferential tuition rates, or in some other form. Other principles depend on the particular source of funds being used and thus may vary with the aid program or the type of award. Sections 8.3.2 through 8.3.8 discuss the principles, and specific legal requirements resulting from them, that present the most difficult problems for financial aid administrators. This Section discusses more general principles affecting financial aid.

The principles of contract law may apply to financial aid awards, since an award once made may create a contract between the institution and the aid recipient. Typically, the institution's obligation is to provide a particular type of aid at certain times and in certain amounts. The student recipient's obligation depends on the type of aid. With loans, the typical obligation is to repay the principal and a prescribed rate of interest at certain times and in certain amounts. With other aid, the obligation may be only to spend the funds for specified academic expenses or to achieve a specified level of academic performance in order to maintain aid eligibility. Sometimes, however, the student recipient may have more extensive obligations—for instance, to perform instructional or laboratory duties, play on a varsity athletic team, or provide particular services after graduation. The defendant student in *State of New York v. Coury*, 359 N.Y.S.2d 486 (N.Y. Sup. Ct. 1974), for instance, had accepted a scholarship and agreed, as a condition of the award, to perform internship duties in a welfare agency for one year after graduation. When the student did not perform the duties, the state sought a refund of the scholarship money. The court held for the state because the student had "agreed to

accept the terms of the contract” and had not performed as the contract required.<sup>24</sup>

Students may also rely on contract law to challenge the withdrawal or reduction in amount of a scholarship. For example, in *Aronson v. University of Mississippi*, 828 So. 2d 752 (Miss. 2002), a student sued the university when it reduced the amount of a scholarship awarded to the student from \$4,000 to \$2,000. The university defended its decision by saying that the catalog, in which the scholarship amount had been listed as \$4,000, was incorrect. Aronson filed a breach of contract claim against the university. The trial court dismissed the claim at the conclusion of the plaintiff’s case, and the appellate court reversed, ruling for the student. The state supreme court reversed and remanded the case, saying that the university was entitled to present a defense. The university had argued that disclaimers in its student catalog and other information should have put the student on notice that the scholarship amount had been changed.

The law regarding gifts, grants, wills, and trusts may also apply to financial aid awards. These legal principles would generally require aid administrators to adhere to any conditions that the donor, grantor, testator, or settlor placed on use of the funds. But the conditions must be explicit at the time of the gift. For example, in *Hawes v. Emory University*, 374 S.E.2d 328 (Ga. Ct. App. 1988), a scholarship donor demanded that the university return the gift, asserting that the funds had not been disbursed as agreed upon. The court found the contribution to be a valid gift without any indication that its use was restricted in the way the donor later alleged.

Funds provided by government agencies or private foundations must be used in accordance with conditions in the program regulations, grant instrument, or other legal document formalizing the transaction. Section 8.3.2 illustrates such conditions in the context of federal aid programs. Similarly, funds made available to the institution under wills or trusts must be used in accordance with conditions in the will or trust instrument, unless those conditions are themselves illegal. Conditions that discriminate by race, sex, or religion have posed the greatest problems in this respect. If a public agency or entity has compelled or affirmatively supported the imposition of such conditions, they will usually be considered to violate the federal Constitution’s equal protection clause (see, for example, *In Re Certain Scholarship Funds*, 575 A.2d 1325 (N.H. 1990)).<sup>25</sup> But if such conditions appear in a privately established and administered trust, they will usually be considered constitutional, because no state action is present. In

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<sup>24</sup>Illustrative cases are collected in David B. Harrison, Annot., “Construction and Application of Agreement by Medical or Social Work Student to Work in Particular Position or at Particular Location in Exchange for Financial Aid in Meeting Costs of Education,” 83 A.L.R.3d 1273. State age-of-majority laws (regarding a parent’s obligation to support a child) are an important supplement to general contract law principles. These laws help the institution determine whether it should contract with the parent or the child in awarding aid and whether it should take parental resources into account in computing the amount of aid.

<sup>25</sup>Cases analyzing gender restrictions in charitable gifts or trusts are collected in Tracey A. Bateman, Annot., “Validity of Charitable Gift or Trust Containing Gender Restrictions on Beneficiaries,” 90 A.L.R.4th 836. See also Phillip E. Hassman, Annot., “Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex,” 90 A.L.R.3d 158.

*Shapiro v. Columbia Union National Bank and Trust Co.* (discussed in Section 1.5.2), for instance, the Supreme Court of Missouri refused to find state action to support a claim of sex discrimination lodged against a university's involvement in a private trust established to provide scholarships exclusively for male students. Even in the absence of state action, however, a discriminatory condition in a private trust may still be declared invalid if it violates one of the federal nondiscrimination requirements applicable to federal fund recipients (see Sections 8.3.3 & 8.3.4).<sup>26</sup>

Conditions in testamentary or *inter vivos* trusts can sometimes be modified by a court under the *cy pres* doctrine. In *Howard Savings Institution v. Peep*, 170 A.2d 39 (N.J. 1961), Amherst College was unable to accept a trust establishing a scholarship loan fund because one of the trust's provisions violated the college's charter. The provision, stipulating that recipients of the funds had to be "Protestant" and "Gentile," was deleted by the court. Similarly, in *Wilbur v. University of Vermont*, 270 A.2d 889 (Vt. 1970), the court deleted a provision in a financial aid trust that had placed numerical restrictions on the size of the student body at the university's college of arts and sciences. In each case the court found that the dominant purpose of the person establishing the trust could still be achieved with the restriction removed. As the court in the *Peep* case explained:

The doctrine of *cy pres* is a judicial mechanism for the preservation of a charitable trust when accomplishment of the particular purpose of the trust becomes impossible, impracticable, or illegal. In such a situation, if the settlor manifested an intent to devote the trust to a charitable purpose more general than the frustrated purpose, a court, instead of allowing the trust to fail, will apply the trust funds to a charitable purpose as nearly as possible to the particular purpose of the settlor [170 A.2d at 42].

However, if the court finds that a trust's purposes can still be realized, it will not permit changes. For example, in *In re R. B. Plummer Memorial Loan Fund Trust*, 661 N.W.2d 307 (Neb. 2003), an alumnus had created a trust to provide loans to students. Because very few students applied for loans from the trust, the university petitioned the court to permit it to make grants from the trust rather than loans. The court refused, finding that Plummer had believed that students should pay for college, and that the university was not promoting the loan opportunities sufficiently to make them attractive to students.

Given the numerous legal and public relations issues involved in institutional fund-raising and gift acceptance, administrators should develop a clear policy on the acceptance of gifts.

A third relevant body of legal principles is that of constitutional due process. These principles apply generally to public institutions; they also apply to

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<sup>26</sup>The relevant cases are collected in A. S. Klein, Annot., "Validity and Effect of Gift for Charitable Purposes Which Excludes Otherwise Qualified Beneficiaries Because of Their Race or Religion," 25 A.L.R.3d 736.

private institutions when those institutions make awards from public funds (see Section 1.5.2). Since termination of aid may affect both “property” and “liberty” interests (see Section 6.7.2.1) of the student recipients, courts may sometimes require that termination be accompanied by some form of procedural safeguard. *Corr v. Mattheis*, 407 F. Supp. 847 (D.R.I. 1976), for instance, involved students who had had their federal aid terminated in midyear, under a federal “student unrest” statute, after they had participated in a campus protest against the Vietnam War. The court found that the students had been denied a property interest in continued receipt of funds awarded to them, as well as a liberty interest in being free from stigmas foreclosing further educational or employment opportunities. Termination thus had to be preceded by notice and a meaningful opportunity to contest the decision. In other cases, if the harm or stigma to students is less, the required procedural safeguards may be less stringent. Moreover, if aid is terminated for academic rather than disciplinary reasons, procedural safeguards may be almost nonexistent, as courts follow the distinction between academic deficiency problems and misconduct problems drawn in Section 9.4.3.

In *Conard v. University of Washington*, 834 P.2d 17 (Wash. 1992), the Washington Supreme Court ruled that student athletes do not have a constitutionally protected property interest in the renewal of their athletic scholarships. The court reversed a lower court’s finding that the students, who had been dropped from the football team after several instances of misconduct, had a property interest in renewal of their scholarships. The financial aid agreements that the students had signed were for one academic year only, and did not contain promises of renewal. The supreme court interpreted the financial aid agreements as contracts that afforded the students the right to *consideration* for scholarship renewal and—citing *Board of Regents v. Roth* (see Sections 6.7.2.1 & 6.7.2.2)—refused to find a “common understanding” that athletic scholarships were given for a four-year period. Furthermore, the court said, the fact that both the university and the National Collegiate Athletic Association (NCAA) provided minimal due process guarantees did not create a property interest. Special considerations involving athletics scholarships and NCAA rules are discussed in Section 10.4.5.

Federal and state laws regulating lending and extensions of credit provide a fourth body of applicable legal constraints. At the federal level, for example, the Truth-in-Lending Act (15 U.S.C. § 1601 *et seq.*) establishes various disclosure requirements for loans and credit sales. Such provisions are of concern not only to institutions with typical loan programs but also to institutions with credit plans allowing students or parents to defer payment of tuition for extended periods of time. The federal Truth-in-Lending Act, however, exempts National Direct Student Loans (NDSLs; now Perkins Loans), Federal Stafford Loans, and Federal Family Education Loans) (see Section 8.3.2) from its coverage (15 U.S.C. § 1603(7)).

As a result of congressional action in 1996 to amend the Internal Revenue Code, all states have adopted college savings plans. Congress added Section 529 to the Internal Revenue Code (26 U.S.C. § 529), which allows a “state

agency or instrumentality” to establish a program under which a person “may purchase tuition credits or certificates on behalf of a designated beneficiary which entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary” (26 U.S.C. § 529(b)(1)). States may establish either prepaid tuition plans or savings plans; educational institutions may establish only prepaid tuition plans. Contributions to the plans are excluded from the contributor’s gross income for federal income tax purposes. An amendment to Section 529 in 2002 allows a beneficiary to make a “qualified withdrawal” from a 529 plan that is free of federal income tax. There are penalties for withdrawals from the fund for noneducational purposes, and prepaid tuition plans differ from savings plans in significant ways. Basic information on these plans is available at <http://www.savingforcollege.com>. (For an assessment of these savings and prepaid tuition plans, see Michael A. Olivas, “State College Savings and Prepaid Tuition Plans: A Reappraisal and Review,” 32 *J. Law & Educ.* 475 (2003).)

Given the multitude of tax (see Section 13.3.1), contract, and other legal complications of prepaid tuition plans, institutions should consult with counsel knowledgeable in these areas of the law before implementing such plans.

**8.3.2. Federal programs.** The federal government provides or guarantees many millions of dollars per year in student aid for postsecondary education through a multitude of programs. To protect its investment and ensure the fulfillment of national priorities and goals, the federal government imposes many requirements on the way institutions manage and spend funds under federal programs. Some are general requirements applicable to student aid and all other federal assistance programs. Others are specific programmatic requirements applicable to one student aid program or to a related group of such programs. These requirements constitute the most prominent—and, critics would add, most prolific and burdensome—source of specific restrictions on an institution’s administration of financial aid.

The most prominent general requirements are the nondiscrimination requirements discussed in Section 8.3.3, which apply to all financial aid, whether or not it is provided under federal programs. In addition, the Family Educational Rights and Privacy Act (FERPA) (discussed in Section 9.7.1) imposes various requirements on the institution’s record-keeping practices for all the financial aid that it disburses. The FERPA regulations, however, do partially exempt financial aid records from nondisclosure requirements. They provide that an institution may disclose personally identifiable information from a student’s records, without the student’s consent, to the extent “necessary for such purposes as” determining the student’s eligibility for financial aid, determining the amount of aid and the conditions that will be imposed regarding it, or enforcing the terms or conditions of the aid (34 C.F.R. § 99.31(a)(4)).

The Student Assistance General Provisions, 34 C.F.R. Part 668, lay out eligibility criteria for institutions wishing to participate in federal student assistance programs, and for students wishing to obtain aid under these programs. Institutional eligibility criteria are addressed at 34 C.F.R. § 668.8. Generally, an



educational program that provides at least an associate's degree or the equivalent may participate in these programs if it meets federal requirements for program length, leads to at least an associate's degree, and meets other regulatory criteria. Proprietary institutions may also participate in federal student aid programs if they provide at least fifteen weeks of instruction that prepares students for "gainful employment in a recognized occupation," and meet other regulatory criteria. Proprietary institutions must also meet specific student completion rates and placement rates (34 C.F.R. § 668.8(e)).

The Student Assistance General Provisions require institutions to enter into a written "program participation agreement" with the Secretary of Education. The program participation agreement applies to all of the branch campuses and other locations of the institution. In the agreement, the institution must agree to a variety of requirements, including a promise that it will comply with all provisions of Title IV of the Higher Education Act (HEA) (the portion of the HEA that authorizes the federal student assistance programs), all regulations promulgated under the authority of the HEA, and all special provisions allowed by the statute. The institution must also certify that it will not charge students a fee for processing applications for federal student aid and that it will maintain records and procedures that will allow it to report regularly to state and federal agencies. The institution must also certify that it complies with a variety of laws requiring the disclosure of information, including the Student Right-to-Know and Campus Security Act (discussed in Section 8.6.3). Specific requirements of program participation agreements are found at 20 U.S.C. § 1994; regulations concerning these agreements are codified at 34 C.F.R. § 668.14.

Advances in technology have resulted in changes to definitions of terms in the General Provisions such as the term "week." Because of the increasing numbers of institutions offering courses to students via distance learning, previous definitions of "week" and "academic year" had excluded otherwise eligible students from receiving federal financial assistance. The Department of Education amended the General Provisions on November 1, 2002 (67 Fed. Reg. 67048, 67061), removing an earlier "twelve-hour rule" in the definition of "academic year" and permitting institutions that offer instruction at least one day per week to participate in the federal student assistance programs (34 C.F.R. § 668.3). In determining a student's eligibility for federal assistance, for instance, an institution must ascertain whether the student is in default on any federally subsidized or guaranteed loan or owes a refund on a federal grant, and must obtain the student's "financial aid transcript(s)" from other institutions to assist in this task (34 C.F.R. § 668.19).

The 2002 amendments of the General Provisions also provide several forms of "safe harbor" for providing incentives to individuals who recruit students for distance learning programs (67 Fed. Reg. 67048, 67072 (November 1, 2002)). The amendments to 34 C.F.R. § 668.14 allow institutions to hire individuals specifically to recruit students for employer-sponsored courses, provide token gifts to alumni or students in return for their assistance in recruiting students, with an annual limit per individual of \$100, and payments to individuals who refer prospective students to the institution via the Internet.

Another provision of the Higher Education Act requires an institution participating in the federal student aid program to certify “that it has in operation a drug abuse prevention program that is determined by the institution to be accessible to any officer, employee, or student at the institution” (20 U.S.C. § 1094(a)(10)). Similar provisions in other laws that place obligations on institutions receiving federal funds are discussed in Section 13.4.4 of this book.

Students convicted of drug offenses are excluded from eligibility for federal student financial aid (20 U.S.C. § 1091(r)). The same section of the law provides that students who have satisfactorily completed a drug rehabilitation program that complies with criteria in federal regulations, and who have either had the conviction reversed or expunged or have passed two unannounced drug tests, may be restored to eligibility for federal student financial aid. Regulations for this provision are found at 34 C.F.R. § 668.40.

Most of the federal student aid programs were created by the Higher Education Act of 1965 (20 U.S.C. §§ 1070 *et seq.*), which has been reauthorized and amended regularly since that year. The most recent changes are contained in the Higher Education Amendments of 1998 (Pub. L. No. 105-244, 112 Stat. 1581). Financial aid programs for veterans and military personnel are in various acts (see Section 13.4.2).

The specific programmatic restrictions on federal student aid depend on the particular program. There are various types of programs, with different structures, by which the government makes funds available:

1. Programs in which the federal government provides funds to institutions to establish revolving loan funds—as in the Perkins Loan program (20 U.S.C. §§ 1087aa–1087ii; 34 C.F.R. Parts 673 & 674).
2. Programs in which the government grants funds to institutions, which in turn provide grants to students—as in the Federal Supplemental Educational Opportunity Grant (SEOG) program (20 U.S.C. § 1070b *et seq.*; 34 C.F.R. Parts 673 & 676) and the Federal Work-Study (FWS) program (42 U.S.C. § 2751 *et seq.*; 34 C.F.R. Parts 673 and 675).
3. Programs in which students receive grants directly from the federal government—as in the “New GI Bill” program (38 U.S.C. § 3001 *et seq.*; 38 C.F.R. Part 21) and the Pell Grant program (20 U.S.C. § 1070a *et seq.*; 34 C.F.R. Part 690).
4. Programs in which students receive funds from the federal government through the states—as in the Leveraging Educational Assistance Partnership Program (20 U.S.C. § 1070c *et seq.*; 34 C.F.R. Part 692) and the Robert C. Byrd Honors Scholarship Program (20 U.S.C. §§ 1070d-31, 1070d-33; 34 C.F.R. § 654.1).
5. Programs in which students or their parents receive funds from third-party lenders—as in the Federal Stafford Loan Program. In the Federal Family Educational Loan program, private lenders provide federally guaranteed loans. This program includes Stafford Loans made to students (20 U.S.C. § 1071 *et seq.*; 34 C.F.R. Part 682), Parent Loans for

Undergraduate Students (PLUS) made to parents (20 U.S.C. § 1078-2; 34 C.F.R. Part 682), and Consolidation Loans (20 U.S.C. § 1078-3; 34 C.F.R. Part 682).<sup>27</sup>

6. Programs in which students and parents borrow directly from the federal government at participating schools. The William D. Ford Direct Loan Program (20 U.S.C. § 1087a *et seq.*; 34 C.F.R. Part 685) includes Direct Stafford Loans, Direct PLUS Loans, and Direct Consolidation Loans. These programs allow institutions authorized by the Department of Education to lend money directly to students through loan capital provided by the federal government.

In order to receive aid, students required to register with Selective Service must file statements with the institutions they attend, certifying that they have complied with the Selective Service law and regulations. The validity of this requirement was upheld by the U.S. Supreme Court in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984). Regulations implementing the certification requirement are published in 34 C.F.R. § 668.37.

The U.S. Department of Education has posted on the World Wide Web a guide to the federal student assistance programs that provides information on applying for grants, loans, and work-study assistance. It is available at <http://www.studentaid.ed.gov>. The department also has a Web site on Information for Financial Assistance Professionals (IFAP), available at <http://ifap.ed.gov>, that provides information on the requirements for the various financial aid programs, lists available publications, and provides updates on recent changes in laws and regulations governing these programs. The Education Department publishes annually the *Federal Student Aid Handbook*, which is mailed to every institution participating in the federal student aid programs, and which also may be downloaded free from the IFAP Web site.

A law passed by Congress in 1999, the Gramm-Leach-Bliley Act (Pub. L. 106-102, November 12, 1999, codified in part at 15 U.S.C. §§ 6801(b), 6805(b)), and intended to reform the banking industry by broadening the scope of permissible business activities for banks, has been interpreted by the Federal Trade Commission (FTC) to apply to institutions of higher education that administer federal financial aid programs. The law's "Standards for Safeguarding Customer Information" (16 C.F.R. Part 314) requires covered entities, including colleges and universities, to restrict their disclosure of information about recipients of federal student aid and to develop a "comprehensive information security program" that protects the privacy of participants in financial transactions with the institution. A brief description of the requirements of the Safeguards Rule and relevant Web-based reference materials are available on the National Association of College and University Attorneys (NACUA) Web site in NACUALERT

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<sup>27</sup>The Secretary of Education has the authority to cause guarantors of federal student loans to cease operations, a power that was recognized in *Student Loan Fund of Idaho, Inc. v. U.S. Department of Education*, 272 F.3d 1155 (9th Cir. 2001), *amended* by 2001 U.S. App. LEXIS 29338, *rehearing en banc denied*, 289 F.3d 599 (2002).

Vol. 1, No. 4 (May 16, 2003), available at <http://www.nacua.org>. The FTC has issued guidance for complying with the Safeguards Rule, which is available on the FTC's Web site at <http://www.ftc.gov>.

The receipt of Title IV funds is conditioned on compliance with a number of verification measures affecting both educational institutions and alien students. In order to participate in grants, loans, or work assistance under Title IV programs, all students must declare in writing that they are U.S. citizens or in an immigrant status that does not preclude their eligibility. Alien students are required to provide the institution with documentation that clearly establishes their immigration status, and further requires the institution to verify the status of such students with the Bureau of Citizenship and Immigration Services. Regulations related to the verification of a student's eligibility to receive federal student aid with respect to citizenship or lawful residence in the United States are found at 34 C.F.R. § 668.133. Institutions are prohibited from denying, delaying, reducing, or terminating Title IV funds without providing students with a reasonable opportunity to establish eligibility. If, after complying with these requirements, an institution determines that a student is ineligible, it is required to deny or terminate Title IV aid and provide the student with an opportunity for a hearing concerning his or her eligibility (34 C.F.R. § 668.136(c)).

Much of the controversy surrounding the federal student aid programs has concerned the sizable default rates on student loans, particularly at institutions that enroll large proportions of low-income students. Several reports issued by the General Accounting Office have been sharply critical of the practices of colleges, loan guarantee agencies, and the Department of Education in implementing the federally guaranteed student loan programs. As a result, substantial changes have been made in the laws and regulations related to eligibility, repayment, and collection practices. Collection requirements of federal student loan programs are discussed in Section 8.3.8.3.

Institutions that participate in federal student aid programs must have their program records audited annually by an independent auditor. Regulations regarding the conduct of the audit and reporting requirements appear at 34 C.F.R. § 668.24.

Federal courts have refused to authorize a private right of action against colleges or universities under the Higher Education Act for students to enforce the financial assistance laws and regulations (see, for example, *L'ggrke v. Benkula*, 966 F.2d 1346 (10th Cir. 1992); *Slovinec v. DePaul University*, 332 F.3d 1068 (7th Cir. 2003)). The courts have reached this result because the Higher Education Act vests enforcement of the financial aid program laws and regulations in the Secretary of Education (20 U.S.C. § 1082(a)(2)). Should the Secretary decline to act in a case in which an institution is violating the federal student aid requirements, a plaintiff with standing may bring an action against the Secretary of Education, but not against the college.

A few courts, however, have permitted students to use state common law fraud or statutory consumer protection theories against the Education Department, colleges, or lenders when the college either ceased operations or provided a poor-quality education (see, for example, *Tipton v. Alexander*, 768

F. Supp. 540 (S.D. W. Va. 1991)). (See Section 13.4.5 for a discussion of private rights of action under federal funding laws.) One court has permitted students to file a RICO (Racketeer Influenced Corrupt Organization) claim against a trade school, alleging mail fraud. In *Gonzalez v. North American College of Louisiana*, 700 F. Supp. 362 (S.D. Tex. 1988), the students charged that the school induced them to enroll and to obtain federal student loans, which they were required to repay. The school was unaccredited; and, after it had obtained the federal funds in the students' name, it closed and did not refund the loan proceeds.

Federal student aid programs bring substantial benefits to students and the colleges they attend. Their administrative and legal requirements, however, are complex and change constantly. It is imperative that administrators and counsel become conversant with these requirements and monitor legislative, regulatory, and judicial developments closely.

**8.3.3. Nondiscrimination.** The legal principles of nondiscrimination apply to the financial aid process in much the same way they apply to the admissions process (see Sections 8.2.4 & 8.2.5). The same constitutional principles of equal protection apply to financial aid. The relevant statutes and regulations on nondiscrimination—Title VI, Title IX, Section 504, the Americans With Disabilities Act, and the Age Discrimination Act—all apply to financial aid, although Title IX's and Section 504's coverage and specific requirements for financial aid are different from those for admissions. And affirmative action poses difficulties for financial aid programs similar to those it poses for admissions programs. Challenges brought under Title VI and the equal protection clause against institutions that reserve certain scholarships for minority students are discussed in Section 8.3.4.

Of the federal statutes, Title IX has the most substantial impact on the financial aid programs and policies of postsecondary institutions. The regulations (34 C.F.R. § 106.37), with four important exceptions, prohibit the use of sex-restricted scholarships and virtually every other sex-based distinction in the financial aid program. Section 106.37(a)(1) prohibits the institution from providing "different amount[s] or types" of aid, "limit[ing] eligibility" for "any particular type or source" of aid, "apply[ing] different criteria," or otherwise discriminating "on the basis of sex" in awarding financial aid. Section 106.37(a)(2) prohibits the institution from giving any assistance, "through solicitation, listing, approval, provision of facilities, or other services," to any "foundation, trust, agency, organization, or person" that discriminates on the basis of sex in providing financial aid to the institution's students. Section 106.37(a)(3) also prohibits aid eligibility rules that treat the sexes differently "with regard to marital or parental status."

The four exceptions to this broad nondiscrimination policy permit sex-restricted financial aid under certain circumstances. Section 106.37(b) permits an institution to "administer or assist in the administration of" sex-restricted financial assistance that is "established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government." Institutions must administer such awards, however, in such a way that

their “overall effect” is “nondiscriminatory” according to standards set out in Section 106.37(b)(2). Section 106.31(c) creates the same kind of exception for sex-restricted foreign-study scholarships awarded to the institution’s students or graduates. Such awards must be established through the same legal channels specified for the first exception, and the institution must make available “reasonable opportunities for similar [foreign] studies for members of the other sex.” The third exception, for athletics scholarships, is discussed in Section 10.4.6. A fourth exception was added by an amendment to Title IX included in the Education Amendments of 1976. Section 412(a)(4) of the amendments (20 U.S.C. § 1681(a)(9)) permits institutions to award financial assistance to winners of pageants based on “personal appearance, poise, and talent,” even though the pageant is restricted to members of one sex.

Section 504 of the Rehabilitation Act of 1973 (see Section 13.5.4), as implemented by the Department of Education’s regulations, restricts postsecondary institutions’ financial aid processes as they relate to disabled persons. Section 104.46(a) of the regulations (34 C.F.R. Part 104) prohibits the institution from providing “less assistance” to qualified disabled students, from placing a “limit [on] eligibility for assistance,” and from otherwise discriminating or assisting any other entity to discriminate on the basis of disability in providing financial aid. The major exception to this nondiscrimination requirement is that the institution may still administer financial assistance provided under a particular discriminatory will or trust, as long as “the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap” (34 C.F.R. § 104.46(a)(2)).

A lawsuit challenging the denial of financial aid as alleged disability discrimination has had a tortured history, and is yet to be resolved. In *Johnson v. Louisiana Department of Education*, 2002 U.S. Dist. LEXIS 1284 (E.D. La. 2002), Johnson, a student at the University of New Orleans, had received financial aid from the university. Johnson experienced a “medical emergency” and withdrew from the university. Several months later, the university notified Johnson that he was no longer eligible for financial aid. Johnson was ready to resume his studies and appealed this decision. The appeals committee approved a continuation of financial aid, but imposed several academic conditions on continued eligibility for the aid. Because Johnson was not notified of the committee’s decision until after the fall semester began, he missed several classes and was unable to attain the grade point average specified by the committee. He was denied further financial aid, and sued the university under Section 504.

Although the university claimed that it was immune from litigation for money damages under Section 504 on the grounds of sovereign immunity, the trial court disagreed. Citing an earlier ruling by the U.S. Court of Appeals for the Fifth Circuit in *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), which determined that the university had waived its sovereign immunity from Title IX claims (discussed in Section 13.1.6), the trial court ruled that the university had waived sovereign immunity by accepting funds under federal spending programs (here, federal financial aid funds).

The U.S. Court of Appeals for the Fifth Circuit vacated the trial court's opinion, 330 F.3d 362 (5th Cir. 2003), and remanded the case with instructions to dismiss Johnson's claims for lack of jurisdiction. Relying on a Fifth Circuit opinion issued after the trial court's opinion in *Johnson (Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003)), the appellate court ruled that the university had not waived sovereign immunity. *Pace* had also involved a Section 504 claim. The court in *Pace* had ruled that, until the decision of the U.S. Supreme Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), university officials were bound by earlier judicial precedent that the acceptance of federal funds did not constitute a waiver of sovereign immunity. After *Garrett*, said the court, any institution's decision to accept federal funds would constitute an express waiver under those statutes, such as Section 504, that expressly condition the receipt of federal funds on a state's waiver of sovereign immunity. However, Johnson's claims arose prior to the *Garrett* decision, and thus the university did not knowingly waive sovereign immunity.

The U.S. Court of Appeals for the Fifth Circuit granted a motion to rehear both *Johnson* and *Pace en banc (Johnson v. Louisiana Department of Education*, 343 F.3d 732 (5th Cir. 2003); *Pace v. Bogalusa City School Board*, 339 F.3d 348 (5th Cir. 2003)). The *en banc* court in *Pace* agreed with the panel's ruling that the state had waived Eleventh Amendment immunity (403 F.3d 272 (5th Cir. 2005)). There have been no further proceedings in *Johnson*.

The Americans With Disabilities Act also prohibits discrimination on the basis of disability in allocating financial aid. Title II, which covers state and local government agencies, applies to public colleges and universities that meet the definition of a state or local government agency. The regulations prohibit institutions from providing a benefit (here, financial aid) "that is not as effective in affording equal opportunity . . . to reach the same level of achievement as that provided to others" (28 C.F.R. § 35.130(b)(1)(iii)). Both public and private colleges and universities are covered by Title III as "places of public accommodation" (28 C.F.R. § 36.104), and are prohibited from limiting the access of individuals with disabilities to the benefits enjoyed by other individuals (28 C.F.R. § 36.202(b)).

Regulations interpreting the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101–6103) (see Section 13.5.5 of this book) include the general regulations applicable to all government agencies dispensing federal aid as well as regulations governing the federal financial assistance programs for education. These regulations are found at 34 C.F.R. Part 110.

The regulations set forth a general prohibition against age discrimination in "any program or activity receiving Federal financial assistance" (34 C.F.R. § 110.10(a)), but permit funding recipients to use age as a criterion if the recipient "reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity" (34 C.F.R. § 110.12) or if the action is based on "reasonable factors other than age," even though the action may have a disproportionate effect on a particular age group (34 C.F.R. § 110.13). With respect to the administration of federal financial aid, the

regulations would generally prohibit age criteria for the receipt of student financial assistance.

Criteria used to make scholarship awards may have discriminatory effects even if they appear facially neutral. For example, research conducted in the 1980s demonstrated that women students tended to score approximately 60 points lower on the Scholastic Aptitude Test (SAT) than male students did, although women's high school and college grades tended to be higher than men's. In *Sharif by Salahuddin v. New York State Education Department*, 709 F. Supp. 345 (S.D.N.Y. 1989), a class of female high school students filed an equal protection claim, seeking to halt New York's practice of awarding Regents and Empire State Scholarships exclusively on the basis of SAT scores. The plaintiffs alleged that the practice discriminated against female students. The judge issued a preliminary injunction, ruling that the state should not use SAT scores as the sole criterion for awarding scholarships. (For a thorough analysis of legal and policy issues related to this issue, see K. Connor & E. J. Vargyas, "The Legal Implications of Gender Bias in Standardized Testing," 7 *Berkeley Women's L.J.* 13 (1992).)

**8.3.4. Affirmative action in financial aid programs.** Just as colleges and universities may adopt voluntary affirmative action policies for admissions in certain circumstances (see Section 8.2.5 above), they may do so for their financial aid programs. As with admissions, when the institution takes race, ethnicity, or gender into account in allocating financial aid among its aid programs or in awarding aid to particular applicants, issues may arise under the equal protection clause (for public institutions), Title VI, Title IX, or Section 1981 (42 U.S.C. § 1981). When the issues arise under Title VI, the "1994 Policy Guidance" on financial aid, issued by the U.S. Department of Education (ED), 59 Fed. Reg. 8756-64 (February 23, 1994), provides an important supplement to the statute and regulations.

The case of *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976), provides an early example of affirmative action issues regarding financial aid. The law school at Georgetown had allocated 60 percent of its financial aid for the first-year class to minority students, who constituted 11 percent of the class. The remaining 40 percent of the aid was reserved for nonminorities, the other 89 percent of the class. Within each category, funds were allocated on the basis of need; but, because of Georgetown's allocation policy, the plaintiff, a white law student, received less financial aid than some minority students, even though his financial need was greater. The school's threshold argument was that this program did not discriminate by race because disadvantaged white students were also included within the definition of minority. The court quickly rejected this argument:

Certain ethnic and racial groups are automatically accorded "minority" status, while whites or Caucasians must make a particular showing in order to qualify. . . . Access to the "favored" category is made more difficult for one racial group than another. This in itself is discrimination as prohibited by Title VI as well as the Constitution [417 F. Supp. at 382].



The school then defended its policy as part of an affirmative action program to increase minority enrollment. The student argued that the policy discriminated against nonminorities in violation of Title VI of the Civil Rights Act (see this volume, Section 13.5.2). The court sided with the student:

Where an administrative procedure is permeated with social and cultural factors (as in a law school's *admission* process), separate treatment for "minorities" may be justified in order to insure that all persons are judged in a racially neutral fashion.

But in the instant case, we are concerned with the question of financial need, which, in the final analysis, cuts across racial, cultural, and social lines. There is no justification for saying that a "minority" student with a demonstrated financial need of \$2,000 requires more scholarship aid than a "nonminority" student with a demonstrated financial need of \$3,000. To take such a position, which the defendants have, is reverse discrimination on the basis of race, which cannot be justified by a claim of affirmative action [417 F. Supp. at 384].

Although *Flanagan* broadly concludes that allotment of financial aid on an explicit racial basis is impermissible, at least for needs-based aid, the U.S. Supreme Court's subsequent decision in *Bakke* (see Section 8.2.5) appeared to leave some room for the explicit consideration of race in financial aid programs. ED's 1994 Policy Guidance, above, confirmed the view that race-conscious financial aid policies are permissible in some circumstances. And more recently, the Supreme Court's 2003 decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (see Section 8.2.5), although concerned with admissions rather than financial aid, have given further support for the position that some consideration of race in allocating and awarding financial aid is permissible.

Since the U.S. Supreme Court has not yet decided a case on affirmative action in financial aid programs, the admission cases, *Grutter* and *Gratz*, are therefore the precedents most nearly on point. It is likely that the general principles from these cases will apply to financial aid programs as well, and that courts will use these principles to resolve equal protection, Title VI, and Section 1981 challenges to financial aid policies of public institutions, and Title VI and Section 1981 challenges to such policies of private institutions.<sup>28</sup> This assessment does not necessarily mean, however, that race-conscious financial aid policies will always be valid or invalid under the law in the same circumstances and to the same extent as race-conscious admissions policies. The Court made clear in *Grutter* and *Gratz* that "[n]ot every decision influenced by race is equally objectionable," and that courts therefore must carefully consider the "context" in which a racial or ethnic preference is used. Since the "context" for financial aid policies typically has some differences from the "context" for admissions, as discussed

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<sup>28</sup>One appellate court has suggested, however, in a post-*Grutter* and *Gratz* case, that somewhat different principles may apply under Section 1981 with respect to the "order and nature of the proof" of intentional discrimination (*Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005)).

below, these differences may lead to some differences in legal reasoning, and perhaps results, in cases challenging affirmative action in financial aid.

The basic principles guiding a court's analysis, however, probably would not change from one context to the other. The threshold questions would likely still include whether the policy on its face or in its operation takes race into account in allocating or awarding financial aid, and if so, whether the policy uses racial quotas for either the dollar amount of aid available to minority applicants or the number of scholarships, loans, or other aid awards for minority applicants. There would still most probably be a need to determine the institution's justification for taking race into account, and the documentation supporting this justification. The permissible justifications for financial aid policies are likely to be the same as for admissions policies—student body diversity and remedying the present effects of the institution's past discrimination; and just as these interests are "compelling interests" for purposes of admissions, they will likely be considered compelling for financial aid as well. The "narrow tailoring" test will also likely continue to apply as the basis for judging whether the consideration of race is designed, and carefully limited, to accomplish whichever compelling interest the institution has attributed to its race-conscious financial aid policies. Thus the strict scrutiny standard of review, as articulated and applied to admissions in *Grutter* and *Gratz*, also can guide analysis of race-conscious financial aid and "provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race *in that particular context*" (539 U.S. at 327; emphasis added).

There appear to be three particularly pertinent ways in which the context of financial aid differs from the context of admissions. *First*, institutions dispense financial aid through a variety of scholarship, loan, and work-study programs that may have differing eligibility requirements and types of aid packages. It may therefore be questionable, in particular cases, whether each "part" of the aid program that takes race into account may be analyzed independent of the other parts of the institution's overall aid program, or whether courts may or must consider how other parts of the program may work together with the challenged part in accomplishing the institution's interest in student body diversity or remedying past discrimination. *Second*, some of the institution's financial aid resources may come from private donors who have established their own eligibility requirements for the aid, and the institution may have various degrees of involvement in and control over the award of this aid from private sources. (The U.S. Department of Education's 1994 Policy Guidance, for example, distinguishes between private donors' awards of race-conscious aid directly to students, which aid is not covered by Title VI, and private donors' provision of funds to a college or university that in turn distributes them to students, which funds are covered by Title VI (see 59 Fed. Reg. at 8757–58, Principle 5).) Questions may therefore arise concerning whether and when such financial aid is fully subject to the requirements of the equal protection clause, or Title VI or Title IX, and whether such aid may or must be considered to be part of the institution's overall aid program if a court considers how all the parts work together to accomplish the institution's interests (see first point immediately above). *Third*, "the

use of race in financial aid programs may have less impact on individuals who are not members of the favored group than the use of race in admissions. If individuals are not admitted to an institution, then they cannot attend it,” but “individuals who do not receive a particular race-conscious scholarship may still be able to obtain loans, work-study funds, or other scholarships in order to attend.” (See Elizabeth Meers & William Thro, *Race Conscious Admissions and Financial Aid Programs* (National Association of College and University Attorneys, 2004), 28; and see generally Meers & Thro at 24–30.)

The most vulnerable type of race-conscious aid is “race-exclusive” scholarships available only to persons of a particular race or ethnicity. Under the 1994 Policy Guidance, above, the U.S. Department of Education permits the use of race-exclusive scholarships in certain narrow circumstances (59 Fed. Reg. at 8757–58 (Principles 3, 4, & 5)). But under the *Grutter* and *Gratz* principles, as applied to financial aid policies, such scholarships may be viewed as employing racial quotas as well as a separate process or separate consideration for minority aid applicants—both of which are prohibited for admissions policies.

In a major case decided prior to *Grutter* and *Gratz*, *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), a U.S. Court of Appeals invalidated a race-exclusive scholarship program of the University of Maryland. In *Podberesky*, a Hispanic student claimed that the university’s Banneker Scholarship program violated Title VI and the equal protection clause. The district court and the appellate court applied strict scrutiny analysis. Defending its program, the university argued that it served the compelling state interest of remedying prior *de jure* discrimination, given the fact that the state was then still under order of the Office for Civil Rights, U.S. Department of Education, to remedy its formerly segregated system of public higher education. The university also argued that the goal of the student body diversity was served by the scholarship program.

The district court found that the university had provided “overwhelming” evidence of the present effects of prior discrimination and upheld the program without considering the university’s diversity argument (764 F. Supp. 364 (D. Md. 1991)). The federal appeals court, however, reversed the district court (956 F.2d 52 (4th Cir. 1992)). Although the appellate court agreed that the university had provided sufficient evidence of prior discrimination, it found the Office for Civil Rights’ observations about the present effects of that discrimination unconvincing because they had been made too long ago (between 1969 and 1985); and it ordered the district court to make new findings on the present effects of prior discrimination. The appellate court also noted that race-exclusive scholarship programs violate *Bakke* if their purpose is to increase student body diversity rather than to remedy prior discrimination.

On remand to the district court, the university presented voluminous evidence of the present effects of prior discrimination, including surveys of black high school students and their parents, information on the racial climate at the university, research on the economic status of black citizens in Maryland and the effects of unequal educational opportunity, and other studies. The district court found that the university had demonstrated a “strong basis in evidence” for four present effects of past discrimination: the university’s poor reputation

in the black community, underrepresentation of blacks in the student body, the low retention and graduation rates of black students at the university, and a racially hostile campus climate (838 F. Supp. 1075 (D. Md. 1993)).

With regard to the university's evidence of the present effects of past discrimination, the court also commented: "It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy" (838 F. Supp. at 1082, n.47). The court also held that the Banneker Scholarship program was narrowly tailored to remedy the present effects of past discrimination because it demonstrated the university's commitment to black students, increased the number of peer mentors and role models available to black students, increased the enrollment of high-achieving black students, and improved the recipients' academic performance and persistence. Less restrictive alternatives did not produce these results. The court did not address the university's diversity argument.

On appeal, the U.S. Court of Appeals for the Fourth Circuit again overruled the district court (38 F.3d 147 (4th Cir. 1994)). Despite the university's voluminous evidence of present effects of prior racial discrimination, the appellate court held that there was insufficient proof of present effects to establish a compelling interest for the race-exclusive scholarships. Furthermore, said the court, the scholarship program was not narrowly tailored to accomplishing the university's interest. The program thus failed both prongs of the strict scrutiny test.

The appellate court was sharply critical of the findings made by the district court on the present effects of prior discrimination. With respect to the district court's findings on the university's poor reputation in the minority community and the hostile racial environment on campus, the appellate court ruled that those then-present conditions were not closely related to the university's prior discrimination but were more directly a result of present societal discrimination that cannot form the basis for a race-conscious remedy. Regarding the findings of low retention and graduation rates of minority students, the appellate court held that this condition was not directly linked to the university's prior discrimination but was a result of economic and other unrelated factors. Similarly, regarding the underrepresentation of black students at the university, the appellate court held that this condition could not be traced directly to the university's prior discrimination; other factors, such as student preferences for predominantly minority public colleges in Maryland, decisions to apply only to out-of-state colleges, and decisions not to attend college at all could explain all or part of the underrepresentation.

The appellate court also rejected the district court's finding that the program provided role models and mentors to other black students, noting that the "Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy" (38 F.3d at 159, citing *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)). In addition, the appellate court also criticized the university for asserting that its program was narrowly tailored to increase the number of black Maryland residents at the university, since the Banneker program was open to out-of-state students.

Thus, the court concluded: “[T]he program more resembles outright racial balancing than a tailored remedial program” (38 F.3d at 160).

Although the university had originally used two rationales for its race-conscious scholarship program—remediation of its own prior discrimination and enhancement of student diversity—the district court had addressed only the remediation rationale in its first decision. In the appellate court’s first reversal of the district court, it rejected diversity as a rationale for race-exclusive programs. The university therefore did not argue that rationale in the second round of litigation, not did the district or appellate courts address it.

*Podberesky* thus signals the legal vulnerabilities of race- or gender-exclusive scholarship programs. At the least, *Podberesky* illustrates how difficult it may be to justify a race-based scholarship program using the remedying-prior-discrimination rationale. The other, less developed, part of *Podberesky*, rejecting the student diversity rationale, is inconsistent with the Supreme Court’s decisions in *Grutter* and *Gratz*, and *Podberesky* therefore cannot be used to foreclose diversity rationales for race-conscious student aid programs. But, as suggested earlier in this subsection, *Grutter* and *Gratz* present institutions with other problems in demonstrating that a race-exclusive scholarship program is not the equivalent of a racial quota and does not employ a separate process insulating minority applicants from competition with nonminorities who seek financial aid. On the other hand, some room is apparently left open, by *Grutter* and *Gratz*, for an institution to argue that there are no race-neutral alternatives, or alternatives that do not involve exclusivity, for accomplishing the diversity objectives that it accomplishes with race-exclusive aid; or to argue that nonminority students are not unduly burdened by the race-exclusive program because their financial aid needs are met in other comparable ways with other funds under other programs. The U.S. Department of Education’s 1994 Policy Guidance (above) appears to adopt a similar position (59 Fed. Reg. at 8757) and thus provides further support for the validity of some race-exclusive scholarships, at least under Title VI.<sup>29</sup>

Both public and private institutions that have race-conscious or gender-conscious financial aid programs may wish to review them in light of these various considerations, and institutions considering the adoption or modification of any such program will want to do the same. In addition, careful monitoring of further developments in the courts, the U.S. Department of Education, and in the states (including proposed amendments to the state constitution) is obviously warranted.

**8.3.5. Discrimination against nonresidents.** State institutions have often imposed significantly higher tuition fees on out-of-state students, and courts have generally permitted such discrimination in favor of the state’s own

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<sup>29</sup>Similar issues could arise with sex-restricted scholarships, and similar arguments would be available to institutions. In addition, institutions may sometimes rely on a Title IX regulation that expressly permits sex-restricted scholarships awarded under wills, trusts, and other legal instruments if the “overall effect” of such awards is not discriminatory (34 C.F.R. § 106.37(b); see subsection 8.3.3 of this book, above).

residents. The U.S. Supreme Court, in the context of a related issue, said: “We fully recognize that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis” (*Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973)). Not all preferential tuition systems, however, are beyond constitutional challenge.

In a variety of cases, students have questioned the constitutionality of the particular criteria used by states to determine who is a resident for purposes of the lower tuition rate.<sup>30</sup> In *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), students challenged a regulation that stipulated: “No student is eligible for resident classification in the university, in any college thereof, unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto.” The students argued, as have the plaintiffs in similar cases, that discrimination against nonresidents affects “fundamental” rights to travel interstate and to obtain an education and that such discrimination is impermissible under the Fourteenth Amendment’s equal protection clause unless necessary to the accomplishment of some “compelling state interest.” The court dismissed the students’ arguments, concluding that “the one-year waiting period does not deter any appreciable number of persons from moving into the state. There is no basis in the record to conclude, therefore, that the one-year waiting period has an unconstitutional ‘chilling effect’ on the assertion of the constitutional right to travel.” The U.S. Supreme Court affirmed the decision without opinion (401 U.S. 985 (1971)).

Other cases are consistent with *Starns* in upholding durational residency requirements of up to one year for public institutions. Courts have agreed that equal protection law requires a high standard of justification when discrimination infringes fundamental rights. But, as in *Starns*, courts have not agreed that the fundamental right to travel is infringed by durational residency requirements. Since courts have also rejected the notion that access to education is a fundamental right (see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)), courts have not applied the “compelling interest” test to durational residency requirements of a year or less. In *Sturgis v. Washington*, 414 U.S. 1057 (1973), *affirming* 368 F. Supp. 38 (W.D. Wash. 1973), the Supreme Court again recognized these precedents by affirming, without opinion, the lower court’s approval of Washington’s one-year durational residency statute.

However, in *Vlandis v. Kline* (cited earlier in this Section), the Supreme Court held another kind of residency requirement to be unconstitutional. A Connecticut statute provided that a student’s residency at the time of application

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<sup>30</sup>The cases are collected in Kenneth Rampino, Annot., “Validity and Application of Provisions Governing Determination of Residency for Purpose of Fixing Fee Differential for Out-of-State Students in Public College,” 56 A.L.R.3d 641. For citations to state statutes and regulations on residency determinations, and an analysis of the governance structure by which each state implements its requirements, see Michael A. Olivas, et al., “State Residency Requirements: Postsecondary Authorization and Regulations,” 13 *Coll. L. Dig.* 157, printed in *West’s Educ. Law. Rptr.* (NACUA Special Pamphlet, February 1983).

for admission would remain her residency for the entire time she was a student. The Supreme Court noted that, under such a statute, a person who had been a lifelong state resident, except for a brief period in another state just prior to admission, could not reestablish Connecticut residency as long as she remained a student. But a lifelong out-of-state resident who moved to Connecticut before applying could receive in-state tuition benefits even if she had lived in the state for only one day. Because such unreasonable results could flow from Connecticut's "permanent irrebuttable presumption" of residency, the Court held that the statute violated due process. At the same time, the Court reaffirmed the state's broad discretion to use more flexible and individualized criteria for determining residency, such as "year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment," and so on. In subsequent cases the Court has explained that *Vlandis* applies only to "those situations in which a state 'purports to be concerned with [domicile but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue'" (*Elkins v. Moreno*, 435 U.S. 647 (1978), quoting *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975)).

Lower courts have considered other types of residency criteria, sometimes (like the Supreme Court in *Vlandis*) finding them unconstitutional. In *Kelm v. Carlson*, 473 F.2d 1267 (6th Cir. 1973), for instance, a U.S. Court of Appeals invalidated a University of Toledo requirement that a law student show proof of postgraduation employment in Ohio before being granted resident status. This requirement created a type of irrebuttable presumption that "can act as an impossible barrier to many students who in utter good faith intend to and, for all other purposes, have succeeded in establishing residency in Ohio"; the regulation arbitrarily discriminated against such students, thus violating the equal protection clause. In *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), a class action brought by female married students, a federal district court invalidated a residency determination rule that made a wife's residency status dependent on her husband's residency. While the state defended the rule by arguing the factual validity of the common law presumption that a woman has the domicile of her husband, the court held that the rule discriminated on the basis of sex and thus violated equal protection principles. And in *Eastman v. University of Michigan* 30 F.3d 670 (6th Cir. 1994), the court identified equal protection problems raised by a university durational residency requirement that did not clearly distinguish between *residency* and *domicile*. Remanding the case to the federal district court for further proceedings, the court reasoned:

A durational requirement imposed on a domiciliary or bona fide resident . . . would run afoul of the Equal Protection Clause. Because domicile can be obtained without the passage of any particular period of time, such a requirement imposed on one who has true domicile or bona fide residence in the state would not advance the legitimate state interest served by such a requirement—restricting preferential tuition rates only to domiciliaries. The requirement therefore would lack a rational basis and violate the Equal Protection Clause.

Although the passage of a certain period of time, such as a year, may be relevant as evidence on the question of domicile, it cannot be dispositive. Thus, if the University's registrar requires some individuals to have a physical residence in Michigan for one year before considering evidence on their domicile or bona fide residence status, and also refuses to give them retroactive credit for residence at the time that his investigation, whenever conducted, shows that domicile or bona fide residence began, then the policy would be unconstitutional as an impermissible durational requirement imposed on domiciliaries. If, on the other hand, the registrar determines, based on all the evidence, whether the student is a domiciliary or bona fide resident at the time of admission, then the policy would not be unconstitutional . . . [30 F.3d at 673-74].

Other courts (like the U.S. Supreme Court in *Starns* and in *Sturgis*) have upheld particular residency criteria against constitutional objections. In *Peck v. University Residence Committee of Kansas State University*, 807 P.2d 652 (Kan. 1991), for instance, the court rejected students' arguments that the state residency requirements violated equal protection and procedural due process (807 P.2d at 663-64). And in *Smith v. Board of Regents of the University of Houston*, 874 S.W.2d 706 (Ct. App. Tex. 1994), the plaintiff applied for the in-state tuition rate after living in Texas and attending the University of Houston for one year. He had moved to Texas in 1987 to commence study at the university's law center. The plaintiff was a full-time student who had declared his intent "to attend law school and live and work [in Texas] after graduation." During the school year he worked part time for a law firm in Houston; during the summers he worked full time for the same firm. In addition, he was registered to vote in Texas, held a Texas driver's license, registered his car in Texas, and rented an apartment in Texas. The university denied his initial request for reclassification as an in-state student and every subsequent request he made before each of his remaining semesters at the university.

The Texas statute defines a nonresident student as "an individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period" (Tex. Educ. Code Ann. § 54.052(f)). There is a presumption in favor of this nonresident student classification "as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution" (§ 54.054). The regulations of the Coordinating Board, Texas College and University System, provide for a reclassification if the individual withdraws from school and resides in the state while gainfully employed for twelve months, but does not provide for this reclassification if the nonresident maintains his status as a full-time student.

The plaintiff argued that the Texas statute governing residency created an unconstitutional, irrebuttable presumption of nonresidency. Citing *Vlandis v. Kline* (above), the court rejected this argument:

Unlike the Connecticut statute [at issue in *Vlandis*], the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the university. A student



may obtain reclassification in any number of ways. First, according to the policy on reclassification, a student will be entitled to reclassification if he or she withdraws from the University for a period of twelve months, and resides in Texas while gainfully employed. Secondly, the statute lists several factors that may result in reclassification. For example, a student may work full time in Texas, while enrolled as a student, or may purchase a homestead in Texas. Dependency on a parent or guardian who has resided in Texas for at least 12 months is also a factor that may result in reclassification. However, the factors listed in the statute are nonexclusive; therefore, presumably there are other circumstances that would result in reclassification. The rule in question also indicates that the “presumption of ‘nonresident’ is not a conclusive presumption,” and may be overcome by showing “facts or actions unequivocally indicative of a fixed intention to reside permanently in the state” [874 S.W.2d at 709].

The court had no difficulty with the university’s position that the plaintiff’s statement of intent to remain in Texas was not sufficient proof of that intent: “to accept the plaintiff’s argument would require the University to reclassify as a resident every student who, after attending the University for a year, makes a self-serving declaration that he intends to reside [in the state].”

The plaintiff also argued that the one-year waiting period infringed on his fundamental right to travel. Relying again on *Vlandis* as well as on *Starns v. Malkerson* (above), the court also rejected this equal protection claim:

We find the reclassification statute distinguishable from either of the two situations in which a statute has been invalidated because it impinged upon the fundamental right to travel. The reclassification statute, and its one-year waiting period, does not involve a basic right or necessity. . . . The right to receive a lower tuition rate at a state university cannot be equated to the right to receive welfare benefits, medical care, or the right to vote. Neither does the reclassification statute, on its face, seek to apportion or limit the benefits accorded to the citizens of Texas based on the length or timing of their residence. Instead, the reclassification policy seeks to establish which students are in fact bona fide residents of the state of Texas [874 S.W.2d at 711].

Because it found that the Texas statute and the regulations promulgated by the coordinating board do not create an irrebuttable presumption of nonresidency or an impingement on the right to travel, but instead create a test of bona fide residency for purposes of tuition, the court rejected the student’s claims and upheld the statute’s constitutionality. Subsequently, in *Teitel v. University of Houston Board of Regents*, 285 F. Supp. 2d. 865 (S.D. Tex. 2002), a federal court also upheld the constitutionality of the Texas residency statute and regulations, rejecting arguments similar to those in *Smith* (as well as contract and negligence claims that were summarily dismissed).

The court’s opinion in *Eastman v. University of Michigan*, 30 F.3d 670 (6th Cir. 1994), contains a useful discussion of the distinction between residency and domicile (30 F.3d at 672–73), as well as an implicit warning to drafters of residency regulations to exercise care in using these terms. The court also clarified that, while durational residency requirements are valid under *Starns*, *Sturgis*,

and *Vlandis*, such a requirement would be unconstitutional if applied to a student *who has already established a bona fide domicile* (as opposed to a resident status) within the state (30 F.3d at 673–74).

In addition to establishing acceptable criteria, institutions must ensure that the procedures they follow in making residency determinations will not be vulnerable to challenges. For instance, they will be expected to follow any procedures established by state statutes or administrative regulations. Their procedures also must comply with the procedural requirements of the federal due process clause. In *Lister v. Hoover*, 706 F.2d 796 (7th Cir. 1983), however, the court held that the due process clause did not obligate the University of Wisconsin to provide students denied resident status with a written statement of reasons for the denial; see also *Michaelson v. Cox*, 476 F. Supp. 1315 (S.D. Iowa 1979). And in *Ward v. Temple University*, 2003 WL 21281768 (E.D. Pa. 2003), the court, citing *Lister*, asserted that “a public university such as Temple does not have to provide a full panoply of procedural protections to individuals claiming in-state residency status for tuition purposes” (2003 WL 21281768 at \*4).

In most of the tuition residency cases discussed above, the courts analyzed the issues under the Fourteenth Amendment’s equal protection and due process clauses. In *Saenz v. Roe*, 526 U.S. 489 (1999), however, the U.S. Supreme Court determined that durational residency requirements for state services are also subject to analysis under the Fourteenth Amendment’s “privileges or immunities” and “citizenship” clauses (14th Amend., § 1, sentences 1 & 2). (See Erika Nelson, Comment, “Unanswered Questions: The Implications of *Saenz v. Roe* for Durational Residency Requirements, 49 *U. Kan. L. Rev.* 193 (2000).) Relying on these two clauses, the Court by a 7-to-2 vote invalidated a California one-year durational residency requirement for welfare benefits. While this case thus identifies two additional bases upon which new arrivals may attack residency requirements for state benefits and services, these new arguments are not likely to be applied successfully to state residency requirements—particularly durational residency requirements—for tuition benefits. In its opinion, the Court distinguished state tuition benefits from state welfare benefits:

[B]ecause whatever benefits [the plaintiffs] receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile. See, e.g., *Sosna v. Iowa*, 419 U.S. 393 (1975); *Vlandis v. Kline*, 412 U.S. 441 (1973) [526 U.S. at 505].

Moreover, the Court said it was “undisputed” that the *Saenz* plaintiffs were citizens and thus residents of the state, and that it was not a case in which “the bona fides of [their] claim to state citizenship were questioned.” Since issues about the bona fides of residency are the focus of most of the cases in this Section, these cases are apparently still good law after the *Saenz* decision.

Residency cases have increasingly focused on issues of state administrative law. Typically, these issues concern the authority of state higher education institutions to promulgate administrative rules and criteria for residency

determinations, the legal interpretation of these rules and criteria, the burden of proof that petitioning students must meet to demonstrate residency, or the standard of review that courts must apply in reviewing administrative denials of residency petitions. In *Peck v. University Residence Committee* (above), for example, the student plaintiff had applied to the defendant residence committee for approval to pay the lower tuition charge for Kansas resident students. The committee denied his request despite the fact that he “(1) registered to vote and voted in Kansas; (2) registered an automobile in Kansas and paid personal property tax in Kansas; (3) insured his automobile in Kansas; (4) acquired a Kansas driver’s license; (5) had a checking and savings account in Kansas; and (6) registered with the selective service in Kansas” (807 P.2d at 656). The state district court overruled the committee’s decision, stating that its “action in denying Peck resident status is not supported by substantial evidence.” Reversing the district court, the Supreme Court of Kansas held that, although the student had established physical residence in Kansas, he had not established the requisite intent to remain permanently in Kansas after graduation. Reviewing the committee’s application of eight primary and nine secondary factors set out in state regulations for use in determining intent, the court concluded that most of the student’s evidence related to secondary factors, which, standing alone, were “not probative for an intent determination because many are capable of being fulfilled within a few days of arriving in Kansas.” The court also rejected the student’s arguments that the residency regulations were inconsistent with the authorizing state statute (Kan. Stat. Ann. § 76-729(c)(4)). The court therefore reinstated the findings and decision of the residence committee.

In a Vermont case, *Huddleston v. University of Vermont*, 719 A.2d 415 (Vt. 1998), the Supreme Court of Vermont upheld a university regulation requiring students to prove their in-state residency status by “clear and convincing” evidence. Pursuant to the Vermont legislature’s “broad delegation of authority” to the university’s trustees to define eligibility for in-state tuition, the university had adopted procedures, rules, and documentation requirements for determining a student’s tuition classification. The enabling statute (16 Vt. Stat. Ann. § 2282) did not mention burdens of proof, but the university nevertheless included the “clear and convincing” requirement in its regulations. The court upheld this provision because the university trustees had “implicit authority” to adopt a burden of proof requirement “in furtherance of this legislative charge to implement state policy on reduced tuition rates for in-state students.”

A case from Oregon, *Polaski v. Clark*, 973 P. 2d 381 (Or. App. 1999), concerned the legal interpretation of residency rules. The plaintiff-student had served in the U.S. Air Force at various locations in the United States. He petitioned to be classified an Oregon resident for tuition purposes beginning with the 1996 winter term. In his application, he explained that “[f]rom October 1994, when I decided to become an Oregon resident upon my discharge, I did all I could to become an Oregon resident. I registered to vote, registered my vehicle, got an Oregon driver’s license and changed my tax status to Oregon. I have recently even purchased my first home in Portland, and I intend to make Oregon my residence both now and in the future.” The Interinstitutional Residency

Committee, and then the vice chancellor for academic affairs, of the Oregon higher education system denied the student's request on the basis that he had not maintained a "continuous presence" in Oregon for the twelve months prior to his request for resident classification, as required by the system's regulation which provides:

- (2) An Oregon resident is a financially independent person who, immediately prior to the term for which Oregon resident classification is requested:
  - (a) Has established and maintained a domicile in Oregon of not less than 12 consecutive months; and
  - (b) Is primarily engaged in activities other than those of being a college student [Or. Admin. Reg. 580-010-0030].

The student sought judicial review of the vice chancellor's decision. Applying the Oregon Administrative Procedure Act, the appellate court explained that, on a petition for judicial review, the court "reviews [only] for substantial evidence and errors of law" (973 P.2d at 383, citing Or. Admin. Reg. 183.484 (4)). The student claimed that the vice chancellor's interpretations of the residency regulations were incorrect (that is, were errors of law). The court determined, however, that the vice chancellor correctly interpreted the rules in denying petitioner resident status. In particular, while the twelve-month rule "does not demand an uninterrupted physical presence" in the state, "it does demand an uninterrupted 'presence,'" in the sense of domicile, "even though the person is physically absent."

In comparison, the court's decision in *Ravindranathan v. Virginia Commonwealth University*, 519 S.E.2d 618 (Va. 1999), concerned issues of the adequacy of evidence rather than issues of legal interpretation (or errors of law). The student had moved to Virginia from Illinois to attend Virginia Commonwealth University (VCU) for her undergraduate education and had stayed on to attend medical school at VCU. She sought residency status for medical school, claiming that her boyfriend lived in Virginia, she paid taxes in Virginia, she registered to vote in Virginia, her father had secured a license to practice medicine in Virginia, and her parents were preparing to move to Virginia. After a residency officer denied her in-state tuition status, the student appealed to the Residency Appeals Committee; when her petition was again denied, she filed suit asking the court to review and reverse these administrative decisions. A state statute provided that the court's function in such a case "shall be only to determine whether the decision reached by the institution could reasonably be said, on the basis of the record, not to be arbitrary, capricious or otherwise contrary to law" (519 S.E.2d at 670, citing Va. Code § 23-7.4:3(A)). The circuit court upheld the Residency Appeals Committee decision, and the Supreme Court of Virginia affirmed. The student had been a nonresident when she came to Virginia for undergraduate school, said the court, and a "presumption" arose that the student continued in the state "for the purpose of attending school and not as a bona fide domiciliary." The student had the evidentiary burden of rebutting this presumption "by clear and convincing evidence." The appeals committee decided she had not met this burden. Moreover:

The circuit court correctly refused to reweigh the evidence considered by the Residency Appeals Committee and, as required by Code § 23-7.4:3, the circuit court limited its review to “whether the decision reached by the institution could reasonably be said, on the basis of the record, not to be arbitrary, capricious or otherwise contrary to law.”

\* \* \* \*

On appeal, the sole issue that we may consider is whether the circuit court was plainly wrong when it held that the Residency Appeals Committee’s decision was not arbitrary, capricious, or otherwise contrary to the law. Our review of the record reveals that the facts upon which [the student] relies to support her purported Virginia domicile could also be deemed auxiliary to fulfilling her educational objectives or are routinely performed by temporary residents of this Commonwealth. Thus, the Residency Appeals Committee’s decision was not arbitrary or capricious, and the circuit court’s judgment upon review of that decision was not plainly wrong [519 S.E.2d at 620-21].

As these administrative law cases illustrate, institutions that act responsibly and consistently will usually be able to prevail when students assert state administrative law challenges to residency determinations. The evidentiary burdens on students may be high; the state statutes may accord considerable discretion to institutions to promulgate rules and make determinations; and the scope of judicial review may be quite narrow. Generally students, to be successful in court, will need to show that the institution has violated its own procedures for processing residency requests, ignored its own residency criteria, or committed a clear error of law in interpreting state law or its own rules.

Similarly, the constitutional cases earlier in this Section indicate that institutions should usually be able to prevail against constitutional challenges to residency regulations. Durational residency requirements of up to one year, and other requirements directly related to the establishment of domicile, will be constitutional so long as they are implemented with clear and specific criteria and basic due process procedures. The two fatal flaws that drafters need to assiduously avoid are (1) the creation of irrebuttable presumptions of nonresidency (see *Vlandis* and *Kelm* above), and (2) creating confusion between the concepts of domicile and residency (see *Eastman* above, and see also *Martinez v. Bynum*, 461 U.S. 321, 327–31 (1983)).

### **8.3.6. Discrimination against aliens**

**8.3.6.1. Documented (immigrant and nonimmigrant) aliens.** In *Nyquist v. Jean-Marie Mauclet*, 432 U.S. 1 (1977), the U.S. Supreme Court set forth constitutional principles applicable to discrimination against resident aliens in student financial aid programs. The case involved a New York State statute that barred permanent resident aliens from eligibility for Regents’ college scholarships, tuition assistance awards, and state-guaranteed student loans. Resident aliens denied financial aid argued that the New York law unconstitutionally discriminated against them in violation of the equal protection clause of the Fourteenth Amendment. The Supreme Court agreed.

The Court's opinion makes clear that alienage, somewhat like race, can be a "suspect classification." Discrimination against resident aliens in awarding financial aid can thus be justified only if the discrimination is necessary in order to achieve some compelling governmental interest.<sup>31</sup> The *Nyquist* opinion indicates that the state's interests in offering an incentive for aliens to become naturalized, and in enhancing the educational level of the electorate, are not sufficiently strong to justify discrimination against resident aliens with regard to financial aid.

Since the case was brought against the state rather than against individual postsecondary institutions, *Nyquist's* most direct effect is to prohibit states from discriminating against resident aliens in state financial aid programs. It does not matter whether the state programs are for students in public institutions, in private institutions, or both, since in any case the state would have created the discrimination. In addition, the case clearly would prohibit public institutions from discriminating against resident aliens in operating their own separate financial aid programs. Private institutions are affected by these constitutional principles only to the extent that they are participating in government-sponsored financial aid programs or are otherwise engaging in "state action" (see Section 1.5.2) in their aid programs.

It does not necessarily follow from *Nyquist* that all aliens must be considered eligible for financial aid. *Nyquist* concerned permanent resident aliens and determined that such aliens as a class do not differ sufficiently from U.S. citizens to permit different treatment. Courts might not reach the same conclusion about nonresident aliens whose permission to be in the United States is temporary. In *Ahmed v. University of Toledo*, 664 F. Supp. 282 (N.D. Ohio 1986), for example, the court considered a challenge to the University of Toledo's requirement that all international students purchase health insurance. Those students not able to show proof of coverage were deregistered, and their financial aid was discontinued. The trial court ruled that the affected international students were not a suspect class for equal protection purposes, because only nonresident aliens were required to purchase the insurance; resident aliens were not. Since the situation was thus unlike *Nyquist*, where the challenged policy had affected resident rather than nonresident aliens, the court used the more relaxed "rational relationship" standard of review for equal protection claims rather than

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<sup>31</sup>There are exceptions to this suspect class/strict scrutiny treatment of alienage classifications. One exception, directly pertinent to the financial aid issues, concerns the federal government's use of alienage classifications. When the federal government treats aliens differently from citizens, courts will presume that it has a legitimate reason for doing so—since the federal government (unlike state and local governments) has constitutional powers over matters of immigration and citizenship. Federal government alienage classifications are therefore not considered "suspect" and are not subject to the strict scrutiny standard the Court used in *Nyquist* (see, for example, *Mathews v. Diaz*, 426 U.S. 67 (1976)). A second possible exception may apply to classifications of nonresident (nonimmigrant) aliens—a class not involved in *Nyquist*. This possible exception is addressed in the *Ahmed* and *Tayyari* cases discussed below in this Section. An apparent third exception concerns classification of undocumented aliens; this exception is discussed in subsection 8.3.6.2 below. (Another exception, generally not relevant to financial aid issues, is discussed in Section 5.3.2 of this book with respect to state and local government employment.)

*Nyquist's* strict scrutiny standard (see generally, regarding strict scrutiny, Section 8.2.5), holding that the university's policy was rational and therefore constitutional. The U.S. Court of Appeals dismissed the students' appeal as moot (822 F.2d 26 (6th Cir. 1987)). In *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D.N.M. 1980), however, the court did invalidate a university policy denying reenrollment (during the Iranian hostage crisis) to Iranian students who were nonimmigrant aliens in this country on student visas. The court considered the Iranian students to be members of a suspect class and determined that the university's reasons for treating them differently could not pass strict scrutiny.

Despite the *Tayyari* reasoning, public colleges and universities subject to the *Nyquist* principles can probably comply by making sure that they do not require students to be U.S. citizens or to show evidence of intent to become citizens in order to be eligible for financial aid administered by the institution. (The U.S. Department of Education has similar eligibility requirements for its student aid programs; see the Department's *Student Guide to Financial Aid*, available at [http://studentaid.ed.gov/students/publications/student\\_guide/index.html](http://studentaid.ed.gov/students/publications/student_guide/index.html); go to "who gets federal student aid" and then click on "eligible noncitizen." Institutions thus may decline to provide institutional aid to aliens who have F, M, or J visas (see Section 8.7.4 of this book) and other temporary nonresident aliens. Such a distinction between permanent resident and temporary nonresident aliens may be justifiable on grounds that institutions (and states) need not spend their financial aid resources on individuals who have no intention to remain in and contribute to the state or the United States. Whether institutions may also make undocumented resident aliens ineligible for financial assistance is a separate question not controlled by *Nyquist* and is discussed in subsection 8.3.6.2 below.

Moreover, since *Nyquist* does not affect state residency requirements, institutions may deny financial aid or in-state tuition status to aliens who are not state residents when the principles discussed in subsection 8.3.5 above permit it. Aid thus would not be denied because the students are aliens but because they are nonresidents of the state. Although state residency for aliens may be determined in part by their particular status under federal immigration law (see especially 8 U.S.C. § 1101(a)(15)), it is well to be cautious in relying on federal law. In *Elkins v. Moreno*, 435 U.S. 647 (1978), the University of Maryland had denied "in-state" status, for purposes of tuition and fees, to aliens holding federal G-4 nonimmigrant visas (for employees of international treaty organizations and their immediate families). The university argued the G-4 aliens' federal status precluded them from demonstrating an intent to become permanent Maryland residents. The U.S. Supreme Court rejected this argument, holding that G-4 aliens (unlike some other categories of nonimmigrant aliens) are not incapable under federal law of becoming permanent residents and thus are not precluded from forming an intent to reside permanently in Maryland. The Court then certified to the Maryland Court of Appeals the question whether G-4 aliens or their dependents are incapable of establishing Maryland residency under the state's common law.

In “Act 2” of this litigation drama, *Toll v. Moreno*, 397 A.2d 1009 (Md. 1979), *judgment vacated*, 441 U.S. 458 (1979), the Maryland court answered “No” to the Supreme Court’s question. In the interim, however, the university had adopted a new in-state policy, which no longer used state residency as the paramount factor in determining in-state status for tuition and fees. Because the changed policy raised new constitutional issues, the Supreme Court ended Act 2 by vacating the Maryland court’s judgment and remanding the case to the federal district court where the *Elkins* case had begun.

After the district court invalidated Maryland’s new policy and the U.S. Court of Appeals affirmed, the case returned to the U.S. Supreme Court (*Toll v. Moreno*, 458 U.S. 1 (1982)) for Act 3. The Court held that the university’s new policy, insofar as it barred G-4 aliens and their dependents from acquiring in-state status, violated the supremacy clause (Art. VI, para. 2) of the U.S. Constitution. The supremacy clause recognizes the primacy of federal regulatory authority over subjects within the scope of federal constitutional power and prevents state law from interfering with federal law regarding such subjects. Since the federal government’s broad constitutional authority over immigration has long been recognized, federal law on immigration preempts any state or local law inconsistent with the federal law. Applying these principles in *Toll*, the Court reasoned:

[Our cases] stand for the broad principle that “state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.” *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976). . . .

The Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U.S.C. § 1101 et seq., . . . recognizes two basic classes of aliens, immigrant and nonimmigrant. With respect to the nonimmigrant class, the Act establishes various categories, the G-4 category among them. For many of these nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States. . . . But significantly, Congress has allowed G-4 aliens—employees of various international organizations, and their immediate families—to enter the country on terms permitting the establishment of domicile in the United States. . . . In light of Congress’ explicit decision not to bar G-4 aliens from acquiring domicile, the State’s decision to deny “in-state” status to G-4 aliens, *solely* on account of the G-4 alien’s federal immigration status, surely amounts to an ancillary “burden not contemplated by Congress” in admitting these aliens to the United States [458 U.S. at 12–14; citations and footnotes omitted].<sup>32</sup>

As a result of the *Elkins/Toll* litigation, it is now clear that postsecondary institutions may not use G-4 aliens’ nonimmigrant status as a basis for denying in-state status for tuition and fees purposes. It does not follow, however, that institutions are similarly limited with respect to other categories of

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<sup>32</sup>The Court’s opinion also includes alternative grounds for invalidating the university’s policy—namely, that it interferes with federal tax policies under which G-4 visa holders are relieved of federal and some state and local taxes on their incomes. See 458 U.S. at 14–16.



nonimmigrant aliens. The nonimmigrant categories are comprised of aliens who enter the United States temporarily for a specific purpose and who usually must maintain their domicile in a foreign country (see, for example, 8 U.S.C. § 1101(a)(15)(B) (temporary visitors for pleasure or business); § 1101(a)(15)(F) (temporary academic students); § 1101(a)(15)(M) (temporary vocational students); and see generally Section 13.2.2 of this book). Such restrictions preclude most nonimmigrant aliens from forming an intent to establish permanent residency (or domicile), which is required under the residency laws of most states. Thus, federal and state law would apparently still allow public institutions to deny in-state status to nonimmigrant aliens, other than G-4s and other narrow categories that are not required to maintain domicile in their home countries.

It also remains important, after *Elkins/Toll*, to distinguish between nonimmigrant (nonresident) and immigrant (resident) aliens. Because immigrant aliens are permitted under federal law to establish U.S. and state residency, denial of in-state status because of their alienage would violate the federal supremacy principles relied on in *Toll* (Act 3). Moreover, such discrimination against immigrant aliens would violate the equal protection clause of the Fourteenth Amendment, as established in *Nyquist v. Mauclet*, discussed earlier in this subsection.

**8.3.6.2. Undocumented aliens.** Since the *Elkins/Toll* litigation, yet another critical distinction has emerged: the distinction between aliens with federal immigrant or nonimmigrant status on the one hand and undocumented aliens on the other. In some circumstances, the equal protection clause will also protect undocumented aliens from state discrimination in the delivery of educational services. In *Plyler v. Doe*, 457 U.S. 202 (1982), for instance, the U.S. Supreme Court used equal protection principles to invalidate a Texas statute that “den[ie]d to undocumented school-age children the free public education that [the state] provides to children who are citizens of the United States or legally admitted aliens.” Reasoning that the Texas law was “directed against children [who] . . . can have little control” over their undocumented status, and that the law “den[ie]d these children a basic education,” thereby saddling them with the “enduring disability” of illiteracy, the Court held that the state’s interests in protecting its education system and resources could not justify this discriminatory burden on the affected children. *Plyler* dealt with elementary education; the key question, then, is whether the case’s reasoning and the equal protection principles that support it would apply to higher education as well—in particular to state policies that deny to undocumented aliens financial aid or in-state tuition status that is available to U.S. citizens and documented aliens.

This question attracted a great deal of attention in California, where courts wrestled with it in a complex chain of litigation. In 1983, the California legislature passed a statute providing that “[a]n alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) from establishing domicile in the United States” (Cal. Educ. Code § 68062(h)). It was not clear how this statute would apply to undocumented aliens who had been living in California and sought to establish residency for in-state tuition purposes. At the request of the

chancellor of the California State University, the Attorney General of California issued an interpretation of the statute, indicating that an undocumented alien's incapacity to establish residence in the United States under federal immigration law precluded that same alien from establishing residency in California for in-state tuition purposes (67 *Opinions of Cal. Attorney General* 241 (Opinion No. 84-101 (1984))). Subsequently, the University of California and the California State University and College System formulated identical policies charging all undocumented aliens out-of-state tuition.

In *Leticia A. v. Regents of the University of California*, No. 588-982-4 (Cal. Super. Ct., Alameda County, orders of April 3, 1985, May 7, 1985, and May 30, 1985 ("Statement of Decision")), four undocumented alien students challenged the constitutionality of these policies on equal protection grounds. The plaintiffs had been brought into this country during their minority and had graduated from California high schools. Relying on the Supreme Court's reasoning in *Plyler*, and on the equal protection clause of the state constitution, the *Leticia A.* court determined that "higher education is an 'important' interest in California" and that the defendants' policies can survive equal protection scrutiny only if "there is a 'substantial' state interest served by the [blanket] classification" of undocumented aliens as nonresidents. The court then compared the rationales supporting this classification and those supporting the federal immigration laws:

The policies underlying the immigration laws and regulations are vastly different from those relating to residency for student fee purposes. The two systems are totally unrelated for purposes of administration, enforcement and legal analysis. The use of unrelated policies, statutes, regulations or case law from one system to govern portions of the other is irrational. The incorporation of policies governing adjustment of status for undocumented aliens into regulations and administration of a system for determining residence for student fee purposes is neither logical nor rational [*Leticia A.* at 9-10].

The court therefore declared the defendants' policies unconstitutional (without rendering any judgment on the validity of Section 68062(h), on which the policies were based) and ordered the defendants to determine the state residence status of undocumented students and applicants for purposes of in-state tuition in the same way as it would make that determination for U.S. citizens.

Neither defendant appealed the *Leticia A.* decision. In 1990, however, a former employee of the University of California sued that institution to require it to reinstate its pre-*Leticia* policy. The employee, Bradford, had been terminated by the University of California for his "unwillingness to comply with the ruling of the [*Leticia A.*] court." The trial court granted summary judgment in favor of the employee. On appeal, in *Regents of the University of California v. Superior Court*, 276 Cal. Rptr. 197 (Ct. App. 2d Dist. 1990) (known as the *Bradford* case), the court reviewed the purpose and constitutionality of the defendant's pre-*Leticia A.* residency policy, as well as of Section 68062(h) itself. The court held that, as originally argued by the defendants in the *Leticia A.* litigation, Section 68062(h) "precludes undocumented alien students from qualifying as residents

of California for tuition purposes.” Then the court examined whether such an interpretation denied undocumented alien students the equal protection of the laws. Reasoning that undocumented aliens are commonly and legitimately denied basic rights and privileges under both state and federal law, that the university also denies the lower tuition rate to residents of other states and to aliens holding student visas, and that the state had “manifest and important” interests in extending this denial to undocumented aliens, the appellate court upheld the trial court’s ruling.

Unlike the *Leticia A.* court, the appellate court in the *Bradford* case did not rely on the Supreme Court’s *Plyler* decision but distinguished it on the basis of the “significant difference between an elementary education and a university education.” Thus, the *Bradford* court’s decision was in direct conflict with *Leticia A.* and served to uphold the constitutionality of Section 68062(h) as well as the University of California’s pre-*Leticia A.* policy. After *Bradford*, litigation continued in the California superior courts to work out the implementation of that decision and its application to the California State University and College System, which was not a defendant in *Bradford* (see, for example, L. Gordon, “Immigrants Face Cal. State Fee Hike,” *Los Angeles Times*, September 9, 1992, p. A3). Then, in a taxpayer action, *American Association of Women v. Board of Trustees of the California State University*, 38 Cal. Rptr. 2d 15 (Ct. App. 2d Dist. 1995), the court expressly disagreed with the reasoning of *Leticia A.*, affirmed that the *Bradford* decision “was correctly decided,” and held that *Bradford* is “binding upon the California State University System.” (For a review and critique of this line of cases, which concludes that *Leticia A.* represents the correct approach, see Michael A. Olivas, “Storytelling out of School: Undocumented College Residency, Race, and Reaction,” 22 *Hastings Const. L.Q.* 1019, 1051–63 (1995).)

The practical significance of the California cases has been diminished, however, by later developments in California and nationwide. In late 1994, the California electorate approved Proposition 187, which, among other things, denied public services to undocumented aliens. Section 8 of the proposition, which was codified as Cal. Educ. Code § 66010.8, included public postsecondary education among the public services denied to undocumented aliens. In *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), the court invalidated most of the provisions of Proposition 187 and the implementing statutes on federal preemption grounds (see Section 13.1.1 of this book), but left intact the provision on denial of postsecondary education benefits in Cal. Educ. Code § 66010.8(a). Then, in 1996, Congress passed two new laws, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), to create uniform national rules regulating and restricting aliens’ eligibility for public benefits. One provision of the IIRIRA, codified as 8 U.S.C. § 1621, makes undocumented aliens ineligible for “any state or local public benefit” (8 U.S.C. § 1621(a)) and defines such benefits to include “any . . . postsecondary education . . . benefit . . . for which payments or assistance are provided to an individual . . . by an agency of a state or local government”

(8 U.S.C. § 1621(c)(1)(B)). Relying on this provision, the district court that had issued the 1995 opinion reconsidered and revised its earlier disposition, concluding that the IIRIRA preempted Section 66010.8(a) and rendered it inoperative (*League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); see also *League of United Latin American Citizens v. Wilson*, 1998 WL 141325 (C.D. Cal. 1998)).

The end result appears to be that denial of state postsecondary education benefits to undocumented aliens—in California and in other states—is now governed primarily by federal law (the IIRIRA) rather than state law.<sup>33</sup> (Other provisions in 8 U.S.C. § 1611 govern undocumented aliens' eligibility for "Federal public benefit(s)," including "any . . . postsecondary education . . . benefit," and impose restrictions similar to those for state and local benefits in 8 U.S.C. § 1621.) The IIRIRA does, however, permit states to make undocumented aliens eligible for postsecondary benefits (and other state and local benefits) for which they are otherwise ineligible under Section 1621(a), but only if states do so "through the enactment of a state law after August 22, 1996, which affirmatively provides for such eligibility" (8 U.S.C. § 1621(d)). Another provision of the IIRIRA limits this state authority, specifically with respect to "postsecondary education benefit(s)," by providing that states may not provide greater benefits to undocumented aliens than it provides to United States citizens who are not residents of the state (8 U.S.C. § 1623). (For a review critique of these IIRIRA provisions and their impact on postsecondary education benefits for undocumented aliens, see Michael A. Olivas, "IIRIRA, The Dream Act, and Undocumented College Student Residency," 30 *J. Coll. & Univ. Law* 435, 449–57 (2004).)

IIRIRA is not likely to be the last word on these sensitive issues concerning financial aid for undocumented alien applicants and students. As of early 2005, eight states had passed legislation allowing undocumented students to qualify for in-state tuition rates (see, for example, Kan. Stat. Ann. 76-731(a)(2004)). In some other states, state universities have taken the same step without the support of post-IIRIRA state legislation. And the U.S. Congress itself is reconsidering the matter of education benefits and other protections for undocumented aliens. (See Olivas, above, 30 *J. Coll. & Univ. Law* at 455–63.)

The primary legislation, called the DREAM Act in the Senate, was introduced in the 108th Congress (S. 1545) and reintroduced in the 109th Congress (S. 2075), and was still pending as this book went to press (see also H.R. 1684 (108th Cong.) and H.R. 251 (109th Cong.)).

**8.3.7. Using government student aid funds at religious institutions.** Many states have student scholarship programs and other financial aid programs for students attending higher educational institutions within the state, and many of these programs cover students attending private (as well

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<sup>33</sup>There is dispute, however, concerning whether the IIRIRA does, or should, apply in this way to benefits that are a function of state residency determinations, such as the in-state tuition rate; see Olivas, 30 *J. Coll. & Univ. Law* at 452–55 (cited in text below).

as public) institutions. The federal government, of course, also has financial aid programs for students in both private and public institutions (see Section 8.3.2 above). Legal problems may arise under such programs concerning the use of funds by students pursuing theological studies, studies to prepare them for religious vocations, or other religious instruction. More generally, problems may arise concerning the use of student aid funds by students attending religiously affiliated institutions, even when the students are pursuing secular or “nonreligious” studies. The issues that may surface are likely to be constitutional issues implicating the establishment and free exercise clauses in the federal Constitution’s First Amendment and the parallel provisions in state constitutions. Section 1.6.3 of this book addresses the leading cases on such issues.

If a state or the federal government decides to *permit* use of its funds by students pursuing religious studies or attending religious institutions, the resulting issues are likely to be establishment (or “antiestablishment”) issues. If a state or the federal government decides to *prohibit* use of its funds by students pursuing religious studies or attending religious institutions, the resulting issues are likely to be free exercise of religion issues. Under the federal Constitution, the leading establishment clause precedent is *Witters v. Department of Services for the Blind*, 474 U.S. 481 (1986) (see Section 1.6.3). The leading free exercise clause precedent is *Locke v. Davey*, 540 U.S. 712 (2004) (see Section 1.6.3).

*Witters* generally permits the inclusion of students pursuing religious studies in government aid programs, so long as the program is a “neutral” program serving students in both public and private institutions, and so long as a student’s use of the funds at a religious institution results from the free and independent choice of the student. The establishment clause reasoning of *Witters* was solidified and extended by the U.S. Supreme Court’s more recent decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld an elementary/secondary school voucher program that included religious schools, even though most of the voucher recipients in the program used their vouchers to attend religiously affiliated schools. In some states, however, the state constitution is more restrictive than the federal Constitution, in which case there is less leeway for the state to include students pursuing religious studies or attending religious institutions in its aid programs. (See, for example, *Witters II*, discussed in Section 1.6.3.)

The more restrictive a state is regarding eligibility of students who pursue religious studies or enroll at religious institutions, the more likely it will be that excluded students will claim that the state has violated their federal free exercise rights. *Locke v. Davey* would then become the applicable precedent. In *Davey*, the Court narrowly construed the free exercise rights of students excluded from government aid programs and left considerable room for states to exclude students pursuing religious studies (particularly studies preparing one to enter the clergy) from state aid programs. It would be a different question, however, if a state were to exclude students attending a religious institution to pursue secular or “nonreligious” studies; it is unclear from *Davey* whether or not a student’s free exercise claim would prevail in this situation. Moreover,

some state constitutions may have freedom-of-religion clauses that the state courts interpret more broadly than the U.S. Supreme Court interpreted the federal free exercise clause in *Davey*. In this circumstance, the state would have less room to restrict the use of student aid funds.

When individual higher educational institutions award aid to their own students, the issues above typically do not arise. If the institution is public, it is generally prohibited—by the federal establishment clause, the state constitution, and other state law—from offering religious instruction; there would therefore not be any basis for questions of whether to award aid for this purpose. If the institution is private, on the other hand, the federal establishment and free exercise clauses do not apply (see Section 1.5.2), and similar state constitutional provisions usually do not apply; the private institution is therefore generally free to offer religious instruction, or not, and to award its own private financial aid funds to students pursuing such studies, or not, as it sees fit.<sup>34</sup>

### 8.3.8. Collection of student debts

**8.3.8.1. Federal bankruptcy law.** Student borrowers have often sought to extinguish their loan obligations to their institutions by filing for bankruptcy under the federal Bankruptcy Code contained in Title 11 of the *United States Code*.<sup>35</sup> The Bankruptcy Code supersedes all state law inconsistent with its provisions or with its purpose of allowing the honest bankrupt a “fresh start,” free from the burden of indebtedness. A debtor may institute bankruptcy proceedings by petitioning the appropriate federal court for discharge of all his provable debts. Following receipt of the bankruptcy petition, the court issues an order fixing times for the filing and hearing of objections to the petition before a bankruptcy judge. Notice of this order is given to all potential creditors, usually by mail.

Debtors may petition for bankruptcy under either Chapter 7 or Chapter 13 of the Bankruptcy Code. Under a Chapter 7 “straight” bankruptcy, debts are routinely and completely discharged unless the creditors can show reasons why no discharge should be ordered (11 U.S.C. § 727) or unless a creditor can demonstrate why its particular claim should be “excepted” from the discharge order as a “nondischargeable debt” (11 U.S.C. § 523). Chapter 13, on the other hand, provides for the adjustment of debts for debtors with regular income. After filing a Chapter 13 petition, the debtor must submit a plan providing for full or partial repayment of debts (11 U.S.C. §§ 1321–1323), and the bankruptcy court must hold a hearing and decide whether to confirm the plan (11 U.S.C. §§ 1324–1325, 1327). Prior to the hearing, the bankruptcy court must notify all creditors whom the debtor has included in the plan; these creditors may then object to the plan’s

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<sup>34</sup>If the private institution is religiously affiliated, it would be protected by the federal establishment and free exercise clauses from governmental attempts to interfere with its choices on these matters. (See Section 1.6.2.)

<sup>35</sup>Because of the complexity of the law of bankruptcy, and its particular implications for the collection of student loans, a summary of the major issues is provided in this section. The discussion relies in part on Robert B. Milligan, Comment, “Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy,” 34 *U.C. Davis L. Rev.* 221 (2000).

confirmation (11 U.S.C. § 1324). If the plan is confirmed and the debtor makes the payments according to the plan's terms, the bankruptcy court will issue a discharge of those debts included in the plan (11 U.S.C. § 1328(a)).

Bankruptcy law relevant to the collection of student debts has changed several times over the past forty years. Currently, the only exception to nondischarge is the "undue hardship" provision.<sup>36</sup> The provision is contained in 11 U.S.C. § 523(a)(8):

**Section 523. Exceptions to discharge:**

(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution of higher education, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Student loans are nondischargeable under Chapter 13 (11 U.S.C. § 1328(a)). (For analysis of the prior versions of the bankruptcy law and the problems it posed for student loan collection, see Note, "Forging a Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)," 75 *Iowa L. Rev.* 733 (1990).)

Section 523(a)(8) covers loans made under any Department of Education student loan program as well as student loans made, insured, guaranteed, or funded by other "governmental units," such as state and local governments, and by nonprofit higher education institutions. Loans made by profit-making postsecondary institutions or privately owned banks (and not guaranteed or insured under a government program) are not covered by the provision and thus continue to be dischargeable. Moreover, Section 523(a)(8) applies to bankruptcies under both Chapter 7 and Chapter 13.

When a debtor files a petition under either Chapter 7 or Chapter 13 of the Bankruptcy Act, such filing creates an automatic "stay" against the attempts of creditors to collect from the debtor (11 U.S.C. § 362). Even if a student loan is nondischargeable under Chapter 7, the filing of a bankruptcy petition may nevertheless affect the institution's efforts to collect the debt. The bankruptcy judge may modify or cancel this prohibition during the proceedings, however, if the institution can show cause why such action should be taken (11 U.S.C. § 362(d)(1)).

In order for a borrower to request that a federal student loan be discharged in bankruptcy through the "undue hardship" exception, the debtor must file a

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<sup>36</sup>Cases and authorities are collected at Andrew M. Campbell, Annot., "Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978 (11 U.S.C.A. § 523(a)(8)(B))," 63 A.L.R. Fed 570. See also Ana Kellia Ramares, Annot., "Validity, Construction, and Application of Statutes, Regulations, or Policies Allowing Denial of Student Loans, Student Loan Guarantees, or Educational Services to Debtors Who Have Had Student Loans Scheduled in Bankruptcy," 107 A.L.R. Fed. 192.

separate lawsuit in federal bankruptcy court against the agency or institution holding the loan. Several public colleges have challenged such suits, claiming that Eleventh Amendment immunity prevents them from being sued in federal court. If sovereign immunity protects state colleges (or other state agencies) in such cases, federal student loans made by these entities would effectively be nondischargeable under current law.

In *Tennessee Student Assistance Corporation v. Hood*, 319 F.3d 755 (6th Cir. 2003), *affirmed on other grounds and remanded*, 541 U.S. 440 (2004), the appellate court sided with the bankruptcy court's ruling that Congress had abrogated states' sovereign immunity for bankruptcy claims when it enacted Article I, Section 8 of the U.S. Constitution, thus requiring the state (or, in this case, the state student assistance agency) to be involved in the bankruptcy proceeding for purposes of determining whether the loan should be discharged on the grounds of undue hardship.

The U.S. Supreme Court, in a 7-to-2 opinion written by Justice Rehnquist, affirmed the outcome below, but refused to address the issue of the abrogation of sovereign immunity, stating that discharge of a student loan does not implicate sovereign immunity. Although the Court conceded that being served with process was an "indignity" to the state, the bankruptcy court did not have *in personam* jurisdiction over the state; its jurisdiction was *in rem*, and was limited to the debtor's property and estate. Even if Congress had not abrogated sovereign immunity under the bankruptcy clause (a finding that the Court did not make), said the Court, the bankruptcy court would still have the authority to make the undue hardship determination that the debtor was seeking in this case, and the state would be bound by that ruling, just as any other creditor would be bound.

There has been considerable litigation on the scope of the "undue hardship" exception to nondischargeability in Section 523(a)(8). In general, bankruptcy courts have interpreted this exception narrowly, looking to the particular facts of each case (see Scott Pashman, Note, "Discharge of Student Loan Debt Under 11 U.S.C. § 523(a)(8): Reassessing 'Undue Hardship' After the Elimination of the Seven-Year Exception," 44 *N.Y.L. Sch. L. Rev.* 605 (2001)). Primary importance has been attached to whether the student debtor's economic straits were foreseeable and within his control. Federal courts have established several tests for undue hardship.

The test created in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), has been used by the majority of federal appellate courts. The three-part test requires the court to determine

1. that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself or] herself and [his or] her dependents if forced to repay the loans; and
2. that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. that the debtor has made good faith efforts to repay the loans [831 F.2d at 396].



Because the *Brunner* standard is fact sensitive and requires a court to determine whether an individual has acted in “good faith,” results across circuits, and even within the same circuit, are difficult to predict. For example, in *In re Peel*, 240 B.R. 387 (N.D. Cal. 1999), a student loan debtor who graduated from chiropractic college filed for Chapter 7 bankruptcy. He had made some payments on the loan when he was financially able to. The court found that the debt was an undue hardship for the plaintiff and discharged his loan because his income was, and was projected to be, insufficient to repay the loan. On the other hand, the court in *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993) rejected the plaintiff’s request to discharge his loan, despite the fact that the debtor was unemployed, owed child support, and had twice been convicted of driving while intoxicated.

Another approach to determining whether the plaintiff’s debt should be discharged under the “undue hardship” criterion is the test created in *In re Bryant*, 72 B.R. 913 (E.D. Pa. 1987). Rejecting the typically subjective standards used in the *Brunner* test, the court ruled that, if the plaintiff’s income exceeded the federal poverty rate, the debt would be ruled nondischargeable. Other issues that courts may take into consideration in determining whether undue hardship exists are the debtor’s mental illness (*In re Meling*, 263 B.R. 275 (N.D. Iowa 2001)), but not the disability of a debtor’s spouse (*In re Naranjo*, 261 B.R. 248 (E.D. Cal. 2001)), or the number and health of dependents (*Educational Credit Management Corp. v. Ross*, 262 B.R. 460 (W.D. Wis. 2000) (no discharge where debtor has no dependents)). In other cases, courts have approved a partial discharge, reducing the amount of debt that the debtor must repay (see, for example, *In re Yapuncich*, 266 B.R. 882 (D. Mont. 2001)).

Cosigners and nonstudents (such as parents) who take out federally guaranteed student loans also appear to be covered by the nondischargeability provisions of the bankruptcy law.<sup>37</sup> In *Webb v. Student Loan Funding Corp.*, 151 Bankr. Rptr. 804 (N.D. Ohio 1992), the parent, the obligor on a federal Parent Loans for Undergraduate Students (PLUS) loan taken out for her daughter’s college education, argued that she had not received a direct benefit from the loan (her daughter, not she, had received the education). The court disagreed, stating that the parent did receive at least an indirect benefit, and that this reason was insufficient to exempt PLUS loans from the clear intent of the bankruptcy law’s statutory language. Similarly, in *In re Hammarstrom*, 95 Bankr. Rptr. 160 (N.D. Cal. 1989), the court held that the exception to dischargeability in Section 523(a)(8) unambiguously applied to the debtor, whether or not the debtor received a direct benefit from the loan. And in *In re Pelkowski*, 990 F.2d 737 (3d Cir. 1993), the court overturned a lower court ruling that the loan was not an “educational” loan if the debtor was a cosigner or guarantor of the loan for the student borrower. After analyzing the legislative history of the amendments to the Bankruptcy Code related to federal student loans, the court concluded that

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<sup>37</sup>Cases and authorities are collected at Lora C. Siegler, Annot., “Applicability to Obligations of Nonstudent Co-obligors of Exception to Discharge in Bankruptcy for Educational Loans Under 11 U.S.C. § 523(a)(8),” 120 A.L.R. Fed. 609.

Congress had acted for the purpose of reducing debtor abuse of the federal student loan program; extending the nondischargeability provisions to nonstudent debtors would further the intent of Congress in this regard. (For analysis of this issue, see Note, “Non-Student Co-Signers and Sec. 523(a)(8) of the Bankruptcy Code,” 1991 *U. Chicago Legal Forum* 357 (1991).)

Students may be precluded from further borrowing under the federal student loan program if they have had earlier loans discharged in bankruptcy. In *Elter v. Great Lakes Higher Education Corp.*, 95 Bankr. Rptr. 618 (E.D. Wis. 1989), a bankruptcy court allowed a state guarantee agency to deny a new educational loan to such students. (For analysis of this issue, see Comment, “*Elter v. Great Lakes Higher Education Corporation*: State Agencies That Grant Educational Loans May Discriminate Against Student Bankrupts Who Default on Prior Educational Loans,” 17 *J. Coll. & Univ. Law* 261 (1990).)

The provisions of Section 523(a)(8) of the Bankruptcy Code apply to “educational loans,” not to student debt incurred by failing to pay tuition or fees. Such indebtedness is dischargeable in bankruptcy, according to several court opinions. (See, for example, *In re Renshaw*, 222 F.3d 82 (2d Cir. 2000), in which Cazenovia College and the College of St. Rose intervened in bankruptcy proceedings brought by students who had been permitted to enroll and take classes despite their failure to pay tuition. Because the college’s forbearance with respect to collecting the tuition was not a formal “loan,” the debt was dischargeable in bankruptcy, according to the court. See also *In re Mehta*, 262 B.R. 35 (D.N.J. 2001).)

(For suggestions regarding appropriate institutional actions in collecting student loans from debtors in bankruptcy, see Julia R. Hoke, *The Campus as Creditor: A Bankruptcy Primer on Educational Debts* (National Association of College and University Attorneys, 2006).)

**8.3.8.2. Withholding certified transcripts.** The Bankruptcy Code generally forbids creditors from resorting to the courts or other legal process to collect debts discharged in bankruptcy (11 U.S.C. § 524(a)(2)). Under the former Bankruptcy Act, however, there was considerable debate on whether informal means of collection, such as withholding certified grade transcripts from a student bankrupt, were permissible. In *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977), decided under the old Act, the court held that the Act did not prohibit private institutions from withholding certified transcripts. Besides reducing the scope of this problem by limiting the dischargeability of student loans, the 1978 Bankruptcy Act appears to have legislatively overruled the result in the *Girardier* case.

The provision of the old Act that was applied in *Girardier* prohibited formal attempts, by “action” or “process,” to collect discharged debts. In the 1978 Act, this provision was amended to read (with further amendments in 1984):

A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived [11 U.S.C. § 524(a)(2)].

The language, especially the phrase “or an act,” serves to extend the provision’s coverage to informal, nonjudicial means of collection, thus “insur[ing] that once a debt is discharged, the debtor will not be pressured in any way to repay it” (S. Rep. No. 95989, 95th Cong., 2d Sess., reprinted in 1978 *U.S. Code Cong. Admin. News* 5866).

The 1978 Act also added the words “any act” to a related provision, Section 362(a)(6), which prohibits creditors from attempting to collect debts during the pendency of a bankruptcy proceeding. Bankruptcy courts have construed this language to apply to attempts to withhold certified transcripts (see *In re Lanford*, 10 Bankr. Rptr. 132 (D. Minn. 1981)). This legislative change, together with the change in Section 524(a)(2), apparently prevents postsecondary institutions from withholding transcripts both during the pendency of a bankruptcy proceeding and after the discharge of debts, under either Chapter 7 or Chapter 13.<sup>38</sup>

The charge typically made when a college refuses to provide a transcript for a student who has filed a bankruptcy petition is that the college has violated the “automatic stay” provisions of the Bankruptcy Code (11 U.S.C. § 362) (*In re Parham*, 56 Bankr. Rptr. 531 (E.D. Va. 1986); *Parraway v. Andrews University*, 50 Bankr. Rptr. 316 (W.D. Mich. 1986)). Even though the debt is nondischargeable, courts in most federal circuits have ruled that the college may not withhold the transcript during the automatic stay period (*In re: Gustafson*, 934 F.2d 216 (9th Cir. 1990); *In re: Weiner Merchant, Debtor*, 958 F.2d 738 (6th Cir. 1992)). However, federal courts in the Third Circuit have ruled for the colleges, reasoning that the colleges were entitled to withhold the transcript for nonpayment of a student loan prior to the filing in bankruptcy, and thus continuing to withhold the transcript maintains the status quo, which is the purpose of the automatic stay. (See, for example, *Johnson v. Edinboro State College*, 728 F.2d 163 (3d Cir. 1984); and *In re: Billingsley*, 276 B.R. 48 (D.N.J. 2002). For analysis of the limitations that the bankruptcy law places on colleges with regard to withholding transcripts, see P. Tanaka, *The Permissibility of Withholding Transcripts Under the Bankruptcy Law* (2d ed., National Association of College and University Attorneys, 1995).)

The situation is different if, as in the majority of situations, the student has not filed a bankruptcy petition. Nothing in the Bankruptcy Code would prohibit postsecondary institutions from withholding transcripts from such student debtors. Moreover, the code does not prevent institutions from withholding transcripts if the bankruptcy court has refused to discharge the student loan debts. In *Johnson v. Edinboro State College* (discussed above), for example, the bankruptcy court had declared a former student to be bankrupt but did not discharge his student loans because he had failed to prove that a hardship existed. Nevertheless, the bankruptcy court had held that the college was obligated to issue the student a transcript because of the Bankruptcy Code’s policy to guarantee debtors “fresh starts.” When the college appealed, the Court of Appeals

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<sup>38</sup>Public institutions may also be restrained by Section 525 of the Bankruptcy Code, which forbids “governmental units” from discriminating against bankrupts in various ways—apparently including denial of transcripts (see *In re Howren*, 10 Bankr. Rptr. 303 (D. Kan. 1980)).

overruled the bankruptcy court, holding that when a bankrupt's student loans are nondischargeable under Section 523(a)(8), the policy of that section overrides the code's general fresh-start policy. The college therefore remained free to withhold transcripts from the student.

Entities that seek to collect federal student loans are subject to the Fair Debt Collection Practices Act (15 U.S.C. §§1692 *et seq.*). This law provides for civil penalties for using false, deceptive, unfair, or "unconscionable" methods of collecting debts. *Kort v. Diversified Collection Services*, 394 F.3d 530 (7th Cir. 2005) illustrates the application of this law and its "bona fide error" defense. In *Crockett v. Edinboro University*, 811 A.2d 1094 (Pa. Commw. Ct. 2002), a former student sued the college under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1-201-9.3) and the Fair Debt Collection Practices Act. The student had not completed his degree and his student loans became due before he graduated. The college refused to issue a transcript because the student had not made arrangements to repay the loan. The court ruled that the student's claims were barred by sovereign immunity.

Although private colleges do not have the protection of sovereign immunity, plaintiffs have similarly had difficulty persuading courts that withholding a transcript in situations not involving bankruptcy violated some legal right. In *Sheridan v. Trustees of Columbia University*, 745 N.Y.S.2d 18 (N.Y. App. Div. 2002), a student denied his transcript for failure to pay an outstanding tuition bill sued the university for breach of contract, fraud, negligent misrepresentation, and intentional infliction of emotional distress. The court dismissed all claims, finding that the university's behavior was reasonable and that the university had no obligation to forward the transcript to graduate schools in light of the unpaid debt.

Similarly, nothing in the federal Family Educational Rights and Privacy Act (FERPA) concerning student records (see this book, Section 9.7.1) prohibits institutions from withholding certified transcripts from student debtors. If an institution enters grades in a student's records, FERPA would give the student a right to see and copy the grade records. But FERPA would not give the student any right to a *certified* transcript of grades, nor would it obligate the institution to issue a certified transcript or other record of grades to third parties. Nor does FERPA prevent a college to which a former student owes student loan repayment from refusing to provide letters of recommendation as long as the loan is in default (*Slovinec v. DePaul University*, 332 F.3d 1068 (7th Cir. 2003)).

The most likely legal difficulty *would* arise under the federal Constitution's due process clause, whose requirements limit only public institutions (see Section 1.5.2). The basic question is whether withholding a certified transcript deprives the student of a "liberty" or "property" interest protected by the due process clause (see generally Sections 9.4.2-9.4.3). If so, the student would have the right to be notified of the withholding and the reason for it, and to be afforded some kind of hearing on the sufficiency of the grounds for withholding. Courts have not yet defined liberty or property interests in this context. But under precedents in other areas, if the institution has regulations or policies entitling students to certified transcripts, these regulations or policies could

create a property interest that would be infringed if the institution withholds a transcript without notice or hearing. And withholding certified transcripts from a student applying to professional or graduate school, or for professional employment, may so foreclose the student's freedom to pursue educational or employment opportunities as to be a deprivation of liberty. Thus, despite the lack of cases on point, administrators at public institutions should consult counsel before implementing a policy of withholding transcripts for failure to pay loans, or for any other reason.<sup>39</sup>

**8.3.8.3. Debt collection requirements in federal student loan programs.**<sup>40</sup>

During the late 1980s and 1990s, the default rate on federal student loans increased sharply. In 1990, the default rate was 22.4 percent, or nearly one in four borrowers. Funding required for these defaulted federal student loans was the fourth largest expenditure in the U.S. Education Department's budget (Roger Roots, "The Student Loan Debt Crisis: A Lesson in Unintended Consequences," 29 *Sw. U. L. Rev.* 501 (2000)). The federal government stepped up its debt collection activities, putting pressure on borrowers and institutions alike to increase repayment of the loans.

The Perkins Loan (formerly National Direct Student Loan) program's statute and regulations contain several provisions affecting the institution's debt collection practices. The statute provides (in 20 U.S.C. § 1087cc(4)), that where a note or written agreement evidencing such a loan has been in default despite the institution's due diligence in attempting to collect the debt, the institution, under certain circumstances, may assign its rights under the note or agreement to the United States. If the debt is thereafter collected by the United States, the amount, less 30 percent, is returned to the institution as an additional capital contribution. The Perkins Loan regulations (34 C.F.R. § 674.41 *et seq.*) provide that each institution maintaining a Perkins Loan fund must accept responsibility for, and use due diligence in effecting, collection of all amounts due and payable to the fund. Due diligence includes the following elements: (1) providing borrowers with information about changes in the program that affect their rights and responsibilities (34 C.F.R. § 674.41(a)); (2) conducting exit interviews with borrowers when they leave the institution and providing them with copies of repayment schedules that indicate the total amount of the loans and the dates and amounts of installments as they come due (34 C.F.R. § 674.42(b)); (3) keeping a written record of interviews and retaining signed copies of borrowers' repayment schedules (34 C.F.R. § 674.42(b)(4)); and (4) staying in contact with borrowers both before and during the repayment period, in order to facilitate billing and keep the borrowers informed of changes in the program that may affect rights and obligations (34 C.F.R. § 674.42(c)).

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<sup>39</sup>Cases and authorities are collected in Ana Kellia Ramares, Annot., "Validity, Construction, and Application of Statutes, Regulations, or Policies Allowing Denial of Student Loans, Student Loan Guarantees, or Educational Services to Debtors Who Have Had Student Loans Scheduled in Bankruptcy," 107 A.L.R. Fed. 192; and Lewis J. Heisman, Annot., "Violation of Automatic Stay Provisions of 1978 Bankruptcy Code (11 U.S.C.A. § 362) as Contempt of Court," 57 A.L.R. Fed. 927.

<sup>40</sup>See generally, Annot., "Rights and Obligations of Federal Government, Under 20 U.S.C.S. § 1080, When Student Borrower Defaults on Federally Insured Loan," 73 A.L.R. Fed. 303.

The institution must also use specified “billing procedures” (set forth at 34 C.F.R. § 674.43), including statements of notice and account and demands for payment on accounts that are more than fifteen days overdue. If an institution is unable to locate a borrower, it must conduct an address search (34 C.F.R. § 674.4). If the billing procedures are unsuccessful, the institution must either obtain the services of a collection agency or utilize its own resources to compel repayment (34 C.F.R. § 675(a)).

The Federal Family Education Loan (FFEL, formerly Guaranteed Student Loan (GSL)) program includes fewer provisions related to debt collection, since post-secondary institutions are not usually the lenders under the program. The regulations require (at 34 C.F.R. § 682.610(a)), that participating institutions establish and maintain such administrative and fiscal procedures and records as may be necessary to protect the United States from unreasonable risk of loss due to defaults. Another approach to debt collection, with more specifics than FFEL but fewer than Perkins, is illustrated by the Health Professions Student Loan program (42 C.F.R. Part 57, subpart C). Participating institutions must exercise “due diligence” in collecting loan payments (42 C.F.R. § 57.210(b)) and must maintain complete repayment records for each student borrower, including the “date, nature, and result of each contact with the borrower or proper endorser in the collection of an overdue loan” (42 C.F.R. § 57.215(c)).

In order to step up collection activities under the Health Education Assistance Loan (HEAL) program (42 U.S.C. § 292 *et seq.*; 42 C.F.R. Part 60), the Public Health Service of the Department of Health and Human Services issued regulations authorizing institutions to withhold transcripts of HEAL defaulters (42 C.F.R. § 60.61). The regulations also require schools to note student loan defaults on *academic* transcripts. (For a discussion of the lawfulness of withholding student transcripts, see Section 8.3.8.2.)

Prior to 1991, the statute of limitations for defaulted student loans was six years. However, the Higher Education Technical Amendments of 1991 (Pub. L. No. 102-26, 105 Stat. 123, codified as amended at 20 U.S.C. § 1091(a)) deleted the six-year statute of limitations temporarily. The Higher Education Amendments of 1992 made the deletion permanent. Following passage of the amendments, the question before the courts was whether student loans in default for more than six years prior to the amendments’ enactment were now subject to collection. The courts have ruled that they are (see, for example, *United States v. Glockson*, 998 F.2d 896 (11th Cir. 1993); see also *United States v. Mastronito*, 830 F. Supp. 1281 (D. Ariz. 1993)).

A law passed by Congress in October 1990, the Student Loan Default Prevention Initiative Act of 1990 (Pub. L. No. 101-508, 104 Stat. 1388, codified at various sections of 20 U.S.C.), is aimed at reducing the number of defaulted loans by rendering institutions with high default rates ineligible to participate in certain student loan programs. Section 1085 provides that any institution whose “cohort default rate” exceeds a certain threshold percentage for three consecutive years loses its eligibility for participation in the FFEL program for the fiscal year in which the determination is made and for the two succeeding years. The regulations specifying how default rates are calculated appear at

34 C.F.R. § 668.15. The process for calculating the cohort default rate was described in *Canterbury Career School, Inc. v. Riley*, 833 F. Supp. 1097 (D.N.J. 1993). In this case the threshold beyond which termination would occur was 30 percent. The court also discussed the due process protections (particularly the opportunity for a hearing) available to schools threatened with termination of their eligibility to participate in federal student aid programs.

In another case, a chain of cosmetology schools challenged the Secretary of Education's decision to terminate the schools' eligibility to participate in the FFEL program. The plaintiffs charged that a "paper" appeal process, rather than a full-blown adversary hearing on the record, violated their rights of due process on both procedural and substantive grounds. The schools also charged that the Secretary had miscalculated the default rate. In *Pro Schools, Inc. v. Riley*, 824 F. Supp. 1314 (E.D. Wis. 1993), the trial court disagreed, noting that the Secretary was permitted to use default data from years prior to the enactment of the Student Loan Default Prevention Initiative Act, and that the use of these data did not make the Act itself retroactive because the issue was the schools' present eligibility, not their past eligibility (citing *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859 (D.C. Cir. 1992)). Although the court accepted the plaintiffs' argument that continued eligibility for participation in the federal programs was both a property and a liberty interest (citing *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877 (7th Cir. 1990)), it viewed the written appeal process as sufficient to protect the schools' due process rights.

In *Ross Learning, Inc. v. Riley*, 960 F. Supp. 1238 (E.D. Mich. 1997), three technical schools whose eligibility to participate in the Federal Family Education Loan Programs had been terminated because their cohort default rates were equal to or greater than 25 percent challenged the Secretary's decision. The court determined that no due process violations had occurred, and that the Secretary had complied with the Higher Education Act.

Institutions have several weapons in their fight to collect Perkins Loans from defaulting student borrowers. The Student Loan Default Prevention Initiative Act permits colleges to use collection agencies to recover defaulted loans, and also permits judges to award attorney's fees to institutions that must litigate to recover the unpaid loans. In *Trustees of Tufts College v. Ramsdell*, 554 N.E.2d 34 (Mass. 1990), the court noted these provisions, but limited the attorney's fees to the state law standard, rather than the more generous ceiling that the university argued was permitted by federal regulations. The regulations interpreting the Act are found at 34 C.F.R. §§ 674.46 and 674.47.

For those loans that have been assigned to the federal government for collection, federal agency heads may seek a tax offset against the debtor's tax refunds by request to the Internal Revenue Service (as provided in 26 U.S.C. § 6402(d)). According to *Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988), the six-year statute of limitations on actions for money damages brought by the United States (28 U.S.C. § 2415(a)) does not bar the tax offset, because the statute of limitations does not negate the debt but only bars a court suit as a means of collection; the debt is still collectible by other means. By regulation,

however, the Internal Revenue Service has provided that it will not use the offset procedure for any debt that has been delinquent for more than ten years at the time offset is requested (26 C.F.R. § 301.6402-6(c)(1)). This regulation was upheld in *Grider v. Cavazos*, 911 F.2d 1158 (5th Cir. 1990). The appellate court refused to permit the Secretary of Education to intercept the tax refunds of two individuals who had defaulted on their loans fifteen and eleven years earlier. Although the Secretary had argued that the loans became delinquent when the banks assigned the loans to the Secretary for collection, the court sided with the debtors' argument that the loans went into default when the required payments to the bank (the lender) were not made. The court commented:

[We] take no pleasure in giving aid and comfort to those former students who shirk their loan repayment obligations by hiding behind statutes of limitation. We can only ask in rhetorical wonderment why the Secretary continues quixotically to pursue judicial construction of the Regulation instead of simply asking his counterpart in the Department of the Treasury to close the loophole in the Regulation with a proverbial stroke of his pen [911 F.2d at 1164].

A similar result occurred in *Lee v. Paige*, 276 F. Supp. 2d 980 (W.D. Mo. 2003), *affirmed*, 376 F.3d 1179 (8th Cir. 2004), in which the court rejected the Secretary of Education's attempt to offset the Social Security benefits of an individual who defaulted on student loans more than twenty years earlier. Interpreting the Debt Collection Improvement Act, which authorizes federal agencies to recover outstanding student loans by offsetting the debtor's Social Security benefits (31 U.S.C. § 3716(c)(3)(A)(i)), the court noted that the new law had left unchanged the original Debt Collection Act's provision that claims that had been outstanding for more than ten years could not be offset. However, in *Lockhart v. U.S.*, 376 F.3d 1027 (9th Cir. 2004), a case decided just two weeks before *Lee*, the U.S. Court of Appeals for the Ninth Circuit ruled that the Debt Collection Act's ten-year limit did not preclude the offsetting of Social Security benefits to obtain repayment of educational loans because the Higher Education Assistance Act, amended in 1991, provided that "notwithstanding any other provision of statute . . . no limitation shall terminate the period within which . . . an offset, garnishment, or other action initiated by . . . the Secretary [of Education] . . . for the repayment of [a student loan shall be made]" (20 U.S.C. §§ 1091a(a)(1)-(2)). The court in *Lee* had rejected that argument, ruling that when the 1991 amendments were enacted, Social Security benefits were not subject to offset, and thus Congress could not have intended that the abolition of the ten-year limitations period would apply to the offset of Social Security benefits.

Lockhart appealed, and the U.S. Supreme Court unanimously affirmed the appellate court's ruling in *Lockhart v. U.S.*, 126 S. Ct. 699 (2005). Rejecting the reasoning of *Lee*, the Court ruled that the Debt Collection Improvement Act "clearly makes Social Security benefits subject to offset, [providing] exactly the sort of express reference that the Social Security Act says is necessary to supersede the anti-attachment provision."



Students challenging their obligation to repay federal student loans have found some creative solutions in situations where the college involved either has closed or did not provide the promised educational services. In some cases students have argued that the lending banks or the state agency guarantors of their federal student loans must be subject to state law regarding secured transactions. (For a case in which students successfully argued this theory, see *Tipton v. Alexander*, 768 F. Supp. 540 (S.D. W. Va. 1991).) And in *Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222 (9th Cir. 1994), the court ruled that the Higher Education Act did not preempt state tort law regarding the circumstances under which a loan obligation is enforceable. Although the court dismissed the students' claims under the Higher Education Act (finding no private right of action), it allowed the state tort law claim to proceed.

Students arguing under other state law theories, however, have been less successful. In *Bogart v. Nebraska Student Loan Program*, 858 S.W.2d 78 (Ark. 1993), the Supreme Court of Arkansas rejected a group of students' claim that the guarantee agency and the banks who actually loaned the money to the students were agents of the stenographic school, against which the students had obtained a judgment for fraud, which they were then unable to collect. The court ruled that the Higher Education Act preempted the students' claims under agency law. A similar result occurred in *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990).

In *Jackson v. Culinary School of Washington*, 811 F. Supp. 714 (D.D.C. 1993), the court rejected the claims of students seeking to have their loan obligations declared null and void because of the Secretary of Education's allegedly negligent supervision of the school's default rate and the quality of its curriculum. After appeals to the federal appellate courts and the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia Circuit vacated the trial court's earlier opinion and ordered it to exercise its discretion in determining which defendants could be subject to District of Columbia consumer protection laws (59 F.3d 254 (D.C. Cir. 1995)). No further opinions in this case have been published.

In *Armstrong v. Accrediting Council for Continuing Education and Training, Inc.*, 168 F.3d 1362 (D.C. Cir. 1999), a student loan debtor filed a claim for declaratory and injunctive relief against an agency that had previously accredited the National Business School, a for-profit vocational school in Washington, D.C., that went bankrupt after the plaintiff students had obtained Guaranteed Student Loans and paid tuition. The plaintiff filed claims under the FTC Holder Rule (see Section 13.2.9), the Higher Education Act, and the District of Columbia Consumer Credit Protection Act. The appellate court ruled that such misconduct by schools and lenders could not be attacked through state consumer fraud laws, but noted that the 1992 amendments to the Higher Education Act helped to reduce the likelihood that students enrolling in proprietary schools would face the same kinds of problems that this plaintiff encountered.

Collection of student loans is a critical issue for colleges and universities, for legal reasons and because of the implications of student default rates for continued eligibility to participate in the federal student aid program. College and university officials should use experienced counsel and student aid professionals

to develop and enforce student financial aid policies that fully comply with state and federal requirements.

## **Sec. 8.4. Student Housing**

**8.4.1. Housing regulations.** Postsecondary institutions with residential campuses usually have policies specifying which students may, and which students must, live in campus housing. Such regulations sometimes apply only to certain groups of students, using classifications based on the student's age, sex, class, or marital status. Institutions also typically have policies regulating living conditions in campus housing. Students in public institutions have sought to use the federal Constitution to challenge such housing policies, while students at private colleges have used landlord-tenant law or nondiscrimination law to challenge housing regulations.<sup>41</sup>

Challenges to housing regulations typically fall into two categories: challenges by students required to live on campus who do not wish to, and challenges by students (or, occasionally, nonstudents) who wish to live in campus housing (or housing affiliated with a college), but who are ineligible under the college's regulations. An example of the first type of challenge is *Prostrollo v. University of South Dakota*, 507 F.2d 775 (8th Cir. 1974).

In *Prostrollo*, students claimed that the university's regulation requiring all single freshmen and sophomores to live in university housing was unconstitutional because it denied them equal protection under the Fourteenth Amendment and infringed their constitutional rights of privacy and freedom of association. The university admitted that one purpose of the regulation was to maintain a certain level of dormitory occupancy to secure revenue to repay dormitory construction costs. But the university also offered testimony that the regulation was instituted to ensure that younger students would educationally benefit from the experience in self-government, community living, and group discipline and the opportunities for relationships with staff members that dormitory life provides. In addition, university officials contended that the dormitories provided easy access to study facilities and to films and discussion groups.

Although the lower court ruled that the regulation violated the equal protection clause, the appellate court reversed the lower court's decision. It reasoned that, even if the regulation's primary purpose was financial, there was no denial of equal protection because there was another rational basis for differentiating freshmen and sophomores from upper-division students: the university officials' belief that the regulation contributed to the younger students' adjustment to college life. The appellate court also rejected the students' right-to-privacy and freedom-of-association challenges. The court gave deference to school authorities' traditionally broad powers in formulating educational policy.

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<sup>41</sup>The cases are collected in Donald M. Zupanec, Annot., "Validity, Under Federal Constitution, of Policy or Regulation of College or University Requiring Students to Live in Dormitories or Residence Halls," 31 A.L.R. Fed. 813. See also Jeffrey F. Ghent, Annot., "Validity and Construction of Statute or Ordinance Forbidding Unauthorized Persons to Enter upon or Remain in School Building or Premises," 50 A.L.R.3d 340.

A similar housing regulation that used an age classification to prohibit certain students from living off campus was at issue in *Cooper v. Nix*, 496 F.2d 1285 (5th Cir. 1974). The regulation required all unmarried full-time undergraduate students, regardless of age and whether or not emancipated, to live on campus. The regulation contained an exemption for certain older students, which in practice the school enforced by simply exempting all undergraduates twenty-three years old and over. Neither the lower court nor the appeals court found any justification in the record for a distinction between twenty-one-year-old students and twenty-three-year-old students. Though the lower court had enjoined the school from requiring students twenty-one and older to live on campus, the appeals court narrowed the remedy to require only that the school not automatically exempt all twenty-three-year-olds. Thus, the school could continue to enforce the regulation if it exempted students over twenty-three only on a case-by-case basis.

A regulation that allowed male students but not female students to live off campus was challenged in *Texas Woman's University v. Chayklintaste*, 521 S.W.2d 949 (Tex. Civ. App. 1975), and found unconstitutional. Though the university convinced the court that it did not have the space or the money to provide on-campus male housing, the court held that mere financial reasons could not justify the discrimination. The court concluded that the university was unconstitutionally discriminating against its male students by not providing them with any housing facilities and also was unconstitutionally discriminating against its female students by not permitting them to live off campus.

The university subsequently made housing available to males and changed its regulations to require both male and female undergraduates under twenty-three to live on campus. Although the regulation was now like the one found unconstitutional in *Cooper*, above, the Texas Supreme Court upheld its constitutionality in a later appeal of *Texas Woman's University v. Chayklintaste*, 530 S.W.2d 927 (Tex. 1975). In this case the university justified the age classification with reasons similar to those used in *Prostrollo*, above. The university argued that on-campus dormitory life added to the intellectual and emotional development of its students and supported this argument with evidence from published research and experts in student affairs.

In *Bynes v. Toll*, 512 F.2d 252 (2d Cir. 1975), another university housing regulation was challenged—in this case a regulation that permitted married students to live on campus but barred their children from living on campus. The court found that there was no denial of equal protection, since the university had several very sound safety reasons for not allowing children to reside in the dormitories. The court also found that the regulation did not interfere with the marital privacy of the students or their natural right to bring up their children.

Housing regulations limiting dormitory visitors have also been constitutionally challenged.<sup>42</sup> In *Futrell v. Ahrens*, 540 P.2d 214 (N.M. 1975), students claimed that a regulation prohibiting visits by members of the opposite sex in

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<sup>42</sup>Cases and authorities are collected in Donald M. Zupanec, Annot., "Validity of Regulation of College or University Denying or Restricting Right of Student to Receive Visitors in Dormitory," 78 A.L.R.3d 1109.

dormitory bedrooms violated their rights of privacy and free association. The regulation did not apply to the lounges or lobbies of the dorms. The court held for the institution, reasoning that even if the regulation affected rights of privacy and association, it was a reasonable time-and-place restriction on exercise of those rights, since it served legitimate educational interests and conformed with accepted standards of conduct.

Taken together, these cases indicate that the courts afford colleges broad leeway in regulating on-campus student housing. An institution may require some students to live on campus; may regulate living conditions to fulfill legitimate health, safety, or educational goals; and may apply its housing policies differently to different student groups. If students are treated differently, however, the basis for classifying them should be reasonable. The cases above suggest that classification based solely on financial considerations may not meet that test. Administrators should thus be prepared to offer sound nonfinancial justifications for classifications in their residence rules—such as the promotion of educational goals, the protection of the health and safety of students, or the protection of other students' privacy interests.

Besides these limits on administrators' authority over student housing, the Constitution also limits public administrators' authority to enter student rooms (see Section 8.4.2) and to regulate solicitation, canvassing, and voter registration in student residences (see Sections 11.4.3 & 11.6.4).

For private as well as public institutions, federal civil rights regulations limit administrators' authority to treat students differently on grounds of race, sex, age, or disability. The Title VI regulations (see Section 13.5.2) apparently prohibit any and all different treatment of students by race (34 C.F.R. §§ 100.3(b)(1)–(b)(5) & 100.4(d)). The Title IX regulations (see Section 13.5.3 of this book) require that the institution provide amounts of housing for female and male students proportionate to the number of housing applicants of each sex, that such housing be comparable in quality and in cost to the student, and that the institution not have different housing policies for each sex (34 C.F.R. §§ 106.32 & 106.33). Furthermore, a provision of Title IX (20 U.S.C. § 1686) states that institutions may maintain single-sex living facilities.

The Section 504 regulations on discrimination against people with disabilities (see Section 13.5.4) require institutions to provide “comparable, convenient, and accessible” housing for students with disabilities at the same cost as for nondisabled students (34 C.F.R. § 104.45). The regulations also require colleges to provide a variety of housing and that students with disabilities be given a choice among several types of housing (34 C.F.R. § 104.45(a)).

A federal court's analysis of a student's religious discrimination challenge to mandatory on-campus residency is instructive. In *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996), an eighteen-year-old first-year student at the University of Nebraska-Kearney challenged the university's policy requiring first-year students to live on campus. Students who were nineteen, married, or living with their parents or legal guardians were expressly excepted from the policy. The rationale for the policy, according to the university, was that it “fosters diversity, promotes tolerance, increases the level of academic achievement, and

improves the graduation rate of its students, [while] ensur[ing] full occupancy of . . . residence halls” (924 F. Supp. at 1543). The student contended that living in the campus residence halls would hinder the free exercise of his religion. Since he did not qualify for exception under any of the enumerated exceptions to the residency policy, he petitioned the university for an ad hoc exception “on the ground that his religious convictions exhort him to live in an environment that encourages moral excellence during [his] college career,” and, to this end, he requested that the university “allow him to live with other students of similar faith in the Christian Student Fellowship facility, across the street from the . . . campus.” The university denied the student’s request, citing its rationale for the residency requirement and finding that nothing in the residence hall environment would hinder the student’s practice of religion.

The court, relying on a U.S. Supreme Court decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Section 1.6.2 of this book), found in favor of the student. It cited the fact that “over one-third of freshman students are excused” from the residency requirement under the enumerated exceptions or under ad hoc exceptions that the university “routinely granted” for other students. The university had, according to the court, created “a system of ‘individualized government assessment’ of the students’ requests for exemptions” from the residency requirement, and had granted numerous exceptions for nonreligious reasons, but had “refused to extend exceptions to freshmen who wish to live at CSF [Christian Student Fellowship] for religious reasons” (924 F. Supp. at 1553). Under *Lukumi Babalu Aye*, therefore, the university’s on-campus residency policy for first-year students was not “generally applicable” or “neutrally applied” to all students and could withstand judicial scrutiny, as applied to Rader, only if the denial of his request for an exception “serves a compelling state interest.”

Although the court agreed that the interests enumerated in the university’s housing policy could be legitimate and important to the state, it found that the university’s implementation of the policy, which allowed more than one-third of the students to be granted exceptions, “undercuts any contention that its interest is compelling.” These interests therefore could not justify the resulting infringement on Rader’s free exercise rights.

Students lodged a claim against Yale University that was similar to the *Rader* claim. This suit was dismissed by a federal district court in *Hack v. The President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998), *affirmed*, 237 F.3d 81 (2d Cir. 2000). Yale requires all unmarried freshman and sophomore students under twenty-two years old to live in campus housing. Four Orthodox Jewish undergraduate students requested exemptions from the housing requirement because all of Yale’s residence halls are coeducational, and the students stated that their religion forbade them to live in a coeducational environment. When the university refused to exempt the students from the housing requirement, they filed a lawsuit claiming that the housing policy violated the U.S. Constitution by interfering with their free exercise of religion, that it also violated the Fair Housing Act (FHA) and the Sherman Antitrust Act, and that it constituted a breach of contract.

The court dismissed the students' constitutional claims, ruling that Yale was a private university and not subject to constitutional restrictions. The students had claimed that, because the governor and lieutenant governor of Connecticut were *ex officio* members of Yale's governing body, the university was a state actor. Citing *Lebron v. National Passenger R.R. Corp.*, 513 U.S. 374 (1995) (Section 1.5.2 of this book), the court ruled that having two public officials on a governing board of nineteen was insufficient under the test articulated in *Lebron* to constitute state action. The court then ruled that the plaintiffs did not have standing to sue under the Fair Housing Act because Yale had not refused to provide housing to the students on the basis of their religion; it had provided them housing that they had paid for, but in which they refused to live.

With respect to the antitrust claim, the court ruled that the students' complaint had not specifically stated whether the tying market (see Section 13.2.8) that Yale was alleged to be attempting to monopolize was "a general university education or an Ivy League education" (16 F. Supp. 2d at 195). Furthermore, said the court, the plaintiffs had not identified the relevant market at issue; substitutes for Yale's campus housing could be obtained by attending a different university. Despite the plaintiffs' attempt to argue that the outcome in the Hamilton College antitrust case (Section 10.2.2) protected their claim against dismissal, the court responded that the Hamilton College case merely established that a private college affected interstate commerce, and that the plaintiff's failure to define the relevant market alleged to be monopolized by Yale doomed their complaint to failure.

In *Fleming v. New York University*, 865 F.2d 478 (2d Cir. 1989), a graduate student who used a wheelchair claimed that the university overcharged him for his room, in violation of Section 504 of the Rehabilitation Act. The trial court dismissed his claim, and the appellate court affirmed. The student had requested single occupancy of a double room as an undergraduate; the university charged him twice the rate that a student sharing a double room paid. After intervention by the U.S. Office for Civil Rights, the university modified its room charge to 75 percent of the rate for two students in a room.

When the student decided to enroll in graduate school at the university, he asked to remain in the undergraduate residence hall. The university agreed, and charged him the 75 percent fee. However, because of low occupancy levels in the graduate residence halls, graduate students occupying double rooms there were charged a single-room rate. When the student refused to pay his room bills, the university withheld his master's degree. The court ruled that the student's claim for his undergraduate years was time barred. The claim for disability discrimination based on the room charges during his graduate program was denied because the student had never applied for graduate housing; he had requested undergraduate housing. There was no discriminatory denial of cheaper graduate housing, the court said, because the student never requested it.

The Age Discrimination Act regulations (see Section 13.5.5) apparently apply to discrimination by age in campus housing. As implemented in the general regulations, the law apparently limits administrators' authority to use explicit age

distinctions (such as those used in *Cooper v. Nix* and *Texas Woman's University v. Chayklintaste*) in formulating housing policies. Policies that distinguish among students according to their class (such as those used in *Prostrollo v. University of South Dakota*) may also be prohibited by the Age Discrimination Act, since they may have the effect of distinguishing by age. Such age distinctions will be prohibited (under § 90.12 of the general regulations) unless they fit within one of the narrow exceptions specified in the regulations (in §§ 90.14 & 90.15) or constitute affirmative action (under § 90.49) (see generally Sections 13.5.5 & 13.5.6 of this book). The best bet for fitting within an exception may be the regulation that permits age distinctions “necessary to the normal operation . . . of a program or activity” (§ 90.14). But administrators should note that the four-part test set out in the regulation carefully circumscribes this exception. For policies based on the class of students, administrators may also be helped by the regulation that permits the use of a nonage factor with an age-discriminatory effect “if the factor bears a direct and substantial relationship to the normal operation of the program or activity” (§ 90.15).

The Fair Housing Act prohibits discrimination in housing on the basis of “familial status” (42 U.S.C. § 3604 (1989)). This statute may create rights for married students greater than they are afforded under the Constitution in cases such as *Bynes v. Toll* above. A case brought under both the Fair Housing Act and Title IX of the Education Amendments of 1972 (Section 13.5.3), although subsequently vacated for lack of jurisdiction, suggests a potential source of liability for colleges and landlords of off-campus housing. In *Wilson v. Glenwood Intermountain Properties, Inc.*, 876 F. Supp. 1231 (D. Utah 1995), *vacated*, 98 F.3d 590 (10th Cir. 1996), the trial court rejected claims by two nonstudent plaintiffs that the housing regulations of Brigham Young University (BYU) violated these laws and that the actions of landlords, who had entered into agreements with BYU to segregate their housing by gender and to rent only to BYU students, also violated the Fair Housing Act. The litigation involved claims of discrimination on the basis of gender, religion, and familial status. Regarding gender, the plaintiffs claimed that the landlords’ segregation of tenants by gender violated the FHA requirement that landlords offer nondiscriminatory “terms, conditions, and privileges” in the rental of housing; and that the landlords’ advertisements, which noted that they rented only to male, or only to female, BYU students, discriminated against them on the basis of gender.

The trial court dismissed the claims involving religious discrimination and discrimination with respect to advertising on jurisdictional grounds, but ruled on the plaintiffs’ other gender discrimination claim on the merits, awarding summary judgment to the defendants. The appellate court vacated the lower court’s judgment and remanded the case with instructions to dismiss, ruling that the plaintiffs lacked standing to challenge the landlords’ practices as a form of gender discrimination. Preliminarily, the court stated, renting only to students does not violate the Fair Housing Act, so the plaintiffs lacked standing because, as nonstudents, they would not be eligible to rent from these landlords even if they could meet the gender requirements. But the court carefully examined the claim of discriminatory advertising (which the trial court had dismissed with

very little analysis), stating that, had the plaintiffs alleged that they had been injured by the gender-exclusive advertising, they may have been able to state a claim. Because no such injury had been shown, the existence of the “discriminatory” advertising, by itself, was insufficient to confer standing on the plaintiffs to challenge the landlords’ actions under the Fair Housing Act.

Another group protesting discrimination in housing policies are same-sex couples. These couples have claimed that because they are not allowed to marry, they are unfairly excluded from a benefit extended to married students. Furthermore, since many colleges and universities prohibit discrimination on the basis of sexual orientation, gay couples have argued that denying them housing violates the institution’s nondiscrimination regulations. Several universities, including the University of Pennsylvania and Stanford University, have provided university housing to unmarried couples, including those of the same sex.

In *Levin v. Yeshiva University*, 691 N.Y.S.2d 280 (Sup. Ct. N.Y. 1999), *affirmed*, 709 N.Y.S.2d 392 (N.Y. App. Div. 2000), *affirmed in part and modified in part*, 96 N.Y.2d 484 (N.Y. 2001), a same-sex couple who were medical students at the university wished to live in university housing that was reserved for married students, their spouses, and dependent children. The medical school requires proof of marriage in order for spouses to live with students in campus apartments. The plaintiffs had been offered student housing, but were not permitted to live together. They argued that they were in a long-term committed relationship and that the medical school’s housing regulations violated the New York State Roommate Law (Real Property Law § 235-f); the New York State and New York City Human Rights Laws (Exec. L. §§ 296(2-a), 296(4), & 296(5)); and the N.Y.C. Admin. Code § 8-197(5)) because the regulations discriminated against the plaintiffs on the basis of their marital status. They also argued that the housing regulations had a discriminatory impact upon them because they were homosexuals.

The trial court rejected all the plaintiffs’ claims. Regarding marital status discrimination, the court cited New York case law that permitted landlords to “recogniz[e] the institution of marriage and distinguish[ ] between married and unmarried couples” [691 N.Y.S.2d at 282]. The plaintiffs were not denied housing by the medical school, said the court—they were provided the same type of housing for which other single students were eligible. Furthermore, New York appellate courts had ruled that a domestic partnership was not a marriage for purposes of health benefits for public school teachers. Regarding the disparate impact claim, the court repeated that the plaintiffs had been given housing by the medical school, and that Yeshiva University was not responsible for the fact that they could not marry.

Finally, the court rejected the claim under New York’s roommate law that allows tenants to live with their spouses and children, or with friends of their own choosing. This law was not intended to cover college housing, according to the court, because college housing is short term, available only as long as the tenants are students, provided as a benefit and a convenience to students, and offered at below-market rates.



The students appealed, and although the appellate court affirmed the trial court's ruling in all respects, the students' subsequent appeal to New York's highest court was somewhat more successful. Although the high court affirmed the lower courts' rulings on the marital status discrimination, they reinstated the plaintiffs' cause of action claiming that the housing policy had a disparately disproportionate impact on homosexuals, a potential violation of New York City's Human Rights Law.

Many colleges have established "theme" housing linked to linguistic or cultural groups. Questions have arisen as to whether these residences, which may not be, or may be perceived not to be, open to all students, violate civil rights laws. The U.S. Department of Education has determined that Cornell University did not violate Title VI of the Civil Rights Act of 1964 (Section 13.5.2) by creating "ethnic program houses," which are residence halls whose residents are predominantly members of a particular race or ethnic group. The positive ruling was premised on the understanding that admission to the residences was not restricted to a particular race or ethnic group (Karla Haworth, "Education Department Finds No Civil-Rights Violations at Cornell's Ethnic Houses," *Chron. Higher Educ.*, October 4, 1996, A45).

Regarding tort liability, residential colleges and universities may wish to consider that requiring students to live in student housing may create a duty to protect them from foreseeable harm, even if the housing is not owned by the university (see generally Section 8.6.2). For an example, see *Knoll v. Board of Regents of the University of Nebraska* (Section 8.6.2.), which discusses institutional liability for an off-campus injury that occurred in a fraternity house subject to the college's student housing policies.

**8.4.2. Searches and seizures.** The Fourth Amendment secures an individual's expectation of privacy against government encroachment by providing that:

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.

Searches or seizures conducted pursuant to a warrant meeting the requirements of this provision are deemed reasonable. Warrantless searches may also be found reasonable if they are conducted with the consent of the individual involved, if they are incidental to a lawful arrest, or if they come within a few narrow judicial exceptions, such as an emergency situation.

The applicability of these Fourth Amendment mandates to postsecondary institutions has not always been clear. In the past, when administrators' efforts to provide a "proper" educational atmosphere resulted in noncompliance with the Fourth Amendment, the deviations were defended by administrators and often upheld by courts under a variety of theories. While the previously common justification of *in loco parentis* is no longer appropriate (see Section 8.1.1),

several remaining theories retain vitality. The leading case of *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971), provides a good overview of these theories and their validity.

In *Piazzola*, the dean of men at a state university, at the request of the police, pledged the cooperation of university officials in searching the rooms of two students suspected of concealing marijuana there. At the time of the search, the university had the following regulation in effect: "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary, the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed." The students' rooms were searched without their consent and without a warrant by police officers and university officials. When police found marijuana in each room, the students were arrested, tried, convicted, and sentenced to five years in prison. The U.S. Court of Appeals for the Fifth Circuit reversed the convictions, holding that "a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment" and that the warrantless searches were unreasonable and therefore unconstitutional under that amendment.

*Piazzola* and similar cases establish that administrators of public institutions cannot avoid the Fourth Amendment simply by asserting that a student has no reasonable expectation of privacy in institution-sponsored housing. (Compare *State v. Dalton*, 716 P.2d 940 (Wash. Ct. App. 1986).) Similarly, administrators can no longer be confident of avoiding the Fourth Amendment by asserting the *in loco parentis* concept or by arguing that the institution's landlord status, standing alone, authorizes it to search to protect its property interests. Nor does the landlord status, by itself, permit the institution to consent to a search by police, since it has been held that a landlord has no authority to consent to a police search of a tenant's premises (see, for example, *Chapman v. United States*, 365 U.S. 610 (1961)).

However, two limited bases remain on which administrators of public institutions or their delegates can enter a student's premises uninvited and without the authority of a warrant.<sup>43</sup> Under the first approach, the institution can obtain the student's general consent to entry by including an authorization to enter in a written housing agreement or in housing regulations incorporated in the housing agreement. But, according to *Piazzola*, the institution cannot require the student to waive his or her Fourth Amendment protections as a condition of occupying a residence hall room.

Thus, housing agreements or regulations must be narrowly construed to permit only such entry and search as is expressly provided, and in any case

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<sup>43</sup>In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the U.S. Supreme Court created a judicial exception to the warrant requirement for certain searches of public school students. However, the Court's opinion directly applies only to public elementary and secondary schools. Moreover, the opinion applies (1) only to searches of the person or property (such as a purse) carried on the person, as opposed to searches of dormitory rooms, lockers, desks, or other such locations (469 U.S. at 337, n.5), and (2) only to "searches carried out by school authorities acting alone and on their own authority," as opposed to "searches conducted by school officials in conjunction with or at the behest of law enforcement agencies" (469 U.S. at 341, n.7).

to permit only entries undertaken in pursuit of an educational purpose rather than a criminal enforcement function. *State v. Hunter*, 831 P.2d 1033 (Utah App. 1992), illustrates the type of search that may come within the *Piazzola* guidelines. The director of housing at Utah State University had instigated and conducted a room-to-room inspection to investigate reports of vandalism on the second floor of a dormitory. Upon challenge by a student in whose room the director discovered stolen university property in plain view, the court upheld the search because the housing regulations expressly authorized the room-to-room inspection and because the inspection served the university's interest in protecting university property and maintaining a sound educational environment.

Under the second approach to securing entry to a student's premises, the public institution can sometimes conduct searches (often called "administrative searches") whose purpose is to protect health and safety—for instance, to enforce health regulations or fire and safety codes. Although such searches, if conducted without a student's consent, usually require a warrant, it may be obtained under less stringent standards than those for obtaining a criminal search warrant. The leading case is *Camara v. Municipal Court*, 387 U.S. 523 (1967), where the U.S. Supreme Court held that a person cannot be prosecuted for refusing to permit city officials to conduct a warrantless code-enforcement inspection of his residence. The Court held that such a search required a warrant, which could be obtained "if reasonable legislative or administrative standards for conducting an area inspection are satisfied"; such standards need "not necessarily depend upon specific knowledge of the condition of the particular dwelling."

In emergency situations where there is insufficient time to obtain a warrant, health and safety searches may be conducted without one. The U.S. Supreme Court emphasized in the *Camara* case (387 U.S. at 539) that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." Although a warrantless search based upon the possibility of a health or safety problem may be permissible under the Fourth Amendment, this exception is a narrow one. The Supreme Judicial Court of Massachusetts determined that a warrantless search of a residence hall room by campus police at Fitchburg State College violated the Fourth Amendment to the U.S. Constitution. In *Commonwealth v. Neilson*, 666 N.E.2d 984 (Mass. 1996), a student challenged his arrest for illegal possession of marijuana, asserting that the search of his room was unconstitutional. Neilson had signed a residence hall contract providing that student life staff members could enter student rooms to inspect for health or safety hazards. A maintenance worker believed he heard a cat inside a four-bedroom suite; one of the bedrooms was occupied by Neilson. The maintenance worker reported the sound to college officials, who visited the suite and informed the occupants that no cats were permitted in university housing. The official posted notices on the bedroom doors of the suite, stating that a "door-to-door check" would be held that night to ensure that no cat was present. When the officials returned, Neilson was not present. They searched his bedroom, and noticed that

the closet light was on. Because they were concerned that there might be a fire hazard, they opened the door and discovered two 4-foot marijuana plants growing under the light. At that point, the campus police were called; they arrived, took pictures of the marijuana, and removed it from the room. No search warrant was obtained at any time.

The court stated that the initial search (to locate the cat) was reasonable, as was the decision to open the closet door, since it was based upon a concern for the students' safety. The constitutional violation occurred, according to the court, when the campus police arrived and seized the evidence without a warrant or the consent of Neilson. Neilson, in the residence hall contract, had consented to student life officials entering his room, but had not consented to campus police doing so. Furthermore, the "plain view" doctrine did not apply in this case because the campus police were not lawfully present in Neilson's room. The plain view doctrine allows a law enforcement officer to seize property that is clearly incriminating evidence or contraband when that property is in "plain view" in a place where the officer has a right to be. The court therefore concluded that all evidence seized by the campus police was properly suppressed by the trial judge.

Before entering a room pursuant to the housing agreement or an administrative (health and safety) search, administrators should usually seek to notify and obtain the specific consent of the affected students when it is feasible to do so. Such a policy not only evidences courtesy and respect for privacy but would also augment the validity of the entry in circumstances where there may be some doubt about the scope of the administrator's authority under the housing agreement or the judicial precedents on administrative searches.

A state appellate court ruled that a "dormitory sweep policy" is *prima facie* unconstitutional. In *Devers v. Southern University*, 712 So. 2d 199 (La. Ct. App. 1998), the court addressed the legality of the university's policy, which stated: "The University reserves all rights in connection with assignments of rooms, inspection of rooms with police, and the termination of room occupancy." The plaintiff, Devers, was arrested when twelve bags of marijuana were discovered in his dormitory room. The drugs were found by university administrators and police officers during a "dormitory sweep" that the university stated was authorized by its housing policy. Devers was expelled from the university after a hearing in which the student judicial board found him guilty of violating the student code of conduct. Devers sued the university, claiming that the search violated the Fourth Amendment. Although the university reached a settlement with Devers with respect to his expulsion (it was reduced to a one-term suspension), his constitutional claim was not settled.

The trial court held that the housing regulation was *prima facie* unconstitutional, and the appellate court affirmed. The court distinguished *State v. Hunter* because the wording of the housing regulation in *Hunter* differed from the language adopted by Southern University. The regulation in *Hunter* authorized entry into students' dormitory rooms for maintaining students' health and safety, for maintaining university property, and for maintaining discipline. Southern's regulation was broader, and would allow unauthorized entry into a student's room

for any purpose. The court also distinguished *Piazzola v. Watkins* because its regulation did not authorize searches by police, as did Southern's. The court noted that Southern "has many ways to promote the safety interests of students, faculty and staff" without using warrantless police searches.

In addition to these two limited approaches (housing agreements and administrative searches) to securing entry, other even narrower exceptions to Fourth Amendment warrant requirements may be available to security officers of public institutions who have arrest powers. Such exceptions involve the intricacies of Fourth Amendment law on arrests and searches (see generally *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). The case of *State of Washington v. Chrisman*, 455 U.S. 1 (1982), is illustrative. A campus security guard at Washington State University had arrested a student, Overdahl, for illegally possessing alcoholic beverages. The officer accompanied Overdahl to his dormitory room when Overdahl offered to retrieve his identification. Overdahl's roommate, Chrisman, was in the room. While waiting at the doorway for Overdahl to find his identification, the officer observed marijuana seeds and a pipe lying on a desk in the room. The officer then entered, confirmed the identity of the seeds, and seized them. Chrisman was later convicted of possession of marijuana and LSD, which security officers also found in the room.

By a 6-to-3 vote, the U.S. Supreme Court applied the "plain view" exception to the Fourth Amendment and upheld the conviction. The Court determined that, since an arresting officer has a right to maintain custody of a subject under arrest, this officer lawfully could have entered the room with Overdahl and remained at Overdahl's side for the entire time Overdahl was in the room. Thus, the officer not only had the right to be where he could observe the drugs; he also had the right to be where he could seize the drugs. According to the Court,

It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a right to be in any of these places as an incident of a valid arrest. . . . This is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy.

*Chrisman* thus recognizes that a security officer may enter a student's room "as an incident of a valid arrest" of either that student or his roommate. The case also indicates that an important exception to search warrant requirements—the plain view doctrine—retains its full vitality in the college dormitory setting. The Court accorded no greater or lesser constitutional protection from search and seizure to student dormitory residents than to the population at large. Clearly, under *Chrisman*, students do enjoy Fourth Amendment protections on campus; but, just as clearly, the Fourth Amendment does not accord dormitory students special status or subject campus security officials to additional restrictions that are not applicable to the nonacademic world.

The Supreme Court placed an important restriction on the plain view doctrine in *Arizona v. Hicks*, 480 U.S. 321 (1987). A police officer, who had entered an apartment lawfully for Fourth Amendment purposes, noticed some stereo equipment that he believed might be stolen. He moved the equipment slightly

to locate the serial numbers and later ascertained that the equipment was, in fact, stolen. The Court ruled that the search and seizure were unlawful because the police officer did not have probable cause to believe the equipment was stolen—only a reasonable suspicion, which is insufficient for Fourth Amendment purposes.

Administrators at private institutions are generally not subject to Fourth Amendment restraints, since their actions are usually not state action (Section 1.5.2). But if local, state, or federal law enforcement officials are in any way involved in a search at a private institution, such involvement may be sufficient to make the search state action and therefore subject to the Fourth Amendment. In *People v. Boettner*, 362 N.Y.S.2d 365 (N.Y. Sup. Ct. 1974), *affirmed*, 376 N.Y.S.2d 59 (N.Y. App. Div. 1975), for instance, the question was whether a dormitory room search by officials at the Rochester Institute of Technology, a private institution, was state action. The court answered in the negative only after establishing that the police had not expressly or implicitly requested the search; that the police were not aware of the search; and that there was no evidence of any implied participation of the police by virtue of a continuing cooperative relationship between university officials and the police. A similar analysis, and similar result, occurred in *State v. Nemser*, 807 A.2d 1289 (N.H. 2002), when the court refused to suppress evidence of drugs seized by a Dartmouth College security officer because the college's residence hall search policy had not been approved or suggested by the local police. A Virginia appellate court reached a similar conclusion in *Duarte v. Commonwealth*, 407 S.E.2d 41 (Va. Ct. App. 1991), because the dean of students at a private college had told college staff to search the plaintiff's room, and police were not involved in the search. And in *State v. Burroughs*, 926 S.W.2d 243 (Tenn. 1996), the Tennessee Supreme Court ruled that a warrantless search of a dormitory room by a director of residence life at Knoxville College, a private institution, did not involve state action, and thus his removal of drug paraphernalia and other evidence did not violate the student's Fourth Amendment rights. The court noted that the student handbook and housing contract both forbid the possession or use of alcohol and drugs, and gave the residence hall director authority to search student rooms. Moreover, noted the court, the search was conducted by a college official, not a police officer, to further the educational objectives of the college, not to enforce the criminal law.

(For a comprehensive analysis of the application of search and seizure law to colleges, see Jan Alan Neiger, "An Overview of Search and Seizure Law on Campus," *Synthesis: Law and Policy in Higher Education*, Vol. 12, no. 4 (Spring 2001). See also Kristal Otto Stanley, "The Fourth Amendment and Dormitory Searches—A New Truce," 65 *U. Chicago L. Rev.* 1403 (1998).)

## **Sec. 8.5. Campus Computer Networks**

**8.5.1. Freedom of speech.** Increasingly, free speech on campus is enhanced, and free speech issues are compounded, by the growth of technology. Cable and satellite transmission technologies, for instance, have had such

effects on many campuses. But the clearest and most important example—now and for the foreseeable future—is computer communications technology. Computer labs, laptops, campus local area networks (LANs), servers, and Internet gateways have assumed a pervasive presence on most campuses, and are used increasingly by the campus community for e-mail communications, discussion groups, Web pages, research, access to information on campus programs and services, and entertainment. Students—the focus of this Section—may be both senders (speakers) and receivers (readers); their purposes may be related to coursework or extracurricular activities, or may be purely personal; and their communications may be local (within the institution) or may extend around the world.

As the amount, variety, and distance of computer communications have increased, so have the development of institutional computer use policies and other institutional responses to perceived problems. The problems may be of the “traffic cop” variety, occasioning a need for the institution to allocate its limited computer resources by directing traffic to prevent traffic jams. Or the problems may be more controversial, raising computer misuse issues such as defamation, harassment, threats, hate speech, copyright infringement, and academic dishonesty. The latter types of problems may present more difficult legal issues, since institutional regulations attempting to alleviate these problems may be viewed as content-based restrictions on speech.

Public institutions, therefore, must keep a watchful eye on the First Amendment when drafting and enforcing computer use policies. Just as federal and state legislation regulating computer communications may be invalidated under the free speech and press clauses (see Section 13.2.12), particular provisions of campus regulations can be struck down as well if they contravene these clauses. Private institutions are not similarly bound (see *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025–27 (S.D. Ohio 1997); and see generally Section 1.5.2). Yet private institutions may voluntarily protect student free expression through student codes or bills of rights, or computer use policies themselves, or through campus custom—and may occasionally be bound to protect free expression by state constitutions, statutes, or regulations; thus administrators at private institutions will also want to be keenly aware of First Amendment developments regarding computer speech.<sup>44</sup>

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<sup>44</sup>In addition to freedom of expression concerns, computer communications also present personal privacy concerns to which colleges and universities should be attentive. See, for example, Constance Hawk, *Computer and Internet Use on Campus* (Jossey-Bass, 2001), Ch. 3 (“Privacy Issues in Electronic Communications”), 81–117. Public institutions, for instance, should be aware of the Fourth Amendment implications of searching students’ personal computer files (see generally Sections 7.1.1 & 7.1.4), and both public and private institutions should be aware of privacy rights concerning computerized records that students may have under FERPA (see generally Section 9.7.1 of this book) and privacy rights concerning computer communications that students may have under the Electronic Communications Privacy Act (ECPA) (see generally Section 13.2.12.2 of this book). In addition, state statutes (many similar to the federal ECPA) and state common law principles may protect the privacy of students’ computer communications in certain circumstances.

Under existing First Amendment principles (see generally Sections 9.5.1, 9.5.2, & 9.6.2), administrators should ask four main questions when devising new computer use policies, or when reviewing or applying existing policies:

1. Are we seeking to regulate, or do we regulate, the *content* of computer speech (“cyberspace speech”)?
2. If any of our regulations are content based, do they fit into any First Amendment exceptions that permit content-based regulations—such as the exceptions for obscenity and “true threats”?
3. (a) Does our institution own or lease the computer hardware or software being used for the computer speech; and (b) if so, has our institution created “forums” for discussion on its computer servers and networks?
4. Are our regulations or proposed regulations clear, specific, and narrow?

For *question 1*, if a computer use policy regulates the content of speech—that is, the ideas, opinions, or viewpoints expressed—and does not fall into any of the exceptions set out below under question 2, the courts will usually subject the regulation to a two-part standard of “strict scrutiny”: (1) Does the content regulation further a “compelling” governmental interest, and (2) is the regulation “narrowly tailored” and “necessary” to achieve this interest? (See, for example, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563–68 (E.D. Va. 1998), discussed below in this subsection.) The need to act in cases of copyright infringement, bribery, fraud, blackmail, stalking, or other violations of federal and state law may often be considered compelling interests, as may the need to protect the institution’s academic integrity when computers are used for “cheating.” In *Mainstream Loudoun* (above) the court also assumed “that minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment are compelling government interests” (24 F. Supp. 2d at 565). Regulations furthering such interests may therefore meet the strict scrutiny standard if they are very carefully drawn.<sup>45</sup> But otherwise this standard is extremely difficult to meet. In contrast, if a computer regulation serves “neutral” government interests not based on the content of speech (for example, routine “traffic cop” regulations), a less stringent and easier to meet standard would apply.

In *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp 1228 (N.D. Ga. 1997), for instance, a federal district court in Georgia considered the validity of a state statute prohibiting data transmitters from falsely identifying themselves in Internet transmissions (Georgia Code Ann. § 16-9-93.1). In invalidating the Georgia statute, the court emphasized that a “prohibition of

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<sup>45</sup>As an adjunct to strict scrutiny analysis, courts may also apply the prior restraint doctrine to some content-based restrictions. In *Mainstream Loudoun* (discussed below in the text of this subsection), for instance, the court determined that the blocking of Internet sites was an unconstitutional prior restraint because the blocking policy included neither sufficient standards nor adequate procedural safeguards (24 F. Supp. 2d at 568–70).



Internet transmissions which ‘falsely identify’ the sender constitutes a presumptively invalid content-based restriction” on First Amendment rights. Recognizing that there is a “right to communicate anonymously and pseudonymously over the Internet” (977 F. Supp. at 1230), the court held that the state may not blanketly prohibit all Internet transmissions in which speakers do not identify themselves or use some pseudonym in place of an accurate identification. The court in *Miller* also held, however, that “fraud prevention . . . is a compelling state interest.” Thus, if speakers were to use anonymity or misidentification in order to defraud the receivers of their Internet messages, then prohibition of false identification would be appropriate so long as the regulation is narrowly tailored to meet the fraud prevention objective. The court suggested that, in order to be narrowly tailored, a regulation must, at a minimum, include a requirement that the speaker has intended to deceive or that deception has in fact occurred (977 F. Supp. at 1232). Thus, for instance, if a public institution were to promulgate narrowly tailored regulations that prohibit speakers from intentionally “misappropriat[ing] the identity of another specific entity or person” (977 F. Supp. at 1232), such regulations would apparently be a valid content-based restriction on speech.

Regarding *question 2*, if a restriction on computer speech is content based, and thus presumptively invalid under the strict scrutiny standard of review, it would still be able to survive if it falls into one of the exceptions to the First Amendment prohibition against content-based restrictions on expression. All these exceptions are technical and narrow, and collectively would cover only a portion of the computer speech institutions may wish to regulate, but in certain cases these exceptions can become very important. One pertinent example is obscenity, which is recognized in numerous cases, including computer cases, as a First Amendment exception (see Sections 10.3.4 & 13.2.12). Another related exception is child pornography, which need not fall within the U.S. Supreme Court’s definition of obscenity to be prohibited, but instead is subject to the requirements that the Court established in *New York v. Ferber*, 458 U.S. 747 (1982). The exception for false or deceptive commercial speech, and commercial speech that proposes unlawful activities, is also pertinent to computer speech (see *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–64 (1980)), as is the exception for “true threats” that was established in *Watts v. United States*, 394 U.S. 705 (1969), and further developed in *Virginia v. Black* (see Section 9.6.2 of this book).<sup>46</sup>

It is the exception for “true threats” that has received the greatest amount of attention in contemporary cyberspeech cases. In *United States v. Alkhabaz aka Jake Baker*, 104 F.3d 1492 (6th Cir. 1997) (*affirming on other grounds*,

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<sup>46</sup>There is also an exception for “fighting words,” but since this exception is narrowly defined to include only face-to-face communications, it has no apparent application to cyberspeech. Defamatory speech and speech that constitutes incitement may also be regulated, but the analysis is different than for the “exceptions” or “categorical exceptions” just discussed. See generally William Kaplin, *American Constitutional Law* (Carolina Academic Press, 2004), Ch. 12, Secs. C.2(1), D.1, & D.2. Incitement analysis, and the difference between incitement and advocacy, are addressed in the *American Coalition of Life Advocates* case discussed below in this subsection.

890 F. Supp. 1375 (E.D. Mich. 1995)), for example, and again in *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001), courts struggled with whether particular computer communications were threats for the purposes of 18 U.S.C. § 875(c) (see Section 13.2.12.3 of this book). Ultimately, using a combination of statutory and constitutional analysis, the courts concluded that Baker's e-mail messages in the first case were not threats for purposes of the federal statute, but Morales's chat room postings in the second case were threats for purposes of the statute. Another instructive example, providing more fully developed First Amendment analysis, is the case of *Planned Parenthood of Columbia/Willamette, Inc., et al. v. American Coalition of Life Advocates, et al.*, 290 F.3d 1058 (9th Cir. 2002).

The defendants in the *American Coalition of Life Advocates (ACLA)* case were organizations and individuals engaged in anti-abortion activities, and the plaintiffs included physicians claiming that they had been threatened and intimidated by these activities. On a Web site operated by a third party, the ACLA had posted the names and addresses of numerous doctors that the posting identified as abortionists. Those doctors on the list who had been murdered, allegedly by anti-abortionists, were particularly noted, as were those doctors who had been wounded. These listings in the "score card" of murders and woundings were labeled as the "Nuremberg Files." Before posting these materials on the Web site, the ACLA had also circulated "wanted posters" containing similar information, and, in fact, three physicians had been murdered after being featured on a wanted poster. The court emphasized the importance of understanding the defendants' messages in the context in which they were made, and that the relevant context included both the wanted posters and the Web site postings, as well as the pattern of murders of physicians whose names had been featured in these communications. Analyzing the speech in context, the court determined that the First Amendment's free speech clause did not protect the defendants because the speech could be considered to be a "death threat message" and therefore a "true threat" within the meaning of *Watts v. United States*. "If ACLA had merely endorsed or encouraged violent reactions of others, its speech would be protected. However, while advocating violence is protected, threatening a person with violence is not" (290 F.3d at 1072).

The court articulated this useful guideline for determining when speech constitutes a true threat and is therefore unprotected by the First Amendment: "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault" (290 F.3d at 1074, citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). Applying this test, the court emphasized that physicians on the lists of abortionists "wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families." ACLA "had every reason to foresee that its expression of intent to harm" through the wanted posters and the Web site "would elicit this reaction." The physicians' fears "did not simply happen; ACLA intended to intimidate them from doing

what they do. This . . . is conduct that we are satisfied lacks any protection under the First Amendment. . . . ACLA was not staking out a position of debate but of threatened demise” (290 F.3d at 1086).

Regarding *question 3*, institutions may put themselves in a stronger regulatory position regarding student cyberspeech if they only restrict communications on *the institutions’* computers, servers, or networks; and if they structure student use in a way that does not create a “public forum” (see generally Section 9.5.2 of this book). The First Amendment standards would be lower and would generally permit content-based restrictions (regardless of whether they fall into one of the exceptions discussed above) other than those based on the particular viewpoint of the speaker. But if the institution, for policy reasons, chooses to use some portion of its computers, servers, or networks as an open “forum” for expression by students or by the campus community, then the normal First Amendment standards would apply, including the presumption that content-based restrictions on speech are unconstitutional. (See Joseph Beckham & William Schmid, “Forum Analysis in Cyberspace: The Case of Public Sector Higher Education,” 98 *West’s Educ. Law Rptr.* 11 (May 18, 1995).) The public forum concept is no longer limited to physical spaces or locations and apparently extends to “virtual” locations as well. In *Rosenberger v. Rector and Visitors of University of Virginia* (Section 10.1.5), for instance, the U.S. Supreme Court declared a student activities fund to be a public forum, subject to the same legal principles as other public forums, even though it was “a forum more in a metaphysical than a spatial or geographic sense . . .” (515 U.S. at 830).

*Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997), provided the first illustration of public forum analysis being applied to a university computer system. The University of Oklahoma was concerned that some of the Internet news groups on the university news server were carrying obscene material. Consequently, the university adopted an access policy under which the university operated two news servers, A and B. The A server’s content was limited to those news groups that had not been “blocked” or disapproved by the university; the B server’s news group content was not limited. The A server was generally accessible to the university community for recreational as well as academic purposes; the B server could be used only for academic and research purposes, and then only by persons over age eighteen. Although the court rejected a free speech clause challenge to this policy, it did so on the basis of conclusory reasoning that reflects an incomplete understanding of the public forum doctrine. One conclusion the court reached, however, does appear to be valid and important: the restriction of the B server to academic and research purposes does not violate the First Amendment because “[a] university is by its nature dedicated to research and academic purposes” and “those purposes are the very ones for which the [computer] system was purchased” (956 F. Supp. at 955). The court apparently reached this conclusion because it did not view any part of the university’s computer services as a public forum. The better view, however, is probably that the B server is a “limited forum” that the university has dedicated to academic use by restricting the purposes of use rather than the content as such. On this reasoning, the court should have proceeded to give separate

consideration to the question of whether the A server was a public forum and, if so, whether its content could be limited as provided in the university's policy.<sup>47</sup>

A later case, *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), provides better guidelines for determining whether a computer system's server or network is a public forum. The defendant library system had installed site-blocking software on its computers to prevent patrons from using these computers to view sexually explicit material on the Internet. The issue was whether the library's restrictions were subject to the strict scrutiny standards applicable to a "limited public forum," or to the lesser standards applicable to a "non-public forum." The court indicated that there are three "crucial factors" to consider in making such a determination: (1) whether the government, by its words and actions, displayed an intent to create a forum; (2) whether the government has permitted broad use of the forum it has created and "significantly limited its own discretion to restrict access"; and (3) "whether the nature of the forum is compatible with the expressive activity at issue" (24 F. Supp. 2d at 562–62). Using these factors, the court determined that the public library system was a limited public forum, that is, a public forum "for the limited purposes of the expressive activities [it] provide[s], including the receipt and communication of information through the Internet." Being a public forum, the library system's restriction on computer communications was subject to strict scrutiny analysis (see above in this subsection), which it could not survive; the restriction was therefore invalid under the First Amendment.

Under *question 4* in the list above, the focus is on the actual wording of each regulatory provision in the computer use policy. Even if a particular provision has been devised in conformance with the First Amendment principles addressed in questions 1, 2, and 3, it must in addition be drafted with a precision sufficient to meet constitutional standards of narrowness and clarity. If it does not, it will be subject to invalidation under either the "overbreadth" doctrine or the "vagueness" doctrine (see generally Sections 9.5.1, 9.5.3., & 9.5.6 of this book).

In *American Civil Liberties Union v. Miller* (above), for instance, the court determined that the language of the Georgia statute presented both overbreadth problems and vagueness problems. Regarding overbreadth, the court remarked that "the statute was not drafted with the precision necessary for laws regulating speech" because it "prohibits . . . the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy," all of which are protected speech activities. The statute was thus "overbroad because it operates unconstitutionally for a substantial category of the speakers it covers" (977 F. Supp. at 1233). Similarly, regarding vagueness,

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<sup>47</sup>There were also other potential issues that the court did not address separately: whether the B server could be restricted to persons over age eighteen (see generally *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in Section 13.2.12.2); and whether the standards and procedures for blocking materials from the A server were constitutionally sufficient (see the *Mainstream Loudoun* case, footnote 39, above in this subsection; and see generally Section 10.3.4).

the court determined that the statute's language did not "give fair notice of proscribed conduct to computer network users," thus encouraging "self-censorship"; and did not give adequate guidance to those enforcing the statute, thus allowing "substantial room for selective [enforcement against] persons who express minority viewpoints" (977 F. Supp. at 1234).

One may fairly ask whether all the preexisting First Amendment principles referenced in questions 1 through 4 should apply to the vast new world of cyberspace. Indeed, scholars and judges have been debating whether free speech and press law should apply in full to computer technology. (See, for example, Lawrence Lessig, "The Path of Cyberlaw," 104 *Yale L.J.* 1743 (1995); Timothy Wu, "Application-Centered Internet Analysis," 85 *Va. L. Rev.* 1163 (1999).) Although courts are committed to taking account of the unique aspects of each new communications technology, and allowing First Amendment law to grow and adapt in the process, thus far none of the basic principles discussed above have been discarded or substantially transformed when applied to cyber-speech. In fact, in the leading case to date, *Reno v. American Civil Liberties Union* (Section 13.2.12.2), the U.S. Supreme Court opinion relied explicitly on the principles referenced in the discussion above. Thus, although counsel and administrators will need to follow both legal and technological developments closely in this fast-moving area, they should work from the premise that established First Amendment principles remain their authoritative guides.

**8.5.2. Liability issues.** Colleges and universities may become liable *to students* for violating students' legal rights regarding computer communications and computer files; and they may become liable *to others* for certain computer communications of their students effectuated through a campus network or Internet service. The following discussion surveys the major areas of liability concern.

To help minimize First Amendment liability arising from institutional regulation of campus computer speech, administrators at public institutions may follow the guidelines suggested by the four questions set out in subsection 8.5.1 above. In addition, administrators might adopt an analogy to student newspapers to limit institutional liability for their students' uses of cyberspace. To adopt this analogy, the institution would consider students' own Web sites, bulletin boards, or discussion lists to be like student newspapers (see generally Section 10.3) and would provide them a freedom from regulation and oversight sufficient to assure that the students are not viewed as agents of the institution (see Section 10.3.6). Institutions might also create alternatives to regulation that would either diminish the likelihood of computer abuse or enhance the likelihood that disputes that do arise can be resolved without litigation. For instance, institutions could encourage, formally and informally, the development of cyberspace ethics codes for their campus communities. (For a foundation for such a code, see Marjorie Hodges & Gary Pavela, "Ten Principles of Civility in Cyberspace," and "Civility in Cyberspace," in *Synthesis: Law and Policy in Higher Education*, Vol. 8, no. 4 (Spring 1997), 624, 631.) To a large extent, the success of such codes would depend on widespread consensus about the

norms established and the willingness to enforce them by peer pressure and cyberspace “counterspeech.”

Another helpful initiative might be for institutions to provide a mediation or arbitration process adapted to the context of cyberspace. (See generally M. Katsh, “Dispute Resolution in Cyberspace,” 28 *Conn. L. Rev.* 953 (1996).) Such a process could be conducted using outside assistance, perhaps even online assistance. Two Web sites to consult regarding cyberspace dispute resolution are The Virtual Magistrate Project, available at <http://www.vmag.org> and The Online Ombuds Office at <http://www.ombuds.org>.

In two other leading areas of concern—tort law and copyright law—federal law now provides institutions some protection from liability for students’ online statements and their unauthorized transmission of copyrighted materials. (See generally Jonathan Bond & Matthew Schruers, “Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act,” 20 *Cardozo Arts & Ent. L.J.* 295 (2002).)

Regarding tort law, the Communications Decency Act (CDA), discussed in Section 13.2.12.2 of this book, contains a Section 509, codified as 47 U.S.C. § 230, that protects “interactive computer service” providers (which include colleges and universities) from defamation liability and other liability based on the content of information posted by others. Section 230(c)(1) applies when a third-party “information content provider” has posted or otherwise transmitted information through a provider’s service, and protects the provider from the liabilities that a “publisher or speaker” might incur in such circumstances (47 U.S.C. §§ 230(c)(1), (f)(2) & (3)).<sup>48</sup> As one court has explained:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial function—such as deciding whether to publish, withdraw, postpone or alter content—are barred [*Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)].

The Section 230(c)(1) immunity apparently extends beyond state tort law claims to protect interactive computer service providers from other state and federal law claims that could be brought against publishers or speakers. For example, in *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 537–39 (E.D. Va. 2003), *affirmed per curiam in an unpublished opinion*, 2004 WL 602711 (4th Cir.), the court held that Section 230(c)(1) protected an Internet service provider from liability under a federal civil rights statute, Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(b)). In addition, Section 230(c)(2) protects service providers from civil liability for actions that they take “in good faith to restrict

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<sup>48</sup>For case law, see Annot., “Liability of Internet Service Provider for Internet or E-Mail Defamation,” 84 A.L.R.5th 169.

access to or availability of material” that they consider “to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . .” (47 U.S.C. § 230(c)(2)(A); and see, for example, *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998)). Section 230 does not provide any immunity, however, from prosecution under federal criminal laws or from claims under intellectual property laws (47 U.S.C. §§ 230(e)(1) & (2)).

By its express language, Section 230 also protects “user(s)” of interactive computer services, such as persons operating Web sites or listservs on a provider’s service. In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), for example, the court held that an operator of a listserv was a “user” who would be immune under Section 230(c)(1) from a defamation claim if another “information content provider” had provided the information to him and he reasonably believed that the material was provided for purposes of publication. Users are protected under Section 230 to the same extent as providers. Litigation continues, however, on the scope of the user provisions and the extent of the immunity that Section 230 provides for users and providers. (See, for example, *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Cal. App. 2004), *opinion superceded and review granted*, 87 P. 3d 797 (Cal. 2004).)

Regarding copyright law, the Digital Millennium Copyright Act (DMCA), discussed in Section 13.2.5 of this book, contains a provision, 17 U.S.C. § 512, that protects Internet “service provider(s),” including colleges and universities, from certain liability for copyright infringement. Specifically, the DMCA establishes “safe harbor” protections for Internet service providers against copyright infringement liability attributable to the postings of third-party users (including students and faculty members) in certain circumstances and under certain conditions (see §§ 512(a)–(d)). The safe harbor provisions also provide some protection for Internet service providers against liability to alleged infringers (including faculty members and students) for erroneously removing material that did not infringe a copyright (17 U.S.C. § 512(g)), and some protection against persons who file false copyright infringement claims (17 U.S.C. § 512(f)). In addition, the DMCA contains a provision that, under certain circumstances, specifically protects colleges and universities, as Internet service providers, from vicarious liability for the acts of their faculty members and graduate students (17 U.S.C. § 512(e)).

Individual students (and faculty members) also have some protections under the DMCA. If a student operates a Web site that is maintained on the institution’s servers, he or she will have some protection against false copyright infringement claims (17 U.S.C. § 512(c)). In *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), the plaintiff students sought monetary damages from the defendant, a copyright holder who had claimed that the students’ posting violated its copyright. The university had removed the posting on the Web site after it had received the defendant’s notice of an alleged copyright infringement. The court ruled in favor of the students and ordered the defendant to pay them money damages because “no reasonable copyright holder could have believed” that the postings in question “were protected by copyright.”

Taken together, Section 230 of the CDA and Section 512 and related provisions of the DMCA provide some leeway for institutions to regulate and monitor their computer systems as their institutional missions and campus cultures may require, and also serve to encourage institutions to create alternatives to regulation as well as dispute-resolution processes (see subsection 8.5.1 above).

One further, emerging, area of liability concern for institutions involves disabled students. Under Section 504 of the Rehabilitation Act (see Section 13.5.4 of this book) and Titles II and III of the Americans With Disabilities Act (see Section 13.2.11 of this book), institutions could become liable for discriminating against disabled students with respect to access to computer communications, or for failing to provide disabled students with computer-based auxiliary aids or services that would be considered reasonable accommodations. (See generally Sections 8.7.3 & 9.3.5.4 of this book; and see also Constance Hawke & Anne Jannarone, "Emerging Issues in Web Accessibility: Implications for Higher Education," *West's Educ. Law Reporter* (March 14, 2002), 715–27.)

## **Sec. 8.6. Campus Security**

**8.6.1. Security officers.** Crime is an unfortunate fact of life on many college campuses. Consequently, campus security and the role of security officers have become high-visibility issues. Although contemporary jurisprudence rejects the concept that colleges are responsible for the safety of students (see Section 3.3.2), institutions of higher education have, in some cases, been found liable for injury to students when the injury was foreseeable or when there was a history of criminal activity on campus.<sup>49</sup> Federal and state statutes, discussed in Section 8.6.3, also impose certain requirements on colleges and their staffs to notify students of danger and to work collaboratively with state and local law enforcement to prevent and respond to crime on campus.

The powers and responsibilities of campus security officers should be carefully delineated. Administrators must determine whether such officers should be permitted to carry weapons and under what conditions. They must determine the security officers' authority to investigate crime on campus or to investigate violations of student codes of conduct. Record-keeping practices also must be devised.<sup>50</sup> The relationship that security officers will have with local and state police must be cooperatively worked out with local and state police forces. Because campus security officers may play dual roles, partly enforcing public criminal laws and partly enforcing the institution's codes of conduct, administrators should carefully delineate the officers' relative responsibilities in each role.

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<sup>49</sup>Cases and authorities are collected in Joel E. Smith, Annot., "Liability of University, College, or Other School for Failure to Protect Student From Crime," 1 A.L.R.4th 1099.

<sup>50</sup>For a general discussion of the legal restrictions on record keeping, see Sections 9.7.1 and 9.7.2. The Family Educational Rights and Privacy Act, discussed in Section 9.7.1, has a specific provision on law enforcement records (20 U.S.C. § 1232g(a)(4)(B)(ii)). Regulations implementing this provision are in 34 C.F.R. §§ 99.3 (definitions of "disciplinary action or proceeding" and "education records") and 99.8.



Administrators must also determine whether their campus security guards have, or should have, arrest powers under state or local law. For public institutions, state law may grant full arrest powers to certain campus security guards. In *People v. Wesley*, 365 N.Y.S.2d 593 (City Ct. Buffalo 1975), for instance, the court determined that security officers at a particular state campus were “peace officers” under the terms of Section 355(2)(m) of the New York Education Law. But a state law that grants such powers to campus police at a religiously controlled college was found unconstitutional as applied because its application violated the establishment clause (*State of North Carolina v. Pendleton*, 451 S.E.2d 274 (N.C. 1994)). For public institutions not subject to such statutes, and for private institutions, deputization under city or county law (see *People of the State of Michigan v. VanTubbergen*, 642 N.W.2d 368 (Mich. Ct. App. 2002)) or the use of “citizen’s arrest” powers may be options (see *Hall v. Virginia*, 389 S.E.2d 921 (Va. Ct. App. 1990)).

If campus police have not specifically been granted arrest powers for off-campus law enforcement actions, the resulting arrests may not be lawful. Decisions from two state courts suggest that campus police authority may not extend beyond the borders of the campus if the alleged crime did not occur on campus. For example, in *Marshall v. State ex rel. Dept. of Transportation*, 941 P.2d 42 (Wyo. 1997), the Wyoming Supreme Court invalidated the suspension of the plaintiff’s driver’s license, stating that his arrest was unlawful and thus the license suspension was tainted as well. Marshall, the plaintiff, had been driving by (but not on) the campus, and a security officer employed by Sheridan College believed that Marshall was driving a stolen car. The security officer followed Marshall and pulled him over. Although Marshall was able to demonstrate that the car was not stolen, the security officer believed that Marshall was driving while intoxicated. Marshall refused to be tested for sobriety, and his license was suspended. Because this was not a situation where a campus police officer was pursuing a suspect, the court ruled that the campus police officer had no authority to stop or to arrest Marshall, and thus the license suspension was reversed.

Some states, however, have passed laws giving campus police at public colleges and universities powers similar to those of municipal police. See, for example, 71 Pa. Stat. § 646.1 (2003), which provides that campus police may “exercise the same powers as are now or may hereafter be exercised under authority of law or ordinance by the police of the municipalities wherein the college or university is located. . . .” This statute overrules two Pennsylvania cases, *Horton v. Commonwealth of Pennsylvania*, 694 A.2d 1 (Pa. Commw. 1997), and *Commonwealth of Pennsylvania v. Croushore*, 703 A.2d 546 (Pa. Super. 1997), in which state appellate courts had ruled that campus police had no authority to effect arrests beyond the borders of the campus. State laws vary considerably regarding the off-campus authority of campus police officers, and the particular facts of each incident may also have an effect on the court’s determination. (For additional cases addressing this issue, see *People v. Smith*, 514 N.E.2d 1158 (Ill. App. Ct. 1987); and *Councill v. Commonwealth*, 560 S.E.2d 472 (Va. Ct. App. 2002).)

Police work is subject to a variety of constitutional restraints concerning such matters as investigations, arrests, and searches and seizures of persons or private property. Security officers for public institutions are subject to all these restraints. In private institutions, security officers who are operating in conjunction with local or state police forces (see Section 8.4.2) or who have arrest powers may also be subject to constitutional restraints under the state action doctrine (see Section 1.5.2). In devising the responsibilities of such officers, therefore, administrators should be sensitive to the constitutional requirements regarding police work.

Campus police or security guards responding to student protests and demonstrations must walk a fine line between protecting human and property interests and respecting students' constitutional rights of speech and assembly. In *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001), the federal appellate court rejected most of a student's constitutional challenges to limitations on a campus protest ordered by the dean and the campus security chief at a public community college, with the exception of the requirement that the protesters "not mention religion." The court ruled that the security officers had qualified immunity for their arrest of the plaintiff for trespassing, but that his claim of First Amendment violations for the prohibition of religious speech could proceed.

Administrators should also be sensitive to the tort law principles applicable to security work (see generally Sections 3.3.2 & 4.7.2). Like athletic activities (Section 10.4.9), campus security actions are likely to expose the institution to a substantial risk of tort liability. Using physical force or weapons, detaining or arresting persons, and entering or searching private property can all occasion tort liability if they are undertaken without justification or accomplished carelessly. Police or security officers employed by public colleges may be protected by qualified immunity if, at the time of the alleged tort by the officer, he or she reasonably believes in light of clearly established law that his or her conduct is lawful (*Saucier v. Katz*, 533 U.S. 194 (2001)). Private security officers who are not deputized and who do not have arrest powers, however, may not be protected by qualified immunity (*Richardson v. McKnight*, 521 U.S. 399 (1997)).

*Jones v. Wittenberg University*, 534 F.2d 1203 (6th Cir. 1976), for example, dealt with a university security guard who had fired a warning shot at a fleeing student. The shot pierced the student's chest and killed him. The guard and the university were held liable for the student's death, even though the guard did not intend to hit the student and may have had justification for firing a shot to frighten a fleeing suspect. The appellate court reasoned that the shooting could nevertheless constitute negligence "if it was done so carelessly as to result in foreseeable injury."

Institutions may also incur liability for malicious prosecution if an arrest or search is made in bad faith. In *Wright v. Schreffler*, 618 A.2d 412 (Pa. Super. Ct. 1992), a former college student's conviction for possession and delivery of marijuana was reversed because the court found that the defendant had been entrapped by campus police at Pennsylvania State University. The former student then sued the arresting officer for malicious prosecution, stating that the officer had no probable cause to arrest him, since the arrest was a result of the

entrapment. The court agreed, and denied the officer's motion for dismissal. See also *Penn v. Harris*, 296 F.3d 573 (7th Cir. 2002) (no liability for malicious prosecution because the police had probable cause to arrest him for disorderly conduct).

Campus police may also be held liable under tort law for their treatment of individuals suspected of criminal activity. In *Hickey v. Zezulka*, 443 N.W.2d 180 (Mich. Ct. App. 1989), a university public safety officer had placed a Michigan State University student in a holding cell at the university's department of public safety. The officer had stopped the student for erratic driving, and a breathalyzer test had shown that the student had blood alcohol levels of between 0.15 and 0.16 percent. While in the holding cell, the student hanged himself by a noose made from his belt and socks that he connected to a bracket on a heating unit attached to the ceiling of the cell.

The student's estate brought separate negligence actions against the officer and the university, and both were found liable after trial. Although an intermediate appellate court upheld the trial verdict against both the university and the officer, the state's supreme court, in *Hickey v. Zezulka*, 487 N.W.2d 106 (Mich. 1992), reversed the finding of liability against the university, applying Michigan's sovereign immunity law. The court upheld the negligence verdict against the officer, however, noting that the officer had violated university policies about removing harmful objects from persons before placing them in holding cells and about checking on them periodically. The court characterized the officer's actions as "ministerial" rather than discretionary, which, under Michigan law, eliminated her governmental immunity defense.

In light of *Hickey*, universities with local holding cells should make sure that campus police regulations are clear about the proper procedures to be used, particularly in handling individuals who are impaired by alcohol and drugs, and should ensure that the procedures are followed to reduce both the potential for harm to individuals and liability to the institution or its employees.

In *Baughman v. State*, 45 Cal. Rptr. 2d 82 (Cal. App. 1995), university police were sued for invasion of privacy, emotional distress, and conversion pursuant to the destruction of computer disks during a search undertaken in connection with a lawfully issued warrant. The court found that the officers had acted within their official capacity, that they were therefore immune from damages resulting from the investigation, and that the investigation justified an invasion of privacy.

Overlapping jurisdiction and responsibilities may complicate the relationship between campus and local police. California has attempted to address this potential for overlap in a law, Section 67381 of the Education Code. This law, passed by the state legislature in 1998, requires the governing board of every public institution of higher education in the state to "adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations" of certain violent crimes that occur on campus (homicide, rape, robbery, and aggravated assault). These agreements are to designate which law enforcement agency will do the investigation of such crimes, and they must "delineate the specific geographical boundaries" of each agency's "operational responsibility."

**8.6.2. Protecting students against violent crime.** The extent of the institution's obligation to protect students from crime on campus—particularly, violent crimes committed by outsiders from the surrounding community—has become a sensitive issue for higher education. The number of such crimes reported, especially sexual attacks on women, has increased steadily over the years. As a result, postsecondary institutions now face substantial tactical and legal problems concerning the planning and operation of their campus security systems, as well as a federal law requiring them to report campus crime statistics.

Institutional liability may depend, in part, on where the attack took place and whether the assailant was a student or an intruder. When students have encountered violence in residence halls from intruders, the courts have found a duty to protect the students similar to that of a landlord. For example, in *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983), the court approved several legal theories for establishing institutional liability in residence hall security cases. The student in *Mullins* had been abducted from her dormitory room and raped on the campus of Pine Manor College, a women's college located in a suburban area. Although the college was located in a low-crime area and there was relatively little crime on campus, the court nevertheless held the college liable.

Developing its first theory, the court determined that residential colleges have a general legal duty to exercise due care in providing campus security. The court said that, because students living in campus residence halls cannot provide their own security, the college's duty is to take reasonable steps "to ensure the safety of its students" (449 N.E.2d at 335). Developing its second theory, the court determined "that a duty voluntarily assumed must be performed with due care." Quoting from Section 323 of the *Restatement (Second) of Torts*, a scholarly work of the American Law Institute, the court held that when a college has taken responsibility for security, it is "subject to liability . . . for physical harm resulting from [the] failure to exercise reasonable care to perform [the] undertaking." An institution may be held liable under this theory, however, only if the plaintiff can establish that its "failure to exercise due care increased the risk of harm, or . . . the harm is suffered because of the student's reliance on the undertaking."

Analyzing the facts of the case under these two broad theories, the appellate court affirmed the trial court's judgment in favor of the student. The facts relevant to establishing the college's liability included the ease of scaling or opening the gates that led to the dormitories, the small number of security guards on night shift, the lack of a system for supervising the guards' performance of their duties, and the lack of deadbolts or chains for dormitory room doors.

Courts have ruled in two cases that universities provided inadequate residence hall security and that lax security was the proximate cause of a rape in one case and a death in a second. In *Miller v. State*, 478 N.Y.S.2d 829 (N.Y. App. Div. 1984), a student was abducted from the laundry room of a residence hall and taken through two unlocked doors to another residence hall where she was raped. The court noted that the university was on notice that nonresidents frequented the residence hall, and it criticized the university for failing to take

“the rather minimal security measure of keeping the dormitory doors locked when it had notice of the likelihood of criminal intrusions” (478 N.Y.S.2d at 833). “Notice” consisted of knowledge by university agents that nonresidents had been loitering in the lounge of the residence hall, and the occurrence of numerous robberies, burglaries, criminal trespass, and a rape. The court applied traditional landlord-tenant law and increased the trial court’s damage award of \$25,000 to \$400,000.

In the second case, *Nieswand v. Cornell University*, 692 F. Supp. 1464 (N.D.N.Y. 1988), a federal trial court refused to grant summary judgment to Cornell University when it denied that its residence hall security was inadequate and thus the proximate cause of a student’s death. A rejected suitor (not a student) had entered the residence hall without detection and shot the student and her roommate. The roommate’s parents filed both tort and contract claims (see Sections 3.3 & 3.4 of this book) against the university. The court, citing *Miller*, ruled that whether or not the attack was foreseeable was a question of material fact, which would have to be determined by a jury. Furthermore, the representations made by Cornell in written documents, such as residence hall security policies and brochures, regarding the locking of doors and the presence of security personnel could have constituted an implied contract to provide appropriate security. Whether a contract existed and, if so, whether it was breached was again a matter for the jury.

In another case involving Cornell, the university was found not liable for an assault in a residence hall by an intruder. The intruder had scaled a two-story exterior metal grate and then kicked open the victim’s door, which had been locked and dead-bolted. In *Vangeli v. Schneider*, 598 N.Y.S.2d 837 (N.Y. App. Div. 1993), the court ruled that Cornell had met its duty to provide “minimal security” as a landlord.

Even if the college provides residence hall security systems, courts have ruled that the institution has a duty to warn students living in the residence hall about the use of these systems and how to enhance their personal safety. In *Stanton v. University of Maine System*, 773 A.2d 1045 (Maine 2001), the Supreme Court of Maine vacated a lower court’s award of summary judgment for the university, ruling that a sexual assault in a college residence hall room was foreseeable, and that the college should have instructed the student, a seventeen-year-old girl attending a preseason soccer program, on how to protect herself from potential assault. Citing *Mullins*, discussed above, the court ruled that the plaintiff’s complaint raised sufficient issues of material fact to warrant a trial. The court rejected, however, the plaintiff’s implied contract claim because no written or oral contract had been entered by the parties.

Institutions that take extra precautions with respect to instructing students about safety may limit their liability for assaults on students, as in *Murrell v. Mount St. Clare College*, 2001 U.S. Dist. LEXIS 21144 (S.D. Iowa, September 10, 2001). A second-year student was sexually assaulted by the guest of a fellow student whom she had allowed to spend the evening in her residence hall room. Earlier that day, the student asked the guests to leave, left her door unlocked, and prepared to take a shower. The guest entered the room and raped her. The

court, in granting the college's motion for summary judgment, noted that the college had provided a working lock, which the plaintiff had not used, had provided the students with a security handbook with guidelines that, if ignored, could lead to fines, and had held a mandatory meeting at the beginning of the school year to discuss residence hall safety and to warn students against leaving doors unlocked or propped open.

An opinion of the Supreme Court of Nebraska linked a university's oversight of fraternal organizations with its duty as a landlord to find the institution liable for a student's injuries. Although *Knoll v. Board of Regents of the University of Nebraska*, 601 N.W.2d 757 (1999), ostensibly involves alleged institutional liability for fraternity hazing, the court rested its legal analysis, and its finding of duty, on the landowner's responsibility for foreseeable harm to invitees. The student, a nineteen-year-old pledge of Phi Gamma Delta fraternity, was abducted from a building on university property and taken to the fraternity house, which was not owned by the university. University policy, however, considered fraternity houses to be student housing units subject to the university's student code of conduct, which prohibited the use of alcoholic beverages and conduct that was dangerous to others. Knoll was forced to consume a large quantity of alcohol and then was handcuffed to a toilet pipe. He broke free of the handcuffs and attempted to escape through a third floor window, from which he fell and sustained serious injuries.

Knoll argued that, because he was abducted on university property, the university had a duty to protect him because the abduction was foreseeable. Although the university argued that the actions were not criminal, but merely "horseplay," the court stated that the actions need not be criminal in nature in order to create a duty. And although the university did not own the fraternity house or the land upon which it was built, the court noted that the code of conduct appeared to apply with equal force to all student housing units, irrespective of whether they were located on university property. Therefore, the university's knowledge of prior code violations and criminal misconduct by fraternity members was relevant to the determination of whether the university owed the plaintiff a duty.

Unforeseeable "pranks" or more serious acts by students or nonstudents do not typically result in institutional liability. For example, in *Rabel v. Illinois Wesleyan University*, 514 N.E.2d 552 (Ill. App. Ct. 1987), the court ruled that the university had no duty to protect a student against a "prank" by fellow students that involved her abduction from a residence hall, despite the fact that the assailant had violated the college's policy against underage drinking. (See also *L.W. v. Western Golf Association*, 712 N.E.2d 983 (Ind. 1999).) A similar result was reached in *Tanja H. v. Regents of the University of California*, 278 Cal. Rptr. 918 (Cal. Ct. App. 1991); the court stated that the university had no duty to supervise student parties in residence halls or to prevent underage consumption of alcohol. Even in *Eiseman v. State*, 518 N.Y.S.2d 608 (N.Y. 1987), the highest court of New York State refused to find that the university had a legal duty to screen applicants who were ex-convicts for violent tendencies before admitting them. (For analysis of this case, see D. M. Kobasic, E. R. Smith, & L. S. Barmore

Zucker, “*Eiseman v. State of New York: The Duty of a College to Protect Its Students From Harm by Other Students Admitted Under Special Programs*,” 14 *J. Coll. & Univ. Law* 591 (1988).)

The difference in outcomes of these cases appears to rest on whether the particular harm that ensued was foreseeable. This was the rationale for the court’s ruling in *Nero v. Kansas State University*, 861 P.2d 768 (Kan. 1993). In *Nero*, the Supreme Court of Kansas considered whether the university could be found negligent for permitting a student who had earlier been charged with sexual assault on campus to live in a coeducational residence hall, where he sexually assaulted the plaintiff, a fellow student. The court reversed a summary judgment for the university, declaring that a jury would have to determine whether the attack was foreseeable, given that, although the university knew that the student had been accused of the prior sexual assault, he not yet been convicted. If the jury found that the second assault was foreseeable, then it would address the issue of whether the university had breached a duty to take reasonable steps to prevent the second attack.

Foreseeability was again the issue in a pair of cases involving violent crimes against students in academic facilities. In *Jesik v. Maricopa County Community College District*, 611 P.2d 547 (Ariz. 1980), a student, during registration at the college, reported to a security guard employed by the college that, following an argument, another individual had threatened to kill him. The security guard took no steps to protect the student. About an hour after the report, the assailant returned to campus carrying a briefcase. The student pointed out the assailant to the same security guard, and the guard assured him that he would be protected. The guard then questioned the assailant, turned to walk away, and the assailant shot and killed the student.

The plaintiff, the father of the murdered student, sued the president and the individual members of the governing board of the community college district, the executive dean and dean of students at Phoenix College, the security guard (Hilton), and the community college district. The trial court summarily dismissed the case against all defendants except the security guard. The plaintiff appealed this dismissal to the Arizona Supreme Court, which first considered the potential liability of the officials and administrators. The plaintiff argued that “[the individual] defendants controlled an inadequate and incompetent security force [and thus should be] liable for any breach of duty by that security force.” To establish the “duty” that had been breached, the plaintiff relied on a series of Arizona statutes that required the community college district’s governing board, where necessary, to appoint security officers (Ariz. Rev. Stat. Ann. §§ 15-679(A)(3) and (9)); “to adopt rules and regulations for the maintenance of public order” (§ 13-1093); and to prevent “trespass upon the property of educational institutions [or] interference with its lawful use” (§ 13-1982). The court rejected this argument, finding that the statutes in question did not establish any specific standard of care but “only set forth a general duty to provide security to members of the public on school property.”

Having discovered no specific legal duty chargeable to the individual defendants (excluding the security officer, whose potential liability the trial court had

not rejected), the Arizona court next considered the liability of the community college district itself. Rejecting the plaintiff's request to adopt two liability principles from the *Restatement (Second) of Torts*,<sup>51</sup> the court found this principle controlling in Arizona:

A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances. [Arizona cases have] established that students are invitees and that schools have a duty to make the premises reasonably safe for their use. If a dangerous condition exists, the invitee must show that the employees of the school knew of or created the condition at issue [611 P.2d at 550].

The court then determined that the *respondeat superior* doctrine applies to governmental defendants under Arizona law, so that the community college district could be held liable for the negligence of its employees. Therefore, if the plaintiff could show at trial that the district's security guard had breached the duty set out above, while acting within the scope of employment, the district would be liable (along with the employee) for the death of the plaintiff's son.

The *Jesik* court also discussed an Arizona statute (Ariz. Rev. Stat. Ann. § 15442(A)(16)) that imposes a standard of care on public school districts and community college districts (see 611 P.2d at 550 (original opinion) and 551 (supplemental opinion)). The court did not base its decision on this statute, since the statute was not yet in effect at the time the crime was committed. But the court's discussions provide a useful illustration of how state statutes may affect liability questions about campus security. In a later case, *Peterson v. San Francisco Community College District*, 205 Cal. Rptr. 842 (Cal. 1984), the court did rely on a statutory provision to impose liability on the defendant. The plaintiff was a student who had been assaulted while leaving the campus parking lot. Her assailant had concealed himself behind "unreasonably thick and untrimmed foliage and trees." Several other assaults had occurred at the same location and in the same manner. Community college officials had known of these assaults but did not publicize them. The court held that the plaintiff could recover damages under Section 835 of the California Tort Claims Act (Cal. Govt. Code § 810 *et seq.*), which provides that "a public entity is liable for injury caused by a dangerous condition of its property" if the dangerous condition was caused by a public employee acting in the scope of his employment or if the entity "had actual or constructive notice of the dangerous condition" and failed to correct it. The court concluded that the failure to trim the foliage or to warn students of the earlier assaults constituted the creation of such a dangerous condition.

If the crime victim has engaged in misconduct that could have contributed to the injury, at least in part, the institution may escape liability. In *Laura O. v. State*,

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<sup>51</sup>Section 318 of the Restatement deals with the duty of a possessor of land to control the conduct of persons permitted to use the land. Section 344 deals with the duty of a possessor of land held open to the public for business purposes to protect members of the public from physical harm caused by third persons.



610 N.Y.S.2d 826 (N.Y. App. Div. 1994), the court held that a university in New York was not liable to a student who was raped in a campus music building after hours. She had been practicing the piano at a time when students were not allowed in the building. Although the student claimed that university officials knew that students used non-dormitory buildings after closing hours, the court stated that the university's security procedures were appropriate. Since the building was not a residence hall and the student was not a campus resident, the university did not owe the student a special duty of protection.

(For further analysis of institutional liability with regard to rapes that occur on campus, see R. Fossey & M. C. Smith, "Institutional Liability for Campus Rapes: The Emerging Law," 24 *J. Law & Educ.* 377 (1995).)

The cases in this Section illustrate a variety of campus security problems and a variety of legal theories for analyzing them. Each court's choice of theories depended on the common and statutory law of the particular jurisdiction and the specific factual setting of the case. The theories used in *Nero*, where the security problem occurred in campus housing and the institution's role was comparable to a landlord's, differ from the theories used in *Jesik*, where the security problems occurred elsewhere and the student was considered the institution's "invitee." Similarly, the first theory used in *Mullins*, establishing a standard of care specifically for postsecondary institutions, differs from theories in the other cases, which apply standards of care for landlords or landowners generally. Despite the differences, however, a common denominator can be extracted from these cases that can serve as a guideline for postsecondary administrators: when an institution has foreseen or ought to have foreseen that criminal activity will likely occur on campus, it must take reasonable, appropriate steps to safeguard its students and other persons whom it has expressly or implicitly invited onto its premises. In determining whether this duty has been met in a specific case, courts will consider the foreseeability of violent criminal activity on the particular campus, the student victim's own behavior, and the reasonableness and appropriateness of the institution's response to that particular threat.

**8.6.3. Federal statutes and campus security.** Following what appears to be an increase in violent crime on campus, the legislatures of several states and the U.S. Congress passed laws requiring colleges and universities to provide information on the numbers and types of crimes on and near campus. The federal legislation, known as the "Crime Awareness and Campus Security Act" (Title II of Pub. L. No. 101-542 (1990)), amends the Higher Education Act of 1965 (this book, Section 8.3.2) at 20 U.S.C. § 1092(f). The Campus Security Act, in turn, was amended by the Higher Education Amendments of 1992 (Pub. L. No. 102-325) and imposes requirements on colleges and universities for preventing, reporting, and investigating sex offenses that occur on campus. The Campus Security Act, passed in response to activism by parents of a student murdered in her college residence hall room and others with similar concerns, is also known as the "Clery Act," named after the young woman who was murdered.

The Campus Security Act, as amended by the Higher Education Amendments of 1992, requires colleges to report, on an annual basis,

statistics concerning the occurrence on campus, during the most recent calendar year, and during the 2 preceding calendar years for which data are available, of the following criminal offenses reported to campus security authorities or local police agencies—

- (i) criminal homicide;
- (ii) sex offenses, forcible or nonforcible;
- (iii) robbery;
- (iv) aggravated assault;
- (v) burglary;
- (vi) motor vehicle theft;
- (vii) arson;
- (viii) arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and illegal weapons possession.

The law also requires colleges to develop and distribute to students, prospective students and their parents, and the Secretary of Education,

- (1) a statement of policy regarding—
  - (i) such institution's campus sexual assault programs, which shall be aimed at prevention of sex offenses; and
  - (ii) the procedures followed once a sex offense has occurred.

The law also requires colleges to include in their policy (1) educational programs to promote the awareness of rape and acquaintance rape, (2) sanctions that will follow a disciplinary board's determination that a sexual offense has occurred, (3) procedures students should follow if a sex offense occurs, and (4) procedures for on-campus disciplinary action in cases of alleged sexual assault.

The Campus Security Act also requires colleges to provide information on their policies regarding the reporting of other criminal actions and regarding campus security and campus law enforcement. They must also provide a description of the type and frequency of programs designed to inform students and employees about campus security.

In one of its most controversial provisions, the law defines "campus" as

- (i) any building or property owned or controlled by the institution of higher education within the same reasonably contiguous geographic area and used by the institution in direct support of, or related to its educational purposes; or
- (ii) any building or property owned or controlled by student organizations recognized by the institution.

The second part of the definition would, arguably, make fraternity and sorority houses part of the "campus," even if they are not owned by the college and are not on land owned by the college.

Regulations implementing the Campus Security Act appear at 34 C.F.R. § 668.46. These regulations require that crimes reported to counselors be included in the college's year-end report, but they do not require counselors to report crimes to the campus community at the time that they learn of them if the student victim requests that no report be made. The regulations require other college officials, however, to make timely reports to the campus community about crimes that could pose a threat to other students.

Colleges must report on their security policies and crime statistics annually, and must distribute these reports to all enrolled students and current employees, to prospective students upon request, to prospective employees upon request, and to the U.S. Department of Education. Additional information about reporting requirements and other provisions of the Campus Security Act can be found at <http://ifap.ed.gov>. Another helpful Web site is at <http://www.securityoncampus.org/schools/cleryact>.

In September 1996, the U.S. Department of Education issued its first charge against a college for violating the Campus Security Act. The department released a report citing Moorhead State University for violating the Act by compiling inaccurate crime statistics and not making annual crime reports public. The department did not impose any sanctions but threatened possible penalties if the university did not comply with the law within thirty days (Karla Haworth, "Education Department Finds a College Violated U.S. Crime-Reporting Law," *Chron. Higher Educ.*, September 27, 1996, A44). In 2000, the department levied a \$25,000 fine against Mount St. Clare College (Iowa) for failing to comply with the reporting requirements of the Campus Security Act ("Education Dept. Fines College on Crime Law," *Chron. Higher Educ.*, July 14, 2000, A33).

Several states have promulgated laws requiring colleges and universities either to report campus crime statistics or to open their law enforcement logs to the public. For example, a Massachusetts law (Mass. Ann. Laws ch. 41 § 98F (1993)) has the following requirement:

Each police department and each college or university to which officers have been appointed pursuant to the provisions of [state law] shall make, keep and maintain a daily log, written in a form that can be easily understood[, of] . . . all responses to valid complaints received [and] crimes reported. . . . All entries in said daily logs shall, unless otherwise provided by law, be public records available without charge to the public.

Pennsylvania law requires colleges to provide students and employees, as well as prospective students, with information about crime statistics and security measures on campus. It also requires colleges to report to the Pennsylvania State Police all crime statistics for a three-year period (24 Pa. Cons. Stat. Ann. § 2502 (1992)).

These federal and state requirements to give "timely warning" may be interpreted as creating a legal duty for colleges to warn students, staff, and others about persons on campus who have been accused of criminal behavior. If the college does not provide such a warning, its failure to do so could result in successful negligence claims against it in the event that a student or staff member

is injured by someone who one or more administrators know has engaged in allegedly criminal behavior in the past. (For analysis of institutional liability and potential defenses, see Section 3.3.2.1.)

In 2000, Congress enacted the Campus Sex Crimes Prevention Act (CSCPA), Pub. L. 106-386, 114 Stat. 1464, which became effective on October 28, 2002. The CSCPA adds subsection (j) to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071, which requires individuals who have been convicted of criminal sexually violent offenses against minors, and who have been determined by a court to be “sexually violent predators,” to register with law enforcement agencies. The CSCPA requires individuals subject to the Wetterling Act to provide the notice required in the statute if he or she is an employee, “carries on a vocation,” or is a student at any institution of higher education in the state, as well as providing notice of any change in status. The law enforcement agency that receives the information then notifies the college or university. The CSCPA also amends the Campus Security Act at 20 U.S.C. § 1092(f)(1), requiring colleges to include in their annual security report a statement as to where information about registered sex offenders who are employees or students may be found (see 34 C.F.R. § 668.46 (b)(12)). It also amends FERPA (Section 9.7.1 of this book) to provide that FERPA does not prohibit the release of information about registered sex offenders on campus. Guidelines implementing the CSCPA may be found at 67 Fed. Reg. 10758 (2002).

## ***Sec. 8.7. Other Support Services***

**8.7.1. Overview.** In addition to financial aid services (Section 8.3), housing (Section 8.4), information technology services (Section 8.5), and security services (Section 8.6), institutions provide various other support services to students. Health services, auxiliary services for students with disabilities, services for foreign (international) students, child care services, and legal services are prominent examples that are discussed in this Section. Other examples include academic and career counseling services, placement services, resident life programming, entertainment and recreational services, parking, food services, and various other student convenience services (see generally Section 15.3.1). An institution may provide many of these services directly through its own staff members; other services may be performed by outside third parties under contract with the institution (see Sections 15.2.2 & 15.3.1) or by student groups subsidized by the institution (see Section 10.1.3). Funding may come from the institution’s regular budget, from mandatory student fees, from revenues generated by charging for the service, from government or private grants, or from donated and earmarked funds. In all of these contexts, the provision of support services may give rise to a variety of legal issues concerning institutional authority and students’ rights, as well as legal liability (see generally Section 2.1), some of which are illustrated in subsections 8.7.2 through 8.7.5 below.

**8.7.2. Health services.** Health services provided by colleges and universities continually expanded during the latter half of the twentieth century. There

were many contributors to these developments—for example, an increased demand for mental health services; the need to respond to public health emergencies such as AIDS; the expanding presence of women on campus, which stimulated the need for women’s health services; the expanding presence of students with disabilities having special health needs; increased emphasis on preventive medicine and wellness programs; the increased visibility of alcohol abuse, drug abuse, and other risky student behaviors with medical implications; and pressures in the nation’s health care system leading to increasing numbers of students without health insurance or other means of access to health care. Paralleling the expansion (and the diversification) of campus health care services has been an expansion of the legal requirements applicable to student health services offices and practitioners.

Traditionally, the primary body of law applicable to health care providers was negligence law (see Sections 3.3.2 & 4.7.2.2 of this book, and especially Section 3.3.2.5 on student suicide), including malpractice (see Sections 4.7.2.2 & 12.5.5 of this book), along with state statutes and regulations regarding licensure of practitioners and facilities (see Section 12.5.5). Adding to that base, health services facilities and health care practitioners are now also subject to a variety of other bodies of law, including various laws prohibiting discrimination in access to campus health services (discussed below); occupational health and safety laws (see Section 4.6.1 of this book); environmental protection laws (see Section 13.2.10 of this book); various record-keeping laws, including FERPA (see Section 9.7.1 of this book), and also including HIPAA (Section 13.2.14) *if* the medical clinic also serves patients other than students and qualifies as a “covered provider”; and laws governing research (see Sections 12.5.5 & 13.2.3) for health services offices that participate in research projects. In addition, health services offices may be subject to the accreditation requirements of the Accreditation Association for Ambulatory Health Care (AAAHC).

The federal civil rights spending statutes (see Section 13.5 of this book) prohibit postsecondary institutions that are federal fund recipients from discriminating by race, national origin, sex, disability, or age in the provision of health services and benefits. The Title IX regulations, for example, provide that institutions must not exclude students from, or deny students the benefits of, health services on grounds of sex, and must not discriminate by sex in the provision of any “medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students” (34 C.F.R. § 106.39). Likewise, the Title IX regulations prohibit discrimination in health services on the basis of pregnancy or childbirth, or, in some situations, on the basis of “parental, family, or marital status” (34 C.F.R. § 106.40). And the regulations for Section 504 of the Rehabilitation Act provide that institutions may not exclude disabled students from participation in health insurance programs or deny them the benefits of such programs (34 C.F.R. § 104.43), and that institutions must provide disabled students “an equal opportunity for participation in” health services and personal counseling services (34 C.F.R. § 104.37).

The numerous day-to-day applications of these civil rights statutes, and of the various other laws noted above, have seldom resulted in noteworthy

litigation. Rather, the legal issues that have resulted in court battles and appellate court opinions, or have attracted the attention of Congress, usually involve special applications of these laws (for example, the Title IX sex discrimination law's application to abortion services, as discussed below), or the invocation of other laws (for example, federal antitrust law as in one of the cases below), or constitutional challenges to health services policies (as in several cases below).

Health services and health insurance involving birth control—that is, abortion, sterilization, or the distribution of contraceptive devices—provide a primary example of issues that have attracted Congress's attention and have also resulted in litigation. The problem may be compounded when the contested service is funded by a student activities fee or other mandatory fee. Students who oppose abortion on grounds of conscience, for instance, may object to the mandatory fees and the use of their own money to fund such services. The sparse law on this point suggests that such challenges will not often succeed. In *Erzinger v. Regents of the University of California*, 187 Cal. Rptr. 164 (Cal. Ct. App. 1982), for instance, students objected to the defendants' use of mandatory fees to provide abortion and pregnancy counseling through campus student health services. The court rejected the students' claim that such use infringed their free exercise of religion. (See generally Thomas Antonini, Note, "First Amendment Challenges to the Use of Mandatory Student Fees to Help Fund Student Abortions," 15 *J. Coll. & Univ. Law* 61 (1988).)

Similarly, in another case about birth control services, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), the court relied in part on the *Erzinger* decision to uphold a University of California at Davis mandatory student registration fee used to subsidize a university health insurance program that covered the cost of abortion services. The university required that all its graduate and professional students have health insurance. Students could acquire this insurance through the Graduate Student Health Insurance Program, which provided a subsidy of \$18.50 per insured student, per quarter, to reduce the cost of the premiums; funds generated by the mandatory student fees covered the cost of the subsidy. Students could opt out of this program by proving that they have health insurance from another provider. The plaintiffs claimed that the university's use of their mandatory fees to subsidize health insurance that covered abortion services violated their free exercise of religion. Their sincerely held religious beliefs, they argued, prevented them financially contributing in any way to abortion services.

In analyzing this claim, the appellate court looked to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. Although RFRA has since been invalidated by the U.S. Supreme Court (see Section 1.6.2), the *Goehring* court's reasoning would still be useful in free exercise cases under the First Amendment or state constitutions.<sup>52</sup> The court held that the plaintiffs had failed to

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<sup>52</sup>A college or university's first line of defense against a free exercise claim, however, would usually be to argue that the student health insurance or health services requirements are "neutral" and "generally applicable" under *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (Section 1.6.2 of this book), and thus subject only to minimal scrutiny by the courts.

“establish that the university’s subsidized health insurance program imposes a substantial burden on a central tenet of their religion.” Several factors were critical to the court’s conclusion:

The plaintiffs are not required to purchase the University’s subsidized health insurance—undergraduate students are not required to have health insurance and graduate students may purchase insurance from any provider. Moreover, the student health insurance subsidy is not a substantial sum of money and the subsidy, taken from registration fees, is distributed only for those students who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services. Abortions are not provided on the University campus. Students who request abortion services are referred to outside providers [94 F.3d at 1299–1300].

The court also concluded that “even if the plaintiffs were able to satisfy the substantial burden requirement, the University’s health insurance system nonetheless survives constitutional attack because it . . . is the least restrictive means of furthering a compelling government interest.”<sup>53</sup> Three “compelling” university interests supported the health insurance program: (1) providing students with affordable health insurance that many would be unable to obtain if it was not available through the university; (2) helping prevent the spread of communicable disease among students who must eat, sleep, and study in close quarters; and (3) protecting students from the distractions of undiagnosed illnesses and unpaid medical bills that could interfere with their studies. Relying on cases that rejected free exercise challenges to the federal government’s collection and expenditure of tax dollars, the court determined that exempting students from paying the portion of the mandatory fee that subsidized the insurance program would not be a viable alternative:

[T]he fiscal vitality of the University’s fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds. Mandatory uniform participation by every student is essential to the insurance system’s survival. . . . [T]here are few, if any, governmental activities to which one person or another would not object [94 F.3d at 1301].

Other questions concerning campus abortion services have arisen under federal statutes and regulations. During Congress’s consideration of the Civil Rights Restoration Act of 1987 (see Section 13.5.7.4 of this book), an issue arose concerning whether an institution’s decision to exclude abortions from its campus medical services or its student health insurance coverage could be considered

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<sup>53</sup>This is a classical strict scrutiny standard. Under the federal free exercise clause, this standard would not apply if the insurance program is “neutral” and “generally applicable” within the meaning of the *Employment Division v. Smith* case (see footnote 51 above, and see generally Section 1.6.2 of this book.)

sex discrimination under the Title IX regulations (see 34 C.F.R. §§ 106.39 & 106.40). Congress responded by including two “abortion neutrality” provisions in the 1987 Act: Section 3(a), which adds a new Section 909 (20 U.S.C. § 1688) to Title IX, and Section 8 (20 U.S.C. § 1688 note). Under these provisions, neither Title IX nor the Civil Rights Restoration Act may be construed (1) to require an institution to provide abortion services, (2) to prohibit an institution from providing abortion services, or (3) to permit an institution to penalize a person for seeking or receiving abortion services related to a legal abortion.

Another development concerning abortion services arose from the 1988 amendments to the Department of Health and Human Services’ (HHS) regulations for Title X of the Public Health Service Act (42 U.S.C. §§ 300–300a-6), which provides federal funds for family planning clinics. These amendments (53 Fed. Reg. 2922 (February 2, 1988)), an initiative of the Reagan administration, prohibited fund recipients (some of whom were campus health clinics or university-affiliated hospitals) from providing counseling or referrals regarding abortion. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the U.S. Supreme Court upheld these regulations, popularly known as the “Gag Rule,” against a challenge that they violated the free speech rights of physicians and the privacy rights of pregnant women. After President Clinton took office, however, he directed the Secretary of HHS to suspend the regulations (58 Fed. Reg. 7455 (1993)) and initiate a new rule-making process aimed at reinstating regulations similar to those in effect prior to the 1988 amendments. The regulations, subsequently adopted, and codified at 42 C.F.R. §§ 59.1–59.12, repeal the Gag Rule. Under these regulations, hospitals and health clinics operating a Title X funded family planning project may provide clients with information on pregnancy termination, upon request, if done in a neutral, nondirective manner and presented as an option along with prenatal care and delivery, infant care, foster care, and adoption. Project staff, however, may not perform abortions for project patients (42 C.F.R. § 59.5).

Other issues concerning health services and health insurance are illustrated by *Lee v. Life Insurance Co. of North America*, 23 F.3d 14 (1st Cir. 1994). Three University of Rhode Island (URI) students challenged a URI requirement that all undergraduate students pay a fixed fee for the use of the university’s on-campus medical clinic, and that they also carry supplementary health insurance. Students had the option of obtaining the additional insurance from the Life Insurance Company of North America (LINA) or from another insurance provider, except that URI would not accept coverage by either Rhode Island Blue Cross or health maintenance organizations based in Rhode Island. Students who did not purchase supplementary coverage were billed for LINA coverage and were not permitted to register for the following semester until the LINA bill had been paid. The students claimed that URI’s practice of conditioning matriculation on payment of the student health fee and the LINA insurance premium was an illegal “tying arrangement” under the Sherman Antitrust Act (see generally Section 13.2.8 of this book). They also claimed that the practice violated the Fourteenth Amendment’s due process clause (because it infringed their right to select their own physicians) and equal protection clause (because the fee and



premiums paid by male and female students were equal, despite the fact that male students did not use gynecological services).

The district court dismissed all of the students' claims, and the appellate court affirmed. Because URI lacked "appreciable economic power" in either the higher education "market" or the health care "market," the students could not claim that the university had created a monopoly. Despite the fact that, in some ways, an education at URI is "unique," said the court, the students had a wide selection of other colleges that would provide a similar type and quality of education. Furthermore, the students could transfer courses from URI to other colleges, and so had not been injured by the alleged tying arrangement should they decide not to return to URI. Because the students knew before they enrolled at URI that this policy existed, they could not use antitrust jurisprudence to argue that they were "locked in" to an economic situation that they did not desire. Moreover, since the students knew about the health clinic fee and health insurance requirement before they enrolled, there was no due process violation; and since the students could not demonstrate that the university had intended to burden male students in a discriminatory fashion, there was no equal protection violation.

Institutions with health services offices will find useful guidance in the American College Health Association (ACHA) publication, *Guidelines for a College Health Program* (1999) (for availability, see <http://www.acha.org>); in the "College Health Programs" section of the *CAS Professional Standards for Higher Education* issued by the Council for the Advancement of Standards in Higher Education (for availability, see <http://www.cas.edu>); and in the most recent edition of the *Accreditation Handbook for Ambulatory Health Care* published by the Accreditation Association for Ambulatory Health Care (AAHC), available at <http://www.aaahc.org>.

**8.7.3. Services for students with disabilities.** When students need support services in order to remove practical impediments to their full participation in the institution's educational program, provocative questions arise concerning the extent of the institution's legal obligation to provide such services. Courts have considered such questions most frequently in the context of auxiliary aids for students with disabilities—for example, interpreter services for hearing-impaired students. *University of Texas v. Camenisch*, 451 U.S. 390 (1981), is an early, and highly publicized, case regarding this type of problem. A deaf graduate student at the University of Texas alleged that the university had violated Section 504 of the Rehabilitation Act of 1973 by refusing to provide him with sign-language interpreter services, which he claimed were necessary to the completion of his master's degree. The university had denied the plaintiff's request for such services on the grounds that he did not meet the university's established criteria for financial assistance to graduate students and should therefore pay for his own interpreter. The district court had issued a preliminary injunction ordering the university to provide the interpreter services, irrespective of the student's ability to pay for them, and the U.S. Court of Appeals affirmed the district court (616 F.2d 127 (5th Cir. 1980)). The U.S.

Supreme Court vacated the judgment in favor of the plaintiff, however, holding that the issue concerning the propriety of the preliminary injunction had become moot because the plaintiff had graduated. Thus, the *Camenisch* case did not furnish definitive answers to questions concerning institutional responsibilities to provide interpreter services and other auxiliary aids to disabled students. A regulation promulgated under Section 504 (34 C.F.R. § 104.44(d)) however, does obligate institutions to provide such services, and this obligation apparently is not negated by the student's ability to pay. But the courts have not ruled definitively on whether this regulation, so interpreted, is consistent with the Section 504 statute. That is the issue raised but not answered in *Camenisch*.

A related issue concerns the obligations of federally funded state vocational rehabilitation (VR) agencies to provide auxiliary services for eligible college students. The plaintiff in *Camenisch* argued that the Section 504 regulation (now § 104.44(d)) does not place undue financial burdens on the universities because "a variety of outside funding sources," including the VR agencies, "are available to aid universities" in fulfilling their obligation. This line of argument suggests two further questions: whether the state VR agencies are legally obligated to provide auxiliary services to disabled college students and, if so, whether their obligation diminishes the obligation of universities to pay the costs (see J. Orleans & M. A. Smith, "Who Should Provide Interpreters Under Section 504 of the Rehabilitation Act?" 9 *J. Coll. & Univ. Law* 177 (1982-83)).

Two cases decided shortly after *Camenisch* provide answers to these questions. In *Schornstein v. New Jersey Division of Vocational Rehabilitation Services*, 519 F. Supp. 773 (D.N.J. 1981), *affirmed*, 688 F.2d 824 (3d Cir. 1982), the court held that Title I of the Rehabilitation Act of 1973 (29 U.S.C. § 100 *et seq.*) requires state VR agencies to provide eligible college students with interpreter services they require to meet their vocational goals. In *Jones v. Illinois Department of Rehabilitation Services*, 504 F. Supp. 1244 (N.D. Ill. 1981), *affirmed*, 689 F.2d 724 (7th Cir. 1982), the court agreed that state VR agencies have this legal obligation. But it also held that colleges have a similar obligation under Section 104.44(d) and asked whose responsibility is primary. The court concluded that the state VR agencies have primary financial responsibility, thus diminishing universities' responsibility in situations in which the student is eligible for state VR services. There is a catch, however, in the application of these cases to the *Camenisch* problem. As the district court in *Schornstein* noted, state VR agencies may consider the financial need of disabled individuals in determining the extent to which the agency will pay the costs of rehabilitation services (see 34 C.F.R. § 361.47). Thus, if a VR agency employs a financial need test and finds that a particular disabled student does not meet it, the primary obligation would again fall on the university, and the issue raised in *Camenisch* would again predominate.

Disputes have continued, however, over whether state vocational rehabilitation agencies must pay for support services, as well as tuition and books, for disabled students. New York courts resolved two cases in which student clients of the state Office of Vocational and Educational Services for Individuals with Disabilities demanded that the agency pay their tuition and fees for law school. In *Murphy v. Office of Vocational and Educational Services for Individuals with*

*Disabilities*, 705 N.E.2d 1180 (N.Y. 1998), and in *Tourville v. Office of Vocational and Educational Services for Individuals with Disabilities*, 663 N.Y.S.2d 368 (N.Y. App. Div. 1997), the courts rejected the claims of students that, despite the fact that the agency had paid for their undergraduate education, it was legally bound to pay for their law school expenses as well. Although *Tourville* was decided on procedural grounds (the plaintiff had not entered an individualized written rehabilitation program (IWRP) plan with the agency), the *Murphy* court decided that the plaintiff had been prepared for the career that she agreed to in her IWRP, and the agency was not required to pay for additional education that was not contemplated by her plan.

In *Murdy v. Bureau of Blindness and Visual Services*, 677 A.2d 1280 (Pa. Commw. Ct. 1996), a blind student (Murdy) had entered an agreement with the bureau under which it agreed to pay for eight semesters of undergraduate education and to provide support services, assuming that Murdy maintained satisfactory academic progress. Murdy needed a ninth semester to complete his undergraduate degree, and the bureau refused to pay his tuition or to pay for support services. The court upheld the bureau's determination because it found that the student was aware that the bureau would cover only eight semesters, and the reasons that the student needed the ninth semester did not fit the agency's criteria for extending support beyond the standard time limit.

These cases suggest that, although state vocational rehabilitation or similar agencies may have the primary responsibility to provide funding for their student clients, colleges and universities will be asked to provide additional support services, or will be asked to provide more extensive services when a student's eligibility for state-funded services expires. State vocational rehabilitation agencies are attempting to shift the funding responsibility for student support services to colleges and universities, a trend that, if it continues, may dissuade colleges from recruiting students with disabilities. (For a discussion of the state agency-higher education conflict, see Jeffrey Selingo, "States and Colleges Wrangle over Paying for Services to Disabled Students," *Chron. Higher Educ.*, June 19, 1998, A37. For a discussion of the effects of this dispute on students, see Debra Hamilton, "Deaf College Students and Sign Language Costs: Why Postsecondary Education Must Confront the VR System," 28 *Coll. L. Dig.* 9 (April 16, 1998), 230-39.)

Public colleges and universities that have established offices serving students with disabilities may now be required to provide additional services to disabled students in compliance with the National Voter Registration Act (NVRA), known as the "motor voter law" (42 U.S.C. § 1973gg-5(a)(2)(B)). This law requires states to designate as voter registration agencies "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities" (42 U.S.C. § 1973gg-5(a)(2)(B)). In *National Coalition for Students with Disabilities Education and Legal Defense Fund v. Gilmore*, 152 F.3d 283 (4th Cir. 1998), the National Coalition sued the state of Virginia under the NVRA after a student with disabilities had been rebuffed in her attempt to register to vote at the Office of Disability Support Services at George Mason University, a public college in Virginia.

The primary dispute between the parties concerned the meaning of the word “office” in the NVRA. The coalition argued that any subdivision of a government department providing services to individuals with disabilities was obligated to comply with the NVRA. The state responded that the NVRA only required a state to provide voter registration assistance at agencies created by the state legislature and funded by appropriations specifically earmarked for services to individuals with disabilities. The appellate court ruled that the plain meaning of the statutory language, the type of “offices” suggested by the statute as additional sites for providing voter registration services (public libraries, fishing and hunting license bureaus, unemployment compensation offices), and with the dictionary definition of “office,” supported the coalition’s position. Since the trial court record demonstrated that the offices providing services to students with disabilities at Virginia Polytechnic Institute and the University of Virginia were within this broader definition of “office,” the appellate court held that they are subject to the NVRA. Since the record did not contain sufficient facts about the Office of Disability Support Services office at George Mason University, the court remanded this matter to the trial court to determine the sources, nature, and handling of funding for that office.

**8.7.4. Services for international students.** International students, as noncitizens, have various needs that are typically not concerns for students who are U.S. citizens. Postsecondary institutions with significant numbers of foreign students face policy issues concerning the nature and extent of the services they will provide for foreign students, and the structures and staffing through which they will provide these services (for example, a network of foreign student advisers or an international services office). Simultaneously, institutions will face legal issues concerning their legal obligations regarding foreign students enrolled in their academic programs. This section focuses primarily on the status of foreign students under federal immigration laws—a critical matter that institutions must consider both in determining how they will assist foreign students and prospective students with their immigration status, and in fulfilling the reporting requirements and other legal requirements imposed on them by the laws and regulations. Other matters concerning employment of foreign nationals, which is pertinent when institutions provide part-time employment for international students, is addressed in Section 4.6.5. Matters concerning admissions and in-state tuition, primarily of interest to state institutions, are addressed in Sections 8.2.4.6 and 8.3.6 above. Matters concerning federal taxation of foreign nationals, and the institution’s tax withholding obligations, are briefly addressed in Section 13.3.1.

The immigration status of international students has been of increasing concern to higher education as the proportion of applicants and students from foreign countries has grown. In 1980 there were approximately 312,000 nonresident alien students on American campuses. Over the decade this figure grew steadily, reaching 407,000 nonresident alien students in 1990 and 548,000 in 2000, at which time international students comprised approximately 3.5 percent of all students enrolled in U.S. colleges (*Digest of Education Statistics* (National

Center for Education Statistics, 2002), 483). This escalating growth slowed, however, after the federal government adopted new visa restrictions in the aftermath of the 9/11 tragedy, and by 2004 the numbers had declined more than 2 percent from the previous year (Burton Bollag, “Enrollment of Foreign Students Drops in U.S.,” *Chron. Higher Educ.*, November 19, 2004, A1).

Foreign nationals may qualify for admission to the United States as students under one of three categories: bona fide academic students (8 U.S.C. § 1101(a)(15)(F)), students who plan to study at a vocational or “nonacademic” institution (8 U.S.C. § 1101(a)(15)(M)), or “exchange visitors” (8 U.S.C. § 1101(a)(15)(J)). In each category the statute provides that the “alien spouse and minor children” of the student may also qualify for admission “if accompanying him or following to join him.”

The first of these three student categories is for aliens in the United States “temporarily and solely for the purpose of pursuing [a full] course of study . . . at an established college, university, seminary, conservatory, . . . or other academic institution or in a language training program” (8 U.S.C. § 1101(a)(15)(F)(i)). This category is called “F-1,” and the included students are “F-1’s.” There is also a more recently created “F-3” subcategory for citizens of Canada and Mexico who live near the U.S. border and wish to commute to a U.S. institution for part-time study. The second of the three student categories is for aliens in the United States “temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than a language training program)” (8 U.S.C. § 1101(a)(15)(M)(i)). This category is called “M-1,” and the included students are “M-1’s.” The spouses and children of students in these first two categories are called “F-2’s” and “M-2’s,” respectively. The third of the student categories, exchange visitor, is known as the “J” category. It includes, among others, any alien (and the family of any alien) “who is a bona fide student, scholar, [or] trainee, . . . who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of . . . studying, observing, conducting research . . . or receiving training” (8 U.S.C. § 1101(a)(15)(J)). Exchange visitors who will attend medical school, and the institutions they will attend, are subject to additional requirements under 8 U.S.C. § 1182(j).

Visa holders in other nonimmigrant categories not based on student status may also be able to attend higher educational institutions during their stay in the United States. G-4 visa holders are one such example (see Section 8.3.6.1 of this book); H-1 visa holders (temporary workers) are another. The rules for these visa holders who become students may be different from those described below with respect to students on F-1, M-1, and J-1 visas.

The Department of State’s role in regulating international students is shaped by its power to grant or deny visas to persons applying to enter the United States. Consular officials verify whether an applicant alien has met the requirements under one of the pertinent statutory categories and the corresponding requirements established by State Department regulations. The State Department’s regulations for academic student visas and nonacademic or vocational

student visas are in 22 C.F.R. § 41.61. Requirements for exchange visitor status are in 22 C.F.R. § 41.62.

The Department of Homeland Security's Bureau of Citizenship and Immigration Services (CIS) has authority to approve the schools that international students may attend and for which they may obtain visas from the State Department (8 C.F.R. § 214.3). The CIS is also responsible for ensuring that foreign students do not violate the conditions of their visas once they enter the United States. In particular, the CIS must determine that holders of F-1 and M-1 student visas are making satisfactory progress toward the degree or other academic objective they are pursuing. The regulations under which the CIS fulfills this responsibility are now located in 8 C.F.R. § 214.2(f) for academic students and 8 C.F.R. § 214.2(m) for vocational students.

The Department of Homeland Security's Bureau of Immigration and Custom Enforcement (ICE) operates the Student and Exchange Visitors Information System (SEVIS) that colleges must use to enter and update information on every student with a student or exchange visitor visa.<sup>54</sup> The SEVIS regulations, 8 C.F.R. Parts 103 and 214, require each college or university to have a "Designated School Official" (DSO) who is responsible for maintaining and updating the information on F-1, F-3, and M-1 students (8 C.F.R. § 214.3) and a "Responsible Officer" for J-1 (exchange visitor) students (8 C.F.R. § 214.2).

In order to obtain an F-1 visa, the student must demonstrate that he or she has an "unabandoned" residence outside the United States and will be entering the United States in order to enroll in a full-time program of study. The student must present a SEVIS Form I-20 issued in his or her own name by a school approved by the CIS for attendance by F-1 foreign students. The student must have documentary evidence of financial support in the amount indicated on the SEVIS Form I-20. And, for students seeking initial admission only, the student must attend the school specified in the student's visa.

The regulations specify the periods of time for which foreign students may be admitted into the country and the circumstances that will constitute a "full course of study." In addition, the regulations establish the ground rules for on-campus employment of foreign students, off-campus employment (much more restricted than on-campus employment), transfers to another school, temporary absences from the country, and extensions of stay beyond the period of initial admission.

Given the complexity of the immigration legislation and regulations, and the substantial consequences of noncompliance (including the real possibility that international students may be required to return to their home countries before they have completed their studies), there is no substitute for experienced, informed staff and for expert legal advice. Training for new staff and professional development programming for established staff are also critically important, as is information technology support sufficient to implement the SEVIS requirements and other reporting and record-keeping requirements.

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<sup>54</sup>SEVIS is authorized by Section 641 of IIRIRA, 8 U.S.C. § 1372(a), as amended by Section 416 of the U.S.A. PATRIOT Act, 8 U.S.C. § 1227(a), and supplemented by the Enhanced Border Security and Visa Entry Reform Act, Section 501, 116 Stat. 543, 8 U.S.C. § 1701.

Helpful guidance on legal requirements is available on the Citizenship and Information Services Web site (<http://www.uscis.gov>) and the Immigration and Customs Enforcement Web site (<http://www.ice.gov>). In addition, the Association of International Educators maintains a Web site (<http://nafsa.org>) with much useful information, including the organization's *NAFSA Adviser's Manual of Federal Regulations Affecting Foreign Students and Scholars*, a comprehensive and frequently updated reference on federal requirements for students and visitors; and the NAFSA report on "Internationalizing the Campus 2003: Profiles of Success at Colleges and Universities," which will be helpful with broader strategies for international student services.

Due to SEVIS and the expanded reporting requirements for institutions, as well as the increased access of federal investigators to information concerning international students, their privacy has been a growing concern. While the Family Educational Rights and Privacy Act (FERPA) (Section 9.7.1 of this book) continues to protect the privacy of international students' student records, the federal government may now waive some FERPA requirements as needed to operate SEVIS (see Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), § 641(c)(2), 8 U.S.C. § 1372 (c)(2)), and to fight terrorism (see USA PATRIOT Act, § 507, 20 U.S.C. § 1232g(j)). (For guidance on the interplay between FERPA and immigration statutes and regulations, see Laura W. Khatcheressian, "FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information about Foreign Students," 29 *J. Coll. & Univ. Law* 457 (2003).)

**8.7.5. Child care services.** Child care is another context in which a court has addressed a claim for support services needed to overcome some practical impediment to education. In *De La Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978), several low-income women brought suit challenging the lack of child care facilities on the campuses of the San Mateo Community College District. The plaintiffs alleged that the impact of the district's decision not to provide child care facilities fell overwhelmingly on women, effectively barring them from the benefits of higher education and thus denying them equal educational opportunity. The women claimed that the policy constituted sex discrimination in violation of the federal Constitution's equal protection clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The district court dismissed the case for failure to state any claim on which relief could be granted, and the plaintiffs appealed. The appellate court, reversing the district court, ruled that the complaint could not be summarily dismissed on the pleadings and remanded the case for a trial on the plaintiffs' allegations.

Although the district's policy did not rest on an explicit gender classification, the appellate court acknowledged that a facially neutral policy could still violate equal protection if it affected women disproportionately and was adopted or enforced with discriminatory intent. And while Title IX would similarly require proof of disproportionate impact, "a standard less stringent than intentional discrimination" may be appropriate when a court is

considering a claim under that statute. Regarding disproportionate impact, the court explained:

There can be little doubt that a discriminatory effect, as that term is properly understood and has been used by the Supreme Court, has been adequately alleged. The concrete human consequences flowing from the lack of sufficient child care facilities, very practical impediments to beneficial participation in the District's educational programs, are asserted to fall overwhelmingly upon women students and would-be students.

[T]he essence of the plaintiffs' grievance is that the absence of child care facilities renders the *included* benefits less valuable and less available to women; in other words, that the effect of the District's child care policy is to render the entire "package" of its programs of lesser worth to women than to men. . . . Were the object of their challenge simply a refusal to initiate or support a program or course of particular interest and value to women—women's studies, for instance—the case might be a much easier one [582 F.2d at 53, 56–57].

After remand, the parties in *De La Cruz* agreed to an out-of-court settlement that provided for the establishment of child care centers on the defendant's campuses. A trial was never held. It is therefore still not known whether the novel claim raised in *De La Cruz*, or similar claims regarding discrimination regarding child care services, would be recognized by the courts. It is now clear, however, that a plaintiff must allege and prove discriminatory intent in order to prevail on any such claim in court, not only under the equal protection clause, but also under Title IX (see Sections 13.5.7.2 & 13.5.9 of this book). In contrast, in the administrative enforcement process, when relying on the Title IX regulations, proof of discriminatory intent may not be necessary to make out a showing of noncompliance (see Sections 13.5.7.2 & 13.5.8 of this book).

As with other services such as health care (subsection 8.7.2 above) and campus security (Section 8.6 above), the legal risks associated with providing child care are considerable. (For a checklist of matters to address to minimize legal risk, and a process for determining whether to contract out or "self-operate" child care services, see Goldstein, Kempner, Rush, & Bookman, *Contract Management or Self-Operation: A Decision-Making Guide for Higher Education* (Council of Higher Education Management Associations, 1993), 49–53).

**8.7.6. Legal services.** In the context of student legal services, the case of *Student Government Ass'n. v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473 (1st Cir. 1989), illustrates complex questions concerning the provision of student legal services. The university had terminated its existing campus legal services office (LSO), which represented students in criminal matters and in suits against the university. Students challenged the termination as a violation of their First Amendment free speech rights. In order for students' access to legal services to be protected under the First Amendment, the legal services office must be considered a "public forum" (see Section 9.5.2) that provides a "channel of communication" between students and other persons (868 F.2d at 476). Here the students sought to communicate with two groups through the LSO: persons with whom they have disagreements, and the attorneys



staffing the LSO. Since the court system, rather than the LSO itself, was the actual channel of communication with the first group, the only channel of communication the LSO provided was with the LSO attorneys in their official capacities. The court did not extend First Amendment public forum protection to this channel because the university was not *regulating* communication in the marketplace of ideas, but only determining whether to *subsidize* communication. Having only extended a subsidy to the LSO, the university could terminate this subsidy unless the plaintiffs could prove that the university was doing so for a reason that itself violated the First Amendment—for instance, to penalize students who had brought suits against the university, or to suppress the assertion (in legal proceedings) of ideas the university considered dangerous or offensive. The court determined that the termination was “nonselective,” applying to all litigation rather than only to litigation that reflected a “particular viewpoint,” and thus did not serve to penalize individual students or suppress particular ideas. The termination therefore did not violate the free speech clause of the First Amendment. (See Patricia Shearer, Jon A. Ward, & Mark A. Wattley, Comment, “*Student Government Association v. Board of Trustees of the University of Massachusetts: Forum and Subsidy Analysis Applied to University Funding Decisions*,” 17 *J. Coll. & Univ. Law* 65 (1990).)

Since the appellate court’s decision in the *University of Massachusetts* case, the U.S. Supreme Court has decided two cases that bear importantly on issues concerning student legal services at public institutions: *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (discussed in Sections 10.1.5 & 10.3.2 of this book), and more particularly, *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). Both cases support the application of First Amendment viewpoint discrimination principles to cases like the *University of Massachusetts* case. *Velazquez* specifically establishes that “advice from the attorney to the client and the advocacy by the attorney to the courts” is private speech protected by the First Amendment. *Velazquez* also illustrates how viewpoint discrimination principles would apply to cases in which a public institution has limited the types of problems or cases covered by a student legal services program, rather than terminating an entire program.

## Selected Annotated Bibliography

### *General*

“Joint Statement on Rights and Freedoms for Students,” 52 *AAUP Bulletin* 365 (1967).

A set of model guidelines for implementing students’ rights on campus, drafted by the Association of American Colleges, the American Association of University Professors, the National Student Association, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors, and endorsed by a number of other professional organizations. (See discussion of the Joint Statement by William Van Alstyne in Grace W. Holmes (ed.), *Student Protest and the Law* (Institute of Continuing Legal Education, 1969), 181–86.) In the early 1990s, a larger group of associations affirmed the Joint Statement and updated it with a set of interpretive notes (see “Report: Joint Statement on Rights and Freedoms of Students,” *Academe* (July–August 1993), 47).

Young, D. Parker, & Gehring, Donald D. *The College Student and the Courts* (College Administration Publications, 1973, and periodic supp.). Briefs and supporting comments on court cases concerning students, with new cases added in quarterly supplements.

### **Sec. 8.1 (The Legal Status of Students)**

Beh, Hazel G. "Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?" 33 *Ga. L. Rev.* 155 (1998). Discusses several theories of the student-institution relationship in the context of program and institution closure. Suggests that the implied-in-law contract theory is the most likely to balance the legitimate interests of both students and the institution when dealing with program closure.

Cherry, Robert L., Jr. "The College Catalog as a Contract," 21 *J. Law & Educ.* 1 (1992). A review of litigation regarding the contractual status of college catalogs. Discusses disclaimers, reservation of rights clauses, and other significant drafting issues.

LaTourette, Audrey Wolfson, & King, Robert D. "Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories," 65 *U. Detroit L. Rev.* 199 (1988). Reviews constitutional and contract law disputes between students and colleges. Authors conclude that heightened judicial scrutiny of institutional due process has strengthened students' procedural rights, but that courts remain deferential to substantive academic judgments. Includes a comprehensive analysis of due process in academic and disciplinary decisions, as well as an overview of the application of contract law to student-institution relationships.

Meleaeer, K. B., & Beckham, Joseph C. *Collegiate Consumerism: Contract Law and the Student-University Relationship* (College Administration Publications, 2003). Discusses a variety of contractual issues related to admission, grading, academic dismissal, and educational malpractice.

Olswang, Steven G., Cole, Elsa Kircher, & Wilson, James B. "Program Elimination, Financial Emergency, and Student Rights," 9 *J. Coll. & Univ. Law* 163 (1982–83). Analyzes one particular aspect of the contract relationship between institution and student: the obligations the institution may have to the student when the institution has slated an academic program for elimination.

See also, regarding sexual harassment, the Cole entry, the Cole & Hustoles entry, the Dziech & Hawkins entry, and the Sandler & Shoop entry in the Selected Annotated Bibliography for Chapter 5, Section 5.3; and the Fitzgerald entry and the Paludi entry in the Selected Annotated Bibliography for Chapter 6, Section 6.4.

### **Sec. 8.2 (Admissions)**

Bowen, William, Kurzweil, Martin, & Tobin, Eugene. *Equity and Excellence in American Higher Education* (University of Virginia, 2005). Chapter 6, "Race in American Higher Education: The Future of Affirmative Action," addresses the role and effects of race-conscious admissions programs, the *Grutter* case and its aftermath, and suggestions for the future. Chapter 7, "Broadening the Quest for Equity at the Institutional Level," compares race preferences in admissions with other preferences now in use (for example, preferences for legacies) and advocates use in some circumstances of preferences based on low socioeconomic status.

- Coleman, Arthur & Palmer, Scott. *Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admission, Financial Aid, and Outreach* (2d ed., College Entrance Examination Board, 2004). This report, updated after the Supreme Court's decisions in *Grutter* and *Gratz*, distills the basic principles from these cases and applies them to race-conscious decision making in admissions, financial aid, and outreach programs. Also provides guidelines for institutional self-assessments in these areas and provides suggestions on the consideration of race-neutral alternatives.
- Hurley, Brigid. Note, "Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act," 32 *B.C. L. Rev.* 1051 (1991). Reviews statutory and regulatory provisions of Section 504 of the Rehabilitation Act of 1973, as well as judicial interpretations of Section 504 for higher education. Examines the reasonable accommodation requirement, the feasibility of the "undue financial burden" defense on behalf of the college, and the practice of "flagging" disabled students in institutional records.
- Johnson, Alex M., Jr. "Bid Whist, Tonk and *United States v. Fordice*: Why Integrationism Fails African-Americans Again," 81 *Cal. L. Rev.* 1401 (1993). Criticizes the Supreme Court's *Fordice* opinion regarding the present effects of former *de jure* segregation in public colleges and universities, particularly the potential effect of the opinion on traditionally black colleges.
- Justiz, Manuel J., Wilson, Reginald, & Bjork, Lars G. *Minorities in Higher Education* (ACE-Oryx, 1994). Includes nineteen articles written by higher education leaders, which discuss how minority enrollment can be increased, financial aid policies that encourage minority enrollment, the effect of new technology on minority students, achievement of minority students, racial/ethnic implications of assessing students, minorities in graduate education, and faculty diversity.
- Leonard, James. "Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act," 75 *Neb. L. Rev.* 27 (1996). Provides an overview of Section 504 of the Rehabilitation Act and Titles II and III of the ADA, analyzing judicial interpretations of the "otherwise qualified" requirement in the laws. Summarizes constitutional and common law principles used by courts when asked to review academic judgments, and examines the standards used by lower courts to evaluate student requests for program modifications. Concludes that deference to academic judgment is warranted.
- Loewe, Eugene Y. (ed). *Promise and Dilemma: Perspectives on Racial Diversity and Higher Education* (Princeton University Press, 1999). Contains essays concerning minority student achievement and affirmative action policy by Randall Kennedy, Richard J. Light, L. Scott Miller, Mamphela Ramphele, Neil J. Smelser, Claude M. Steele, Chang-Lin Tien, and Philip Uri Treisman. The Steele essay on "stereotype threat" discusses research on the causes of the "test gap" between minority and nonminority students.
- Loewy, Arnold. "Taking *Bakke* Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process," 77 *N. Carolina L. Rev.* 1479 (1999). Argues that diversity and affirmative action are different concepts, and that diversity is broader than the racial or ethnic categories used for many campus affirmative action programs. Argues that decisions based on diversity rationales are sounder than those based upon affirmative action rationales.
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the U.S. Supreme Court's decisions in the *Grutter* and *Gratz* affirmative action cases, and analyzes the validity of race-conscious admissions and financial aid policies in light of principles from these two cases and other legal sources. Discusses enforcement of the limits on affirmative action through private lawsuits and through the Office of Civil Rights, U.S. Department of Education. Also contains guidelines and suggestions for institutions.

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- Sindler, Allan P. *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* (Longman, 1978). A thought-provoking analysis of the various issues raised by affirmative admissions policies. Traces the issues and their implications through the U.S. Supreme Court's pronouncement in *Bakke*.
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- Sullivan, Kathleen M. "After Affirmative Action," 59 *Ohio St. L.J.* 1039 (1998). Examines the issue of class-based, rather than race-based, affirmative action and discusses how legal challenges to such programs might be defended. Concludes that race-neutral proxies for increasing racial diversity are constitutional.
- "Symposium: *Regents of the University of California v. Bakke*," 67 *Cal. L. Rev.* 1 (1979). Contains articles, comments, and a book review on issues relating to *Bakke*. Lead articles, all by noted legal scholars, are Derrick A. Bell, Jr., "*Bakke*, Minority Admissions, and the Usual Price of Racial Remedies"; Vincent Blasi, "*Bakke* as Precedent: Does Mr. Justice Powell Have a Theory?"; Robert G. Dixon, Jr., "*Bakke*: A Constitutional Analysis"; R. Kent Greenawalt, "The Unresolved Problems of Reverse Discrimination"; Louis Henkin, "What of a Right to Practice a Profession?"; Robert M. O'Neil, "*Bakke* in Balance: Some Preliminary Thoughts"; and Richard A. Posner, "The *Bakke* Case and the Future of Affirmative Action."
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### **Sec. 8.3 (Financial Aid)**

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requirements for audits, and student loan consolidation issues. Includes sample forms, federal regulations, and a glossary of terms.

- Olivas, Michael A. “*Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and ‘Enduring Disability,’*” 15 *J. Coll. & Univ. Law* 19 (1986). Examines the impact of two important U.S. Supreme Court cases on the rights of undocumented aliens to attend and receive resident status at public higher education institutions. Proposes that the Court’s treatment of undocumented alien elementary school students in Texas (in *Plyler v. Doe*) may be extended to other jurisdictions as well as to the higher education arena. Includes a table, with accompanying explanatory text, of the regulatory or policy-making entities that formulate higher education residency requirements in each of the states.
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- Somers, Patricia, & Hollis, James M. “Student Loan Discharge Through Bankruptcy,” 4 *Am. Bankr. Inst. L. Rev.* 457 (1996). Reviews the major issues raised in bankruptcy cases involving law and their implications for the discharge of student loans. Does not include changes to federal student loan programs resulting from the Higher Education Amendments of 1998.
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- Williams, Rosemary E. *Bankruptcy Practice Handbook* (2d ed., Clark, Boardman, Callaghan, 1995). “Takes you through a sample case from initial contact and interview through conclusion under each chapter of the Code.” Written for attorneys on both sides of a bankruptcy case. Includes forms, sample letters, and checklists as well as discussion of the roles of trustees, examiners, and attorneys representing creditors.
- Woodcock, Raymond L. “Burden of Proof, Undue Hardships, and Other Arguments for the Student Debtor Under 11 U.S.C. § 523(a)(8)(B),” 24 *J. Coll. & Univ. Law* 377 (1998). Discusses theories that favor student debtors seeking discharge of federal student loans, reviews litigation in which courts have accepted or rejected these theories, and suggests approaches for courts and financial institutions that would support the social policy undergirding the federal student loan program.
- See also Meers & Thro entry in Selected Annotated Bibliography for Section 8.2 above.

### ***Sec. 8.4 (Student Housing)***

- Christman, Dana E. "Change and Continuity: A Historical Perspective of Campus Search and Seizure Issues," 2002 *BYU Educ. & L.J.* 141 (2002). Discusses constitutional issues related to residence hall searches, with particular emphasis on public institutions of higher education.
- Delgado, Richard. "College Searches and Seizures: Students, Privacy and the Fourth Amendment," 26 *Hastings L.J.* 57 (1975). Discusses the legal issues involved in dormitory searches and analyzes the validity of the various legal theories used to justify such searches.
- Gehring, Donald D. (ed.). *Administering College and University Housing: A Legal Perspective* (rev. ed., College Administration Publications, 1992). An overview of legal issues that can arise in the administration of campus housing. Written in layperson's language and directed to all staff involved with campus housing. Contains chapters by Gehring, Pavela, and others, covering the application of constitutional law, statutory and regulatory law, contract law, and tort law to the residence hall setting, and provides suggestions for legal planning. Includes an appendix with a "Checklist of Housing Legal Issues" for use in legal audits of housing programs.

### ***Sec. 8.5 (Campus Computer Networks)***

- EDUCAUSE/Cornell Institute for Computer Policy and Law. Web site, available at <http://www.educause.edu/icpl/>, provides a collection of computer use policies from institutions throughout the country, information on computer policy development, and links to other sites on topics such as computer privacy, First Amendment issues, and service providers' liability. To access these materials, click on "library resources."
- Kaplin, William, & Pavela, Gary. "Sexual Harassment and Cyberspace Speech on Campus," available at [http://law.edu/Fac\\_Staff/KaplinW/rick.cfm](http://law.edu/Fac_Staff/KaplinW/rick.cfm), or at <http://www.collegepubs.com/ref/sfxcsestdyricksrevenge.shtml>. Contains a case study ("Rick's Revenge") on cyberspace sexual harassment effectuated by campus Web sites and e-mail, along with commentary on the case study and on recent cases delineating Title IX's applicability to sexual harassment. A fuller version of the case study, including a mediation exercise complete with role instructions, is available from the Center for Dispute Resolution at Willamette University College of Law.
- Office of Information Technology, University of Maryland. "NEThics," available at <http://www.inform.umd.edu/CompRes/NEThics/>. Collects information—including suggestions, resources, and links to other sites—on law, policy, and ethics issues regarding computer use on campus.
- O'Neil, Robert M. "The Internet in the College Community," 17 *N. Ill. U. L. Rev.* 191 (1997). Using three real-life case studies as a base, this article explores the application of First Amendment principles to cyberspace and, especially, to campus problems regarding the Internet. Takes the position that, in general, "[s]peech in cyberspace should be as free from government restraint as is the printed or spoken word."
- Symposium, "Emerging Media Technology and the First Amendment," 104 *Yale L.J.* 1613 (1994), provides various perspectives on the role of freedom of expression in the technological revolution. Contains a foreword by Owen Fiss, "In Search of a New Paradigm," followed by seven commentaries: (1) Jerry Berman & Daniel J.

Weitzner, “Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media”; (2) Anne Wells Branscomb, “Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace”; (3) M. Ethan Katsh, “Rights, Camera, Action: Cyberspatial Settings and the First Amendment”; (4) Thomas G. Krattenmaker & L. A. Powe, Jr., “Converging First Amendment Principles for Converging Communications Media”; (5) Lawrence Lessig, “The Path of Cyberlaw”; (6) Cass R. Sunstein, “The First Amendment in Cyberspace”; and (7) Eugene Volokh, “Cheap Speech and What It Will Do.”

Sermersheim, Michael. *Computer Access: Selected Legal Issues Affecting Colleges and Universities* (2d ed., National Association of College and University Attorneys, 2003). A monograph addressing issues regarding students’ and faculty members’ access to computers and the Internet. Provides suggestions and guidelines for institutions developing or revising computer access policies. Also includes discussion of the USA PATRIOT Act’s impact on computer access.

### Sec. 8.6 (Campus Security)

Burling, Philip. *Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability* (2d ed., National Association of College and University Attorneys, 2003). Discusses theories of legal liability when crime occurs on campus, discusses legislation requiring colleges to report crime statistics and other information, and suggests steps that institutions can take to reduce the impact of crime on campus. Discusses event management, campus disciplinary procedures that involve violations of both the student code of conduct and criminal law.

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Giles, Molly. Comment, “Obscuring the Issue: The inappropriate Application of *in loco parentis* to the Campus Crime Victim Duty Question,” 39 *Wayne L. Rev.* 1335 (1993). Reviews the propensity for crime victims and/or their parents to attempt to hold the university liable for the acts of third parties or the negligence of the students themselves.

Gregory, Dennis E., & Janosik, Steven M. “The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement,” 32 *Stetson L. Rev.* 7 (2002). Reviews media and scholarly commentary on the effectiveness of the Clery Act and its contribution to reducing crime on campus. Provides recommendations for increasing safety on campuses.

Jacobson, Jeffrey S. *Campus Police Authority: Understanding Your Officers’ Territorial Jurisdiction* (National Association of College and University Attorneys, 2006). Discusses variations in state laws regarding the authority of campus police to effect off-campus arrests or other police actions. Provides suggestions for expanding campus officers’ territorial authority and for minimizing institutional liability for officers’ actions. Includes court cases and links to state statutes.

National Association of College and University Business Officers. *Campus Crime Reporting: A Guide to Clery Act Compliance* (ACE-NACUBO Advisory Report



2002-02). Reviews requirements of the federal laws requiring that campus crime statistics be reported to all enrolled students and current employees, as well as to the U.S. Department of Education. Includes definitions of terms. Forms, helpful Web pages, and other resources are included.

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Smith, Michael Clay, & Fossey, Richard. *Crime on Campus: Legal Issues and Campus Administration* (ACE-Oryx, 1995). Includes discussion of college liability issues, response to crimes, buildings and crime, and strategies for coping with alcohol abuse on campus. Provides suggestions for complying with the Student Right-to-Know and Campus Security Acts.

### ***Sec. 8.7 (Other Support Services)***

National Association of College and University Business Officers. *Child Care Services: A Guide for Colleges and Universities* (NACUBO, 1993). A monograph providing advice to administrators on establishing and operating child care programs for the benefit of students and others. Includes discussion of licensing and accreditation.

See Hurley entry in Selected Annotated Bibliography for Section 8.2.

# The Law of Higher Education

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VOLUME II

FOURTH EDITION

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# Contents

Notice to Instructors	vi
Notice of Web Site and Periodic Supplements	viii
Preface	xxiii
Acknowledgments	xxxiii
The Authors	xxxvii

## **VOLUME I**

### **PART ONE PERSPECTIVES AND FOUNDATIONS 1**

<b>1 Overview of Higher Education Law</b>	<b>3</b>
1.1 How Far the Law Reaches and How Loud It Speaks	3
1.2 Evolution of Higher Education Law	9
1.3 The Governance of Higher Education	22
1.3.1 <i>Basic concepts and distinctions</i>	22
1.3.2 <i>Internal governance</i>	24
1.3.3 <i>External governance</i>	25
1.4 Sources of Higher Education Law	29
1.4.1 <i>Overview</i>	29
1.4.2 <i>External sources of law</i>	30
1.4.2.1 <i>Federal and state constitutions</i>	30
1.4.2.2 <i>Statutes</i>	30
1.4.2.3 <i>Administrative rules and regulations</i>	31
1.4.2.4 <i>State common law</i>	32
1.4.2.5 <i>Foreign and international law</i>	32

1.4.3	<i>Internal sources of law</i>	35
1.4.3.1	<i>Institutional rules and regulations</i>	35
1.4.3.2	<i>Institutional contracts</i>	35
1.4.3.3	<i>Academic custom and usage</i>	35
1.4.4	<i>The role of case law</i>	37
1.5	<b>The Public-Private Dichotomy</b>	40
1.5.1	<i>Overview</i>	40
1.5.2	<i>The state action doctrine</i>	42
1.5.3	<i>Other bases for legal rights in private institutions</i>	54
1.6	<b>Religion and the Public-Private Dichotomy</b>	57
1.6.1	<i>Overview</i>	57
1.6.2	<i>Religious autonomy rights of religious institutions and their personnel</i>	59
1.6.3	<i>Governmental support for religious institutions</i>	61
1.6.4	<i>Religious autonomy rights of individuals in public postsecondary institutions</i>	71
1.7	<b>The Relationship Between Law and Policy</b>	75
	<b>Selected Annotated Bibliography</b>	81
<b>2</b>	<b>Legal Planning and Dispute Resolution</b>	<b>90</b>
2.1	<b>Legal Liability</b>	90
2.1.1	<i>Overview</i>	90
2.1.2	<i>Types of liability</i>	91
2.1.3	<i>Agency law</i>	91
2.1.4	<i>Enforcement mechanisms</i>	92
2.1.5	<i>Remedies for legal violations</i>	93
2.1.6	<i>Avoiding legal liability</i>	93
2.2	<b>Litigation in the Courts</b>	93
2.2.1	<i>Overview</i>	93
2.2.2	<i>Access to court</i>	95
2.2.2.1	<i>Jurisdiction</i>	95
2.2.2.2	<i>Other technical doctrines</i>	100
2.2.2.3	<i>Statutes of limitations</i>	102
2.2.2.4	<i>Exhaustion of remedies</i>	103
2.2.3	<i>Pretrial and trial issues</i>	105
2.2.3.1	<i>Class action suits</i>	105
2.2.3.2	<i>Pretrial discovery</i>	107
2.2.3.3	<i>Issues regarding evidence</i>	108
2.2.3.4	<i>Summary judgments and motions to dismiss</i>	113
2.2.3.5	<i>Standards of judicial review and burdens of proof</i>	114
2.2.3.6	<i>Final judgments</i>	118
2.2.4	<i>Judicial remedies</i>	121
2.2.4.1	<i>Overview</i>	121
2.2.4.2	<i>Money damages</i>	121
2.2.4.3	<i>Injunctions</i>	122
2.2.4.4	<i>Attorney's fees</i>	123
2.2.4.5	<i>Contempt of court</i>	125
2.2.5	<i>Judicial (academic) deference</i>	126
2.2.6	<i>Managing litigation and the threat of litigation</i>	132
2.3	<b>Alternative Dispute Resolution</b>	134
2.3.1	<i>Overview</i>	134
2.3.2	<i>Types of ADR</i>	135
2.3.3	<i>Applications to colleges and universities</i>	138

2.4	Legal Services	140
2.4.1	<i>Organizational arrangements for delivery of legal services</i>	140
2.4.2	<i>Treatment law and preventive law</i>	144
2.4.3	<i>Ethical issues</i>	150
2.5	Institutional Management of Liability Risk	150
2.5.1	<i>Overview and suggestions</i>	150
2.5.2	<i>Risk avoidance and risk control</i>	151
2.5.3	<i>Risk transfer</i>	152
2.5.3.1	<i>Liability insurance</i>	152
2.5.3.2	<i>Hold-harmless and indemnification agreements</i>	153
2.5.3.3	<i>Releases and waivers</i>	156
2.5.4	<i>Risk retention</i>	157
2.5.5	<i>Legal limits on authority to transfer risk</i>	157
	Selected Annotated Bibliography	160

## **PART TWO THE COLLEGE AND ITS GOVERNING BOARD, PERSONNEL, AND AGENTS 165**

<b>3</b>	<b>The College and Its Trustees and Officers</b>	<b>167</b>
3.1	The Question of Authority	167
3.2	Sources and Scope of Authority and Liability	171
3.2.1	<i>Trustees</i>	171
3.2.1.1	<i>Overview</i>	171
3.2.1.2	<i>Trustees of public colleges</i>	172
3.2.1.3	<i>Trustees of private colleges</i>	174
3.2.2	<i>Other officers and administrators</i>	181
3.2.3	<i>Campus organizations</i>	187
3.2.4	<i>Trustee liability</i>	188
3.3	Institutional Tort Liability	189
3.3.1	<i>Overview</i>	189
3.3.2	<i>Negligence</i>	195
3.3.2.1	<i>Premises liability</i>	198
3.3.2.2	<i>Liability for injuries related to on-campus instruction</i>	201
3.3.2.3	<i>Liability for injuries in off-campus courses</i>	203
3.3.2.4	<i>Liability for cocurricular and social activities</i>	206
3.3.2.5	<i>Student suicide</i>	210
3.3.2.6	<i>Liability for injuries related to outreach programs</i>	212
3.3.3	<i>Educational malpractice</i>	213
3.3.4	<i>Defamation</i>	217
3.3.5	<i>Other sources of tort liability</i>	222
3.4	Institutional Contract Liability	225
3.5	Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability)	230



3.6	Captive and Affiliated Organizations	241
3.6.1	Overview	241
3.6.2	Structural problems	242
3.6.3	Taxation issues	244
3.6.4	Application of regulatory laws	246
3.6.5	“State action” issues	248
3.6.6	Liability issues	249
	Selected Annotated Bibliography	250
<b>4</b>	<b>The College and Its Employees</b>	<b>255</b>
4.1	Overview of Employment Relationships	255
4.2	Defining the Employment Relationship	258
4.2.1	Employees versus independent contractors	258
4.2.2	Where is the workplace?	261
4.3	Employment Contracts	261
4.3.1	Defining the contract	261
4.3.2	The at-will doctrine	262
4.3.3	Sources, scope, and terms of the contract	263
4.3.3.1	Sources of the contract	263
4.3.3.2	Contract interpretation	263
4.3.3.3	Employee handbooks as contracts	265
4.3.3.4	Other contract claims	266
4.3.3.5	Contract rescission	267
4.3.3.6	Drug testing and medical screening	267
4.3.3.7	Executive contracts	270
4.3.4	Amendment of the contract	271
4.3.5	Waiver of contract rights	272
4.3.6	Legal planning with contracts	273
4.4	Civil Service Rules	275
4.5	Collective Bargaining	277
4.5.1	Overview	277
4.5.2	The public-private dichotomy in collective bargaining	278
4.5.2.1	Bargaining at private colleges	279
4.5.2.2	Collective bargaining in religiously affiliated institutions	282
4.5.2.3	Bargaining at public colleges	286
4.5.3	Organization, recognition, and certification	287
4.5.4	Bargainable subjects	293
4.5.5	Collective bargaining and antidiscrimination laws	298
4.5.6	Students and collective bargaining	301
4.6	Other Employee Protections	303
4.6.1	Occupational Safety and Health Act	303
4.6.2	Fair Labor Standards Act	305
4.6.3	Employee Retirement Income Security Act	311
4.6.4	Family and Medical Leave Act	313
4.6.5	Immigration laws	317
4.6.6	Workers’ compensation laws	320
4.6.7	Unemployment compensation laws	325
4.6.8	Whistleblower protections	327
4.6.9	Uniformed Services Employment and Reemployment Rights Act	330

4.7	Personal Liability of Employees	332
4.7.1	<i>Overview</i>	332
4.7.2	<i>Tort liability</i>	332
4.7.2.1	<i>Overview</i>	332
4.7.2.2	<i>Negligence</i>	334
4.7.2.3	<i>Defamation</i>	337
4.7.2.4	<i>Other tort claims</i>	342
4.7.3	<i>Contract liability</i>	344
4.7.4	<i>Constitutional liability (personal liability under Section 1983)</i>	346
4.7.4.1	<i>Qualified immunity</i>	346
4.7.4.2	<i>Issues on the merits: State-created dangers</i>	353
4.8	Performance Management Issues	357
4.8.1	<i>Pre-hire issues</i>	357
4.8.2	<i>Evaluation</i>	359
4.8.3	<i>Discipline</i>	360
4.8.4	<i>Promotion</i>	362
4.8.5	<i>Termination</i>	363
	Selected Annotated Bibliography	365
<b>5</b>	<b>Nondiscrimination and Affirmative Action in Employment</b>	<b>371</b>
5.1	The Interplay of Statutes, Regulations, and Constitutional Protections	371
5.2	Sources of Law	374
5.2.1	<i>Title VII</i>	374
5.2.2	<i>Equal Pay Act</i>	383
5.2.3	<i>Title IX</i>	386
5.2.4	<i>Section 1981</i>	389
5.2.5	<i>Americans With Disabilities Act and Rehabilitation Act of 1973</i>	391
5.2.6	<i>Age Discrimination in Employment Act</i>	399
5.2.7	<i>Constitutional prohibitions against employment discrimination</i>	403
5.2.8	<i>Executive Orders 11246 and 11375</i>	405
5.3	The Protected Classes	406
5.3.1	<i>Race</i>	406
5.3.2	<i>National origin and alienage</i>	408
5.3.3	<i>Sex</i>	411
5.3.3.1	<i>Overview</i>	412
5.3.3.2	<i>Pregnancy and health benefits discrimination</i>	412
5.3.3.3	<i>Sexual harassment</i>	414
5.3.3.4	<i>Application to athletics coaches</i>	420
5.3.4	<i>Disability</i>	425
5.3.5	<i>Age</i>	430
5.3.6	<i>Religion</i>	433
5.3.7	<i>Sexual orientation</i>	435
5.4	Affirmative Action	442
5.4.1	<i>Overview</i>	442
5.4.2	<i>Affirmative action under Title VII</i>	445
5.4.3	<i>Affirmative action under the equal protection clause</i>	449
5.4.4	<i>State regulation of affirmative action</i>	455
5.4.5	<i>Conclusions</i>	455
5.5	Application of Nondiscrimination Laws to Religious Institutions	456
	Selected Annotated Bibliography	462

**PART THREE THE COLLEGE AND ITS FACULTY 467**

**6 Faculty Employment Issues 469**

- 6.1 Overview 469
- 6.2 Faculty Contracts 469
  - 6.2.1 *Overview* 469
  - 6.2.2 *Statutory versus contract rights in public institutions* 476
  - 6.2.3 *Academic custom and usage* 479
  - 6.2.4 *Part-time faculty* 482
  - 6.2.5 *Contracts in religious institutions* 485
- 6.3 Faculty Collective Bargaining 490
  - 6.3.1 *Bargaining unit eligibility of faculty* 490
  - 6.3.2 *Coexistence of collective bargaining and traditional academic practices* 496
- 6.4 Application of Nondiscrimination Laws to Faculty Employment Decisions 501
  - 6.4.1 *Overview* 501
  - 6.4.2 *Judicial deference and remedies for tenure denial* 501
  - 6.4.3 *Challenges to employment decisions* 510
    - 6.4.3.1 *Race and national origin discrimination claims* 510
    - 6.4.3.2 *Sex discrimination* 513
    - 6.4.3.3 *Disability discrimination* 515
    - 6.4.3.4 *Age discrimination* 516
  - 6.4.4 *Challenges to salary decisions* 517
  - 6.4.5 *Other workplace issues* 521
- 6.5 Affirmative Action in Faculty Employment Decisions 522
- 6.6 Standards and Criteria for Faculty Personnel Decisions 528
  - 6.6.1 *General principles* 528
  - 6.6.2 *Termination of tenure for cause* 531
  - 6.6.3 *Denial of tenure* 536
  - 6.6.4 *Post-tenure review* 542
- 6.7 Procedures for Faculty Employment Decisions 544
  - 6.7.1 *General principles* 544
  - 6.7.2 *The public faculty member's right to constitutional due process* 547
    - 6.7.2.1 *Nonrenewal of contracts* 547
    - 6.7.2.2 *Denial of tenure* 552
    - 6.7.2.3 *Termination of tenure* 557
    - 6.7.2.4 *Other personnel decisions* 567
  - 6.7.3 *The private faculty member's procedural rights* 571
  - 6.7.4 *Implementing procedural requirements* 575
- 6.8 Closure, Merger, and Reduction in Force 579
  - 6.8.1 *Overview* 579
  - 6.8.2 *Contractual considerations* 579
  - 6.8.3 *Constitutional considerations* 587
  - 6.8.4 *Statutory considerations* 594
  - 6.8.5 *Preparing for closures and reductions in force* 596

Selected Annotated Bibliography 597

<b>7</b>	<b>Faculty Academic Freedom and Freedom of Expression</b>	<b>605</b>
7.1	General Concepts and Principles	605
7.1.1	<i>Faculty freedom of expression in general</i>	605
7.1.2	<i>Academic freedom: Basic concepts and distinctions</i>	613
7.1.3	<i>Professional versus legal concepts of academic freedom</i>	615
7.1.4	<i>The foundational constitutional law cases</i>	617
7.1.5	<i>External versus internal restraints on academic freedom</i>	622
7.1.6	<i>“Institutional” academic freedom</i>	625
7.2	Academic Freedom in Teaching	627
7.2.1	<i>In general</i>	627
7.2.2	<i>The classroom</i>	628
7.2.3	<i>Grading</i>	644
7.2.4	<i>Methods of analyzing academic freedom in teaching claims</i>	648
7.2.5	<i>Private institutions</i>	653
7.3	Academic Freedom in Research and Publication	654
7.4	Academic Freedom in Institutional Affairs	665
7.4.1	<i>In general</i>	665
7.4.2	<i>Speech on governance matters</i>	667
7.4.3	<i>Intramural speech on extramural public affairs</i>	683
7.5	Academic Freedom in Private Life	685
7.5.1	<i>In general</i>	685
7.5.2	<i>Extramural speech</i>	688
7.6	Administrators’ Authority Regarding Faculty Academic Freedom and Freedom of Expression	693
7.7	Protection of Confidential Academic Information: The “Academic Freedom Privilege”	699
7.7.1	<i>Overview</i>	699
7.7.2	<i>Personnel issues</i>	700
7.7.3	<i>Research findings</i>	706
7.8	Academic Freedom in Religious Colleges and Universities	714
	Selected Annotated Bibliography	717

## **PART FOUR THE COLLEGE AND ITS STUDENTS 723**

### **8 The Student-Institution Relationship 725**

8.1	The Legal Status of Students	725
8.1.1	<i>Overview</i>	725
8.1.2	<i>The age of majority</i>	726
8.1.3	<i>The contractual rights of students</i>	727
8.1.4	<i>Student academic freedom</i>	737
8.1.5	<i>Students’ legal relationships with other students</i>	747
8.2	Admissions	752
8.2.1	<i>Basic legal requirements</i>	752
8.2.2	<i>Arbitrariness</i>	754

8.2.3	<i>The contract theory</i>	755
8.2.4	<i>The principle of nondiscrimination</i>	758
8.2.4.1	<i>Race</i>	758
8.2.4.2	<i>Sex</i>	762
8.2.4.3	<i>Disability</i>	768
8.2.4.4	<i>Age</i>	775
8.2.4.5	<i>Residence</i>	777
8.2.4.6	<i>Immigration status</i>	778
8.2.5	<i>Affirmative action programs</i>	781
8.2.6	<i>Readmission</i>	803
8.3	<b>Financial Aid</b>	808
8.3.1	<i>General principles</i>	808
8.3.2	<i>Federal programs</i>	812
8.3.3	<i>Nondiscrimination</i>	817
8.3.4	<i>Affirmative action in financial aid programs</i>	820
8.3.5	<i>Discrimination against nonresidents</i>	825
8.3.6	<i>Discrimination against aliens</i>	833
8.3.6.1	<i>Documented (immigrant and nonimmigrant) aliens</i>	833
8.3.6.2	<i>Undocumented aliens</i>	837
8.3.7	<i>Using government student aid funds at religious institutions</i>	840
8.3.8	<i>Collection of student debts</i>	842
8.3.8.1	<i>Federal bankruptcy law</i>	842
8.3.8.2	<i>Withholding certified transcripts</i>	846
8.3.8.3	<i>Debt collection requirements in federal student loan programs</i>	849
8.4	<b>Student Housing</b>	854
8.4.1	<i>Housing regulations</i>	854
8.4.2	<i>Searches and seizures</i>	861
8.5	<b>Campus Computer Networks</b>	866
8.5.1	<i>Freedom of speech</i>	866
8.5.2	<i>Liability issues</i>	873
8.6	<b>Campus Security</b>	876
8.6.1	<i>Security officers</i>	876
8.6.2	<i>Protecting students against violent crime</i>	880
8.6.3	<i>Federal statutes and campus security</i>	885
8.7	<b>Other Support Services</b>	888
8.7.1	<i>Overview</i>	888
8.7.2	<i>Health services</i>	888
8.7.3	<i>Services for students with disabilities</i>	893
8.7.4	<i>Services for international students</i>	896
8.7.5	<i>Child care services</i>	899
8.7.6	<i>Legal services</i>	900
	<b>Selected Annotated Bibliography</b>	901

## **VOLUME II**

### **9 Rights and Responsibilities of Individual Students 910**

9.1	<b>Disciplinary and Grievance Systems</b>	910
9.1.1	<i>Overview</i>	910
9.1.2	<i>Establishment of systems</i>	911

9.1.3	<i>Codes of student conduct</i>	913
9.1.4	<i>Judicial systems</i>	917
9.2	<b>Disciplinary Rules and Regulations</b>	921
9.2.1	<i>Overview</i>	921
9.2.2	<i>Public institutions</i>	921
9.2.3	<i>Private institutions</i>	924
9.2.4	<i>Disciplining students with psychiatric illnesses</i>	924
9.3	<b>Grades, Credits, and Degrees</b>	927
9.3.1	<i>Overview</i>	927
9.3.2	<i>Awarding of grades and degrees</i>	927
9.3.3	<i>Degree revocation</i>	938
9.3.4	<i>Sexual harassment of students by faculty members</i>	941
9.3.5	<i>Evaluating students with disabilities</i>	959
9.3.5.1	<i>Overview</i>	959
9.3.5.2	<i>The concept of disability</i>	960
9.3.5.3	<i>Notice and documentation of disabilities</i>	962
9.3.5.4	<i>Requests for programmatic or instructional accommodations</i>	965
9.4	<b>Procedures for Suspension, Dismissal, and Other Sanctions</b>	972
9.4.1	<i>Overview</i>	972
9.4.2	<i>Public institutions: Disciplinary sanctions</i>	973
9.4.2.1	<i>Notice</i>	978
9.4.2.2	<i>Hearing</i>	978
9.4.3	<i>Public institutions: Academic sanctions</i>	982
9.4.4	<i>Private institutions</i>	988
9.5	<b>Student Protests and Freedom of Speech</b>	993
9.5.1	<i>Student free speech in general</i>	993
9.5.2	<i>The “public forum” concept</i>	996
9.5.3	<i>Regulation of student protest</i>	1001
9.5.4	<i>Prior approval of protest activities</i>	1008
9.5.5	<i>Court injunctions and criminal prosecutions</i>	1010
9.5.6	<i>Posters and leaflets</i>	1012
9.5.7	<i>Protests in the classroom</i>	1015
9.6	<b>Speech Codes and the Problem of Hate Speech</b>	1017
9.6.1	<i>Hate speech and the campus</i>	1017
9.6.2	<i>The case law on hate speech and speech codes</i>	1019
9.6.3	<i>Guidelines for dealing with hate speech on campus</i>	1026
9.7	<b>Student Files and Records</b>	1029
9.7.1	<i>Family Educational Rights and Privacy Act (FERPA)</i>	1029
9.7.2	<i>State law</i>	1035
9.7.3	<i>The Federal Privacy Act</i>	1040
	<b>Selected Annotated Bibliography</b>	1041
<b>10</b>	<b>Rights and Responsibilities of Student Organizations and Their Members</b>	<b>1050</b>
10.1	<b>Student Organizations</b>	1050
10.1.1	<i>The right to organize</i>	1050
10.1.2	<i>The right not to join, or associate, or subsidize</i>	1056

10.1.3	<i>Mandatory student activities fees</i>	1058
10.1.4	<i>Principle of nondiscrimination</i>	1065
10.1.5	<i>Religious activities</i>	1069
10.2	<b>Fraternities and Sororities</b>	1078
10.2.1	<i>Overview</i>	1078
10.2.2	<i>Institutional recognition and regulation of fraternal organizations</i>	1079
10.2.3	<i>Institutional liability for the acts of fraternal organizations</i>	1087
10.2.4	<i>Liability of fraternal organizations or their members</i>	1093
10.3	<b>The Student Press</b>	1096
10.3.1	<i>General principles</i>	1096
10.3.2	<i>Mandatory student fee allocations to student publications</i>	1098
10.3.3	<i>Permissible scope of institutional regulation</i>	1100
10.3.4	<i>Advertising in student publications</i>	1105
10.3.5	<i>Obscenity</i>	1107
10.3.6	<i>Libel</i>	1108
10.3.7	<i>Obscenity and libel in private institutions</i>	1114
10.4	<b>Athletics Teams and Clubs</b>	1114
10.4.1	<i>General principles</i>	1114
10.4.2	<i>Athletes' due process rights</i>	1115
10.4.3	<i>Athletes' freedom of speech</i>	1119
10.4.4	<i>Pertinent statutory law</i>	1121
10.4.5	<i>Athletic scholarships</i>	1123
10.4.6	<i>Sex discrimination</i>	1127
10.4.7	<i>Discrimination on the basis of disability</i>	1140
10.4.8	<i>Drug testing</i>	1142
10.4.9	<i>Tort liability for athletic injuries</i>	1147
	<b>Selected Annotated Bibliography</b>	1153

## **PART FIVE THE COLLEGE AND LOCAL, STATE, AND FEDERAL GOVERNMENTS 1159**

### **11 Local Governments and the Local Community 1161**

11.1	<b>General Principles</b>	1161
11.2	<b>Zoning and Land Use Regulation</b>	1167
11.2.1	<i>Overview</i>	1167
11.2.2	<i>Public institutions and zoning regulations</i>	1167
11.2.3	<i>Private institutions and zoning regulations</i>	1169
11.2.4	<i>Special exceptions and variances</i>	1173
11.2.5	<i>Amendment of zoning ordinances</i>	1177
11.2.6	<i>Rights of other property owners</i>	1178
11.2.7	<i>Zoning off-campus housing</i>	1180
11.3	<b>Local Government Taxation</b>	1183
11.3.1	<i>General tax concepts</i>	1183
11.3.2	<i>Property taxes</i>	1184
11.3.3	<i>Sales, admission, and amusement taxes</i>	1197
11.4	<b>Student Voting in the Community</b>	1199
11.4.1	<i>Registering to vote</i>	1199
11.4.2	<i>Scheduling elections</i>	1202

11.4.3	<i>Canvassing and registration on campus</i>	1203
11.4.4	<i>Reapportionment</i>	1205
11.5	Relations with Local Police	1206
11.6	Community Access to the College's Campus	1211
11.6.1	<i>Public versus private institutions</i>	1211
11.6.2	<i>Exclusion of speakers and events</i>	1213
11.6.3	<i>Trespass statutes and ordinances, and related campus regulations</i>	1217
11.6.4	<i>Soliciting and canvassing</i>	1229
11.6.4.1	<i>Overview</i>	1229
11.6.4.2	<i>Commercial solicitation</i>	1230
11.6.4.3	<i>Noncommercial solicitation</i>	1236
11.7	Community Activities of Faculty Members and Students	1239
	Selected Annotated Bibliography	1244
<b>12</b>	<b>The College and the State Government</b>	<b>1247</b>
12.1	Overview	1247
12.2	State Provision of Public Postsecondary Education	1250
12.2.1	<i>Overview</i>	1250
12.2.2	<i>Statutorily based institutions</i>	1253
12.2.3	<i>Constitutionally based institutions</i>	1255
12.3	State Chartering and Licensure of Private Postsecondary Institutions	1258
12.3.1	<i>Scope of state authority</i>	1258
12.3.2	<i>Chartering and licensure of religious institutions</i>	1264
12.4	State Regulation of Out-of-State Institutions and Programs	1267
12.5	Other State Regulatory Laws Affecting Postsecondary Education Programs	1273
12.5.1	<i>Overview</i>	1273
12.5.2	<i>Open meetings and public disclosure</i>	1276
12.5.3	<i>Open records laws</i>	1281
12.5.4	<i>State administrative procedure laws</i>	1286
12.5.5	<i>Laws regulating medical services and medical research</i>	1288
	Selected Annotated Bibliography	1292
<b>13</b>	<b>The College and the Federal Government</b>	<b>1297</b>
13.1	Federal Constitutional Powers over Education	1297
13.1.1	<i>Overview</i>	1297
13.1.2	<i>Spending power</i>	1299
13.1.3	<i>Taxing power</i>	1301
13.1.4	<i>Commerce power</i>	1301
13.1.5	<i>Civil rights enforcement powers</i>	1304
13.1.6	<i>State sovereign immunity from suit</i>	1307
13.2	Federal Regulation of Postsecondary Education	1313
13.2.1	<i>Overview</i>	1313
13.2.2	<i>Immigration laws</i>	1314
13.2.3	<i>Regulation of research</i>	1318
13.2.3.1	<i>Overview</i>	1318
13.2.3.2	<i>Laws governing research on human subjects</i>	1318



13.2.3.3	<i>Laws governing animal research</i>	1325
13.2.3.4	<i>Research misconduct</i>	1329
13.2.4	<i>USA PATRIOT Act and related laws</i>	1330
13.2.5	<i>Copyright law</i>	1334
13.2.5.1	<i>Overview</i>	1334
13.2.5.2	<i>The fair use doctrine</i>	1335
13.2.5.2.1	<i>Guidelines</i>	1336
13.2.5.2.2	<i>Coursepacks</i>	1337
13.2.5.2.3	<i>Research copies</i>	1338
13.2.5.2.4	<i>Use of author's own work</i>	1339
13.2.5.2.5	<i>Use of unpublished material</i>	1339
13.2.5.2.6	<i>Fair use of other types of expression</i>	1339
13.2.5.2.7	<i>Fair use summary</i>	1341
13.2.5.3	<i>Performance rights</i>	1342
13.2.5.4	<i>The "work made for hire" doctrine</i>	1344
13.2.5.4.1	<i>Copyright and coauthorship</i>	1346
13.2.5.5	<i>Liability for infringement</i>	1346
13.2.5.6	<i>Licensing</i>	1350
13.2.5.7	<i>Sovereign immunity</i>	1351
13.2.5.8	<i>Other copyright issues</i>	1352
13.2.5.8.1	<i>Scope of copyright protection</i>	1352
13.2.5.8.2	<i>Music</i>	1353
13.2.5.8.3	<i>Anti-circumvention</i>	1353
13.2.5.8.4	<i>Term extension</i>	1354
13.2.5.8.5	<i>Copyright and standardized tests</i>	1355
13.2.6	<i>Patent law</i>	1355
13.2.6.1	<i>Overview</i>	1355
13.2.6.2	<i>Patentability</i>	1356
13.2.6.3	<i>Ownership of patents</i>	1358
13.2.6.4	<i>Infringement lawsuits</i>	1360
13.2.6.5	<i>Sovereign immunity</i>	1360
13.2.7	<i>Trademark law</i>	1361
13.2.8	<i>Antitrust law</i>	1368
13.2.9	<i>Federal Trade Commission Act</i>	1375
13.2.10	<i>Environmental laws</i>	1376
13.2.11	<i>Americans With Disabilities Act</i>	1381
13.2.12	<i>Laws regulating computer network communications</i>	1384
13.2.12.1	<i>Overview</i>	1384
13.2.12.2	<i>Computer statutes</i>	1385
13.2.12.3	<i>General statutes</i>	1393
13.2.13	<i>Medicare</i>	1397
13.2.14	<i>Health Insurance Portability and Accountability Act</i>	1401
13.2.15	<i>False Claims Act and other fraud statutes</i>	1404
13.3	<i>Federal Taxation of Postsecondary Education</i>	1406
13.3.1	<i>Introduction and overview</i>	1406
13.3.2	<i>Tax-exempt status</i>	1408
13.3.3	<i>Tax-exempt status and intermediate sanctions</i>	1410
13.3.4	<i>Tax rules regarding students</i>	1412
13.3.5	<i>Gifts and contributions</i>	1415
13.3.6	<i>The unrelated business income tax</i>	1416
13.3.7	<i>Related entities and commercialization</i>	1419
13.3.8	<i>IRS audit guidelines</i>	1420

13.4	Federal Aid-to-Education Programs	1423
13.4.1	<i>Functions and history</i>	1423
13.4.2	<i>Distinction between federal aid and federal procurement</i>	1424
13.4.3	<i>Legal structure of aid programs</i>	1425
13.4.4	<i>“Cross-cutting” aid conditions</i>	1428
13.4.4.1	<i>Drug-Free Workplace Act of 1988</i>	1432
13.4.4.2	<i>Drug-Free Schools and Communities Act Amendments</i>	1434
13.4.4.3	<i>Student Right-to-Know Act</i>	1435
13.4.5	<i>Enforcing compliance with aid conditions</i>	1435
13.4.6	<i>Protecting institutional interests in disputes with funding agencies</i>	1438
13.5	Civil Rights Compliance	1449
13.5.1	<i>General considerations</i>	1449
13.5.2	<i>Title VI</i>	1450
13.5.3	<i>Title IX</i>	1462
13.5.4	<i>Section 504</i>	1464
13.5.5	<i>Age Discrimination Act</i>	1469
13.5.6	<i>Affirmative action</i>	1471
13.5.7	<i>Scope and coverage problems</i>	1472
13.5.7.1	<i>Coverage of employment discrimination</i>	1472
13.5.7.2	<i>Coverage of unintentional discriminatory acts</i>	1474
13.5.7.3	<i>Scope of the phrase “receiving federal financial assistance”</i>	1477
13.5.7.4	<i>Scope of the phrase “program or activity”</i>	1479
13.5.7.5	<i>Coverage of retaliatory acts</i>	1482
13.5.7.6	<i>Coverage of extraterritorial acts of discrimination</i>	1484
13.5.8	<i>Administrative enforcement</i>	1486
13.5.9	<i>Other enforcement remedies</i>	1493
13.6	Dealing with the Federal Government	1501
13.6.1	<i>Handling federal rule making and regulations</i>	1501
13.6.2	<i>Obtaining information</i>	1506
	Selected Annotated Bibliography	1507

## **PART SIX THE COLLEGE AND EXTERNAL PRIVATE ENTITIES 1523**

### **14 The College and the Education Associations 1525**

14.1	Overview of the Education Associations	1525
14.2	Applicable Legal Principles	1528
14.3	The College and the Accrediting Agencies	1530
14.3.1	<i>Overview of accrediting agencies</i>	1530
14.3.2	<i>Accreditation and the courts</i>	1534
14.3.2.1	<i>Formative developments</i>	1534
14.3.2.2	<i>State common law and “federal common law”</i>	1538
14.3.2.3	<i>The U.S. Constitution</i>	1543
14.3.2.4	<i>Antitrust law</i>	1546
14.3.2.5	<i>Defamation law and other tort theories</i>	1549
14.3.2.6	<i>Bankruptcy law</i>	1553
14.3.3	<i>Accreditation and the U.S. Department of Education</i>	1554
14.3.4	<i>Dealing with accrediting agencies</i>	1559

14.4 Athletic Associations and Conferences	1560
14.4.1 Overview	1560
14.4.2 Federal constitutional constraints	1561
14.4.3 State statutes regulating athletic associations' enforcement activities	1564
14.4.4 Antitrust laws	1566
14.4.5 Common law principles	1571
14.4.6 Federal civil rights statutes	1573
14.4.6.1 The civil rights spending statutes	1573
14.4.6.2 The Americans With Disabilities Act	1577
14.5 The American Association of University Professors	1581
14.6 Dealing with the Education Associations	1584
Selected Annotated Bibliography	1586
<b>15 The College and the Business/Industrial Community</b>	<b>1591</b>
15.1 The Contract Context for College Business Transactions	1591
15.1.1 Overview	1591
15.1.2 Types of contracts and contract terms	1591
15.1.3 Elements of the contract	1593
15.1.4 Breach of contract and remedies for breach	1595
15.1.5 Arbitration	1597
15.2 The College as Purchaser	1599
15.2.1 Purchase of goods	1599
15.2.2 Purchase of services	1603
15.2.3 Purchase of real estate	1610
15.2.4 The special case of design and construction contracts	1610
15.2.4.1 General principles	1610
15.2.4.2 Construction contracts in public institution	1612
15.2.4.3 Liability problems	1615
15.3 The College as Seller/Competitor	1618
15.3.1 Auxiliary enterprises	1618
15.3.1.1 Overview	1618
15.3.1.2 Institutional authority to operate auxiliary enterprises	1621
15.3.1.2.1 Public institutions	1621
15.3.1.2.2 Private institutions	1627
15.3.2 State noncompetition statutes	1628
15.3.3 Federal antitrust law	1632
15.3.4 Taxation of income from entrepreneurial activities	1634
15.3.4.1 Federal unrelated business income tax	1634
15.3.4.2 State and local taxation	1637
15.3.5 Administering auxiliary enterprises	1639
15.4 The College as Research Collaborator and Partner	1640
15.4.1 Potentials and problems	1640
15.4.2 The research agreement	1643
15.4.3 Application of patent law	1650
15.4.4 Federal tax exemptions for research	1652
15.4.5 Application of antitrust law	1654
15.4.6 Federal government incentives for research collaboration	1655
15.4.7 Conflicts of interest	1657
Selected Annotated Bibliography	1662
<b>Indexes</b>	<b>1667</b>

# 9

## Rights and Responsibilities of Individual Students

### *Sec. 9.1. Disciplinary and Grievance Systems*

**9.1.1. Overview.** Colleges and universities develop codes of student conduct (discussed in Section 9.2) and standards of academic performance (discussed in Section 9.3), and expect students to conform to those codes and standards. Sections 9.1 through 9.4 discuss student challenges to institutional attempts to discipline students for violations of these codes and standards. Section 9.1 presents the guidelines for disciplinary and grievance systems that afford students appropriate statutory and constitutional protections. Section 9.2 analyzes the courts' responses to student challenges to colleges' disciplinary rules and regulations, emphasizing the different standards that public and private institutions must meet. Section 9.3 addresses "academic" matters, such as students' challenges to grades, graduates' challenges to degree revocation, students' allegations of sexual harassment by faculty, and the special issues raised by students with disabilities who request accommodations of an academic nature. Section 9.4 reviews the guidelines courts have developed in reviewing challenges to the *procedures* used by colleges when they seek to discipline or expel a student for either social or academic misconduct.

Section 9.5 discusses a variety of legal limitations on institutions' authority to discipline students for social or academic misconduct, with particular attention to the differences between public and private institutions. Sections 9.5 and 9.6 focus on the parameters of student free speech and expressive conduct, with special emphasis on student protests, free speech zones, and the phenomenon of "hate speech." Section 9.7 addresses federal (and some state) protections for the privacy of student records and the interplay between such protections and

state open records and open meetings laws. (The latter laws are also discussed in Section 12.5.)

**9.1.2. Establishment of systems.** Postsecondary institutions have extensive authority to regulate both the academic and the nonacademic activities and behavior of students. This power is summarized in an often-cited judicial statement:

In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. It is not a lawful mission, process, or function of . . . [a public] institution to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process, or function of . . . [a public] institution.

Standards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes, and functions of the institution.

Standards so established may require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws [“General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education,” 45 F.R.D. 133, 145 (W.D. Mo. 1968)].

It is not enough, however, for an administrator to understand the extent and limits of institutional authority. The administrator must also skillfully implement this authority through various systems for the resolution of disputes concerning students. Such systems should include procedures for processing and resolving disputes, substantive standards or rules to guide the judgment of the persons responsible for dispute resolution, and mechanisms and penalties with which decisions are enforced. The procedures, standards, and enforcement provisions should be written and made available to all students. Dispute resolution systems, in their totality, should create a two-way street; that is, they should provide for complaints by students against other members of the academic community as well as complaints against students by other members of the academic community.

The choice of structures for resolving disputes depends on policy decisions made by administrators, preferably in consultation with representatives of various interests within the institution. Should a single system cover both academic and nonacademic disputes, or should there be separate systems for different kinds of disputes? Should there be a separate disciplinary system for students, or should there be a broader system covering other members of the academic community as well? Will the systems use specific and detailed standards of student conduct, or will they operate on the basis of more general rules and policies? To what extent will students participate in establishing the rules governing their

conduct? To what extent will students, rather than administrators or faculty members, be expected to assume responsibility for reporting or investigating violations of student conduct codes or honor codes? To what extent will students take part in adjudicating complaints by or against students? What kinds of sanctions can be levied against students found to have been engaged in misconduct? Can the students be fined, made to do volunteer work on campus, suspended or expelled from the institution, given a failing grade in a course or denied a degree, or required to make restitution? To what extent will the president, provost, or board of trustees retain final authority to review decisions concerning student misconduct?

Devices for creating dispute resolution systems may include honor codes or codes of academic ethics; codes of student conduct; bills of rights, or rights and responsibilities, for students or for the entire academic community; the use of various legislative bodies, such as a student or university senate; a formal judiciary system for resolving disputes concerning students; the establishment of grievance mechanisms for students, such as an ombuds system or a grievance committee; and mediation processes that provide an alternative or supplement to judiciary and grievance mechanisms. On most campuses, security guards or some other campus law enforcement system may also be involved in the resolution of disputes and regulation of student behavior.

Occasionally, specific procedures or mechanisms will be required by law. Constitutional due process, for instance, requires the use of certain procedures before a student is suspended or dismissed from a public institution (see Section 9.4). The Title IX regulations (Section 13.5.3) and the Family Educational Rights and Privacy Act (FERPA) regulations (Section 9.7.1) require both public and private institutions to establish certain procedures for resolving disputes under those particular statutes. Even when specific mechanisms or procedures are not required by law, the procedures or standards adopted by an institution will sometimes be affected by existing law. A public institution's rules regarding student protest, for instance, must comply with First Amendment strictures protecting freedom of speech (Section 9.5). And its rules regarding administrative access to or search of residence hall rooms, and the investigatory techniques of its campus police, must comply with Fourth Amendment strictures regarding search and seizure (Section 8.4.2). Though an understanding of the law is thus crucial to the establishment of disciplinary and grievance systems, the law by no means rigidly controls such systems' form and operation. To a large extent, the kind of system adopted will depend on the institution's history and campus culture.

Fair and accessible dispute resolution systems, besides being useful administrative tools in their own right, can also insulate institutions from lawsuits. Students who feel that their arguments or grievances will be fairly considered within the institution may forgo resort to the courts. If students ignore internal mechanisms in favor of immediate judicial action, the courts may refer the students to the institution. Under the "exhaustion-of-remedies" doctrine (see Section 2.2.2.4), courts may require plaintiffs to exhaust available remedies within the institution before bringing the complaint to court. In *Pfaff v. Columbia-Greene Community*

*College*, 472 N.Y.S.2d 480 (N.Y. App. Div. 1984), for example, the New York courts dismissed the complaint of a student who had sued her college, contesting a C grade entered in a course, because the college had an internal appeal process and the student “failed to show that pursuit of the available administrative appeal would have been fruitless.”

**9.1.3. Codes of student conduct.** Three major issues are involved in the drafting or revision of codes of student conduct: the type of conduct the code will encompass, the procedures to be used when infractions of the code are alleged, and the sanctions for code violations.

Codes of student conduct typically proscribe both academic and social misconduct, whether or not the misconduct violates civil or criminal laws, and whether or not the misconduct occurs on campus. Academic misconduct may include plagiarism, cheating, forgery, or alteration of institutional records. In their review of sanctions for academic misconduct, and of the degree of procedural protection required for students accused of such misconduct, courts have been relatively deferential (see Section 9.4.3).

Social misconduct may include disruption of an institutional function (including teaching and research) and abusive or hazing behavior (but limitations on speech may run afoul of free speech protections, as discussed in Section 9.6). It may also encompass conduct that occurs off campus,<sup>1</sup> particularly if the misconduct also violates criminal law and the institution can demonstrate that the restrictions are directly related to its educational mission or the campus community’s welfare (*Krasnow v. Virginia Polytechnic Institute*, 551 F.2d 591 (4th Cir. 1977); *Wallace v. Florida A&M University*, 433 So. 2d 600 (Fla. Dist. Ct. App. 1983)).

Sanctions for code violations may range from a warning to expulsion, with various intermediate penalties, such as suspension or community service requirements. Students who are expelled may seek injunctive relief under the theory that they will be irreparably harmed; some courts have ruled that injunctive relief is not appropriate for sanctions short of expulsion (*Boehm v. University of Pennsylvania School of Veterinary Medicine*, 573 A.2d 575 (Pa. Super. Ct. 1990), but see *Jones v. Board of Governors*, 557 F. Supp. 263 (W.D.N.C.), *affirmed*, 704 F.2d 713 (4th Cir. 1983)). Students at public institutions may assert constitutional claims related to deprivation of a property and/or liberty interest (see Section 6.6.2), while students at both public and private institutions may file actions based on contract law.

If a code of conduct defines the offenses for which a student may be penalized by a public institution, that code must comply with constitutional due process requirements concerning vagueness. The requirement is a minimal one: the code must be clear enough for students to understand the standards with which their conduct must comply, and it must not be susceptible to arbitrary enforcement. A public institution’s code of conduct must also comply with the constitutional

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<sup>1</sup>Cases and authorities are collected in Dale R. Agthe, Annot., “Misconduct of College or University Students Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action,” 28 A.L.R.4th 463.

doctrine of overbreadth in any area where the code could affect First Amendment rights. Basically, this doctrine requires that the code not be drawn so broadly and vaguely as to include protected First Amendment activity along with behavior subject to legitimate regulation (see Sections 9.5.2 & 9.6). Finally, a public institution's student conduct code must comply with a general requirement of evenhandedness; that is, the code cannot arbitrarily discriminate in the range and types of penalties, or in the procedural safeguards, afforded various classes of offenders. *Paine v. Board of Regents of the University of Texas System*, 355 F. Supp. 199 (W.D. Tex. 1972), *affirmed per curiam*, 474 F.2d 1397 (5th Cir. 1973), concerned such discriminatory practices. The institution had given students convicted of drug offenses a harsher penalty and fewer safeguards than it gave to all other code offenders, including those charged with equally serious offenses. The court held that this differential treatment violated the equal protection and due process clauses.

The student codes of conduct at some institutions include an "honor code" that requires fellow students to report cheating or other misconduct that they observe. In *Vargo v. Hunt*, 581 A.2d 625 (Pa. Super. 1990), a state appellate court affirmed the ruling of a trial court that a student's report of cheating by a fellow student was subject to a conditional privilege. The Allegheny College honor code explicitly required students to report "what appears to be an act of dishonesty in academic work" to an instructor or a member of the honor committee. When Ms. Hunt reported her suspicions that Mr. Vargo was cheating, he was charged with, and later found guilty of, a violation of the disciplinary code, was suspended from the college for one semester, and received a failing grade in the course. Vargo then sued Hunt for defamation. The court ruled that Hunt had acted within the boundaries of the honor code and had not communicated the allegedly defamatory information beyond the appropriate individuals, and that the academic community had a common interest in the integrity of the academic process.

Sometimes a state law requires students to report wrongdoing on campus. A Texas anti-hazing law contains provisions that require anyone who has "firsthand knowledge of the planning of a specific hazing incident . . . or firsthand knowledge that a specific hazing incident has occurred," to report the incident to a college official (§ 37.152, Tex. Educ. Code). Failure to do so can result in a fine or imprisonment. Students charged with failure to report hazing, as well as with hazing and assault, challenged the law, arguing that compliance with the reporting provisions of the law required them to incriminate themselves in the alleged hazing incident, a violation of their Fifth Amendment rights. In *The State of Texas v. Boyd*, 2 S.W.3d 752 (Ct. App. Tex. 1999), a state appellate court affirmed the ruling of a trial court that held this provision of the law unconstitutional. The Court of Criminal Appeals of Texas, however, reversed, noting that the anti-hazing law also provides for immunity from prosecution for anyone who testifies for the prosecution in such a case (38 S.W.3d 155 (Tex. Crim. App. 2001)).

As noted above, codes of conduct can apply to the off-campus actions as well as the on-campus activity of students. But the extension of a code to off-campus activity can pose significant legal and policy questions. In the *Paine* case above, the institution automatically suspended students who had been put on probation



by the criminal courts for possession of marijuana. The court invalidated the suspensions partly because they were based on an off-campus occurrence (court probation) that did not automatically establish a threat to the institution. More recent cases, however, suggest that courts are more likely to uphold the suspension or expulsion of students who were arrested and found guilty of a criminal offense, in particular drug possession or use. (See, for example, *Krasnow v. Virginia Polytechnic Institute*, 551 F.2d 591 (4th Cir. 1977); *Sohmer v. Kinnard*, 535 F. Supp. 50 (D. Md. 1982).) In *Woodis v. Westark Community College*, 160 F.3d 435 (8th Cir. 1998), the plaintiff, a nursing student expelled from the college after she pleaded *nolo contendere* to a charge of attempting to obtain a controlled substance with a forged prescription, asserted that the college's code of conduct was unconstitutionally vague. She also argued that the college's disciplinary procedure denied her procedural due process because the vice president of student affairs had too much discretion to determine the punishment for students who violated the code. A trial court awarded summary judgment to the college, and the student appealed.

The college's code stated that students were expected to "conduct themselves in an appropriate manner and conform to standards considered to be in good taste at all times" (160 F.3d at 436). The code also required students to "obey all federal, state, and local laws." The appellate court therefore rejected the student's vagueness claim, ruling that drug offenses are criminal violations, and that she was on notice that criminal conduct was also a violation of college policy. With respect to the student's due process claim, the court also rejected the student's claim and affirmed the ruling of the trial court that had used the principles developed in *Esteban v. Central Missouri State College* (Section 9.2.2): adequate notice, a clear indication of the charges against the student, and a hearing that provides an opportunity for the student to present her side of the case. Even if the vice president's discretion had been too broad (an issue that the court did not determine), the student had the right to appeal the vice president's decision to an independent disciplinary board and also to the president. The student had also been given a second hearing after her *nolo contendere* plea, at which she was permitted to consult with counsel, examine the evidence used against her, and participate in the hearing. These procedures provided the student with sufficient due process protections to meet the *Esteban* standard.

The degree to which the institution can articulate a relationship between the off-campus misconduct and the interests of the campus community will improve its success in court. In the *Woodis* case discussed above, the fact that it was a nursing student who had used a forged prescription very likely strengthened the institution's argument that her off-campus conduct was relevant to institutional interests. In *Ray v. Wilmington College*, 667 N.E.2d 39 (Ohio Ct. App. 1995), for instance, the court stated:

An educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises. The institution has the prerogative to decide that certain types of off-campus conduct [are] detrimental to the institution and to discipline a student who engages in that conduct [667 N.E.2d at 711].

As long as the college can articulate a reasonable relationship between the off-campus misconduct and the well-being of the college community, reviewing courts will not overturn a disciplinary action unless they find that the action was arbitrary, an abuse of discretion, or a violation of a student's constitutional rights. And if the college includes language in its student code of conduct specifying that off-campus conduct that affects the well-being of the college community is expressly covered by the code of conduct, defending challenges to discipline for off-campus misconduct may be more successful.

(For legal and policy analysis of the institution's authority to regulate student misconduct off campus, see Gary Pavela (ed.), "Responding to Student Misconduct Off-Campus," Parts I & II, *Synfax Weekly Report*, December 13, 1999, and December 20, 1999. Part II (December 20, 1999), at page 927, makes the point that the policy issues regarding off-campus conduct are more difficult than the legal issues, and questions the extension of campus codes of conduct to off-campus settings.)

To avoid problems in this area, administrators should ascertain that an off-campus act has a direct detrimental impact on the institution's educational functions before using that act as a basis for disciplining students. (See, for example, the Opinion of the Attorney General of Maryland, upholding the right of the state university to discipline "for off-campus conduct detrimental to the interests of the institution, subject to the fundamental constitutional safeguards that apply to all disciplinary actions by educational officials" (74 *Opinions of the Attorney General* 1, Opinion No. 89-002 (Md. 1989)).)

Private institutions not subject to the state action doctrine (see Section 1.5.2) are not constitutionally required to follow these principles regarding student codes. Yet the principles reflect basic notions of fairness, which can be critical components of good administrative practice; thus, administrators of private institutions may wish to use them as policy guides in formulating their codes.

A question that colleges and universities, irrespective of control, may wish to consider is whether the disciplinary code should apply to student organizations as well as to individual students. Should students be required to assume collective responsibility for the actions of an organization, and should the university impose sanctions, such as withdrawal of institutional recognition, on organizations that violate the disciplinary code? (For a model student disciplinary code that includes student organizations within its ambit, see Edward N. Stoner & John Wesley Lowery, "Navigating Past the 'Spirit of Insubordination': A 21st Century Model for a Student Conduct Code with a Model Hearing Script," 31 *J. Coll. & Univ. Law* 1 (2004).)

(For additional information about honor codes and other resources, see the Center for Academic Integrity Web site at <http://www.academicintegrity.org>. A useful publication designed to assist institutions in evaluating their disciplinary rules and procedures is "Reviewing Your Student Discipline Policy: A Project Worth the Investment," available from United Educators at <http://www.ue.org>. For a student-oriented analysis of appropriate disciplinary procedures, see *Guide to Due Process and Fair Procedure on Campus*, published by the Foundation for Individual Rights in Education, and available at <http://www.thefireguides.org>.)

**9.1.4. Judicial systems.** Judicial systems that adjudicate complaints of student misconduct must be very sensitive to procedural safeguards. The membership of judicial bodies, the procedures they use,<sup>2</sup> the extent to which their proceedings are open to the academic community, the sanctions they may impose, the methods by which they may initiate proceedings against students, and provisions for appealing their decisions should be set out in writing and made generally available within the institution.

Whenever the charge could result in a punishment as serious as suspension, a public institution's judicial system must provide the procedures required by the due process clause (see Section 9.4.2). The focal point of these procedures is the hearing at which the accused student may present evidence and argument concerning the charge. The institution, however, may wish to include preliminary stages in its judicial process for more informal disposition of complaints against students. The system may provide for negotiations between the student and the complaining party, for instance, or for preliminary conferences before designated representatives of the judicial system. Full due process safeguards need not be provided at every such preliminary stage. *Andrews v. Knowlton*, 509 F.2d 898 (2d Cir. 1975), dealt with the procedures required at a stage preceding an honor code hearing. The court held that due process procedures were not required at that time because it was not a "critical stage" that could have a "prejudicial impact" on the final determination of whether the student violated the honor code. Thus, administrators have broad authority to construct informal preliminary proceedings—as long as a student's participation in such stages does not adversely affect his or her ability to defend the case in the final stage.

Although the due process requirements for student disciplinary systems are relatively modest (see Sections 9.1.2 & 9.1.3), public institutions that do not follow their own rules and regulations may face charges of constitutional due process violations. Depending on the severity of the deviation from the rules, the courts may side with the student. For example, in *University of Texas Medical School v. Than*, 901 S.W.2d 926 (Tex. 1995), the Texas Supreme Court ruled that a medical student's procedural due process rights were violated when members of the hearing board that subsequently recommended his dismissal for academic dishonesty inspected the testing location without allowing Than to be present.

A question receiving increased attention is whether the judicial system will permit the accused student to have an attorney present. Several models are possible: (1) neither the college nor the student will have attorneys; (2) attorneys may be present to advise the student but may not participate by asking questions or making statements; or, (3) attorneys may be present and participate fully in questioning and making opening and closing statements. A federal appellate court was asked to rule on whether a judicial system at Northern Illinois University that followed the second model—attorney present but a nonparticipant—violated

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<sup>2</sup>Cases and authorities related to student judicial procedures are collected in Jay M. Zitter, Annot., "Admissibility of Hearsay Evidence in Student Disciplinary Proceedings," 30 A.L.R.4th 935.

a student's due process rights. In *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993), the court wrote:

Even if a student has a constitutional right to *consult* counsel . . . we don't think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc [13 F.3d at 225].

The court then, citing *Mathews v. Eldridge* (see Section 6.7.2.3), balanced the cost of permitting lawyers to participate against the risk of harm to students if lawyers were excluded. Concluding that the risk of harm to students was “trivial,” the court refused to rule that attorneys were a student's constitutional right.

Occasionally, a campus judicial proceeding may involve an incident that is also the subject of criminal court proceedings. The same student may thus be charged in both forums at the same time. In such circumstances, the postsecondary institution is not legally required to defer to the criminal courts by canceling or postponing its proceedings. As held in *Paine* (Section 9.1.4) and other cases, even if the institution is public, such dual prosecution is not double jeopardy because the two proceedings impose different kinds of punishment to protect different kinds of state interests. The Constitution's double jeopardy clause applies only to successive criminal prosecutions for the same offense. Nor will the existence of two separate proceedings necessarily violate the student's privilege against self-incrimination. In several cases—for instance, *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968)—courts have rejected student requests to stay campus proceedings on this ground pending the outcome of criminal trials. One court emphasized, however, that if students in campus proceedings “are forced to incriminate themselves . . . and if that testimony is offered against them in subsequent criminal proceedings, they can then invoke . . . [Supreme Court precedents] in opposition to the offer” (*Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Cal. 1969)). In another case, the court rejected as speculative a student's claim that his being identified in campus disciplinary proceedings would jeopardize the fairness of his criminal trial (*Nzuve v. Castleton State College*, 335 A.2d 321 (Vt. 1975)).

The Supreme Court of Maine has addressed the issue of double jeopardy in a situation in which a student was subject to criminal and college penalties for an offense he committed. In *State of Maine v. Sterling*, 685 A.2d 432 (Me. 1996), Sterling, a football team member and recipient of an athletic scholarship, had assaulted a teammate on campus. The university held a hearing under the student conduct code, determined Sterling had violated the code, and suspended him for the summer. In addition, the football coach withdrew the portion of Sterling's scholarship that covered room and board. Shortly thereafter, criminal charges were brought against Sterling. He pleaded not guilty and filed a motion to dismiss the criminal charges, stating that the prosecution of the criminal

complaint constituted double jeopardy because he had already received a penalty through the revocation of his scholarship. A trial court agreed, and dismissed the criminal proceedings. The state appealed.

The Supreme Court of Maine reversed, determining that the withdrawal of the scholarship was not a punishment because it was done to further the purposes of the student disciplinary code and to protect the integrity of the public educational system. The court explained that protection from double jeopardy was available if each of three requirements were met:

1. the sanction in each forum was for the same conduct;
2. the non-criminal sanction and the criminal prosecution were imposed in separate proceedings; and
3. the non-criminal sanction constitutes punishment [685 A.2d at 434].

Although Sterling's situation satisfied elements 1 and 2, the court refused to characterize the withdrawal of the scholarship as "punishment," stating that the scholarship was a privilege that could be withdrawn for valid reasons.

A Wisconsin appellate court addressed a similar issue in *City of Oshkosh v. Winkler*, 557 N.W.2d 464 (Wis. Ct. App. 1996). Winkler, a student at the University of Wisconsin-Oshkosh, was arrested by the city police for participating in a student riot near the university campus. The university also filed charges against Winkler under its disciplinary code. He was found guilty by a Student Conduct Hearing Committee and placed on disciplinary probation. When the city attempted to prosecute Winkler under its disorderly conduct ordinance, Winkler claimed that the criminal prosecution was barred by the double jeopardy doctrine. A trial court ruled in Winkler's favor, and the city appealed.

The city had argued that the university's student conduct code was not punitive but designed to maintain order on campus, and thus the double jeopardy doctrine did not apply in Winkler's case. Although some provisions of the university's code of conduct were very similar to the language of the Oshkosh ordinances prohibiting disorderly conduct, the appellate court refused to apply the double jeopardy standard. It noted that Wisconsin's administrative code requires the university system to "identify basic standards of nonacademic conduct necessary to protect the community" (Wis. Adm. Code § UWS 17.01 (1966)). Thus, the university's sanction was not punitive, according to the court, but was designed to maintain institutional order.

The court in *Winkler* relied, in part, on an opinion of the U.S. Supreme Court in *United States v. Halper*, 490 U.S. 435 (1989), which stated that if both the civil and the criminal proceedings were punitive in nature, then the double jeopardy doctrine was triggered. However, in *Hudson v. United States*, 522 U.S. 93 (1997), the U.S. Supreme Court criticized the method of analysis used in *Halper*. In an opinion to which five Justices subscribed, and in which there were four separate concurring opinions, the Court held that bank officers who had been assessed civil monetary penalties by the Office of the Comptroller of the Currency could also be indicted for criminal violations based on the same transactions for which they had been assessed civil penalties. The majority stated that, despite the fact

that civil monetary penalties had a deterrent effect, they could not be construed as so punitive that they had the effect of a criminal sanction because they were not disproportionate to the nature of the misconduct. *Hudson* suggests that it may now be more difficult for students to claim double jeopardy, particularly if the noncriminal proceeding occurs before the criminal proceeding (as is often the case in campus disciplinary actions). As always, those institutions that can demonstrate that their student codes of conduct and judicial systems are designed for educational purposes and to maintain order rather than to punish will be in the best position to defend against double jeopardy claims, whether they are used in the campus disciplinary case or a criminal matter.

While neither double jeopardy nor self-incrimination need tie the administrator's hands, administrators may nevertheless choose, for policy reasons, to delay or dismiss particular campus proceedings when the same incident is in the criminal courts. It is possible that the criminal proceedings will adequately protect the institution's interests. Or, as *Furutani* and *Nzuve* suggest, student testimony at a campus proceeding could create evidentiary problems for the criminal court.

If a public institution proceeds with its campus action while the student is subject to charges still pending in criminal court, the institution may have to permit the student to have a lawyer with him or her during the campus proceedings. In *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978), a student challenged a University of Rhode Island rule that prohibited the presence of legal counsel at campus disciplinary hearings. The student obtained an injunction prohibiting the university from conducting the hearing without permitting the student the advice of counsel. The appellate court, affirming the lower court's injunction order, held that when a criminal case based on the same conduct giving rise to the disciplinary proceeding is pending in the courts, "the denial to [the student] of the right to have a lawyer of his own choice to consult with and advise him during the disciplinary proceeding would deprive [him] of due process of law."

The court emphasized that the student was requesting the assistance of counsel to consult with and advise him during the hearing, not to conduct the hearing on the student's behalf. Such assistance was critical to the student because of the delicacy of the legal situation he faced:

Were the appellee to testify in the disciplinary proceeding, his statement could be used as evidence in the criminal case, either to impeach or as an admission if he did not choose to testify. Appellee contends that he is, therefore, impaled on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree he is within weeks of receiving, and his reputation will be seriously blemished [582 F.2d at 103].

If a public institution delays campus proceedings, and then uses a conviction in the criminal proceedings as the basis for its campus action, the institution must

take care to protect the student's due process rights. In the *Paine* case, a university rule required the automatic two-year suspension of any student convicted of a narcotics offense. The court held that the students must be given an opportunity to show that, despite their conviction and probation, they posed "no substantial threat of influencing other students to use, possess, or sell drugs or narcotics." Thus, a criminal conviction does not automatically provide the basis for suspension; administrators should still ascertain that the conviction has a detrimental impact on the campus, and the affected student should have the opportunity to make a contrary showing.

Given the deferential review by courts of the outcomes of student disciplinary proceedings (assuming that the student's constitutional or contractual rights have been protected), student challenges to these proceedings are usually unsuccessful. Even if the student is eventually exonerated, the institution that follows its rules and provides procedural protections will very likely prevail in subsequent litigation. For example, a state trial court rejected a student's attempt to state a negligence claim against a university for subjecting him to disciplinary proceedings for an infraction he did not commit. In *Weitz v. State of New York*, 696 N.Y.S.2d 656 (Ct. Claims N.Y. 1999), the plaintiff was an innocent bystander during a brawl in his residence hall that involved individuals who did not live in the residence hall. In addition to claims of negligence with respect to the security of the residence hall, the student claimed that the university was negligent in prosecuting him for violating the institution's code of conduct when he had not done so. The court noted that there was no cause of action in New York for negligent prosecution, and that it could find no public policy reason for creating such a cause of action simply because the student charged with a violation was ultimately found to be innocent.

## ***Sec. 9.2. Disciplinary Rules and Regulations***

**9.2.1. Overview.** Postsecondary institutions customarily have rules of conduct or behavior that students are expected to follow. It has become increasingly common to commit these rules to writing and embody them in codes of conduct that are binding on all students (see Section 9.1.3). Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better-conceived and administered system, written rules also provide a specific target to aim at in a lawsuit.

Students have challenged institutional attempts to discipline them by attacking the validity of the rule they allegedly violated or by attacking the nature of the disciplinary proceeding that determined that the alleged violation occurred. This Section discusses student challenges to the validity of institutional rules and regulations; Section 9.4 discusses challenges to the procedures used by colleges to determine whether, in fact, violations have occurred.

**9.2.2. Public institutions.** In public institutions, students frequently contend that the rules of conduct violate some specific guarantee of the Bill of

Rights, as made applicable to state institutions by the Fourteenth Amendment (see Section 1.5.2). These situations, the most numerous of which implicate the free speech and press clauses of the First Amendment, are discussed in Section 9.1 and various other Sections of this chapter. In other situations, the contention is a more general one: that the rule is so vague that its enforcement violates due process; that is (as was noted in Section 9.1.3), the rule is unconstitutionally “vague” or “void for vagueness.”

*Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969), is illustrative. The University of Wisconsin had expelled students for attempting to block access to an off-campus recruiter as a protest against the Vietnam War. The university had charged the students under a rule prohibiting “misconduct” and argued in court that it had inherent power to discipline, which need not be exercised through specific rules. Both the U.S. District Court and the U.S. Court of Appeals held that the misconduct policy was unconstitutionally vague. The appellate court reasoned:

The inadequacy of the rule is apparent on its face. It contains no clues which could assist a student, an administrator, or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the university as “misconduct.”

. . . We do not require university codes of conduct to satisfy the same rigorous standards as criminal statutes. We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of “misconduct” without reference to any preexisting rule which supplies an adequate guide [418 F.2d at 167–68].

While similar language about vagueness is often found in other court opinions, the actual result in *Soglin* (the invalidation of the rule) is unusual. Most university rules subjected to judicial tests of vagueness have survived, sometimes because the rule at issue is less egregious than the “misconduct” rule in *Soglin*, sometimes because a court accepts the “inherent power to discipline” argument raised by the *Soglin* defendants and declines to undertake any real vagueness analysis, and sometimes because the student conduct at issue was so contrary to the judges’ own standards of decency that they tended to ignore the defects in the rules in light of the obvious “defect” in behavior. *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), the case most often cited in opposition to *Soglin*, reveals all three of these distinctions. In this case, students contested their suspension under a regulation prohibiting “participation in mass gatherings which might be considered as unruly or unlawful.” In upholding the suspension, the court emphasized the need for “flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct” and recognized the institution’s “latitude and discretion in its formulation of rules and regulations.” The approach has often been followed in later cases—for instance, in *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992 (5th Cir. 1975), where the court upheld a series of regulations dealing with disorderly assembly and disturbing the peace on campus.

In addition to *procedural* due process challenges, institutional rules and their application may be challenged under *substantive* due process theories. Such



challenges are possible when the institution may have violated fundamental privacy rights of a student or may have acted arbitrarily or irrationally (see generally William Kaplin, *American Constitutional Law* (Carolina Academic Press, 2004), Ch. 11, Secs. B & C). The latter argument, for instance, has been made in situations in which a college or school has enacted “zero tolerance” rules with respect to possession of controlled substances and weapons, a practice that requires punishment for possession despite the factual circumstances. In *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), a high school student was expelled after a knife was found in the glove compartment of his car. The student said that the knife belonged to a friend, and that he was not aware that the knife was in the car. Under the school’s zero tolerance rules, the student was expelled anyway. The trial and appellate courts rejected the school district’s argument that the serious problem of weapons at school justified its summary action, stating that if the student had been unaware that he was “in possession” of a knife, then he could not have used it to harm anyone. Thus, said the court, the expulsion without an opportunity to determine if the student had actual knowledge of his “possession” was a violation of substantive due process. The court remanded the case for trial on the issue of the student’s credibility.

Despite the outcome in *Seal*, courts are reluctant to create new substantive due process protections, particularly where students have remedies under other legal theories. For example, in *Dacosta v. Nwachukwa*, 304 F.3d 1045 (11th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003), an instructor at the Georgia Military College injured a student when he shoved her and slammed a door in her face. The student filed a claim under 42 U.S.C. § 1983 (see Section 4.7.4 of this book), asserting a breach of her substantive due process rights. Noting that the student had a cause of action against the instructor for intentional battery, a tort under Georgia law, the court ruled that the instructor was protected by qualified immunity from constitutional claims.

Although the judicial trend suggests that most rules and regulations will be upheld, administrators should not assume that they have a free hand in promulgating codes of conduct. *Soglin* signals the institution’s vulnerability when it has no written rules at all or when the rule provides no standard to guide conduct. And even the *Esteban* court warned: “We do not hold that any college regulation, however loosely framed, is necessarily valid.” To avoid such pitfalls, disciplinary rules should provide standards sufficient to guide both the students in their conduct and the disciplinarians in their decision making. A rule will likely pass judicial scrutiny if the standard “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices” (*Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971), upholding a regulation that “demonstrations are forbidden in any areas of the health center, inside any buildings, and congregating in the locations of fire hydrants”). Regulations need not be drafted by a lawyer—in fact, student involvement in drafting may be valuable to ensure an expression of their “common understanding”—but it would usually be wise to have a lawyer play a general advisory role in the process.

Once the rules are promulgated, institutional officials have some latitude in interpreting and applying them, as long as the interpretation is reasonable.

In *Board of Education of Rogers, Ark. v. McCluskey*, 458 U.S. 966 (1982), a public school board's interpretation of one of its rules was challenged as unreasonable. The board had held that its rule against students being under the influence of "controlled substances" included alcoholic beverages. The U.S. Supreme Court, quoting *Wood v. Strickland* (see Section 4.7.4), asserted that "federal courts [are] not authorized to construe school regulations" unless the board's interpretation "is so extreme as to be a violation of due process" (458 U.S. at 969–70).

**9.2.3. Private institutions.** Private institutions, not being subject to federal constitutional constraints (see Section 1.5.2), have even more latitude than public institutions do in promulgating disciplinary rules. Courts are likely to recognize a broad right to make and enforce rules that is inherent in the private student-institution relationship or to find such a right implied in some contractual relationship between student and school. Under this broad construction, private institutional rules will not be held to specificity standards such as those in *Soglin* (discussed in Section 9.2.2). Thus, in *Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957), the court upheld the plaintiff's suspension for misconduct under a policy where the school "reserves the right to sever the connection of any student with the university for appropriate reason"; and in *Carr v. St. John's University, New York*, 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *affirmed*, 187 N.E.2d 18 (N.Y. 1962), the courts upheld the dismissal of four students for off-campus conduct under a regulation providing that "in conformity with the ideals of Christian education and conduct, the university reserves the right to dismiss a student at any time on whatever grounds the university judges advisable."

Despite the breadth of such cases, the private school administrator, like his or her public counterpart, should not assume a legally free hand in promulgating disciplinary rules. Courts can now be expected to protect private school students from clearly arbitrary disciplinary actions (see Section 1.5.3). When a school has disciplinary rules, courts may overturn administrators' actions taken in derogation of the rules. And when there is no rule, or if the applicable rule provides no standard of behavior, courts may overturn suspensions for conduct that the student could not reasonably have known was wrong. Thus, in *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), though the court upheld the expulsion of a graduate student for dishonesty under the student code of conduct, it first asked "whether the . . . [expulsion] was arbitrary" and indicated that the university's findings would be accorded a presumption of correctness only "if the regulations concerned are reasonable [and] if they are known to the student or should have been." To avoid such situations, private institutions may want to adhere to much the same guidelines for promulgating rules as are suggested above for public institutions, despite the fact that they are not required by law to do so.

**9.2.4. Disciplining students with psychiatric illnesses.** Research conducted in 2002 indicated that the number of students seeking help for psychiatric disorders has increased dramatically on college campuses (Erica Goode,

“More in College Seek Help for Psychological Problems,” *New York Times*, February 3, 2003, p. A11). Students with mental or psychological disabilities are protected against discrimination by the Rehabilitation Act and the Americans With Disabilities Act (ADA) (see Sections 8.2.4.3. & 13.5.4, and for student employees, Section 5.2.5). Yet a student’s misconduct may disrupt campus activities, or the student may be dangerous to herself or to other students, faculty, or administrators. Opinion is divided among educators and mental health professionals as to whether students suffering from mental disorders who violate the institution’s code of student conduct should be subject to the regular disciplinary procedure or should be given a “medical withdrawal” if their presence on campus becomes disruptive or dangerous.<sup>3</sup>

Several issues arise in connection with mentally ill students who are disruptive or dangerous. If campus counseling personnel have gained information from a student indicating that he or she is potentially dangerous, the teachings of *Tarasoff v. Regents of the University of California* (Section 4.7.2 of this book) and its progeny (as well as many state statutes codifying *Tarasoff*) regarding a duty to warn the potential target(s) of the violence would apply. If administrators or faculty know that the student is potentially dangerous and that student subsequently injures someone, negligence claims based on the foreseeability of harm may arise (Section 3.3.2). On the other hand, potential violations of the federal Family Educational Rights and Privacy Act (discussed in Section 9.7.1) could also be implicated if institutional officials routinely warned a student’s family or others of medical or psychological conditions.

Furthermore, college counseling staff may face tort claims for their alleged negligence in treating or advising students with psychiatric disorders (see, for example, *Williamson v. Liptzin*, 539 S.E.2d 313 (N.C. 2000), in which the court rejected the claim by a student who shot two individuals that the negligence of the university psychiatrist who treated him was the proximate cause of his criminal acts and subsequent injuries). Or the student may claim that disclosure by a counselor of his psychiatric condition constitutes “malpractice” (see *Jarzynka v. St. Thomas University School of Law*, 310 F. Supp. 2d 1256 (S.D. Fla. 2004), in which the court rejected the plaintiff’s malpractice claim because the counselor was not a mental health therapist).

Federal and state disability discrimination laws require colleges and universities, as places of public accommodation, to provide appropriate accommodations for otherwise qualified students with disabilities. But if a student’s misconduct is related to the nature of the disability, and the conduct would otherwise violate the college’s code of student conduct, administrators must face a difficult choice. This issue was addressed squarely in a case that has implications for higher education even though it involves a private elementary school. In *Bercovitch v. Baldwin School*, 133 F.3d 141 (1st Cir. 1998), a student with attention deficit disorder (ADD) performed acceptably in his studies, but consistently violated the school’s code of conduct. The school made numerous

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<sup>3</sup>Cases and authorities are collected in J. M. Zitter, Annot., “Physical or Mental Illness as Basis of Dismissal of Student from School, College or University,” 17 A.L.R.4th 519.

attempts to accommodate his disruptive behavior even before it was aware of the diagnosis of ADD. After the diagnosis and medication, the student's disruptive behavior continued, and the school suspended the student. The parents brought a claim under Title III of the Americans With Disabilities Act. Although a trial court ruled that the school had to reinstate the student and make greater efforts to accommodate him, the appellate court disagreed. The student was not otherwise qualified for ADA purposes if he could not comply with the school's code of conduct, said the court. Furthermore, the student's disorder did not qualify for protection under the ADA because it did not substantially limit his ability to learn. (The court explained that this private school was not subject to the Individuals With Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*), as are public schools, and had no obligation to provide an individualized educational plan or to provide accommodations that modified its disciplinary code or its academic programs.)<sup>4</sup>

But if a court determines that following the rules is an essential function of being a student, then the student may not be "otherwise qualified" and thus unprotected by disability discrimination law. A federal trial court rejected the claim of a graduate student that the university should have considered his learning disability when enforcing its code of conduct against him. In *Childress v. Virginia Commonwealth University*, 5 F. Supp. 2d 384 (E.D. Va. 1998), the plaintiff was charged with multiple violations of the honor code when he committed several acts of plagiarism. The honor board found him guilty of the violations and recommended his expulsion. The student appealed, but his appeal was denied and he was expelled from the university. He filed discrimination claims under the Americans With Disabilities Act and Section 504 of the Rehabilitation Act.

The court assumed without deciding that the plaintiff had a learning disability that qualified for protection under the ADA and Section 504. The court then turned to the issue of whether the plaintiff was a qualified individual with a disability—whether he could perform the essential functions of a graduate student. The court determined that complying with the honor code was an essential function of being a graduate student. Furthermore, said the court, the honor board had taken the plaintiff's disability into consideration when determining whether he had violated the honor code, thus complying with the ADA's requirement that an individualized determination be made as to whether the individual is qualified. (For another case decided in a similar fashion, see *El Kouni v. Trustees of Boston University*, 169 F. Supp. 2d 1 (D. Mass. 2001).)

Students with disabilities who challenge disciplinary sanctions as discriminatory must establish that the college was aware of the student's disability and that the discipline resulted from that knowledge. In *Rosenthal v. Webster*

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<sup>4</sup>On the other hand, if a student has a record of otherwise acceptable academic performance and behavior, and the alleged code violation is not a serious one, a court may require the school to take the disability into consideration when determining whether to discipline the student. In *Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994), a federal trial court enjoined a private secondary school from expelling a student with an autoimmune disorder for misconduct related to an injury she incurred at school. The court ruled that the student's prior good academic and disciplinary record established that she was "otherwise qualified," and that her expulsion was an ADA violation.

*University*, 2000 U.S. App. LEXIS 23733 (8th Cir. 2000) (unpublished), a federal appellate court rejected a student's ADA and Rehabilitation Act claims that the university discriminated against him on the basis of his bipolar disorder by suspending him. The court found that the university was not aware of his disability before it suspended him, but took that action because the plaintiff had carried a gun onto campus and had threatened to use it.

These cases suggest that the courts will follow the analysis used by the U.S. Supreme Court in the *Sutton* trilogy (see Section 5.2.5). If other courts rule that the ability to comply with a reasonable code of conduct is an "essential function" of being a student, then students whose misconduct is linked to their disability will have considerable difficulty demonstrating that they should be exempt from that code of conduct under the ADA or Section 504.

Given the potential for constitutional claims at public institutions and discrimination and contract claims at all institutions, administrators who are considering disciplinary action against a student with a mental or emotional disorder should provide due process protections (see Section 9.4.2). If the student has violated the institution's code of conduct and is competent to participate in the hearing, some experts recommend subjecting the student to the same disciplinary proceedings that a student without a mental or emotional impairment would receive (see, for example, Gary Pavela, *The Dismissal of Students with Mental Disorders* (College Administration Publications, 1985)). If the student is a danger to himself/herself or others, summary suspension may be appropriate, but postsuspension due process or contractual protections should be provided if possible. (For an analysis of the issues facing public colleges and universities in these circumstances, and recommended actions, see Jeanette DiScala, Steven G. Olswang, & Carol S. Niccolls, "College and University Responses to the Emotionally or Mentally Impaired Student," 19 *J. Coll. & Univ. Law* 17 (1992).)

## **Sec. 9.3. Grades, Credits, and Degrees**

**9.3.1. Overview.** Fewer legal restrictions pertain to an institution's application of academic standards to students than to its application of behavioral standards. Courts are more deferential to academia when evaluation of academic work is the issue, believing that such evaluation resides in the expertise of the faculty rather than the court.

Despite the fact that judicial review of academic judgments is more deferential than judicial review of discipline for student misconduct, courts hold institutions to their rules, policies, and procedures, and examine the foundations for the academic decision to determine whether it is based on academic standards. Faculty and administrators should ensure that they can document the basis for their academic judgments, that they follow institutional rules and procedures, and that the student is fully informed of his or her rights with respect to opportunities for appealing the decision.

**9.3.2. Awarding of grades and degrees.** When a student alleges that a grade has been awarded improperly or a degree has been denied unfairly, the

courts must determine whether the defendant's action reflected the application of academic judgment or an arbitrary or unfair application of institutional policy. In one leading case, *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), a medical student challenged his dismissal from medical school. He had failed the pediatrics-obstetrics course and was excluded, under a College of Medicine rule, for having failed 25 percent or more of his major third-year courses. The court described its role, and the institution's legal obligation, in such cases as follows:

Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness, or capriciousness may be actionable. . . .

This rule has been stated in a variety of ways by a number of courts. It has been said that courts do not interfere with the management of a school's internal affairs unless "there has been a manifest abuse of discretion or where [the school officials'] action has been arbitrary or unlawful" . . . or unless the school authorities have acted "arbitrarily or capriciously" . . . or unless they have abused their discretion . . . or acted in "bad faith" [citations omitted].

The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness, or bad faith. The reason for this rule is that, in 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's faculty's freedom from interference from other noneducational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student [244 F. Supp. at 159-60].

The plaintiff had alleged that his instructor decided before completion of the course to fail him regardless of the quality of his work. The court held that these allegations met its requirements for judicial review. They therefore stated a cause of action, which if proven at trial would justify the entry of judgment against the college.

In 1975, a federal appeals court issued an important reaffirmation of the principles underlying the *Connelly* case. *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975), concerned a nursing student who had been dismissed for deficient performance in clinical training. In rejecting the student's suit against the school, the court held that:

[t]he courts are not equipped to review academic records based upon academic standards within the particular knowledge, experience, and expertise of academicians. Thus, when presented with a challenge that the school authorities

suspended or dismissed a student for failure re: academic standards, the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive [513 F.2d at 850–51].

The U.S. Supreme Court has twice addressed the subject of the standard of review of academic judgments. It first considered this subject briefly in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (discussed in Section 9.4.3). A dismissed medical student claimed that the school applied stricter standards to her because of her sex, religion, and physical appearance. Referring particularly to *Gaspar v. Bruton*, the Court rejected the claim in language inhospitable to substantive judicial review of academic decisions:

A number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if “shown to be clearly arbitrary or capricious.” . . . Courts are particularly ill equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process [see Section 9.4.3] speak *a fortiori* here and warn against any such judicial intrusion into academic decision making [435 U.S. at 91–92].

In a case in which the Court relied heavily on *Horowitz*, a student filed a substantive due process challenge to his academic dismissal from medical school. The student, whose entire record of academic performance in medical school was mediocre, asserted that the school’s refusal to allow him to retake the National Board of Medical Examiners examination violated his constitutional rights because other students had been allowed to retake the exam. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court assumed without deciding the issue that Ewing had a property interest in continued enrollment in medical school. The Court noted that it was not the school’s procedures that were under review—the question was “whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination” (474 U.S. at 225). The court then stated:

Ewing’s claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career [474 U.S. at 225].

Citing *Horowitz*, the Court emphasized:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment [474 U.S. at 225].

Citing *Keyishian* (discussed in Section 7.1.1), the Court reminded the parties that concerns about institutional academic freedom also limited the nature of judicial review of substantive academic judgments.

Although the result in *Ewing* represents the standard to be used by lower courts, the Court's willingness to assume the existence of a property or liberty interest is questionable in light of a subsequent Supreme Court ruling. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court ruled that when defendants who are state officials or state agencies raise a defense of qualified immunity (see Section 4.7.4), federal courts must determine whether a property or liberty interest was "clearly established" at the time the defendant acted. Applying *Siegert*, the Supreme Court of Hawaii in *Soong v. University of Hawaii*, 825 P.2d 1060 (Haw. 1992), ruled that a student had no clearly established substantive constitutional right to continued enrollment in an academic program.

The *Ewing* case has guided courts in subsequent challenges to academic dismissals of students. In *Frabotta v. Meridia Huron Hospital School*, 657 N.E.2d 816 (Ohio Ct. App. 1995), a nursing student who was dismissed six days prior to graduation challenged her dismissal as arbitrary and capricious, and a violation of her due process and equal protection guarantees. The court, citing *Ewing*, stated:

Courts should not intervene in academic decision-making where a student is dismissed unless the dismissal is clearly shown to be arbitrary and capricious. . . . In this case, Frabotta was dismissed because of her failing performance in the clinical portion of her Nursing 303 class. . . . Thus, there is no dispute that Frabotta's dismissal was clearly an academic decision. It being an academic decision, Frabotta had the burden of proving that the decision was arbitrary and capricious [657 N.E.2d at 819].

Simply because the student believed she deserved a second chance, or an additional opportunity to improve her performance, did not render the school's actions either arbitrary or capricious, according to the court, nor was the school's refusal to give her additional opportunities to improve her performance a denial of due process. The student had been warned of her deficiencies, said the court; even though the school cut short her opportunity to improve her performance, that was a subjective, academic judgment that the court could not overturn absent clear evidence of bad faith on the part of the instructor.<sup>5</sup>

A Texas appellate court did find considerable evidence of bad faith on the part of faculty members who voted to dismiss a doctoral student on purported academic grounds. In *Alcorn v. Vaksman*, 877 S.W.2d 390 (Tex. Ct. App. 1994), an *en banc* court upheld the findings of a trial court that several faculty members had voted to dismiss Vaksman from the doctoral program at the University of Houston not because of poor academic performance but because of his unpopular ideas and his tendency to publicize those ideas. Vaksman had never been informed that his academic performance was sufficiently poor to justify

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<sup>5</sup>Although *Ewing* may protect an institution against constitutional challenges if a student is dismissed just prior to graduation, one student used contract law to receive damages for forgone income when he was dismissed for academic reasons just prior to graduation. See *Sharik v. Southeastern University of the Health Sciences*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000), *rev. dismissed*, 822 So. 2d 1290 (Fla. 2002), discussed in Section 8.1.3.



any academic sanction, and he had not been given an opportunity to discuss the alleged academic deficiencies with the graduate committee that recommended his dismissal. In addition to ordering the university to reinstate Vaksman to the doctoral program in history and pay him \$32,500 in actual damages, the trial judge ordered the two faculty members, the department chair, and a member of the graduate committee, who voted to dismiss Vaksman, to pay \$10,000 each toward the damage award. The appellate court held that, although the university's officers were immune from liability for money damages in their official capacities, the actions of the two faculty members, whose conduct "intentionally inflicted emotional distress" upon Vaksman, were not taken in good faith and, thus, the award of individual judgments against the two faculty members was appropriate.

Courts may resolve legal questions concerning the award of grades, credits, or degrees not only by applying standards of arbitrariness or bad faith but also by applying the terms of the student-institution contract (Section 8.1.3). A 1979 Kentucky case, *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky. Ct. App. 1979), illustrates the deference that may be accorded postsecondary institutions—especially church-related institutions—in identifying and construing the contract. The case also illustrates the problems that may arise when institutions attempt to withhold academic recognition from students because of their homosexuality.

The Lexington Theological Seminary, a seminary training ministers for the Disciples of Christ and other denominations, had denied Vance, a student who had successfully completed all his academic requirements, a Master of Divinity degree because of his admitted homosexuality. Three years after he first enrolled, he advised the dean of the school and the president of the seminary of his homosexuality. In January 1976, the student was informed that his degree candidacy would be deferred until he completed one additional course. In May 1976, after he had successfully completed the course, the faculty voted to grant the Master of Divinity degree. The seminary's executive committee, however, voted not to approve the faculty recommendation, and the board of trustees subsequently ratified the committee's decision. The student brought suit, seeking conferral of the degree.<sup>6</sup>

The trial court dealt with the suit as a contract case and held that the seminary had breached its contract with the plaintiff student. The Kentucky Court of Appeals, although it overruled the trial court, also agreed to apply contract principles to the case: "The terms and conditions for graduation from a private college or university are those offered by the publications of the college at the time of enrollment and, as such, have some of the characteristics of a contract."

The appellate court relied on various phrases from the seminary's catalog—such as "Christian ministry," "gospel transmitted through the Bible," "servants of the Gospel," "fundamental character," and "display traits of character and personality which indicate probable effectiveness in the Christian ministry"—that it

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<sup>6</sup>See generally Annot., "Student's Right to Compel School Officials to Issue Degree, Diploma, or the Like," 11 A.L.R.4th 1182.

determined to be contract terms. It held that these terms created “reasonably clear standards” and interpreted them to permit the seminary to bar a homosexual student from receiving a degree. The court found that the seminary, being a religious institution preparing ministers to preach the gospel, had “a most compelling interest” in allowing only “persons possessing character of the highest Christian ideals” to graduate and that it had exercised sound discretion in denying the degree.

The court’s reasoning sparked a strong dissenting opinion, which examined not only the language in the seminary catalog but also the conduct of the seminary’s dean, president, and faculty. To the dissenting judge, “Since neither the dean, the president, nor the faculty understood the catalogue to clearly exclude homosexuals, their view certainly cloud[ed] any contrary meaning.” The dissent also argued that the language used in the catalog was not sufficiently clear: “In the future, the board should consider revising the catalogue to be more explicit on what is meant by ‘fundamental character.’ The board might also make it clear that applications for degree candidacy will not only be ‘evaluated by the faculty’ but will also be reviewed by the board.”

The *Lexington Theological Seminary* case illustrates that courts may resolve questions of academic credits or degrees by viewing the school catalog as a contract binding on both student and institution. The majority opinion also illustrates the flexibility that courts may accord postsecondary institutions in drafting and interpreting this contract, and the special deference that may be accorded church-related institutions in enforcing terms dealing with morality. The dissent in this case, however, deserves as much attention as the majority opinion. It cautions administrators against construing ambiguous catalog or policy language in a way that is inconsistent with their prior actions (see Section 1.4.2.3) and illustrates the potential for ambiguity that resides in general terms such as “fundamental character.” Even if administrators could confidently expect broad deference from the courts, the dissent’s cautions are still valuable as suggestions for how institutions can do better, of their own accord rather than through judicial compulsion, in ordering their own internal affairs. Statements in the catalog reserving the institution’s right to make changes in programs, graduation requirements, or grading policy provide important protections in breach of contract claims (see, for example, *Bender v. Alderson-Broaddus College*, 575 S.E.2d 112 (W. Va. 2002), in which the court rejected a nursing student’s claim that the college’s decision to change its grading policy was arbitrary and capricious).

An example of a court’s refusal to defer to a college’s interpretation of its catalog and policy documents is *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989). Sharon Russell had been asked to withdraw from the nursing program at the college because the administrators believed her obesity was unsatisfactory for a nursing student. Russell’s academic performance in all but one course was satisfactory or better; the instructor in one clinical course gave her a failing grade, which the jury found was related to her weight, not to her performance. Although the nursing program’s rules specified that failing a clinical course would result in expulsion, the college promised Russell that she could remain in the program if she would sign a contract promising to lose weight on a regular basis. She did so,

and attended Weight Watchers during that year, but did not lose weight. At the end of her junior year, Russell was asked to withdraw from Salve Regina, and she transferred to a nursing program at another college, where she was required to repeat her junior year because of a two-year residency requirement. She completed her nursing degree, but in five years rather than four.

Although the trial judge dismissed her tort claims of intentional infliction of emotional distress and invasion of privacy (stemming from administrators' conduct regarding her obesity), the contract claim had been submitted to the jury, which had found for Russell and had awarded her approximately \$144,000. On appeal, the court discussed the terms of the contract:

From the various catalogs, manuals, handbooks, etc., that form the contract between student and institution, the district court, in its jury charge, boiled the agreement between the parties down to one in which Russell on the one hand was required to abide by disciplinary rules, pay tuition, and maintain good academic standing, and the College on the other hand was required to provide her with an education until graduation. The court informed the jury that the agreement was modified by the "contract" the parties signed during Russell's junior year. The jury was told that, if Russell "substantially performed" her side of the bargain, the College's actions constituted a breach [890 F.2d at 488].

The college had objected to the trial court's use of commercial contract principles of substantial performance rather than using a more deferential approach, such as was used in *Slaughter v. Brigham Young University* (discussed in Sections 9.2.3 & 9.4.4). But the appellate court disagreed, noting that the college's actions were based not on academic judgments but on a belief that the student's weight was inappropriate, despite the fact that the college knew of the student's obesity when it admitted her to both the college and the nursing program:

Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard to compel an institution to graduate a student merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action [890 F.2d at 489].

Unlike the student in the *Lexington Theological Seminary* case, Russell was not asking the court to award her a degree; she was asking for contract damages, which included one year of forgone income (while she attended the other college for the extra year). The appellate court found that this portion of the award, \$25,000, was appropriate.<sup>7</sup>

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<sup>7</sup>The U.S. Supreme Court subsequently reversed and remanded the appellate court's decision (499 U.S. 255 (1991)); on remand the appellate court reinstated its prior judgment and opinion (938 F.2d 315 (1st Cir. 1991)).

Although infrequent, challenges to grades or examination results have been brought by students. For example, in *Olsson v. Board of Higher Education of the City of New York*, 402 N.E.2d 1150 (N.Y. 1980), a student had not passed a comprehensive examination and therefore had not been awarded the M.A. degree for which he had been working. He claimed that his professor had misled him about the required passing grade on the examination. The professor had meant to say that a student must score three out of a possible five points on four of the five questions; instead, the professor said that a student must pass three of five questions. The student invoked the “estoppel” doctrine—the doctrine that justifiable reliance on a statement or promise estops the other from contradicting it if the reliance led directly to a detriment or injustice to the promisee. He argued that (1) he had justifiably relied on the professor’s statement in budgeting both his study and test time, (2) he had achieved the grade the professor had stated was necessary, and (3) injustice would result if the university was not estopped from denying the degree.

The trial court and the intermediate appellate court both accepted the student’s argument. The state’s highest appellate court, however, did not. Defering to the academic judgment of the institution, and emphasizing that the institution had offered the student an opportunity to retake the exam, the court refused to grant a “degree by estoppel.” Although conceding that principles of apparent authority and agency law would be relevant in a noneducational context, the court stated that:

such hornbook rules cannot be applied mechanically where the “principal” is an educational institution and the result would be to override a determination concerning a student’s academic qualifications. Because such determinations rest in most cases upon the subjective professional judgment of trained educators, the courts have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community. . . .

This judicial reluctance to intervene in controversies involving academic standards is founded upon sound considerations of public policy. When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline. In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis. Indeed, the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their longstanding practice of restraint in this area and instead began to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified [402 N.E.2d at 1152–53].

Although the court refused to apply the estoppel doctrine to the particular facts of this case, it indicated that in other, more extreme, circumstances estoppel could apply to problems concerning grading and other academic judgments. The court compared Olsson’s situation to that of the plaintiff in *Blank v. Board*

of *Higher Education of the City of New York*, 273 N.Y.S.2d 796 (see Section 3.2.2), in which the student had completed all academic requirements for his bachelor's degree but had not spent his final term "in residence." The student demonstrated reliance on the incorrect advice of several advisers and faculty members, and had failed only to satisfy a technical requirement rather than an academic one. The court explained:

The outstanding feature which differentiates *Blank* from the instant case is the unavoidable fact that in *Blank* the student unquestionably had fulfilled the academic requirements for the credential he sought. Unlike the student here, the student in *Blank* had demonstrated his competence in the subject matter to the satisfaction of his professors. Thus, there could be no public policy objection to [the court's] decision to award a "diploma by estoppel" [402 N.E.2d at 1154].<sup>8</sup>

The *Olsson* case thus provides both an extensive justification of "academic deference"—that is, judicial deference to an educational institution's academic judgments—and an extensive analysis of the circumstances in which courts, rather than deferring, should invoke estoppel principles to protect students challenging academic decisions. Synthesizing its analysis, the court concluded:

It must be stressed that the judicial awarding of an academic diploma is an extreme remedy which should be reserved for the most egregious of circumstances. In light of the serious policy considerations which militate against judicial intervention in academic disputes, the courts should shun the "diploma by estoppel" doctrine whenever there is some question as to whether the student seeking relief has actually demonstrated his competence in accordance with the standards devised by the appropriate school authorities. Additionally, the courts should be particularly cautious in applying the doctrine in cases such as this, where a less drastic remedy, such as retesting, may be employed without seriously disrupting the student's academic or professional career [402 N.E.2d at 1154].

A challenge to grades in two law school courses provided the New York courts with an opportunity to address another issue similar to that in *Olsson*—the standard of review to be used when students challenge particular grades. In *Susan M v. New York Law School*, 544 N.Y.S.2d 829 (N.Y. App. Div. 1989), *reversed*, 556 N.E.2d 1104 (N.Y. 1990), a law student dismissed for inadequate academic performance sought judicial review of her grades in her constitutional law and corporations courses. The student claimed that she had received poor grades because of errors made by the professors in both courses. In the constitutional law

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<sup>8</sup>Another case in which the court ordered the award of a degree is *Kantor v. Schmidt*, 423 N.Y.S.2d 208 (N.Y. App. Div. 1979), a *mandamus* proceeding under New York law. The State University of New York at Stony Brook had withheld the degree because the student had not made sufficient progress, within established time limits, toward completion of the degree. A New York trial court ordered the defendant to award a B.A. degree to the student because the university had not complied with the state commissioner of education's regulations on student progress and informing students of progress. The appellate court affirmed but, on reargument, vacated its decision and dismissed the appeal as moot (432 N.Y.S.2d 156 (1980)).

course, she alleged, the professor gave incorrect instructions on whether the exam was open book; in the corporations course, the professor evaluated a correct answer as incorrect. The law school asserted that these allegations were beyond judicial review because they were a matter of professional discretion.

Although Susan M's claims were dismissed by the trial court, the intermediate appellate court disagreed with the law school's characterization of both grade disputes as beyond judicial review. It agreed that the dispute over the constitutional law examination was "precisely the type of professional, educational judgment the courts will not review" (544 N.Y.S.2d at 830); but the student's claim regarding her answer in the corporations exam, for which she received no credit, was a different matter. The court ruled that the student's allegation that the professor's decision had been arbitrary and capricious required the court to determine whether the professor's justification for giving the student no credit for one of her answers was "rational." The court remanded this issue to the law school for further consideration of petitioner's grade in the corporations course. The law school appealed, and the state's highest court unanimously reversed the appellate division's holding, reinstating the outcome in the trial court.

The court strongly endorsed the academic deference argument made by the law school, stating in the opinion's first paragraph: "Because [the plaintiff's] allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim" (556 N.E.2d at 1105). After reviewing the outcomes in earlier challenges to the academic determinations of colleges and universities, the state's highest court stated:

As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review [556 N.E.2d at 1107].

Concluding that the plaintiff's claims concerned substantive evaluation of her academic performance, the court refused to review them.

Students' attempts to challenge course requirements have also met with judicial rejection. In *Altschuler v. University of Pennsylvania Law School*, 1997 U.S. Dist. LEXIS 3248 (S.D.N.Y. March 21, 1997), *affirmed without opinion*, 201 F.3d 430 (3d Cir. 1999), for example, a law student who had just graduated challenged a failing grade he received in his first year. The grade resulted from the plaintiff's refusal to argue a "mock" case in a legal writing class on the grounds of moral and ethical objections. The plaintiff claimed that the professor "promised" him that he could argue and brief the opposite side but later

retracted her promise. When the plaintiff refused to argue the assigned side, he received a failing grade in the course. The court dismissed all contract and tort claims based on the failing grade, saying that the professor's "breach of promise" was an academic decision, which had been reviewed by a faculty committee and found to be appropriate. (For a more recent and successful challenge to a course requirement on first amendment grounds, see the *Axson-Flynn* case, discussed in Section 8.1.4.)

In *Disesa v. St. Louis Community College*, 79 F.3d 92 (8th Cir. 1996), the court rejected a student's challenge to a particular grade based on alleged "administrative deficiencies" in the testing process, including typographical errors in the materials and test questions, testing on materials not covered in class, an inability to review quizzes after they were graded, and arbitrary implementation of a class policy prohibiting erasure marks. Despite the plaintiff's argument that these were not "academic" decisions per se, the court disagreed and deferred to the college's actions.

Courts also have refused to review certain challenges to grades on the basis that the claims were "frivolous." (See, for example, *Banks v. Dominican College*, 35 Cal. App. 4th 1545 (1995) (granting \$18,000 in sanctions against the plaintiff); and *Dilworth v. Dallas Community College Dist.*, 81 F.3d 616 (5th Cir. 1996) (finding there was no controversy sufficient to rise to the level of federal jurisdiction).) But in *Sylvester v. Texas Southern University*, 957 F. Supp. 944 (S.D. Tex. 1997), a federal district court ordered a law student's grade changed to a "Pass" from a D because the law school had not followed its procedures for adjudicating a grade dispute.

The law school's rules provided that, if a student appealed a grade to the Academic Standing Committee, the committee was required to review the disputed grade. Neither the professor who gave the disputed grade nor the Academic Standing Committee complied with university regulations. The court criticized the institution and the professor for flouting the institution's own policies and procedures: "Between active manipulation and sullen intransigence, the faculty, embodying arbitrary government, have mistreated a student confided to their charge. This violates their duty to conduct the public's business in a rationally purposeful manner" (957 F. Supp. at 947).

The type of "bad faith" referred to in *Susan M* and its progeny is often alleged in the context of a retaliation claim. In *Ross v. Saint Augustine's College*, 103 F.3d 338 (4th Cir. 1996), a federal appeals court upheld a jury award of \$180,000 against a college for harassing an honors student who testified on behalf of a professor in a reverse discrimination suit against the institution. The court held that Leslie Ross "experienced a sudden reversal of fortune at Saint Augustine's College" when her grade point average fell from 3.69/4.0 to 2.2/4.0. The administration called a sudden student body meeting to impeach Ross as class president, and ultimately Ross was not able to graduate. Although the case involved only monetary damages, there is no indication that courts would afford deference to the academic decisions made under those circumstances had the student challenged the college's failure to award her a degree. (For additional cases in which students challenged specific course grades using retaliation theories,

see *Davis v. Goode*, 995 F. Supp. 82 (E.D.N.Y. 1998) (court denied college's motion for summary judgment); and *Mostaghim v. Fashion Institute of Technology*, 2002 U.S. Dist. LEXIS 10968 (S.D.N.Y. 2002), *affirmed*, 57 Fed. Appx. 497 (2d Cir. 2003) (court rejected student's claim that course requirement to design women's wear rather than men's wear constituted a Title IX violation, and that his subsequent grade of C and suspension from the institution were a form of retaliation under Title IX.)

(For a summary of legal challenges to academic judgments and a review of the *Susan M* case, see Note, "Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?" 18 *J. Coll. & Univ. Law* 577 (1992). See also F. Faulkner, "Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—The Fiduciary Alternative," 40 *Syracuse L. Rev.* 837 (1990); and T. A. Schweitzer, "'Academic Challenge' Cases: Should Judicial Review Extend to Academic Evaluations of Students?" 41 *Am. U. L. Rev.* 267 (1992). *Susan M* is also humorously reviewed in verse by R. E. Rains in 40 *J. Legal Educ.* 485 (1990), and 43 *J. Legal Educ.* 149 (1993).)

Although students apparently may not obtain academic credentials through litigation, they occasionally obtain them fraudulently, either by claiming degrees from "diploma mills" or by altering transcripts to make it appear that they completed a degree. (For analysis of this issue, see J. Van Tol, "Detecting, Deterring and Punishing the Use of Fraudulent Academic Credentials: A Play in Two Acts," 29 *Santa Clara L. Rev.* 1 (1990).)

Finally, a college or university may decide not to award a degree, even if the student has completed all academic requirements satisfactorily, because the student has violated the institution's disciplinary code. (For cases rejecting students' challenges to the denial of their degrees on these grounds, see *Harwood v. Johns Hopkins University*, 747 A.2d 205 (Ct. App. Md. 2000), discussed in Section 8.1.3; and *Dinu v. Harvard College*, 56 F. Supp. 2d 129 (D. Mass. 1999).)

**9.3.3. Degree revocation.** Generally, both public and private colleges and universities have authority to revoke improperly awarded degrees when good cause for doing so, such as discovery of fraud or misrepresentation, is shown.<sup>9</sup> Public institutions must afford the degree recipient notice and an opportunity for a hearing before making a decision on whether to revoke a degree, following due process guidelines (see Section 9.4.2). Private institutions, although generally not subject to constitutional requirements, are subject to contract law, and generally must use procedures that will protect the degree recipient from potentially arbitrary or capricious conduct by the institution (see Section 9.4.4).

Degree revocations by both public and private institutions have been challenged in lawsuits. In *Waliga v. Board of Trustees of Kent State University*, 488 N.E.2d 850 (Ohio 1986), the Ohio Supreme Court upheld the university's right to rescind a degree. Two individuals had been awarded baccalaureate degrees, one in 1966 and one in 1967, from Kent State University. University officials

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<sup>9</sup>Cases and authorities are collected in Lori J. Henkel, Annot., "College's Power to Revoke Degree," 57 A.L.R.4th 1243.



discovered, more than ten years later, discrepancies such as credits granted for courses the students never took, and grades on official records different from those reported by course professors. The university rescinded the degrees on the grounds that the students had not completed the appropriate number of credits for graduation.

The students sought a declaratory judgment on the university's power to rescind a degree. The Ohio Supreme Court found such power under two theories. First, the court interpreted Ohio law as permitting any action necessary for operating the state university unless such action was expressly prohibited by statute. As long as a fair hearing had been held, the university had the power to rescind a degree procured by fraud. Second, the court addressed the significance of the public's confidence in the integrity of degrees awarded by colleges and universities:

Academic degrees are a university's certification to the world at large of the recipient's educational achievement and the fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified [488 N.E.2d at 852].

Just as a university has the power to refuse to confer a degree if a student does not complete the requirements for graduation, it also has the power, the court ruled, to rescind a degree awarded to a student who did not complete those requirements.

Given an institution's power to rescind a degree, what procedural protections must the institution give the student? If the institution is public, the Fourteenth Amendment's due process clause may require certain protections, particularly if the court finds a property interest in the student's possession of the degree. In *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), a federal appeals court addressed this issue.

After awarding Crook an M.A. in geology, the University of Michigan determined that the data he had used in his master's thesis were fabricated, and notified him that a hearing would be held to determine whether the degree should be revoked. Crook filed a complaint in federal court, asserting that the university lacked the power to rescind a degree and, if such power were present, that the procedures used by the university violated his due process rights because they did not permit him to cross-examine witnesses.

The court first considered whether the university had the power to rescind the degree. Summarizing the opinion in *Waliga* at some length, the court determined that "there is nothing in Michigan constitutional, statutory or case law that indicates that the Regents do not have the power to rescind the grant of a degree" (813 F.2d at 92), and noted that the state constitution gave the university significant independence in educational matters.

Turning to the student's procedural claims, the court applied the teachings of *Goss v. Lopez* (Section 9.4.2) to evaluate the sufficiency of the procedural protections afforded Crook. Although the trial court had ruled that the hearing

violated Crook's right to due process, the appellate court found that the university had given Crook sufficient notice of the charges against him and that the hearing—at which he was permitted to have counsel present, to present witnesses in his behalf, and to respond to the charges against him—complied with the requirements of *Goss*. The appellate court characterized the hearing as “informal,” in that hearing panel members asked questions and neither the university nor Crook was permitted to ask questions of the witnesses. Citing its earlier opinion in *Frumkin v. Board of Trustees* (see Section 6.7.2.3), the court found that Crook had no procedural due process right to have his attorney examine and cross-examine witnesses, and that the procedures provided by the university were sufficient for due process purposes.

Crook had also claimed violation of his substantive due process rights, alleging no rational basis for the rescission of his degree. Citing *Ewing* (see Section 9.3.1), the court found that the hearing committee had exercised professional judgment and that the committee's determination that Crook's data were fabricated was neither arbitrary nor capricious.

*Waliga* and *Crook* establish the power of a public institution to rescind a degree, and *Crook* discusses the type of procedural protection required to meet constitutional due process standards. When private institutions are involved, however, constitutional requirements typically do not apply. Unless the institution can meet the “state action” test (see Section 1.5.2), constitutional protections are not available to the student (*Imperiale v. Hahnemann University*, 966 F.2d 125 (3d Cir. 1992)).

In a lawsuit filed against Claremont University Center by a student whose doctoral degree was revoked on the grounds that his dissertation was plagiarized, a California appellate court analyzed the university's actions under a deferential standard of review—whether or not the university abused its discretion. In *Abalkhail v. Claremont University Center*, 2d Civ. No. B014012 (Cal. Ct. App. 1986), the court detailed the procedures used to determine whether the degree should be revoked. The university had received a report that portions of the dissertation might have been plagiarized, and it appointed a committee of investigation to determine whether plagiarism had occurred and degree revocation was warranted.

After the committee concluded that plagiarism might have occurred, the graduate school dean informed Abalkhail that a hearing would be held and described the procedures that would be followed. Abalkhail did not receive a copy of the letter that instigated the investigation until the day of the hearing, but he was given the opportunity to respond to the charges against him and was asked if there were additional procedures necessary to give him a fair hearing. The hearing committee met again with Abalkhail to inform him of additional evidence against him and to permit him to respond to that evidence by a particular time. After the time for response had elapsed, the committee found that much of Abalkhail's dissertation was plagiarized and recommended that his degree be rescinded. The university did so, and Abalkhail filed a complaint, alleging deprivation of due process and fairness protections.

Applying the California common law doctrine of fair procedures required of nonprofit groups, the court ruled that Abalkhail was entitled to “the minimum

requisites of procedural fairness” (2d Civ. No. B014012 at 15). These “minimum requisites” included notice of the charges and the probable consequences of a finding that the charges would be upheld, a fair opportunity to present his position, and a fair hearing. These had been provided to the plaintiff, according to the court.

(For analysis of *Waliga, Crook, and Abalkhail*, see B. Reams, Jr., “Revocation of Academic Degrees by Colleges and Universities,” 14 *J. Coll. & Univ. Law* 283 (1987). For a case in which a court confirmed a public university’s right to revoke a degree for criminal misconduct (embezzlement) but allowed breach of contract and other claims to go forward because of alleged procedural due process violations, see *Goodreau v. Rector and Visitors of the University of Virginia*, 116 F. Supp. 2d 694 (W.D. Va. 2000).)

Although institutions of higher education appear to have the authority to revoke degrees, the revocation must be an act of the same entity that has the authority to award the degree. In *Hand v. Matchett*, 957 F.2d 791 (10th Cir. 1992), a federal appellate court affirmed a federal trial court’s award of summary judgment to a former student who challenged his degree revocation. The Board of Regents of New Mexico State University had not acted on the degree revocation, but had delegated that decision to the graduate dean and, when the student appealed the dean’s decision, to the executive vice president. Although the university had developed a procedure that involved both faculty and external experts in the determination that the plaintiff’s dissertation had been plagiarized, the court, interpreting New Mexico law, said that the board could not delegate its authority to revoke a degree to a subordinate individual or body.

**9.3.4. Sexual harassment of students by faculty members.** Whether one is addressing students’ sexual harassment complaints against faculty members, as in this Section, or students’ sexual harassment complaints against other students (as in Section 8.1.5),<sup>10</sup> it is important to begin with a general understanding of what type of behaviors constitute sexual harassment.<sup>11</sup> The following definitions and examples will provide a foundation for this understanding.

In guidelines issued by the U.S. Department of Education, sexual harassment is defined as “unwelcome [verbal, nonverbal, or physical] conduct of a sexual nature” (“Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” Part II, (January 19, 2001), available at <http://www.ed.gov/offices/OCR/archives/index.html>). In two studies by the American Association of University Women (AAUW), sexual harassment is defined as “unwanted and unwelcome sexual behavior [both physical and nonphysical] that interferes with the [victim’s] life” (*Hostile Hallways: The AAUW Survey on*

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<sup>10</sup>Other types of harassment may also create problems on campus and become the subject of internal complaints or litigation. The most important of these other types of harassment are discussed at the end of this subsection.

<sup>11</sup>When a student’s sexual harassment complaint against a faculty member concerns the faculty member’s classroom statements or classroom conduct, academic freedom arguments may also come into play. This problem is discussed in Section 7.2.2, most specifically with reference to the *Cohen, Silva, and Bonnell* cases.

*Sexual Harassment in America's Schools* (AAUW Education Foundation, 1993), 6, 8; see also *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School* (AAUW Education Foundation, 2001), 9–11). And in a report by the National Coalition for Women and Girls in Education, sexual harassment is defined as “unwanted and unwelcome sexual behavior that creates a hostile environment, limiting full access to education” (*Title IX at 30: Report Card on Gender Equity*, June 2002, 40). Examples of sexual harassment, from the above sources, include: sexual advances; requests for sexual favors; sexual taunting; spreading sexual rumors; drawing graffiti of a sexual nature; making jokes, gestures, or comments of a sexual nature; showing sexually explicit photographs or illustrations; sending sexual notes or messages; pulling clothing down or off in a sexual way; forced kissing; touching, grabbing, or pinching in a sexual way; flashing; and intentionally brushing up against someone, blocking someone’s path, or cornering someone in a sexual way. Consistent with the three general definitions, such behaviors must be “unwelcome” before they would be considered to be sexual harassment.

Harassment victims can be both male and female, just as perpetrators are both female and male. Moreover, sexual harassment can occur not only when the victim and perpetrator are of the opposite sex but also when they are of the same sex. Thus, as the Education Department’s Sexual Harassment Guidance emphasizes, a female’s harassment of another female or a male’s harassment of another male is sexual harassment whenever the harasser’s conduct is sexual in nature (“Revised Sexual Harassment Guidance,” Part III).

Sexual harassment by faculty members (or other employees) may be divided into two categories: “*quid pro quo* harassment” and “hostile environment harassment.” The Education Department’s Sexual Harassment Guidance, for instance, distinguishes the categories as follows:

*Quid pro quo* harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct, [regardless of whether] the student resists and suffers the threatened harm or submits and avoids the threatened harm. . . .

By contrast, [hostile environment] harassment . . . does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct [but does nevertheless] limit a student’s ability to participate in or benefit from the school’s program based on sex.

Teachers and other employees can engage in either type of harassment. Students . . . are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment [“Revised Sexual Harassment Guidance,” Part V.A].

Student complaints alleging harassment by a faculty member may implicate grades in two basic ways. In the first way, akin to *quid pro quo* harassment, a student may complain that she was denied a deserved grade because she refused the instructor’s sexual advances, or that she was awarded a grade only after having submitted unwillingly to the instructor’s advances. In *Crandell v. New York College of Osteopathic Medicine*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000), for example, a female medical student claimed she was harassed by a medical resident who

supervised her in a six-week rotation at a teaching hospital. She claimed she was subjected to numerous sexual comments, incidents of touching, and a threat to give her a failing grade for the rotation if she did not spend time with him on a regular basis. In context, the student interpreted this demand to be sexual in nature. The court determined that this conduct constituted *quid pro quo* harassment. (The *Alexander v. Yale University* case, discussed below, is also this type of case.) In the second way, akin to hostile environment harassment, a student may complain that she received (or is in danger of receiving) a low grade because the instructor's sexual conduct has interfered with her ability to do her course work. In *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003), for example, a student was in an undergraduate political science course in which the professor gave her the nickname "Monica," in light of "her supposed physical resemblance to Monica Lewinsky, a former White House intern who at that time was attaining notoriety for her involvement in a widely-covered sex scandal with then-President William Clinton." The professor's "use of this nickname persisted even after [the student] requested that he stop. Despite her protestations, [the professor] would occasionally, in dramatic fashion, attempt to locate [the student] in the classroom by sitting in front of his desk and screaming the name 'Monica.'" His comments "occurred at least once per class period throughout the rest of the semester." His conduct "was not limited to using the 'Monica' nickname, but included other comments as well. These added context to the nickname by associating [the student] with some of the more sordid details of the Clinton/Lewinsky scandal." The student claimed that the "Monica" comments "humiliat[ed] her in front of her peers, caus[ed] her to experience difficulty sleeping, and ma[de] it difficult for her to concentrate in school and at work." The court determined that, on these facts, a reasonable jury could conclude that the professor's actions constituted hostile environment sexual harassment. (See also *Kracunas and Pallett v. Iona College*, 119 F.3d 80 (2d Cir. 1997).) This second type of claim may also extend to situations when the student is harassed for having received a low grade, as in *Kadiki v. Virginia Commonwealth University*, 892 F. Supp. 746 (E.D. Va. 1995), where a professor spanked a student; or when a low grade precedes rather than follows the harassment (see *Kracunas and Pallett v. Iona College*, 119 F.3d 80 (2d Cir. 1997)); or when the harasser is a patient, client, or coworker in a clinical or internship setting, rather than the instructor (see, for example, *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995)).

In such situations, students may assert sex discrimination claims under Title IX of the Education Amendments of 1972 (see Section 13.5.3 of this book) or under a comparable state civil rights law. Section 1983 claims (see Sections 3.5 & 4.7.4 of this book) alleging a violation of the federal equal protection clause may also be brought in some circumstances. In addition, if the student works for the college or university and is harassed by a supervisor or coworker, the student may assert an employment discrimination claim under Title VII (see Section 5.2.1 of this book) or the state's fair employment statute.<sup>12</sup> (See, for

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<sup>12</sup>Various tort and contract claims may also be brought under state law, as discussed later in this subsection.

example, *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), where the university was held liable for the sexual harassment of a student employee by her supervisor; and see also *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).) Depending on the source of law used, claims may be assertable against the college or university itself, against the alleged harasser(s), or against other institutional employees who have some role in supervising the alleged harasser or protecting against harassment on campus.

For all such claims, it is important, as a threshold matter, to focus on the claim's legal elements. The case of *Waters v. Metropolitan State University*, 91 F. Supp. 2d 1287 (D. Minn. 2000), provides a good shorthand description of these elements that would fit most statutes that cover hostile environment sexual harassment. According to that case, challenged conduct must have been "unwelcome," it must have been "based on sex," and it must have been "sufficiently severe as to alter the conditions of [the student's] education and create an abusive educational environment" (91 F. Supp. 2d at 1291). Further specificity on these elements is provided by the excellent analysis of Judge Calabresi in *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003) (discussed above and below in this subsection), in which he carefully reviewed the severity requirement, a related pervasiveness requirement, the "on the basis of sex" or "because of sex" requirement, and the hostile or abusive educational environment requirement, as they applied to the student's claim in that case (352 F.3d at 746–49). The court in *Hayut* also reviewed the requirement that the educational environment be hostile not only from the victim's subjective perspective but also from the objective perspective of a reasonable person or reasonable fact finder (352 F.3d at 746). In addition, the court demonstrated how Title VII still provides important guidance for making hostile environment determinations under Title IX and Section 1983, even though Title IX's standards for determining institutional liability for an employee's acts are different from Title VII's (352 F.3d at 744).

First Amendment free speech law sometimes must also be taken into account in determining the parameters of sexual harassment,<sup>13</sup> since sexual harassment (whether of the *quid pro quo* or the hostile environment variety) is usually effectuated in large part through the spoken or written word or by symbolic gestures. This was strikingly true in the *Hayut* case, as well as in other cases cited above. Because much of the conduct alleged to be harassment is also expressive conduct, institutions and faculty members may seek to defend themselves against harassment claims by asserting that the challenged conduct is protected by the First Amendment. The cases discussed in Section 7.2.2 of this book, especially

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<sup>13</sup>Free exercise and establishment issues may also become involved in sexual harassment cases when the defendant is a religious institution or a religious figure. For an example, see *Bollard v. California Providence of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), in which a student priest alleged that his instructor, his superior priest, had sexually harassed him while he was attending the seminary. The defendant argued that the free exercise and establishment clauses compelled the court to dismiss the case; the appellate court disagreed, because religious reasons for the harassment and religious doctrine were not involved in the case, nor would a decision in the plaintiff's favor interfere with the defendant's freedom to select its ministers.

the *Silva*, *Cohen*, and *Bonnell* cases, all present such issues in the context of academic freedom claims; and these cases, taken together, do provide some First Amendment protection for faculty members. This does not mean, however, that there is a viable free speech issue whenever a harasser uses expression as part of the harassment. In some cases, *Hayut* being a major example, the faculty member's classroom comments are so far removed from any legitimate purpose that a free expression claim becomes marginalized or is not even addressed in the case (352 F.3d at 745–49). (See generally Sangree, "Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight," 47 *Rutgers L. Rev.* 461 (1995).)

The case of *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), illustrates how courts may summarily dismiss free speech claims when they arise in contexts concerning a faculty member's conduct with respect to students. In this case, a professor had been denied reappointment, largely on the basis of various complaints and charges against him that suggested a "pattern of unwelcome, inappropriate, boorish behavior." The professor's oral statements were a major component of much of this behavior. For example, at an academic conference, while attending a private dinner party along with his graduate students, the professor made extended statements about "pregnancy, orgasms, and extramarital affairs and went on to advocate sex outside marriage. . . ."

The professor had also accompanied his statements with "the use of hand gestures to demonstrate various parts of the female anatomy." At the same conference, he made various "sexually charged comments in the presence of male and female professors and students." In addition, on and around the campus, the professor had extended "unwelcome invitations" to his graduate students to meet with him to play cards or engage in other activities, and had made various sexual comments about his female graduate students. The professor claimed that his various comments were protected speech under the First Amendment. The court rejected this contention. Regarding the academic conference, the court determined that the professor's "statements were simply parts of a calculated type of speech designed to further [his] private interest in attempting to solicit female companionship . . ."; and that "the record is barren of any evidence besides Trejo's self-serving statements that [his] remarks were designed to serve any truly pedagogic purpose." Regarding other comments by the professor, on and off campus, the court determined that they were primarily "casual, idle, and flirtatious chit-chat. . . ." The court concluded that these comments, and the comments at the academic conference, "were focused almost exclusively on matters of private concern" and did not merit protection either under the *Pickering/Connick* line of cases or under *Keyishian* (see Sections 7.1.1 & 7.1.4).

Of the various types of harassment claims, Title IX claims have received the greatest attention from the courts. Title IX harassment claims are the primary focus of the rest of this Section. Such claims are assertable only against institutions, and not against their individual officers or employees (see Section 13.5.9). In an early case, *Alexander v. Yale University*, 631 F.2d 178 (2d Cir. 1980), five female students alleged that Yale's practices and procedures for dealing with

sexual harassment of students violated Title IX of the Education Amendments of 1972. One of the plaintiffs alleged that a faculty member had “offered to give her a grade of ‘A’ in the course in exchange for her compliance with his sexual demands” and that, when she refused, he gave her a C, which “was not the result of a fair evaluation of her academic work, but the result of her failure to accede to [the professor’s] sexual demands.” The remaining plaintiffs made other allegations concerning acts of harassment and the inadequacies of campus procedures to deal with them. The district court entered judgment for Yale, and the U.S. Court of Appeals affirmed. With the exception of the lowered-grade claim of one plaintiff, all the various claims and plaintiffs were dismissed for technical reasons: the plaintiffs had graduated and their claims were therefore “moot”; Yale had already adopted procedures for dealing with sexual harassment and thus, in effect, had already granted the primary remedy requested in the suit; other claims of harm were too “speculative” or “uncertain.” The lowered-grade claim was dismissed because the plaintiff, at trial, did not prove the allegations.

Although all claims were rejected, the *Alexander* litigation by no means shut the door on Title IX actions alleging that the integrity of grading or other academic processes has been compromised by a faculty member’s sexual harassment of students. Both the district and appellate courts made clear that the grade claim was a “justiciable claim for relief under Title IX.” A denial or threatened denial of earned academic awards would be a deprivation of an educational benefit protected by Title IX; and when imposed for sexual reasons, that deprivation becomes sex discrimination prohibited by Title IX. As the district court held, and the appellate court quoted with apparent approval, “[A]cademic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education” (459 F. Supp. at 4; 631 F.2d at 182).

Nevertheless, the lower courts in cases after *Alexander* expressed differing views on when, and the extent to which, Title IX would cover sexual harassment. It was not until 1992 that the U.S. Supreme Court resolved this matter in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The plaintiff, a high school student in Georgia, sued the school board under Title IX, seeking relief from both hostile environment and *quid pro quo* sexual harassment by a teacher. Her complaint alleged that the teacher, also a sports coach, had harassed her continually beginning in the fall of her sophomore year. The student accused the teacher of engaging her in sexually oriented conversations, forcibly kissing her on the mouth on school property, telephoning her at home, and asking her to see him socially. She also alleged that during her junior year, this teacher went to her class, asked the classroom teacher to excuse her, and then took her to a private office where he raped her. According to the student’s complaint, school officials and teachers were aware of these occurrences, and although the school board eventually investigated them, it took no action to stop the harassment and agreed to let the teacher resign in return for dropping all harassment charges.

The student filed a complaint with the U.S. Department of Education’s Office for Civil Rights (OCR), which investigated her charges. OCR determined that



verbal and physical sexual harassment had occurred, and that the school district had violated the student's Title IX rights. But OCR concluded that, because the teacher and the school principal had resigned and the school had implemented a grievance procedure, the district was in compliance with Title IX. The student then went to federal court, and ultimately the U.S. Supreme Court ruled in her favor. (The Court's reasoning and legal analysis are further discussed in Section 13.5.9.) The teacher's actions were sexual harassment, and the district, in failing to intervene, had intentionally discriminated against her, in violation of Title IX.

The *Franklin* case clearly established that sexual harassment, including hostile environment harassment, may be the basis for a sex discrimination claim under Title IX, and that student victims of harassment by a teacher may sue their schools for money damages under Title IX. But other important issues remained unresolved by the Court's *Franklin* opinion—in particular the issue of when, and under what theories, courts would hold schools and colleges liable for money damages under Title IX for a faculty member's or other employee's sexual harassment of a student. In *Franklin*, the school administrators had actual knowledge of the teacher's misconduct. The Supreme Court did not address whether a school could be found liable only if it had such actual knowledge of the misconduct but failed to stop it, or whether a school could be liable even absent actual knowledge because an employee's intentional discrimination could be imputed to the school. (Under agency law, the employer may be held responsible for the unlawful conduct of its agent (called *respondeat superior*) even if the employer does not have actual knowledge of the conduct; see Section 2.1 of this book.)<sup>14</sup>

The institutional liability questions left open by *Franklin* were extensively discussed in the lower courts in *Franklin*'s aftermath. No pattern emerged; different courts took different approaches in determining when liability would accrue to an educational institution for the actions of its teachers or other employees. Some courts determined that an educational institution could be vicariously liable on the basis of common law agency principles of *respondeat superior* (see, for example, *Kracunas and Pallett v. Iona College*, 119 F.3d 80 (2d Cir. 1997)). Other courts determined that an educational institution should be liable under a constructive notice, or “knew or should have known,” standard (see, for example, *Doe v. Petaluma School District*, 949 F. Supp. 1415 (N.D. Cal. 1996)); or could be liable only in certain narrow circumstances where it had knowledge of the harassment and failed to respond (see, for example, *Rosa H. v. San Elizario*

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<sup>14</sup>Another unresolved issue after *Franklin* was whether plaintiffs must always show that the discrimination (the sexual harassment) was intentional, or whether unintentional discrimination may also be actionable upon a showing of discriminatory effect or impact (see Section 13.5.7.2). Although *Franklin* did not address this issue, federal district courts in cases subsequent to *Franklin* generally required that plaintiffs demonstrate intentional discrimination. See, for example, *R.L.R. v. Prague Public School District I-103*, 838 F. Supp 1526 (W.D. Okla. 1993). The U.S. Supreme Court's later decision in *Alexander v. Sandoval*, discussed in Sections 13.5.7.2 and 13.5.9, appears to resolve this point, requiring intentional discrimination.

*Independent School District*, 106 F.3d 648 (5th Cir. 1997) (harassment)); or should not be liable at all, at least for hostile environment harassment (see *Bougher v. University of Pittsburgh*, 713 F. Supp. 139 (W.D. Pa. 1989), *affirmed on other grounds*, 882 F.2d 74 (3rd Cir. 1989)). The U.S. Department of Education also weighed in on these liability issues. The department's Office for Civil Rights published the first version of its sexual harassment guidelines ("Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 Fed. Reg. 12034 (March 13, 1997), also available at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar00.html>). The Guidance provided that liability for harassment by teachers or other employees of a school or college should be governed by agency principles:

A school will . . . be liable for hostile environment sexual harassment by its employees . . . if the employee—(1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution . . . [62 Fed. Reg. at 12039].

The U.S. Supreme Court resolved these Title IX liability issues in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), where the issue was the extent to which "a school district may be held liable in damages in an implied right of action under Title IX . . . for the sexual harassment of a student by one of the district's teachers." In a 5-to-4 decision, the Court majority held that Title IX damages liability is based neither on common law agency principles of *respondeat superior* nor upon principles of constructive notice. Distinguishing Title IX from Title VII of the Civil Rights Act of 1964 (Section 5.2.1 of this book), which does utilize such principles, the Court insisted that "[i]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on [such] principles . . . , i.e., without actual notice to a school district official" (524 U.S. at 285). Thus, the Court held that students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official [of the school district], who at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf has actual knowledge of discrimination and fails adequately to respond" (524 U.S. at 276). Moreover, the official's response to the harassment:

. . . must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions [524 U.S. at 290].

Putting aside the U.S. Department of Education's Sexual Harassment Guidance (see above) that had applied agency principles to teacher-student sexual

harassment, the Court made clear that it would listen only to Congress (and not to the Department of Education) on these questions: “[U]ntil Congress speaks directly on the subject . . . , we will not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference” (524 U.S. at 292). In so doing, and in contrast with its methodology in other situations (see, for example, *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991)), the Court refused to accord any deference to the decisions of the administrative agency authorized to implement the statute, as Justice Stevens emphasized in his dissent (524 U.S. at 300).

Applying these principles to the student’s claim, the Court determined that the student had not met the standards and therefore affirmed the lower court’s entry of summary judgment for the school district. In reaching this decision, the Court acknowledged that the school district had not implemented any sexual harassment policy or any grievance procedure for enforcing such a policy as required by the Department of Education’s regulations (34 C.F.R. §§ 106.8(b) & 106.9(a)). But the Court nevertheless held that the school district’s failure in this regard was not evidence of “actual notice and deliberate indifference,” nor did this failure “itself constitute ‘discrimination’ under Title IX” (524 U.S. at 292).

Four Justices vigorously dissented from the majority’s holdings in *Gebser*. Point by point, the dissenting Justices refuted the majority’s reasons for rejecting the application of agency principles under Title IX and for concluding that Title IX is based upon a different model of liability than Title VII. In addition, the dissenting Justices provided an extended argument to the effect that the refusal to provide meaningful protection for students subjected to harassment flies in the face of the purpose and meaning of Title IX. According to Justice Stevens:

Congress included the prohibition against discrimination on the basis of sex in Title IX [in order] to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have “authority to institute corrective measures on the district’s behalf.” *Ante*, at 277.

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As a matter of policy, the Court ranks protection of the school district’s purse above the protection of immature high school students. . . . Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government [524 U.S. at 300–301, 306 (Stevens, J. dissenting)]; see generally 524 U.S. at 293–306 (Stevens, J., dissenting)].

The *Gebser* case thus establishes a two-part standard for determining institutional liability in damages for a faculty member's (or other employee's) sexual harassment of a student:<sup>15</sup>

1. An official of the school district: (a) must have had "actual knowledge" of the harassment; and (b) must have authority to "institute corrective measures" to resolve the harassment problem.
2. If such an official did have actual knowledge, then the official:
  - (a) must have "fail[ed] to adequately respond" to the harassment;
  - and (b) must have acted with "deliberate indifference."

In these respects, the *Gebser* test stands in stark contrast to the liability standards under Title VII. In two cases decided in the same court term as the *Gebser* case, the Supreme Court determined that liability under Title VII is based upon agency principles and a *respondeat superior* model of liability (*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), both discussed in Section 5.3.3.3). Thus, under Title VII, but not under Title IX, an employer may be liable in damages for a supervisor's acts of harassment even though the employer did not have either actual knowledge or constructive notice of the harassment. It is therefore much more difficult for students to meet the Title IX liability standards than it is for employees to meet the Title VII standards, and consequently students have less protection against harassment under Title IX than employees have under Title VII. While Title IX, as a spending statute, is structured differently from Title VII, a regulatory statute, and while courts interpreting and applying Title IX are not bound by Title VII judicial precedents and administrative guidelines, the result in *Gebser* nevertheless seems questionable. Students may be at a more vulnerable age than many employees, and may be encouraged by the academic environment to have more trust in teachers than would usually be the case with supervisors in the work environment. It is thus not apparent, either as a matter of policy or of law, why students should receive less protection from harassment under Title IX than employees do under Title VII.

In practice, the *Gebser* two-part liability standard provides scant opportunity for student victims of harassment to succeed with Title IX damages actions against educational institutions. The difficulty of proving "actual knowledge" is compounded by the difficulty of proving "deliberate indifference" (see, for example, *Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999)). In addition, since "actual knowledge" must be possessed by an official with authority to take corrective

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<sup>15</sup>*Gebser* standards may also be applicable to student-student harassment in certain narrow circumstances in which the institution has granted a student some kind of authority over other students. In *Morse v. Regents of the University of Colorado*, 154 F.3d 1124 (10th Cir. 1998), for instance, the court applied *Gebser* to a Title IX claim against the university brought by female Reserve Officer Training Corps (ROTC) cadets who were allegedly harassed by a higher-ranking male cadet. The university could be liable for the actions of the male cadet, said the court, if he was "acting with authority bestowed by" the university-sanctioned ROTC program.

action, there are difficulties in proving that the officials or employees whom the victim notified had such authority.<sup>16</sup> In *Liu v. Striuli*, 36 F. Supp. 2d 452, 465–66 (D.R.I. 1999), for instance, a court applying *Gebser* rejected a graduate student’s Title IX claim because neither the director of financial aid nor the director of the graduate history department, whom the student had notified, had “supervisory authority” over the alleged harasser. Therefore neither official had authority to correct the alleged harassment. Similarly, in *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004), a student confided to a professor that she had been harassed by another professor and had also discussed the matter with a counselor. But her Title IX harassment claim failed because neither the professor nor the counselor had authority to take corrective action, and neither they nor the student had reported the harassment to a university official who did have such authority.

In *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003), the court had no difficulty determining that a jury could conclude that a professor’s classroom behavior was “hostile educational environment sexual harassment.” But the university was not liable for the professor’s misconduct because its authorized officials did not have knowledge of the harassment until after it had ceased. The student plaintiff also could not meet the deliberate indifference test. Although the court acknowledged that “deliberate indifference may be found . . . when remedial action only follows after a ‘lengthy and unjustified delay;’” there was no such delay in this case. Once the student did report the alleged harassment to the dean, the dean’s response thereafter was timely and adequate.

In *Oden v. Northern Marianas College*, 284 F.3d 1058 (9th Cir. N. Mariana Islands 2002), the plaintiff-student did have evidence of a lengthy delay, but her Title IX claim failed nevertheless. The student had complained to college officials that her music professor had sexually harassed her on various occasions with various inappropriate acts. Once the student had reported the harassment, college personnel helped the student draft a formal internal complaint, provided counseling for her, began an investigation, and took other actions, culminating in a hearing by the college’s Committee on Sexual Harassment, which determined that the professor’s actions constituted sexual harassment. The student, dissatisfied with various aspects of the college’s response, filed her Title IX suit, claiming that the college had acted with deliberate indifference. Her primary contention was that almost ten months had passed between the date of her formal complaint to the date of her hearing. In the context of the various actions that the college had taken in responding to the student’s harassment allegations, the court declined to consider the delay as deliberate indifference:

Although there was a lengthy delay, there were also valid reasons for the delay: [the College] had a number of administrative hurdles to jump, including

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<sup>16</sup>It is important that institutions do not overemphasize such technical questions concerning legal liability. In resolving students’ harassment complaints through campus grievance mechanisms, for instance, the primary focus of attention should be on whether harassment occurred, not on whether the institution could be liable in court if it did occur. Moreover, much of the institution’s policy and practice regarding sexual harassment may be driven more by educational and ethical concerns than by legal concerns, as discussed later in this subsection.

the formation of a sexual harassment hearing committee; [the student] had difficulty retaining an attorney; and . . . had relocated to the State of New Mexico. At most, [the College] is guilty of bureaucratic sluggishness. We decline to equate bureaucratic sluggishness with “deliberate indifference,” especially where the school authorities began turning their bureaucratic wheels immediately after being notified of the alleged misconduct [284 F.3d at 1061].<sup>17</sup>

In the *Delgado* case (above), although the court rejected the student’s claim, it did provide clarification of the actual notice standard that could prove helpful to student victims in subsequent cases. Specifically, the court explained that the university could have been liable under Title IX if university officials had foreknowledge that the alleged harasser (the professor) had harassed *other* students. It was not necessary, for purposes of the “actual knowledge” requirement, that officials knew of the professor’s harassment of the plaintiff (the complaining student). “So if, for example, [the professor] had been known to be a serial harasser, [university officials] might well be found to have had a sufficient approximation to actual knowledge that [the plaintiff] would be harassed.” This argument did not work for the student in this case because, even though the professor “had made advances to three other woman students, . . . they had never filed complaints” (367 F.3d at 670). The professor therefore “was not known by anyone in the university administration . . . to be harassing other students” (367 F.3d at 672).

On the other hand, although the new *Gebser* standards are very difficult for plaintiffs to meet, these standards do not create an insurmountable barrier for students challenging a faculty member’s harassment. For example, in *Chontos v. Rhea*, 29 F. Supp. 2d 931 (N.D. Ind. 1998), a student filed a Title IX claim against Indiana University, claiming that a professor of physical education had forcibly kissed and fondled her. The university had received three other complaints about this professor from three different women students over the prior seven years. After the first incident, he received a written reprimand and was warned that if he repeated the behavior he could be fired. After the second incident, the professor was sent for psychological counseling, but the university did not follow up to ascertain whether the counseling was successful. After the third incident (which, in contrast to the others, was limited to verbal harassment), the faculty member was told to “clean up his act.” A sealed report was placed in his personnel file, but no disciplinary action was taken. After the fourth incident, which was the subject of this litigation, he was suspended and offered the choice of a dismissal proceeding or resignation. The professor resigned with full benefits. Ruling that a reasonable jury could find that the university was deliberately indifferent, the court rejected the university’s motion for summary judgment. With respect to the university’s defense that the students did not want to pursue formal complaints, which meant that, under university rules, they would not confront the professor in a formal termination

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<sup>17</sup>The judgment in this case was later vacated by the U.S. Supreme Court on technical grounds having nothing to do with the lower court’s analysis of the sexual harassment issues (*Oden v. Northern Marianas College*, 539 U.S. 924 (2003)).

hearing, the court replied that the university had other sanctions available short of dismissal, but chose “to do nothing.”

The *Gebser* court did not utilize the distinction between *quid pro quo* harassment and hostile environment harassment that previous courts had sometimes invoked. Although the *Gebser* liability standard clearly applies to hostile environment claims, it is not entirely clear whether it would apply in the same way to *quid pro quo* harassment—or, as courts increasingly put it, to harassment that involves a “tangible” adverse action against the victim. Thus, it is not entirely clear whether earlier cases applying a different liability standard (easier for plaintiffs to meet) to *quid pro quo* claims (see, for example, *Kadiki v. Virginia Commonwealth University*, above) are still good law. So far, the answer is apparently “No.” The court in *Burtner v. Hiram College*, 9 F. Supp. 2d 852 (N.D. Ohio 1998), *affirmed without opinion*, 194 F.3d 1311 (6th Cir. 1999), applied the *Gebser* actual knowledge standard to both types of harassment; the court in *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999), applied the actual notice standard to *quid pro quo* harassment; and the court in *Klemencic v. Ohio State University*, 10 F. Supp. 2d 911 (S.D. Ohio 1998), *affirmed*, 263 F. 3d 504 (6th Cir. 2001), applied the actual notice and the deliberate indifference standards to *quid pro quo* harassment. Similarly, in the administrative realm, the Department of Education’s Sexual Harassment Guidance “moves away from specific labels for types of sexual harassment,” using the distinction between *quid pro quo* and hostile environment harassment only for explanatory purposes (“Revised Sexual Harassment Guidance,” Part V.A, and Preamble, under “Harassment by Teachers and Other School Personnel”).

After *Gebser*, lawsuits against institutions for money damages are not the only way students may enforce their Title IX rights. There are two other ways: (1) suing the institution in court and seeking injunctive or declaratory relief rather than money damages;<sup>18</sup> and (2) in lieu of or in addition to suit, filing an administrative complaint against the institution with the U.S. Department of Education and seeking administrative compliance. (See generally William Kaplin, “A Typology and Critique of Title IX Sexual Harassment Law After *Gebser* and *Davis*,” 26 *J. Coll. & Univ. Law* 615, 632–34, 636–38 (2000).) The first alternative, since it does not itself seek monetary damages, is apparently not directly governed by the *Gebser* case—whose factual context is limited to monetary liability and whose legal rationale seems dependent on the negative impact of monetary damage awards upon educational institutions. It is therefore not clear what the liability standard would be for a Title IX harassment claim seeking only injunctive or declaratory relief. Even if the actual knowledge standard did apply, it would likely be easily met, since the lawsuit itself would

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<sup>18</sup>Title IX suits for monetary, injunctive, or declaratory relief are suits against the institution, not against individuals. See, for example, *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999), discussed in Section 13.5.3. Suits against individuals for sexual harassment may be brought under Section 1983 (see Section 4.7.4.1 of this book) if the individuals are acting under color of law; see Laura Oren, “Section 1983 and Sex Abuse in Schools: Making a Federal Case of It,” 72 *Chi-Kent L. Rev.* 747 (1997).

have provided such notice well before the court would order the institution to comply with Title IX.

The second alternative—the administrative complaint—is apparently not governed at all by *Gebser*. In the administrative process, the U.S. Department of Education is presumably free to use standards of institutional noncompliance that differ from the *Gebser* liability standards, as long as its standards are consistent with the nondiscrimination prohibitions in the Title IX statute and regulations. Since the institution would always receive notice of its noncompliance and the opportunity to make appropriate adjustments before any administrative penalty is imposed, and since an administrative proceeding would never result in a monetary damages remedy against the institution, it appears that the U.S. Department of Education may continue to apply its own Sexual Harassment Guidance (see above) to administrative complaints, compliance investigations, and fund cut-off hearings (see *Gebser* at 287, 292). Indeed, in the aftermath of *Gebser* and the successor *Davis* case on peer sexual harassment (see Section 8.1.5), the department issued a revised guidance (66 Fed. Reg. 5512 (January 2001)) that reaffirms the department’s own separate standards that it had first articulated in the 1997 Guidance (above). (See “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” 66 Fed. Reg. 5512 (January 19, 2001), available at <http://www.ed.gov/offices/OCR/archives/shguide/index.html>.)

Colleges and universities have considerable leeway in fulfilling their legal obligations under the *Gebser* case (as well as the *Davis* case that deals with peer harassment; see Section 8.1.5). The monetary liability standards in these cases are not onerous and should be viewed as the minimum or floor—not the full extent—of the institution’s responsibilities regarding sexual harassment. The standards for injunction and declaratory relief cases may be a bit stricter for institutions, but these cases are seldom pursued by students (see Section 13.5.9). The standards for compliance in the Department of Education’s Sexual Harassment Guidance are stricter for institutions but nevertheless leave considerable discretion in the hands of institutions. Thus, as is true in other legal contexts as well, educational and ethical standards can be as important as Title IX legal standards in guiding institutional planning, and nonlegal solutions to campus problems can be as viable as legal solutions—or more so.

Since sexual harassment can do substantial harm to the victims and have substantial adverse consequences for the campus community, and since sexual harassment is such a sensitive matter to deal with, institutions will likely engage in considerable institutional planning and educational programming. A highly pertinent perspective and useful starting point for doing so is contained in the “Preamble” accompanying the Department of Education’s Revised Sexual Harassment Guidance. The Preamble emphasizes that a central concern of Title IX is whether schools can recognize when harassment has occurred and take “prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects” (“Revised Sexual



Harassment Guidance,” Preamble, under “Enduring Principles from the 1997 Guidance,” available at <http://www.ed.gov/offices/OCR/archives/shguide/index.html>). In this regard, the preamble makes two key points. First,

If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct [Id.].

Second, it is critically important:

[to have] well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. . . . Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it [Id.; see also Parts V.D & X of Revised Sexual Harassment Guidance].

Following these two key points, there are numerous initiatives that colleges and universities might undertake. They include educational programs for students; workshops and other training programs for instructors, staff, and leaders of student organizations; counseling and support programs for victims; counseling programs for perpetrators; and alternative dispute resolution programs that provide mediation and other nonadversarial means for resolving some sexual harassment complaints. Institutions should also make sure that sexual harassment is covered clearly and specifically in their student disciplinary codes and faculty ethics codes. It is equally important to ensure that *retaliation* against persons complaining of sexual harassment is clearly covered and prohibited in such codes. In addition, institutions should make sure that mechanisms are in place for protecting the confidentiality of students who report that they—or others—have been sexually harassed (see “Revised Sexual Harassment Guidance,” Part VII.B); and for protecting the due process rights and free speech rights of anyone accused of harassment. Through such initiatives, colleges and universities can work out harassment problems in a multifaceted manner that lessens the likelihood of lawsuits against them in court. Effectuating such initiatives will require good teamwork between administrators and college counsel (see Section 2.4.2).

(For further guidance, see Judith Brandenburg, *Confronting Sexual Harassment: What Schools and Colleges Can Do* (Teachers College Press, 1997), especially 49–82; Susan Hippensteele & Thomas C. Pearson, “Responding Effectively to Sexual Harassment: Victim Advocacy, Early Intervention, and Problem Solving,” *Change*, January–February 1999, 48–53; and “Sexual Harassment: Suggested Policy and Procedures for Handling Complaints,” in *AAUP Policy Documents and Reports* (9th ed., 2001), 113–15, which includes due process protections for the accused and provides for a faculty committee as fact finder.

Another related decision institutions may face in drafting and enforcing sexual harassment policies is whether to prohibit all sexual relationships between students and faculty members, consensual or not. Proponents of a total ban argue that the unequal power relationships between student and faculty member mean that no relationship is truly consensual. Opponents of total bans, on the other hand, argue that students are usually beyond the legal age for consent, and that institutions may infringe on constitutional rights of free association or risk invasion of privacy claims if they attempt to regulate the personal lives of faculty and students. (For discussion of this difficult issue, see R. Carlson, "Romantic Relationships Between Professors and Their Students: Morality, Ethics, and Law," 42 *S. Tex. L. Rev.* 493 (2001); M. Chamallas, "Consent, Equality and the Legal Control of Sexual Conduct," 61 *S. Cal. L. Rev.* 777 (1988); P. DeChiara, "The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students," 21 *Columbia J.L. & Soc. Probs.* 137 (1988); and E. Keller, "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy," 15 *J. Coll. & Univ. Law* 21 (1988).)

Sexual harassment claims may also be brought under Section 1983, which is used to enforce the Fourteenth Amendment equal protection clause against both institutions and individuals (see Laura Oren, "Section 1983 and Sex Abuse in Schools: Making a Federal Case of It," 72 *Chi-Kent L. Rev.* 747 (1997)). Unlike Title IX claims, Section 1983 claims can be brought only against public institutions and individuals employed by public institutions. Moreover, claims against the institution can succeed only if the challenged actions were taken pursuant to an established institutional policy or custom (see Section 3.5 of this book). Claims against individuals can succeed only if the plaintiff can defeat the qualified immunity defense typically asserted by individuals who are Section 1983 defendants (see Section 4.7.4). In *Oona R.S. v. McCaffrey*, 143 F.3d 473 (9th Cir. 1998), for instance, a student who was allegedly harassed by a student teacher used Section 1983 to sue school officials who were allegedly responsible for permitting the harassment. The court held that the student had stated a valid equal protection claim for gender discrimination and rejected the officials' qualified immunity defense.

In *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003), a student filed a Section 1983 claim against a professor whom she alleged had harassed her and against three administrators whom she claimed were supervisors of the professor at the time of the harassment. The court acknowledged that a hostile environment sexual harassment claim may also be an equal protection claim that can be brought under Section 1983 if the professor and the supervisors were acting "under color of law" (see Section 3.5 of this book). Since the student's evidence concerning the professor's classroom conduct was sufficient to sustain a Section 1983 claim, the appellate court reversed the district court's entry of summary judgment in the professor's favor. The student's failure to report the professor's harassment to a supervisor until after the course was over was not fatal to the student's claim. "Given the power disparity between teacher and student a factfinder could reasonably conclude that a student-victim's inaction, or counter-intuitive reaction does not reflect the true

impact of objectionable conduct. . . . ‘What students will silently endure is not the measure of what a college must tolerate’” (*Hayut*, 352 F.3d at 749, quoting *Vega v. Miller* 273 F.3d 460, 468 (2d Cir. 2001)). Regarding the administrators, however, the appellate court affirmed summary judgment in their favor because the student had not introduced any evidence of their “personal involvement” in the harassment. To bring a Section 1983 claim against supervisory personnel for the actions of a subordinate, the plaintiff must have shown that the supervisors participated in the harassment, failed to take corrective action after being notified of the harassment, created “a policy or custom to foster the unlawful conduct,” committed “gross negligence in supervising subordinates” who commit the harassment, or are deliberately indifferent “to the rights of others by failing to act on information regarding the [harassment].”

In *Lipsett v. University of Puerto Rico*, above, the plaintiff also sued university officials under Section 1983 in their individual capacities (see Section 4.7.4 of this book). The court held that individuals can be liable for a subordinate’s actions (including harassment) in certain circumstances:

A state official . . . can be held liable . . . if (1) the behavior of such subordinates results in a constitutional violation and (2) the official’s action or inaction was “affirmative[ly] link[ed],” *Oklahoma City v. Tuttle*, 471 U.S. 808 . . . (1985), to that behavior in the sense that it could be characterized as “supervisory encouragement, condonation, or acquiescence” or “gross negligence amounting to deliberate indifference” [864 F.2d at 902].

Since the plaintiff had discussed the harassment numerous times with the dean, the director of surgery, and the director of the surgical residency program, the court concluded that “supervisory encouragement” could be found and that Section 1983 liability could attach.

Another possibility for a student harassment victim is a claim brought under a state nondiscrimination law. In *Smith v. Hennepin County Technical Center*, 1988 U.S. Dist. LEXIS 4876 (D. Minn. 1988), two students brought suit under Minnesota’s statute, charging their instructor in a dental laboratory with offensive touching and retaliation when they complained of his conduct. The court ruled that, under the state law, the plaintiff must show that “she was subject to unwelcome harassment,” that “the harassment was based on sex,” and that “the harassment had the purpose or effect of unreasonably interfering with her education or created an intimidating, hostile, or offensive learning environment.” In addition, using the federal Title VII law by analogy, the court determined that the educational institution would be liable for the acts of its employees if it “knew or should have known of the harassment and failed to take proper remedial action.” Because the instructor was an employee of the institution, the court ruled that the institution would be directly liable for his acts of its employee if it should have known of them and could have prevented them through the exercise of reasonable care.

State tort law claims challenging harassment can be brought against both institutions and individual employees, either public or private, but public institutions and their officials will sometimes be immune from suit (see Section 3.3.1). The types of tort claims that could cover harassment include

intentional (or negligent) infliction of emotional distress, assault, battery, negligent hiring, negligent supervision, and negligent retention. In *Chontos v. Rhea*, 29 F. Supp. 2d 931 (N.D. Ind. 1998), for example, the court allowed a student to proceed with a negligent retention claim against a university based on the university's awareness of a professor's prior harassment of students. But in *Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999), the court determined that a student complaining of a professor's harassment had not established viable claims of intentional infliction or negligent hiring against the university.

Contract claims are also a possibility. In *George v. University of Idaho*, 822 P.2d 549 (Idaho Ct. App. 1991), a law student, who had ended a consensual relationship with a law professor, filed a breach of contract claim against the university, asserting that the professor's efforts to resume the relationship, and his retaliation in the form of actions disparaging her character within the law school and the legal community, constituted breach of an implied contract. The court denied summary judgment for the university, noting the existence of several questions of fact concerning the nature and scope of the university's responsibility to the student. First of all, the court noted, the university had an implied contract with the student—as evidenced by the university's sexual harassment policy and by its statement in the faculty handbook that it would “fulfill its responsibilities in pursuit of the academic goals and objectives of all members of the university community.” Furthermore, when the student brought the professor's actions to the attention of the school, a written agreement had been executed, in which the professor promised to stop harassing the plaintiff if she would drop claims against him and the law school. The court found that the university had an obligation under that agreement independent of its implied contract with the plaintiff, an obligation that extended beyond her graduation, to take reasonable measures to enforce the agreement.

Sexual harassment, of course, is not the only form of harassment that is a problem on college campuses or that may be actionable under the law. It is, however, the type of harassment most often associated with problems concerning grades and credits earned by students, and the type of harassment that is most often addressed in court opinions. Other forms of harassment, all of which would apparently fall within the scope of pertinent civil rights statutes, include racial harassment, harassment on the basis of national origin, harassment of students with disabilities, and harassment on the basis of age. Regarding racial harassment, the U.S. Department of Education has determined that it is within the scope of Title VI, and has issued guidelines for dealing with racial harassment issues under that statute. See *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11448 (March 10, 1994). This Guidance preceded the Sexual Harassment Guidance that is discussed above, and it articulates liability standards in a slightly different way; but the policy is still comparable to the sexual harassment guidance, and like that Guidance, its standards are much tougher on institutions than the judicial standards for sexual harassment articulated in the *Gebser* case.

Another form of harassment that has created substantial problems for colleges and universities, as well as elementary and secondary schools, is harassment on

the basis of sexual orientation. As indicated at the beginning of this Section, same-sex harassment may sometimes be covered under Title IX as a form of sexual harassment. In other circumstances, it now seems clear that same-sex harassment is also covered by the equal protection clause of the Fourteenth Amendment, in which case victims of such harassment in public postsecondary institutions may use Section 1983 (see above) to sue individual instructors, administrators, staff persons, and other students who have participated in the harassment. In two public school cases concerning peer harassment, two federal courts of appeals have ruled that local school personnel may be held personally liable for failing to protect gay students from persistent patterns of peer harassment, including verbal and physical abuse (see *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); and *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. 2003)).

### 9.3.5. Evaluating students with disabilities

**9.3.5.1 Overview.** As noted in Section 8.2.4.3, the Rehabilitation Act and the Americans With Disabilities Act of 1990 require colleges and universities to provide reasonable accommodations for students with disabilities. Although the laws do not require institutions to change their academic criteria for disabled students, institutions may need to change the format of tests; to provide additional time, or readers or aides, to help students take examinations; or to change minor aspects of course requirements.

Lawsuits filed by students who assert that a college or university has not accommodated their disabilities have mushroomed. Although courts have addressed claims involving a wide range of disabilities, the largest proportion involve alleged learning disabilities and academic accommodations, such as additional time on tests (or a different test format), waiver of required courses or prerequisites, and, in some cases, waiver of certain portions of the curriculum. Students in elementary and secondary education have been entitled to accommodations for physical, psychological, and learning disorders since the 1975 enactment of the Education for All Handicapped Children Act (Pub. L. No. 94-142), which was renamed the Individuals With Disabilities Education Act (IDEA) in 1990 and was most recently amended by the Individuals With Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446. The IDEA is codified in 20 U.S.C. §§ 1400 *et seq.* Many of the students who have received special services and other accommodations under this law are now enrolled in college and, due to their experiences with IDEA services, may have heightened expectations about receiving services at the postsecondary level as well.<sup>19</sup>

Although the IDEA does not apply to a disabled student once he or she has completed high school or has reached the age of twenty-one (whichever occurs

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<sup>19</sup>According to a report published in 2000, approximately one out of every eleven college students reports having a disability. Of those, 41 percent reported a learning disability (American Council on Education, "More College Freshmen Report Disabilities, New ACE Study Shows," 49 *Higher Educ. & Nat'l. Aff.* 2 (January 17, 2000), available at <http://www.ace.net.edu>, cited in Laura Rothstein, "Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading," 63 *Maryland L. Rev.* 122 (2004)).

first), such students continue to be protected in higher education by Section 504 of the Rehabilitation Act of 1973 and by the Americans With Disabilities Act (ADA). As is the case with disputes over the admission of students with disabilities (see Section 8.2.4.3), issues related to classroom accommodations, testing issues, and accommodations for licensing examinations have expanded in recent years, in part because of the expectations and aspirations of students who have grown up with IDEA.

In 2001, the U.S. Supreme Court ruled that the employment provisions of the ADA are subject to Eleventh Amendment immunity in *University of Alabama v. Garrett*, 531 U.S. 356 (2001) (discussed in Section 5.2.5). This means that public institutions cannot be sued for money damages under the ADA in federal court. Federal appellate courts have applied the reasoning of *Garrett* to lawsuits brought against a university under Title II of the ADA, which forbids discrimination by places of public accommodation. For example, in *Robinson v. University of Akron School of Law*, 307 F.3d 409 (6th Cir. 2002), the student brought claims under both the ADA and the Rehabilitation Act, alleging that the law school had failed to provide accommodations to which the student was entitled as a result of his learning disability. The court ruled that the university had waived sovereign immunity against Rehabilitation Act claims, but that it was protected from ADA suits in federal court under the result in *Garrett*. (For a similar ruling, see *Shepard v. Irving*, 77 Fed. Appx. 615 (4th Cir. 2003) (unpublished).)

**9.3.5.2. The concept of disability.** In order to receive the protections of either Section 504 or the ADA, the student must demonstrate that he or she has a disability that meets the statutory requirements. The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities” of the individual, or “a record of such an impairment,” or “being regarded as having such an impairment” (42 U.S.C. § 12102(2)). Whether or not an individual is disabled for ADA purposes is to be determined on an individualized basis (29 C.F.R. § 1630.21(j)). The definition of disability used in Section 504 is the same as the ADA definition (34 C.F.R. § 104.3(j)). Although most cases do not involve this issue (in contrast to employment litigation under the ADA, in which a frequent employer defense is that the individual’s disorder does not meet the ADA definition—see Section 5.2.5), it is useful to remember that the institution is entitled to inquire into the nature of the disability, to require documentation of the disability, and to reach its own determination as to whether the disorder is a disability that requires accommodation under the ADA or Section 504.

Courts evaluating whether students met the laws’ definition of disability initially struggled with the issue of whether an individual whose disability was mitigated, fully or in part, by either medication or self-accommodation was entitled to reasonable accommodations under the law. For example, in *McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974 (10th Cir. 1998), a federal appellate court considered whether a medical student with test anxiety in math and chemistry classes was disabled for ADA purposes. The student had challenged his marginal first-year grades but refused to retake the exams or repeat the first year of instruction. Although the medical school did not dispute

the student's claim that he had an "anxiety disorder," the court emphasized that "[j]ust as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety" (170 F.3d at 979). The court then ruled that this disorder did not meet the ADA definition of disability because it did not substantially limit one or more major life activities.

The question of whether to consider "mitigating measures" in determining whether an individual has an ADA-protected disability was resolved by three decisions announced by the U.S. Supreme Court in 1999. In *Sutton v. United Air Lines*, 527 U.S. 471; *Murphy v. United Parcel Service*, 527 U.S. 516; and *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (all discussed in Section 5.2.5), the Court addressed the employment discrimination claims of three individuals under the ADA. In each of these cases, the individual had a disorder that could be minimized or corrected by a device (such as prescription lenses) or by medication. The Court ruled that such "mitigating measures" must be taken into account in determining whether the individuals were disabled. Although the trio of cases is in the employment context, the Court interpreted the ADA's definition of "disability," which applies to all titles of the ADA.

The potential fallout of these three cases is illustrated by *New York State Board of Law Examiners v. Bartlett*, 527 U.S. 1031 (1999). Bartlett had sought accommodations in taking the New York State Bar Examination because of her learning disabilities. The board of law examiners had refused to provide those accommodations because they had found that Bartlett's self-accommodations had permitted her to read at an average level. The U.S. Court of Appeals for the Second Circuit had followed the Equal Employment Opportunity Commission (EEOC) Guidance that required the determination of a disability to be made without regard to mitigating measures, and found that Bartlett's learning disorder qualified as a disability for purposes of the ADA. It had remanded the case to the trial court to determine what accommodations should be provided and the damages due Bartlett (*Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998)). The board appealed, and the U.S. Supreme Court vacated the appellate court's decision and remanded it for further consideration in light of the three ADA cases it had recently decided. On remand, the trial court that had originally heard the case determined that Bartlett's dyslexia substantially limited her in the major life activities of reading and working, and that she was entitled to reasonable accommodations in the form of double the normally allotted time to take the bar examination, the use of a computer, additional accommodations, and compensatory damages (2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. 2001)).

Despite the eventual outcome in *Bartlett*, the Supreme Court's rulings in the mitigation cases have made it more difficult for students whose disabilities are somehow mitigated to state ADA claims. For example, in *Gonzales v. National Board of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001), a federal appellate court rejected a medical student's request for a preliminary injunction to force the National Board of Medical Examiners to allow him extra time on a licensing examination. The court ruled that the student did

not meet the ADA's definition of disability because he had performed successfully without accommodation on other timed standardized tests.

Similarly, a surgical resident's subsequent academic and professional success after being dismissed from a residency program by the University of Cincinnati persuaded a court that he was not disabled. In *Swanson v. University of Cincinnati*, 268 F.3d 307 (6th Cir. 2001), the federal appellate court rejected the former resident's ADA and Rehabilitation Act claims against the university, observing that the limitations posed by his depression were not the reason for his termination from the residency program, and his subsequent success at another university's residency program demonstrated that his depression did not substantially limit his ability to work.

The ADA also protects students against discrimination when they are erroneously regarded as disabled. In *Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37 (D.N.H. 1997), a student contended that his professors and academic advisors regarded him as disabled and caused him to be dismissed from his medical residency. The plaintiff, a resident in neurosurgery, developed a disorder that mimicked the symptoms of multiple sclerosis (MS). Although the resident provided medical documentation that his condition was not MS, and also disputed the defendants' contention that he could not perform surgery, he was dismissed from the residency program. The court found that the medical school had not followed its own procedures, which included a meeting with the student to discuss his performance problems and a three-month probationary period. In addition, said the court, issues of material fact existed as to whether the defendants regarded the plaintiff as disabled and as to whether he could perform the physical demands of the neurosurgical residency. The summary judgment motion of the defendants was denied. (For a case in which an appellate court ruled that the university had regarded a student as disabled but had not discriminated against that student, see *Betts v. Rector and Visitors of the University of Virginia*, 198 F. Supp. 2d 787 (W.D. Va. 2002).)

In addition to satisfying the laws' definition of disability, students must also be able to demonstrate that they are "qualified" to meet the institution's academic standards. For example, regulations implementing Section 504 of the Rehabilitation Act define a "qualified" individual with a disability as one who "meets the academic and technical standards requisite to admission or participation" (34 C.F.R. § 104.3(l)(3)). *Zukle v. Regents of the University of California*, 166 F.3d 1041 (9th Cir. 1999), addresses this issue. Zukle, a medical student who had learning disabilities and who had received numerous accommodations but still could not meet the school's academic standards, was unable to convince the court that she could meet the eligibility requirements of the medical school, even with reasonable accommodations. The court ruled that the student's requested accommodation—lengthening the time during which she could complete her medical degree—would lower the school's academic standards, which is not required by either the ADA or the Rehabilitation Act (see Section 9.3.5.4).

**9.3.5.3. Notice and documentation of disabilities.** Courts have generally ruled that, unless the institution has knowledge of the student's disability, there is no duty to accommodate. For example, in *Goodwin v. Keuka College*, 929 F.



Supp. 90 (W.D.N.Y. 1995), the plaintiff alleged that she had been improperly terminated from an occupational therapy program due to her mental disability. Under the school's policy, if a student failed to complete two field placements, he or she was automatically terminated from the program. The school policy also provided that a student would automatically fail a field placement if he or she left the assignment without prior permission. After failing one field assignment, passing another, and having a third incomplete, the plaintiff walked off her fourth field assignment after an argument with her supervisor. Nearly three weeks later, the plaintiff sent a letter to the college explaining that she was seeking an evaluation to determine if she had a learning disability and was eligible for accommodation. The college responded that she had been terminated from the program based on her actions, not on the basis of any disability. Although the plaintiff subsequently produced a psychiatric report that she did have a disability, the college refused to reinstate her. The court dismissed the plaintiff's suit, finding that she could not make out a *prima facie* case under either the Rehabilitation Act or the ADA because she could not allege she was dismissed on the basis of her disability. For a school to dismiss a student based on her disability, it must first be aware of that disability.

In addition to the institution having knowledge of the disability, courts have ruled that the ADA requires the student to demonstrate that the university has actually denied a specific request for an accommodation. In *Tips v. Regents of Texas Tech University*, 921 F. Supp. 1515 (N.D. Tex. 1996), the court dismissed the plaintiff's claim because it found that she had not requested the accommodation. After examining the relevant legislative history and regulations, the court held that the duty to accommodate is triggered only upon a request by (or on behalf of) the disabled student. Because the plaintiff did not make her request for accommodation until after her dismissal from the program, the court held that the plaintiff could not make out a case of disability discrimination. A similar result was reached in *Gill v. Franklin Pierce Law Center*, discussed in 8.2.4.3. And in *Scott v. Western State University College of Law*, 1997 U.S. App. LEXIS 9089 (9th Cir. 1997) (unpublished), the appellate court affirmed a trial court's summary judgment on behalf of the law school. The college had dismissed Scott for academic reasons after his first year of law school. After he was dismissed, Scott asserted that he had a disability. The court ruled that the law school's action was unrelated to Scott's disability, since it had no notice of the alleged disability, and that, furthermore, Scott was not "otherwise qualified" for Rehabilitation Act purposes.

Institutions are entitled to require students who seek accommodation to provide recent documentation from a qualified health care provider or other appropriate diagnostician not only of the disability, but also the restrictions or limitations placed on the student by the disability. This issue arose in a widely publicized case, *Guckenberger v. Boston University*, 957 F. Supp. 306 (D. Mass. 1997) (*Guckenberger I*), which ultimately resulted in three lengthy opinions by the district court. Students asserted that Boston University's new policy requiring students to present recent (no more than three years old) documentation of learning disabilities was in violation of state and federal nondiscrimination laws.

They also challenged the evaluation and appeal procedure for requesting academic accommodations, as well as the university's "blanket prohibition" against course substitutions for mathematics and foreign language requirements. Furthermore, the students claimed that negative comments by the university's president about learning-disabled students had created a hostile learning environment for them.

The district court granted class action certification to the plaintiffs (all students with learning disabilities and/or attention deficit disorders currently enrolled at Boston University), thus avoiding mootness concerns. In addition, the court examined the viability of a "hostile academic environment" claim based on disability, concluding that such a claim was possible, but that the allegations of the plaintiffs' complaint fell short of such a claim. Although statements made by the university's president may have been offensive, the court considered the First Amendment concerns at hand and found that these remarks were not "sufficiently directed" toward the plaintiffs to constitute a hostile academic environment.

In a subsequent opinion, *Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass. 1997) (*Guckenberger II*), the district court addressed the plaintiffs' claims that the university violated the ADA and Section 504 by requiring students with learning disabilities to be retested every three years by a physician, a clinical psychologist, or a licensed psychologist; and by refusing to modify the requirement that students in the College of Arts and Sciences complete one semester of mathematics and four semesters of a foreign language. The court ruled that the university's previous policy and its application had, in several respects, violated the disability discrimination laws. But the university had changed its policy and some of its practices after the litigation began, and some of those changes had cured some of the violations.

The court ruled that requiring new documentation of a learning disability every three years, without regard to whether the updated information was medically necessary, violated the law because the requirements screened out or tended to screen out students with specific disabilities, and because the university did not demonstrate that the requirements were necessary to provide educational services or accommodations. The university's new policy permits a waiver of the three-year retesting regulation when medically unnecessary; this change, said the court, cured the violation.

The court also ruled that the university's requirement that it would accept documentation only from professionals with certain types of doctorates violated the law because professionals with other degrees (doctorates in education and certain master's degrees) were also qualified to assess individuals for learning disabilities. The court did note, however, that for the assessment of attention deficit disorder, it was appropriate to require that the assessor have a doctorate.

The university's decision to implement the policy in the middle of the academic year, without advance notice to affected students, also violated the ADA and Section 504, according to the court. Furthermore, the court ruled that the president and his staff, who lacked "experience or expertise in diagnosing learning disabilities or in fashioning appropriate accommodations" (974 F. Supp. at

118) had personally administered the policy on the basis of “uninformed stereotypes about the learning disabled.” The university’s new policy, which delegated the evaluation of accommodation requests to a licensed psychologist, cured that violation. (The third *Guckenberger* opinion is discussed in Section 9.3.5.4 below.)

**9.3.5.4. Requests for programmatic or instructional accommodations.<sup>20</sup>**

Although both Section 504 and the ADA require colleges and universities to provide reasonable accommodations to qualified disabled students, they need not do so if the accommodation will fundamentally alter the nature of the academic program (see *Southeastern Community College v. Davis*, Section 8.2.4.3).<sup>21</sup>

The question of how much change is required arose in *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992). A medical student dismissed on academic grounds asserted that the medical school had refused to accommodate his learning disability by requiring him to take a multiple choice test rather than an alternative that would minimize the impact of his learning disability. Initially, the trial court granted summary judgment for Tufts, but the appellate court reversed on the grounds that the record was insufficient to enable the court to determine whether Tufts had attempted to accommodate Wynne and whether Tufts had evaluated the impact of the requested accommodation on its academic program (932 F.2d 19 (1st Cir. 1991, *en banc*)).

On remand, the university provided extensive evidence to the trial court that it had permitted Wynne to repeat his first year of medical school, had paid for the neuropsychological testing of Wynne that had identified his learning disabilities, and had provided him with tutors, note takers, and other assistance. It had permitted him to take make-up examinations for courses he failed, and had determined that there was not an appropriate alternative method of testing his knowledge in the biochemistry course.

On the strength of the school’s evidence of serious consideration of alternatives to the multiple choice test, the district court again awarded summary judgment for Tufts, and the appellate court affirmed. In deferring to the school’s judgment on the need for a certain testing format, the court said:

[T]he point is not whether a medical school is “right” or “wrong” in making program-related decisions. Such absolutes rarely apply in the context of subjective decision-making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make “a professional, academic judgment that [a] reasonable accommodation [was] simply not available” [976 F.2d at 795].

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<sup>20</sup>Cases and other authorities are collected at Richard E. Kaye, Annot., “What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program or School Rules as Applied to Learning Disabled Student,” 166 A.L.R. Fed. 503.

<sup>21</sup>For the pertinent regulations on accommodation, see 28 C.F.R. § 35.130(h)(7) (ADA Title II), 28 C.F.R. §36.302(a) (ADA Title III), and 34 C.F.R. § 104.44 (Section 504). For the pertinent regulations defining “qualified” disabled student, see 28 C.F.R. § 35.104 (ADA Title II) and 34 C.F.R. § 104.3(k)(4) (Section 504).

Given the multiple forms of assistance that Tufts had provided Wynne, and its ability to demonstrate that it had evaluated alternate test forms and determined that none would be an appropriate substitute for the multiple choice format, the court was satisfied that the school had satisfied the requirements of the Rehabilitation Act.

In *Halasz v. University of New England*, 816 F. Supp. 37 (D. Maine 1993), a federal trial court relied on *Wynne* to review the challenge of a student, dismissed from the University of New England on academic grounds, that the school had failed to provide him with necessary accommodations and had discriminated against him on the basis of his disability. The school had a special program for students with learning disabilities who lacked the academic credentials necessary for regular admission to the university. The program provided a variety of support services for these students, and gave them an opportunity for regular admission to the university after they completed the special one-year program. Despite the special services, such as tutoring, taped texts, untimed testing, and readers for some of his classes, the plaintiff was unable to attain an academic record sufficient for regular admission to the university. His performance in the courses and tests that he took during his year in the special program indicated, the university alleged, that he was not an “otherwise qualified” student with a disability and thus was not protected by the Rehabilitation Act. The university was able to demonstrate the academic rationale for its program requirements and to show that the plaintiff had been given the same amount and quality of assistance that had been given to other students who later were offered admission to the university’s regular academic program.

The decisions in *Wynne* and *Halasz* demonstrate the significance of an institution’s consideration of potential accommodations for students with disabilities. Given the tendency of courts to defer to academic judgments, but to hold colleges and universities to strict procedural standards, those institutions that can demonstrate, as could Tufts, that they gave careful consideration to the student’s request, and reached a decision on *academic* grounds that the accommodation was either unnecessary or unsuitable, should be able to prevail against challenges under either the Rehabilitation Act or the ADA.

The scope of the accommodation requirement was also addressed in the *Guckenberger* trilogy (Section 9.3.5.3), and the case is particularly instructive because of the court’s scrutiny of the process used by the university to make an academic determination concerning the requested accommodations. The students had challenged the university’s refusal to waive the foreign language requirement in the College of Arts and Sciences, or to permit substitution of other courses taught in English, as a violation of the ADA. In *Guckenberger II*, the court agreed in principle that the university was not required to lower its academic standards or require substantial alteration of academic programs. The court found, however, that the university had not even considered the alternatives suggested by the students (or any other alternatives) that would have provided an appropriate accommodation while maintaining academic standards and programmatic integrity. Said the court: “[T]he University simply relied on the status quo as the rationale” (974 F. Supp. at 115). The court awarded

damages for breach of contract and emotional distress to several of the students whose accommodations were delayed or denied because of the policy and its application by university officials. It also ordered the university to develop a “deliberative procedure” for considering whether other courses could be substituted for the foreign language requirement of the liberal arts college without fundamentally altering the nature of its liberal arts degree program.

The university turned to a faculty committee that advised the dean of arts and sciences on curricular and programmatic issues. That committee heard the views of some of the student plaintiffs during its deliberations; no administrators were committee members, nor did they attend the meetings. At the conclusion of its deliberations, the committee stated that the foreign language requirement was “fundamental to the nature of the liberal arts degree at Boston University” and recommended against permitting course substitutions as an alternative to the foreign language requirement. The president accepted the committee’s recommendation. Then, in a third ruling, *Guckenberger v. Boston University*, 8 F. Supp. 2d 82 (D. Mass. 1998) (*Guckenberger III*), the court ruled that the university had complied with its order, approved the procedure that had been used, and dismissed the plaintiffs’ challenge to the process and the outcome of the committee’s work.

In determining whether the university used the appropriate process and standards to decide whether a requested accommodation was reasonable, the district court in *Guckenberger III* looked to the opinion of the U.S. Court of Appeals for the First Circuit in *Wynne v. Tufts University School of Medicine*, discussed earlier in this subsection.

“If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation” [8 F. Supp. 2d at 87, quoting *Wynne I* at 26].

The *Guckenberger III* court first engaged in fact finding to determine whether Boston University had exercised “reasoned deliberation.” It examined who the decision makers were, whether the deliberative group addressed why the foreign language requirement was unique, and whether it considered possible alternatives to the requirement. Although the committee had not kept minutes of its meetings in the past, it had been ordered by the court to do so; review of those minutes was an important factor in the court’s determination. The minutes reflected that the committee had discussed why the foreign language requirement was important, and why alternatives to the foreign language requirement would not meet the goals which the requirement was enacted to fulfill. The committee was insulated from those officials whose comments and decisions had been criticized by the court in earlier rulings, and the committee gave students an opportunity to provide information and their perspective on the issue. The court concluded that “the Committee’s reliance on only its own academic

judgment and the input of College students was reasonable and in keeping with the nature of the decision” (8 F. Supp. 2d at 87–88).

The court then evaluated “whether the facts add up to a professional, academic judgment that reasonable accommodation is simply not available” (8 F. Supp. 2d at 89, quoting *Wynne I* at 27–28). Despite the fact that the committee did not consult external experts, and the fact that many elite universities, such as Harvard, Yale, and Columbia, have no similar foreign language requirement, the court ruled that the process used was appropriate and the outcome was rationally justifiable. The court stated:

[S]o long as an academic institution rationally, without pretext, exercises its deliberate professional judgment not to permit course substitutions for an academic requirement in a liberal arts curriculum, the ADA does not authorize the courts to intervene even if a majority of other comparable academic institutions disagree [8 F. Supp. 2d at 90].

Determinations of whether accommodation requests would fall short of fundamental academic standards must be based on professional academic judgments.

Much of the litigation concerning conflicts between the accommodations sought by the student and the accommodations the institution is willing to grant occur with medical students or other students for whom a clinical experience is required. Most federal courts are deferential to a determination by faculty or academic administrators that a requested accommodation is either inappropriate for educational reasons or that the student cannot satisfactorily complete the required curriculum even with accommodation. For example, in *Zukle v. The Regents of the University of California*, 166 F.3d 1041 (9th Cir. 1999), the court treated as a matter of first impression the question of “judicial deference to an educational institution’s academic decisions in ADA and Rehabilitation Act cases” (166 F.3d at 1047). Although the Tenth Circuit had rejected a deferential approach in *Pushkin v. Regents of the University of Colorado* (Section 8.2.4.3), the Ninth Circuit determined that deference was appropriate, following the lead of the First, Second, and Fifth Circuits. In *Zukle*, a medical student with learning disorders that made reading slow and difficult, requested to be relieved of the requirement to complete several of her clinical rotations until after other academic requirements had been completed. The medical school refused. The court ruled that the medical school had offered the plaintiff “all of the accommodations that it normally offers learning disabled students,” such as double time on exams, note-taking services, and textbooks on audiocassettes. But *Zukle*’s request that she delay the completion of several clinical rotations and retake a portion of them at a later time was a “substantial alteration” of the curriculum, and thus the medical school was not required to acquiesce to her request. Because the student could not demonstrate that she could meet the academic requirements of the medical school, even with the accommodations it did provide, the court ruled that she was not qualified, and thus had not established a *prima facie* case of disability discrimination.

In a somewhat similar case from the Sixth Circuit, the court ruled that the Ohio College of Podiatric Medicine (OPM) had provided sufficient accommodations for a student. In *Kaltenberger v. Ohio College of Podiatric Medicine*, 162

F.3d 432 (6th Cir. 1998), the plaintiff challenged her academic dismissal on ADA grounds. The student had not performed well academically during her first semester at OPM, and sought a diagnosis for possible learning disorders. She was eventually diagnosed with attention deficit/hyperactive disorder (ADHD). Although by the time the student was properly diagnosed she had been dismissed for academic reasons, she appealed the dismissal on the grounds that she had ADHD, and she was reinstated to a five-year program that provided a lighter course load. She was also provided with the five accommodations that the diagnosing professional had recommended for the student. The student did not take advantage of several of the accommodations (individual tutoring, additional academic counseling), and continued to perform poorly in courses she was required to retake. She was dismissed at the end of her second academic year. As in *Zukle*, the Sixth Circuit deferred to the academic judgment of the plaintiff's professors and advisors. It rejected the plaintiff's assertion that she should be allowed to substitute less demanding courses for the required curriculum, and ruled that the college had provided sufficient reasonable accommodations to the student.

Another Ninth Circuit case addressed the standard used by courts to review an institution's claim that it could not provide academic accommodations. In *Wong v. Regents of the University of California*, 192 F.3d 807 (9th Cir. 1999), a medical student with learning disabilities had been dismissed on academic grounds, primarily because he had difficulties completing his clinical rotations successfully. The trial court had ruled that accommodations provided by the university were reasonable, and that the plaintiff was not qualified to continue as a medical student. The appellate court disagreed.

Although the medical school dean had approved several accommodations for the student over a period of years, he had rejected the student's final accommodation requests. The court explained the standard of review appropriate to accommodation decisions of academic institutions:

In the typical disability discrimination case in which a plaintiff appeals a district court's entry of summary judgment in favor of the defendant, we undertake this reasonable accommodation analysis ourselves as a matter of course, examining the record and deciding whether the record reveals questions of fact as to whether the requested modification substantially alters the performance standards at issue or whether the accommodation would allow the individual to meet those requirements. In a case involving assessment of the standards of an academic institution, however, we abstain from an in-depth, de novo analysis of suggested accommodations that the school rejected if the institution demonstrates that it conducted such an inquiry itself and concluded that the accommodations were not feasible or would not be effective [192 F.3d at 818].

Because the university had not submitted evidence that the dean had made a reasoned determination that the accommodations requested by Wong were unreasonable, particularly since they were very similar to earlier accommodations that the dean had approved, and given the fact that the prior accommodations enabled Wong to perform very well (circumstances very different from

those in *Zukle*), the court refused to defer to the university's determination "because it did not demonstrate that it conscientiously exercised professional judgment in considering the feasibility" of the requested accommodations. The court then addressed the issue of Wong's qualifications to continue as a medical student. Again the court rejected the deferential standard of review, because "the school's system for evaluating a learning disabled student's abilities and its own duty to make its program accessible to such individuals fell short of the standards we require to grant deference . . ." (192 F.3d at 823). Because Wong had performed well when given additional time to prepare for each clinical rotation, the court ruled that he should be allowed to establish at trial that he was qualified.

The court concluded with some advice to institutions, and a warning:

The deference to which academic institutions are entitled when it comes to the ADA is a double-edged sword. It allows them a significant amount of leeway in making decisions about their curricular requirements and their ability to structure their programs to accommodate disabled students. On the other hand, it places on an institution the weighty responsibility of carefully considering each disabled student's particular limitations and analyzing whether and how it might accommodate that student in a way that would allow the student to complete the school program without lowering academic standards or otherwise unduly burdening the institution. . . . We will not sanction an academic institution's decision to refuse to accommodate a disabled student and subsequent dismissal of that student when the record contains facts from which a reasonable jury could conclude that the school made those decisions for arbitrary reasons unrelated to its academic standards [192 F.3d at 826].<sup>22</sup>

On remand, the trial court determined that the student was not disabled (an issue that the earlier opinions had not addressed) because he had been able to achieve earlier academic success without accommodations; the appellate court affirmed that ruling (379 F.3d 1097 (1994)).

In another case, *Doe v. University of Maryland Medical System Corporation*, 50 F.3d 1261 (4th Cir. 1995), an HIV-infected neurosurgical resident had rejected the medical school's proposed accommodation and attempted to force the school to permit him to continue performing surgery. The third-year resident was stuck with a needle while treating an HIV-positive patient, and the resident later tested HIV-positive himself. The hospital permanently suspended Doe from surgical practice, offering him residencies in pathology and psychiatry. Doe rejected these alternatives and filed claims under the Rehabilitation Act and the ADA. The court ruled that he was not otherwise qualified because he

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<sup>22</sup>After the appellate court ruling, but before remanded case came to trial, the U.S. Supreme Court released its opinion in *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which interpreted the ADA's definition of "disability" very narrowly. The trial court determined that, under the *Toyota* standard, Wong was not disabled because his overall academic performance prior to the final year of medical school had been very successful, and the appellate court affirmed, thus ending Wong's case (379 F.3d 1097 (9th Cir. 2004)).



posed a significant risk to patient safety that could not be eliminated by reasonable accommodation, and that the accommodations proposed by the medical school were reasonable.

As is the case with ADA claims by employees, students may ask to “telecommute” to college. In *Maczaczynj v. State of New York*, 956 F. Supp. 403 (W.D.N.Y. 1997), a federal trial court was asked to order Empire State College to permit the plaintiff to “attend” required weekend class sessions by telephone from his home, an accommodation that the college had refused to allow. The plaintiff, who suffered from panic attacks (a psychiatric disorder), had rejected the offer of the program faculty to modify certain program requirements, such as excusing him from social portions of the class sessions, providing an empty room for him to use when he became agitated, allowing him to bring along a friend of his choice, and allowing him to select the location on campus where the sessions would take place. The court credited the college’s argument that attendance was required for pedagogical reasons, and that the course was not designed to be delivered through distance learning or telecommunication technologies. Finding that telephone “attendance” would therefore not be the academic equivalent of the required class sessions, the court denied the plaintiff’s request.

As study abroad programs become more popular, students with disabilities have sought to participate, and many institutions have worked to accommodate the individualized needs of students with mobility or other impairments. Although the Office of Civil Rights, U.S. Department of Education has ruled that Section 504 of the Rehabilitation Act and Title II of the ADA do not apply outside the United States,<sup>23</sup> students have attempted to state both federal and state law claims challenging their institutions’ alleged failure to accommodate them on study abroad trips.

In *Bird v. Lewis & Clark College*, 303 F.3d 1015 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), a student who used a wheelchair participated in the college’s study abroad program in Australia after college representatives assured her and her parents that she would be fully accommodated. Although the college made numerous accommodations for the student, she was unable to participate in several activities with her classmates, and sued the college upon her return, claiming ADA violations and breach of the college’s fiduciary duty to her, a state law claim. The college argued that neither Section 504 nor Title III of the ADA had extraterritorial application (see Section 13.5.7.6), but the court did not rule on that issue because it determined that the college had reasonably accommodated the student. However, the court affirmed the jury’s finding that the college breached its fiduciary duty to the student, based upon the assurances and representations that the college had made to the student and her parents, and its award of \$5,000 in damages.

As the court opinions (particularly *Guckenberger* and *Wong*) in this Section illustrate, process considerations are of great importance in administering the institution’s system for reviewing student requests for accommodation.

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<sup>23</sup>OCR Region VIII, Case #08012047, December 3, 2001 (Arizona State University).

The institution will need to consider such requests on an individualized, case-by-case basis. Documentation that is submitted by students or obtained by the institution will need to be prepared or evaluated by professionals with appropriate credentials. Determinations of whether accommodation requests would fall short of fundamental academic standards must be based on professional judgments of faculty and academic administrators. On the other hand, once the institution can show that it has in effect, and has relied upon, a process meeting these requirements, it can expect to receive considerable deference from the courts if its determination is challenged (see especially the *Zukle* case).

This area of the law continues to develop rapidly. Although the 1999 decisions of the U.S. Supreme Court (Section 9.3.5.2 above) clarify one aspect of the ADA's interpretation, and other cases in Section 9.3.5 clarify other aspects, many other issues related to students with disabilities remain. How substantial must a requested change in an academic program be before it is considered an undue hardship for the institution? What should be the institution's response if a faculty member argues that a requested accommodation infringes his or her academic freedom rights? Can an institution require a student to receive counseling or to take medication as part of the accommodation agreement? These and other issues will challenge administrators, faculty, and university counsel as they seek to act within the ADA's requirements while maintaining the academic integrity of their programs.

### ***Sec. 9.4. Procedures for Suspension, Dismissal, and Other Sanctions***

**9.4.1. Overview.** As Sections 9.2 and 9.3 indicate, both public and private postsecondary institutions have the clear right to dismiss, suspend, or impose lesser sanctions on students for behavioral misconduct or academic deficiency. But just as that right is limited by the principles set out in those Sections, so it is also circumscribed by a body of procedural requirements that institutions must follow in effecting disciplinary or academic sanctions. These procedural requirements tend to be more specific and substantial than the requirements set out above, although they do vary depending on whether behavior or academics is involved and whether the institution is public or private (see Section 1.5.2).

At the threshold level, whenever an institution has established procedures that apply to the imposition of sanctions, the law will usually require that these procedures be followed. In *Woody v. Burns*, 188 So. 2d 56 (Fla. 1966), for example, the court invalidated an expulsion from a public institution because a faculty committee had "circumvented . . . [the] duly authorized [disciplinary] committee and arrogated unto itself the authority of imposing its own penalty for appellant's misconduct." And in *Tedeschi v. Wagner College*, 49 N.Y.2d 652 (N.Y. 1980), New York's highest court invalidated a suspension from a private institution, holding that "when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion, that procedure must be substantially observed."

There are three exceptions, however, to this "follow the rules" principle. *First*, an institution may be excused from following its own procedures if the student

knowingly and freely waives his or her right to them, as in *Yench v. Stockmar*, 483 F.2d 820 (10th Cir. 1973), where the student neither requested that the published procedures be followed nor objected when they were not. *Second*, deviations from established procedures may be excused when they do not disadvantage the student, as in *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972), where the student contested the school's use of a panel other than that required by the rules, but the court held that the "deviations were minor ones and did not affect the fundamental fairness of the hearing." And *third*, if an institution provides more elaborate protections than constitutionally required, failure to provide nonrequired protections may not imply constitutional violations (see Section 9.4.3).

This Section focuses on challenges to the fairness of the procedures that colleges use to determine whether a student has violated a campus rule or code of conduct, as well as the fairness of the sanction, if any, levied against the student. Because public colleges are subject to constitutional regulation as well as statutory and common law, disciplinary decisions at public colleges are discussed separately from those at private colleges. And sanctions based on student academic misconduct are discussed separately for public institutions from those based upon student social (or criminal) misconduct, although the distinctions between academic and disciplinary sanctions seem to be blurring as some courts are viewing academic misconduct as behavior rather than as a violation of academic standards, and are applying standards developed in student discipline cases to academic misconduct cases.

(For a thoughtful critique of college disciplinary procedures and suggestions for enhancing the fairness of such discipline, see Curtis J. Berger & Vivian Berger, "Academic Discipline: A Guide to Fair Process for the University Student," 99 *Columbia L. Rev.* 289 (1999).)

**9.4.2. Public institutions: Disciplinary sanctions.** State institutions may be subject to state administrative procedure acts, state board of higher education rules, or other state statutes or administrative regulations specifying particular procedures for suspensions or expulsions. In *Mary M. Clark*, 473 N.Y.S.2d 843 (N.Y. App. Div. 1984), the court refused to apply New York State's Administrative Procedure Act to a suspension proceeding at State University of New York-Cortland; but in *Mull v. Oregon Institute of Technology*, 538 P.2d 87 (Or. 1975), the court applied that state's administrative procedure statutes to a suspension for misconduct and remanded the case to the college with instructions to enter findings of fact and conclusions of law as required by one of the statutory provisions.

The primary external source of procedural requirements for public institutions, however, is the due process clause of the federal Constitution, which prohibits the government from depriving an individual of life, liberty, or property without certain procedural protections.<sup>24</sup> Since the early 1960s, the concept of procedural due process has been one of the primary legal forces shaping the

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<sup>24</sup>Cases are collected in Daniel A. Klein, Annot., "Expulsion, Dismissal, Suspension, or Other Discipline of Student of Public School, College, or University as Violating Due Process Clause of Federal Constitution's Fourteenth Amendment—Supreme Court Cases," 88 L. Ed. 2d 1015.

administration of postsecondary education. For purposes of due process analysis, courts typically assume, without deciding, that a student has a property interest in continued enrollment at a public institution (see, for example, *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 622 (D.P.R. 1974)). One court stopped short of finding a property interest, but said that the Fourteenth Amendment “gives rights to a student who faces expulsion for misconduct at a tax-supported college or university” (*Henderson State University v. Spadoni*, 848 S.W.2d 951 (Ark. Ct. App. 1993)). As did the court in *Marin*, the U.S. Supreme Court has assumed a property interest in continued enrollment in a public institution (for example, in *Ewing* and *Horowitz*, discussed in Sections 9.3.1 and 9.4.3 respectively), but has not yet directly ruled on this point.

A landmark 1961 case on suspension procedures, *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), is still very instructive. Several black students at Alabama State College had been expelled during a period of intense civil rights activity in Montgomery, Alabama. The students, supported by the National Association for the Advancement of Colored People (NAACP), sued the state board, and the court faced the question “whether [the] due process [clause of the Fourteenth Amendment] requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct.” On appeal this question was answered in the affirmative, with the court establishing standards by which to measure the adequacy of a public institution’s expulsion procedures:

The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the board of education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college’s educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the board directly, the results and findings of the hearing should be presented in a report open to the student’s inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled [294 F.2d at 158–59].

Since the *Dixon* case, courts at all levels have continued to recognize and extend the due process safeguards available to students charged by college officials with misconduct. Such safeguards must now be provided for all students in publicly supported schools, not only before expulsion, as in *Dixon*, but before suspension and other serious disciplinary action as well (unless the student is a danger to the campus community and must be removed, in which case a postremoval hearing would be required). In 1975, the U.S. Supreme Court itself recognized the vitality and clear national applicability of such developments when it held that even a secondary school student faced with a suspension of less than ten days is entitled to “some kind of notice and . . . some kind of hearing” (*Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

Although the Court in *Goss* was not willing to afford students the right to a full-blown adversary hearing (involving cross-examination, written transcripts, and representation by counsel), it set out minimal requirements for compliance with the due process clause. The Court said:

We do not believe that school authorities must be totally free from notice and hearing requirements. . . . [T]he student [must] 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. The [Due Process] Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school [419 U.S. at 581].

In cases subsequent to *Goss*, most courts have applied these “minimal” procedural standards and, for the most part, have ruled in favor of the college.

Probably the case that has set forth due process requirements in greatest detail and, consequently, at the highest level of protection, is *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967) (see also later litigation in this case, discussed in Section 9.2.2 above). The plaintiffs had been suspended for two semesters for engaging in protest demonstrations. The lower court held that the students had not been accorded procedural due process and ordered the school to provide the following protections for them:

1. A written statement of the charges, for each student, made available at least ten days before the hearing;
2. A hearing before the person(s) having power to expel or suspend;
3. The opportunity for advance inspection of any affidavits or exhibits the college intends to submit at the hearing;
4. The right to bring counsel to the hearing to advise them (but not to question witnesses);
5. The opportunity to present their own version of the facts, by personal statements as well as affidavits and witnesses;
6. The right to hear evidence against them and question (personally, not through counsel) adverse witnesses;

7. A determination of the facts of each case by the hearing officer, solely on the basis of the evidence presented at the hearing;
8. A written statement of the hearing officer's findings of fact; and
9. The right, at their own expense, to make a record of the hearing.

The judicial imposition of specific due process requirements rankles many administrators. By and large, courts have been sufficiently sensitive to avoid such detail in favor of administrative flexibility (see, for example, *Moresco v. Clark*, 473 N.Y.S.2d 843 (N.Y. App. Div. 1984); *Henson v. Honor Committee of the University of Virginia*, 719 F.2d 69 (4th Cir. 1983), discussed in Section 9.4.2.2). Yet for the internal guidance of an administrator responsible for disciplinary procedures, the *Esteban* requirements provide a useful checklist. The listed items not only suggest the outer limits of what a court might require but also identify those procedures most often considered valuable for ascertaining facts where they are in dispute. Within this framework of concerns, the constitutional focus remains on the notice-and-opportunity-for-hearing concept of *Dixon*.

Although the federal courts have not required the type of protection provided at formal judicial hearings, deprivations of basic procedural rights can result in judicial rejection of an institution's disciplinary decision. In *Weidemann v. SUNY College at Cortland*, 592 N.Y.S.2d 99 (N.Y. App. Div. 1992), the court annulled the college's dismissal of a student who had been accused of cheating on an examination, and ordered a new hearing. Specifically, the court found these procedural defects:

1. Evidence was introduced at the hearing of which the student was unaware.
2. The student was not provided the five-day written notice required by the student handbook about evidence supporting the charges against him, and had no opportunity to defend against that evidence.
3. The hearing panel contacted a college witness after the hearing and obtained additional evidence without notifying the student.
4. The student was given insufficient notice of the date of the hearing and the appeal process.
5. The student was given insufficient notice (one day) of his right to appeal.
6. The student's attorney had advised college officials of these violations, but the letter had been ignored.

In addition to possible due process problems listed above, a long delay between the time a student is charged and the date of the hearing may disadvantage the student. Although a federal trial court rejected a student's claim that a nine-month delay in scheduling his disciplinary hearing was a denial of due process (*Cross v. Rector and Visitors of the University of Virginia*, 84 F. Supp.

2d 740 (W.D. Va. 2000), *affirmed without opinion*, 2000 U.S. App. LEXIS 22017 (August 28, 2000)), ensuring that hearings are held in a timely fashion should discourage such due process claims.

A case brought against Indiana University is illustrative of both notice and hearing aspects of the student disciplinary process. In *Reilly v. Daly*, 666 N.E.2d 439 (Ind. App. 1996), a student who was dismissed from the university for cheating claimed a variety of constitutional violations. Reilly, a student at Indiana University School of Medicine, was accused of cheating on a final examination by two professors who believed she had been copying from another student.

The professors compared the test papers of the two students. A statistician advised the professors that there was 1 chance in 200,000 that Reilly and the other student could have had the same incorrect answers on their multiple choice questions without cheating having occurred. The professors gave Reilly an F on the exam, sending her a letter that outlined the suspicious behavior and the statistical comparisons. Reilly sent a letter of protest to the professors, who reaffirmed their decision. Reilly was permitted to bring a lawyer with her to meet with the professors to rebut their charges. As a result of that meeting, the professors had a second statistical analysis run on the two test papers, which resulted in a lower, but still significantly high probability that the similarities were not a result of chance.

Because Reilly had received a grade of F in another course, also as the result of cheating on a final exam, she was informed that she was entitled to a hearing before the Student Promotions Committee prior to dismissal from medical school. She was permitted the assistance of her attorney and was allowed to present her version of the facts. The committee voted to recommend her dismissal. Reilly appealed the committee's decision, but it reaffirmed its recommendation. The dean then dismissed Reilly from medical school.

In court, Reilly alleged that the university denied her due process and equal protection. The alleged due process violations were her lack of opportunity to question the course professors at the hearing, the vagueness of a rule that forbids "the appearance of cheating," and the committee's failure to use the "clear and convincing" standard of proof. The court did not address whether the dismissal was on academic or disciplinary grounds because it found that the medical school had afforded her sufficient due process for either type of dismissal. Even had the dismissal been on disciplinary grounds, said the court, she had no right to formally cross-examine her accusers; she was fully aware of the evidence against her; and she had been given the opportunity to discuss it with the professors.

The court disposed of the vagueness claim by noting that Reilly had been dismissed because the committee had determined that she cheated, so the "appearance of cheating" rule was irrelevant to her dismissal. And the court stated that only "substantial evidence" was necessary to uphold the dismissal; the committee was not required to use the "clear and convincing" standard of proof.

Reilly also challenged her dismissal on equal protection grounds, asserting that students in other units of the university were given certain rights that she,

as a medical student, was not, including the right to cross-examine witnesses and the use of the clear and convincing evidence standard. The court noted that the equal protection clause does not require that all persons be treated identically, but only that an individual be treated the same as “similarly situated” persons. Reilly was treated the same as other medical students, said the court; she was not “similarly situated” to undergraduates or students in the law school. The court affirmed the trial court’s denial of the preliminary injunction sought by Reilly.

Because of the potential for constitutional or other claims, administrators should ensure that the staff who handle disciplinary charges against students, and the members of the hearing panels who determine whether the campus code of conduct have been violated, are trained in the workings of the disciplinary system and the protections that must be afforded students. Judicial review of the outcomes of disciplinary hearings is typically deferential *if* the institution has followed its own procedures carefully, and if those procedures comport with constitutional requirements.

**9.4.2.1. Notice.** Notice should be given of both the conduct with which the student is charged and the rule or policy that allegedly proscribes the conduct.<sup>25</sup> The charges need not be drawn with the specificity of a criminal indictment, but they should be “in sufficient detail to fairly enable . . . [the student] to present a defense” at the hearing (*Jenkins v. Louisiana State Board of Education*, 506 F.2d 992 (5th Cir. 1975)), holding notice in a suspension case to be adequate, particularly in light of information provided by the defendant subsequent to the original notice). Factual allegations not enumerated in the notice may be developed at the hearing if the student could reasonably have expected them to be included.

There is no clear constitutional requirement concerning how much advance notice the student must have of the charges. As little as two days before the hearing has been held adequate (*Jones v. Tennessee State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969); see also *Nash v. Auburn University*, 812 F.2d 655 (11th Cir. 1987)). *Esteban* required ten days, however, and in most other cases the time has been longer than two days. In general, courts handle this issue case by case, asking whether the amount of time was fair under all the circumstances. And, of course, if the college’s written procedures for student discipline provide for deadlines for notice to be given, or provide periods of time for the student to prepare for the hearing, those procedures should be followed in order to avoid potential breach of contract or constitutional claims.

**9.4.2.2. Hearing.** The minimum requirement is that the hearing provide students with an opportunity to speak in their own defense and explain their side of the story. Since due process apparently does not require an open or a public hearing, the institution has the discretion to close or partially close the hearing or to leave the choice to the accused student. But courts usually will accord students

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<sup>25</sup>Cases and authorities are collected at E. H. Schopler, Annot., “Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution,” 58 A.L.R.2d 903.



the right to hear the evidence against them and to present oral testimony or, at minimum, written statements from witnesses. Formal rules of evidence need not be followed. Cross-examination, the right to counsel, the right to a transcript, and an appellate procedure have generally not been constitutional essentials, but where institutions have voluntarily provided these procedures, courts have often cited them approvingly as enhancers of the hearing's fairness.

When the conduct with which the student is charged in the disciplinary proceeding is also the subject of a criminal court proceeding, the due process obligations of the institution will likely increase. Since the student then faces additional risks and strategic problems, some of the procedures usually left to the institution's discretion may become constitutional essentials. In *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978) (discussed in Section 9.1.4), for example, the court required that the institution allow the student to have a lawyer present to advise him during the disciplinary hearing.

The person(s) presiding over the disciplinary proceedings and the person(s) with authority to make the final decision must decide the case on the basis of the evidence presented and must, of course, weigh the evidence impartially. Generally the student must show malice, bias, or conflict of interest on the part of the hearing officer or panel member before a court will make a finding of partiality. In *Blanton v. State University of New York*, 489 F.2d 377 (2d Cir. 1973), the court held that—at least where students had a right of appeal—due process was not violated when a dean who had witnessed the incident at issue also sat on the hearing committee. And in *Jones v. Tennessee State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969), the court even permitted a member of the hearing committee to give evidence against the accused student, in the absence of proof of malice or personal interest. But other courts may be less hospitable to such practices, and it would be wise to avoid them whenever possible.

A federal appellate court considered the question of the neutrality of participants in the hearing and discipline process. In *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir. 1988), a student suspended for a number of disciplinary infractions charged that the university's disciplinary proceedings were defective in several respects. He asserted that two students on the student-faculty University Board on Student Conduct were biased against him because of earlier encounters; that he had been denied the assistance of counsel at the hearing; that he had been denied a transcript of the hearing; and that the director of student life had served as adviser to the board and also had prepared a record of the hearing, thereby compromising the board's independence.

Finding no evidence that Gorman was denied a fair hearing, the court commented:

[T]he courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process [837 F.2d at 16].

In some cases, the institution may determine that a student must be removed from campus immediately for his or her own safety or the safety of others. Even if the institution determines that a student is dangerous and that a summary suspension is needed, the student's due process rights must be addressed. While case law on these points has been sparse, the U.S. Supreme Court's 1975 ruling in *Goss v. Lopez* explains that:

[a]s a general rule notice and hearing should precede removal of the student from school. We agree . . . , however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school . . . [and notice and hearing] should follow as soon as practicable [419 U.S. at 583 (1975)].

In *Ashiegbu v. Williams*, 1997 U.S. App. LEXIS 32345 (6th Cir. 1997) (unpublished), a student from Ohio State University (OSU) alleged that he had been called to the office of the vice president for student affairs, handed a letter stating that he was being suspended "because of a continuing pattern of threats and disruptions to the OSU community," and ordered not to return to campus until he had obtained both a psychiatric evaluation and OSU's consent to his return. Ruling that the indefinite suspension was the equivalent of a permanent expulsion, the court stated that the vice president should have provided Ashiegbu with notice, an explanation of the evidence against him, and an opportunity to present his side of the story. The court also ruled that Ashiegbu had the right to a preexpulsion (but not necessarily a presuspension) hearing. Given these due process violations, the appellate court ruled that the trial court's dismissal of Ashiegbu's civil rights action was improper.

On the other hand, a federal trial court rejected a student's claim that his suspension prior to a hearing violated due process guarantees. In *Hill v. Board of Trustees of Michigan State University*, 182 F. Supp. 2d 621 (W.D. Mich. 2001), Hill, a Michigan State University student, was caught on videotape participating in a riot after a basketball game and vandalizing property. Because Hill was already on probation for recent violations of the alcohol policy, an administrator suspended Hill and offered him a hearing before a student-faculty hearing panel the following week. The court ruled that the administrator was justified in using his emergency power of suspension prior to a hearing because of Hill's violent conduct, and that the subsequent hearing held a week later, at which Hill was represented by counsel who participated in the questioning, was timely and impartial.

Some victims of alleged violence by fellow students, or other witnesses, may be reluctant to actually "face" the accused, and have requested that either they or the accused be allowed to sit behind screens in order not to be seen by the accused. In *Gomes v. University of Maine System*, 304 F. Supp. 2d 117 (D. Maine 2004), the university had suspended two students for allegedly committing a sexual assault. The students challenged their suspensions on both substantive and procedural due process grounds. Although the trial court awarded summary

judgment to the university on the students' substantive due process claims, finding that the university's decision was within the protections of the Fourteenth Amendment, it refused to side with the university on the students' procedural due process claims. The students and their attorneys had been required to sit behind screens so that neither the students nor their attorneys could see the accuser or the hearing panel. The court agreed with the students that such a walling off could have interfered with their counsels' ability to cross-examine witnesses, and ruled that the procedural due process claim would have to be tried.

(For analyses of student rights in disciplinary hearings, see J. M. Picozzi, "University Disciplinary Process: What's Fair, What's Due and What You Don't Get," 96 *Yale L.J.* 2132 (1987); and D. R. Richmond, "Students' Right to Counsel in University Disciplinary Proceedings," 15 *J. Coll. & Univ. Law* 289 (1989).)

When students are accused of academic misconduct, such as plagiarism or cheating, conduct issues become mixed with academic evaluation issues (compare the *Napolitano* case in Section 9.4.4). Courts typically require some due process protections for students suspended or dismissed for academic misconduct, but not elaborate ones. For example, in *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351 (6th Cir. 1988), the court found no constitutional deprivation in a law school's decision to suspend a student for one year after finding that he had plagiarized a course paper. The school had given the student an opportunity to respond to the charges against him, and the court also determined that the student had no property interest in his law degree because he had not completed the degree requirements.

But in *Jaksa v. Regents of the University of Michigan*, 597 F. Supp. 1245 (E.D. Mich. 1984), a trial court noted that a student challenging a one-semester suspension for cheating on a final examination had both a liberty interest and a property interest in continuing his education at the university. Applying the procedural requirements of *Goss v. Lopez*, the court ruled that the student had been given a meaningful opportunity to present his version of the situation to the hearing panel. It rejected the student's claims that due process was violated because he was not allowed to have a representative at the hearing, was not given a transcript, could not confront the student who charged him with cheating, and was not provided with a detailed statement of reasons by the hearing panel.

If an institution has developed due process procedures for investigating allegations of plagiarism or other forms of academic misconduct on the part of faculty, their use when graduate students are accused of academic misconduct should protect them from constitutional claims. In *Pugel v. Board of Trustees of the University of Illinois*, 378 F.3d 659 (7th Cir. 2004), the university initiated an investigation of data that a graduate student had submitted to a scholarly journal and had presented at a conference. The university used its standard investigative process, submitting the issue to an "Inquiry Team," which issued a report recommending that a full investigation be conducted. The investigation concluded that the graduate student had fabricated data in her article and presentation. The university had notified the student at the beginning of the

investigative process. After receiving the report of the Inquiry Team, an Investigation Panel was created that held hearings at which the student was permitted to testify and to present witnesses to testify on her behalf. Her doctor testified that she had attention deficit/hyperactivity disorder (ADHD) and thus was not guilty of academic misconduct. The Investigative Panel concluded that the student had committed academic misconduct. The next level of review was the chancellor, who concurred with the panel's conclusions and dismissed the student from the university. She appealed that decision to the president of the university, who denied her appeal on all grounds but one—the severity of the sanction. He referred that issue to the Senate Committee on Student Discipline, which met and determined that the sanction was warranted. The lawsuit followed. The trial court dismissed the student's constitutional claims, and the appellate court affirmed, stating that the student had been given ample notice, an opportunity to be heard and to clear her name, and three opportunities to appeal the outcome of the hearing.

Although the appellate court cited *Goss* as authority for somewhat less formal procedures than required by *Loudermill* (see Section 6.7.2.3), it noted that dismissal from graduate school was a more severe sanction than the discipline at issue in *Goss*, and thus required procedural protections more extensive than those outlined in *Goss*. Nevertheless, according to the court, the student received appropriate notice and a pretermination hearing, both of which fully complied with procedural due process requirements.

**9.4.3. Public institutions: Academic sanctions.** As noted above, the Fourteenth Amendment's due process clause also applies to students facing suspension or dismissal from publicly supported schools for deficient academic performance. But even though academic dismissals may be even more damaging to students than disciplinary dismissals, due process affords substantially less protection to students in the former situation. Courts grant less protection because they recognize that they are less competent to review academic evaluative judgments than factually based determinations of misconduct and that hearings and the attendant formalities of witnesses and evidence are less meaningful in reviewing grading than in determining misconduct.

*Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975), was apparently the first case to provide any procedural due process rights to a student facing an academic suspension or dismissal. The plaintiff was a forty-four-year-old high school graduate pursuing practical nurse training in a vocational-technical school. After completing more than two-thirds of the program, she was dismissed for deficient performance in clinical training. She had been on probation for two months owing to such deficiencies and had been informed that she would be dismissed if they were not corrected. When they were not, she was notified of dismissal in a conference with the superintendent and some of her instructors and was subsequently offered a second conference and an opportunity to question other staff and faculty members who had participated in the dismissal decision.

The trial and appellate courts upheld the dismissal, rejecting the student's contention that before dismissal she should have been confronted with and

allowed to challenge the evidence supporting the dismissal and permitted to present evidence in her defense. Although the appellate court recognized a “property interest” in continued attendance, it held that school officials had only minimal due process obligations in this context:

We hold that school authorities, in order to satisfy due process prior to termination or suspension of a student for deficiencies in meeting minimum academic performance, need only advise that student with respect to such deficiencies in any form. All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards [513 F.2d at 850–51].

More significant protection was afforded in *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), where another U.S. Court of Appeals invalidated a medical student’s dismissal because he had not been accorded procedural due process. The school had dismissed the student for “lack of intellectual ability or insufficient preparation” and had conveyed that information to the liaison committee of the Association of American Medical Colleges, where it was available to all other medical schools. The court ruled that:

the action by the school in denigrating Greenhill’s intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty, for it admittedly “imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other . . . opportunities” [*Board of Regents v. Roth*, 408 U.S. at 573, 92 S. Ct. at 2707].

The next year the same U.S. Court of Appeals extended its *Greenhill* ruling in another medical school case, *Horowitz v. Board of Curators of the University of Missouri*, 538 F.2d 1317 (8th Cir. 1976). But on appeal, the U.S. Supreme Court clipped this court’s wings and put an apparent halt to the development of procedural due process in academic disputes (*Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978)). The university had dismissed the student, who had received excellent grades on written exams, for deficiencies in clinical performance, peer and patient relations, and personal hygiene. After several faculty members repeatedly expressed dissatisfaction with her clinical work, the school’s council on evaluation recommended that Horowitz not be allowed to graduate on time and that, “absent radical improvement” in the remainder of the year, she be dropped from the program. She was then allowed to take a special set of oral and practical exams, administered by practicing physicians in the area, as a means of appealing the council’s determination. After receiving the results of these exams, the council reaffirmed its recommendation. At the end of the year, after receiving further clinical reports on Horowitz, the council recommended that she be dropped from school. The school’s coordinating committee, then the dean, and finally the provost for health sciences affirmed the decision.

Though there was no evidence that the reasons for the dismissal were conveyed to the liaison committee, as in *Greenhill*, the appellate court held that

“Horowitz’s dismissal from medical school will make it difficult or impossible for her to obtain employment in a medically related field or to enter another medical school.” The court concluded that dismissal would so stigmatize the student as to deprive her of liberty under the Fourteenth Amendment and that, under the circumstances, the university could not dismiss the student without providing “a hearing before the decision-making body or bodies, at which she shall have an opportunity to rebut the evidence being relied upon for her dismissal and accorded all other procedural due process rights.”

The Supreme Court found it unnecessary to decide whether Horowitz had been deprived of a liberty or property interest. Even assuming she had, Horowitz had no right to a hearing:

Respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed respondent of the faculty’s dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the due process clause of the Fourteenth Amendment. We agree with the district court that respondent was afforded full procedural due process by the [school]. In fact, the court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct [435 U.S. at 85].

The Court relied on the distinction between academic and disciplinary cases that lower courts had developed in cases prior to *Horowitz*, finding that distinction to be consistent with its own due process pronouncements, especially in *Goss v. Lopez* (Section 9.4.2):

The Court of Appeals apparently read *Goss* as requiring some type of formal hearing at which respondent could defend her academic ability and performance. . . .

A school is an academic institution, not a courtroom or administrative hearing room. In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact finding to call for a “hearing” before the relevant school authority. . . .

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. In *Goss*, the school’s decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances “provide a meaningful hedge against erroneous action.” The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was

making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making [435 U.S. at 85–90].

*Horowitz* signals the Court's lack of receptivity to procedural requirements for academic dismissals. Clearly, an adversary hearing is not required. Nor are all the procedures used by the university in *Horowitz* required, since the Court suggested that Horowitz received more due process than she was entitled to. But the Court's opinion does not say that no due process is required. Due process probably requires the institution to inform the student of the inadequacies in performance and their consequences on academic standing. Apparently, due process also generally requires that the institution's decision making be "careful and deliberate." For the former requirements, courts are likely to be lenient on how much information or explanation the student must be given and also on how far in advance of formal dismissal the student must be notified. For the latter requirement, courts are likely to be very flexible, not demanding any particular procedure but rather accepting any decision-making process that, overall, supports reasoned judgments concerning academic quality. Even these minimal requirements would be imposed on institutions only when their academic judgments infringe on a student's "liberty" or "property" interest.

Since courts attach markedly different due process requirements to academic sanctions than to disciplinary sanctions, it is crucial to be able to place particular cases in one category or the other. The characterization required is not always easy. The *Horowitz* case is a good example. The student's dismissal was not a typical case of inadequate scholarship, such as poor grades on written exams; rather, she was dismissed at least partly for inadequate peer and patient relations and personal hygiene. It is arguable that such a decision involves "fact finding," as in a disciplinary case, more than an "evaluative," "academic judgment." Indeed, the Court split on this issue: five Justices applied the "academic" label to the case, two Justices applied the "disciplinary" label or argued that no labeling was appropriate, and two Justices refused to determine either which label to apply or "whether such a distinction is relevant." (For an analysis of *Horowitz*, and a criticism of its deference to the university's academic judgment, see W. G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 *Iowa L. Rev.* 1 (1979).)

Two federal appellate courts weighed in on the "academic" side in cases involving mixed issues of misconduct and poor academic performance. In *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46 (3d Cir. 1986), the court ruled that the dismissal of a medical student who repeatedly failed to produce thesis data was on academic rather than disciplinary grounds. And in *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986), in reviewing a student's involuntary withdrawal for inadequate grades, the court held that a professor's letter to a student's file, charging the student with incompetent performance (including absence from

class) and unethical behavior in a course, concerned academic rather than disciplinary matters.

Although there is no bright line separating the type of “academic” conduct to which a deferential standard of review should be applied from academic misconduct (such as cheating) to which due process protections should be provided, the Supreme Court of Texas has provided some guidance. In *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995), a medical student, Than, was dismissed for allegedly cheating on an examination. The University of Texas (UT) Medical School provided Than with the opportunity to challenge his dismissal before a hearing board. Than’s hearing itself met due process requirements, but at the hearing’s end, the hearing officer and the medical school official, who presented the case against Than, inspected the room in which the test had been administered. Than was not allowed to accompany them; he asserted that this decision was a denial of due process. The court said:

UT argues that Than’s dismissal was not solely for disciplinary reasons, but was for academic reasons as well, thus requiring less stringent procedural due process than is required under *Goss* for disciplinary actions. . . . This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct. . . . Than’s dismissal for academic dishonesty unquestionably is a disciplinary action for misconduct [901 S.W.2d at 931].

The court ruled that the exclusion of Than from the posthearing inspection violated his procedural due process rights.

A federal district court rejected the contentions of a defendant college that it was not required to follow its disciplinary procedures in cases of expulsion for “academic misconduct.” In *Siblerud v. Colorado State Board of Agriculture*, 896 F. Supp. 1506 (D. Colo. 1995), Robert Siblerud, a former student who was trying to complete his dissertation, was dismissed from the Ph.D. program in physiology after he twice submitted manuscripts to journals that included a footnote in which he represented himself as a student. He was not given a hearing, but was permitted to appeal his dismissal by using the graduate school’s grievance process. Although the graduate school committee was divided, the provost affirmed the dismissal. Siblerud asserted that his dismissal was disciplinary, not academic, and the trial court agreed. Although the case was dismissed because the claim was time barred, the judge criticized the university’s handling of the situation and characterized it as a disciplinary action, rather than one sounding in academic judgment.

The boundary between academic and disciplinary dismissals, examined in *Siblerud* and *Than*, was also at issue in a 1999 U.S. Court of Appeals case. In *Wheeler v. Miller*, 168 F.3d 241 (5th Cir. 1999), the plaintiff had been dismissed from a doctoral program after receiving four grades of C and failing two sets of oral examinations. The program director gave the student two opportunities to remediate his academic deficiencies, but the student was unable to do so. The appellate court upheld the grant of summary judgment to the university, ruling that Wheeler’s due process claim was without merit because “the school’s



decision to terminate him from the doctoral program was careful and deliberate, following a protracted series of steps to rate [his] academic performance, identify and inform him of his weak performance, and . . . provide [him] with a specially tailored remedial plan” (168 F.3d at 248). These actions were not disciplinary, but designed to help him overcome his prior academic failure. To Wheeler’s claim that one professor gave him a C in a course because he fell asleep in class, turned in assignments late, and exhibited behavior that caused her to question his commitment to school psychology, the court responded that these issues were academic ones and were not conduct for which he was being disciplined.

In many cases an academic dismissal decision is based on both academic failure and problematic behavior, particularly for students in professional or clinical programs.<sup>26</sup> Observing that courts have struggled with the academic/disciplinary distinction and that students deserve to be given a reasonable opportunity to respond to charges whether the context be academic or disciplinary failure, one commentator suggests that a “consolidated” standard that is sensitive to the type of expertise required of the decision-maker be adopted by the courts (Fernand N. Dutile, “Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?” 29 *J. Coll. & Univ. Law* 619 (2003)).

When dismissal or other serious sanctions depend more on disputed factual issues concerning conduct than on expert evaluation of academic work, the student should be accorded procedural rights akin to those for disciplinary cases (Section 9.4.2), rather than the lesser rights for academic deficiency cases. Of course, even when the academic label is clearly appropriate, administrators may choose to provide more procedural safeguards than the Constitution requires. Indeed, there may be good reason to provide some form of hearing prior to academic dismissal whenever the student has some basis for claiming that the academic judgment was arbitrary, in bad faith, or discriminatory (see Section 9.3.1). The question for the administrator, therefore, is not merely what procedures are constitutionally required but also what procedures would make the best policy for the particular institution.

Overall, two trends are emerging from the reported decisions in the wake of *Horowitz*. First, litigation challenging academic dismissals has usually been decided in favor of the institutions. Second, courts have read *Horowitz* as a case whose message has meaning well beyond the context of constitutional due process and academic dismissal. Thus, *Horowitz* also supports the broader concept of “academic deference,” or judicial deference to the full range of an academic institution’s academic decisions. Both trends help insulate postsecondary institutions from judicial intrusion into their academic evaluations of students

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<sup>26</sup>See, for example, *Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003), in which a student was dismissed for failing a required test, for his “lack of professional demeanor with his colleagues,” and for being “a possible risk to patients in a clinical setting.” The court ruled that the dismissal was for academic reasons and that fully informing the student of the “faculty’s dissatisfaction with the student’s academic progress,” and a “careful and deliberate” decision process, were sufficient to meet due process requirements.

by members of the academic community. But just as surely, these trends emphasize the institution's own responsibilities to deal fairly with students and others and to provide appropriate internal means of accountability regarding institutional academic decision making.

**9.4.4. *Private institutions.*** Federal constitutional guarantees of due process do not bind private institutions unless their imposition of sanctions falls under the state action doctrine explained in Section 1.5.2. But the inapplicability of constitutional protections, as Sections 9.2 and 9.3 suggest, does not necessarily mean that the student stands procedurally naked before the authority of the school.

The old view of a private institution's authority is illustrated by *Anthony v. Syracuse University*, 231 N.Y.S. 435 (N.Y. App. Div. 1928), where a student's dismissal was upheld even though "no adequate reason [for it] was assigned by the university authorities." The court held that "no reason for dismissing need be given," though the institution "must . . . have a reason" that falls within its dismissal regulations. "Of course, the university authorities have wide discretion in determining what situation does and what does not fall within . . . [its regulations], and the courts would be slow indeed in disturbing any decision of the university authorities in this respect."

In more recent times, however, many courts have become faster on the draw with private schools. In *Carr v. St. John's University, New York* (see Section 9.2.3), a case limiting the impact of *Anthony* within New York State, the court indicated, although ruling for the university, that a private institution dismissing a student must act "not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion." In subsequently applying this standard to a discipline case, another New York court ruled that "the college or university's decision to discipline that student [must] be predicated on procedures which are fair and reasonable and which lend themselves to a reliable determination" (*Kwiatkowski v. Ithaca College*, 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975)).

A federal appellate court has made it clear that private colleges and universities are not held to the same constitutional standards as are public institutions, even if state law requires them to promulgate disciplinary rules. In *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988), students suspended by Hamilton College for occupying the college's administration building brought constitutional claims under a state action theory (see Section 1.5.2). Section 6450 of New York's Education Law required all institutions of higher education to adopt disciplinary rules, and to file them with the state, which the college had done. Although the college's rules and disciplinary procedures provided for a judiciary board that would review the charges and evidence and determine the sanctions to be levied, the procedures also reserved to the president the right to dispense with the written procedures. In dealing with the students, who continued to occupy the building even after the college had secured a court order enjoining the occupation, the president suspended them effective at the end of the semester, but invited them to state in writing their views on the situation to either the

trustees or himself. The students demanded a hearing before the judiciary board, which was not granted. The lawsuit ensued.

The *en banc* court provided a lengthy discussion of the state action doctrine. In this case, it noted, the state law required that the disciplinary rules be placed on file, but the state had made no attempt to evaluate the rules or to ensure that the colleges followed them. Given the lack of state action, the plaintiffs' constitutional claims were dismissed. The court remanded for further consideration the students' claim that the college's selective enforcement of its disciplinary regulations violated Section 1981's prohibitions against race discrimination (see Section 8.2.4.1).

As is true for public institutions, judges are more likely to require private institutions to provide procedural protections in the misconduct area than in the academic sphere. For example, in *Melvin v. Union College*, 600 N.Y.S.2d 141 (N.Y. App. Div. 1993), a breach of contract claim, a state appellate court enjoined the suspension of a student accused of cheating on an examination; the court took this action because the college had not followed all the elements of its written disciplinary procedure. But in *Ahlum v. Administrators of Tulane Educational Fund*, 617 So. 2d 96 (La. Ct. App. 1993), the appellate court of another state refused to enjoin Tulane University's suspension of a student found guilty of sexual assault. Noting that the proper standard of judicial review of a private college's disciplinary decisions was the "arbitrary and capricious" standard, the court upheld the procedures used and the sufficiency of the factual basis for the suspension. Since the court determined that Tulane's procedures exceeded even the due process protections required in *Goss v. Lopez*, it did not attempt to determine the boundaries of procedural protections appropriate for the disciplinary actions of private colleges and universities. A similar result was reached in *In re Rensselaer Society of Engineers v. Rensselaer Polytechnic Institute*, 689 N.Y.S.2d 292 (N.Y. App. Div. 1999), in which the court ruled that "judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious" (689 N.Y.S.2d at 295).

In an opinion extremely deferential to a private institution's disciplinary procedure, and allegedly selective administrative enforcement of the disciplinary code, a federal appellate court refused to rule that Dartmouth College's suspension of several white students violated federal nondiscrimination laws. In *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989), the students alleged that the college's decision to charge them with disciplinary code violations, and the dean's refusal to help them prepare for the hearing (which was promised in the student handbook), were based on their race. The court disagreed, stating that unfairness or inconsistency of administrative behavior did not equate to racial discrimination, and, since they could not demonstrate a causal link between their race and the administrators' conduct, the students' claims failed.

The emerging legal theory of choice for students challenging disciplinary or academic sanctions levied by private colleges is the contract theory. In

*Boehm v. University of Pennsylvania School of Veterinary Medicine*, 573 A.2d 575 (Pa. Super. Ct. 1990), the court, after reviewing case law, legal scholarship, and other sources, concluded that:

[a] majority of the courts have characterized the relationship between a private college and its students as contractual in nature. Therefore, students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides. . . . The general rule, therefore, has been that where a private university or college establishes procedures for the suspension or expulsion of its students, substantial compliance with those established procedures must be had before a student can be suspended or expelled [573 A.2d at 579].

In *Fellheimer v. Middlebury College*, 869 F. Supp. 238 (D. Vt. 1994), a student challenged his suspension for a violation of a “disrespect for persons” provision of the college’s code of student conduct. The student had been charged with raping a fellow student. The hearing board found him not guilty of that charge, but guilty of the disrespect charge, a charge of which he had never received notice. The college accepted the hearing board’s determination and suspended Fellheimer for a year, requiring him to receive counseling prior to applying for readmission. Fellheimer then filed a breach of contract claim (Section 8.1.3), based upon his theory that the student handbook, which included the code of conduct, was a contract. The court agreed, ruling that the college was contractually bound to provide whatever procedural safeguards the college had promised to students.<sup>27</sup>

Although the court rejected Fellheimer’s argument that the college had promised to provide procedural protections “equivalent to those required under the Federal and State constitutions,” the handbook’s language did promise “due process. . . . The procedures outlined [in the handbook] are designed, however, to assure fundamental fairness, and to protect students from arbitrary or capricious disciplinary action” (869 F. Supp. at 243–44). Fellheimer, thus, did not have constitutional due process rights, but he did have the contractual right to be notified of the charges against him. He had never been told that there were two charges against him, nor was he told what conduct would violate the “disrespect for persons” language of the handbook. Therefore, the court ruled, the hearing was “fundamentally unfair.” The court refused to award Fellheimer damages until the college decided whether it would provide him with another hearing that cured the violation of the first hearing. It also rejected his emotional distress claim, ruling that, with the exception of the notice violation, the college substantially complied with its own procedures and thus its conduct was neither extreme nor outrageous.

On the other hand, the Massachusetts Supreme Court, while assuming that the student handbook was a contract, rejected a student’s claim based on alleged

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<sup>27</sup>Cases and authorities are collected at Claudia G. Catalano, “Liability of Private School or Educational Institution for Breach of Contract Arising from Expulsion or Suspension of Student,”<sup>47</sup> A.L.R.5th 1.

violations of the handbook's provisions regarding student disciplinary hearings. In *Schaer v. Brandeis University*, 735 N.E.2d 373 (Mass. 2000), a student suspended after being found guilty of raping a fellow student challenged the discipline on the grounds that the institution's failure to follow its own policies and procedures was a breach of contract. The student had alleged that the university failed to investigate the rape charge, and that the disciplinary board did not make a record of the hearing, admitted irrelevant evidence and excluded relevant evidence, failed to apply the "clear and convincing evidence" standard set out in the student code, and failed to follow the institution's policies regarding instructing the hearing board on due process in a disciplinary hearing. Although the trial court had dismissed his complaint, the intermediate appellate court reversed and remanded, ruling that the college had made several procedural errors that had prejudiced Schaer and that could have constituted a breach of contract.

The college appealed, and the state's highest court, assuming without deciding that a contractual relationship existed between Schaer and Brandeis, ruled in a 3-to-2 opinion that Schaer had not stated a claim for which relief could be granted. The majority took particular exception to the intermediate appellate court's criticism of the conduct of the hearing and the admission of certain evidence, saying:

It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject. . . . A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts [735 N.E.2d at 380, 381].

Two of the five justices dissented vigorously, stating that "students should not be subject to disciplinary procedures that fail to comport with the rules promulgated by the school itself" (735 N.E.2d at 381), and that Schaer's allegations were sufficient to survive the motion to dismiss. The sharp differences of opinion in *Schaer* suggest that some courts will more closely scrutinize colleges' compliance with their own disciplinary rules and regulations.

Two trial court opinions on breach of contract claims by students challenging the outcomes of disciplinary hearings demonstrate the importance of careful drafting of procedural rules. In *Millien v. Colby College*, 2003 Maine Super. LEXIS 183 (Maine Super. Ct., Kennebec Co., August 15, 2003), the court rejected a student's breach of contract claim, in part because of a strong reservation of rights clause in the student handbook (see Section 8.1.3). The student complained that an additional appeal board not mentioned in the student handbook had reversed an earlier hearing panel decision in the student's favor. The court said that the handbook was not the only source of a potential contractual relationship between the college and the student, and ruled that the student was attempting to use a breach of contract claim to invite the court to review the merits of the appeal board's ruling, which the court refused to do.

But in *Ackerman v. President and Trustees of the College of Holy Cross*, 2003 Mass. Super. LEXIS 111 (Super. Ct. Mass. at Worcester, April 1, 2003), the court

ordered a student reinstated pending a hearing before the campus hearing board. Citing *Schaer*, the court closely read the words of the student handbook. Because the handbook provided that disciplinary charges against a student that could result in suspension would “normally” be heard by the hearing board, failure to provide the student a hearing under such circumstances could be a breach of contract.

Given the tendency of courts to find a contractual relationship between the college and the student with respect to serious discipline (suspension, expulsion), it is very important that administrators and counsel review student codes of conduct and published procedures for disciplinary hearings. Terms such as “due process,” “substantial evidence,” and “just cause” should not be used unless the private college intends to provide a hearing that will meet each of these standards. Protocols should be developed for staff who interview students charged with campus code violations, especially if the charges have the potential to support criminal violations. Members of campus hearing boards should be trained and provided with guidelines for the admission of evidence, for the evaluation of potentially biased testimony, for assigning the burden of proof between the parties (see Section 2.2.3.6), for determining the evidentiary standard that the board should follow in making its decision (see Section 2.2.3.5), and for determining what information should be in the record of the proceeding or in the board’s written ruling.

Even the most conscientious training of staff and hearing board members may not prevent alleged unfairness in the disciplinary process. The case of *Williams v. Lindenwood University*, 288 F.3d 349 (8th Cir. 2002), is instructive. Williams, an African American student, was expelled from the university for violating its alcohol policies and other school rules at a party. Three other students who had also violated the rules were expelled and then reinstated (two were white, one African American), but Williams was not reinstated because the dean determined that he had created a dangerous situation by “bringing criminals and gang members” to campus and because he had hosted the party. Williams brought race discrimination and breach of contract claims against the university. Although the trial court granted the university’s motion for summary judgment, the federal appellate court reversed, ruling that the student’s evidence that racially derogatory remarks by the dean of students (who recommended the expulsion), the university’s president, and the dean of admissions (who made the negative readmission decision) raised sufficient issues of material fact to permit a fact finder to conclude that racial discrimination was a motive for the university’s refusal to readmit the plaintiff.

In reviewing determinations of academic performance, rather than disciplinary misconduct, the courts have crafted lesser procedural requirements for private colleges. As is also true for public institutions, however, the line between academic and disciplinary cases may be difficult to draw. In *Napolitano v. Trustees of Princeton University*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982), the court reviewed the university’s withholding of a degree, for one year, from a student whom a campus committee had found guilty of plagiarizing a term paper. In upholding the university’s action, the court determined that the

problem was one “involving academic standards and not a case of violation of rules of conduct.” In so doing, the court distinguished “academic disciplinary actions” from disciplinary actions involving other types of “misconduct,” according greater deference to the institution’s decisions in the former context and suggesting that lesser “due process” protection was required. The resulting dichotomy differs from the “academic/disciplinary” dichotomy delineated in Section 9.4.3 and suggests the potential relevance of a third, middle category for “academic disciplinary” cases. Because such cases involve academic standards, courts should be sufficiently deferential to avoid interference with the institution’s expert judgments on such matters; however, because such cases may also involve disputed factual issues concerning student conduct, courts should afford greater due process rights than they would in academic cases involving only the evaluation of student performance.

The Supreme Court of Iowa addressed the question of whether a medical student’s dismissal for failure to successfully complete his clinical rotations was on academic or disciplinary grounds. In *Lekutis v. University of Osteopathic Medicine*, 524 N.W.2d 410 (Iowa 1994), the student had completed his coursework with the highest grades in his class and had scored in the 99th percentile in standardized tests. The student had serious psychological problems, however, and had been hospitalized several times while enrolled in medical school. During several clinical rotations, his instructors had found his behavior bizarre, inappropriate, and unprofessional, and gave him failing grades. He was eventually dismissed from medical school.

The court applied the *Ewing* standard, reviewing the evidence to determine whether the medical school faculty “substantially departed from accepted academic norms [or] demonstrated an absence of professional judgment” (524 N.W.2d at 413). Although some evaluations had been delayed, the court found that the staff did not treat the student in an unfair or biased way, and that there was considerable evidence of his inability to interact appropriately with patients and fellow medical staff.

While the doctrinal bases for procedural rights in the public and private sectors are different, and while the law accords private institutions greater deference, the cases discussed in this Section demonstrate that courts are struggling with the notion that students who attend private colleges are entitled to something less than the notice and opportunity to be heard that are central to the concept of due process that students at public colleges enjoy. Because many student affairs personnel view student conduct codes and the disciplinary process as part of the educational purpose of the institution (rather than as law enforcement or punishment for a “crime”), the language of the student handbook and other policy documents should reflect that purpose and make clear the rights of the accused student, the disciplinary board, and the institution itself.

## ***Sec. 9.5. Student Protests and Freedom of Speech***

***9.5.1. Student free speech in general.*** Student free speech issues arise in many contexts on the campus as well as in the local community. Issues

regarding protests and demonstrations were among the first to receive extensive treatment from the courts, and these cases served to develop many of the basic general principles concerning student free speech (see below). Issues regarding student protests and demonstrations also remain among the most difficult for administrators and counsel, both legally and strategically. Subsections 9.5.3 through 9.5.5 and 9.5.7 below therefore focus on these First Amendment issues and the case law in which they have been developed and resolved. Other important free speech developments, of more recent origin, concern matters such as student communication via posters and leaflets (discussed in subsection 9.5.6 below), hate speech (discussed in Section 9.6), student communication via campus computer networks (discussed in Section 8.5.1), students' freedom to refrain from supporting student organizations whose views they oppose (discussed in Sections 10.1.2 & 10.1.3), and student academic freedom (discussed in Section 8.1.4). The closely related topic of students' freedom of the press is discussed in Section 10.3.

Freedom of expression for students is protected mainly by the free speech and press provisions in the First Amendment of the U.S. Constitution, which applies only to "public" institutions (see *Coleman v. Gettysburg College*, 335 F. Supp. 2d 586 (M.D. Pa. 2004), and see generally Section 1.5.2 of this book). In some situations, student freedom of expression may also be protected by state constitutional provisions (see Section 1.4.2.1 and the *Schmid* case in Section 11.6.3) or by state statutes (see, for example, Cal. Educ. Code §§ 66301 & 76120 (public institutions) and § 94367 (private institutions)). As the California statutes and the *Schmid* case both illustrate, state statutes and constitutional provisions sometimes apply to private as well as public institutions. In 1998, Congress also attempted to extend First Amendment free speech protections to students in private institutions by adding a new provision to the Higher Education Act. This provision, which applies to all institutions receiving federal financial assistance, appears as Section 112, "Protection of Student Speech and Association Rights," of the Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1591 (October 7, 1998), codified at 20 U.S.C. § 1011a. The provision has had minimal impact, however, because it has no enforcement mechanism and, in effect, merely states the "sense of Congress" on this matter.

Student freedom of expression may also be protected by the institution's own bill of rights or other internal rules (see Section 1.4.2.3) in both public and private institutions. By this means, private institutions may consciously adopt First Amendment norms that have been developed in the courts and that bind public institutions, so that these norms sometimes become operative on private as well as public campuses. The following discussion focuses on these First Amendment norms and the case law in which they have been developed.

In a line of cases arising mainly from the campus unrest of the late 1960s and early 1970s, courts have affirmed that students have a right to protest and demonstrate peacefully—a right that public institutions may not infringe. This right stems from the free speech clause of the First Amendment as reinforced by that Amendment's protection of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The keystone



case is *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Several high school students had been suspended for wearing black armbands to school to protest the United States' Vietnam War policy. The U.S. Supreme Court ruled that the protest was a nondisruptive exercise of free speech and could not be punished by suspension from school. The Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students" and that students "are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State."

Though *Tinker* involved secondary school students, the Supreme Court soon applied its principles to postsecondary education in *Healy v. James*, 408 U.S. 169 (1972), discussed further in Section 9.1.1. The *Healy* opinion carefully notes the First Amendment's important place on campus:

State colleges and universities are not enclaves immune from the sweep of the First Amendment. . . . [T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom [408 U.S. at 180–81].

In the *Tinker* case (above), the Court also made clear that the First Amendment protects more than just words; it also protects certain "symbolic acts" that are performed "for the purpose of expressing certain views." The Court has elucidated this concept of "symbolic speech" or "expressive conduct" in a number of subsequent cases; see, for example, *Virginia v. Black*, 538 U.S. 343, 358 (2003) (cross burning is symbolic speech); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (burning the American flag is symbolic speech). Lower courts have applied this concept to higher education and students' rights. In *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*), for example, the dispute concerned two photographs that students had posted in a display case outside a departmental office (for further details, see Section 9.5.2 below). Citing *Tinker*, the court noted that the posting of the photographs was "expressive behavior" that "qualifies as constitutionally protected speech." According to the court:

Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way. *Spence v. Washington*, 418 U.S. 405, 411 (1969)]. [The two professors], through their photographs, were attempting, at least in part, to convey and advocate their scholarly and professorial interests in military history and in military weaponry's part in their vocation. [The two students], as well, were attempting to show their creativeness and interest in the scope of the

teaching mission of the history department. The display was [the students'] idea; they organized and exhibited it. Because these messages sufficiently satisfy the *Spence* test, the photographs and the display qualify as speech. *Id.* And, we do not understand that [the chancellor] disputes this conclusion [119 F. 3d at 674].

The free speech protections for students are at their peak when the speech takes place in a “public forum”—that is, an area of the campus that is, traditionally or by official policy, available to students, the entire campus community, or the general public for expressive activities. Since the early 1980s, the public forum concept has become increasingly important in student freedom of expression cases. The concept and its attendant “public forum doctrine” are discussed in Section 9.5.2 below.

Although *Tinker*, *Healy*, and *Widmar* apply the First Amendment to the campus just as fully as it applies to the general community, the cases also make clear that academic communities are “special environments,” and that “First Amendment rights . . . [must be] applied in light of the special characteristics of the school environment” (*Tinker* at 506). In this regard, “[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities” (*Widmar v. Vincent*, 454 U.S. 263, 268, n.5 (1981)). The interests that academic institutions may protect and promote, and the nature of threats to these interests, may thus differ from the interests that may exist for other types of entities and in other contexts. Therefore, although First Amendment principles do apply with full force to the campus, their application may be affected by the unique interests of academic communities.

Moreover, colleges and universities may assert and protect their interests in ways that create limits on student freedom of speech. The *Tinker* opinion recognizes “the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools” (at 507). That case also emphasizes that freedom to protest does not constitute freedom to disrupt: “[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech” (at 513). *Healy* makes the same points.

**9.5.2. The “public forum” concept.** As indicated in Section 9.5.1 above, student expressive activities undertaken in a “public forum” receive more protection under the First Amendment than expressive activities undertaken in or on other types of government property. The public forum concept is therefore a key consideration in many disputes about freedom of speech on campus as well as in the local community.

Public forum issues arise, or may arise, when government seeks to regulate “private speech” activities that take place on its own property.<sup>28</sup> The “public forum doctrine” provides help in resolving these types of issues. The general questions addressed by the public forum doctrine are (1) whether a government’s status as *owner*, *proprietor*, or *manager* of the property affords it additional legal rationales (beyond traditional rationales such as incitement, fighting words, obscenity, or defamation) for regulating speech that occurs on this property; and (2) whether the free speech rights of the speaker may vary depending on the *character* of the government property on which the speech occurs. In other words, can government regulate speech on its own property that it could not regulate elsewhere and, if so, does the constitutionality of such speech regulations depend on the character of the government property at issue? These questions are sometimes framed as *access* questions: To what extent do private individuals have a First Amendment *right of access* to government property for purposes of expressive activity?

Since the right of access is based in the First Amendment, and since the property involved must be government property, public forum issues generally arise only at public colleges and universities. Such issues could become pertinent to a private college or university, however, if its students were engaging, or planning to engage, in speech activities on public streets or sidewalks that cut through or are adjacent to the private institution’s campus; or if its students were using other government property in the vicinity of the campus for expressive purposes.

The basic question is whether the property is “forum” property; some, but not all, government property will fit this characterization. The U.S. Supreme Court’s cases reveal three categories of forum property: (1) the “traditional” public forum; (2) the “designated” public forum; and (3) the “nonpublic” forum.<sup>29</sup> Government property that does not fall into any of these three categories is considered to be “nonforum” property, that is, “not a forum at all” (*Arkansas Educational Television Comm’n. v. Forbes*, 523 U.S. 666, 678 (1998)). For such property, the government, in its capacity as owner, proprietor, or manager, may exclude all private speech activities from the property and preserve the property solely for its intended governmental purposes.

Courts have long considered public streets and parks, as well as sidewalks and town squares, to be traditional public forums. A traditional public forum is

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<sup>28</sup>“Private speech” is the speech of private individuals who are expressing their own ideas rather than those of the government. Private speech may be contrasted to “government speech,” by which government conveys its own message through its own officials or employees, or through private entities that government subsidizes for the purpose of promoting the governmental message. See *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995); and see generally William Kaplin, *American Constitutional Law* (Carolina Academic Press, 2004), Chap. 11, Sec. F. Student speech is typically considered to be private speech, as it was in the *Rosenberger* case.

<sup>29</sup>See generally *Perry Education Association v. Perry Local Educator’s Association*, 460 U.S. 37, 44–46 (1983); *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 800–802 (1985); *Arkansas Educational Television Comm’n. v. Forbes*, 523 U.S. 666, 677–78 (1998).

generally open to all persons to speak on any subjects of their choice. The government may impose restrictions regarding the “time, place, or manner” of the expressive activity in a public forum, so long as the restrictions are content neutral and otherwise meet the requirements for such regulations (see Section 9.5.3). But the government cannot exclude a speaker from the forum based on content or otherwise regulate the content of forum speech unless the exclusion or regulation “is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that interest” (*Arkansas Educational Television Comm’n.*, 523 U.S. at 677, quoting *Cornelius*, 473 U.S. at 800). (See generally Susan Williams, “Content Discrimination and the First Amendment,” 139 *U. Pa. L. Rev.* 615 (1991).) The traditional public forum category may also include a subcategory called “new forum” property or (ironically) “nontraditional forum” property that, according to some Justices, encompasses property that is the functional equivalent of, or a modern analogue to, traditional forum property.<sup>30</sup>

A designated public forum, in contrast to a traditional public forum, is government property that the government has, by its own intentional action, designated to serve the purposes of a public forum. Designated forum property may be land or buildings that provide physical space for speech activities, but it also may include different forms of property, such as bulletin boards, space in print publications, or (as in *Rosenberger*, above) even a student activities fund that a university uses to subsidize expressive activities of student groups. A designated forum may be just as open as a traditional forum, or access may be limited to certain classes of speakers (for example, students at a public university) or to certain classes of subject matter (for example, curriculum-related or course-related subjects). The latter type of designated forum is called a “limited public forum” or a “limited designated forum.” (See *Widmar v. Vincent*, 454 U.S. 263 (1981) (discussed in Section 10.1.5).) Thus, unlike traditional public forums, which must remain open to all, governments retain the choice of whether to open or close a designated forum as well as the choice of whether to limit the classes of speakers or classes of topics for the forum. However, for speakers who fall within the classes of speakers and topics for which the forum is designated, the constitutional rules are the same as for a traditional forum. Government may impose content-neutral time, place, and manner requirements on the speaker but may not regulate the content of the speech (beyond the original designation of permissible topics) unless it meets the compelling interest standard set out above. In addition, if government does limit the forum by designating permissible classes of speakers and topics, its distinction between the classes must be “reasonable in light of the purpose served by the forum” (*Cornelius*, 473 U.S. at 806) and must also be viewpoint neutral (*Rosenberger*, 515 U.S. at 829–30; see generally *Good News Club v. Milford Central School*, 533 U.S. 98, 106–7 (2001)). As the Court explained in *Rosenberger*: “In determining whether the . . . exclusion of a class of speech is legitimate, we have observed a distinction between . . . content discrimination, which may be permissible . . . and viewpoint discrimination,

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<sup>30</sup>See especially *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697–99 (1992) (Kennedy, J., concurring in the judgment).

which is presumed impermissible when directed against speech otherwise within the forum’s limitations” (515 U.S. at 829–30).

A nonpublic forum, in contrast to a traditional or designated forum, is open neither to persons in general nor to particular classes of speakers. It is open only on a selective basis for individual speakers. In other words, “the government allows selective access for individual speakers rather than general access for a class of speakers” (*Arkansas Educational Television Comm’n. v. Forbes*, 523 U.S. 666, 679 (1998)). Governments have more rationales for prohibiting or regulating speech activities in nonpublic forums, and governmental authority to exclude or regulate speakers is correspondingly greater, than is the case for traditional and designated forums. (See, for example, *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).) A reasonableness requirement and the viewpoint neutrality requirement, however, do limit government’s discretion in selecting individual speakers and regulating their speech in a nonpublic forum. The constitutional requirements for a nonpublic forum, therefore, are similar to the requirements that apply to the government’s designation of classes of speakers and topics for a limited designated forum. The nonpublic forum, however, is not subject to the additional strict requirements, noted above, that apply to a limited designated forum when government regulates the speech of persons who fall within classes designated for the forum.

When the public forum doctrine is applied to a public institution’s campus, its application will vary depending on the type of property at issue. The entire grounds of a campus would not be considered to be public forum property, nor would all of the buildings and facilities. (For analysis of this point, see *Roberts v. Haragan*, 346 F. Supp. 2d 853, 860–63 (N.D. Tex. 2004).) Even for a particular part of the grounds, or a particular building or facility, part of it may be a public forum while other parts are not. Thus, a public institution need not, and typically does not, open all of its grounds or facilities to expressive uses by students or others. In *State of Ohio v. Spingola*, 736 N.E.2d 48 (Ohio 1999), for example, the court considered Ohio University’s uses of its College Green—“an open, square-shaped area surrounded on three sides by academic buildings.” The court first held that “the green is not a traditional public forum” because “it does not possess the characteristics inherent in” such a forum, nor was there evidence that students or others had “traditionally used the green for public assembly and debate.” As to the remaining two options for characterizing the green, the court held that part of the green was in the designated forum category and part (the part called “The Monument”) was in the nonpublic forum category. The university “may designate portions of the green as a nontraditional public forum, but keep other areas of the green as nonpublic forums.” Since the university had done so, it could exclude demonstrators or other speakers from using the nonpublic forum parts of the green (specifically, the Monument) for their expressive activities.

Public forum property is not limited to grounds, as in *Spingola*, or to rooms in buildings, or comparable physical space. It may also be, for instance, a bulletin board (see Section 9.5.6 below), a table used for distribution of fliers, or a display case. In *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*), for

example, two students in the history department at the University of Minnesota at Duluth (UMD) had prepared a photographic display of the history faculty's professional interests. The display included a photograph of Burnham dressed in a coonskin cap and holding a .45-caliber military pistol, and a photograph of another professor wearing a cardboard laurel wreath and holding a Roman short sword. The display case was located in a public hallway outside the history department offices and classrooms. Asserting reasons relating to campus safety, the university's chancellor (Ianni) ordered the two photographs removed from the display case.

In the ensuing lawsuit, the two students, along with the two faculty members, claimed that the removal of the photographs violated their free speech rights. The chancellor argued that the display case was a "nonpublic forum" that the university could regulate subject only to a reasonableness test that the chancellor's actions had met. A seven-judge majority of the U.S. Court of Appeals, sitting *en banc*, rejected this argument; three judges dissented. According to the majority:

In this case the nature of the forum makes little difference. Even if the display case was a nonpublic forum, . . . [the] Supreme Court has declared that "the State may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry [*Education Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46]. . . . Here we find that the suppression was unreasonable both in light of the purpose served by the forum and because of its viewpoint-based discrimination.

The display case was designated for precisely the type of activity for which the [plaintiff students and professors] were using it. It was intended to inform students, faculty and community members of events in and interests of the history department. The University was not obligated to create the display case, nor did it have to open the case for use by history department faculty and students. However, once it chose to open the case, it was prevented from unreasonably distinguishing among the types of speech it would allow within the forum. Since the purpose of the case was the dissemination of information about the history department, the suppression of exactly that type of information was simply not reasonable.

We recognize that UMD "may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel [v. Center Moriches Union Free School District]*, 508 U.S. 384, at 390 (1993)]. However, as the Supreme Court has stated:

[A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Id.* at 394 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

The suppression of this particular speech was also viewpoint-based discrimination. As the Supreme Court has noted, in determining whether the government may legitimately exclude a class of speech to preserve the limits of a forum, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (citing *Perry*, 460 U.S. at 46). As *Rosenberger* illustrates, what occurred here was impermissible. The photographs of [the professors] expressed the plaintiffs' view that the study of history necessarily involves a study of military history, including the use of military weapons. Because other persons on the UMD campus objected to this viewpoint, or, at least, to allowing this viewpoint to be expressed in this particular way, [the chancellor] suppressed the speech to placate the complainants. To put it simply, the photographs were removed because a handful of individuals apparently objected to the plaintiffs' views on the possession and the use of military-type weapons and especially to their exhibition on campus even in an historical context. Freedom of expression, even in a nonpublic forum, may be regulated only for a constitutionally valid reason; there was no such reason in this case [119 F.3d at 676; compare 119 F.3d at 685 (McMillan, J., dissenting)].

The public forum concept is complex, and there is considerable debate among judges and commentators concerning its particular applications—including its applications to the campus. Characterizing the property at issue, and assigning it to its appropriate category, requires careful analysis of institutional policies and practices against the backdrop of the case law. Administrators should therefore work closely with counsel whenever public forum issues may become pertinent to decision making concerning student expression on campus. And counsel should be cautious in working with lower court opinions on the public forum doctrine, since it is not unusual for the U.S. Supreme Court precedents to be misconstrued or the analysis to be otherwise garbled in these opinions.

**9.5.3. Regulation of student protest.** It is clear, under the U.S. Supreme Court's decisions in *Tinker* and *Healy* (see Section 9.5.1 above), that postsecondary institutions may promulgate and enforce rules that prohibit disruptive group or individual protests. Lower courts have upheld disruption regulations that meet the *Tinker/Healy* guidelines. In *Khademi v. South Orange Community College District*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002), for example, the court cited *Tinker* in affirming the proposition that “the [college] has a compelling state interest in preventing ‘the commission of unlawful acts on community college premises’ and ‘the substantial disruption of the orderly operation of the community college’” (194 F. Supp. 2d at 1027, quoting Cal. Educ. Code § 76120). Students may be suspended if they violate such rules by actively participating in a disruptive demonstration—for example, entering the stands during a college football game and “by abusive and disorderly acts and conduct” depriving the spectators “of the right to see and enjoy the game in peace and

with safety to themselves” (*Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968), *affirmed*, 399 F.2d 638 (4th Cir. 1968)), or physically blocking entrances to campus buildings and preventing personnel or other students from using the buildings (*Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968)).<sup>31</sup>

The critical problem in prohibiting or punishing disruptive protest activity is determining when the activity has become sufficiently disruptive to lose its protection under *Tinker* and *Healy*. In *Shamloo v. Mississippi State Board of Trustees*, 620 F.2d 516 (5th Cir. 1980), for example, the plaintiffs, Iranian nationals who were students at Jackson State University, had participated in two on-campus demonstrations in support of the regime of Ayatollah Khomeini in Iran. The university disciplined the students for having violated campus regulations that required advance scheduling of demonstrations and other meetings or gatherings. When the students filed suit, claiming that the regulations and the disciplinary action violated their First Amendment rights, the defendant argued that the protests were sufficiently disruptive to lose any protection under the First Amendment. The appellate court asked whether the demonstration had “materially and substantially interfered with the requirements of appropriate discipline in the operation of the school”—the standard developed in an earlier Fifth Circuit case and adopted by the U.S. Supreme Court in *Tinker*. Applying this standard to the facts of the case, the court rejected the defendant’s claim:

There was no testimony by the students or teachers complaining that the demonstration was disrupting and distracting. Shamloo testified that he did not think any of the classes were disrupted. Dr. Johnson testified that the demonstration was quite noisy. Dr. Smith testified that he could hear the chanting from his office and that, in his opinion, classes were being disrupted. The only justification for his conclusion is that there are several buildings within a close proximity of the plaza that students may have been using for purposes of study or for classes. There is no evidence that he received complaints from the occupants of these buildings.

The district court concluded that “the demonstration had a disruptive effect with respect to other students’ rights.” But this is not enough to conclude that the demonstration was not protected by the First Amendment. The court must also conclude (1) that the disruption was a *material* disruption of classwork or (2) that it involved *substantial* disorder or invasion of the rights of others. It must constitute a *material* and *substantial* interference with discipline. The district court did not make such a conclusion and we certainly cannot, especially in light of the conflicting evidence found in the record. We cannot say that the demonstration did not constitute activity protected under the First Amendment [620 F.2d at 522].

As *Shamloo* suggests, and *Tinker* states expressly, administrators seeking to regulate protest activity on grounds of disruption must base their action

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<sup>31</sup>Cases are collected in Sheldon R. Shapiro, Annot., “Participation of Student in Demonstration on or Near Campus as Warranting Expulsion or Suspension from School or College,” 32 A.L.R.3d 864.



on something more substantial than mere suspicion or fear of possible disruption:

Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause disturbance. But our Constitution says we must take this risk (*Terminiello v. Chicago*, 337 U.S. 1 (1949)); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society [*Tinker*, 393 U.S. at 508–9].

Yet substantial disruption need not be a *fait accompli* before administrators can take action. It is sufficient that administrators have actual evidence on which they can “reasonably . . . forecast” that substantial disruption is imminent (*Tinker*, 393 U.S. at 514).

In addition to determining that the protest is or will become disruptive, it is also important to determine whether the disruption is or will be created by the protesters themselves or by onlookers who are reacting to the protesters' message or presence. “[T]he mere possibility of a violent reaction to . . . speech is . . . not a constitutional basis on which to restrict [the] right to speech. . . . The First Amendment knows no heckler's veto” (*Lewis v. Wilson*, 253 F.3d 1077, 1081–82 (8th Cir. 2001)). In *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), for example, the court struck down a regulation limiting off-campus speakers at Mississippi state colleges because it allowed for such a “heckler's veto.” The court emphasized that “one simply cannot be restrained from speaking, and his audience cannot be prevented from hearing him, unless the feared result is likely to be engendered by what the speaker himself says or does.” Thus, either the protesters themselves must engage in conduct that is disruptive, as in *Barker* and *Buttney* above, or their own words and acts must be “directed to inciting or producing imminent” disruption by others and “likely to produce” such disruption (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), before an administrator may stop the protest or discipline the protesters. Where the onlookers rather than the protesters create the disruption, the administrator's proper recourse is against the onlookers.

Besides adopting regulations prohibiting disruptive protest, public institutions may also promulgate “reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities” (*Healy*, 408 U.S. at 192–93). Students who violate such regulations may be disciplined even if their violation did not create substantial disruption. As applied to speech in a public forum, however, such regulations may cover only those times, places, or manners of expression that are “basically incompatible with the normal activity of a particular place at a particular time” (*Grayned v. Rockford*, 408 U.S. 104, 116 (1972)). Incompatibility must be determined by the

physical impact of the speech-related activity on its surroundings and not by the content or viewpoint of the speech as such.

The *Shamloo* case (above) also illustrates the requirement that time, place, and manner regulations be “content neutral.” The campus regulation at issue provided that “all events sponsored by student organizations, groups, or individual students must be registered with the director of student activities, who, in cooperation with the vice-president for student affairs, approves activities of a wholesome nature.” In validating this regulation, the court reasoned that:

regulations must be reasonable as limitations on the time, place, and manner of the protected speech and its dissemination (*Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 . . . (1973); *Healy v. James*, 408 U.S. 169 (1972)). Disciplinary action may not be based on the disapproved *content* of the protected speech (*Papish*, 410 U.S. at 670) . . .

The reasonableness of a similar university regulation was previously addressed by this court in *Bayless v. Martine*, 430 F.2d 872, 873 (5th Cir. 1970). In *Bayless* ten students sought injunctive relief from their suspension for violating a university regulation. The regulation in *Bayless* created a Student Expression Area that could be reserved forty-eight hours in advance for any nonviolent purpose. All demonstrations similar to the one held by the Iranian students were regulated to the extent that they could only be held at the Student Expression Area “between the hours of 12:00 noon to 1:00 P.M. and from 5:00 to 7:00 P.M.” but there was no limitation on the content of the speech. This court noted that the requirement of forty-eight hours advance notice was a reasonable method to avoid the problem of simultaneous and competing demonstrations and it also provided advance warning of the possible need for police protection. This court upheld the validity of the regulation as a valid exercise of the right to adopt and enforce reasonable nondiscriminatory regulations as to the time, place, and manner of a demonstration.

There is one critical distinction between the regulation examined in *Bayless* and the Jackson State regulation. The former made no reference to the *content* of the speech that would be allowed in the Student Expression Area. As long as there was no interference with the flow of traffic, no interruption of the orderly conduct of university affairs, and no obscene material, the students were not limited in what they could say. Apparently, the same cannot be said with respect to the Jackson State regulations, which provide that only “activities of a *wholesome* nature” will be approved. And if a demonstration is not approved, the students participating may be subjected to disciplinary action, including the possibility of dismissal.

Limiting approval of activities only to those of a “wholesome” nature is a regulation of *content* as opposed to a regulation of time, place, and manner. Dr. Johnson testified that he would disapprove a student activity if, in his opinion, the activity was unwholesome. The presence of this language converts what might have otherwise been a reasonable regulation of time, place, and manner into a restriction on the content of speech. Therefore, the regulation appears to be unreasonable on its face [620 F.2d at 522–23].

Since *Shamloo*, various U.S. Supreme Court cases have elucidated the First Amendment requirements applicable to time, place, and manner regulations of

speech in a public forum. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), are particularly important precedents. In *Clark*, the Court upheld National Park Service regulations limiting protests in the parks. The Court noted that these regulations were “manner” regulations and upheld them because they conformed to this three-part judicial test: (1) “they are justified without reference to the content of the regulated speech . . . , (2) they are narrowly tailored to serve a significant governmental interest, and . . . (3) they leave open ample alternative channels for communication of the information” (468 U.S. at 293, numbering added). In *Ward*, the Court upheld a New York City regulation applicable to a bandstand area in Central Park. The Court affirmed that the city had a substantial interest in regulating noise levels in the bandstand area to prevent annoyance to persons in adjacent areas. It then refined the first two parts of the *Clark* test:

[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation” (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

The overall effect of this *Ward* refinement is to create a more deferential standard, under which it is more likely that courts will uphold the constitutionality of time, place, and manner regulations of speech.

One particular type of time, place, and manner regulation that has been a focus of attention in recent years is the “free speech zone” or “student speech zone.” (See generally Thomas Davis, Note, “Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine,” 79 *Ind. L.J.* 267 (2004).) The 1970 case of *Bayless v. Martine*, discussed in the *Shamloo* case above, provides an early example. The court in *Bayless* upheld the creation of what Southwest Texas State University called a “Student Expression Area.” Another example of this regulatory technique is found in *Auburn Alliance for Peace and Justice v. Martin*, 684 F. Supp. 1072 (M.D. Alabama 1988), *affirmed without opinion*, 853 F.2d 931 (11th Cir. 1988) (see Section 9.5.4 below), in which Auburn University had created, and the court upheld, the campus “Open Air Forum.”

A more recent and more extended example is found in *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999), and *Khademi v. South Orange County Community College District*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002)—twin cases involving student challenges to the free speech zones on the same community college campus. Under the district’s free speech policies, three “preferred areas” were set aside for speech activities that involved twenty or more persons or would involve the use of amplification equipment. None of these three areas included the area in front of the student center, which was an “historically popular” place for speech activities and the “most strategic location on campus”

(74 F. Supp. 2d at 951). In *Burbridge*, the court issued a preliminary injunction against enforcement of the preferred areas regulations because they were content-based prior restraints that did not meet a standard of strict scrutiny and were also overbroad (74 F. Supp. 2d at 949–52). Subsequently, the community college district amended its regulations, and students again challenged them. In *Khademi*, the court held that the new preferred areas regulations violated the students’ free speech rights because they granted the college president “unlimited discretion” to determine what expressive activities would be permitted in the preferred areas (194 F. Supp. 2d at 1030).

Free speech zones sometimes have been implemented by requirements that students reserve the zone in advance, as in *Bayless*, *Auburn Alliance*, *Burbridge*, and *Khademi*; or that students obtain prior approval for any use outside the hours specified in the institutional policy, as in *Auburn Alliance*. Any such regulatory system would have to meet the prior approval requirements in Section 9.5.4 below. In addition, even if the institution does not employ any prior approval requirement, the free speech zone must meet the requirements of the U.S. Supreme Court’s public forum cases (Section 9.5.2 above), including the three-part test for time, place, and manner regulations established in *Clark v. Community for Creative Non-Violence* (above). Free speech zones will raise serious difficulties under these requirements in at least two circumstances. *First*, if the institution’s regulations allow free speech only in the approved zone or zones, and if other parts of the campus that are unavailable for certain speech activities are considered traditional public forums, serious issues will arise because traditional public forum property cannot be entirely closed off to expressive uses. *Second*, if some but not all of the other campus areas that are public forums (besides the free speech zone or zones) are left open for some or all expressive activity, other serious issues may arise under the *Clark/Ward* three-part test (above). Specifically, there could be problems concerning (1) whether the institution selected other areas to be open and closed, or limited the expressive activity in the other open areas, on a content-neutral basis; (2) whether the closings of certain forum areas (or the limitations imposed on certain areas) were narrowly tailored to serve substantial interests of the institution; and (3) whether the areas that remain open are sufficient to provide “ample alternative channels for communication.” In *Roberts v. Haragan*, 2004 WL 2203130 (N.D. Tex. 2004), pp. 11–12, for example, the court invalidated provisions of a Texas Tech interim policy regulating speech in campus areas outside of six “forum areas” designated by the policy because these provisions of the policy were not “narrowly tailored.” (See also *Mason v. Wolf*, 356 F. Supp. 2d 1147 (D. Colo. 2005).)

Postsecondary administrators who are drafting or implementing protest regulations must be attentive not only to the various judicial requirements just discussed but also to the doctrines of “overbreadth” and “vagueness” (also discussed in Sections 6.6.1, 9.1.3, 9.2.2, & 9.6). The overbreadth doctrine provides that regulations of speech must be “narrowly tailored” to avoid sweeping within their coverage speech activities that would be constitutionally protected under the First Amendment. The vagueness doctrine provides that regulations of

conduct must be sufficiently clear so that the persons to be regulated can understand what is required or prohibited and conform their conduct accordingly. Vagueness principles apply more stringently when the regulations deal with speech-related activity: “Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the dissemination of ideas may be the loser” (*Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 620 (1976), quoting *Smith v. California*, 361 U.S. 147, 151 (1959)). In the *Shamloo* case (above), the court utilized both doctrines in invalidating campus regulations prohibiting demonstrations that are not “of a wholesome nature.” Regarding the vagueness doctrine, the court reasoned that:

[t]he restriction on activities other than those of a “wholesome” nature raises the additional issue that the Jackson State regulation may be void for vagueness. . . . An individual is entitled to fair notice or a warning of what constitutes prohibited activity by specifically enumerating the elements of the offense (*Smith v. Goguen*, 415 U.S. 566 . . . (1974)). The regulation must not be designed so that different officials could attach different meaning to the words in an arbitrary and discriminatory manner (*Smith v. Goguen, supra*). But, of course, we cannot expect “mathematical certainty” from our language (*Grayned v. City of Rockford*, 408 U.S. 104 . . . (1972)). The approach adopted by this court with respect to university regulations is to examine whether the college students would have any “difficulty in understanding what conduct the regulations allow and what conduct they prohibit” [quoting *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1004 (5th Cir. 1975)].

The requirement that an activity be “wholesome” before it is subject to approval is unconstitutionally vague. The testimony revealed that the regulations are enforced or not enforced depending on the purpose of the gathering or demonstration. Dr. Johnson admitted that whether or not something was wholesome was subject to interpretation and that he, as the Vice-President of Student Affairs, and Dr. Jackson, Director of Student Activities, could come to different conclusions as to its meaning. . . . The regulation’s reference to wholesome activities is not specific enough to give fair notice and warning. A college student would have great difficulty determining whether or not his activities constitute prohibited unwholesome conduct. The regulation is void for vagueness [620 F.2d at 523–24].

The time, place, and manner tests and the overbreadth and vagueness doctrines, as well as principles concerning “symbolic” speech, all played an important role in another leading case, *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333 (W.D. Va. 1987), and 671 F. Supp. 1105 (W.D. Va. 1987), *affirmed*, 838 F.2d 735 (4th Cir. 1988). At issue in this case was a University of Virginia (UVA) regulation prohibiting student demonstrations against university policies on investment in South Africa. In the first phase of the litigation, students challenged the university’s policy prohibiting them from constructing shanties—flimsy structures used to protest apartheid conditions in South Africa—on the university’s historic central grounds, “the Lawn.” The federal district court held that the university’s policy created an unconstitutional restriction on

symbolic expression in a public forum. Specifically, the court declared that the “current lawn use regulations . . . are vague, are too broad to satisfy the University’s legitimate interest in esthetics, and fail to provide the plaintiffs with a meaningful alternative channel for expression.”

UVA subsequently revised its policy to tailor it narrowly to the achievement of the university’s goals of historic preservation and aesthetic integrity. The students again brought suit to enjoin the enforcement of the new policy on the same constitutional grounds they had asserted in the first suit. The case was heard by the same judge, who this time held in favor of the defendant university and upheld the revised policy. The court determined that the amended policy applied only to “structures,” as narrowly defined in the policy; that the policy restricted such structures from only a small section of the Lawn; and that the policy focused solely on concerns of architectural purity. Applying the *Clark* test, the court held that:

[UVA] may regulate the symbolic speech of its students to preserve and protect the Lawn area as an architectural landmark. To be constitutionally permissible, the regulation must be reasonable in time, place and manner. The revised Lawn Use Policy lies within the constitutional boundaries of the first amendment. The new policy is content-neutral, precisely aimed at protecting the University’s esthetic concern in architecture, and permits students a wide array of additional modes of communication. The new policy is also sufficiently detailed to inform students as to the types of expression restricted on the Lawn [671 F. Supp. at 1108].

On appeal by the students, the U.S. Court of Appeals for the Fourth Circuit agreed with the reasoning of the district court and affirmed its decision.

The *O’Neil* case, together with the *Shamloo*, *Burbridge*, and *Khademi* cases (above), serve to illuminate pitfalls that administrators will wish to avoid in devising and enforcing their own campus’s demonstration regulations. The *O’Neil* litigation also provides a good example of how to respond to and resolve problems concerning the validity of campus regulations.

**9.5.4. Prior approval of protest activities.** Sometimes institutions have attempted to avoid disruption and disorder on campus by requiring that protest activity be approved in advance and by approving only those activities that will not pose problems. Under this strategy, a protest would be halted, or its participants disciplined, not because the protest was in fact disruptive or violated reasonable time, place, and manner requirements but merely because it had not been approved in advance. Administrators at public institutions should be extremely leery of such a strategy. A prior approval system constitutes a “prior restraint” on free expression—that is, a temporary or permanent prohibition of expression imposed before the expression has occurred rather than a punishment imposed afterward. Prior restraints “are the most serious and the least tolerable infringement of First Amendment rights” (*Nebraska Press Ass’n. v. Stuart*, 427 U. S. 539, 559 (1976)).

*Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967), provides a classic example of prior restraint. The defendant college had a rule

providing that “the student body is not to celebrate, parade, or demonstrate on the campus at any time without the approval of the Office of the President.” Several students were expelled for violating this rule after they held a demonstration for which they had not obtained prior approval. The court found the rule to be “on its face a prior restraint on the right to freedom of speech and the right to assemble” and held the rule and the expulsions under it to be invalid.

*Khademi v. South Orange County Community College District*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002), provides a more recent example consistent with *Hammond*. The court in *Khademi* invalidated four provisions of the community college district’s regulations concerning student use of certain campus grounds and buildings for expressive purposes. Three of these provisions required students to obtain a reservation of the property in advance of any such use; and the other provision required an advance reservation for certain uses of amplification equipment. The decision of whether to grant a reservation was within the sole discretion of the college’s president. The court held that these provisions were prior restraints because:

they condition expression in certain areas of the District’s campuses upon approval of the administration. . . . The four sections identified here delegate completely unfettered discretion to the campus president to permit or prohibit expression. . . . Because these provisions provide the presidents with absolutely no standards to guide their decisions, they are unconstitutional and must be stricken [194 F. Supp. 2d at 1023].

The courts have not asserted, however, that all prior restraints on expression are invalid. In *Healy v. James* (Sections 9.5.1 & 10.1), the U.S. Supreme Court stated the general rule this way: “While a college has a legitimate interest in preventing disruption on campus, which under circumstances requiring the safeguarding of that interest may justify . . . [a prior] restraint, a ‘heavy burden’ rests on the college to demonstrate the appropriateness of that action” (408 U.S. at 184). More recently, the Court has made clear that prior restraints that are “content neutral”—based only on the time, place, and manner of the protest activity and not on the message it is to convey—are subject to a lesser burden of justification and will usually be upheld. The key case is *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), in which the Court upheld a requirement that groups of fifty or more persons, and persons using sound amplification equipment, must obtain a permit before using the public parks. This “licensing scheme . . . is not subject-matter censorship, but content-neutral time, place, and manner regulation . . . ,” said the Court. “The Park District’s ordinance does not authorize a licensor to pass judgment on the content of speech: None of the [thirteen] grounds for denying a permit has anything to do with what a speaker might say” (534 U.S. at 322). Although *Thomas* is not a higher education case, courts have applied the same principles to public colleges and universities. In *Auburn Alliance for Peace and Justice v. Martin*, 684 F. Supp. 1072 (M.D. Ala. 1988), *affirmed without opinion*, 853 F.2d 931 (11 Cir. 1988), for instance, the trial and appellate courts upheld the facial validity of Auburn’s regulations for

the “Open Air Forum,” an area of the campus designated as a public forum for demonstrations; and also held that the university’s denial of a student-faculty group’s request for weeklong, round-the-clock use of this forum was an appropriate means of implementing time, place, and manner requirements.

If a prior restraint system would permit the decision maker to consider the message to be conveyed during the protest activity, however, it will be considered to be “content based,” and the “heavy burden” requirement of *Healy* clearly applies. To be justifiable under *Healy* and more recent cases, such a prior consideration of content must apparently be limited to factors that would likely create a substantial disruption on campus. It is therefore questionable whether a content-based prior approval mechanism could be applied to small-scale protests that have no reasonable potential for disruption. Also in either case, prior approval regulations would have to contain a clear definition of the protest activity to which they apply, precise standards to limit the administrator’s discretion in making approval decisions, and procedures for ensuring an expeditious and fair decision-making process. Administrators must always assume the burden of proving that the protest activity would violate a reasonable time, place, or manner regulation or would cause substantial disruption.<sup>32</sup> Given these complexities, prior approval requirements may invite substantial legal challenges. Administrators should carefully consider whether and when the prior approval strategy is worth the risk. There are always alternatives: disciplining students who violate regulations prohibiting disruptive protest; disciplining students who violate time, place, or manner requirements; or using injunctive or criminal processes, as set out in Section 9.5.5 below.

**9.5.5. Court injunctions and criminal prosecutions.** When administrators are faced with a mass disruption that they cannot end by discussion, negotiation, or threat of disciplinary action, they may want to seek judicial assistance. A court injunction terminating the demonstration is one option. Arrest and criminal prosecution is the other.<sup>33</sup> Although both options involve critical tactical considerations and risks, commentators favor the injunction for most situations, primarily because it provides a more immediate judicial forum for resolving disputes and because it shifts the responsibility for using law enforcement officials from administrators to the court. Injunctions may also be used in some instances to enjoin future disruptive conduct, whereas criminal prosecutions are limited to punishing past conduct. The use of the injunctive process does not legally foreclose the possibility of later criminal prosecutions; and injunctive orders or criminal prosecutions do not legally prevent the institution

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<sup>32</sup>These prior restraint requirements have been established in bits and pieces in various court cases. *Healy* is a leading case on burdens of proof. *Kunz v. New York*, 340 U.S. 290 (1951), *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), are leading cases on standards to guide administrative discretion. *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), is a leading case on procedural requirements.

<sup>33</sup>Cases are collected in Sheldon R. Shapiro, Annot., “Participation of Student in Demonstration on or Near Campus as Warranting Imposition of Criminal Liability for Breach of Peace, Disorderly Conduct, Trespass, Unlawful Assembly, or Similar Offense,” 32 A.L.R.3d 551.



from initiating student disciplinary proceedings. Under U.S. Supreme Court precedents, none of these combinations would constitute double jeopardy. (For other problems regarding the relationship between criminal prosecutions and disciplinary proceedings, see Section 9.1.4.)

The legality of injunctions or criminal prosecutions depends on two factors. First, the conduct at issue must be unlawful under state law. To warrant an injunction, the conduct must be an imminent or continuing violation of property rights or personal rights protected by state statutory law or common law; to warrant a criminal conviction, the conduct must violate the state criminal code. Second, the conduct at issue must not constitute expression protected by the First Amendment. Both injunctive orders and criminal convictions are restraints on speech-related activity and would be tested by the principles discussed in Section 9.5.3 concerning the regulation of student protest. Since injunctions act to restrain future demonstrations, they may operate as prior restraints on expression and would also be subject to the First Amendment principles described in Section 9.5.4.

The U.S. Supreme Court has now provided substantial guidance on how to analyze the validity of court injunctions against protest activities. In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and its predecessor case *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the Court considered the validity of multifaceted injunctions limiting protest activity in the vicinity of abortion clinics. In each case, the Court acknowledged that the challenged injunctions were restraints on speech-related activity and thus subject to First Amendment analysis. Also in both cases, however, the Court acknowledged that the particular injunctions at issue were content-neutral rather than content-based injunctions and thus not subject to "strict scrutiny" review. Generally, content-neutral regulations of speech are subject to a less rigorous "time, place, and manner" scrutiny. But in *Madsen* the Court determined for the first time that its "standard time, place, and manner analysis is not sufficiently rigorous" for purposes of reviewing content-neutral injunctions. The Court thus established a new test to apply: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest" (*Madsen*, 512 U.S. at 765). The *Schenck* case reaffirms and applies this same test, using it (as the *Madsen* Court did) to invalidate some parts of the injunction at issue but uphold other parts.

The protest activities in *Schenck* included what the lower court called "constructive blockades" as well as "sidewalk counseling." The blockades, as described by the lower court, consisted of "demonstrating and picketing around the entrances of the clinics, and . . . harassing patients and staff entering and leaving the clinics" (519 U.S. at 365). Included in the blockades were "attempts to intimidate or impede cars from entering the parking lots, congregating in driveway entrances, and crowding around, yelling at, grabbing, pushing, and shoving people entering and leaving the clinics" (519 U.S. at 365). The sidewalk counseling was "aggressive" and included "occasional shoving and elbowing, trespassing into clinic buildings to continue counseling . . . and blocking of doorways and driveways" (519 U.S. at 365).

Two types of injunctive provisions were the particular focus of the Court in *Schenck*: the “fixed buffer zones” provisions and the “floating buffer zones” provisions. The fixed zones provisions banned the protesters from demonstrating within 15 feet of the driveways and doorways of the abortion clinics. The floating zones provisions banned the protesters from approaching within “a normal conversational distance” of individuals arriving at or departing from the clinics in order to leaflet or otherwise communicate messages to them. Using the new test from *Madsen*, the *Schenck* Court invalidated the floating buffer zones, even though they prohibited “classic forms of speech,” because “they burden more speech than is necessary to serve the relevant governmental interests” (519 U.S. at 377). Focusing on the dynamics of ingress to and egress from the clinics, the Court reasoned that, given the nature of the floating zones, “it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits” (519 U.S. at 378). For the same reasons, the *Schenck* Court also invalidated the injunction provisions creating floating buffer zones around vehicles entering and leaving the clinic facilities.

In contrast, the Court in *Schenck* upheld the fixed buffer zones provisions because:

these buffer zones are necessary to ensure that people or vehicles trying to enter or exit the clinic property or clinic parking lots can do so. . . . [T]he record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots [519 U.S. at 380].

Many of the dynamics of entry and exit described by the Court may be similar to those for entering and leaving campus buildings, roadways, parking areas, and other facilities. Much campus protest activity—or other expressive activity such as religious proselytizing—may also use tactics or have effects similar to those of the blockades and sidewalk counseling in *Schenck*. The *Schenck* and *Madsen* opinions, therefore, may often be the primary guidance for higher educational institutions considering injunctions as a means to manage campus protests and demonstrations.

When the assistance of the court is requested, public and private institutions are on the same footing. Since the court, rather than the institution, will ultimately impose the restraint, and since the court is clearly a public entity subject to the Constitution, both public and private institutions’ use of judicial assistance must comply with First Amendment requirements. Also, for both public and private institutions, judicial assistance depends on the same technical requirements regarding the availability and enforcement of injunctions and the procedural validity of arrests and prosecutions.

**9.5.6. Posters and leaflets.** Students routinely communicate by posters or fliers posted on campus and by leaflets or handbills distributed on campus. This means of communication is a classic exercise of free speech; “the distribution

of leaflets, one of the ‘historical weapons in the defense of liberty’ is at the core of the activity protected by the First Amendment” (*Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001), quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 162 (1939)).<sup>34</sup> The message need not be in the form of a protest, nor need it even express an opinion, to be protected. “[E]ven if [speech] is merely informative and does not actually convey a position on a subject matter,” First Amendment principles apply (*Giebel*, 244 F.3d at 1187). Among the most pertinent of these principles are those concerning “public forums” (see subsection 9.5.2 above). If posters appear on a bulletin board, wall, or other surface that is a public forum—usually meaning a *designated* public forum—these communications will receive strong First Amendment protection in public institutions. Similarly, if leaflets are distributed in an area that is a public forum, the communication will be strongly protected.

In *Khademi v. South Orange County Community College District*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002), for example, the court considered the constitutionality of Board Policy 8000 (“BP 8000”) under which the district regulated student expression on its two campuses. Some of the regulations included in BP 8000 applied specifically to the posting and distribution of written materials. BP 8000 was based upon, and served to implement, a California statute (Cal. Educ. Code § 76120, discussed in Section 9.5.1 above) that directed community college districts to implement regulations protecting student freedom of expression, including “the use of bulletin boards [and] the distribution of printed materials or petitions. . . .” Section 76120, however, also listed certain exceptions to First Amendment protection, such as expression that causes “substantial disruption of the orderly operation of the community college.” One part of BP 8000 gave the district the absolute right to review writings after they are posted to determine if they comply with Section 76120. This part of BP 8000 also authorized the district to remove any writing that violates Section 76120 and to order persons to stop distributing any material found to violate Section 76120. The court in *Khademi* found that these parts of BP 8000 were “content-based” restrictions on student speech in the public forum and thus would be permissible only if they “are necessary to further a compelling interest . . . and are narrowly drawn to achieve that end” (194 F. Supp. at 1026, quoting *Burbridge v. Sampson*, 74 F. Supp. 2d 940, 950 (C.D. Cal. 1999)). Applying this strict scrutiny standard, the court determined that the district had not demonstrated “a compelling interest justifying the examination of the content of student expression to root out all speech prohibited by § 76120,” and that “the blanket enforcement of § 76120 is not narrowly tailored to those interests that the court finds compelling” (194 F. Supp. 2d at 1027, citing the *Tinker* case). The court therefore ruled that the regulations on student writings violated the First Amendment.

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<sup>34</sup>*Schneider* is one of the foundational cases on the free speech clause and leafleting, and is usually paired with another leafleting case decided one year earlier: *Lovell v. Griffin*, 303 U.S. 444 (1938). Other key U.S. Supreme Court cases on leafleting are *Talley v. California*, 362 U.S. 60 (1960), discussed below; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); and *Lee v. International Society for Krishna Consciousness*, 505 U.S. 830 (1992).

If the place of posting or distribution is a “nonpublic forum” rather than a public forum, the communication may be protected to a lesser degree—but it will usually be very difficult for students to prevail in such cases. In *Desyllas v. Bernstine*, 351 F.3d 934 (9th Cir. 2003), for example, a student at Portland State University (PSU) challenged the university’s alleged removal of his fliers announcing a press conference. The court determined that the campus areas that were approved for posting under the university’s “Bulletin Board Posting Policy” are designated public forums; and that campus areas not approved for posting “are not designated public fora because the university did not intend to open them for expression, as manifested by the university’s . . . Policy.” The student’s fliers were posted in unapproved areas, which the court considered to be nonpublic forums. The university could therefore remove them if the action “is reasonable,” that is, “consistent with preserving the property” for its intended purposes, and is “not based on the speaker’s viewpoint.”<sup>35</sup> The university’s action met the second requirement because there was no proof that the defendants had selectively removed the student’s fliers “while allowing others to remain” or that the university’s action “was motivated by a desire to stifle [the student’s] particular perspective or opinion.” The second requirement was met because:

[t]he hallways, doorways and columns of the PSU campus are designated off-limits to fliers primarily for aesthetic reasons. The university’s policy states that handbills shall not be posted in those areas because doing so causes damage. Widner’s removal of Desyllas’s press conference fliers, along with other fliers posted on the columns near Smith Center, is consistent with the university’s purpose to preserve the appearance of campus structures [351 F.3d at 944].

Even if the place of posting or distribution is a public forum (traditional or designated), there is still some room for public colleges and universities to regulate these activities and to remove nonconforming posters and terminate nonconforming leafleting. To be valid, such regulations and enforcement actions must be not only “viewpoint neutral” (see *Desyllas*, above; and see also *Giebel v. Sylvester*, above, 244 F.3d at 1188–89) but also “content neutral,” meaning that they must be based only on the “time, place, and manner” of the posting or distribution and not on the subject matter or information expressed. The three-part test that the U.S. Supreme Court has crafted for time, place, and manner regulations of speech is discussed in Section 9.5.3 above with reference to *Clark v. Community for Creative Non-Violence* and *Ward v. Rock Against Racism*. Permissible types of time, place, and manner regulations may include prior institutional approvals for postings and leafleting on campus, so long as the approval process “does not authorize [the decision maker] to pass judgment on the content of the speech” (*Thomas v. Chicago Park District*, 534 U.S. 316 (2002)) and otherwise meets the three-part test.

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<sup>35</sup>The court was quoting from its own prior opinion in *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 965, 967 (9th Cir. 1999). The court also relied on *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), which is discussed in Sections 10.1.4 and 10.3.2 of this book.

In addition to such content-neutral regulations, the institution may also, in narrow circumstances, regulate the content of posters and handbills in a public forum. The two most likely possibilities are regulations concerning obscenity and defamation (see generally Sections 10.3.4 & 10.3.5). These types of regulations, called “content-based” regulations, must be very clear and specific, such that they meet constitutional requirements regarding “overbreadth” and “vagueness,” as discussed in Section 9.5.3 above. Such regulations must also usually be implemented without using a prior approval process, since a prior approval process that takes the content of the speech into account will often be considered to be an unconstitutional prior restraint (see Section 9.5.4 above).

One problematic type of poster and handbill regulation is a requirement that posters and handbills identify the student or student organization that sponsors, or that distributed, the message. From one perspective, if such a requirement is applied across the board to all postings and distributions, the requirement is a content-neutral requirement that will be upheld if it meets the three-part test. From another perspective, however, such a requirement could “chill” the expression of controversial viewpoints, and to that extent could be considered to be a “content-based” regulation. The U.S. Supreme Court took the latter approach in the classic case of *Talley v. California*, 362 U.S. 60 (1960), in which it invalidated a city ordinance requiring that all handbills include the name and address of the speaker. The Court reasoned that such an identification requirement could lead to “fear of reprisal” that would “deter perfectly peaceful discussions of public matters of importance.” The Court thus, in effect, recognized a right to anonymous speech. At the same time, however, the Court left some room carefully drafted identification requirements that can be shown to be necessary to the prevention of fraud, libel, or other similar harms. In *Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 502 F. Supp. 789 (N.D. Ill. 1980), the court relied on *Talley* in upholding some of the institution’s identification requirements for handbills and postings while invalidating others (502 F. Supp. at 803–4).

**9.5.7. Protests in the classroom.** Student protest occasionally occurs in the classroom during class time. In such circumstances, general First Amendment principles will continue to apply. But the institution’s interests in maintaining order and decorum are likely to be stronger than when the protest occurs in other areas of the campus, and student free speech interests are likely to be lessened because the classroom during class time is usually not considered a “public forum” (see *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991); and see generally Section 9.5.2 above). If the speech is by class members and is pertinent to the class discussion and subject matter of the course, it would usually be protected if it is not expressed in a disruptive manner. Moreover, if the classroom protest is by students enrolled in the course, and is silent, passive, and nondisruptive—like the black armband protest in *Tinker v. Des Moines School District* (Section 9.5.1 above)—it will usually be protected by the First Amendment even if it is not pertinent to the class. Otherwise, however, courts will not usually protect classroom protest.

In *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998), for instance, the court rejected the free speech claim of a first-year dental student, a native of Iran with American citizenship who was studying dentistry as a second career. The student disagreed with a “last row rule” imposed by two professors who prohibited first-year students from occupying the last row of seats in their classrooms. The student addressed his concerns about this rule to the professors and to the associate dean; he also protested the rule, on several occasions, by sitting in the last row in the professors’ classes and remaining there after being asked to change seats. Ultimately the school took disciplinary action against the student, and he filed suit claiming that the school had retaliated against him for exercising his free speech rights. The court rejected this claim because:

[the student’s] expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process. . . . The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching. Under the facts of this case, the balance clearly weighs in favor of the University [159 F.3d at 208].

The court relied on the *Tinker* case to support its reasoning, especially the passage in the opinion about “conduct by the student, in class or out of it, which . . . materially disrupts classwork . . .” (see Section 9.5.1 above).

As for students who are not class members, their rights to protest inside a classroom, or immediately outside, during class time are no greater than, and will often be less than, the rights of class members. Students who are not enrolled in the course would not likely have any right to be present in the classroom. Moreover, the presence of uninvited non-class members in the classroom during class time would be likely to create “a material disruption” of the class within the meaning of the *Tinker* case. And protest activity outside the classroom would often create noise that is projected into the classroom or would block ingress and egress to the classroom, thereby also creating a “material disruption” within the meaning of *Tinker*. In *Furumoto v. Lyman*, 362 F. Supp. 1267 (N.D. Cal. 1973), an example drawn from the civil rights era, students who were not class members had entered the classroom of Professor William Shockley at Stanford University. The uninvited students challenged the professor’s views on eugenics, which the students claimed were racist views; the students did not leave the classroom when asked to do so; and the scheduled business for the class was not completed. After campus hearings, the students were indefinitely suspended. Citing the *Tinker* case, the court rejected the students’ argument that the suspension violated their First Amendment free speech rights. The court also upheld the validity of the Stanford campus disruption policy (362 F. Supp. at 1280–84), which provided that “[i]t is a violation of University policy for a member of the . . . student body to (1) prevent

or disrupt the effective carrying out of a University function . . . , such as lectures [or] meetings. . . .”<sup>36</sup>

(For further discussion of students’ free speech rights in the classroom, see Section 8.1.4 of this book (“Student Academic Freedom”).)

## ***Sec. 9.6. Speech Codes and the Problem of Hate Speech***<sup>37</sup>

**9.6.1. Hate speech and the campus.** Since the late 1980s, colleges and universities have frequently confronted the legal, policy, and political aspects of “hate speech” and its potential impacts on equal educational opportunity for targeted groups and individuals. Responding to racist, anti-Semitic, homophobic, and sexist incidents on campus, as well as to developments in the courts, institutions have enacted, revised, and sometimes revoked policies for dealing with these problems. (For state-by-state and institution-by institution summaries of such policies, see <http://www.speechcodes.org>, a Web site maintained by the Foundation for Individual Rights in Education (FIRE); and for analysis of particular institutional policies on harassing and abusive behavior directed against minority group members, see Richard Page & Kay Hunnicutt, “Freedom for the Thought We Hate: A Policy Analysis of Student Speech Regulation at America’s Twenty Largest Public Universities,” 21 *J. Coll. & Univ. Law* 1, 38–56 (1994).) Typically, institutional policies have been directed at harassment, intimidation, or other abusive behavior targeting minority groups. When such harassment, intimidation, or abuse has been conveyed by the spoken, written, or digitalized word, or by symbolic conduct, difficult legal and policy issues have arisen concerning students’ free speech and press rights.

Beginning in the mid-1990s, after the courts had decided a number of cases limiting postsecondary institutions’ authority to regulate hate speech (see subsection 9.6.2 below), and institutions had responded by developing more nuanced policies for dealing with hate speech, there was a period of relative quiet regarding these issues. In the aftermath of the terrorist attacks of September 11, 2001, however, and in light of continuing terrorist threats against the United States, the war in Iraq, and continuing violence associated with the Israeli/Palestinian conflict, the debate and controversy about hate speech and campus speech codes reemerged. (See, for example, Katherine Mangan, “Proposal for Speech Code at Harvard Law School Sets Off Debate,” *Chron. Higher*

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<sup>36</sup>In an earlier part of its opinion, the court had concluded that, Stanford being a private university, its action did not constitute “state action” for purposes of applying the First Amendment (see Section 1.5.2). The court’s First Amendment analysis, therefore, was an alternative analysis showing that the plaintiffs would lose “[e]ven if state action were present in this case” (362 F. Supp. at 1280).

<sup>37</sup>Some portions of this Section were extracted and adapted (without further attribution) from William Kaplin, “A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech,” 63 *J. Higher Educ.* 517 (1992), copyright © 1992 by the Ohio State University Press; and from William Kaplin, “Hate Speech on the College Campus: Freedom of Speech and Equality at the Crossroads,” 27 *Land & Water L. Rev.* 243 (1992), copyright © 1992 by the University of Wyoming. All rights reserved.

*Educ.*, December 6, 2002, A37; Judith Rodin, “We Must Defeat Hate, Not Simply Ban It,” *Chron. Higher Educ.*, November 1, 2002, A14.) Renewed concerns over “political correctness” on campus, and a push for an “Academic Bill of Rights” (see Section 8.1.4 of this book) also provided stimulus for the renewed debate about speech codes.<sup>38</sup>

“Hate speech” is an imprecise catch-all term that generally includes verbal and written words and symbolic acts that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability. Hate speech is thus highly derogatory and degrading, and the language is typically coarse. The purpose of the speech is more to humiliate or wound than it is to communicate ideas or information. Common vehicles for such speech include epithets, slurs, insults, taunts, and threats. Because the viewpoints underlying hate speech may be considered “politically incorrect,” the debate over hate speech codes has sometimes become intertwined with the political correctness phenomenon on American campuses (see, for example, the *Levin* case in Section 7.3).

Hate speech is not limited to a face-to-face confrontation or shouts from a crowd. It takes many forms. It may appear on T-shirts, posters, classroom blackboards, bulletin boards (physical or virtual) or Web logs, or in flyers and leaflets, phone calls, letters, or e-mail messages. It may be a cartoon appearing in a student publication or a joke told on a campus radio station or at an after-dinner speech, a skit at a student event, an anonymous note slipped under a dormitory door, graffiti scribbled on a wall or sidewalk, or a posting in an electronic chat room. It may be conveyed through defacement of posters or displays; through symbols such as burning crosses, swastikas, KKK insignia, and Confederate flags; and even through themes for social functions, such as blackface Harlem parties or parties celebrating white history week.

When hate speech is directed at particular individuals, it may cause real psychic harm to those individuals and may also inflict pain on the broader class of persons who belong to the group denigrated by the hate speech. Moreover, the feelings of vulnerability, insecurity, and alienation that repeated incidents of hate speech can engender in the victimized groups may prevent them from taking full advantage of the educational, employment, and social opportunities on the campus and may undermine the conditions necessary for constructive dialogue with other persons or groups. Ultimately, hate speech may degrade the intellectual environment of the campus, thus harming the entire academic community.

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<sup>38</sup>Similar issues may arise concerning the hate speech of faculty members and staff members. See, for example, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Barrett v. University of Colorado Health Sciences Center*, 61 Fair Empl. Prac. Cases 369 (Colo. 1993). Institutions will generally have more constitutional leeway to regulate faculty and staff hate speech than they do for student hate speech; see the *Pickering/Connick* line of cases in Section 7.1.1 of this book, and see also *Martin v. Parrish* and *Bonnell v. Lorenzo* in Section 7.2.2 and *Jeffries v. Harleston* in Section 7.5. In the faculty cases, students may be targets of the alleged hate speech. Their rights as victims, rather than as speakers, would then be at stake. See Sections 7.2.2, 8.1.4, and 9.3.4 for perspectives on students’ rights as the victims of hate speech and harassing speech.



Since hate speech regulations may prohibit and punish particular types of messages, they may raise pressing free expression issues not only for public institutions (see Section 1.5.2) but also for private institutions that are subject to state constitutional provisions or statutes employing First Amendment norms (see Section 9.5.1 above) or that voluntarily adhere to First Amendment norms. The free expression values that First Amendment norms protect may be in tension with the equality values that institutions seek to protect by prohibiting hate speech. The courts have decided a number of important cases implicating these values since 1989, as discussed in the next subsection.

**9.6.2. The case law on hate speech and speech codes.** Some of the hate speech cases have involved college or university speech codes; others have involved city ordinances or state statutes that covered hate speech activities or that enhanced the penalties for conduct undertaken with racist or other biased motivations. All of the college and university cases except one are against public institutions; the exception—the *Corry* case discussed below—provides an instructive illustration of how hate speech issues can arise in private institutions.

The U.S. Supreme Court’s 1992 decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), addresses the validity of a city ordinance directed at hate crimes. This ordinance made it a misdemeanor to place on public or private property any symbol or graffiti that one reasonably knew would “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *R.A.V.*, a juvenile who had set up and burned a cross in the yard of a black family, challenged the ordinance as overbroad (see Section 9.5.3 of this book). The lower courts upheld the validity of the statute by narrowly construing it to apply only to expression that would be considered fighting words or incitement. The U.S. Supreme Court disagreed and invalidated the ordinance, but the majority opinion by Justice Scalia did not use overbreadth analysis. Instead, it focused on the viewpoint discrimination evident in the ordinance and invalidated the ordinance because its restriction on speech content was too narrow rather than too broad:

Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects [505 U.S. at 391].

The Court did note several narrow exceptions to this requirement of viewpoint neutrality but found that the St. Paul ordinance did not fall into any of these narrow exceptions (505 U.S. at 386–90). The Court also determined that the city could not justify its narrow viewpoint-based ordinance. The city did have a compelling interest in promoting the rights of those who have traditionally been subject to discrimination. But because a broader ordinance without the viewpoint-based restriction would equally serve this interest, the law was not “reasonably necessary” to the advancement of the interest and was thus invalid.

The Supreme Court revisited the hate speech problem again in *Wisconsin v. Mitchell*, 508 U.S. at 476 (1993). At issue was the constitutionality of a state law that enhanced the punishment for commission of a crime when the victim was intentionally selected because of his “race, religion, color, disability, sexual orientation, national origin or ancestry” (Wis. Stat. § 939.645(1)(b)). The state had applied the statute to a defendant who, with several other black males, had seen and discussed a movie that featured a racially motivated beating and thereupon had brutally assaulted a white male. Before the attack, the defendant had said, among other things, “There goes a white boy; go get him.” A jury convicted the defendant of aggravated battery, and the court enhanced his sentence because his actions were racially motivated.

The Court unanimously upheld the statute because it focused on the defendant’s motive, traditionally a major consideration in sentencing. Unlike the *R.A.V.* case, the actual crime was not the speech or thought itself, but the assault—“conduct unprotected by the First Amendment.” Moreover, the statute did not permit enhancement of penalties because of “mere disagreement with offenders’ beliefs or biases” but rather because “bias-inspired conduct . . . is thought to inflict greater individual and societal harm.” The Court did caution, moreover, “that a defendant’s abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.” Thus, in order for a penalty-enhancing statute to be constitutionally applied, the prosecution must show more than the mere fact that a defendant is, for example, a racist. Such evidence alone would most likely be considered irrelevant and unduly prejudicial by a trial judge. Instead, the prosecution must prove that the defendant’s racism motivated him to commit the particular crime; there must be a direct connection between the criminal act and a racial motive. This showing will generally be difficult to make and may necessitate direct evidence such as that in *Mitchell*, where the defendant’s own contemporaneous statements indicated a clear and immediate intent to act on racial or other proscribed grounds.

In *Virginia v. Black*, 538 U.S. 343 (2003), the U.S. Supreme Court considered the constitutionality of a state statute prohibiting the use of a particular “symbol of hate”: cross burnings (538 U.S. at 357). The Virginia statute at issue made it a crime to burn a cross in public with “an intent to intimidate a person or group of persons” (Va. Code Ann. § 18.2-423). In its opinion, the Court considered the First Amendment status of “true threats,” a concept that arose from the earlier case of *Watts v. United States*, 394 U.S. 705 (1969) and was further developed in *R.A.V.* (505 U.S. at 388). Consistent with those cases, the Court in *Virginia v.*

*Black* reaffirmed that “the First Amendment . . . permits a state to ban a ‘true threat’” and defined a true threat as a statement “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” (538 U.S. at 359). The Court then determined that intimidation may be included within the category of true threats, so long as the intimidation is limited to statements in which “a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death” (538 U.S. at 360). According to the Court, such intentional statements, whether termed as threats or intimidation, are “constitutionally proscribable” and thus outside the scope of the First Amendment (538 U.S. at 365). Applying these principles to the cross burning, the Court determined that “the burning of a cross is symbolic expression,” but it is also “a particularly virulent form of intimidation.” The Court therefore upheld the constitutionality of Section 18.2-423’s prohibition of cross burning because a “ban on cross burning carried out the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment” (538 U.S. at 363).<sup>39</sup>

Although no case involving campus hate speech has yet reached the U.S. Supreme Court, there have been several important cases in the lower courts. The first was *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The plaintiff, a graduate student, challenged the university’s hate speech policy, whose central provision prohibited “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status.” The policy prohibited such behavior if it “[i]nvolves an express or implied threat to” or “[h]as the purpose or reasonably foreseeable effect of interfering with” or “[c]reates an intimidating, hostile, or demeaning environment” for individual pursuits in academics, employment, or extracurricular activities. This prohibition applied to behavior in “educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers.” Focusing on the wording of the policy and the way in which the university interpreted and applied this language, the court held that the policy was unconstitutionally overbroad on its face because its wording swept up and sought to punish substantial amounts of constitutionally protected speech. In addition, the court held the policy to be unconstitutionally vague on its face. This fatal flaw arose primarily from the words “stigmatize” and “victimize” and the phrases “threat to” or “interfering with,” as applied to an individual’s academic pursuits—language that was so vague that students would not be able to discern what speech would be protected and what would be prohibited.

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<sup>39</sup>The Court declined, however, to uphold the constitutionality of another provision in the Virginia cross-burning statute that made the burning itself *prima facie* evidence of an intent to intimidate. The Court splintered on its treatment of this particular provision, but ultimately a majority determined that the provision, as interpreted by the trial court’s jury instruction, was unconstitutional because it served to make all cross burnings a crime even though some burnings could be engaged in as “core political speech” rather than as intimidation (538 U.S. at 365 (plurality opinion of Justice O’Connor)).

Similarly, in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991), the court utilized both overbreadth and vagueness analysis to invalidate a campus hate speech regulation. The regulation applied to “racist or discriminatory comments, epithets, or other expressive behavior directed at an individual” and prohibited any such speech that “intentionally” (1) “demean[s]” the race, sex, or other specified characteristics of the individual, and (2) “create[s] an intimidating, hostile, or demeaning environment for education.” The court held this language to be overbroad because it encompassed many types of speech that would not fall within any existing exceptions to the principle that government may not regulate the content of speech. Regarding vagueness, the court rejected the plaintiffs’ argument that the phrase “discriminatory comments, epithets, or other expressive behavior” and the word “demean” were vague. But the court nevertheless held the regulation unconstitutionally vague because another of its provisions, juxtaposed against the language quoted above, created confusion as to whether the prohibited speech must actually demean the individual and create a hostile educational environment, or whether the speaker must only *intend* those results and they need not actually occur.

A third case, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (4th Cir. 1993), was decided (unlike *Doe* and *UWM Post*) after the U.S. Supreme Court’s decision in *R.A.V. v. City of St. Paul*. In this case a fraternity had staged an “ugly woman contest” in which one member wore blackface, used padding and women’s clothes, and presented an offensive caricature of a black woman. After receiving numerous complaints about the skit from other students, the university imposed heavy sanctions on the fraternity. The fraternity, relying on the First Amendment, sought an injunction that would force the school to lift the sanctions. The trial court granted summary judgment for the fraternity, and the appellate court affirmed the trial court’s ruling.

Determining that the skit was “expressive entertainment” or “expressive conduct” protected by the First Amendment, and that the sanctions constituted a content-based restriction on this speech, the court applied reasoning similar to that in *R.A.V.*:

The mischief was the University’s punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University’s goals and probably embraced by a majority of society as well. . . .

The University, however, urges us to weigh Sigma Chi’s conduct against the substantial interests inherent in educational endeavors. . . . The University certainly has a substantial interest in maintaining an environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express. We agree wholeheartedly that it is the University officials’ responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that “the manner of [its action] cannot

consist of selective limitations upon speech.” [R.A.V., 505 U.S. at 392] . . . The First Amendment forbids the government from “restrict[ing] expression because of its message [or] its ideas.” *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint [993 F.2d at 393].<sup>40</sup>

In *Corry v. Stanford University*, No. 740309 (Cal. Superior Ct., Santa Clara Co., February 27, 1995), a state trial court judge invalidated Stanford’s Policy on Free Expression and Discriminatory Harassment. Since Stanford is a private university, the First Amendment did not directly apply to the case, but it became applicable through a 1992 California law, the “Leonard Law” (Cal. Educ. Code § 94367) that subjects private institutions’ student disciplinary actions to the strictures of the First Amendment. Applying U.S. Supreme Court precedents such as *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (the “fighting words” case), and *R.A.V. v. City of St. Paul* (above), the court held that the Stanford policy did not fall within the scope of the “fighting words” exception to the First Amendment’s application and also constituted impermissible “viewpoint discrimination” within the meaning of *R.A.V.* Stanford did not appeal. The court’s opinion in *Corry* is thoughtfully “described and critiqued” in an article by one of the primary drafters of the Stanford policy (see Thomas C. Grey, “How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience,” 29 *U.C. Davis L. Rev.* 891 (1996) (esp. at 896–97 & 910–31)).

The more recent disputes about hate speech and speech codes, especially in the aftermath of 9/11 (see beginning of this Section), have been more varied than the earlier disputes exemplified by the *Doe v. University of Michigan* case and the *UWM Post, Inc. v. Board of Regents* case discussed above. (See, for example, Harvey Silverglate & Greg Lukianoff, “Speech Codes: Alive and Well at Colleges,” *Chron. Higher Educ.*, August 1, 2003, B7; and compare Robert O’Neil, “. . . but Litigation Is the Wrong Response,” *Chron. Higher Educ.*, August 1, 2003, B9.) These newer disputes may not focus only on hate speech directed against minority groups as such, but instead may concern other types of speech considered hurtful to individuals or detrimental to the educational process. In *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), for example, the plaintiffs successfully challenged speech policies that not only prohibited “acts of intolerance directed at others for ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and/or political characteristics,” but also prohibited communications that “provoke, harass, intimidate, or harm another” (regardless of that other’s identity), and “acts of intolerance that demonstrate malicious intentions towards others” (regardless of the other’s identity). The court ruled that

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<sup>40</sup>In a strong concurring opinion, one judge agreed with the decision only because the university had “tacitly approv[ed]” of the skit without giving any indication that the fraternity would be punished, and then imposed sanctions only after the skit had been performed. More generally, the concurring judge asserted that the university had “greater authority to regulate expressive conduct within its confines as a result of the unique nature of the educational forum” (see Section 9.5.2 of this book) and therefore could regulate certain offensive speech that interferes with its ability to “provide the optimum conditions for learning” and thus “runs directly counter to its mission.”

such language made the university's speech policies unconstitutionally overbroad. Similarly, the institutional policies involved in these more recent disputes may not be hate speech codes as such, but instead may be speech policies covering a broader range of expression, or conduct codes focusing primarily on behavior and only secondarily on expression, or mission statements drawn from various institutional documents, or even unwritten policies and ad hoc decisions implicating expression. In the *Bair* case (above), for example, the provisions being challenged were found in the preamble to and various sections of the Code of Conduct, and in the university's Racism and Cultural Diversity Policy.<sup>41</sup> And the settings in which the more recent disputes arise may be more particularized than in the earlier disputes. The setting, for example, may be student speech in the classroom (see Gary Pavela, "Classroom 'Hate Speech' Codes," Parts I & II, *Synfax Weekly Report*, October 11 and October 18, 2004), or student speech on the institution's computer network (see Section 8.5).

The four earlier campus cases, combined with *R.A.V.*, *Mitchell*, and *Virginia v. Black*, demonstrate the exceeding difficulty that any public institution would face if it attempted to promulgate hate speech regulations that would survive First Amendment scrutiny. Read against the backdrop of other Supreme Court cases on freedom of speech, both before and after *R.A.V.*, the hate speech cases reflect and confirm five major free speech principles, that together, severely constrain the authority of government to regulate hate speech.

Under the first free speech principle—the "content discrimination" principle—regulations of the content of speech (that is, regulations of the speaker's subject matter or message) are suspect. As the U.S. Supreme Court has frequently stated, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard" (*Police Department v. Mosley*, 408 U.S. 92, 95–96 (1972), quoting A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1948; reprinted by Greenwood Press, 1979), 27). This principle applies with extra force whenever a government restricts a speaker's message because of its *viewpoint* rather than merely because of the subject matter being addressed. As the *R.A.V.* case makes clear, and as other cases such as *Rosenberger v. Rector and Visitors of University of Virginia* (see Section 10.1.5) have confirmed, "viewpoint discrimination" against private speakers is virtually always unconstitutional (see *R.A.V.*, 505 U.S. at 391–92). In addition to *R.A.V.*, the *Iota Xi Chapter* case and the *Corry* case above also rely on viewpoint discrimination analysis.

Under the second free speech principle—the "emotive content" principle—the emotional content as well as the cognitive content of speech is protected

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<sup>41</sup>The court in the *Bair* case issued a preliminary injunction against the enforcement of the challenged speech provisions. Subsequently, the parties settled the case, with the university agreeing to rewrite portions of its conduct code and diversity policy. See Eric Hoover, "Shippensburg U. Agrees to Change Conduct Code in Settlement with Advocacy Group," *Chron. Higher Educ.*, March 5, 2004, A31.

from government regulation. As the U.S. Supreme Court explained in *Cohen v. California*, 403 U.S. 15 (1971):

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message [403 U.S. at 26].

Under the third free speech principle—the “offensive speech” principle—speech may not be prohibited merely because persons who hear or view it are offended by the message. In a flag-burning case, *Texas v. Johnson*, 491 U.S. 397 (1989), the U.S. Supreme Court reaffirmed that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

Under the fourth free speech principle—the “overbreadth and vagueness” principle—government may not regulate speech activity with provisions whose language is either overbroad or vague and would thereby create a “chilling effect” on the exercise of free speech rights. As the U.S. Supreme Court has stated: “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity” (*NAACP v. Button*, 371 U.S. 415, 433 (1963)). The concurring opinion in *R.A.V.* also provides an instructive example of how overbreadth analysis applies to hate speech regulations (505 U.S. at 397–415 (White, J., concurring)). The speech codes in the *Doe*, *UWM Post*, and *Bair* cases were all invalidated on overbreadth grounds, and the first three of the cases were invalidated on vagueness grounds as well. Another good example comes from *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), in which the appellate court invalidated the defendant university’s “discriminatory harassment policy” on its face. Since the policy expressly applied to “verbal behavior,” “written literature,” and the use of “symbols, [epithets], or slogans,” it clearly covered First Amendment speech. But the policy’s language did not clearly specify when such speech would be considered “discriminatory harassment” and thus be prohibited. The policy was therefore unconstitutionally overbroad and unconstitutionally vague. (Although *Dambrot* concerned a basketball coach’s speech rather than a student’s speech, its overbreadth and vagueness analysis is equally applicable to student hate speech policies.)

Application of the overbreadth doctrine to speech codes may sometimes be combined with public forum analysis (see Section 9.5.2 above). Restrictions on student speech in a public forum are more likely to be found unconstitutional than restrictions on speech in a nonpublic forum; thus, the more public forum property a speech code covers, the more vulnerable it may be to an overbreadth challenge. In *Roberts v. Haragan*, 2004 WL 2203130 (N.D. Tex. 2004), for instance, the court determined that the “application of [Texas Tech University’s] Speech Code to the public forum areas on campus would suppress [substantial

amounts of] speech that, no matter how offensive,” is protected by the First Amendment. The court therefore held the Speech Code to be “unconstitutional as to the public forum areas of the campus.” In addition, since the policy covered only certain “racial or ethnic content” and left untouched other harassing speech, it constituted “impermissible viewpoint discrimination” within the meaning of *R.A.V. v. St. Paul* (see discussion of first free speech principle above).

And under the fifth free speech principle—the “underbreadth” principle—when government regulates what is considered an unprotected type, or proscribable category, of speech—for example, fighting words or obscenity—it generally may not restrict expression of certain topics or viewpoints in that unprotected area without also restricting expressions of other topics and viewpoints within that same area. For example, if government utilizes the “fighting words” rationale for regulation, it must generally regulate all fighting words or none; it cannot selectively regulate only fighting words that convey disfavored messages. This principle, sometimes called the “underbreadth” principle, is an addition to First Amendment jurisprudence derived from the *R.A.V.* case. There is an exception to this principle created by the *R.A.V.* case, however, that permits regulation of a portion or “subset” of the proscribable category if the regulation focuses on the most serious occurrences of this type of speech and does so in a way that does not involve viewpoint discrimination. The Court in *Virginia v. Black* (above) invoked this exception when using the true threats or intimidation category of proscribable speech to uphold the Virginia cross-burning statute. “[A] State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm,” the Court reasoned; therefore, “[i]nstead of prohibiting all intimidating messages Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence” (538 U.S. at 344; compare 538 U.S. at 380–387 (Souter J., dissenting in part)).

**9.6.3. Guidelines for dealing with hate speech on campus.** In light of the imposing barriers to regulation erected by the five free speech principles in subsection 9.6.2 above, it is critical that institutions (public and private alike) emphasize *nonregulatory* approaches for dealing with hate speech. Such approaches do not rely on the prohibition of certain types of speech or the imposition of involuntary sanctions on transgressors, as do regulatory approaches. Moreover, nonregulatory initiatives may reach or engage a wider range of students than regulatory approaches can. They also may have more influence on student attitudes and values and may be more effective in creating an institutional environment that is inhospitable to hate behavior. Thus, nonregulatory initiatives may have a broader and longer-range impact on the hate speech problem. Nonregulatory initiatives may also be more in harmony with higher education’s mission to foster critical examination and dialogue in the search for truth. (See generally S. Sherry, “Speaking of Virtue: A Republican Approach to



University Regulation of Hate Speech,” 75 *Minn. L. Rev.* 933, 934–36, 942–44 (1991).) Nonregulatory initiatives, moreover, do not raise substantial First Amendment issues. For these reasons, institutions should move to regulatory options only if they are certain that nonregulatory initiatives cannot suitably alleviate existing or incipient hate speech problems.

In addition to nonregulatory initiatives, institutions may regulate hate *conduct* or *behavior* (as opposed to speech) on their campuses. Hateful impulses that manifest themselves in such behavior or conduct are not within the constitutional protections accorded speech (that is, the use of words or symbols to convey a message). Examples include kicking, shoving, spitting, throwing objects at persons, trashing rooms, and blocking pathways or entryways. Since such behaviors are not speech, they can be aggressively prohibited and punished in order to alleviate hate problems on campus.

If an institution also deems it necessary to regulate speech itself, either in formulating general policies or in responding to particular incidents, it should first consider the applicability or adaptability of regulations that are already in or could readily be inserted into its general code of student conduct. The question in each instance would be whether a particular type of disciplinary regulation can be applied to some particular type of hate speech without substantially intruding on free speech values and without substantial risk that a court would later find the regulation’s application to hate speech unconstitutional. Under this selective incremental approach, much hate speech must remain unregulated because no type of regulation could constitutionally reach it. But some provisions in conduct codes might be applied to some hate speech. The following discussion considers five potential types of such regulations. Any such regulation must be drafted with language that would meet the overbreadth and vagueness requirements discussed under the fourth free speech principle in subsection 9.6.2 above.

*First*, when hate speech is combined with nonspeech actions in the same course of behavior, institutions may regulate the nonspeech elements of behavior without violating the First Amendment. A campus building may be spray-painted with swastikas; homophobic graffiti may be chalked on a campus sidewalk; a KKK insignia may be carved into the door of a dormitory room; a student may be shoved or spit on in the course of enduring verbal abuse. All these behaviors convey a hate message and therefore involve speech; but all also have a nonspeech element characterizable as destruction of property or physical assault. While the institution cannot prohibit particular messages, it can prohibit harmful acts; such acts therefore may be covered under neutral regulations governing such nonspeech matters as destruction and defacement of property or physical assaults of persons.

*Second*, institutions may regulate the time or place at which hate speech is uttered or the manner in which it is uttered, as long as they use neutral regulations that do not focus on the content or viewpoint of the speech. For example, an institution could punish the shouting of racial epithets in a dormitory quadrangle in the middle of the night, as long as the applicable regulation

would also cover (for example) the shouting of cheers for a local sports team at the same location and time.

*Third*, institutions may regulate the content of hate speech that falls within one of the various exceptions to the principle forbidding content-based restrictions on speech. Thus, institutions may punish hate speech that constitutes a “true threat” or intimidation, as provided in *Virginia v. Black* (subsection 9.6.2 above), and may prohibit hate speech (and other speech) that constitutes fighting words, obscenity, incitement, or private defamation. (For an example of a higher education case adopting the fighting words rationale, see *State v. Hoshijo ex rel. White*, 76 P.3d 550, 564–65 (Hawaii Sup. Ct. 2003).) Any such regulation, however, must comply with the “underbreadth” principle, the fifth principle set out in subsection 9.6.2 above. Under this principle, an institution could not have a specific hate speech code prohibiting (for example) “fighting words” directed at minority group members, but it could have a broader regulation that applies to hate speech constituting fighting words as well as to all other types of fighting words.

*Fourth*, institutions probably may regulate hate speech that occurs on or is projected onto private areas, such as dormitory rooms or library study carrels, and thereby infringes on substantial privacy interests of individuals who legitimately occupy these places. For First Amendment purposes, such private areas are not considered “public forums” open to public dialogue (see Section 9.5.2); and the persons occupying such places may be “captive audiences” who cannot guard their privacy by avoiding the hate speech (see *Frisby v. Schultz*, 487 U.S. 474 (1988)). For these two reasons, it is likely that hate speech of this type could be constitutionally reached under provisions dealing generally with unjustified invasions of students’ personal privacy, so long as the regulation does not constitute viewpoint discrimination (see the first free speech principle discussed in subsection 9.6.2 above).

*Fifth*, institutions probably may regulate hate speech that furthers a scheme of racial or other discrimination. If a fraternity places a sign in front of its house reading “No blacks allowed here,” the speech is itself an act of discrimination, making it unlikely that black students would seek to become members of that fraternity. When such speech is an integral element of a pattern of discriminatory behavior, institutions should be able to cover it and related actions under a code provision prohibiting discrimination on the basis of identifiable group characteristics such as race, sex, or ethnicity. The *R.A.V.* majority opinion itself apparently supports such a rationale when it suggests that the nondiscrimination requirements of Title VII (the federal employment discrimination statute) could constitutionally be applied to sexual harassment accomplished in part through speech (505 U.S. at 409–10).

In addition to these five bases for regulating hate speech, institutions may also—as was suggested above—devise enhanced penalties under their conduct codes for hate *behavior* or *conduct* (such as the racially inspired physical attack in *Wisconsin v. Mitchell* above) that does not itself involve speech. An offense that would normally merit a semester of probation, for instance, might be punished by a one-semester suspension upon proof that the act was undertaken for racial reasons. Institutions must proceed most cautiously, however. The delicate inquiry into the

perpetrator's motives that penalty enhancement requires is usually the domain of courts, lawyers, and expert witnesses, guided by formal procedures and rules of evidence as well as a body of precedent. An institution should not consider itself equipped to undertake this type of inquiry unless its disciplinary system has well-developed fact-finding processes and substantial assistance from legal counsel or a law-trained judicial officer. Institutions should also assure themselves that the system's "judges" can distinguish between the perpetrator's actual motivation for the offense (which is a permissible basis for the inquiry) and the perpetrator's thoughts or general disposition (which, under *Mitchell*, is an impermissible consideration).

## **Sec. 9.7. Student Files and Records**

**9.7.1. Family Educational Rights and Privacy Act (FERPA).** The Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), popularly known as FERPA (or sometimes as the Buckley Amendment, after its principal senatorial sponsor), places significant limitations on colleges' disclosure and handling of student records. The Act and its implementing regulations, 34 C.F.R. Part 99, apply to all public and private educational agencies or institutions that receive federal funds from the U.S. Department of Education or whose students receive such funds (under the Federal Family Education Loan program, for example) and pay them to the agency or institution (34 C.F.R. § 99.1).<sup>42</sup> While FERPA does not invalidate common law or state statutory law applicable to student records (see Section 9.7.2 below), the regulations are so extensive and detailed that they are the predominant legal consideration in dealing with student records.<sup>43</sup>

FERPA establishes three basic rights for college students: the rights (1) to inspect their own education records; (2) to request that corrections to the records be made if the information in them was recorded inaccurately (and, if the school refuses, the right to a hearing by the school to determine whether the records should be corrected); and (3) to restrict the access of others (in some cases including even the students' own parents<sup>44</sup>) to personally identifiable records unless one of a number of enumerated exceptions is at issue. The regulations also require colleges to notify students annually of their rights under FERPA, and they provide

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<sup>42</sup>Cases and authorities are collected in John E. Theuman, Annot., "Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (20 U.S.C.S. § 1232g)," 112 A.L.R. Fed. 1.

<sup>43</sup>The FERPA regulations provide that "[i]f an educational agency or institution determines that it cannot comply with the Act or [regulations] due to a conflict with State or local law, it shall notify the [Family Policy Compliance] Office within 45 days, giving the text and citation of the conflicting law" (34 C.F.R. § 99.61). Where such conflict exists, the federal law will take precedence unless the institution is willing to relinquish federal funding (see generally *Rosado v. Wyman*, 397 U.S. 397, 420–23 (1970)). The federal government would, however, allow a period of negotiation and encourage the institution to seek an official interpretation of the state law compatible with FERPA or an amendment of the state law.

<sup>44</sup>If a student is a dependent for federal income tax purposes, the institution may, but is not required to, disclose the student's education records to the student's parents.

a procedure for complaints to be filed with the Department of Education if a student believes that the college has not complied with FERPA.<sup>45</sup>

The Family Policy Compliance Office (FPCO) of the Education Department is charged with the development, interpretation, and enforcement of FERPA regulations. The FPCO maintains a Web site that provides an overview of FERPA at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. The Web site also contains the FERPA legislation and its implementing regulations at <http://www.ed.gov/policy/gen/leg/edpicks.jhtml?src=ln> (for the legislation) and <http://www.ed.gov/policy/gen/reg/ferpa/index.html> (for the regulations).

The education records that are protected under FERPA's quite broad definition are all "those records that are (1) [d]irectly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution" (20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3).<sup>46</sup> This section of the regulations contains five exceptions to this definition, which exclude from coverage certain personal and private records of institutional personnel,<sup>47</sup> certain campus law enforcement records, certain student employment records, certain records regarding health care, and "records . . . [such as certain alumni records] that only contain information about an individual after he or she is no longer a student at [the] . . . institution." There is also a partial exception for "directory information," which is exempt from the regulations' nondisclosure requirements under certain conditions (34 C.F.R. § 99.37).

Following a flurry of litigation concerning access by the press to campus law enforcement records involving students (considered, under FERPA's earlier definition, to be student education records and thus protected), Congress passed the Higher Education Amendments of 1992 (Pub. L. No. 102-325, codified at 20 U.S.C. § 1232g(a)(4)(B)(ii)), which amended FERPA to exclude from the definition of "education records" records that are both created and maintained by a law enforcement unit of an educational agency or institution for the purpose of law enforcement. This change enables institutions, under certain circumstances, to disclose information about campus crime contained in law enforcement unit records to parents, the media, other students, and

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<sup>45</sup>The current regulations remove the previous rule that institutions adopt a formal written student records policy (although institutions may wish to retain their policies to help avoid inconsistent practices with respect to student records) (61 Fed. Reg. at 59295). An appendix to the 1996 amendments to the regulations includes a model notice of rights under FERPA for postsecondary institutions to use. The language of the model notice is advisory only and not part of the regulations (61 Fed. Reg. at 59297).

<sup>46</sup>It is important to recognize that the definition of "education record" is broader than a record of grades or student discipline. For example, student course evaluation scores for courses taught by graduate students fall within the definition of "education record." Therefore, posting student course evaluation scores for these instructors, either physically or on a Web site, would arguably be a violation of FERPA.

<sup>47</sup>For example, in *Klein Independent School District v. Mattox*, 830 F.2d 576 (5th Cir. 1987), a school district had been asked, under the Texas open records law, to produce the college transcript of one of its teachers. The court ruled that, since the teacher was an employee, not a student, of the school district, FERPA did not protect her transcript from disclosure as required under the Texas law, even though it would have protected her transcript from disclosure by her college.

other law enforcement agencies. Regulations specifying institutional responsibilities with respect to law enforcement records under FERPA are codified at 34 C.F.R. § 99.8.

Although FERPA provides substantial protection for the privacy of student records, it has been amended numerous times to address public (and parental) concerns about campus safety and the shield that FERPA provided to alleged student perpetrators of violent crimes, as well as various other issues and concerns. FERPA regulations currently list fifteen exceptions to the requirement of prior consent before the release of a personally identifiable education record (34 C.F.R. § 99.31). Several of these exceptions are discussed below.

In one such instance, the Education Department revised the FERPA regulations to clarify the definition of a disciplinary record and to specify the conditions for its release. Disciplinary records generally are considered “education records” and are thus subject to FERPA’s limitations on disclosure. However, the revised regulations permit the institution to disclose to the victim of an “alleged perpetrator of a crime of violence or non-forcible sex offense” the “final results” of a disciplinary proceeding involving the student accused of the crime (34 C.F.R. § 99.31(a)(13)).<sup>48</sup> Prior to this amendment, student press groups had sought access to disciplinary records, in some cases successfully, under state open records laws (see the discussion of *The Red and the Black* case, Section 12.5.3). The regulations also allow the institution to disclose the “final results” of a disciplinary proceeding to the general public if the student who is the subject of the proceeding is an “alleged perpetrator of a crime of violence or non-forcible sex offense” and the institution determines that the student has violated one or more institutional rules and policies. Under either exception, the institution may not disclose the names of other witnesses, including the alleged victim, without the relevant student’s or students’ consent (34 C.F.R. § 99.31(a)(14)).<sup>49</sup> Because of the specificity of these exceptions to the nondisclosure rule, most disciplinary records will still be protected by FERPA and may be disclosed only with permission of the student.

In 1994, Congress amended FERPA to permit disclosure to teachers and other school officials at *other* institutions of information about a disciplinary action taken against a student for behavior that posed a significant risk to the student or to others.<sup>50</sup> FERPA also permits an institution to disclose information otherwise protected by FERPA in order to comply with a judicial order or a lawfully issued subpoena, as long as either the institution makes a “reasonable effort” to notify the parent or eligible student of the order or subpoena in advance or the subpoena is for law enforcement purposes and prohibits disclosure on its face (34 C.F.R. § 99.31(a)(9)(ii)).

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<sup>48</sup>In 1990, the Student Right-to-Know and Campus Security Act, discussed in Section 8.6.3, amended FERPA to permit this disclosure to the student victim of a violent crime. The FERPA regulations were amended in 1995 (60 Fed. Reg. 3464 (January 17, 1995)).

<sup>49</sup>The Higher Education Amendments of 1998 (Pub. L. No. 105-244, October 7, 1998) amended FERPA to permit this disclosure (20 U.S.C. § 1232g(b)(6)(C)).

<sup>50</sup>Improving America’s Schools Act of 1994 (IASA) (Pub. L. No. 103-382, enacted October 20, 1994).

The USA PATRIOT Act (Pub. L. No. 107-56; 115 Stat. 272, October 26, 2001) (discussed in Section 13.2.4 of this book) amended FERPA to permit an institution to disclose, without informing the student or seeking the student's consent, information about the student in response to an *ex parte* order issued by a court at the request of the U.S. Attorney General or his designee. In order to obtain such a court order, the Attorney General must demonstrate the need for this information in order to further investigation or prosecution of terrorism crimes as specified in 18 U.S.C. §§ 2332b(g)(5)(B) and 2331. The USA PATRIOT Act also amends the recordkeeping provisions of FERPA (20 U.S.C. § 1232g(b)(4); 34 C.F.R. § 99.32); the institution is not required to record the disclosure of information in a student's education record in response to an *ex parte* order issued under the circumstances described above. (An explanation of the USA PATRIOT Act amendments and other exceptions to the requirement of student notice and consent is contained in a technical assistance letter of April 12, 2002, from the Director of the Family Policy Compliance Office. It can be found at <http://www.ed.gov/policy/gen/guid/fpco/pdf/hterrorism.pdf>.)

Another FERPA exception allows colleges to give a student's parents or guardian information concerning the student's violation of laws or institutional policies governing the use or possession of alcohol or illegal drugs if the student is under twenty-one years of age, and if the college has determined that the student's conduct constituted a disciplinary violation (34 C.F.R. § 99.31(a)(15)).<sup>51</sup> (For an assessment of the impact of this FERPA exception in reducing underage student drinking, see Leo Reisberg, "2 Years After Colleges Started Calling Home, Administrators Say Alcohol Policy Works," *Chron. Higher Educ.*, January 19, 2001, A34–36.)

The Campus Sex Crimes Prevention Act (§ 1601 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386) amends FERPA to permit the release of information provided to the college concerning sex offenders whom the law requires to register. This amendment to FERPA is codified at 20 U.S.C. § 1232g(b)(7).<sup>52</sup> Interpretive Guidance regarding this legislation and its implications for colleges may be found at <http://www.ed.gov/offices/OM/fpco>.

The key to success in dealing with FERPA is a thorough understanding of the implementing regulations. Administrators should keep copies of the regulations at their fingertips and should not rely on secondary sources to resolve particular problems. Counsel should review the institution's record-keeping policies and practices, and every substantial change in them, to ensure compliance with the regulations. Administrators and counsel should work together to maintain appropriate legal forms to use in implementing the regulations, such as forms for a student's waiver of his or her rights under the Act or regulations, forms for securing a student's consent to release personally identifiable information from

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<sup>51</sup>Higher Education Amendments of 1998, codified at 20 U.S.C. § 1232g(i).

<sup>52</sup>A provision of the Student Right-to-Know Law and Campus Security Act (discussed in Section 8.6.3) requires colleges to include in their annual security reports, effective October 1, 2003, a discussion of how information concerning registered sex offenders living, working, or attending classes in the community may be found.

his or her records (34 C.F.R. § 99.30), and forms for notifying parties to whom information is disclosed of the limits on the use of that information (34 C.F.R. § 99.34). Questions concerning the interpretation or application of the regulations may be directed to the Family Policy Compliance Office at the U.S. Department of Education at <http://FERPA@ED.gov>.

A useful reference for FERPA compliance is Steven J. McDonald, *The Family Educational Rights and Privacy Act (FERPA): A Legal Compendium* (2d ed., National Association of College and University Attorneys, 2002). This compendium includes the statute and regulations, sample forms and policies, technical assistance letters from the Family Policy Compliance Office, and a list of additional resources.

Since FERPA has been in effect, litigation about disclosure of education records and questions about who has access, and to what types of records, have proliferated. For example, students at Harvard University who wished to examine the comments that admissions staff had made about them on “summary sheets” filed a complaint with the Department of Education when Harvard denied their request. Harvard had told the students that the summary sheets were kept in a file separate from the student’s academic records, that they included direct quotes from confidential letters of recommendation, and that they had no further significance once a student was admitted. Therefore, Harvard believed that these documents were not accessible under FERPA.

In an advisory letter, reprinted in *22 Coll. Law Dig.* 299 (July 16, 1992), the Department of Education ruled that the students had a right to examine the summary sheets. Applying FERPA’s broad definition of an “education record” (documents containing information related to a student that are maintained by an educational agency (20 U.S.C. § 1232g(a)(4)(A)), the Department of Education determined that the summary sheets met that definition. However, the department ruled that the university could redact from the documents any excerpts specifically derived from confidential letters of recommendation if the student had waived his or her right of access to these letters.

In 2002, the U.S. Supreme Court ruled that there is no private right of action under FERPA, putting an end to more than two decades of litigation over that issue. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court ruled 7 to 2 that Congress had not created a private right of action under FERPA, and also ruled that the law created no personal rights enforceable under 42 U.S.C. § 1983. Doe, a former education student at Gonzaga University, a private institution in the State of Washington, had sued Gonzaga in state court, alleging violation of his FERPA rights for a communication between a university administrator and the state agency responsible for teacher certification. In that communication, the university administrator alleged that Doe had committed certain sex-based offenses against a fellow student, despite the fact that the alleged victim had not filed a complaint and no determination had been made as to the truth of the allegations, which the administrator had overheard from a third party. Doe also sued Gonzaga and the administrator under tort and contract theories. A jury found for Doe, awarding him more than \$1 million in compensatory and punitive damages, including \$450,000 in damages on the FERPA claim.

The Washington Court of Appeals reversed the outcome at the trial level, but, in *Doe v. Gonzaga University*, 24 P.3d 390 (Wash. 2001), the Washington Supreme Court reversed yet again, ruling that, although FERPA did not create a private cause of action, its nondisclosure provisions provided a right enforceable under Section 1983. Since the lower courts were divided as to the existence of FERPA's enforceability under Section 1983, the U.S. Supreme Court granted *certiorari* to resolve the conflict.

The Court compared the language of FERPA with that of Titles VI and IX (discussed in this book, Sections 13.5.2 & 13.5.3 respectively), which provide that “no person” shall be subject to discrimination. In FERPA, however, Congress focused on the obligation of the Secretary of Education to withhold federal funds from any institution that failed to comply with the law's nondisclosure provisions. This language, said the Court, did not confer the type of “individual entitlement” that can be enforced through Section 1983, citing *Cannon v. University of Chicago* (discussed in Section 13.5.9), a case that found a private right of action under Title IX. Furthermore, said the Court, FERPA provides for penalties for institutions that have a “policy or practice” of permitting the release of education records, rather than penalties for a single act of noncompliance. Furthermore, said the Court, FERPA's creation of an administrative enforcement mechanism through the Secretary of Education demonstrates that Congress did not intend for the law to create an individual right, either under FERPA itself or through Section 1983. The Court reversed the Washington Supreme Court's ruling.<sup>53</sup>

(For a discussion of *Gonzaga* and *Owasso*, and a review of non-FERPA-based privacy issues with respect to student records, see Margaret L. O'Donnell, “FERPA: Only a Piece of the Privacy Puzzle,” 29 *J. Coll. & Univ. Law* 679 (2003).)

A perennial issue that colleges face is whether the use of Social Security numbers as identifiers of students violates FERPA. Although an earlier ruling by a federal court<sup>54</sup> established that students could challenge the use of Social Security numbers as identification numbers on class rosters, identification cards, meal tickets, and other university documents under Section 1983 (a position since rejected by the U.S. Supreme Court in *Gonzaga*), the FPCO has taken the position that the use of even partial Social Security numbers to publicly post student grades is a FERPA violation (Letter re: Hunter College, FPCO May 29, 2001, available at <http://www.ed.gov/policy/gen/guid/fpc/doc/hunter.doc>). A New York law prohibits any public or private school or university from displaying a student's Social Security number for posting of grades, on class rosters, on student identification cards, in student directories, or for other purposes unless specifically authorized or required by law (N.Y.C.L.S. Educ. § 2-b (2003)).

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<sup>53</sup>In a case decided a few months before *Gonzaga*, the U.S. Supreme Court ruled that peer grading in a classroom setting does not violate FERPA's nondisclosure requirements because unrecorded grades are not education records (*Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002)). The issue of whether FERPA provided for a private right of action was not before the court in *Owasso*.

<sup>54</sup>*Krebs v. Rutgers, The State University of New Jersey*, 797 F. Supp. 1246 (D.N.J. 1992).



**9.7.2. State law.** In a majority of states, courts now recognize a common law tort of invasion of privacy, which, in some circumstances, protects individuals against the public disclosure of damaging private information about them and against intrusions into their private affairs. A few states have similarly protected privacy with a statute or constitutional provision. Although this body of law has seldom been applied to educational record-keeping practices, the basic legal principles appear applicable to record-keeping abuses by postsecondary institutions. This body of right-to-privacy law could protect students against abusive collection and retention practices where clearly intrusive methods are used to collect information concerning private affairs. In *White v. Davis*, 533 P.2d 222 (Cal. 1975) (see Section 11.5), for example, the court held that undercover police surveillance of university classes and meetings violated the right to privacy because “no professor or student can be confident that whatever he may express in class will not find its way into a police file.” Similarly, right-to-privacy law could protect students against abusive dissemination practices that result in unwarranted public disclosure of damaging personal information.

In addition to this developing right-to-privacy law, many states also have statutes or administrative regulations dealing specifically with record keeping. These include subject access laws, open record or public record laws, and confidentiality laws. Such laws usually apply only to state agencies, and a state’s postsecondary institutions may or may not be considered state agencies subject to record-keeping laws (see Section 12.5.3). Occasionally a state statute deals specifically with postsecondary education records. A Massachusetts statute, for instance, makes it an “unfair educational practice” for any “educational institution,” including public and private postsecondary institutions, to request information or make or keep records concerning certain arrests or misdemeanor convictions of students or applicants (Mass. Gen. Laws Ann. ch. 151C, § 2(f)).

Since state laws on privacy and records vary greatly from state to state, administrators should check with counsel to determine the law in their particular state. Since state open records requirements may occasionally conflict with FERPA regulations, counsel must determine whether any such conflict exists. While there have been several cases involving the conflict between FERPA’s confidentiality requirements and the demands of state public records laws, there is little agreement as to how a public institution can comply with both laws.

If a case is not brought under FERPA, but instead asserts only state law claims, federal courts may not have subject matter jurisdiction (Section 2.2.2.1). In *Gannett River States Publishing Corp. v. Mississippi State University*, 945 F. Supp. 128 (S.D. Miss. 1996), the federal district court refused to hear an action based on the Mississippi Public Records Act (Miss. Code Ann. §§ 25-61-1 through 25-61-17). The plaintiff had filed suit for disclosure of records in state court, but the university had removed the action to federal court based on federal question jurisdiction. The university argued that the plaintiff’s claims were federal in nature because it was FERPA that prevented the release of the records sought; even the plaintiff’s complaint explicitly mentioned FERPA and disputed its applicability to the records at hand. The federal court rejected this argument and remanded the case back to state court. Citing long-established precedents

concerning federal jurisdiction, the court held that state law, not FERPA, was the basis for the plaintiff's claim, and the suit thus did not "arise under" federal law. The references to FERPA did not convert the matter from one of federal law to one of state law; mentioning FERPA in the complaint was simply an "anticipation" of the university's defense. This case is an interesting reminder to institutional defendants that, in the absence of diversity jurisdiction, the substance of the plaintiff's complaint may determine the forum in which disclosure issues are decided.

Several state courts have ruled that public records laws trump the confidentiality provisions of FERPA, particularly with respect to disciplinary proceedings. Although the changes to FERPA made by the 1998 Higher Education Amendments will allow colleges to release limited information concerning the outcomes of student disciplinary hearings (Section 9.7.1), the law still does not provide for the complete release of transcripts, documentary evidence, or other records that meet FERPA's definition of "education records." Thus, the outcomes in the cases discussed below are still relevant to college administrators and, until and unless FERPA is once again amended, colleges may have to walk a tightrope in attempting to comply with conflicting state laws regarding public records and public meetings.

In a case whose rationale is similar to the *Red and Black* case (discussed in Section 12.5.3), a Connecticut appellate court addressed a claim under Connecticut's Freedom of Information law that audiotapes of a student disciplinary hearing were public records and thus subject to disclosure. In *Eastern Connecticut State University v. Connecticut Freedom of Information Commission*, No. CV96-0556097, 1996 Conn. Super. LEXIS 2554 (Conn. Super., September 30, 1996), a faculty member who had filed disciplinary charges against a student enrolled in his class requested audiotapes of the hearing that had been held to adjudicate those charges. The college had refused, citing FERPA's provision that protects records of disciplinary hearings from disclosure unless the student consents. Although the state Freedom of Information Commission (FOIC) had found the hearings to fall squarely within FERPA's protection, it also found that the faculty member had a legitimate educational interest in the student's behavior and thus was entitled to the information under another FERPA provision (20 U.S.C. § 1232g(h); 34 C.F.R. § 99.3). The court held that FERPA did not prevent a state legislature from enacting a law providing for access to public records, and that FERPA does not prohibit disclosing the student records, but that nondisclosure is "merely a precondition for federal funds." Taken to its logical conclusion, this ruling would elevate the interest of the public in access to public records over the ability of the state institution to be eligible to receive federal funds. (This unpublished opinion does not discuss an earlier Connecticut case, *University of Connecticut v. FOI Comm'n.* (discussed in Section 12.5.3), whose outcome was quite different.)

A second state court differed sharply with the result in the *Eastern Connecticut State University* case. In *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University*, No. 393, 334 (1st Judicial Dist. Ct. Caddo Parish, La., March 4, 1994) (unpublished opinion at 17),

the court found that the results of a disciplinary hearing concerning theft of student government funds by student government members were more like education records (protected by FERPA) than law enforcement records (not protected by FERPA). The court rejected the plaintiffs' claim that FERPA did not prohibit disclosure of disciplinary hearing records, stating: "[T]he intent of Congress to withhold millions of federal dollars from universities that violate [FERPA] is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs." Although the court determined that the disciplinary hearing records were subject to the state's public records act, the court ruled that, given FERPA's requirements, the state constitution provided for an implied exception in the law for college disciplinary hearings. Distinguishing *Red and Black* (discussed in Section 12.5.3) on several grounds, the court held that the records should not be disclosed.

Despite the clarity of the FERPA regulations that include disciplinary records within the definition of education record, a lengthy legal battle pitting state courts against their federal counterparts resulted, eventually, in a determination that FERPA's privacy protections trumped state open records laws. In the state court litigation, the Supreme Court of Ohio held in *State ex rel Miami Student v. Miami University*, 680 N.E.2d 956 (Ohio 1997), that university disciplinary records are not education records under FERPA. The editor of the university's student newspaper had sought student disciplinary records, redacted of the students' names, Social Security numbers, and student identification numbers, or any other information that would identify individual students. The university provided the information but, in addition to the redactions that the editor had agreed to, also deleted information on the sex and age of the accused individuals, the date, time and location of the incidents, and memoranda, statements by students, and the disposition of some of the proceedings. The editor sought a writ of *mandamus* from the state supreme court. As in *Colonial School District*, the majority opinion did not cite or analyze the 1995 amendments to the FERPA regulations (Section 9.7.1) or, for that matter, any of the implementing regulations. Instead, the opinion analyzed the *Red and Black* case and determined that disciplinary records were not related to "student academic performance, financial aid, or scholastic probation," and thus could be disclosed without violating FERPA. Noting that the public records act was intended to be interpreted broadly, the court also noted that crime on campus was a serious problem and that the public should have access to the information requested by the student editor.

One justice dissented from the court's ruling that the information sought was not an education record, stating that the court's conclusion was "clearly contrary to the history, language and intent of FERPA." Noting that the *Red and Black* case was decided prior to the 1995 amendments (in which the Secretary of Education explicitly included disciplinary records within the definition of education records), the judge noted that *Shreveport* was a more recent analysis of the conflict, suggesting that it was the better authority.

The U.S. Supreme Court denied *certiorari* in the *Miami Student* case (522 U.S. 1022 (1997)). The U.S. Department of Education then brought a claim in a

federal district court in Ohio, seeking to enjoin the colleges from complying with the state supreme court's ruling to release the disciplinary records. The federal court issued the requested injunction, stating that the disciplinary records at issue clearly met the FERPA definition of "education records" and that the Ohio Supreme Court's interpretation of FERPA as pertaining only to academic records was incorrect (*United States v. Miami University*, No. C2:98-0097, February 12, 1998).

The federal district court then permitted the addition of the *Chronicle of Higher Education* as a codefendant to argue that disciplinary records are law enforcement records, rather than education records, and that FERPA does not preempt the Ohio Public Records Act (John Lowery, "Balancing Students' Right to Privacy and the Public's Right to Know," *Synthesis: Law and Policy in Higher Education*, Vol. 10, no. 2 (Fall 1998), 715).

The *Chronicle* asked the court to dismiss the Education Department's lawsuit for lack of subject matter jurisdiction, arguing that the department lacked standing to bring the action. The trial court ruled that FERPA expressly gave the Secretary of Education standing to enforce the law (20 U.S.C. § 1232g(f)), including enforcement by litigation (*United States of America v. The Miami University and The Ohio State University*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000)). Additionally, said the court, the Secretary of Education had the authority to sue the recipients of federal funds to force them to comply with the terms of funding programs, one of which is compliance with FERPA. And, third, the court rejected the *Chronicle's* argument that FERPA does not prohibit colleges from releasing education records, but rather merely authorizes the Department of Education to withdraw federal funding from an institution that does not comply with FERPA. The court stated that the inclusion in the statute of several enforcement mechanisms, in addition to termination of funds for FERPA violations, demonstrated that Congress intended that the law apply directly to colleges. The federal district court also made an explicit ruling that student disciplinary records are education records under FERPA. Denying the *Chronicle's* motion to dismiss and awarding summary judgment to the Department of Education, the federal court issued a permanent injunction against Miami University and Ohio State University, forbidding the further release of student disciplinary records.

The intervening party, the *Chronicle of Higher Education*, appealed, and the U.S. Court of Appeals for the Sixth Circuit affirmed (294 F.3d 797 (6th Cir. 2002)). The *Chronicle* asserted that the Department of Education lacked standing to bring the action seeking to enjoin the release of the records, challenged the lower court's ruling as an implicit decision that FERPA preempts state open records laws, and asserted that the lower court was incorrect in ruling that disciplinary records were education records within the meaning of FERPA. The *Chronicle* also argued that FERPA violates the First Amendment because it limits access to otherwise publicly available records.

The appellate court ruled that the Department of Education had standing to seek the injunction on the same grounds that the trial court had relied upon. Furthermore, said the court, the Ohio Supreme Court's ruling that disciplinary records were not education records was incorrect; despite that ruling, the Ohio

court had allowed Miami to redact all personally identifiable information from the records before disclosing them, an action that complied with FERPA's requirements. The federal appellate court relied on the numerous exceptions to FERPA's prohibition against disclosure of education records to conclude that disciplinary records were, in fact, still included within the law's definition of education record, a result that complies with the position of the FPCO. With respect to the First Amendment claim, the court explained that student disciplinary proceedings were not criminal trials, and therefore, jurisprudence related to the public's access to criminal trials was not applicable to disciplinary hearings in which students lacked the panoply of protections available to litigants in the courts. Student disciplinary hearings at both universities were closed to the public, and press or public access to such hearings would complicate, not aid, the educational purpose that the hearings were designed to further. The court rejected the *Chronicle's* First Amendment claims. The court noted that the *Chronicle* could request student disciplinary records from which all individually identifying information had been redacted, as FERPA would not prohibit the release of such information.

Despite the first ruling of the federal trial court in the Miami University case (enjoining the release of the records prior to trial), the Court of Appeals of Maryland followed the lead of the Ohio Supreme Court. In *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. Ct. App. 1998), the Maryland court ruled that Maryland's Public Information Act (Maryland Code § 10-611-28) authorizes the disclosure of information sought from the university by the student newspaper. The newspaper was seeking correspondence and parking violation records involving the basketball coach and several student players, which the university refused to provide. The university asserted that the parking violation records related to the coach were personnel records, which the law exempted from disclosure, and that the parking violation records related to the students were education records, protected from disclosure by FERPA. The court rejected both of the university's defenses.

The court held that the parking violation records of the student athletes were not education records because Congress had intended only that records related to a student's academic performance be covered by FERPA. In addition to attempting to protect student privacy through FERPA, said the court:

Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind [FERPA]. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public [721 A.2d at 204].

The court upheld the ruling of the trial court that the university was required to release the information sought by the student newspaper.

But another state appellate court has ruled that, despite its finding that the “Undergraduate Court” at the University of North Carolina was a “public body” under North Carolina’s Open Meetings Law (N.C. Gen. Stat. § 143-318.9 *et seq.*), that body was entitled to hold closed disciplinary hearings in order to comply with the dictates of FERPA. In *DTH Publishing Corp. v. The University of North Carolina at Chapel Hill*, 496 S.E.2d 8 (N.C. Ct. App. 1998), the court applied language in the Open Meetings Law that allowed a public body to hold a closed session, if it was necessary, to prevent the disclosure of information that is “privileged or confidential.” The university had argued that FERPA’s prohibition of the nonconsensual release of personally identifiable student records rendered the records of student disciplinary hearings “privileged and confidential” for the purposes of state law. The court distinguished the *Miami Student* case, noting that the Ohio court had only ordered the release of “statistical data” from which student names had been deleted, and which included the location of the incident, age and sex of the student, nature of the offense, and the type of discipline imposed, but had not ordered the release of records from specific disciplinary hearings. The court also rejected arguments by the student newspaper that the state and federal constitutions required that judicial proceedings be open to the public, stating that the Undergraduate Court was not the type of court contemplated by these constitutions, and that there was no history at the university of open disciplinary hearings.

In *Caledonian-Record Publishing Company, Inc. v. Vermont State College*, 833 A.2d 1273 (Vt. 2003), Vermont’s highest court was asked to decide whether the press could have access to the daily security logs, student disciplinary records, and student disciplinary hearings at Lyndon State College and the entire Vermont State College System under the state’s Open Meeting Law and Public Records Act. The colleges provided the daily security logs compiled by their campus police departments, but refused to provide the requested student disciplinary records or to allow access to student disciplinary hearings.

The court found that Vermont’s Public Records Act exempts “student records at educational institutions funded wholly or in part by state revenue” (1 V.S.A. § 317(c)(11)) from disclosure. Because the plaintiffs had stated that they did not want to attend the hearings, but only to have access to the minutes or other records of the hearings, the court did not reach the issue of whether the media should be allowed to attend student disciplinary hearings. It also found that minutes or other records documenting the proceedings and outcome of student disciplinary hearings also fit the definition of “student records,” and thus were exempted from disclosure.

**9.7.3. The Federal Privacy Act.** The Privacy Act of 1974 (88 Stat. 1896, partly codified in 5 U.S.C. § 552a) applies directly to federal government agencies and, with two exceptions discussed below, does not restrict postsecondary education institutions. The Act accords all persons—including students, faculty members, and staff members—certain rights enforceable against the federal government regarding information about them in federal agency files, whether

collected from a postsecondary institution or from any other source. The Act grants the right to inspect, copy, and correct such information and limits its dissemination by the agency. Regulations implementing the Privacy Act are found at 34 C.F.R. Part 5b.<sup>55</sup>

Section 7 of the Act prohibits federal, state, and local government agencies from requiring persons to disclose their Social Security numbers. This provision applies to public but not to private postsecondary institutions (see the *Krebs* case in Section 9.7.1, which also discusses when an institution is considered a state agency for purposes of this provision) and thus may prevent public institutions from requiring either students or employees to disclose their Social Security numbers if they meet this definition. The two exceptions to this nondisclosure requirement permit an institution to require disclosure (1) where it is required by some other federal statute and (2) where the institution maintains “a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual” (88 Stat. 1896 at 1903).

The second provision of the Act potentially relevant to some postsecondary institutions is Section 3(m) (5 U.S.C. § 552a(m)), which applies the Act’s requirements to government contractors who operate record-keeping systems on behalf of a federal agency pursuant to the contract.

(A reference guide to the Federal Freedom of Information Act and the Federal Privacy Act is published regularly by the U.S. Department of Justice. A description of this guide, *The Freedom of Information Act Guide and Privacy Act Overview*, and information on obtaining it, are available at <http://www.usdoj.gov/oip/foiapost/2004foiapost2.htm>.)

Many states have enacted privacy laws that regulate the actions of public colleges and universities, and sometimes private colleges as well. Administrators should consult with counsel for updated information on the existence of, or changes in, state privacy laws. For example, at least eight states prohibit the use of Social Security numbers by public agencies, which some of these laws define to include colleges and universities.

## Selected Annotated Bibliography

### *General*

Kaplin, William A. *American Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004). In Chapters 11 and 12, this book presents the foundational due process and free expression principles, and the leading U.S. Supreme Court cases, that undergird students’ federal constitutional rights. Chapter 14, Section E, provides an introduction to state constitutional rights regarding due process and freedom of expression.

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<sup>55</sup>Cases and authorities are collected at George K. Chamberlin, Annot., “Applicability of § 3(b) of Privacy Act of 1974 (5 U.S.C.A. § 552a(b)), Requiring Individual’s Consent to Disclosure of Agency Records Maintained on Individual, to Disclosure of Information Otherwise Known to Federal Agency or Official,” 52 A.L.R. Fed. 579.

### ***Sec. 9.1 (Disciplinary and Grievance Systems)***

- Bach, Jason L. "Students Have Rights, Too: The Drafting of Student Conduct Codes," 2003 *BYU Educ. & L.J.* 1 (2003). Suggests a series of factors to be considered in drafting codes of student conduct; criticizes those who argue that formal due process protections are not necessary for campus judicial hearings; analyzes the procedural and substantive due process rights of students charged with violations of campus codes of student conduct.
- Baker, Thomas R. "Criminal Sanctions for Student Misconduct: Double Jeopardy Litigation in the 1990s," 130 *West's Educ. L. Rep.* 1 (1998). Discusses the problem of dealing with students whose campus code violation is also a criminal violation, and judicial responses to student attempts to challenge on-campus or criminal proceedings under the double jeopardy theory.
- Dannels, Michael. *From Discipline to Development: Rethinking Student Conduct in Higher Education*. ASHE-ERIC Higher Education Report, Vol. 25, no. 2 (ERIC Clearinghouse on Higher Education, 1997). Reviews the history of student discipline, examines the characteristics of students who violate disciplinary codes, and the role of institutions in preventing or facilitating student misconduct. Suggests models of student disciplinary codes and judicial proceedings that contribute to student development as well as improving conduct.
- Jameson, Jessica Katz. "Diffusion of a Campus Innovation: Integration of a New Student Dispute Resolution Center into the University," 16 *Mediation Q.* 129 (1998). Proposes guidelines for integrating dispute resolution programs into a college's existing culture while keeping in mind the educational and mediation goals of such programs.
- Pavela, Gary. "Applying the Power of Association on Campus: A Model Code of Academic Integrity," 24 *J. Coll. & Univ. Law* 97 (1997). Discusses the use of honor codes at colleges and universities; proposes a model honor code. Includes a list of Ten Principles of Academic Integrity.
- Pavela, Gary. "Limiting the Pursuit of Perfect Justice on Campus: A Proposed Code of Student Conduct," 6 *J. Coll. & Univ. Law* 137 (1980). A well-drafted sample code, including standards of conduct and hearing procedures, with comprehensive annotations explaining particular provisions and cites to relevant authorities. The code represents an alternative to the procedural complexities of the criminal justice model. See also Pavela's "Model Code of Student Conduct," available at <http://www.collegepubs.com>.
- Pavela, Gary. "Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus," 9 *J. Coll. & Univ. Law* 101 (1982–83). Analyzes the pitfalls associated with postsecondary institutions' use of "psychiatric withdrawals" of students. Pitfalls include violations of Section 504 (on disability discrimination) and of students' substantive and procedural due process rights. The article concludes with "Policy Considerations," including the limits of psychiatric diagnosis, the danger of substituting a "therapeutic" approach as a solution for disciplinary problems, and the "appropriate uses for a psychiatric withdrawal policy." For a later monograph adapted from this article, with model standards and procedures, hypothetical case studies, and a bibliography, see Gary Pavela, *The Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations, and Alternative Responses* listed in Section 9.4.



- Picozzi, James M. "University Disciplinary Process: What's Fair, What's Due, and What You Don't Get," 96 *Yale L.J.* 2132 (1987). Written by a defendant in a student disciplinary case. Provides a critical review of case law and institutional grievance procedures, concluding that the minimal due process protections endorsed by the courts are insufficient to protect students' interests.
- U.S. District Court, Western District of Missouri (*en banc*). "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education," 45 *Federal Rules Decisions* 133 (1968). A set of guidelines promulgated for the use of this district court in deciding students' rights cases. The guidelines are similarly useful to administrators and counsel seeking to comply with federal legal requirements.

### ***Sec. 9.2 (Disciplinary Rules and Regulations)***

- Brown, Valerie L. (ed.). *Student Disciplinary Issues: A Legal Compendium* (National Association of College and University Attorneys, 1997). A collection of law review articles, institutional policies, judicial opinions, and conference outlines related to student disciplinary rules and disciplinary systems. Issues related to both academic and nonacademic misconduct are included. A list of additional resources is also provided.
- Faulkner, Janet E., & Tribbensee, Nancy E. *Student Disciplinary Issues: A Legal Compendium* (National Association of College & University Attorneys, 2004). Collects articles, NACUA outlines, institutional policies, reports, and statutes related to (1) student due process and contract rights; (2) sanctions; (3) disclosure of conduct records, and (4) model codes of student conduct.
- Munsch, Martha Hartle, & Schupansky, Susan P. *The Dismissal of Students with Mental Disabilities* (National Association of College and University Attorneys, 2003). Provides guidance on upholding the institution's academic and disciplinary standards while complying with the laws protecting students with disabilities. Reviews applicable federal law; includes a question-and-answer section on common issues that arise when dealing with student misconduct related to a psychiatric or learning disability.
- Zirkel, Perry A. "Disciplining Students for Off-Campus Misconduct: Ten Tips," 163 *West's Educ. L. Rep.* 551 (2002). Discusses the problems inherent in applying student codes of conduct to off-campus misconduct, and provides suggestions for avoiding legal liability.

See the Selected Annotated Bibliography for Section 9.1.

### ***Sec. 9.3 (Grades, Credits, and Degrees)***

- Babbitt, Ellen M. (ed.). *Accommodating Students with Learning and Emotional Disabilities* (National Association of College and University Attorneys, 2005). Includes statutes, regulations, agency guidance, and Supreme Court decisions concerning students with learning and emotional disabilities; general principles of ADA analysis; special issues, with a particular focus on accommodating learning and emotional disabilities at professional schools, in athletics and for off-site and distance learning programs; and an extensive collection of additional resources, Web sites, and other materials.

Center for Academic Integrity. *The Fundamental Values of Academic Integrity* (Center for Academic Integrity, 1999). Describes the purpose and functions of the center, which is affiliated with the Kenan Ethics Program at Duke University. The center is a consortium of 200 colleges and universities, and 500 individual members, established “to identify and affirm the values of academic integrity and to promote their achievement in practice.” Further information is available at <http://www.academicintegrity.org>.

Flygare, Thomas J. *Students with Learning Disabilities: New Challenges for Colleges and Universities* (2d ed., National Association of College and University Attorneys, 2002). Discusses the development of institutional policies for dealing with students with learning disabilities, ensuring that admissions materials are reviewed for accessibility, and the process of determining which accommodations are appropriate.

Francis, Leslie Pickering. *Sexual Harassment as an Ethical Issue in Academic Life* (Rowan & Littlefield, 2001). Explores sexual harassment from ethical, legal, and policy perspectives. Part One of the book contains seven chapters on various topics prepared by the author; Part Two contains selected excerpts from the pertinent writings of other authors. There is also a chapter containing “illustrative” sexual harassment policies from various public and private postsecondary institutions, and a “Selected Bibliography” of sources. Reviewed at 28 *J. Coll. & Univ. Law* 243 (2001).

Johnston, Robert Gilbert, & Oswald, Jane D. “Academic Dishonesty: Revoking Academic Credentials,” 32 *J. Marshall L. Rev.* 67 (1998). Develops a “model code” for colleges and universities to guide them in the event that student academic misconduct is discovered after a degree is conferred. Includes discussion of due process protections and strategies for minimizing the risk of judicial rejection of the college’s degree revocation.

Kibler, William L., Nuss, Elizabeth M., Peterson, Brent G., & Pavela, Gary. *Academic Integrity and Student Development* (College Administration Publications, 1988). Examines student academic dishonesty from several perspectives: student development, methods for preventing academic dishonesty, and the legal issues related to student dishonesty. A model code of academic integrity and case studies are included in the appendix.

Leonard, James. “Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act,” 75 *Nebraska L. Rev.* 27 (1996). Examines the role of judicial deference to academic decisions in Section 504 and ADA actions involving claims that a student is “otherwise qualified” to participate in a program. Reviews the constitutional and common law principles used by courts in deferring to academic decisions. Argues that deference to academic decisions is justified because courts are not competent to determine the appropriateness of academic standards.

Note, “Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans With Disabilities Act,” 111 *Harv. L. Rev.* 1560 (1998). Provides background information on learning disabilities; reviews a range of approaches taken by courts in reviewing claims individuals with learning disabilities, and provides suggestions for evaluating claims by individuals with learning disabilities.

Schweitzer, Thomas A. “‘Academic Challenge’ Cases: Should Judicial Review Extend to Academic Evaluations of Students?” 41 *Am. U. L. Rev.* 267 (1992). Compares judicial review of student discipline cases with “academic challenge” cases (in

which the student challenges an academic decision made by the institution). Provides a thorough and penetrating analysis of a variety of challenges to academic decisions, including degree revocation.

Wilhelm, Suzanne. "Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements," 32 *J. Law & Educ.* 217 (2003). Reviews the requirements of the ADA with respect to accommodating students with mental disorders; suggests guidelines and policies for accommodating these students.

Zirkel, Perry A., & Hugel, Paul S. "Academic Misguidance in Colleges and Universities," 56 *West's Educ. L. Rptr.* 709 (1989). Discusses the legal and practical implications of erroneous or inadequate academic advice by faculty and administrators. Reviews four legal theories used by students to seek damages when they are harmed, allegedly by "misguidance," and concludes that most outcomes favor the institution, not the student.

See the Neiger entry in the Selected Annotated Bibliography for Section 13.5 and the Paludi entry for Section 6.4.

### ***Sec. 9.4 (Procedures for Suspension, Dismissal, and Other Sanctions)***

Berger, Curtis J., & Berger, Vivian. "Academic Discipline: A Guide to Fair Process for the University Student," 99 *Columbia L. Rev.* 289 (1999). Argues that due process protections for students at private colleges should not differ from those for students attending public colleges, applying the contractual doctrine of the implied covenant of good faith and fair dealing as the contractual equivalent of constitutional due process.

Cole, Elsa Kircher. *Selected Legal Issues Relating to Due Process and Liability in Higher Education* (Council of Graduate Schools, 1994). A pamphlet designed for faculty and academic advisors that reviews the basics of due process in dealing with academic misconduct or discipline problems. Also covers termination of faculty, scientific misconduct, and privacy of student records.

Ford, Deborah L., & Strobe, John L., Jr. "Judicial Responses to Adverse Academic Decisions Affecting Public Postsecondary Institution Students Since *Horowitz* and *Ewing*," 110 *West's Educ. L. Rptr.* 517 (1996). Discusses judicial review of institutions' judgments regarding student academic performance, noting under what circumstances courts will defer to those judgments.

Jennings, Eileen K., & Strobe, John L., Jr. "Procedural Due Process in Academia: *Board of Curators v. Horowitz* Seven Years Later," 28 *West's Educ. L. Rptr.* 973 (1986). Reviews the outcome of *Horowitz* and discusses the required elements of due process in academic dismissals.

Paterson, Brent G., & Kibler, William L. (eds.). *The Administration of Campus Discipline: Student, Organization and Community Issues* (College Administration Publications, 1998). A collection of articles by student judicial affairs scholars, college attorneys, and student affairs professionals. Includes a model code for student discipline, a discussion of the differences between the criminal justice system and campus judicial systems, and a review of federal restrictions on the disclosure of student judicial records. Reviews issues related to adjudicating a variety of specific student conduct issues, issues related to disciplining student organizations, and academic misconduct issues. Includes ten case studies of student misconduct suitable for training programs.

Pavela, Gary. *The Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations, and Alternative Responses* (College Administration Publications, 1985).

Reviews the protections provided by the Rehabilitation Act of 1973 (Section 504) for students with mental disabilities. Recommends elements of an appropriate policy for psychiatric withdrawal, and provides a checklist for responding to students with mental disorders. Includes a case study about a disruptive student and suggests an appropriate institutional response. For related work by the same author, see Pavela, "Therapeutic Paternalism," entry for Section 9.1.

Stevens, Ed. *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*. ASHE-ERIC Higher Education Report, Vol. 27, no. 2 (ERIC Clearinghouse on Higher Education, 1999). Reviews the development and refinement of due process in higher education for both academic and disciplinary sanctions. Suggests how policies and practices may be developed and monitored to ensure compliance with due process protections and requirements.

See Faulkner and Tribbensee entry for Section 9.2.

### ***Sec. 9.5 (Student Protests and Freedom of Speech)***

Blasi, Vincent. "Prior Restraints on Demonstrations," 68 *Mich. L. Rev.* 1482 (1970).

A comprehensive discussion of First Amendment theory and case law and the specific manner in which the law bears on the various components of a student demonstration.

Herman, Joseph. "Injunctive Control of Disruptive Student Demonstrations," 56 *Va. L. Rev.* 215 (1970). Analyzes strategic, constitutional, and procedural issues concerning the use of injunctions to control disruptive student protest.

### ***Sec. 9.6 (Speech Codes and the Problem of Hate Speech)***

Byrne, J. Peter. "Racial Insults and Free Speech Within the University," 79 *Georgetown L.J.* 399 (1991). Author argues that, to protect "the intellectual values of academic discourse," universities may regulate racial (and other similar) insults on campuses even if the state could not constitutionally enact and enforce the same type of regulation against society at large. He asserts, however, that public universities may not use such regulations "to punish speakers for advocating any idea in a reasoned manner." Article analyzes the evolution of relevant constitutional law and examines policies enacted at the University of Wisconsin, the University of Michigan, and Stanford University. Author was a member of a committee to formulate a "student speech and expression policy" at Georgetown University.

Coleman, Arthur L., & Alger, Jonathan R. "Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses," 23 *J. Coll. & Univ. Law* 91 (1996). Describes how an educational environment that is free from discrimination and therefore conducive to learning is mutually supportive of an educational environment in which a free and robust exchange of ideas takes place. The article provides a comprehensive review of free speech law, including the *R.A.V.* case, as well as antidiscrimination law. By applying this law to scenarios likely to arise in colleges and universities, article attempts to display how the goals of these two legal areas need not be mutually exclusive in the higher education setting.

- Dry, Murray. "Hate Speech and the Constitution," 11 *Const. Comment.* 501 (1994–95). Analyzes the U.S. Supreme Court's decisions in *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*. Seeks to explain the purported conflict between the two opinions of the Court as they impact colleges and universities.
- Grey, Thomas C. "How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience," 29 *U.C. Davis L. Rev.* 891 (1996). Provides a lively and thought-provoking critique of *Corry v. Stanford University*, the unreported case invalidating Stanford's policy on Free Expression and Discriminatory Harassment; and of *R.A.V. v. St. Paul* and *Chaplinsky v. New Hampshire*, the main U.S. Supreme Court precedents applied in *Corry*. Also includes the background of the Stanford policy's adoption, an analysis of the "politics" of campus hate speech, and the full text of the Stanford policy and the "Fundamental Standard" of which it was a part. A companion article—Elena Kagan, "When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints," 29 *U.C. Davis* 957 (1996)—provides a counterpoint to Professor Grey's article.
- Heumann, Milton, & Church, Thomas W., with Redlawsk, David (eds.). *Hate Speech on Campus* (Northeastern University Press, 1997). Divided into three parts—Cases, Case Studies, and Commentary—with the editors providing a general introduction to the book and an introduction to each of the three parts. Covers basic free speech and hate speech history and principles, and provides focused analysis pertaining to the campus setting. Includes discussion of several universities' codes and regulations, as well as the potential advantages and dangers of regulating speech on campus. The Commentary section presents a variety of viewpoints and concerns.
- Kaplin, William. "A Proposed Process for Managing the Free Speech Aspects of Campus Hate Speech," 63 *J. Higher Educ.* 517 (1992). Describes a process for dealing with "hate speech" while preserving individuals' rights to free speech. Identifies key principles of First Amendment law that circumscribe the institution's discretion to deal with hate speech, suggests regulatory options that may be implemented consistent with these principles, and emphasizes the need to consider nonregulatory options prior to considering regulatory options.
- Lawrence, Charles R., III. "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L.J.* 431 (1990). Develops an argument for the constitutionality of hate speech regulations based on an interpretation of *Brown v. Board of Education*, calls for carefully drafted hate speech regulations on the campuses, explores the injurious nature of hate speech, and criticizes the position of free speech libertarians.
- Massaro, Toni M. "Equality and Freedom of Expression: The Hate Speech Dilemma," 32 *Wm. & Mary L. Rev.* 211 (1991). Summarizes theoretical and practical aspects of the hate speech debate; critiques the approaches of "civil liberties theorists," "civil rights theorists," and "accommodationists"; and reviews various narrow approaches to regulating campus hate speech.
- Shiell, Timothy C. *Campus Hate Speech on Trial* (University Press of Kansas, 1998). A thorough exploration, by a philosopher, of the arguments for and against campus speech codes. Includes an analysis of recent experience with speech codes, both in and out of court; a proposal for a narrow regulatory response to campus hate speech; and some broader perspectives on campus speech problems generally. Reviewed by Robert O'Neil in *Academe* (January–February 1999), 65–66.

- Strossen, Nadine. "Regulating Racist Speech on Campus: A Modest Proposal?" 1990 *Duke L.J.* 484 (1990). Reviews the First Amendment principles and doctrines applicable to campus hate speech regulations; responds to Charles Lawrence's advocacy of hate speech regulations (see entry above); and argues that "prohibiting racist speech would not effectively counter, and could even aggravate, the underlying problem of racism," and that "means consistent with the first amendment can promote racial equality more effectively than can censorship." Includes substantial discussion of ACLU policies and activities regarding hate speech.
- Sunstein, Cass. "Liberalism, Speech Codes, and Related Problems," *Academe* (July–August 1993), 14. Traces the tension between academic freedom and hate speech and relates hate speech regulation to the "low-value speech" versus "high-value speech" dichotomy developed in U.S. Supreme Court precedents. Author's primary purpose is to "defend the constitutionality of narrowly drawn restrictions on hate speech, arguing in the process against the broader versions that have become popular in some institutions." (This is a condensed version of a lecture that is included in the Menand entry in the Selected Annotated Bibliography for Section 7.1.)

### ***Sec. 9.7 (Student Files and Records)***

- American Association of Collegiate Registrars and Admissions Officers. *The AACRAO 2001 FERPA Guide* (AACRAO, 2001). Provides an overview of the Act and discusses specific issues and problems that college administrators have encountered. Includes a discussion of the changes in FERPA compliance resulting from amendments to the FERPA regulations in 2000.
- Daggett, Lynn M. "Bucking up *Buckley I*: Making the Federal Student Records Statute Work," 46 *Cath. U. L. Rev.* 617 (1997). Reviews the history and enforcement of FERPA. Recommends a series of amendments to the law with respect to dealing with student violations of institutional substance abuse policies.
- McDonald, Steven J. (ed.). *The Family Educational Rights and Privacy Act (FERPA): A Legal Compendium* (2d ed., National Association of College and University Attorneys, 2002). Includes legislative and regulatory histories of FERPA, more than 30 of the most important technical assistance letters from the Education Department, and journal articles, outlines, memos, sample institutional policies and forms, and an annotated bibliography.
- O'Donnell, Margaret L. "FERPA: Only a Piece of the Puzzle," 29 *J. Coll. & Univ. Law* 679 (2003). Reviews two U.S. Supreme Court cases involving FERPA, and discusses how institutions of higher education might apply FERPA to digital records. Discusses a range of institutional options with respect to protecting the privacy of student records.
- Rosenzweig, Ethan M. "Please Don't Tell: The Question of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act," 51 *Emory L.J.* 447 (2002). Discusses the conflict between FERPA and the Campus Security Act; argues that student disciplinary processes and outcomes should be protected by FERPA; suggests strategies for accommodating the requirements of both laws.
- Sidbury, Benjamin F. "*Gonzaga University v. Doe* and Its Implications: No Right to Enforce Student Privacy Rights Under FERPA," 29 *J. Coll. & Univ. Law* 655 (2003).

Discusses the U.S. Supreme Court's *Gonzaga* case; addresses compliance with FERPA regulations, and reviews alternative remedies available to students for allegedly unauthorized release of student education records.

Tribbensee, Nancy. *The Family Educational Rights and Privacy Act: A General Overview* (National Association of College and University Attorneys, 2002). A brief review in question-and-answer format of the most common issues related to FERPA. Designed for faculty and staff with a limited knowledge of student records law. Includes discussion of directory information, which records are protected by FERPA, access to student records by faculty and campus officials, and disclosure of student education records.

# 10

## Rights and Responsibilities of Student Organizations and Their Members

### *Sec. 10.1. Student Organizations*

**10.1.1. The right to organize.** Student organizations provide college students with the opportunity to learn leadership skills, to supplement their formal education with extracurricular academic programming, and to pursue diverse nonacademic interests. While there are therefore many good reasons for institutions to support, and students to join, student organizations, it is also true—at least at public institutions—that students have a legal right to organize and join campus groups, and that administrators have a legal obligation to permit them to do so. Specifically, students in public postsecondary institutions have a general right to organize; to be recognized officially whenever the school has a policy of recognizing student groups;<sup>1</sup> and to use meeting rooms, bulletin boards, computer terminals, and similar facilities open to campus groups. Occasionally a state statute will accord students specific organizational rights (see *Student Ass’n. of the University of Wisconsin-Milwaukee v. Baum*, 246 N.W.2d 622 (Wis. 1976), discussed in Section 3.2.3). More generally, organizational rights are protected by the freedom of expression and freedom of association guarantees of the First Amendment. Public institutions retain authority, however, to withhold or revoke recognition in certain instances and to regulate evenhandedly the organizational use of campus facilities. While students at private institutions do not have a constitutional right to organize (see *Jackson v. Strayer College* at end of this subsection), many private institutions nevertheless provide organizational rights to

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<sup>1</sup>See the cases and authorities collected in Dag E. Ytreberg, Annot., “Student Organization Registration Statement, Filed with Public School or State University or College, as Open to Inspection by Public,” 37 A.L.R.3d 1311.



students through institutional regulations; in such circumstances, the private institution's administrators may choose to be guided by First Amendment principles, as set out below, in their relations with student organizations.

The balance between the organization's rights and the institution's authority was struck in *Healy v. James*, 408 U.S. 169 (1972), the leading case in the field.<sup>2</sup> *Healy* concerned a state college's denial of a student organization's request for recognition. The request for recognition as a local Students for a Democratic Society (SDS) organization had been approved by the student affairs committee at Central Connecticut State College, but the college's president denied recognition, asserting that the organization's philosophy was antithetical to the college's commitment to academic freedom and that the organization would be a disruptive influence on campus. The denial of recognition had the effect of prohibiting the student group from using campus meeting rooms and campus bulletin boards and placing announcements in the student newspaper. The U.S. Supreme Court found the president's reasons insufficient under the facts to justify the extreme effects of nonrecognition on the organization's ability to "remain a viable entity" on campus and "participate in the intellectual give and take of campus debate." The Court therefore overruled the president's decision and remanded the case to the lower court, ruling that the college had to recognize the student group if the lower court determined that the group was willing to abide by all reasonable campus rules.

The associational rights recognized in *Healy* are not limited to situations where recognition is the issue. In *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974), for instance, the plaintiff, Gay Students Organization (GSO), was an officially recognized campus organization. After it sponsored a dance on campus, the state governor criticized the university's policy regarding GSO; in reaction, the university announced that GSO could no longer hold social functions on campus. GSO filed suit, and the federal appeals court found that the university's new policy violated the students' freedom of association and expression.<sup>3</sup> *Healy* was the controlling precedent, even though GSO had not been denied recognition:

[T]he Court's analysis in *Healy* focused not on the technical point of recognition or nonrecognition, but on the practicalities of human interaction. While the Court concluded that the SDS members' right to further their personal beliefs

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<sup>2</sup>The later case of *Widmar v. Vincent*, discussed in subsection 10.1.5 below, affirms many of the principles of *Healy* and adds important new guidance on the particular question of when a student group may have access to meeting rooms and other campus facilities. See also *Gay Student Services v. Texas A&M University*, 737 F.2d 1317, 1331-33 (5th Cir. 1984), in which the court used *Widmar's* "public forum" analysis in invalidating the defendant's refusal to recognize the plaintiff groups; and *Rosenberger v. Rector and Visitors of the University of Virginia* (discussed in subsection 10.1.5), which extends *Widmar* to protection of student access to institutional funds available to student groups.

<sup>3</sup>Cases and authorities are collected in Jean F. Rydstrom, Annot., "Validity, Under First Amendment and 42 U.S.C. § 1983, of Public College or University's Refusal to Grant Formal Recognition to, or Permit Meetings of, Student Homosexual Organizations on Campus," 50 A.L.R. Fed. 516.

had been impermissibly burdened by nonrecognition, this conclusion stemmed from a finding that the “primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes.” The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activity, not the isolated and for the most part irrelevant issue of recognition per se [509 F.2d at 658–59].

*Healy* and related cases reveal three broad bases on which public institutions may decline to recognize, or limit the recognition of, particular student organizations without violating associational rights. *First*,

[A] college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students’ associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform to reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition [*Healy*, 408 U.S. at 193].

Such standards of conduct, of course, must not themselves violate the First Amendment or other constitutional safeguards. Recognition, for instance, could not be conditioned on the organization’s willingness to abide by a rule prohibiting all peaceful protest demonstrations on campus (see Section 9.5.3) or requiring all student-run newspaper articles to be approved in advance by the administration (see Section 10.3.3). But as long as campus rules avoid such pitfalls, student organizations must comply with them, just as individual students must. If the organization refuses to agree in advance to obey campus law, recognition may be denied until such time as the organization does agree. If a recognized organization violates campus law, its recognition may be suspended or withdrawn for a reasonable period of time.

*Second*, “[a]ssociational activities need not be tolerated where they . . . interrupt classes, or substantially interfere with the opportunity of other students to obtain an education” (*Healy*, 408 U.S. at 189). Thus, administrators may also deny recognition to a group that would create substantial disruption on campus, and they may revoke the recognition of a group that has created such disruption. In either case, the institution has the burden of demonstrating with reasonable certainty that substantial disruption will or did in fact result from the organization’s actions—a burden that the college failed to meet in *Healy*. This burden is a heavy one, because “denial of recognition [is] a form of prior restraint” of First Amendment rights (*Healy*, 408 U.S. at 184).

*Third*, the institution may act to prevent organizational activity that is itself illegal under local, state, or federal laws, as well as activity that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” (*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), quoted in *Healy*, 408 U.S. at 188). While the GSO case (above) specifically supported this basis

for regulation, the court found that the institution had not met its burden of demonstrating that the group's activities were illegal or inciting. A similar conclusion was reached in *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), reversing 416 F. Supp. 1350 (W.D. Mo. 1976). The trial court found, on the basis of the university's expert evidence, that recognition of the student group would lead to "increased homosexual activities, which . . . includes sodomy [as] one of the most prevalent forms of sexual expression in homosexuality." Relying on this finding and on the fact that sodomy is an illegal activity that can be prohibited, the trial court upheld the university's refusal to recognize the group. Overruling the trial court, the appellate court held that the university's proof was insufficient to demonstrate that the student organization intended to breach university regulations or advocate or incite imminent lawless acts. At most, the group intended peaceably to advocate the repeal of certain criminal laws—expression that constitutionally could not be prohibited. Thus, the appellate court concluded that the university's denial of recognition impermissibly penalized the group's members because of their status rather than their conduct. (To the same effect, see *Gay Activists Alliance v. Board of Regents of University of Oklahoma*, 638 P.2d 1116 (Okla. 1981); and see generally Note, "The Rights of Gay Student Organizations," 10 *J. Coll. & Univ. Law* 397 (1983–84).)

All rules and decisions regarding student organizations should be supportable on one or more of these three regulatory bases. Administrators should apply the rules evenhandedly, carefully avoiding selective applications to particular groups whose views or goals they find to be repugnant (see discussion immediately below). Decisions under the rules should be based on a sound factual assessment of the impact of the group's activity rather than on speculation or on what the U.S. Supreme Court has called "undifferentiated fear or apprehension" (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969)). Decisions denying organizational privileges should be preceded by "some reasonable opportunity for the organization to meet the University's contentions" or "to eliminate the basis of the denial" (*Wood v. Davison*, 351 F. Supp. 543, 548 (N.D. Ga. 1972)). If a student committee makes decisions about recognizing student organizations, or the student government devises regulations for its operations or those of recognized student organizations, they are subject to the same First Amendment restrictions as the institution itself (see the *Southworth* litigation discussed in subsection 10.1.3 below). Keeping these points in mind, administrators can retain substantial yet sensitive authority over the recognition of student groups.

If a public institution denies funding to a student group because of the views its members espouse, it is a clear violation of constitutional free speech protections, even if a student government committee rather than an institutional official makes the decision. In *Gay and Lesbian Students Ass'n. v. Gohn*, 850 F.2d 361 (8th Cir. 1988), a committee of the student senate denied funds to an organization that provided education about homosexuality. The court, noting that the administration had upheld the committee's denial of funding, said: "The University need not supply funds to student organizations; but once having

decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed” (850 F.2d at 362). After *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), these same general rules apply to an institution’s decisions regarding the funding of student religious organizations (see Section 10.1.5 of this book).

In a leading post-*Rosenberger* case, a federal appeals court invalidated the attempt of the Alabama legislature to deny funding to student organizations and other groups that advocate on behalf of homosexuality. In *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997), affirming *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548 (M.D. Ala. 1996), the Alabama law at issue prohibited colleges and universities from using “public funds or public facilities . . . to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws (Ala. Code § 16-1-28(a)). The law also declared that no student organization (or other campus group) that uses public funds or facilities “shall permit or encourage its members or encourage other persons to engage in any such unlawful acts or provide information or materials that explain how such acts may be engaged in or performed” (Ala. Code § 16-1-28(b)). Confronted with this law, the University of South Alabama denied funding for, and withheld recognition from, the Gay and Lesbian Bisexual Alliance (GLBA). The Alliance then sued the university’s president and dean of students as well as the state attorney general.

The federal district court held the entire law unconstitutional, despite subsection (c) of the law, which provided that the law “shall not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of this state.” Relying almost exclusively on the U.S. Supreme Court’s decision in *Rosenberger*, the court held the Alabama statute to be “naked viewpoint discrimination” that violated the free speech clause and emphasized that:

[a] viewpoint may include not only *what* a person says but *how* she says it. For example, as the defendants admitted at oral argument, the State does not seek to ban discussion about sexually transmitted diseases; rather, it only seeks to limit how such diseases may be discussed. In other words, the State seeks to impose its viewpoint on how the discussion may proceed [917 F. Supp. at 1554 (emphasis in the original)].

The district court was not persuaded by the state’s argument that it was simply deterring crime, that is, homosexual acts. Quoting from *Healy v. James* (above), which in turn quoted *Brandenburg v. Ohio* (above), the court ruled that the statute did not draw the required distinction between mere advocacy and incitement. (In a separate reported decision, *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558 (M.D. Ala. 1996), the district court reiterated and expounded upon its prior opinion and refused to limit its prior judgment or to stay the decision pending appeal.)

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court. Relying heavily on *Rosenberger*, the appellate court characterized the funding system for student organizations at the University of South Alabama (USA) as a limited public forum:

[The law] as applied to GLBA clearly runs afoul of . . . *Rosenberger*. USA's limited public forum does not prohibit discussion of the sodomy or sexual misconduct laws in general. Rather, based on [the law], USA prohibited funding to GLBA based on the Attorney General's unsupported assumption that GLBA fosters or promotes a violation of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination [110 F.3d at 1549].

Given their detailed application of *Rosenberger*, the opinions in *Gay Lesbian Bisexual Alliance* provide extensive guidance for both administrators and student groups. In particular, the opinions illustrate how the *Rosenberger* case joins with the *Healy* case to enhance the constitutional protection of student organizations at public postsecondary institutions. In light of this impact of *Rosenberger*, there is now an even stronger basis for the decisions in earlier cases such as the *GSO* case and the *Gay Lib* case above.

Although students at public colleges typically have a constitutionally protected right to organize, such is not the case for students at private colleges. In *Jackson v. Strayer College*, 941 F. Supp. 192 (D.D.C. 1996), *affirmed*, 1997 WL 411656 (D.C. Cir. 1997), for example, the court dismissed a student's constitutional claims based on allegations that the college had obstructed his efforts to form a student government. The court held that federal constitutional protections do not extend to the formation of a private college student government; in the absence of "state action" (see Section 1.5.2), the alleged actions of the college could not constitute a First Amendment violation. Furthermore, the court held that the student's First Amendment "peaceful assemblage" claim failed because the college's campus is private property upon which students have no constitutional right to assemble that they may assert against the college.

Some private institutions, however, are subject to state or local civil rights laws that may serve to prohibit various forms of discrimination against students. In such circumstances, student organizations in private institutions, or their members, may have some statutory protection for their right to organize. The case of *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987), illustrates such statutory protection and also examines the difficult freedom of religion issues that may arise when these statutory protections are asserted against religiously affiliated institutions.

In the *Gay Rights Coalition* case, two student gay rights groups sought official recognition from the university. The university refused, citing Catholic doctrine that condemns homosexuality. Denial of recognition meant that the groups could not use the university's facilities or its mailing and labeling services, could not have a mailbox in the student activities office, and could not request

university funds. The student group sued under a District of Columbia law (D.C. Code § 1-2520) that outlaws discrimination (in the form of denying access to facilities and services) on the basis of sexual orientation (among other characteristics). The university defended its actions on the grounds of free exercise of religion. The appellate court issued seven separate opinions, which—although none attracted a majority of the judges—reached a collective result of not requiring the university to recognize the groups but requiring it to give the group access to facilities, services, and funding.

By severing the recognition process from the granting of access to university facilities and funding, the court avoided addressing the university's constitutional claim with regard to recognition. In interpreting the D.C. statute, the court found no requirement that "one private actor . . . 'endorse' another" (536 A.2d at 5). For that reason, Georgetown's denial of recognition to the student groups did not violate the statute. But the statute did require equal treatment, according to the court. And, the court concluded, the District of Columbia's compelling interest in eradicating discrimination based on sexual preference outweighed any burden on the university's freedom of religion that providing equal access would impose. (For a critical analysis of this case and the conflicts it embodies, see F. N. Dutile, "God and Gays at Georgetown: Observations on *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*," 15 *J. Coll. & Univ. Law* 1 (1988).<sup>4</sup>)

**10.1.2. The right not to join, or associate, or subsidize.** The right-to-organize concept in subsection 10.1.1 above has a flip side. Students often are organized into large associations representing all students, all undergraduate students, all graduate students, or the students of a particular school (for example, the law school). Typically these associations are recognized by the institution as student governments. Mandatory student activities fees are often collected by the institution and channeled to the student government association. The student government may then allocate (or the institution may allocate) portions of the mandatory fee collections to other recognized student organizations that do not represent the student body but serve special purposes—for example, minority and foreign student associations, gay and lesbian student alliances, social action groups, sports clubs, academic interest

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<sup>4</sup>In the wake of the *Gay Rights Coalition* case, the U.S. Congress, which has legislative jurisdiction over the District of Columbia, passed The Nation's Capitol Religious Liberty and Academic Freedom Act, 102 Stat. 2269 (1988). The law provided that the District government would not receive further appropriations unless it adopted legislation authorizing religiously affiliated institutions to deny endorsement or benefits in a situation like that in the *Gay Rights Coalition* case. The constitutionality of the law was challenged by D.C. City Council members in *Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989). Although a panel of the appellate court affirmed a trial court's ruling that the law was an unconstitutional burden on the free speech of city council members (*Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989)), the full court vacated the panel opinion as moot in *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990) (*en banc*), because the appropriation act had expired. The next year's appropriations act did not contain a funding limitation because Congress used its power under the District of Columbia Self-Government and Governmental Reorganization Act (Pub. L. No. 93-198 (1973)) to amend the District of Columbia law directly to permit religious institutions to discriminate on the basis of sexual orientation.

societies (premed society, French club, and so forth), religious organizations, and student publications. In public colleges and universities, such arrangements may raise various issues under the First Amendment. Regarding student government associations, the primary focus of concern has been whether institutions may require that students be members of the association or that they pay the activities fee that supports the association. Regarding recognized special purpose organizations, the primary focus of concern has been whether the institution may require students to have any relationship with student organizations that they would prefer to avoid, and especially whether institutions may require students to pay the portions of their activities fees that are allocated to particular organizations if the students object to the views that the organization espouses. The issues regarding mandatory fee allocations for student organizations are discussed in subsections 10.1.3 and 10.1.5 below, and issues regarding mandatory fee allocations for student publications are discussed in Section 10.3.2.

An early case, *Good v. Associated Students of the Univ. of Washington*, 542 P.2d 762 (Wash. 1975), distinguished between a university's requirement that students be *members* of the student government and a requirement that students pay a mandatory student activities fee that supports the student government. The student government in the *Good* case, the Associated Students of the University of Washington (ASUW), was a nonprofit organization representing all of the university's students. The university required all students to be members. The court held that this requirement violated the First Amendment freedom of association (see Section 10.1.1 above) because "[f]reedom to associate carries with it a corresponding right to not associate." According to the court:

[W]e have no hesitancy in holding that the state, through the university, may not compel membership in an association, such as the ASUW, which purports to represent all the students at the university. . . . [The ASUW] expends funds for political and economic causes to which the dissenters object and promotes and espouses political, social and economic philosophies which the dissenters find repugnant to their own views. There is no room in the First Amendment for such absolute compulsory support, advocacy and representation. . . . Thus we hold that the university may not mandate membership of a student in the ASUW [542 P.2d at 768].

The mandatory fee requirement, however, was not unconstitutional; the university could collect, and the ASUW could use, the mandatory fees so long as the ASUW did not "become the vehicle for the promotion of one particular viewpoint, political, social, economic or religious" (542 P.2d at 769).

Since the *Good* case, it has been generally accepted that public institutions may not require students to be members of the student government association or any other student extracurricular organization (see, for example, *Carroll v. Blinken*, 957 F.2d 991, 1003 (2d Cir. 1992)). But for many years there were continuing disputes and uncertainties concerning mandatory student fee systems until the U.S. Supreme Court finally ruled on the matter in 2000, as discussed in the next subsection.

**10.1.3. Mandatory student activities fees.** Throughout the 1970s, 1980s, and 1990s, the state courts and lower federal courts decided numerous cases on mandatory student activities fees in public colleges and universities. These cases presented a variety of constitutional challenges to entire systems for funding student organizations (see, for example, *Smith v. Regents of the Univ. of California*, 844 P.2d 500 (Cal. 1993)), to the use of mandatory fees by student governments (see, for example, *Smith v. Regents of the Univ. of California*, 65 Cal. Rptr. 2d 813 (Cal. Ct. App. 1997)), and to the allocations of fees to particular student organizations (see, for example, *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999)). Other cases presented statutory challenges to public institutions' authority regarding particular aspects of student fee systems (see *Cortes v. State of Florida, Board of Regents*, 655 So. 2d 132 (Fla. Dist. Ct. App. 1995); *Smith v. Regents of the Univ. of California* (above), 844 P.2d at 851)). At least one case, *Associated Students of the Univ. of California at Riverside v. Regents of the Univ. of California*, 1999 WL 13711 (N.D. Cal 1999), turned the issues around—presenting a challenge by students who favored, rather than opposed, mandatory student fees, but who objected to a particular limitation on the use of the fees.

Finally, after such cases had bounced around the lower courts for many years, the constitutionality of mandatory student activities fees finally reached the U.S. Supreme Court in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The Court's ruling in *Southworth*, and a follow-up ruling by the U.S. Court of Appeals on remand (*Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002)), serve to resolve most of the inconsistencies among lower court opinions and to establish a single analytical approach for freedom of speech and freedom of association issues concerning public institutions' imposition of mandatory student fees.

The *Southworth* case was brought by a group of students at the Madison campus who objected to the university's collection and allocation of mandatory fees, insofar as the fees were allocated to student organizations that expressed "political and ideological" views with which the objecting students disagreed. The student plaintiffs claimed that this use of the fees violated their First Amendment right to be free from governmental compulsion to support speech conflicting with their personal views and beliefs. When the case reached the U.S. Supreme Court, it upheld the university's authority to allocate the mandatory fees to student organizations for the "purpose of facilitating the free and open exchange of ideas by, and among, its students." At the same time, the Court recognized that objecting students have a right to "certain safeguards with respect to the expressive activities which they are required to support" (529 U.S. at 229). The primary requirement that a university must meet to assure that its fee system facilitates "free and open exchange of ideas," and the primary safeguard for objecting students, is "viewpoint neutrality"—a concept that the Court had relied on in its earlier *Rosenberger* ruling (see Section 10.1.5 below) and that it expanded upon in *Southworth*. Thus, the *Southworth* case establishes the "viewpoint neutrality principle" as the primary criterion to use in evaluating



the constitutionality of a public institution's mandatory fee system under the free speech clause.

Under the University of Wisconsin fee system challenged in *Southworth*, 20 percent of mandatory student fee collections went to registered student organizations (RSOs). The other 80 percent of student fees, not at issue in the case, were used for expenses such as student health services, intramural sports, and the maintenance and repair of student union facilities. Student fees were collected annually, and there was no opt-out provision by which students could decline to support certain RSOs and receive a pro rata refund of their fees. The collected fees were allocated to RSOs (of which there were more than six hundred at the time of the litigation) on the basis of applications from those RSOs requesting funding. Decisions on applications for funding were made by the student government, the Associated Students of Madison (ASM), through two of its committees, or by a student referendum in which the entire student body voted to fund or defund a particular RSO. Decisions to allocate funds were presented to the chancellor and the board of regents for final approval. RSOs generally received funding on a reimbursement basis, with reimbursement primarily paying for the organization's operating costs, the costs of sponsoring events, and travel expenses. According to university policy, reimbursements were not made for lobbying activities or for gifts or donations to other organizations; and RSOs with a primarily political mission could not be funded. The student plaintiffs in *Southworth* objected to the allocations to eighteen of the funded RSOs. These organizations included WISPIRG; the Lesbian, Gay Bisexual Campus Center; the UW Greens; Amnesty International; and La Colectiva Cultural de Aztlan.

Relying on *Abood v. Detroit Bd. of Education.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), the U.S. District Court upheld the students' claim that the university's program violated their rights to free speech and association, and enjoined the board of regents from using its mandatory fee system to fund any RSO that engaged in ideological or political advocacy. The Seventh Circuit U.S. Court of Appeals affirmed in part, reversed in part, and vacated in part. Affirming the district court's reliance on *Abood* and *Keller*, the Seventh Circuit extended the analysis to include a three-part test articulated in *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), a case concerning the expenditure of mandatory union dues in violation of the faculty members' First Amendment rights (see Section 4.5.3). Applying the *Lehnert* test, the appellate court determined that the educational benefits of the mandatory fee system did not justify the significant burden that the system placed on the free speech rights of the objecting students (*Southworth v. Grebe*, 151 F.3d 717, 732–33 (1998)). The U.S. Supreme Court then reversed the Seventh Circuit and remanded the case to the lower courts for further proceedings. Rather than applying the three-part test from the *Lehnert* case, the Court determined that the operation of the fee system was closely analogous to a public forum (see Section 9.5.2) and that the "standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling."

Under the viewpoint neutrality standard, according to the U.S. Supreme Court, the university could allocate mandatory fee funds to RSOs via the student

government and its committees so long as “viewpoint neutrality [is] the operational principle.” But the university could not distribute these funds via a student referendum. “[I]t is unclear . . . what protection, if any, there is for viewpoint neutrality in [the referendum] process. . . . The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views” (529 U.S. at 235). The student referendum aspect of the program for funding speech and expressive activities thus “appears to be inconsistent with the viewpoint neutrality requirement” (529 U.S. at 230).

The university could include an “opt-out” or refund mechanism in its fee system if it wished. But it was not constitutionally obligated to do so. “The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk” (529 U.S. at 232).

Because the plaintiffs and the university had stipulated early in the litigation that the student government and its committees operated in a viewpoint-neutral manner when allocating funds to RSOs, the Court did not need to make its own determination on this key issue. But the Court did remand the case to the court of appeals for “re-examin[ation] in light of the principles we have discussed,” and the court of appeals in turn remanded the case to the district court. After remand, the student plaintiffs moved to void their stipulation that the mandatory fee funds were allocated on a viewpoint-neutral basis, and the district court granted the motion. That court did not reexamine the referendum process, however, since the university had eliminated this method of funding RSOs and the issue therefore was moot. The district court then reexamined the university’s mandatory fee system to determine if it was viewpoint neutral, concluding that it was not because “the absence of express objective standards vests unfettered and unbridled discretion in the program decisionmakers . . .” (*Fry v. Board of Regents of Univ. of Wisconsin System*, 132 F. Supp. 2d 744 (W.D. Wis. 2000)). To allow the university time to revise its allocation procedures and policies to create “express objective standards” for making fee allocations, the district court deferred its judgment for two months.

The university administration, in conjunction with student government committees, then established criteria and procedures for students’ use in allocating funds and granting reimbursements in a viewpoint-neutral manner. The student government bylaws were amended to include a provision entitled “Viewpoint Neutrality Compliance,” which set procedures and guiding principles for student officers to follow and required student officers to take an oath to uphold the principle of viewpoint neutrality. An appellate process was also established by which an RSO could appeal a funding decision to the student judiciary and/or the chancellor and board of regents. This appellate process included procedural safeguards such as adequate and public notice and hearings on the record. While these changes to the mandatory fee system were substantial, the district court, upon further review, decided that the student government still retained too much discretion in allocating fees and enjoined the university from collecting fees from objecting students to support RSO expressive activities to which the students objected.

On appeal to the Seventh Circuit, the parties did not contest the referendum provision, since the university had deleted that method of funding from its fee allocation system. The appellate court did note in passing, however, that the “student referendum mechanism” was “constitutionally deficient” (307 F.3d at 594). The primary issue on appeal was “whether the unbridled discretion standard” that the district court relied on “is part of the constitutional requirement of viewpoint neutrality” (307 F.3d at 578). The appellate court sought to untangle the relationship between the viewpoint neutrality principle that the U.S. Supreme Court had applied in its *Southworth* decision and the “no unbridled discretion” principle that the Court had applied in earlier cases challenging governmental denials of a license or permit to speak in a public forum. It determined that the two standards were linked:

While the Supreme Court has never expressly held that the prohibition on unbridled discretion is an element of viewpoint neutrality, we believe that conclusion inevitably flows from the Court’s unbridled discretion cases. From the earliest unbridled discretion cases . . . , the Supreme Court has made clear that when a decisionmaker has unbridled discretion there are two risks: First, the risk of self-censorship, where the plaintiff may edit his own viewpoint or the content of his speech to avoid governmental censorship; and second, the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content, and that without standards to guide the official’s decision an as-applied challenge will be ineffective to ferret out viewpoint discrimination. Both of these risks threaten viewpoint neutrality [307 F.3d at 578–79].

The appellate court thus held that “the prohibition against unbridled discretion is a component [or a ‘corollary’] of the viewpoint-neutrality requirement,” and “the unbridled discretion standard appropriately applies to the University’s mandatory fee system” (307 F.3d at 579–80).

Having established this framework for analysis, the appellate court then addressed the central issue in the case: “whether the University’s mandatory fee system does in fact vest the student government with unbridled discretion” and thus fails the viewpoint neutrality requirement. In resolving this issue, the appellate court reviewed every aspect of the university’s mandatory student fee allocation system, especially the various provisions the university had added to its policies after the district court had ruled, after trial, that the policies then in effect did not meet the constitutional requirements. In its thorough and detailed review of the university’s revised policies (307 F.3d at 581–88), the appellate court considered the university’s financial and administrative policies, as amended after the trial; the student government’s bylaws pertaining to mandatory student fee allocations for RSOs, as amended; and the rules of the student government’s finance committee, as amended. The court considered the principles embodied in these various documents, the criteria for allocating funds set forth in the documents, and the various procedures that they establish for applying for and challenging fund allocations. Grouping the various principles, criteria, and procedures together under the heading “Funding Standards,” the court determined that they

“greatly limit[ed] the discretion” of the student government and its committees in allocating the fees. The court took particular note of these features of the university’s and student government’s policies: (1) there were specific explicit statements requiring all persons involved in funding decisions to comply with the viewpoint neutrality requirement; (2) there was a requirement that every student involved in allocation decisions take an oath to support the viewpoint neutrality requirement, and there were provisions for removing from office any student who failed to do so; (3) there were “specific, narrowly drawn and clear criteria to guide the student government in their funding decisions”; (4) there were “detailed procedural requirements for the hearings” on funding applications; (5) there was a policy of full disclosure regarding all funding applications and the student government’s decisions on these applications; and (6) there was a “comprehensive appeals process” by which any student organization that was denied funding, or any student who objected to a funding decision, could appeal the decision to the student council and then to the chancellor for the campus, whenever “it is alleged that the decision was based on an organization’s extracurricular speech or expressive activities” (307 F.3d at 582). The court also highlighted “one particular aspect” of this appeal process:

In reviewing funding decisions, the appeals procedures require the Student Council to compare the grant amounts [the student government committees] allocated to various RSOs to determine whether similar RSO’s applications were treated equally. By comparing the funding decisions, the Student Council can determine whether the student government, while purporting to apply the Funding Standards in a viewpoint-neutral way, nonetheless treated similar RSOs with varying viewpoints differently. The Student Council can then rectify any differing treatment on appeal [307 F.3d at 588].

On the basis of this review, the court agreed with the university that the funding standards satisfied the constitutional requirements:

In conclusion, in addition to expressly prohibiting viewpoint discrimination, requiring student officials to attest to their commitment to viewpoint neutrality, and providing for sanctions against student officials who engage in viewpoint discrimination, the Funding Standards provide narrowly drawn, detailed, and specific guidelines directing the SSFC [Student Service Finance Committee] and ASM Finance Committee’s funding decisions as to all funding decisions other than travel grants. The SSFC and ASM Finance Committee’s discretion is further limited by the procedural rules governing the funding and appeals process. While the Funding Standards grant a certain amount of discretion, that discretion is no greater than necessary to allow the student government to evaluate the funding requests. Accordingly, we conclude that these Funding Standards sufficiently bridled the SSFC and ASM Finance Committee’s discretion to satisfy the First Amendment’s mandate of viewpoint neutrality and the prohibition on granting decisionmakers unbridled discretion . . . [307 F.3d at 592].

The court identified two exceptions, however, to this broad ruling supporting the university’s funding standards and also issued two cautions about the

scope of its ruling. The first exception concerned the criteria used by the ASM finance committee, which was responsible for awarding three types of grants to RSOs: events grants, operations grants, and travel grants. At the time of the trial, the university had provided the court with the criteria for awarding the events grants and the operations grants but did not provide any criteria for the travel grants. Absent any clear and specific criteria, such as those for the events and operations grants, the travel grant portion of the mandatory fee allocation system gave unbridled discretion to the ASM finance committee that awarded the grants. The student government therefore could not award the travel grants until such time as it had implemented constitutionally suitable criteria.

The second exception to the court's broad approval concerned two of the criteria that the student government committees used to allocate funds: a criterion providing for consideration of "the length of time that an RSO has been in existence," and a criterion providing for consideration of "the amount of funding the RSO received in prior years." These criteria were not viewpoint neutral, said the court, for two reasons (see 307 F.3d at 593–94). *First*, to the extent that current funding decisions are based on the length of time an RSO has been in existence, or the amount of funding that the RSO has received in the past, these current decisions could depend in part on "viewpoint-based decisions of the past." *Second*, considering the length of time in existence or the amount of prior funding serves to favor "historically popular viewpoints" and to disadvantage nontraditional or minority viewpoints. Therefore, as to these two criteria, the court concluded that they "are related to the content or viewpoint of the applying RSO, as well as based on a prior system which lacks the constitutional safeguard of viewpoint neutrality."

The first of the court's two cautions concerns another criterion for awarding mandatory fees: a criterion permitting the funding committees to consider the number of students participating in or benefiting from the speech activities for which funding is sought. Although the court acknowledged that there are various content-neutral reasons for considering such information, it cautioned that such information could also permit the committees to "use the popularity of the speech as a factor in determining funding," thus providing an advantage to majority viewpoints at the expense of minority viewpoints. Since this criterion could be applied in permissible content-neutral ways, it was not "facially invalid," but the court warned that "improper consideration of the popularity of the speech may justify an as-applied challenge" in some circumstances (307 F.3d at 595).

The court's second caution also concerned possible "as-applied" challenges to the university's funding standards. The court held that, on their face, the funding standards satisfied viewpoint neutrality and were thus "facially" constitutional. But such a ruling does not necessarily validate all applications of the funding standards to particular situations. Thus the court cautioned, at various points in its opinion, that the funding standards might be applied to particular circumstances in ways that contravene the requirements of viewpoint neutrality; and that, in such situations, the funding standards would be subject to "as-applied" challenges either through the university's own internal appeal process or through the courts.

When the Supreme Court's *Southworth* decision is put together with the Seventh Circuit's further elaboration, and these cases are viewed against the backdrop provided by the earlier *Rosenberger* case (see subsection 10.1.5 below) and by the public forum cases (see Section 9.5.2), the result is a much clearer picture of this area of the law than has ever existed previously. This picture reveals the following guidelines that public institutions may use to help assure that their systems for allocating mandatory student activities fees to student organizations are constitutional under the First Amendment:

1. The fee allocation system should be designed and used to “facilitate a wide range of [student extracurricular] speech” and a “free and open exchange of ideas by, and among, [the institution’s] students” (*Southworth*, 529 U.S. at 231, 229).
2. The fee allocation system, on paper and in operation, must comply with the “principle of viewpoint neutrality” (529 U.S. at 233–34) and the corollary principle of “no unbridled discretion” (307 F.3d at 575–81). These principles, at a minimum, require that the institution “may not prefer some [student] viewpoints over others” and must assure that “minority views are treated with the same respect as are majority views” (529 U.S. at 233, 235). As a safeguard for this required neutrality, the institution should have “specific, narrowly drawn, and clear criteria to guide the student government in their funding decisions” (307 F.3d at 588).
3. The institution should have an express written requirement that all mandatory student fee allocations to student organizations are subject to the viewpoint neutrality principle and that all student decision makers are bound to uphold this principle (307 F.3d at 581, 583). In conjunction with this requirement, the institution should implement various procedures to assure that the viewpoint neutrality principles will be met in practice. One procedural safeguard meriting particular attention is a requirement that the decision makers who allocate the funds, or those who review their decisions, must compare the amounts allocated to particular student organizations (307 F.3d at 588).
4. Institutions should be wary of using funding criteria that require or permit consideration of the number of prior years in which a student organization has received fee allocations, the amounts of funds an organization has received in the past, the size of the organization’s membership, or the number of nonmembers who have attended or are expected to attend the organization’s speech-related activities. If any such criteria are used, they must be carefully limited to content-neutral considerations (for example, considering the size of the organization’s membership or the size of the audience for an event in order to estimate the expenses of setting up and maintaining the type of room or facility needed for the organization’s meetings or events). Any such criteria should also be used in ways that do not give an advantage to

popular, traditional, or majoritarian viewpoints at the expense of controversial, nontraditional, or minority viewpoints (307 F.3d at 592–95).

5. A student referendum may not be used to make funding decisions regarding particular student groups—at least not when the referendum would “substitute[ ] majority determinations for viewpoint neutrality” and thus allow “majority views” to be “treated” with more “respect” than “minority views.” A mandatory fee allocation, in other words, cannot “depend upon majoritarian consent” (529 U.S. at 235).
6. An institution may choose to include in its fee allocation system an opt-out provision or refund mechanism to protect objecting students, but the Constitution does not require the inclusion of such a mechanism (529 U.S. at 235).
7. An institution may choose to distinguish between the on-campus and off-campus expressive activities of student organizations in its fee allocation system, but it may do so only if it implements the distinction through “viewpoint neutral rules.” The Constitution, however, does not require that the institution adopt any “territorial boundaries” for student speech activities or impose any “geographic or spatial restrictions” on student organizations’ “entitlement” to a fee allocation (529 U.S. at 234). (For pre-*Southworth* cases about off-campus student speech, see *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) and 42 F.3d 122 (2d Cir. 1994); and *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999).)

**10.1.4. Principle of nondiscrimination.** While the law prohibits administrators from imposing certain restrictions on student organizations (as subsections 10.1.1–10.1.3 above indicate), there are other restrictions that administrators may be required to impose. The primary example concerns discrimination, particularly on the basis of race or sex. Just as institutions are usually prohibited from discriminating on these grounds, their student organizations are usually prohibited from doing so as well. Thus, institutions generally have an obligation either to prohibit race and sex discrimination by student organizations or to withhold institutional support from those that do discriminate.

In public institutions, student organizations may be subject to constitutional equal protection principles under the federal Fourteenth Amendment or comparable state constitutional provisions if they act as agents of the institution or are otherwise controlled by or receive substantial encouragement from the institution (see generally Section 1.5.2). In *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (also discussed in Section 10.3.3), for example, a minority-oriented student newspaper allegedly had a segregationist editorial policy and had discriminated by race in staffing and in accepting advertising. Although the court prohibited the university president from permanently cutting off the paper’s funds, because of the restraining effect of such a cut-off on free press, it did hold that the president could and must prohibit the discrimination in staffing and advertising: “The equal protection clause forbids racial discrimination in

extracurricular activities of a state-supported institution . . . and freedom of the press furnishes no shield for discrimination” (477 F.2d at 463).

*Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (*en banc*), presents a more complex illustration of the equal protection clause’s application and a possible affirmative action justification for some racial classifications. The case concerned certain rules of student organizations at the University of North Carolina. The Campus Governing Council, the legislative branch of the student government, was required under its constitution to have at least two minority students, two males, and two females among its eighteen members. The student Honor Court, under its rules, permitted defendants to demand that a majority of the judges hearing the case be of the same race (or the same sex) as the defendant. Eschewing the need for any extended analysis, the appellate court at first invalidated each of the provisions as race discrimination: “Without either reasonable basis or compelling interest, the composition of the council is formulated on the basis of race. This form of constituency blatantly fouls the letter and the spirit of both [Title VI] and the Fourteenth Amendment” (*Uzzell v. Friday*, 547 F.2d 801 (4th Cir. 1977)). (The sex discrimination aspects of the provisions were not challenged by the plaintiff students or addressed by the court.) In *Friday v. Uzzell*, 438 U.S. 912 (1978), the U.S. Supreme Court, seeing possible affirmative action issues underlying this use of racial considerations, vacated the appellate court’s judgment and remanded the case for further consideration in light of the *Bakke* decision (discussed in Section 8.2.5).<sup>5</sup> The appeals court then reconsidered its earlier decision and, by a vote of 4 to 3, again invalidated the rules (*Uzzell v. Friday*, 591 F.2d 997 (4th Cir. 1979) (*en banc*)):

The permeating defect in the organization of . . . the governing council is the imposition of an artificial racial structure upon this elective body that bars non-minority students from eligibility for appointment to the Council. This resort to race affronts *Bakke*. Although the regulation in question seeks to provide “protective representation,” its effect is to establish a racial classification, as it relies exclusively on race to preclude non-minority students from enjoying opportunities and benefits available to others [591 F.2d at 998].

The minority, reading *Bakke* more liberally, argued that more facts were necessary before the court could ascertain whether the student government rules were invalid race discrimination, on the one hand, or valid affirmative action, on the other. They therefore asserted that the case should be returned to the district court for a full trial:

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<sup>5</sup>For another example of race classifications that institutions may seek to justify by invoking affirmative action considerations, see Wendy Hernandez, “The Constitutionality of Racially Restrictive Organizations Within the University Setting,” 21 *J. Coll. & Univ. Law* 429, 434–43 (1994); and Ben Gose, “A Place of Their Own,” *Chron. Higher Educ.*, December 8, 1995, A33. These articles address the issue of minority student organizations (or living accommodations groups) that restrict membership (or entrance to living accommodations) on the basis of race or ethnicity. As noted in the next footnote below in this subsection, such issues would now be governed by the *Grutter* and *Gratz* cases rather than *Bakke*.



The present record simply does not permit a firm conclusion as to the extent of discrimination at the University of North Carolina and the need for and efficacy of the present regulations. The majority's condemnation of the regulations because they impinge upon the rights of others is simplistic. *Bakke* teaches that as a necessary remedial measure a victimized group may be preferred at the expense of other innocent persons. What cries out for determination in the instant case is whether such preferment is justified under the principles of *Bakke* [591 F.2d at 1001].

In June 1980, the Fourth Circuit recalled its 1979 decision because the *en banc* court that had heard the appeal was improperly constituted: a senior judge sat as a member of the panel—a violation of a federal statute (28 U.S.C. § 46) requiring that an *en banc* panel consist only of active circuit court judges. The new rehearing *en banc* placed the matter before the appeals court for the third time (*Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (*en banc*)). On this occasion the court ruled 5 to 3 to remand the case to the district court for a full development of the record and reconsideration in light of *Bakke*. In so ruling, the court expressly adopted the views of the dissenting judges in the 1979 decision. The majority indicated that race-conscious actions that impinge on one class of persons in order to ameliorate past discrimination against another class are not unlawful per se, and that “the university should have the opportunity to justify its regulations so that the district court can apply the *Bakke* test: is the classification necessary to the accomplishment of a constitutionally permissible purpose?”<sup>6</sup>

Federal civil rights laws (see Section 13.5 of this book) may require private as well as public institutions to ensure, as a condition of receiving federal funds, that student organizations do not discriminate. The Title VI regulations (see Section 13.5.2 of this book) contain several provisions broad enough to cover student organizations; in particular, 34 C.F.R. § 100.3(b)(1) prohibits institutions from discriminating by race, either “directly or through contractual or other arrangements,” and 34 C.F.R. § 100.3(b)(4) prohibits institutions from discriminating by race in the provision of services or benefits that are offered “in or through a facility” constructed or operated in whole or part with federal funds. And the Title IX regulations (Section 13.5.3) prohibit institutions from “providing significant assistance” to any organization “which discriminates on the basis of sex in providing any aid, benefit, or service to students” (34 C.F.R. § 106.31(b)(6); see also § 106.6(c)). Title IX does not apply, however, to the membership practices of tax-exempt social fraternities and sororities (20 U.S.C. § 1681(a)6(A)). And more generally, under the Civil Rights Restoration Act (discussed in Section 13.5.7.4), all “programs” and “activities” of an institution

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<sup>6</sup>Were similar issues to arise again in the future, the U.S. Supreme Court's decisions in *Grutter* and *Gratz*, the University of Michigan affirmative action cases discussed in Sections 8.2.5 and 8.3.4, would also become pertinent. Under these cases, strict scrutiny would still be the applicable standard of review. Under this standard, remedying the present effects of the institution's prior discrimination would be a compelling state interest, but considerable proof of the prior discrimination and its present effects would be required in order to rely on this justification.

receiving federal funds are subject to the nondiscrimination requirements of the civil rights statutes.

State statutes and regulations may also provide protection against discrimination by student organizations at both public and private institutions. In *Frank v. Ivy Club*, 576 A.2d 241 (N.J. 1990), for example, the court was asked to determine whether two private “eating clubs” affiliated with Princeton University, which at the time admitted only men to membership, were subject to a state law prohibiting nondiscrimination in places of public accommodation. The case began when Sally Frank, then an undergraduate at Princeton, filed a charge with the New Jersey Division on Civil Rights (the state’s human rights agency), asserting that she was denied membership in the clubs on the basis of her gender, and that this denial constituted unlawful discrimination by a place of public accommodation. She claimed that the university was responsible for supervising the clubs and therefore was partially responsible for their discriminatory activities. The university (and the clubs) contended that the clubs were private organizations not formally affiliated with the university. The Division on Civil Rights determined that the clubs were places of public accommodation and thus subject to the nondiscrimination requirements of state law. It also ruled that the clubs enjoyed a “symbiotic relationship” with the university, since the university had assisted them in their business affairs, a majority of upper-division Princeton students took their meals at the clubs (relieving the university of the responsibility of providing meals for them), and the clubs would not have come into being without the existence of the university. From these findings, the Division on Civil Rights concluded that probable cause existed to believe that the clubs had unlawfully discriminated against Frank on the basis of her gender.

After several appeals to intermediate courts and other procedural wrangling, the New Jersey Supreme Court affirmed the Division on Civil Rights’ jurisdiction over the case and accepted its findings and conclusions that the clubs must cease their discriminatory membership practices. The court reasoned that:

[w]here a place of public accommodation [the university] and an organization that deems itself private [the clubs] share a symbiotic relationship, particularly where the allegedly “private” entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination [576 A.2d at 257].<sup>7</sup>

In light of such constitutional and regulatory requirements, it is clear that administrators cannot ignore alleged discrimination by student organizations. In some areas of concern, race and sex discrimination being the primary

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<sup>7</sup>While the state court proceedings were in progress, one of the clubs filed a claim in federal court, asserting that the state civil rights agency’s assertion of jurisdiction over its activities violated its freedom of association under the First Amendment of the U.S. Constitution. A federal appellate court affirmed a trial court’s finding that the club’s federal claims were not moot and could be litigated in federal court (*Ivy Club v. Edwards*, 943 F.2d 270 (3d Cir. 1991)).

examples, institutions' obligations to prohibit such discrimination are relatively clear. In other areas of concern, however, the law is either more sparse or less clear regarding the institution's obligations to prohibit discrimination. Religious discrimination and sexual orientation discrimination by student organizations are the primary contemporary examples. (See generally Burton Bollag, "Choosing Their Flock," *Chron. Higher Educ.*, January 28, 2005, A33.) The federal civil rights statutes (above), for instance, do not cover either of these types of discrimination, and federal constitutional law provides a lower standard of scrutiny for sexual orientation discrimination than for race or gender discrimination (see *Romer v. Evans*, 517 U.S. 620 (1996)).

Regarding religious discrimination, at least in public institutions, the First Amendment's free exercise clause actually provides a zone of protection for student organizations that have religious qualifications, based on sincere religious belief, for leadership positions, membership, or other prerogatives (see generally Section 1.6 of this book). The freedom of expressive association implicit in the First Amendment may also provide some protection for such student organizations (see *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)). Regarding sexual orientation discrimination, the free exercise clause may also provide some protection for student organizations that discriminate on the basis of sexual orientation if they do so based upon sincerely held religious beliefs; and the First Amendment freedom of association, as applied in the *Dale* case (above), may provide some protection to organizations discriminating by sexual orientation even when their policy is not based on religious belief. These developments do not mean that public institutions must forgo all regulation or oversight of religious or sexual orientation discrimination based on religious belief or expressive association, but they do mean that administrators should exercise particular care in this sensitive arena and involve counsel in all aspects of these matters. (For a review of litigation emerging in 2005, see Sara Lipka, "Arizona State U. Settles Lawsuit by Agreeing to Allow Christian Group to Bar Members on Sexual Grounds," *Chron. Higher Educ.*, September 16, 2005, A42; Elizabeth Farrell, "Federal Appeals Court Orders Illinois University to Recognize Christian Group, Pending Ruling," *Chron. Higher Educ.*, September 9, 2005, A36; and for periodically updated information on litigation, go to <http://www.clsnet.org>, and click on The Center.)

**10.1.5. Religious activities.** Numerous legal issues may arise concerning student organizations that engage in religious activities or have a religious purpose or a religious affiliation. The most significant issues usually arise under the free speech, free exercise, or establishment clauses of the First Amendment, or under parallel provisions of state constitutions, and are therefore of primary concern to public institutions. This subsection addresses constitutional problems concerning religious student organizations' use of campus facilities and receipt of student activities fee allocations. Subsection 10.1.4 above addresses student organizations' restrictive membership policies.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), a case involving the University of Missouri-Kansas City (UMKC), the U.S. Supreme Court established important

rights for student religious groups at public postsecondary institutions that seek to use the institution's facilities. In 1972, the Board of Curators of UMKC promulgated a regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." In 1977, UMKC applied this regulation to a student religious group called Cornerstone. This group was "an organization of evangelical Christian students from various denominational backgrounds. . . . [It] held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences" (454 U.S. at 265, n.2). When UMKC denied Cornerstone permission to continue meeting in university facilities, eleven members of the organization sued the university, alleging that it had abridged their rights to free exercise of religion and freedom of speech under the First Amendment.

For the Supreme Court, as for the lower courts, the threshold question was whether the case would be treated as a free speech case. In considering this question, Justice Powell's opinion for the Court (with Justice White dissenting) characterized the students' activities as "religious speech," which, like other speech, is protected by the free speech clause. The university, by making its facilities generally available to student organizations, had created a "forum" open to speech activities, which the Court described both as a "limited public forum" and an "open forum." The free speech clause therefore applied to the situation. This clause did not require UMKC to establish a forum; but once UMKC had done so, the clause required it to justify any exclusion of a student group from this forum because of the content of its activities:

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the university must satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end [454 U.S. at 269-70].

In attempting to justify its regulation under this standard, UMKC relied on the First Amendment's establishment clause and on the establishment clause in the Missouri state constitution. Its argument was that maintaining separation of church and state, as mandated by these clauses, was a "compelling state interest," which justified its no-religious-worship regulation under the free speech clause. Resorting to establishment clause jurisprudence, the Court rejected this argument. Although the Court agreed that maintaining separation of church and state was a compelling interest, it did not believe that an equal access policy violated the establishment clause. The Court relied on the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not

foster an excessive government entanglement with religion.” Applying the test, the Court reasoned:

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the “primary effect” of advancing religion.

The University’s argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech (see *Healy v. James*, 408 U.S. 169 . . . (1972)). In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum’s likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization’s enjoyment of merely “incidental” benefits does not violate the prohibition against the “primary advancement” of religion [citations omitted].

We are satisfied that any religious benefits of an open forum at UMKC would be “incidental” within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the court of appeals quite aptly stated, such a policy “would no more commit the University . . . to religious goals” than it is “now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,” or any other group eligible to use its facilities (*Chess v. Widmar*, 635 F.2d at 1317).

Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect [citations omitted]. If the Establishment Clause barred the extension of general benefits to religious groups, “a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair” (*Roemer v. Maryland Public Works Board*, 426 U.S. 736, 747 . . . (1976) (plurality opinion)). . . . At least in the absence of empirical evidence that religious groups will dominate UMKC’s open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum’s “primary effect” [454 U.S. at 271–75].

With regard to the university’s argument that its interest in enforcing the Missouri constitution’s prohibition against public support for religious activities outweighed the students’ free speech claim, the Court stated:

Our cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content (see, for example, *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 . . . (1972)). On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the establishment clause of the Federal Constitution—is limited by the Free Exercise Clause and in this

case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech [454 U.S. at 276].

Since UMKC could not justify its content-based restriction on access to the forum it had created, the Court declared the university's regulation unconstitutional. The plaintiff students thereby obtained the right to have their religious group hold its meetings in campus facilities generally open to student groups. It follows that other student religious groups at other public postsecondary institutions have the same right to use campus facilities; institutions may not exclude them, whether by written policy or otherwise, on the basis of the religious content of their activities.<sup>8</sup>

*Widmar* has substantial relevance for public institutions, most of which have created forums similar to the forum at UMKC. The opinion falls far short, however, of requiring institutions to relinquish all authority over student religious groups. There are substantial limits to the opinion's reach:

1. *Widmar* does not require (nor does it permit) institutions to create forums especially for religious groups, or to give them any other preferential treatment. As the Court noted, "Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups but not by others" (454 U.S. at 271, n.10; see also 454 U.S. at 273, n.13).

2. Nor does *Widmar* require institutions to create a forum for student groups generally, or to continue to maintain one, if they choose not to do so. The case applies only to situations where the institution has created and voluntarily continues to maintain a forum for student groups.

3. *Widmar* requires access only to facilities that are part of a forum created by the institution, not to any other facilities. Similarly, *Widmar* requires access only for students: "We have not held . . . that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings" (454 U.S. at 268, n.5).

4. *Widmar* does not prohibit all regulation of student organizations' use of forum facilities; it prohibits only content-based restrictions on access. Thus, the Court noted that "a university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities" (454 U.S. at 268, n.5). In particular, according to the Court, the *Widmar* opinion "in

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<sup>8</sup>In 1984, Congress passed and the President signed the Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302, giving limited statutory recognition to the principles underlying *Widmar*. By its terms, however, the Act extends these principles to, and applies only to, "public secondary school[s] . . . receiv[ing] federal financial assistance."

no way undermines the capacity of the university to establish reasonable time, place, and manner regulations” (454 U.S. at 276) for use of the forum. Such regulations must be imposed on all student groups, however, not just student religious organizations, and must be imposed without regard to the content of the group’s speech activities (see *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981)). If a student religious group or other student group “violate[s] [such] reasonable campus rules or substantially interfere[s] with the opportunity of other students to obtain an education” (454 U.S. at 277), the institution may prohibit the group from using campus facilities for its activities.

5. *Widmar* does not rule out every possible content-based restriction on access to a forum. The Court’s analysis quoted above makes clear that a content-based regulation would be constitutional under the First Amendment if it were “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” As *Widmar* and other First Amendment cases demonstrate, this standard is exceedingly difficult to meet. But the *Widmar* opinion suggests at least two possibilities, the contours of which are left for further development should the occasion arise. First, the Court hints that, if there is “empirical evidence that religious groups will dominate . . . [the institution’s] open forum” (454 U.S. at 275, also quoted above), the institution apparently may regulate access by these groups to the extent necessary to prevent domination. Second, if the student demand for use of forum facilities exceeds the supply, the institution may “make academic judgments as to how best to allocate scarce resources” (454 U.S. at 276). In making such academic judgments, the institution may apparently prefer the educational content of some group activities over others and allocate its facilities in accord with these academic preferences. Justice Stevens’s opinion concurring in the Court’s judgment contains an example for consideration:

If two groups of twenty-five students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of *Hamlet*—the First Amendment would not require that the room be reserved for the group that submitted its application first. . . . [A] university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. . . . A university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted [454 U.S. at 278–80].

For a different example of a content-based restriction—approved by one federal appellate court subsequent to *Widmar*—see *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984). In this case, the court ruled that North Carolina State University could prohibit a student from door-to-door canvassing in dormitories to publicize campus Bible study meetings, even though it permitted candidates for top student government offices to campaign door to door.

A subsequent Supreme Court case, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), concerns religious student organizations' eligibility for funding from mandatory student fee assessments. A student group, Wide Awake Productions (WAP), had been recognized by the university and was entitled to use university facilities just as other organizations did. But the university's guidelines for allocating mandatory student fees excluded certain types of organizations, including fraternities and sororities, political and religious organizations, and organizations whose membership policies were exclusionary. The guidelines also prohibited the funding of, among others, religious and political activities. WAP published a journal containing articles written from a religious perspective, and its constitution stated that the organization's purpose included the expression of religious views. The student council, which had been delegated the authority to disburse the funds from student fees, had denied funding to WAP, characterizing its publication of the journal as "religious activity."

The student members of WAP sued the university, alleging that the denial of funding violated their rights to freedom of speech, press, association, religious exercise, and equal protection under both the federal and state constitutions. The district court rejected all of the plaintiffs' arguments and granted the university's motion for summary judgment on all claims. The appellate court, focusing particularly on the free speech and establishment clause issues, upheld the district court in all respects.

The U.S. Supreme Court then reversed the judgments of the district and appellate courts. By a 5-to-4 vote, the majority held that (1) the university's refusal to provide Student Activities Fund (SAF) funds to Wide Awake Productions violated the students' First Amendment free speech rights; and (2) university funding for WAP would not violate the First Amendment's establishment clause, and the university therefore could not justify its violation of the free speech clause by asserting a need to adhere to the establishment clause. Justice Kennedy wrote the opinion for the majority of five; Justice O'Connor wrote an important concurring opinion; and Justice Souter wrote the opinion for the four dissenters.

The tension between the free speech and establishment clauses of the First Amendment is clearly illuminated by the sharply divergent majority and dissenting opinions. The majority opinion addresses *Rosenberger* from a free speech standpoint, and finds no establishment clause justification for infringing the rights of a student publication that reports the news from a religious perspective. On the other hand, the dissent characterizes the students' publication as an evangelical magazine directly financed by the state, and regards such funding to be a clear example of an establishment clause violation. Justice O'Connor's narrow concurring opinion, tailored specifically to the facts of the case, serves to limit the majority's holding and reduce the gulf between the majority and the dissent.

As the Court explained the situation, the university had established a mandatory student activities fee, the income from which supported a student activities fund used to subsidize a variety of student organizations. All recognized



student groups had to achieve the status of a “Contracted Independent Organization” (CIO), after which some groups could then submit certain of its bills to the student council for payment from SAF funds. The eligible bills were those from “outside contractors” or “third-party contractors” that provided services or products to the student organization. Disbursement was made directly to the third party; no payments went directly to a student group. The university’s SAF guidelines prohibited the use of SAF funds for, among others, religious activities, defined by the guidelines as an activity that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.” Wide Awake Productions was a CIO established to publish a campus magazine that “‘offers a Christian perspective on both personal and community issues’” (515 U.S. at 826, quoting from the magazine’s first issue). WAP applied for SAF funding—funding already provided to fifteen student “media groups”—to be used to pay the printer that printed its magazine. The university rejected the request on grounds that WAP’s activities were religious.

Explicating the majority’s free speech analysis, Justice Kennedy described the SAF as a forum “more in a metaphysical sense than in a spatial or geographic sense,” but nonetheless determined that the SAF, as established and operated by the university, is a “limited public forum” for First Amendment purposes. Having opened the SAF to the university community, the university

must respect the lawful boundaries it has itself set. [It] may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum” (citing *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 804–6 (1985)), nor may it discriminate against speech on the basis of its viewpoint (citing *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392 (1993)) [515 U.S. 827–28].

The majority then determined that the university had denied funding to WAP because of WAP’s perspective, or viewpoint, rather than because WAP dealt with the general subject matter of religion. Thus, although “it is something of an understatement to speak of religious thought and discussion as just a viewpoint,” “viewpoint discrimination is the proper way to interpret the university’s objection to Wide Awake”:

By the very terms of the SAF prohibition, the [u]niversity does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make the third-party payments [to the printer], for the subjects discussed were otherwise within the approved category of publications [515 U.S. at 831].

Furthermore, the majority rejected the university’s contention that “no viewpoint discrimination occurs because the Guidelines discriminate against an

entire class of viewpoints.” Because of the “complex and multifaceted nature of public discourse . . . [i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint” (515 U.S. at 831).

Having determined that the university had violated the students’ free speech rights, the majority considered whether providing SAF funds to WAP would nevertheless violate the establishment clause. In order for a government regulation to survive an establishment clause challenge, it must be neutral toward religion (see Section 1.6 of this book). Relying on past decisions upholding governmental programs when “the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse” (515 U.S. at 839), the Court held that the SAF is neutral toward religion:

There is no suggestion that the university created [the SAF] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. . . . The category of support here is for “student news, information, opinion, entertainment, or academic communications media groups,” of which *Wide Awake* was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was [515 U.S. at 840].

Thus, the WAP application for funding depended not on the religious editorial viewpoint of the publication, nor on WAP being a religious organization, but rather on the neutral factor of its status as a student journal. “Any benefit to religion is incidental to the government’s provision of secular services for secular purposes on a religion-neutral basis” (515 U.S. at 843–44).

In completing its establishment clause analysis, the majority distinguished another line of cases forbidding the use of tax funds to support religious activities and rejected the contention that the mandatory student activities fee is a tax levied for the support of a church or religion. Unlike a tax, which the majority describes as an exaction to support the government and a revenue-raising device, the student activity fee is used for the limited purpose of funding student organizations consistent with the educational purposes of the university. No public funds would flow directly into WAP’s coffers; instead, the university would pay printers (third-party contractors) to produce WAP’s publications. This method of third-party payment, along with university-required disclaimers stating that the university is not responsible for or represented by the recipient organization, evidenced the attenuated relationship between the university and WAP. The majority found no difference in “logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access [as in *Widmar*], and a school paying a third-party contractor to operate the facility on its behalf.”

Justice O’Connor’s concurring opinion carefully limits her analysis to the facts of the case, emphasizing that “[t]he nature of the dispute does not admit

of any categorical answers, nor should any be inferred from the Court’s decision today.” Justice O’Connor based her concurrence on four specific considerations that ameliorate the establishment clause concerns that otherwise would arise from government funding of religious messages. *First*, at the insistence of the university, student organizations such as WAP are separate and distinct from the university. All groups that wish to be considered for SAF funding are required to sign a contract stating that the organization exists and operates independently of the university. Moreover, all publications, contracts, letters, or other written materials distributed by the group must bear a disclaimer acknowledging that, while members of the university faculty and student body may be associated with the group, the organization is independent of the “corporation which is the university and which is not responsible for the organizations’ contracts, acts, or omissions.” *Second*, no money is given directly to WAP. By paying a third-party vendor, in this case a printer that printed WAP’s journal, the university is able to ensure that the funding that it has granted is being used to “further the University’s purpose in maintaining a free and robust marketplace of ideas, from whatever perspective.” This method of funding, according to the concurrence, is analogous to a school providing equal access to a generally available physical facility, like a printing press on campus. *Third*, because WAP does not exist “in a vacuum,” it will not be mistakenly perceived to be university endorsed. This potential danger is greatly diminished by both the number and variety of other publications receiving SAF funding. O’Connor thus found it illogical to equate university funding of WAP with the endorsement of one particular viewpoint. And *fourth*, the “proceeds of the student fees in this case [may be distinguishable] from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, . . . and from government funds generally”:

Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws out of this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds.<sup>9</sup> The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students [515 U.S. at 851–52 (O’Connor, J., concurring)].

Although the first three of Justice O’Connor’s distinctions were also relied on by Justice Kennedy, Justice O’Connor states her conclusions more narrowly than does Kennedy and limits her reasoning more tightly to the unique facts of the case. Justice O’Connor also adds the fourth consideration regarding the character of the student fee proceeds. Since Justice O’Connor provides the critical

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<sup>9</sup>[Author’s footnote] This issue of proportional refunds for objecting students, or an “opt-out” system, was later addressed by the Court in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), discussed in subsection 10.1.3 above.

fifth vote that forms the 5-to-4 majority, her opinion carries unusual significance. To the extent that her establishment clause analysis is narrower than Justice Kennedy's, it is her opinion rather than his that apparently provides the current baseline for understanding the establishment clause restrictions on public institutions' funding of student religious groups.

The four dissenting Justices disagreed with both the majority's free speech clause analysis and its establishment clause analysis. Regarding the former, Justice Souter insisted that the university's refusal to fund WAP was not viewpoint discrimination but rather a "subject-matter distinction," an educational judgment not to fund student dialogue on the particular subject of religion regardless of the viewpoints expressed. Regarding the establishment issue, which he termed the "central question in this case," Justice Souter argued that, because "there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, . . . the university's refusal to support petitioners' religious activities is compelled by the Establishment Clause." Emphasizing that WAP's publications call on Christians "'to live, in word and deed, according to the faith they proclaim . . . and to consider what a personal relationship with Jesus Christ means'" (551 U.S. at 868, quoting from WAP's first issue), Justice Souter likens the paper to an "evangelist's mission station and pulpit" (515 U.S. at 868). He thus argues that the use of public (SAF) funds for this activity is a "direct subsidization of preaching the word" and a "direct funding of core religious activities by an arm of the State" (515 U.S. at 863).

The majority's reasoning in *Rosenberger* generally parallels the Court's earlier reasoning in *Widmar v. Vincent* (above) and generally affirms the free speech and establishment principles articulated in that case. More important, both Justice Kennedy's and Justice O'Connor's opinions extend student organizations' First Amendment rights beyond access to *facilities* (the issue in *Widmar*) to include access to *services*. The Kennedy and O'Connor opinions also refine the *Widmar* free speech analysis by distinguishing between *content*-based restrictions on speech (the issue in *Widmar*) and *viewpoint*-based restrictions (the issue as the Court framed it in *Rosenberger*). The latter type of restriction, sometimes called "viewpoint discrimination," is the most suspect of all speech restrictions and the type least likely to be tolerated by the courts (see generally Sections 9.6.2 & 10.1.3). *Widmar* appears to reserve a range of discretion for a higher educational institution to make academic judgments based on the educational *content* of a student organization's activities; *Rosenberger* appears to prohibit any such discretion when the institution's academic judgment is based on consideration of the student group's *viewpoints* (see 515 U.S. at 845).

## **Sec. 10.2. Fraternities and Sororities**

**10.2.1 Overview.** Fraternal organizations have been part of campus life at many colleges and universities for more than a century. Some, such as Phi Beta Kappa, were founded to recognize academic achievement, while others have a predominantly social focus. Because of their strong ties to colleges and

universities, whether because the houses occupied by members are on or near the college's property or because their members are students at the college, the consequences of the individual and group behavior of fraternity and sorority members can involve the college in legal problems.

The legal issues that affect nonfraternal student organizations (see Section 10.1) may also arise with respect to fraternities and sororities. But because fraternal organizations have their own unique histories and traditions, are related to national organizations that may influence their activities, and play a significant social role on many campuses, they may pose unique legal problems for the college with which they are affiliated.

Supporters of fraternal, or "Greek," organizations argue that members perform more service to the college and the community and make larger alumni contributions than nonmembers, and that fraternity houses provide room and board to undergraduate students whom the college would otherwise be required to accommodate. Critics of fraternal organizations argue that they foster "elitism, sexism, racism and in worst instances, criminal activity" (V. L. Brown, "College Fraternities and Sororities: Tort Liability and the Regulatory Authority of Public Institutions of Higher Education," 58 *West's Educ. Law Rptr.* (1990)). Institutions have responded to problems such as hazing, alcohol and drug abuse, sexual harassment and assault, and the death or serious injury of fraternity members in various ways—for instance, by regulating social activities, suspending or expelling individual fraternities, or abolishing the entire Greek system on campus.

Fraternities and sororities may be chapters of a national organization or may be independent organizations. The local chapters, whether or not they are tied to a national organization, may be either incorporated or unincorporated associations. If the fraternity or sorority provides a house for some of its members, it may be located on land owned by the colleges or it may be off campus. In either case, the college may own the fraternity house, or an alumni organization (sometimes called a "house corporation") may own the house and assume responsibility for its upkeep.

Litigation concerning fraternal organizations has increased sharply in the past decade. Institutional attempts to regulate, discipline, or ban fraternal organizations have met with stiff resistance, both on campus and in the courts. Students or other individuals injured as a result of fraternal organizations' activities, or the activities of individual members of fraternal organizations, have sought to hold colleges legally responsible for those injuries. And fraternal organizations themselves are facing increasing legal liability as citizens and courts have grown less tolerant of the problems of hazing and other forms of misconduct that continue to trouble U.S. college campuses.

**10.2.2. Institutional recognition and regulation of fraternal organizations.** Recognition by a college is significant to fraternal organizations because many national fraternal organizations require such recognition as a condition of the local organization's continued affiliation with the national. The conditions under which recognition is awarded by the college are important

because they may determine the college's power to regulate the conduct of the organization or its members.

Some colleges and universities require, as a condition of recognition of fraternal organizations, that each local fraternity sign a "relationship statement." These statements outline the college's regulations and elicit the organization's assurance that it will obtain insurance coverage, adhere to fire and building codes, and comply with the institution's policy on the serving of alcohol.<sup>10</sup> Some of these statements also require members to participate in alcohol awareness programs or community service. Some statements include restrictions on parties and noise, and extend the jurisdiction of the college's student conduct code and disciplinary system to acts that take place where students live, even if they live off campus.

On some campuses, institutional regulation of fraternal organizations extends to their membership practices. Traditionally, fraternities and sororities have limited their membership to one gender, and in the past many of these organizations prohibited membership for nonwhite and non-Christian individuals. In more recent years, however, several colleges and universities, including Middlebury, Bowdoin, and Trinity (Conn.) Colleges, have required fraternities and sororities to admit members of both sexes (see N. S. Horton, "Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?" 18 *J. Coll. & Univ. Law* 419 (1992)) and, in general, to avoid discriminatory practices. (See, for example, Eric Hoover, "Black Student Breaks Color Barrier in U. of Alabama's Fraternity System," *Chron. Higher Educ.*, November 9, 2001, A31.)

Other colleges have banned fraternities altogether. For example, Colby College, a private liberal arts college, withdrew recognition of all its fraternities and sororities in 1984 because administrators believed that fraternal activities were incompatible with its goals for student residential life. When a group of students continued some of the activities of a banned fraternity, despite numerous attempts by the college's administration to halt them, the president and college dean imposed discipline on the "fraternity" members, ranging from disciplinary probation to one-semester suspensions.

In *Phelps v. President and Trustees of Colby College*, 595 A.2d 403 (Maine 1991), the students sought to enjoin the discipline and the ban on fraternities under Maine's Civil Rights Act, 5 M.R.S.A. §§ 4681 *et seq.* (2003), and the state constitution's guarantees of free speech and the right to associate. Maine's Supreme Judicial Court rejected the students' claims. It held that the state law, directed against harassment and intimidation, did not apply to the actions of the college because the law "stopped short of authorizing Maine courts to mediate disputes between private parties exercising their respective rights of free expression and association" (595 A.2d at 407). The court also held that the actions of private entities, such as the college, were not subject to state constitutional restrictions.

Although private institutions are not subject to constitutional requirements, their attempts to discipline fraternal organizations and their members are still

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<sup>10</sup>Cases and authorities are collected in R. A. Vinluan, Annot., "Regulations as to Fraternities and Similar Associations Connected with Educational Institution," 10 A.L.R.3d 389.

subject to challenge. In *In re Rensselaer Society of Engineers v. Rensselaer Polytechnic Institute*, 689 N.Y.S.2d 292 (N.Y. Ct. App. 1999), the Society of Engineers, a fraternity, brought a state administrative law claim against Rensselaer Polytechnic Institute (RPI), challenging the institution's decision to suspend the fraternity for several years for various violations of RPI's code of student conduct. The fraternity was already on disciplinary probation for earlier infractions of the code of conduct. Ruling that the institution's conduct was neither arbitrary nor capricious, the court said: "Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings" (689 N.Y.S.2d at 295). The institution's actions were eminently reasonable, said the court; it followed its "detailed" grievance procedure in both making and reviewing the challenged disciplinary decision, and afforded the fraternity three levels of administrative review.

But the decision of another private institution to suspend a fraternity was vacated by a state appellate court, and the university was ordered to provide additional procedural protections to the fraternity. In *Gamma Phi Chapter of Sigma Chi Fraternity v. University of Miami*, 718 So. 2d 910 (Fla. Ct. App. 1998), the fraternity had sought an injunction to prevent the university's enforcement of sanctions against it. The fraternity claimed that the procedure used by the university to impose sanctions, including the suspension of rushing, was based on an *ex parte* fact-finding process (a process that did not allow the fraternity an opportunity to participate or to speak in its own behalf). The appellate court enjoined the sanctions and ordered the university to provide a fair hearing. The vice president for student affairs then appointed a panel consisting of two students, two faculty members, and an attorney not employed by the university. The fraternity, however, sought a second injunction to prevent the panel from hearing the case, arguing that the Interfraternity Council had the responsibility to decide such matters. The court denied the second injunction, ruling that, until the university had acted and the fraternity had pursued all internal remedies, the court would not exercise jurisdiction.

Although some colleges have banned fraternities altogether, others have sought less drastic methods of controlling them. The attempt of Hamilton College to minimize the influence of fraternities on campus was stalled temporarily by an unusual use of the Sherman Act, which outlaws monopolies that are in restraint of trade (see Section 13.2.8). Hamilton College announced a policy, to become effective in the 1995–96 academic year, of requiring all students to live in college-owned facilities and to purchase college-sponsored meal plans. The college made this change, it said, to minimize the dominance of fraternities over the social life of the college and to encourage more women applicants. Four fraternities that owned their own fraternity houses, and that had previously received approximately \$1 million in payment for housing and feeding their members, sought to enjoin the implementation of the new housing policy, arguing that it was an attempt by the college to exercise monopoly power over the market for student room and board. A trial court granted the college's

motion to dismiss the lawsuit, stating that the provision of room and board to students was not “trade or commerce,” and that there was no nexus between the college’s conduct and interstate commerce. The trial court did not rule on the issue of whether the product market at issue was the market for room and board for Hamilton students (as the fraternities claimed), or the market for highly selective liberal arts colleges with which Hamilton competes for students (as the college had claimed).

The appellate court reversed the dismissal, stating that the fraternities had alleged sufficient facts that, if they could be proven, could constitute a Sherman Act violation (*Hamilton Chapter of Alpha Delta Phi v. Hamilton College*, 128 F.3d 59 (2d Cir. 1997)). The plaintiffs had claimed that the college’s goal was to raise revenues by forcing students to purchase housing from the college, to raise its housing prices due to the lack of competition for housing, and to purchase the fraternity houses at below-market prices. Because Hamilton recruits students from throughout the United States, and because more than half of its room and board revenue was obtained from out-of-state students, there was clearly a nexus between Hamilton’s housing policy and interstate commerce. Therefore, since antitrust jurisdiction was established, the appellate court reversed the lower court’s judgment and remanded the case. On remand, the trial court ruled that the plaintiffs’ characterization of the product market was incorrect, and awarded summary judgment to the college (106 F. Supp. 2d 406 (N.D.N.Y. 2000)).

Dartmouth College’s decision to eliminate fraternities and sororities drew litigation not from students, but from alumni who had contributed to the college’s fund-raising campaign. Seven alumni sued the Dartmouth Trustees after the trustees used funds raised in a capital campaign to restructure the college’s residential life program, eliminating Greek organizations in the process. In *Brzica v. Trustees of Dartmouth College*, 791 A.2d 990 (N.H. 2002), the New Hampshire Supreme Court rejected the plaintiffs’ claim that the trustees had a fiduciary duty to the alumni, and found that there was no evidence that the trustees had conspired to eliminate Greek organizations prior to the fund-raising campaign.

Public colleges and universities face possible constitutional obstacles to banning fraternities, including the First Amendment’s guarantee of the right to associate (see Sections 9.5.1, 9.5.2, & 10.1). The U.S. Supreme Court, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1983), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), established the parameters of constitutionally protected rights of association and provided the impetus for constitutional challenges to institutional attempts to suspend or eliminate fraternal organizations.

The U.S. Court of Appeals for the Third Circuit addressed the extent of a fraternity’s constitutionally protected rights of association in *Pi Lambda Phi Fraternity v. University of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000). The local and national fraternity challenged the university’s decision to revoke the local chapter’s status as a recognized student organization after a drug raid at the fraternity house yielded cocaine, heroin, opium, and Rohypnol (the “date rape” drug). Four chapter members were charged with possession of controlled substances. The university followed the recommendation of a student judiciary panel that determined that the chapter had violated the university’s policy of



holding fraternal organizations accountable “for actions of individual members and their guests.” The local and national fraternities sued the university and several of its administrators under 42 U.S.C. § 1983 for violation of the chapter’s First Amendment rights of intimate and expressive association. The trial court awarded summary judgment to the university, ruling that the fraternity’s primary activities were social rather than either intimate or expressive, and thus unprotected by the First Amendment.

Although the appellate court affirmed the outcome, it performed a more extensive analysis of the fraternity’s freedom of association claims. The local chapter did not meet the test of *Roberts* for intimate association, said the court, because of the large number of members (approximately eighty) and the fact that the chapter “is not particularly selective in whom it admits” (229 F.3d at 442). With respect to the expressive association claim, the court applied the three-step test created by the Supreme Court in *Dale*. *First*, the court ruled that the fraternity’s purpose was not expressive because there was virtually no evidence that the chapter engaged in expressive activity (such as political advocacy or even extensive charitable activities). *Second*, the university’s act to revoke the fraternity’s charter had only an indirect or attenuated effect on its expressive activity. Furthermore, the reason for the university’s “burden” on the fraternity’s activities was punishing illegal drug activity, which was not a form of expression protected by the First Amendment. *And third*, the university’s interest in enforcing its rules and regulations, and in preventing student use of drugs, outweighed any possible burden on the fraternity’s expressive activity.

The court similarly rejected the fraternity’s equal protection claim, ruling that the university’s policy of holding fraternities accountable for the actions of their members and guests was virtually identical to a rule holding students living in residence halls responsible for the actions of their guests. And even if the university had treated fraternities differently from other student organizations, said the court, fraternities are not a suspect classification for constitutional purposes, and thus any differential treatment by a public university would be reviewed under the “rational basis” test, a relatively deferential standard for a public university to meet.

The unsuccessful legal challenges to the banning of fraternities stimulated congressional action. In the Higher Education Amendments of 1998 (Pub. L. No. 105-244), Congress added a nonbinding “sense of Congress” provision protecting the speech and association rights of students. The provision reads, in part:

It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this Act, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution [20 U.S.C. § 1011a(a)].

The provision does allow institutions to regulate disruptive conduct and to take “action to prevent violation of State liquor laws, to discourage binge

drinking and other alcohol abuse, to protect students from sexual harassment including assault and date rape, to prevent hazing, or to regulate unsanitary or unsafe conditions in any student residence” (20 U.S.C. § 1011a(b)(2)). The provision is not legally binding on colleges, and does not appear to have caused those institutions that have banned fraternal organizations to reinstate them.

Although a clear articulation of the college’s expectations regarding the behavior of fraternity members may provide a deterrent to misconduct, some courts have viewed institutional attempts to regulate the conduct of fraternity members as an assumption of a duty to control their behavior, with a correlative obligation to exercise appropriate restraint over members’ conduct. For example, in *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), the state’s supreme court ruled that the university could be found liable for injuries a student received during fraternity hazing, since the university’s strict rules against hazing demonstrated that it had assumed a duty to protect students against hazing injuries. (See Section 10.2.3 below for further discussion of these liability issues.)

Because of the potential for greater liability when regulation is extensive (because a student, parent, or injured third party may claim that the college assumed a duty to regulate the conduct of the fraternity and its members), some institutions have opted for “recognition” statements such as those used to recognize other student organizations. Although this minimal approach may defeat a claim that the institution has assumed a duty to supervise the activities of fraternity members, it may limit the institution’s authority to regulate the activities of the organization, although the institution can still discipline individual student members who violate its code of student conduct.

A study that examined tort liability issues related to fraternal organizations (E. D. Gulland & M. B. Powell, *Colleges, Fraternities and Sororities: A White Paper on Tort Liability Issues* (American Council on Education, 1989), at 14–15) recommends that recognition statements include the following provisions:

1. Description of the limited purpose of recognition (no endorsement, but access to institutional facilities);
2. Specification of the lack of principal-agent relationship between college and fraternity;
3. Acknowledgment that the fraternity is an independently chartered corporation existing under state laws;
4. Confirmation that the college assumes no responsibility for supervision, control, safety, security, or other services;
5. Restrictions on use of the college’s name, tax identification number, or other representations that the fraternity is affiliated with the college;
6. Requirement that the fraternity furnish evidence that it carries insurance sufficient to cover its risks.

One area where institutional regulation of fraternal organizations is receiving judicial—and legislative—attention is the “ritual” of hazing, often included

as part of pledging activities. If an institution promulgates a policy against hazing, it may be held legally liable if it does not enforce that policy vigorously. A case not involving fraternal organizations is nevertheless instructive on the potential for liability when hazing occurs. In a case brought by a former student injured by hazing, the Supreme Court of Vermont affirmed a sizable jury verdict against Norwich University, a paramilitary college that entrusts to upper-class students the responsibility to “indoctrinate and orient” first-year students, called “rooks.” Although Norwich had adopted policies against hazing and had included precautions against hazing in its training for the upper-class “cadre,” who were entrusted with the “indoctrination and orientation” responsibility, the former student alleged that hazing was commonplace and tolerated by the university’s administration, and that it caused him both physical and financial injury.

In *Brueckner v. Norwich University*, 730 A.2d 1086 (Vt. 1999), the student, who withdrew from Norwich after enduring physical and psychological harassment, filed claims for assault and battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent supervision. A jury found Norwich liable on all counts and awarded the student \$488,600 in compensatory damages and \$1.75 million in punitive damages. On appeal, the state supreme court affirmed the liability verdicts, holding that cadre members were authorized by Norwich to indoctrinate and orient rooks, and Norwich was thus vicariously liable for the tortious acts of the cadre because these actions were within the “scope of their employment” (despite the fact that Norwich forbade such behavior). The court affirmed the compensatory damage award, but reversed the punitive damage award, stating that Norwich’s behavior was negligent but did not rise to the standard of malice required by that state’s case law on punitive damages. One justice dissented, arguing that Norwich’s behavior had demonstrated indifference and its tolerance for hazing constituted reckless disregard for the safety of its students.

Although an institution may not wish explicitly to assume a duty to supervise the conduct of fraternity members, it does have the power to sanction fraternal organizations and their members if they violate institutional policies against hazing or other dangerous conduct. In *Psi Upsilon v. University of Pennsylvania*, 591 A.2d 755 (Pa. Super. Ct. 1991), a state appellate court refused to enjoin the university’s imposition of sanctions against a fraternity whose members kidnapped and terrorized a nonmember as part of a hazing activity. The student filed criminal charges against the twenty students who participated in the prank, and the university held a hearing before imposing sanctions on the fraternity. After the hearing, the university withdrew its recognition of the fraternity for three years, took possession of the fraternity house without compensating the fraternity, and prohibited anyone who took part in the kidnapping from participating in a future reapplication for recognition.

In evaluating the university’s authority to impose these sanctions, the court first examined whether the disciplinary procedures met legal requirements. Noting that the university was privately controlled, the court ruled that the students were entitled only to whatever procedural protections university policies had

given them. The court then turned to the relationship statement that the fraternity had entered into with the university.

Characterizing the relationship statement as contractual, the court ruled that it gave ample notice to the members that they must assume collective responsibility for the activities of individual members, and that breaching the statement was sufficient grounds for sanctions. After reviewing several claims of unfairness in the conduct of the disciplinary proceeding, the court upheld the trial judge's denial of injunctive relief.

More than thirty states have passed laws outlawing hazing. Illinois's anti-hazing law (Ill. Rev. Stat. ch. 144, para. 221 (1989)) was upheld against a constitutional challenge in *People v. Anderson*, 591 N.E.2d 461 (Ill. 1992), as was Ohio's anti-hazing law in *Carpetta v. Pi Kappa Alpha Fraternity*, 100 Ohio Misc. 2d 42 (Ct. Common Pleas, Lucas Co. 1998). (See also Mass. Ann. Laws ch. 269, §§ 17–19 (Supp. 1987); Cal. Educ. Code § 32050 (West 1990); and Virginia Hazing, Civil and Criminal Liability, Va. Code Ann. § 18.2-56. Florida's anti-hazing law makes hazing a third-class felony, punishable by up to five years in prison (Fla. Stat. § 1006.63(2) (2005).) The Missouri anti-hazing statute survived a void for vagueness challenge. Where a student was convicted of hazing Kappa Alpha Psi pledges, resulting in the death of one of them, the Supreme Court of Missouri held that the anti-hazing statute was not void for vagueness, nor did it violate the equal protection clause, and the student was adequately informed of the charges against him (*State v. Allen*, 905 S.W.2d 874 (Mo. 1995)). And the Texas Court of Criminal Appeals upheld a Texas statute that requires individuals who are involved in or witness hazing to report it or face criminal sanctions, rejecting a claim that the law violated the Fifth Amendment's privilege against self-incrimination (*State v. Boyd*, 38 S.W.3d 155 (Tex. Crim. App. 2001)).

Although institutions may have the authority to sanction fraternities and their members for criminal conduct or violations of the campus conduct code, conduct that may be construed as antisocial but is not unlawful may be difficult to sanction. For example, some public institutions have undertaken to prohibit such fraternity activities as theme parties with ethnic or gender overtones or offensive speech. These proscriptions, however, may run afoul of the First Amendment's free speech guarantees. For example, George Mason University sanctioned Sigma Chi fraternity for holding an "ugly woman contest," a fundraising activity in which fraternity members dressed as caricatures of various types of women, including an offensive caricature of a black woman. (For a discussion of this case, see Section 9.6.) The fraternity sued the university under 42 U.S.C. § 1983 (see this book, Section 3.5), alleging a violation of its rights under the First and Fourteenth Amendments. In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (4th Cir. 1993), a federal appellate court affirmed an award of summary judgment to the fraternity on the grounds that the skit was "expressive entertainment" and "expressive conduct," both protected under First Amendment jurisprudence.

Although colleges are limited in their ability to sanction fraternities for offensive speech (or expressive conduct), they can hold individual student members to the same code of conduct expected of all students, particularly with regard

to social activities and the use of alcohol. The complexity of balancing the need for a college to regulate fraternal organizations with its potential liability for their unlawful acts is the subject of the next subsection.

### ***10.2.3. Institutional liability for the acts of fraternal organizations.***

Despite the fact that fraternal organizations are separate legal entities, colleges and universities have faced legal liability from injured students, parents of students injured or killed as a result of fraternity activity, or victims of violence related to fraternity activities.<sup>11</sup> Because most claims are brought under state tort law theories, the response of the courts has not been completely consistent. The various decisions suggest, however, that colleges and universities can limit their liability in these situations but that fraternities and their members face increased liability, particularly for actions that courts view as intentional or reckless.

As discussed in Section 3.3, liability may attach if a judge or jury finds that the college owed an individual a duty of care, then breached that duty, and that the breach was the proximate cause of the injury. Because colleges are legally separate entities from fraternal organizations, the college owes fraternities, their members, and others only the ordinary duty of care to avoid injuring others. But in some cases courts have found either that a special relationship exists between the college and the injured student or that the college has assumed a duty to protect the student.

In *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), the Delaware Supreme Court reversed a directed verdict for the university and ordered a new trial on the issue of liability in a lawsuit by a student injured during a hazing incident. The court noted the following factors in determining that a jury could hold the institution at least partially responsible for the injuries: (1) The university owned the land on which the fraternity house was located, although it did not own the house. The injury occurred in the house. (2) The university prohibited hazing and was aware of earlier hazing incidents by this fraternity. The court said that the likelihood of hazing was foreseeable, as was the likelihood of injury as a result of hazing.

While *Furek* may be an anomaly among the cases in which colleges are sued for negligence (see subsection 3.3.2.4), the opinion suggests some of the dangers of institutional attempts to regulate the conduct of fraternities or their members—for instance, by assuming duties of inspecting kitchens or houses, requiring that fraternities have faculty or staff advisers employed by the college, providing police or security services for off-campus houses, or assisting these organizations in dealing with local municipal authorities. Such actions may suggest to juries deliberating a student’s negligence claim that the institution had assumed a duty of supervision (see Gulland & Powell, *Colleges, Fraternities and Sororities*, cited in Section 10.2.2).

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<sup>11</sup>Cases and authorities are collected in Cheryl M. Bailey, Annot., “Tort Liability of College, University, or Fraternity or Sorority for Injury or Death of Member or Prospective Member by Hazing or Initiation Activity,” 68 A.L.R.4th 228.

Colleges and universities have been codefendants with fraternities in several cases. In most of these cases, the institution has escaped liability. For example, in *Thomas v. Lamar University-Beaumont*, 830 S.W.2d 217 (Tex. Ct. App. 1992), the mother of a student who died as a result of pledge hazing sued both the fraternity and the university, which owned the track that was used during the hazing incident. The plaintiff asserted that the university had waived its sovereign immunity because it had failed to supervise those who used its track. The trial court determined that the university had no duty of supervision and awarded summary judgment for the university. The appellate court affirmed.

In *Estate of Hernandez v. Board of Regents*, 838 P.2d 1283 (Ariz. Ct. App. 1991), the personal representative of a man killed in an automobile accident caused by an intoxicated fraternity member sued the University of Arizona and the fraternity. The plaintiff asserted that the university was negligent in continuing to lease the fraternity house to the house corporation when it knew that the fraternity served alcohol to students who were under the legal drinking age of twenty-one.

The plaintiff cited the "Greek Relationship Statement," which required all fraternities to participate in an alcohol awareness educational program, as evidence of the university's assumption of a duty to supervise. The statement also required an upper-division student to be assigned to each fraternal organization to educate its members about responsible conduct relating to alcohol. Furthermore, the university employed a staff member who was responsible for administering its policies on the activities of fraternities and sororities. Despite these attempts to suggest that the university had assumed a duty to supervise the activities of fraternities, the court applied Arizona's social host law, which absolved both the fraternity and the university of liability and affirmed the trial court's award of summary judgment.

The Supreme Court of Arizona reversed the trial court's award of summary judgment to the defendant fraternity and the individual fraternity members and pledges (866 P.2d 1330 (Ariz. 1994)). The court said that the lower courts had misinterpreted Arizona's social host law. It did not immunize nonlicensees (social hosts, as compared with bar owners) who served individuals who were under the legal drinking age. The immunity, said the court, applies only to entities that are licensed to serve alcohol, not social hosts. Moreover, the court also ruled that state tort law provided a liability theory for one who provides alcohol to an underage individual who then drives a car, stating that "a minor is similar to an adult who has diminished judgment and capacity to control his alcohol consumption" (866 P.2d at 1341).

On remand, the trial court entered summary judgment in favor of the national fraternity and various individual members and pledges of the local chapter. The appellate court then reversed the summary judgments that had been granted the individual fraternity members and pledges, noting that a jury could find that each individual knew that alcohol would be served to minors, and that his contribution to the fund to purchase the alcohol made him a participant in an illegal venture. Even those pledges who had not yet contributed to the fund were participants in the illegal venture, said the appellate court (924

P.2d 1036 (Ariz. Ct. App. 1995)). Regarding the national fraternity, the appellate court stated:

The national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored. . . . That a duty exists in this circumstance was implicitly admitted by the act of the national fraternity in sending to local chapters instructions to abide by local laws and university regulations in serving alcohol at chapter functions. . . . The argument that the national fraternity had no power to control the activities of the local chapter or its members is belied by the much stricter alcohol policy adopted by the local chapter at the request of the national after the incident in this case [924 P.2d at 1038–39].

The court nevertheless affirmed summary judgment for the national fraternity on other grounds, including *respondeat superior* and landlord-tenant law.

The defendants appealed again, to the Arizona Supreme Court, which addressed only the arguments of the pledges. Reversing the intermediate appellate court's ruling with respect to the pledges, the Arizona Supreme Court reinstated the trial court's summary judgment on their behalf (*Hernandez-Wheeler v. Flavio*, 930 P.2d 1309 (Ariz. 1997)). The court noted that the pledges had no control over the arrangements for the party and did not contribute funds or purchase any alcohol, compared with the members of the fraternity who acted through a committee to purchase and distribute the alcohol to minors. The court therefore ruled as a matter of law that the pledges did not participate in the joint venture. The court left undisturbed the intermediate appellate court's rulings regarding the national fraternity and the individual members of the local chapter.

When the student's own behavior is a cause of the injury, the courts have typically refused to hold colleges or fraternities liable for damages. In *Whitlock v. University of Denver*, 744 P.2d 54 (Colo. 1987), the Colorado Supreme Court rejected a student's contention that the university had undertaken to regulate the use of a trampoline in the yard of a fraternity house, even though the university owned the land and had regulated other potentially dangerous activities in the past. Similarly, students injured in social events sponsored by fraternities have not prevailed when the injury was a result of the student's voluntary and intentional action. For example, in *Foster v. Purdue University*, 567 N.E.2d 865 (Ind. Ct. App. 1991), a student who became a quadriplegic after diving head-first into a fraternity's "water slide" was unsuccessful in his suit against both the university and the fraternity of which he was a member. Similarly, in *Hughes v. Beta Upsilon Building Ass'n.*, 619 A.2d 525 (Maine 1993), a student who was paralyzed after diving into a muddy field on the fraternity's property at the University of Maine was unsuccessful because the court ruled that the Building Association, landlord for the local fraternity chapter, was not responsible for the chapter's activities.

When, however, the injury is a result of misconduct by *other* fraternity members, individual and organizational liability may attach. Particularly in cases where pledges have been forced to consume large amounts of alcohol as part

of a hazing ritual, fraternities and their members have been held responsible for damages.<sup>12</sup> Because of the increasing tendency of plaintiffs to look to national fraternities for damages, several national fraternities have developed risk management information and training programs for local chapters. College administrators responsible for oversight of fraternal organizations should work with national fraternities to advance their mutual interest in minimizing dangerous activity, student injuries, and ensuing legal liability. Given the seriousness of injuries related to misconduct by fraternities and their members, administrators should examine their institutional regulations, their relationship or recognition statements, and their institutional code of student conduct to ascertain the extent of the college's potential liability. Educational programs regarding the responsible use of alcohol, swift disciplinary action for breaches of the code of student conduct, and monitoring (rather than regulation) of the activities of fraternal organizations may reduce the likelihood of harm to students or others and of liability for the college.

For example, a Louisiana appellate court upheld a jury award of liability against Louisiana Tech on the grounds of negligence, stemming from an injury incurred by a student who encountered hazing during the pledging process. In *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105 (La. Ct. App. 1999), *appeal denied*, 749 So. 2d 634 (La. 1999), a student at Louisiana Tech had been beaten by the president of the local chapter of Kappa Alpha Psi during pledging activities. The student sustained serious head and neck injuries, and reported the assault to the campus police. After an investigation, both the university and the national chapter of the fraternity suspended the local chapter. The injured student sued the university, the national fraternity, the local chapter, and the assailant. A jury found the university, the national fraternity, and the assailant equally liable, and awarded \$312,000 in compensatory damages. (The charges against the local chapter were dismissed on procedural grounds.) The jury found that the university owed the student a duty to protect him against the tortious actions of fellow students. The university appealed.

The appellate court affirmed the jury verdict, ruling that the university's own actions and its knowledge of previous hazing incidents by the local chapter created a special relationship between the injured student and the institution. A university official had received written and oral complaints about hazing by the local chapter, and a local judge had called the official to express his concerns about hazing by chapter members that his son had experienced. Although the

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<sup>12</sup>In *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488 (S.C. Ct. App. 1986), a state appellate court found that the national fraternity owes a duty of care to initiates not to injure them; the court therefore held that fraternity responsible for damages related to a pledge's wrongful death from alcohol poisoning. A student who sustained serious neurological damage after forced intoxication was similarly successful in *Quinn v. Sigma Rho Chapter*, 507 N.E.2d 1193 (Ill. App. Ct. 1987), as was the father of a student who died after being forced to drink as part of an initiation ritual for the lacrosse team at Western Illinois University. In that case, the students were found liable as individuals (*Haben v. Anderson*, 597 N.E.2d 655 (Ill. App. Ct. 1993)). For a review of the potential liability of national fraternities for hazing injuries, see Note, "Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities," 7 *Rev. Litig.* 191 (1988).



university cited the ruling of the Louisiana Supreme Court in *Pitre* (Section 3.3.2.1), which denied that the university had a duty to protect students against the dangers of sledding down a hillside, the court replied that “the pledging process to join a fraternal organization is not an activity which an adult college student would regard as hazardous.” The court found that the university’s prior knowledge of hazing activity and the potential dangers of hazing justified the creation of a special relationship, which thus imposed a duty on the university to monitor the chapter’s behavior and to prevent further hazing incidents.

This ruling is directly contrary to a ruling by the Supreme Court of Idaho, which rejected the “special relationship” standard in *Coghlan v. Beta Theta Pi et al.*, 987 P.2d 300 (Idaho 1999). In *Coghlan*, a student at the University of Idaho sued three national fraternities whose local chapter parties she had attended, her own sorority, and the university for injuries she sustained when, after becoming intoxicated at fraternity parties, she returned to her sorority house and fell off a third-floor fire escape. She sought to hold the university liable under the “special relationship” doctrine, arguing that such a relationship created a duty to protect her from the risks associated with her own intoxication. The court rejected that claim, citing *Beach* and *Bradshaw* (Section 3.3.2). But the court was somewhat more sympathetic to the plaintiff’s claim that the university had assumed a duty to the student because of its own behavior. The student argued that because two university employees were present at one of the fraternity parties and should have known that underage students were being served alcohol, the university had assumed a duty to protect her. Although the court declined to conclude as a matter of law that the university had assumed such a duty, it remanded the case for further litigation, overturning the trial court’s dismissal of the action.

The majority rule, however, appears still to be that the college has no duty to protect an individual from injury resulting from a student’s or fraternal organization’s misconduct. For example, in *Lloyd v. Alpha Phi Alpha and Cornell University*, 1999 U.S. Dist. LEXIS 906 (N.D.N.Y., January 26, 1999), a student injured during hazing by a fraternity sued Cornell under three theories: negligent supervision and control, premises liability, and breach of implied contract. The court rejected all three claims. With respect to the negligent supervision claim, the court ruled that, despite the fact that Cornell published materials about the dangers of hazing and provided training to fraternities to help them improve the pledging process, it had not assumed a duty to supervise the student-plaintiff and prevent him from participating in the pledging process because “this involvement does not rise to the level of encouraging and monitoring pledge participation.” The court rejected the plaintiff’s premises liability claim because it found that Cornell had no knowledge that recent hazing activities had taken place in the fraternity house (which Cornell owned). The local chapter had been forbidden by the national fraternity from taking in new members, so Cornell was entitled to presume that no pledging, and thus no hazing, was occurring. And although Cornell required fraternities to have an advisor, that did not transform the advisor into an agent of Cornell. The court rejected the breach of contract claim because the university had not promised to protect

students from hazing. In fact, because hazing was a violation of Cornell's code of student conduct, it was the obligation of students, not the university, to refrain from hazing. Although Cornell argued that the plaintiff had assumed the risk of injury by participating in hazing activities, a theory that would bar a negligence claim, the court explicitly rejected this reasoning, which the Alabama Supreme Court had used in *Jones v. Kappa Alpha Order, Inc.* (Section 10.2.4), saying that New York law differed from Alabama law in this regard.

In *Rothbard v. Colgate University*, 652 N.Y.S.2d 146 (N.Y. App. Div. 1997), a New York intermediate appeals court rejected a fraternity member's claim that the university should be held liable for injuries resulting from his fall, while intoxicated, from the portico outside his window. University rules prohibited students from both underage drinking and from standing on roofs or porticos. The fraternity member claimed that the university should have been aware that both policies were routinely violated at the fraternity house and that the university's failure to enforce its own rules caused his injuries. The court held that the inclusion of rules in the student handbook did not impose a duty upon the university to supervise the plaintiff and take affirmative steps to prevent him from violating the rules. Quite succinctly, the court held that an institution has no duty to shield students from their own dangerous activities.

Although, for the most part, colleges appear to be shielded from a duty to supervise students and fraternal organizations, they may face liability under landlord-tenant law. A recent ruling by the Supreme Court of Nebraska held that the university has a duty to students to protect them from foreseeable risks when those students live in campus housing. In *Knoll v. Board of Regents of the University of Nebraska*, 601 N.W.2d 757 (1999), the state supreme court did not discuss the special relationship theory, but rather, the duty of a landowner to an invitee. In this case, which is discussed more fully in Section 8.6.2, a pledge was injured as the result of a fraternity's hazing activities. The court's analysis focused primarily on the fact that the student was abducted on university property, that the university considered fraternity houses to be student housing units that were subject to regulation by the university, and that university policy required that the plaintiff live in a university housing unit. The court ruled that the university had notice of earlier hazing activities by members of other fraternities, and also had notice of several criminal incidents perpetrated by members of the fraternity that abducted the plaintiff. Therefore, said the court, the abduction and hazing of the plaintiff were foreseeable and created "a landowner-invitee duty to students to take reasonable steps to protect" them against such actions and the resultant harm. The court returned the case to the trial court for determination of whether the university breached its duty to act reasonably and whether the university's inaction was the proximate cause of the plaintiff's injury.<sup>13</sup>

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<sup>13</sup>For a case in which a court rejected a student's attempt to hold both the university and the fraternity responsible for a sexual assault that occurred in an off-campus house rented by a group of fraternity members, but not leased or owned by either the fraternity or the university, see *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003).

Given the volume of litigation by students and others who allege injuries as a result of the actions of local fraternities or their members, colleges and national fraternities—both of which have been found liable in several of these cases—should work to reduce the amount of underage drinking and to educate students about the dangers of hazing. (These and other suggestions are contained in Gregory E. Rutledge, “Hell Night Hath No Fury Like a Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities,” 25 *J. Coll. & Univ. Law* 361 (1998).)

**10.2.4. Liability of fraternal organizations or their members.** Even if a college or university is not sued, fraternities and their members are facing litigation by students, the parents of students who died as a result of hazing incidents, or other individuals who were injured as a result of social events or hazing by members of fraternal organizations. The cases are fact sensitive, and often turn on whether the court views the excessive drinking or otherwise dangerous behavior as voluntary on the part of the injured student or coerced as part of a hazing ritual. Most of the cases involve excessive alcohol consumption, often by underage students.

The social host and alcohol control laws, which vary by state, cover some of the legal issues related to a fraternal organization’s liability for injuries resulting from serving alcohol at a fraternity.<sup>14</sup> Where a first-year coed was sexually assaulted by an alumni member in a fraternity house after a homecoming party at Indiana University, the court held that the local fraternity chapter and the national fraternity had no duty to protect the invitee from sexual assault, nor was the local chapter liable under Indiana’s Dram Shop Act (subsection 3.3.2.4). The court held that the attack was not foreseeable merely because alcohol was served to the alumni member, and that there was no actual evidence that the alumni member drank beer provided by the fraternity (*Motz v. Johnson*, 651 N.E.2d 1163 (Ind. App. 1995)). On appeal, the Indiana Supreme Court upheld the Dram Shop ruling for the fraternities, but reversed the trial court’s summary judgment award on the issue of duty (*Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (Ind. 1999)). The fraternity did have a duty to an invitee to exercise reasonable care for her protection, said the court. Because of similar assaults at the fraternity house in the two previous years, and because the national fraternity had sent educational information about the correlation between underage drinking at fraternities and assault, a jury could reasonably decide that the assault on the plaintiff was foreseeable, and thus summary judgment was inappropriate.

Cases in which injured parties attempt to hold fraternities liable seem to turn on whether the dangerous conduct (usually, but not always, excessive drinking) was voluntary or coerced. If the conduct occurred during hazing, a

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<sup>14</sup>If fraternity members serve alcohol to underage guests, they may face criminal liability. Cases and authorities are collected at Milton Roberts, Annot., “Criminal Liability of Member or Agent of Private Club or Association, or of Owner or Lessor of Its Premises, for Violation of State or Local Liquor or Gambling Laws Thereon,” 98 A.L.R.3d 694. For a summary of the *Hernandez* case, in which the Arizona Supreme Court interpreted its social host law to hold fraternity members who purchased alcohol for underage drinkers liable, see Section 10.2.3.

court may conclude that it was coerced. For example, in *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344 (N.Y. Sup. Ct. App. Div. 1999), the parents of a student who died after consuming excessive amounts of alcohol during a hazing ritual sued the local chapter and several of its members. The appellate court affirmed the trial court's refusal to dismiss the parents' claims of negligence and violations of the anti-hazing statute. The court ruled that the plaintiffs had alleged facts that could support a finding that the deceased student's intoxication was not voluntary, and that the failure of the fraternity members to care for the student after he became intoxicated could also warrant a finding of liability.

In *Nisbet v. Bucher*, 949 S.W.2d 111 (Mo. Ct. App. 1997), parents of a student who died after a hazing ritual filed a wrongful death suit against the fraternities and another association, alleging that the students forced their son to consume alcohol, including a "heated preparation of grain alcohol and peas"; that they coerced him to drink until he became intoxicated and even after he became unconscious; and that they left him face down and unattended, delaying medical treatment for him. The appellate court rejected the defendants' argument that the student was the proximate cause of his own death, noting that participation in initiation activities was required for new members, and that the student was pressured to drink by the organization's members.

But not all courts view hazing as coerced behavior. In *Ex Parte Barran (Jones v. Kappa Alpha Order)*, 730 So. 2d 203 (Ala. 1998), the Supreme Court of Alabama rejected a former Auburn University student's tort claims against a fraternity he had pledged. The student had claimed negligence, assault and battery, negligent supervision, conspiracy, and the tort of outrage. He had endured the hazing for an entire academic year and had been suspended at the end of his first year for poor academic performance. The court noted that the student submitted voluntarily to the hazing, that 20 to 40 percent of the pledge class had withdrawn from the fraternity because of the hazing, and that the student had lied to university officials and to his parents when asked whether he was being hazed. Because the student could have stopped the hazing by withdrawing from the fraternity, the court ruled that he assumed the risk of injury by remaining.

In *Kenner v. Kappa Alpha Psi Fraternity*, 808 A.2d 178 (Pa. Super. 2002), a student seriously injured when he was beaten during a hazing ritual sued both the national fraternity and the members of the local chapter who beat him. Although the trial court awarded summary judgment to the fraternity and its members, the state appellate court ruled that the case must go to trial. The appellate court found that the fraternity owed the student a duty to protect him from harm because the national fraternity knew that there had been earlier incidents of hazing by the local chapter. The national fraternity had a policy against hazing, which created a duty to protect initiates from that behavior. The court went on to rule that the fraternity had not breached its duty to the plaintiff because it had suspended the local chapter for two years for violations of the national fraternity's hazing policy, which the members understood was punishment for previous hazing incidents. But the court ruled that the fraternity's chapter advisor may have breached his individual duty to protect the plaintiff from injury because the advisor had not warned chapter members

against hazing nor discussed the national fraternity's policy against hazing. Prohibition of hazing by another national fraternity resulted in a summary judgment in its favor in *Walker v. Phi Beta Sigma Fraternity*, 706 So. 2d 525 (La. Ct. App. 1997); the court ruled that the national was not in a position to control the day-to-day activities of its local chapters.

The Michigan Court of Appeals held that the Tau Kappa Epsilon national fraternity was not liable for a fatal accident involving alcohol supplied by the local chapter. In *Colangelo v. Theta Psi Chapter of Tau Kappa Epsilon*, 517 N.W.2d 289 (Mich. Ct. App. 1994), the court reasoned that the national fraternity had no duty to supervise the local chapter's daily activities, and that the national fraternity could not have foreseen that the local chapter would have a party that would result in intoxication and injury. The court further reasoned that the national fraternity was ill equipped to supervise the drinking and other activities carried on by local chapters, and that to impose a duty would result in fundamentally changing the role of national fraternities "from an instructor of the principles, rituals, and traditions of the fraternity to a central planning and policing authority" (517 N.W.2d at 292). A similar result, using similar reasoning, was reached in *Walker v. Phi Beta Sigma Fraternity*, 706 So. 2d 525 (La. Ct. App. 1997).

If a fraternal organization has undertaken to protect a pledge or member from harm, failure to do so may breach a duty. The Idaho Supreme Court reversed a summary judgment ruling for a sorority and remanded for trial on the issue of whether the sorority had assumed a duty to protect one of its new members. The plaintiff, a student at the University of Idaho, had fallen out of a third-story window of her sorority house after returning, highly intoxicated, from two fraternity parties at which alcohol was served. Because the sorority had encouraged the plaintiff, who was too young to drink legally, to attend the fraternity parties, had assigned an older sorority member as a "guardian angel" to supervise her at the party (but who refused to do so), and because sorority members had escorted the plaintiff home and left her, unattended and still intoxicated, a material issue of fact existed as to whether the sorority voluntarily assumed a duty of reasonable care to supervise and protect the plaintiff until she was no longer intoxicated (*Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999)).

Plaintiffs seeking to hold fraternal organizations liable for injuries to members have not been successful when the conduct was not coerced. For example, in *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402 (Kan. 2002), the Kansas Supreme Court dismissed a negligence action against the local fraternity and several individual members. The plaintiff voluntarily drank the alcohol that led to his injuries, according to the court, and because he was not required to do so, liability did not attach. Similarly, the parents of a college junior who drowned in a river after drinking beer at a fraternity party were unsuccessful in holding the local and national fraternities responsible. In *Rocha v. Pi Kappa Alpha*, 69 S.W.3d 315 (Tex. Ct. App. 2002), the court ruled that the fraternities owed no duty to the deceased student; there was no evidence that the fraternity had planned the swimming trip, and simply because some of the individuals who participated in the swimming outing were fraternity members did not make the event a fraternity-sponsored social occasion. Nor, according to the Iowa Supreme Court, does a special relationship exist between a fraternity

and one of its members if the misconduct (here, excessive drinking) was not part of an initiation ritual or hazing (*Garofalo v. Lambda Chi Alpha*, 616 N.W.2d 647 (Iowa 2000)).

In addition to being sued under negligence theories, a few fraternities have faced litigation brought on the grounds of premises liability. For example, in *Brakeman v. Theta Lambda Chapter of Pi Kappa Alpha*, 2002 Iowa App. LEXIS 1258 (Iowa Ct. App. 2002) (unpublished), a student who fell out of the upper window of a bar at which a fraternity was sponsoring a party sued the fraternity. The court of appeals reversed a jury verdict for the plaintiff, ruling that the fraternity did not have the requisite control of the premises to incur liability, as the staff of the bar were present during the party and had the responsibility to ensure that they served only those of legal age. Similarly, an attempt by a woman assaulted at an off-campus house rented by several fraternity members to hold the fraternity responsible under a premises liability theory failed because the fraternity did not own or control the premises (*Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003)).

The U.S. Department of Justice has determined that fraternity or sorority houses owned and operated by a college or university are covered by Title III of the Americans With Disabilities Act (see Section 13.2.11). (See Technical Assistance Letter #488 (May 2002), available at <http://www.usdoj.gov/crt/foia/talindex.htm>.) This would require a new fraternity or sorority house to be constructed in compliance with Title III access specifications and would also be relevant to renovation of such a building.

### **Sec. 10.3. The Student Press**

**10.3.1. General principles.** In general, student newspapers and other student publications have the same rights and responsibilities as other student organizations on campus (see Section 10.1 above), and the student journalists have the same rights and responsibilities as other students.<sup>15</sup> The rights of student press organizations and their staffs (and contributors) will vary considerably, however, depending on whether the institution is public or private. This is because the key federal constitutional rights of freedom of the press and freedom of association protect the student press in its relations with public institutions; in private institutions these constitutional rights do not apply (see Section 1.5.2), and the student press' relationship with the institution is primarily a contractual relationship that may vary from institution to institution (see Section 8.1.3).<sup>16</sup>

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<sup>15</sup>Regarding responsibilities, however, student journalists may be subject to ethical obligations that differ from those of other students. For examples and discussion, see Gary Pavela, "The Ethical Principles for College Journalists," *Synthesis, Law & Pol'y. Higher Educ.* Vol. 15, no. 2 (Fall 2003), pp. 1069-1070, 1088.

<sup>16</sup>If a student publication at a private institution is restricted by an outside governmental entity, however, it is protected by federal constitutional rights in much the same way as a student publication at a public institution would be protected. Examples would include a libel suit in which a private institution's student newspaper is a defendant subject to a court's jurisdiction (see Section 10.3.6 below) and a search of the office of a private institution's student newspaper by local police officers (see Section 11.5).

Sections 10.3.2 through 10.3.6 below focus primarily on the First Amendment free press rights of student publications at public institutions. Section 10.3.7 focuses on private institutions. Other First Amendment issues pertinent to student publications are discussed in Sections 8.1.4, 8.5.1, 9.5.6, and 9.6.

Fourth Amendment rights regarding searches and seizures may also become implicated in a public institution's relationship with student publications. In *Desyllas v. Bernstine*, 351 F.3d 934 (9th Cir. 2003), for example, the editor of a student newspaper claimed that the institution's public safety director and a campus police officer had violated his constitutional rights when they sought to recover some missing confidential student records that they believed were in the editor's possession. They had temporarily secured the newspaper office by locking the door with a "clam shell" lock; had allegedly detained the editor temporarily for questioning about the missing records; and had then convinced the editor to surrender the records. The court held that, under the circumstances (set out at length in the opinion), none of the actions—the locking of the office, the alleged detention of the editor, nor the recovery of the records—was an unlawful "seizure" under the Fourth Amendment. The court determined, moreover, that the First Amendment generally does not provide any additional protections from searches and seizures in such circumstances beyond what the Fourth Amendment already provides (see *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), discussed in Section 11.5), and that the student editor's position with the student newspaper did not accord him any greater rights under the Fourth Amendment than any other student would have in similar circumstances. (In circumstances in which a seizure directly "interfere[s] with the [newspaper's] publication of the news" (*Desyllas*, 351 F.3d at 942), however, the First Amendment would provide additional protections; see, for example, *Kincaid v. Gibson*, discussed in Section 10.3.3 below.)<sup>17</sup>

Freedom of the press is perhaps the most staunchly guarded of all First Amendment rights. The right to a free press protects student publications from virtually all encroachments on their editorial prerogatives by public institutions. In a series of forceful cases, courts have implemented this student press freedom, using First Amendment principles akin to those that would protect a big-city daily from government interference.<sup>18</sup>

The chief concern of the First Amendment's free press guarantee is censorship. Thus, whenever a public institution seeks to control or coercively influence the content of a student publication, it will have a legal problem

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<sup>17</sup>For extensive resources on the rights of student journalists, see the Web site of the Student Press Law Center, available at <http://www.splc.org>.

<sup>18</sup>Cases are collected in Donald T. Kramer, Annot., "Validity, Under Federal Constitution, of Public School or State College Regulation of Student Newspapers, Magazines, or Other Publications—Federal Cases," 16 A.L.R. Fed. 182. The more recent cases in this line do suggest that an exception to the principle of broad protection may operate if the student publication is part of a course or other curriculum-related activity, or is otherwise characterized as a "non-public forum." See, for example, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (*en banc*), discussed in Section 10.3.3 below.

on its hands.<sup>19</sup> The problem will be exacerbated if the institution imposes a prior restraint on publication—that is, a prohibition imposed in advance of publication rather than a sanction imposed subsequently (see generally Section 9.5.4). Conversely, the institution’s legal problems will be alleviated if the institution’s regulations do not affect the message, ideas, or subject matter of the publication and do not permit prior restraints on publication. Such “neutral” regulations might involve, for example, the allocation of office space, procedures for payment of printing costs, or limitations on the time, place, or manner of distribution.

### **10.3.2. Mandatory student fee allocations to student publications.**

Objecting students have no more right to challenge the allocation of mandatory student fees to student newspapers that express a particular viewpoint than they have to challenge such allocations to other student organizations expressing particular viewpoints. These issues are now controlled, at least for public institutions and their recognized student organizations that produce publications, by the principles established by the U.S. Supreme Court in *Board of Regents, University of Wisconsin v. Southworth*, discussed in Section 10.1.2 above. Long before *Southworth*, however, lower federal courts had protected student newspapers from losing their student fee allocations because they had editorial viewpoints with which other students disagreed.

In *Larson v. Board of Regents of the University of Nebraska*, 204 N.W.2d 568 (Neb. 1973), for example, the court rejected a student challenge to mandatory fee allocations for a student newspaper whose views the students opposed. The next year, in *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *affirmed without published opinion*, 526 F.2d 587 (4th Cir. 1975), the court rejected a challenge to the University of North Carolina’s use of mandatory fees to subsidize its campus newspaper, the *Daily Tar Heel*. Since the paper did not purport to speak for the entire student body and its existence did not inhibit students from expressing or supporting opposing viewpoints, the subsidy did not infringe First Amendment rights. Eight years later, the same court reconsidered and reaffirmed *Arrington* in *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); and in 1992 another U.S. Court of Appeals (citing *Kania*) reached the same result (*Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992)).

*Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), provides another instructive example of a court rejecting an attempt to terminate a student newspaper’s mandatory fee allocations. The University of Minnesota had changed the funding mechanism of one of its student newspapers by eliminating mandatory

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<sup>19</sup>Legal problems may also arise if a public institution seeks to regulate the distribution, on campus, of newspapers published off campus and not recognized or supported by the institution. Students may claim First Amendment rights to obtain such newspapers. In *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), for example, the court invalidated restrictions on distribution of a free newspaper distributed throughout the county. Other problems may arise when public institutions prohibit the sale of publications on campus; see *Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 502 F. Supp. 789, 799–803, 805–6 (appendix) (N.D. Ill. 1980). These types of problems would now likely be resolved using principles developed by the U.S. Supreme Court in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).



student fees and instead allowing students to elect individually whether or not a portion of their fees would go to the *Minnesota Daily*. Implementation of this refundable fee system came on the heels of intense criticism from students, faculty, religious groups, and the state legislature over a satirical “Humor Issue” of the paper. Although the university argued that the change in funding mechanism came in response to general student objections about having to fund the paper (which the court assumed, *arguendo*, would be a legitimate motive for the change in funding), the court pointed to evidence suggesting that, at least in part, the change was impermissibly in retaliation for the content of the Humor Issue. Holding that the school failed to carry its burden of showing that the permissible motive would have produced the same result, even in the absence of the impermissible retaliatory motive, the court struck down the funding change.

Shortly before its decision in the *Southworth* case, the U.S. Supreme Court decided *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (further discussed in Section 10.1.5 above), its first pronouncement on mandatory student fee allocations for student publications. The Court’s reasoning in *Rosenberger* is consistent with the principles later developed in *Southworth*. But *Rosenberger* also went beyond the analysis in *Southworth*, and in the earlier lower court cases, in two important respects: (1) *Rosenberger* focuses specifically on viewpoint discrimination issues that may arise when a university or its student government decides to fund some student publications but not others; and (2) *Rosenberger* addresses the special situation that arises when a student publication has an editorial policy based on a religious perspective.

The plaintiffs in *Rosenberger* were students who published a magazine titled “Wide Awake: A Christian Perspective at the University of Virginia.” As described by the U.S. Supreme Court:

The paper’s Christian viewpoint was evident from the first issue, in which its editors wrote that the journal “offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia.” The editors committed the paper to a two-fold mission: “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis’ ideas about evil and free will, and reviews of religious music. In the next two issues, *Wide Awake* featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of *Wide Awake*, and the end of each article or review, is marked by a cross. The advertisements carried in *Wide Awake* also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores [515 U.S. at 826].

The university’s guidelines for student fee allocations (“Guidelines”) permitted “student news, information, opinion, entertainment, or academic communications media groups,” among other groups, to apply for allocations that

the university would then use to pay each group's bills from outside contractors that printed its publication. The Guidelines provided, however, that student groups could not use fee allocations to support "religious activity," defined as activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Fifteen student publications received funding, but the Wide Awake publication did not because the student council determined that it was a religious activity. Wide Awake's members challenged this denial as a violation of their free speech and press rights under the First Amendment.

The U.S. Supreme Court upheld Wide Awake's claim because the university's action was a kind of censorship based on the publication's viewpoint. The Court then addressed the additional considerations that arose in the case because Wide Awake published *religious* viewpoints rather than *secular* viewpoints based on politics or culture. Since Wide Awake sought to use public (university) funds to subsidize religious viewpoints, the First Amendment establishment clause also became a focus of the analysis. The Court, however, rejected the argument that funding Wide Awake would violate the establishment clause (see the discussion in Section 10.1.5 above). Concluding that the university funding would be "neutral toward religion," the Court emphasized that this funding was part of a broad program that "support[ed] various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." The Court also emphasized that:

[the university's Guidelines] have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was [515 U.S. at 840].

**10.3.3. Permissible scope of institutional regulation.** Three classic 1970s cases—the *Joyner*, *Bazaar*, and *Schiff* cases, discussed below—illustrate the strength and scope of First Amendment protection accorded the student press in public institutions. These cases also illustrate the different techniques by which an institution may seek to regulate a student newspaper, and they explain when and why such techniques may be considered unconstitutional censorship.

In *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), the president of North Carolina Central University had permanently terminated university financial support for the campus newspaper. The president asserted that the newspaper had printed articles urging segregation and had advocated the maintenance of an all-black university. The court held that the president's action violated the student staff's First Amendment rights:

It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a

student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. . . .

The principles reaffirmed in *Healy* [see *Healy v. James*, discussed in Section 10.1 above] have been extensively applied to strike down every form of censorship of student publications at state-supported institutions. Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant materials, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse [477 F.2d at 460].

The president also asserted, as grounds for terminating the paper's support, that the newspaper would employ only blacks and would not accept advertising from white-owned businesses. While such practices were not protected by the First Amendment and could be enjoined, the court held that the permanent cut-off of funds was an inappropriate remedy for such problems because of its broad effect on all future ability to publish.

In *Bazaar v. Fortune*, 476 F.2d 570, *rehearing*, 489 F.2d 225 (5th Cir. 1973), the University of Mississippi had halted publication of an issue of *Images*, a student literary magazine written and edited with the advice of a professor from the English department, because a university committee had found two stories objectionable on grounds of "taste." While the stories concerned interracial marriage and black pride, the university disclaimed objection on this basis and relied solely on the stories' inclusion of "earthy" language. The university argued that the stories would stir an adverse public reaction, and, since the magazine had a faculty adviser, their publication would reflect badly on the university. The court held that the involvement of a faculty adviser did not enlarge the university's authority over the magazine's content. The university's action violated the First Amendment because

speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people, be they politicians or ordinary citizens, and newspapers. To come forth with such a rule would be to virtually read the First Amendment out of the Constitution and, thus, cost this nation one of its strongest tenets [476 F.2d at 579].

*Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), concerned the firing of the editors of the *Atlantic Sun*, the student newspaper of Florida Atlantic University. The university's president based his action on the poor quality of the newspaper and on the editors' failure to respect university guidelines regarding the publication of the paper. The court characterized the president's action as a form of direct control over the paper's content and held that such action violated the First Amendment. Poor quality, even though it "could embarrass, and perhaps bring some element of disrepute to the school," was not a permissible basis on which to limit free speech. The university president in *Schiff* attempted to bolster his case by arguing that the student editors were employees of the state. The court did not give the point the attention it deserved. Presumably, if a

public institution chose to operate its own publication (such as an alumni magazine) and hired a student editor, the institution could fire that student if the technical quality of his or her work was inadequate. The situation in *Schiff* did not fit this model, however, because the newspaper was not set up as the university's own publication. Rather, it was recognized by the university as a publication primarily by and for the student body, and the student editors were paid from a special student activities fee fund under the general control of the student government association.

While arrangements such as those in *Schiff* may insulate a student newspaper from university control, it might nevertheless be argued that a newspaper's receipt of mandatory student fee allocations, and its use of university facilities and equipment, could constitute state action (see Section 1.5.2), thus subjecting the student editors themselves to First Amendment restraints when dealing with other students and with outsiders. In *Mississippi Gay Alliance v. Goude-lock*, 536 F.2d 1073 (5th Cir. 1976), however, the court rejected a state action argument (over a strong dissent) and upheld a student newspaper's refusal to print an ad for a gay counseling service. And in *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987), the court held that the newspaper was not engaged in state action when it refused to print sexual preferences in classified ads. In *Gay and Lesbian Students Ass'n. v. Gohn*, 850 F.2d 361 (8th Cir. 1988), however, the court distinguished *Sinn* and found state action in a situation where the student organization's activity was "not free from university control." Later, in *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996) (discussed further in Section 1.5.2), the court—like the courts in *Goude-lock* and *Sinn*—refused to find that a student newspaper was engaged in state action when it rejected an advertisement submitted to the paper.

In a more recent and highly important case, *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*), the court reaffirmed the strong protections of these earlier cases and also confirmed that a confiscation of the printed copies of a student publication will often be considered a classic First Amendment violation. In addition, moving beyond the reasoning in the earlier cases, the court emphasized the importance of "public forum" analysis (see generally Section 9.5.2) in First Amendment cases about student publications.

*Kincaid v. Gibson* concerned a student yearbook, *The Thorobred*, published by students at Kentucky State University (KSU). KSU administrators had confiscated the yearbook covering the 1992–93 and the 1993–94 academic years when the printer delivered it to the university for distribution. The vice president for student affairs (Gibson) claimed that the yearbook was of poor quality and "inappropriate," citing, in particular, the failure to use the school colors on the cover, the lack of captions for many photos, the inappropriateness of the "destination unknown" theme, and the inclusion of current events unrelated to the school. The yearbook's student editor and another student sued the vice president, the president, and members of the board of trustees, claiming that the confiscation violated their First Amendment rights.

Relying in part on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a case about a high school newspaper, the federal district court granted

the defendants' motion for summary judgment, holding that the yearbook was a "nonpublic forum" and that the university's action was consistent with the principles applicable to nonpublic forums. A three-judge panel of the Sixth Circuit upheld the district court's decision (191 F.3d 719 (6th Cir. 1999)); but on further review the full appellate court, sitting *en banc*, disagreed with the panel, reversed the district court, and ordered it to enter summary judgment for the students.

The *en banc* court applied the leading U.S. Supreme Court public forum cases but, unlike the district court and the three-judge panel, it determined that the yearbook was a "limited public forum." Specifically, the court noted that KSU had a written policy placing the yearbook under the management of the Student Publications Board (SPB) but lodging responsibility for the yearbook's content with the student editors. Although the SPB was to appoint a school employee to act as advisor of the publication, the policy provided that "[i]n order to meet the responsible standards of journalism, an advisor may require changes in the form of materials submitted by students, but such changes must deal only with the form or the time and manner of expressions rather than alteration of content." The written policy thus indicated to the court that the university's "intent" was "to create a limited public forum rather than reserve to itself the right to edit or determine [the yearbook's] content."

Following the teachings of the *Rosenberger* case (Section 10.3.2 above), the *en banc* court declined to follow the Court's decision in *Hazelwood*, the high school newspaper case. According to the court: "There can be no serious argument about the fact that, in its most basic form, the yearbook serves as a forum in which student editors present pictures, captions, and other written material, and that these materials constitute expression for purposes of the First Amendment." In particular, the yearbook was distinguishable from the newspaper in *Hazelwood* because it was not a "closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content." Moreover, in a university setting, unlike a high school setting, the editors and readers of the yearbook "are likely to be young adults." Therefore, "there can be no justification for suppressing the yearbook on the grounds that it might be 'unsuitable for immature audiences'" (quoting *Hazelwood*, 484 U.S. at 271).

On the basis of these factors, the court concluded that the yearbook was a limited public forum open for student expression. In such a forum,

the government may impose only reasonable time, place and manner regulations, and content-based regulations that are narrowly drawn to effectuate a compelling state interest. . . . In addition, as with all manner of fora, the government may not suppress expression on the basis that state officials oppose a speaker's view [236 F.3d at 354].

The court then found that "KSU officials ran afoul of these restrictions" when they confiscated the copies of *The Thorobred* without notification or explanation and refused to distribute them. Such action

is not a reasonable time, place, or manner regulation of expressive activity. . . . Nor is it a narrowly crafted regulation designed to preserve a compelling state interest. . . . [There was] no other student forum for recording words and pictures to reflect the experience of KSU students during the 1992 through 1994 school years. Indeed, the likelihood of the existence of any such alternative forum at this late date, when virtually all of the students who were at KSU in the early 1990s will have surely moved on, is extraordinarily slim. Accordingly, the KSU officials' confiscation of the yearbooks violates the First Amendment, and the university has no constitutionally valid reason to withhold distribution of the 1992–94 *Thorobred* from KSU students from that era [236 F.3d at 354].

The *en banc* court especially emphasized that the university's confiscation was based on the yearbook's content, and that "[c]onfiscation ranks with forced government speech as amongst the purest forms of content alteration." According to the court:

[T]he record makes clear that Gibson sought to regulate the content of the 1992–94 yearbook: in addition to complaining about the yearbook's color, lack of captions, and overall quality, Gibson withheld the yearbooks because she found the yearbook theme of "destination unknown" inappropriate. Gibson also disapproved of the inclusion of pictures of current events, and testified that "[t]here were a lot of pictures in the back of the book that . . . to me, looked like a *Life* magazine." . . . And after the yearbooks came back from the printer, Gibson complained to Cullen that "[s]everal persons have received the book, and are thoroughly disappointed at the quality and content." Thus, it is quite clear that Gibson attempted to regulate the content of *The Thorobred* once it was printed [236 F.3d at 354–55].

The court also determined that, even if the yearbook were a nonpublic forum, rather than a limited public forum, the university's confiscation of the yearbooks would still have violated the First Amendment. This was because "suppression of the yearbook smacks of viewpoint discrimination as well," and "government may not regulate even a nonpublic forum based upon the speaker's viewpoint." According the court, "[A]n editor's choice of theme, selection of particular pictures, and expression of opinions are clear examples of the editor's viewpoint . . ." (236 F.3d at 356). (For further, detailed, discussion of *Kincaid v. Gibson*, see Richard Peltz, "Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the 'College Hazelwood' Case," 68 *Tenn. L. Rev.* 481 (2001).)

Thus *Kincaid*, like the earlier cases of *Joyner*, *Bazaar*, and *Schiff*, clearly demonstrates the very substantial limits on administrators' authority to regulate the student press at public institutions. But these cases do not stand for the proposition that *no* regulation is permissible. To the contrary, each case suggests narrow grounds on which student publications can be subjected to some regulation. The *Joyner* case indicates that the student press can be prohibited from racial discrimination in its staffing and advertising policies. *Stanley* suggests that institutions may alter the funding mechanisms for student publications as long as they do not do so for reasons associated with a publication's content. *Bazaar*

indicates that institutions may dissociate themselves from student publications to the extent of requiring or placing a disclaimer on the cover or format of the publication. (The court specifically approved the following disclaimer after it reheard the case: “This is not an official publication of the university.”) *Schiff* suggests enigmatically that there may be “special circumstances” where administrators may regulate the press to prevent “significant disruption on the university campus or within its educational processes.” And *Kincaid* indicates that institutions may impose content-neutral “time, place, and manner regulations” on the student press, and also suggests that institutions may regulate student publications that are part of a curricular activity or that are established to operate under the editorial control of the institution.

The latter points from *Kincaid* were further developed, and integrated with public forum analysis, in another highly important case decided by another U.S. Court of Appeals, also sitting *en banc*. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005 (*en banc*)), concerned the validity of a dean’s alleged order to halt the printing of a subsidized student newspaper until she had reviewed and approved the issues. The *en banc* court used the U.S. Supreme Court’s *Hazelwood* case as the “starting point” and the “framework” for its analysis. Following *Hazelwood*, the court held that, if a subsidized student newspaper falls within the category of a non-public forum, then it “may be open to reasonable regulation” by the institution, including content regulation imposed for “legitimate pedagogical reasons” (412 F.3d at 735, 737). The appellate court then remanded the case to the district court for further proceedings on the issue of whether the student newspaper was a nonpublic forum subject to such regulation or a public forum not subject to content regulation.

The clear lesson of the student publication cases, then, is not so much “Don’t regulate” as it is “Don’t censor.” So long as administrators avoid censorship, there will be some room for them to regulate student publications; and, in general, they may regulate publications by student organizations or individual students in much the same way that they may regulate other expressive activities of student organizations (see Section 10.1 above) or students generally (see Section 9.5). Even content need not be totally beyond an administrator’s concern. A disclaimer requirement can be imposed to avoid confusion about the publication’s status within the institution. If the publication were a nonpublic forum, some content regulation for pedagogical purposes would be permissible. Advertising content in a publication may also be controlled to some extent, as discussed in subsection 10.3.4 below. Content that is obscene or libelous as defined by the U.S. Supreme Court may also be regulated, as subsections 10.3.5 and 10.3.6 below suggest. And as the *Rosenberger* case in subsection 10.3.2 above suggests, religious content may be regulated to an extent necessary to prevent establishment clause violations.

**10.3.4. Advertising in student publications.** In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the U.S. Supreme Court upheld a regulation prohibiting newspapers from publishing “help-wanted” advertisements in sex-designated columns. And in *Virginia State*

*Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), while invalidating a statutory ban on advertising prescription drug prices, the Court affirmed the state's authority to regulate false or misleading advertising and advertising that proposes illegal transactions. These foundational cases suggest that there is at least some narrow room within which public institutions may regulate advertising in student newspapers.

Issues regarding advertising in student newspapers are considered at length in *Lueth v. St. Clair County Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990). The plaintiff, a former editor of the student newspaper, sued the college because it had prohibited the publication of ads for an off-campus nude-dancing club. Concluding that the advertising was "commercial speech" (Section 11.6.4.1) and that the student-run newspaper was a public forum (Section 9.5.2), the court applied the First Amendment standards for commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), as modified by *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (both discussed in Section 11.6.4.1). Although the college had substantial interests in not fostering underage drinking or the degradation of women, the court held the advertising prohibition unconstitutional because the college had no advertising guidelines or other limits on its authority that would ensure that its regulation of advertising was "narrowly tailored" to achieve its interests. (To similar effect, see *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), in which the court held a state statute regulating alcohol beverage advertising to be unconstitutional as applied to a student newspaper.)

As the *Lueth* and *Pitt News* cases suggest, advertising of alcoholic beverages has been a particular concern for colleges and universities for many years. Advertising of tobacco products, unlawful drugs, and firearms may raise similar concerns. The validity of regulations limiting such advertising has become more doubtful since the U.S. Supreme Court's decisions in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), invalidating certain state restrictions on advertising of alcoholic beverages, and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), invalidating certain state restrictions on advertising of tobacco products. Relying on *Lorillard*, the court in *Khademi v. South Orange County Community College District*, 194 F. Supp. 2d 1011, 1028–29 (C.D. Cal. 2002), invalidated campus regulations that prohibited advertising for alcoholic beverages, tobacco products, or firearms. The court, however, did uphold a campus regulation prohibiting advertising of "illegal substances as identified by the Federal Government, and/or by the State of California," because it was limited to products made illegal by criminal law. As to tobacco, alcohol, and firearms advertising regulations, they were content-based regulations of speech that did not meet the standard of justification required by the case law. It was not enough that some of the community college district's students were underage and, therefore, prohibited by state law from purchasing these products. According to the court, "sixty-eight percent of the District's students are legally of age to buy alcohol, tobacco, and firearms products," and a complete ban on advertising these products would therefore not be narrowly tailored to effectuate the community college's legitimate interests (194 F. Supp. 2d at 1029, n.13).



**10.3.5. Obscenity.** It is clear that public institutions may discipline students or student organizations for having published obscene material. Public institutions may even halt the publication of such material if they do so under carefully constructed and conscientiously followed procedural safeguards. A leading case is *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970), which invalidated a system of prior review and approval by a faculty advisory board, because the system did not place the burden of proving obscenity on the board, or provide for a prompt review and internal appeal of the board's decisions, or provide for a prompt final judicial determination. *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973), which sets out prior review requirements in the secondary school context, is also illustrative. Clearly, the constitutional requirements for prior review regarding obscenity are stringent, and the creation of a constitutionally acceptable system is a very difficult and delicate task. (For U.S. Supreme Court teaching on prior review, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).)

Moreover, institutional authority extends only to material that is actually obscene, and the definition or identification of obscenity is, at best, an exceedingly difficult proposition. In a leading Supreme Court case, *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the plaintiff was a graduate student who had been expelled for violating a board of curators bylaw prohibiting distribution of newspapers "containing forms of indecent speech." The newspaper at issue had a political cartoon on its cover that "depicted policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: 'With Liberty and Justice for All.'" The newspaper also "contained an article entitled 'M——F—— Acquitted,' which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as 'Up Against the Wall, M——F——.'" After being expelled, the student sued the university, alleging a violation of her First Amendment rights. The Court, in a *per curiam* opinion, ruled in favor of the student:

We think [*Healy v. James*, Section 10.1.1 above] makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected [410 U.S. at 670].

Obscenity, then, is not definable in terms of an institution's or an administrator's own personal conceptions of taste, decency, or propriety. Obscenity can be defined only in terms of the guidelines that courts have constructed to prevent the concept from being used to choke off controversial social or political dialogue. As the U.S. Supreme Court stated in the leading case, *Miller v. California*, 413 U.S. 15 (1973):

We now confine the permissible scope of . . . regulation [of obscenity] to works which depict or describe sexual conduct. That conduct must be specifically

defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value [413 U.S. at 24 (1973)].

Although these guidelines were devised for the general community, the Supreme Court made clear in *Papish* that “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech.” Administrators devising campus rules for public institutions are thus bound by the same obscenity guidelines that bind the legislators promulgating obscenity laws. Under these guidelines, the permissible scope of regulation is very narrow, and the drafting or application of rules is a technical exercise that administrators should undertake with the assistance of counsel, if at all.

**10.3.6. Libel.** As they may for obscenity, institutions may discipline students or organizations that publish libelous matter. Here again, however, the authority of public institutions extends only to matter that is libelous according to technical legal definitions. It is not sufficient that a particular statement be false or misleading. Common law and constitutional doctrines require that (1) the statement be false; (2) the publication serve to identify the particular person libeled; (3) the publication cause at least nominal injury to the person libeled, usually including but not limited to injury to reputation; and (4) the falsehood be attributable to some fault on the part of the person or organization publishing it. The degree of fault depends on the subject of the alleged libel. If the subject is a public official or what the courts call a “public figure,” the statement must have been made with “actual malice”; that is, with knowledge of its falsity or with “reckless disregard” for its truth or falsity. In all other situations governed by the First Amendment, the statement need only have been made negligently. Courts make this distinction in order to give publishers extra breathing space when reporting on certain matters of high public interest.<sup>20</sup>

A decision of the Virginia Supreme Court illustrates that a false statement of fact is at the heart of a defamation claim. The claim in *Yeagle v. Collegiate Times*, 497 S.E.2d 136 (Va. 1998), arose from the student newspaper’s publication of an article about a program facilitated by the plaintiff, a university administrator. Although otherwise complimentary of the administrator, the article included a large-print block quotation attributed to her and identifying her as “Director of Butt Licking.” The court rejected the defamation claim because the expression “cannot reasonably be understood as stating an actual fact about [the plaintiff’s] job title or her conduct, or that she committed a crime of moral

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<sup>20</sup>The U.S. Supreme Court has developed these constitutional principles of libel law in a progression of decisions beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 389 U.S. 997 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

turpitude.” Although the phrase “Director of Butt Licking” is “disgusting, offensive, and in extremely bad taste,” in the circumstances of this case it was “no more than ‘rhetorical hyperbole.’” The court further rejected the plaintiff’s argument that “the phrase connotes a lack of integrity in the performance of her duties.” Explaining that “inferences cannot extend the statements by innuendo, beyond what would be the ordinary and common acceptance of the statement,” the court relied on the complimentary content of the article itself to find that there was no basis for the inference the plaintiff sought to draw.

An instructive illustration of the “public official” concept and the “actual malice” standard is provided by *Waterson v. Cleveland State University*, 639 N.E.2d 1236 (Ohio 1994). The plaintiff, then deputy chief of the campus police force at the defendant university, claimed that he had been defamed in an editorial published in the campus student newspaper and written by its then editor-in-chief, Quarles. The university claimed that the deputy chief was a “public official” within the meaning of the leading U.S. Supreme Court precedents and that he therefore could not prevail on a defamation claim unless he proved that Quarles or the university had acted with “actual malice” in publishing the editorial. The court accepted the university’s argument and categorized the plaintiff as a public official:

[T]he students and faculty of CSU [Cleveland State University] have a significant interest in the qualifications, performance and conduct of the officers of the CSU police department, as they rely on these officers for their campus security and are more likely to have day-to-day contact with them than with the officers of the greater Cleveland community. Further, the interest of the campus community in any individual officer’s performance is likely to increase with the authority and influence of the officer. At the time the editorial in question was published, . . . plaintiff was second in command in the department, ranking only below the Chief of Police, and was responsible for the continued training of the approximately thirty officers on the force. Plaintiff thus was in a position to wield considerable influence over the rank and file members of the department and to set the tone within the department on issues such as the appropriate use of force and ethnic sensitivity. Finally, the CSU community is the principal audience of the publication in which the editorial in question appeared, precisely the audience with the greatest interest in the performance of CSU police officers, including plaintiff [639 N.E.2d at 1238–39].

The plaintiff (the deputy chief) then argued that, even if he was a public official, he had met his burden of proof of demonstrating “actual malice.” Again, the court disagreed:

[T]he focus of an actual-malice inquiry is on the conduct and state of mind of the defendant. *Herbert v. Lando*, 441 U.S. 153 (1979). To prevail, a plaintiff must show that the false statements were made with a “high degree of awareness of their probable falsity . . .” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). . . . The record in this case reveals that plaintiff presented no evidence of who Quarles’ sources for the editorial were, and hence no evidence of the reliability of those sources. Nor did plaintiff present any evidence as to what, if any, investigations Quarles undertook prior to publishing her editorial. In fact, plaintiff

presented no evidence whatsoever which would allow one to conclude that Quarles either knew that the allegations contained in her editorial were false or that she entertained serious doubts as to their veracity [639 N.E.2d at 1239–140].

The appellate court therefore affirmed the trial court's order dismissing the deputy chief's defamation claim.

Given the complexity of the libel concept, administrators should approach it most cautiously. Because of the need to assess both injury and fault, as well as identify the defamatory falsehood, libel may be even more difficult to combat than obscenity. Suppression in advance of publication is particularly perilous, since injury can only be speculated about at that point, and reliable facts concerning fault may not be attainable. Much of the material in campus publications, moreover, may involve public officials or public figures and thus be protected by the higher-fault standard of actual malice.

Though these factors might reasonably lead administrators to forgo any regulation of libel, there is a countervailing consideration: institutions or administrators may occasionally be held liable in court for libelous statements in student publications (see Sections 3.3.4). Such liability could exist where the institution sponsors a publication (such as a paper operated by the journalism department as a training ground for its students), employs the editors of the publication, establishes a formal committee to review the content of material in advance of publication, or otherwise exercises some control (constitutionally or unconstitutionally) over the publication's content. In any case, liability would exist only for statements deemed libelous under the criteria set out above.

Such potential liability, however, need not necessarily prompt increased surveillance of student publications. Increased surveillance would demand regulations that stay within constitutional limits yet are strong enough to weed out all libel—an unlikely combination. And since institutional control of the publication is the predicate to the institution's liability, increased regulation increases the likelihood of liability should a libel be published. Thus, administrators may choose to handle liability problems by lessening rather than enlarging control. The privately incorporated student newspaper operating independently of the institution would be the clearest example of a no-control/no-liability situation.

The decision of the New York State Court of Claims in *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981), not only illustrates the basic steps for establishing libel but also affirms that institutional control over the newspaper, or lack thereof, is a key to establishing or avoiding institutional liability. The opinion also discusses the question of whether an institution can ever restrain in advance the planned publication of libelous material.

The plaintiffs (claimants) in *Mazart* were two students at the State University of New York-Binghamton who were the targets of an allegedly libelous letter to the editor published in the student newspaper, the *Pipe Dream*. The letter described a prank that it said had occurred in a male dormitory and characterized the act as prejudice against homosexuals. The plaintiffs' names appeared at the end of the letter, although they had not in fact written it, and the body of the letter identified them as "members of the gay community."

The court analyzed the case in three stages. *First*, applying accepted principles of libel law to the educational context in which the incident occurred, the court determined that this letter was libelous:

Did the letter in the *Pipe Dream* expose claimants to hatred, contempt, or aversion, or induce an evil or unsavory opinion of them in the minds of a substantial number of the [university] community? The answer to the question is far from simple. . . . According to the chairman of the English Department at the University, . . . sexual orientation had no more bearing in the classroom than religious affiliation. The Assistant Vice President for Finance, Management, and Control of the University opined that the published letter had a “[v]ery low, very little affect” [*sic*] on the campus community.

No doubt the impact of the published letter on the collective mind of the University was considerably less than it might have been had the letter been published in a conservative rural American village. Nonetheless, the court finds that an unsavory opinion of the claimants did settle in the minds of a substantial number of persons in the university community. . . . The question of homosexuality was a significant one on the university campus. . . . Both claimants testified that they were accosted by numerous fellow students after the event and queried about their sexual orientation, and the court finds their testimony, in this respect, credible. Deviant sexual intercourse and sodomy were crimes in the state of New York at the time the letter was published (Penal Law, §§ 130 and 130.38). Certainly those members of the University community who did not personally know the claimants would logically conclude that claimants were homosexual, since the letter identified them as being members of the “gay community.” The court finds that a substantial number of the University community would naturally assume that the claimants engaged in homosexual acts from such identification [441 N.Y.S.2d at 603–4].

*Second*, the court considered the state’s argument that, even if the letter was libelous, its publication was protected by a qualified privilege because the subject matter was of public concern. Again using commonly accepted libel principles, the court concluded that a privilege did not apply because

the editors of the *Pipe Dream* acted in a grossly irresponsible manner by failing to give due consideration to the standards of information gathering and dissemination. It is obvious that authorship of a letter wherein the purported author appears to be libeled should be verified. Not only was the authorship of the letter herein not verified but it appears that the *Pipe Dream*, at least in November of 1977, had no procedures or guidelines with regard to the verification of the authorship of any letters to the editor [441 N.Y.S.2d at 604].

*Third*, the court held that, although the letter was libelous and not privileged, the university (and thus the state) was not liable for the unlawful acts of the student newspaper. In its analysis the court considered and rejected two theories of liability:

(1) [that] the state, through the University, may be vicariously liable for the torts of the *Pipe Dream* and its editors on the theory of *respondeat superior* (that is, the University, as principal, might be liable for the torts of its agents, the student

paper and editors); and (2) [that] the state, through the University, may have been negligent in failing to provide guidelines to the *Pipe Dream* staff regarding libel generally, and specifically, regarding the need to review and verify letters to the editor [441 N.Y.S.2d at 600].

In rejecting the first theory, the court relied heavily on First Amendment principles:

[T]he state could be held vicariously liable if the University and the *Pipe Dream* staff operated in some form of agency relationship. However, it is characteristic of the relationship of principal and agent that the principal has a right to control the conduct of the agent with respect to matters entrusted to him. While this control need not apply to every detail of an agent's conduct and can be found where there is merely a right held by the principal to make management and policy decisions affecting the agent, there can be no agency relationship where the alleged principal has no right of control over the alleged agent. . . .

There are severe constitutional limitations on the exercise of any form of control by a state university over a student newspaper . . . (*Panarella v. Birenbaum*, 37 A.D.2d 987, 327 N.Y.S.2d 755, *affirmed*, 32 N.Y.2d 108, 343 N.Y.S.2d 333, 296 N.E.2d 238). . . . Censorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been uniformly proscribed by the Courts. Such censorship or prior restraint cannot be imposed by suspending editors . . . , by suppressing circulation . . . , by requiring prior approval of controversial articles . . . , by excising or suppressing distasteful material . . . , or by withdrawing financial support . . . [441 N.Y.S.2d at 604–5 (most citations omitted)].<sup>21</sup>

Due to these strong constitutional protections for student newspapers at public institutions, the defendant university had no authority “to prevent the publication of the letter.” A “policy of prior approval of items to be published in a student newspaper, even if directed only to restraining the publication of potentially libelous material . . . , would run afoul of [the First Amendment]” (citing *Near v. State of Minnesota*, 283 U.S. 697 (1931)). The court therefore ruled that the university did not have a right of control over the *Pipe Dream* sufficient to sustain an agency theory:

The Court recognizes that the *Pipe Dream* and its staff may be incapable of compensating claimants for any damages flowing from the libel. But, in light of the university's eschewing control, editorial or otherwise, over the paper and the constitutionally imposed barriers to the exercise by the University of any editorial control over the newspaper, the Court must reluctantly conclude that the relationship of the university and the *Pipe Dream* is not such as would warrant the imposition of vicarious liability on the state for defamatory material appearing in the student newspaper (see “Tort Liability of a University for Libelous Material in Student Publications,” 71 *Mich. L. Rev.* 1061) [441 N.Y.S.2d at 604–6; most citations omitted].

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<sup>21</sup>For discussion of these principles and illustrative cases, see subsection 10.3.3 of this Section.

The court then also rejected the plaintiffs' second liability theory. Focusing particularly on the tort law concept of "duty" (see generally Section 3.3.1), the court ruled that the university and state were not negligent "for failing to provide to the student editors guidelines and procedures designed to avoid the publication of libelous material." The issue, the court said, was "whether there was a duty on the part of the University administration" to furnish such guidelines; and the "constitutional limitations on the actual exercise of editorial control by the university," noted above, did "not necessarily preclude the existence of [such] a duty." But the courts, as well as the New York state legislature, regard college students as young adults and not children, and the *Pipe Dream* editors, as young adults, are therefore presumed to have "that degree of maturity and common sense necessary to comprehend the normal procedures for information gathering and dissemination."

The court must, therefore, find that the University had no duty to supply news gathering and dissemination guidelines to the *Pipe Dream* editors since they were presumed to already know those guidelines. Admittedly, it appears that the student editors of the *Pipe Dream* in 1977 either did not know or simply ignored commonsense verification guidelines with regard to the publication of the instant letter. But that was not the fault of the University. In either event, there was no duty on the part of the University. The editors' lack of knowledge of or failure to adhere to standards which are common knowledge (*Greenberg v. CBS, Inc.* [419 N.Y.S.2d 988 (N.Y. App. Div. 1979)],) and ordinarily followed by reasonable persons . . . was not reasonably foreseeable [441 N.Y.S.2d at 607].

The validity and importance of the *Mazart* case was reaffirmed in *McEvaddy v. City University of New York*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995). The *McEvaddy* court dismissed a defamation claim brought against City University of New York for an allegedly libelous article published in the student newspaper. Citing *Mazart*, the court held that "[t]he presence of a faculty advisor to the paper, whose advice is nonbinding, and the financing of the paper through student activity fees . . . , do not demonstrate such editorial control or influence over the paper by [the university] as to suggest an agency relationship." The New York Court of Appeals, the state's highest court, denied the claimant's motion for leave to appeal (664 N.E.2d 1258 (N.Y. 1996)). (For another, more recent, affirmation of the principles in *Mazart* and *McEvaddy*, see *Lewis v. St. Cloud State University*, 693 N.W.2d 466 (Minn. App. 2005).)

*Mazart v. State* is an extensively reasoned precedent in an area where there had been little precedent. The court's opinion, together with the later opinions in *McEvaddy* and *Lewis*, provide much useful guidance for administrators of public institutions. The reasoning in these opinions depends, however, on the particular circumstances concerning the campus setting in which the newspaper operated and the degree of control the institution exercised over the newspaper, and also, under *Mazart*, on the foreseeability of libelous actions by

the student editors. Administrators will therefore want to consult with counsel before attempting to apply the principles of these cases to occurrences on their own campuses. Moreover, tort concepts of duty applicable to colleges and universities have been evolving since the *Mazart* case (see Robert Bickel & Peter Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Life?* (Carolina Academic Press, 1999)), and counsel will want to take these developments into consideration as well when applying the duty principles from the *Mazart* case.

**10.3.7. Obscenity and libel in private institutions.** Since the First Amendment does not apply to private institutions that are not engaged in state action (see Section 1.5.2), such institutions have a freer hand in regulating obscenity and libel. Yet private institutions should devise their regulatory role cautiously. Regulations broadly construing libel and obscenity based on lay concepts of those terms could stifle the flow of dialogue within the institution, while attempts to avoid this problem with narrow regulations may lead the institution into the same definitional complexities that public institutions face when seeking to comply with the First Amendment. Moreover, in devising their policies on obscenity and libel, private institutions will want to consider the potential impact of state law. Violation of state obscenity or libel law by student publications could subject the responsible students to damage actions, possibly to court injunctions, and even to criminal prosecutions, causing unwanted publicity for the institution. But if the institution regulates the student publications to prevent such problems, the institution could be held liable along with the students if it exercises sufficient control over the publication (see generally Sections 2.1.3 & 3.3.4).

## **Sec. 10.4. Athletics Teams and Clubs**

**10.4.1. General principles.** Athletics, as a subsystem of the postsecondary institution, is governed by the general principles set forth elsewhere in this chapter and this book. These principles, however, must be applied in light of the particular characteristics and problems of curricular, extracurricular, and intercollegiate athletic programs. A student athlete's eligibility for financial aid, for instance, would be viewed under the general principles in Section 8.3, but aid conditions related to the student's eligibility for or performance in intercollegiate athletics create a special focus for the problem (see subsection 10.4.5 below). The institution's tort liability for injuries to students would be subject to the general principles in Section 3.3, but the circumstances and risks of athletic participation provide a special focus for the problem (see subsection 10.4.9 below). Similarly, the due process principles in Section 9.4 may apply when a student athlete is disciplined, and the First Amendment principles in Section 9.5 may apply when student athletes engage in protest activities. But in each case the problem may have a special focus (see subsections 10.4.2 & 10.4.3 below). Moreover, as in many other areas of the law, there are various statutes that have special applications to athletics (see subsection 10.4.4 below).



Surrounding these special applications of the law to athletics, there are major legal and policy issues that pertain specifically to the status of “big-time” intercollegiate athletics within the higher education world. In addition to low graduation rates of athletes, the debate has focused on academic entrance requirements for student athletes; postsecondary institutions’ recruiting practices; alleged doctoring or padding of high school and college transcripts to obtain or maintain athletic eligibility; drug use among athletes and mandatory drug testing (subsection 10.4.8 below); other misconduct by student athletes, such as sexual assaults, and institutional responses to the alleged misconduct; alleged exploitation of minority athletes; improper financial incentives and rewards or improper academic assistance for student athletes; and the authority and practices of the National Collegiate Athletic Association (NCAA) and athletic conferences (see Section 14.4) regarding such matters. The overarching concern prompted by these issues is one of integrity: the integrity of individual institutions’ athletic programs, the integrity of academic standards at institutions emphasizing major intercollegiate competition, the integrity of higher education’s mission in an era when athletics has assumed such a substantial role in the operation of the system. (For discussion of these issues, see John R. Thelin, *Games Colleges Play: Scandal and Reform in Intercollegiate Athletics* (John Hopkins University Press, 1996) (exploring evolution of intercollegiate athletics from 1910 to 1990); Andrew Zimbalist, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports* (Princeton University Press, 1999) (exploring current problems, need for reform, and recommendations for the future); and Timothy Davis, “Racism in Athletics: Subtle Yet Persistent,” 21 *U. Ark. Little Rock L. Rev.* 881 (1999) (exploring continuing problems of racism). For a study that reaches troubling conclusions about the effect of athletics on student and institutional academic performance, see James L. Shulman & William G. Bowen, *The Game of Life: College Sports and Educational Values* (Princeton University Press, 2001) (presenting numerous findings based on data from three databases). And for recommendations for reforming college athletics by two college presidents, see James J. Duderstadt, *Intercollegiate Athletics and the American University* (University of Michigan Press, 2000), and William G. Bowen & Sarah A. Levin, *Reclaiming the Game: College Sports and Educational Values* (Princeton University Press, 2003).)

**10.4.2. Athletes’ due process rights.** If a student athlete is being disciplined for some infraction, the penalty may be suspension from the team. In such instances, the issue raised is whether the procedural protections accompanying suspension from school are also applicable to suspension from a team. For institutions engaging in state action (see Sections 1.5.2 & 14.4.2), the constitutional issue is whether the student athlete has a “property interest” or “liberty interest” in continued intercollegiate competition sufficient to make suspension or some other form of disqualification a deprivation of “liberty or property” within the meaning of the due process clause. Several courts have addressed this question. (Parallel “liberty or property” issues also arise in the context of faculty dismissals (Section 6.6.2) as well as student suspensions and dismissals (Section 9.4.2).)

In *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972), a suit brought by University of Minnesota basketball players suspended from the team for participating in an altercation during a game, the court reasoned that participation in intercollegiate athletics has “the potential to bring [student athletes] great economic rewards” and is thus as important as continuing in school. The court therefore held that the students’ interests in intercollegiate participation were protected by procedural due process and granted the suspended athletes the protections established in the *Dixon* case (Section 9.4.2). In *Regents of the University of Minnesota v. NCAA*, 422 F. Supp. 1158 (D. Minn. 1976), the same district court reaffirmed and further explained its analysis of student athletes’ due process rights. The court reasoned that the opportunity to participate in intercollegiate competition is a property interest entitled to due process protection, not only because of the possible remunerative careers that result but also because such participation is an important part of the student athlete’s educational experience.<sup>22</sup> The same court later used much the same analysis in *Hall v. University of Minnesota*, 530 F. Supp. 104 (D. Minn. 1982).

In contrast, the court in *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976), relying on an appellate court’s opinion in a case involving high school athletes (*Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976)), held that college athletes have no property or liberty interests in participating in intercollegiate sports, participating in postseason competition, or appearing on television. The appellate court affirmed (570 F.2d 320 (10th Cir. 1978)). (The trial court did suggest, however, that revocation of an athletic scholarship would infringe a student’s property or liberty interests and therefore would require due process safeguards (see Section 10.4.5 below).) And in *Hawkins v. NCAA*, 652 F. Supp. 602, 609–11 (C.D. Ill. 1987), the court held that student athletes have no property interest in participating in postseason competition. Given the intense interest and frequently high stakes for college athletes, administrators at both public and private colleges should provide at least a minimal form of due process when barring college athletes from playing in games or postseason tournaments, and should provide notice and an opportunity for the student to be heard if a scholarship is to be rescinded.

Other forms of disqualification from competition may also implicate due process protections for students at public institutions of higher education. In *NCAA v. Yeo*, 114 S.W.3d 584 (Tex. App. 2003), *reversed*, 171 S.W.3d 863 (Tex. 2005), the Texas Supreme Court rejected a student athlete’s claim that she possessed a “constitutionally protected interest” in participation in athletic events. The Texas Court of Appeals, applying state rather than federal constitutional due process guarantees, had found that a student athlete’s athletic career was a protected interest requiring procedural due process protections when that student already had an “established athletic reputation” prior to her college matriculation. The due process claim stemmed from an athletic eligibility

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<sup>22</sup>Although the appellate court reversed this decision, 560 F.2d 352 (8th Cir. 1977), it did so on other grounds and did not question the district court’s due process analysis.

dispute at the University of Texas (UT)-Austin. The athlete in this dispute, Joscelin Yeo, is a world-class swimmer who had competed in two Olympic Games for her native country, Singapore. Yeo began her college career at University of California-Berkeley, and then transferred to the University of Texas-Austin when her coach accepted a position at Texas. National Collegiate Athletic Association regulations required that “a transferring student-athlete refrain from athletic competition for two full long-semesters.” After completion of this one-year residency requirement at her new institution, Yeo could compete in swimming competitions.

Complications arose with the residency requirement when Yeo was training for the 2000 Olympic Games. Yeo had to obtain a waiver to take less than a full courseload while she was training for the Sydney Olympics, and UT-Austin’s athletic department obtained a waiver from the NCAA allowing Yeo to be “eligible for practice, competition, and athletically related financial aid for the fall 2000 term *without being enrolled in any courses at Texas*” (114 S.W.3d at 589). When Yeo attempted to compete for the University of Texas in the 2000–2001 academic year, the NCAA determined that the Olympic waiver did not operate as a waiver of its two-semester residency requirement. After the NCAA made the residency determination, the UT athletic director declared the athlete ineligible to swim in competitions, without consulting Yeo or allowing an opportunity for hearing. After the athletic director’s determination of ineligibility, Yeo’s only option was to request reinstatement. However, Yeo was not informed of her ineligibility until nearly six months after the determination, when she was told that she had to miss four additional collegiate competitions in 2002. Additionally, no one provided Yeo with the determinations made by the NCAA or the guidelines for appealing its decisions. When Yeo finally learned that her status was in dispute, she participated in a hearing to decide her eligibility for an upcoming swim meet, but she was not told that the hearing was nonappealable. After Yeo was informed of her ineligibility status in the hearing, days before a major swimming tournament, UT-Austin recommended that she seek independent legal counsel. As a result, Yeo sued in district court to compete in the NCAA championship tournament. The court granted her a temporary restraining order to permit her to swim in the competition, and Yeo obtained a permanent injunction against declaring her ineligible from competition.

In reviewing Yeo’s due process claim, the Texas Court of Appeals had first to determine whether Yeo’s interest in competing in intercollegiate sports created either a property or liberty interest, and, if so, what protections were due. The court refused to determine whether a liberty or property interest was at stake, preferring to call the interest a “protected interest” without deciding whether it was liberty or property. The court analogized Yeo’s circumstances to an injury of professional reputation, stating that “[r]eputation plays an important role in this calculation; when a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to her, due process protections are more likely to apply” (114 S.W.3d at 596). The court found that Yeo’s athletic reputation was a protected interest, since it was established prior to her college athletic career.

[T]he protected interest of constitutional dimension presented by this case is not her right to participate in intercollegiate athletics generally, but rather the right to protect her reputation and good name that would be adversely affected by a declaration of ineligibility made without an opportunity to be heard. . . . We recognize that interference by the courts in athletic eligibility determinations, if unfettered, would impede the efficient administration of academic and extracurricular programs and undercut the credibility of athletic competition and academic preparedness. We reaffirm that there is no constitutionally protected interest in extracurricular participation per se [114 S.W.3d at 597].

After establishing that Yeo had a protected interest, the court then analyzed what process she was entitled to. The court found several procedural flaws in the UT athletic director's determination of Yeo's ineligibility. There was no record of the decision, Yeo was given no notice of the decision, and as a result, Yeo could not participate in the hearing. Even though UT was aware of the impact such a determination would make on her career, Yeo was not advised to retain counsel until much later, after the determination of athletic ineligibility. Moreover, UT did not even suggest to Yeo at the outset that she could have avoided the entire athletic eligibility dispute by obtaining a waiver to participate from the University of California-Berkeley. The court found further flaws in the school's actions after the determination of athletic ineligibility. When UT attempted to add additional meets to the spring swim schedule to comply with the residency requirement, UT again failed to notify Yeo until the eligibility process was almost complete. According to the court, UT's failure to notify again foreclosed Yeo's ability to meaningfully participate in the second eligibility determination and retain counsel. The court then stated that:

[d]ue process generally involves a meaningful opportunity to be heard. It is not the NCAA reinstatement process that failed Yeo, but the fact that important decisions regarding her eligibility were made by UT-Austin without notice that a problem existed and with no opportunity for Yeo to advocate for her own position [114 S.W.3d at 600].

The court noted that a formal hearing was not necessary, but that UT should have given Yeo notice and an opportunity to communicate with officials informally prior to the final determination by the NCAA. According to the court, had the compliance staff notified Yeo of the eligibility problem in a timely way, and had they given her an opportunity to respond, she would have received the required due process protections.

The Texas Supreme Court rejected the reasoning and outcome of the appellate court. The state's high court refused to distinguish between nationally ranked student athletes and nonranked students. The court asserted: "The United States Supreme Court has stated, and we agree, that whether an interest is protected by due process depends not on its *weight* but on its *nature*" (citing *Board of Regents v. Roth*, discussed in Section 6.7.2). The court viewed an individual's interest in his or her good name as "the same no matter how good the reputation is." Citing a case it had decided twenty years earlier (*Spring*

*Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985)), the court reiterated that “students do not possess a constitutionally protected interest in their participation in extracurricular activities” (695 S.W.2d at 561). Furthermore, said the court, Yeo’s assertion that her future financial opportunities were substantial was “too speculative” to implicate constitutional protections. Said the court: “While student-athletes remain amateurs, their future financial opportunities remain expectations” (171 S.W.3d at 870). Comparing Yeo’s alleged liberty interest with that at issue in *University of Texas Medical School v. Than* (discussed in Section 9.4.3), the court said: “We decline to equate an interest in intercollegiate athletics with an interest in graduate education” (171 S.W.3d at 870).

**10.4.3. Athletes’ freedom of speech.** When student athletes are participants in a protest or demonstration, their First Amendment rights must be viewed in light of the institution’s particular interest in maintaining order and discipline in its athletic programs. An athlete’s protest that disrupts an athletic program would no more be protected by the First Amendment than any other student protest that disrupts institutional functions. While the case law regarding athletes’ First Amendment rights is even more sparse than that regarding their due process rights, *Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972), does specifically apply the *Tinker* case (Section 9.5.1) to a protest by intercollegiate football players. Black football players had been suspended from the team for insisting on wearing black armbands during a game to protest the alleged racial discrimination of the opposing church-related school. The court held that the athletes’ protest was unprotected by the First Amendment because it would interfere with the religious freedom rights of the opposing players and their church-related institution. The *Williams* opinion is unusual in that it mixes considerations of free speech and freedom of religion. The court’s analysis would have little relevance to situations where religious freedom is not involved. Since the court did not find that the athletes’ protest was disruptive, it relied solely on the seldom-used “interference with the rights of others” branch of the *Tinker* case.

In *Marcum v. Dahl*, 658 F.2d 731 (10th Cir. 1981), the court considered a First Amendment challenge to an institution’s nonrenewal of the scholarships of several student athletes. The plaintiffs, basketball players on the University of Oklahoma’s women’s team, had been involved during the season in a dispute with other players over who should be the team’s head coach. At the end of the season, they had announced to the press that they would not play the next year if the current coach was retained. The plaintiffs argued that the institution had refused to renew their scholarships because of this statement to the press and that the statement was constitutionally protected. The trial court and then the appellate court disagreed. Analogizing the scholarship athletes to public employees for First Amendment purposes (see Sections 7.1 & 7.3), the appellate court held that (1) the dispute about the coach was not a matter of “general public concern” and the plaintiffs’ press statement on this subject was therefore not protected by the First Amendment, and (2) the plaintiffs’ participation in the dispute prior to the press statement, and the resultant disharmony, provided an independent basis for the scholarship nonrenewal.

Free speech issues may also arise when student athletes are the intended recipients of a message rather than the speakers. In such situations, the free speech rights at stake will be those of others—employees, other students, members of the general public—who wish to speak to athletes either individually or as a group. Sometimes the athlete’s own First Amendment right to receive information could also be at issue.

In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), the head basketball coach at Central Michigan University was terminated when it became widely publicized that he had used the word “nigger” in at least one instance when addressing basketball team members in the locker room. In terminating the coach, the university relied on the institution’s discriminatory harassment policy. The coach and many of the team members sued the university, claiming that it had violated the coach’s free speech rights. Dambrot argued that he was using the N-word in a positive manner, urging his players to be “fearless, mentally strong, and tough.” Although the appellate court ruled that the university’s discriminatory harassment policy was unconstitutionally overbroad and vague (see Section 9.6.2), it also held that the coach was not wrongfully terminated because his speech neither touched a matter of public concern nor implicated academic freedom.

In *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004), the question was whether students and faculty members of the University of Illinois could speak with prospective student athletes being recruited for the university’s athletic teams. The question arose because of a controversy concerning the university’s athletic “mascot” or “symbol,” called “Chief Illiniwek.” To some, Chief Illiniwek was a respectful representation of the Illinois Nations of Native Americans, or the “fighting spirit,” or “the strong, agile human body.” To others, Chief Illiniwek was an offensive representation of the Illinois Nations, or a “mockery” or distortion of tribal customs, or the source of a “hostile environment” for Native American students (370 F.3d at 673–74).<sup>23</sup> The plaintiffs wished to speak with prospective athletes about this controversy and the negative implications of competing for a university that uses the Chief Illiniwek symbol. The chancellor issued a directive prohibiting students and employees from contacting prospective student athletes without the express approval of the athletics director. The federal district court held that the university’s directive violated the free speech rights of university employees and students, and the U.S. Court of Appeals affirmed by a 2-to-1 vote. Neither court directly addressed the free speech rights of students apart from those of employees who were restrained by the directive, or the potential free speech rights of the prospective student athletes to “receive” the message.<sup>24</sup>

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<sup>23</sup>For more on Chief Illiniwek, see 370 F.3d at 672–74; and for more on college athletic mascots, see 370 F.3d at 671–72. For a view of the continuing controversy over “Indian” mascots for athletic teams, including Chief Illiniwek, see Eric Wills, “Pride or Prejudice?” *Chron. Higher Educ.*, June 3, 2005, A29.

<sup>24</sup>A related issue in the case was whether the employees’ and students’ contacts with the student athlete recruits would violate NCAA rules. See 370 F.3d at 679–80 (majority) and 686–87 (dissent). For discussion of NCAA rule making and enforcement, see Section 14.4 of this book.

The most recent issue to arise concerning speech directed to (rather than the speech of) student athletes is one that involves the spectators at sporting events. The students in the student sections at intercollegiate basketball games, for instance, often have unique methods of communicating with the visiting team's athletes on the floor. In some situations, at some schools, the communicative activities of the student section have been considered by school officials, or by other spectators, to be profane or otherwise offensive.<sup>25</sup> The issue that then may arise is whether or not the university can limit the speech of students in the student section in ways that would not violate their First Amendment free speech rights. In Maryland, this issue was the subject of a memorandum from the State Attorney General's Office to the president of the University of Maryland (March 17, 2004), in which the attorney general's office concluded, without providing specific examples, that some regulation of student speech at university basketball games would be constitutionally permissible. In general, this delicate issue of student crowd speech at athletic events would be subject to the same five free speech principles, and the same suggestions for regulatory strategies, that are set out in Section 9.6.3 of this book concerning hate speech. There would likely be particular attention given to the problem of "captive audiences" that is mentioned in the fifth suggestion for regulating hate speech on campus. (For further legal and policy analysis of this problem, see Gary Pavela, "Incivility and Profanity at Athletic Events," Part 1 & Part 2, in *Synfax Weekly Report*, February 16, 2004, and February 23, 2004.)

Because issues concerning the free speech rights of persons wishing to address student athletes arise in such varied contexts, as the above examples indicate, and because there are substantial questions of strategy to consider along with the law, university administrators and counsel should be wary about drawing any fast and firm conclusions concerning problems that they may face. Instead, the analysis should depend on the specific context, including who the speaker is, where the speech takes place, the purpose of the speech, and its effect on others. If an institution chooses to regulate in this area, the cases make clear that the overbreadth and vagueness problem will be a major challenge for those drafting the regulations. In *Dambrot* (above), for example, even though the court upheld the termination of the coach, it invalidated the university's discriminatory harassment policy because it was overbroad and vague. (For a discussion of the tension between free speech and civility at athletics events, see Howard M. Wasserman, "Cheers, Profanity, and Free Speech," 31 *J. Coll. & Univ. Law* 377 (2005).)

**10.4.4. Pertinent statutory law.** Similarly, state and federal statutory law has some special applications to an institution's athletes or athletic programs.

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<sup>25</sup>The opposite situation can also arise if student-athletes seek to communicate with spectators at a game. In *State v. Hoshijo ex rel. White*, 76 P.3d 550 (Hawaii S. Ct. 2003), for example, a student manager of the basketball team directed an offensive comment to a spectator during a game. A key question in the case that followed was whether the student manager's speech was protected by the First Amendment. The court concluded that the speech constituted "fighting words" (see Section 9.6.2) and was therefore not protected.

Questions have arisen, for example, about the eligibility of injured intercollegiate athletes for workers' compensation (see Section 4.6.6). Laws in some states prohibit agents from entering representation agreements with student athletes (see, for example, Mich. Comp. Laws Ann. § 750.411e) or from entering into such an agreement without notifying the student's institution (see, for example, Fla. Stat. Ann. § 468.454).<sup>26</sup> State anti-hazing statutes may have applications to the activities of athletic teams and clubs (see, for example, Ill. Comp. Stat. Ann. § 720 ILCS 120/5). An earlier version of this law was upheld in *People v. Anderson*, 591 N.E.2d 461 (Ill. 1992), a prosecution brought against members of a university lacrosse club. Regarding federal law, the antitrust statutes may have some application to the institution's relations with its student athletes when those relations are governed by athletic association and conference rules (Section 14.4.3). And the Student Right-to-Know and Campus Security Act, discussed below, contains separate provisions dealing with low graduation rates of student athletes in certain sports.

The Student Right-to-Know Act (Title I of the Student Right-to-Know and Campus Security Act, 104 Stat. 2381–84 (1990)), ensures that potential student athletes will have access to data that will help them make informed choices when selecting an institution. Under the Act, an institution of higher education that participates in federal student aid programs and that awards “athletically related student aid” must annually provide the Department of Education with certain information about its student athletes. Athletically related student aid is defined as “any scholarship, grant, or other form of financial assistance the terms of which require the recipient to participate in a program of intercollegiate athletics at an institution of higher education in order to be eligible to receive such assistance” (104 Stat. 2384, 20 U.S.C. § 1092(e)(8)).

Institutions must report the following information, broken down by race and gender: (1) the number of students receiving athletically related student aid in basketball, football, baseball, cross country/track, and all other sports combined (20 U.S.C. § 1092(e)(1)(A)); (2) the completion or graduation rates of those students (20 U.S.C. § 1092(e)(1)(C)); and (3) the average completion or graduation rate for the four most recent classes (20 U.S.C. § 1092(e)(1)(E)). The same types of information must be collected on students in general (20 U.S.C. § 1092(e)(1)(B, D, & F)). In addition to reporting to the Department of Education, institutions must provide this information to potential student athletes and their parents, guidance counselors, and coaches (20 U.S.C. § 1092(e)(2)). Other students may receive the information upon request.<sup>27</sup> The Secretary of Education may waive the annual reporting requirements if, in his or her opinion, an institution of higher education is a member of an athletic association or conference that publishes data “substantially comparable” to the information specified in the Act (20 U.S.C. § 1092(e)(6)). Regulations implementing the Act are published at 34 C.F.R. Part 668.

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<sup>26</sup>For a discussion of these laws, see Diane Sudia & Rob Remis, “Statutory Regulation of Agent Gifts to Athletes,” 10 *Seton Hall J. Sports L.* 265 (2000).

<sup>27</sup>This information is in addition to other information institutions must provide to prospective and enrolled students under 20 U.S.C. § 1092. See Section 8.3.2, and see also Section 13.4.4.3.



In addition to the Student Right-to-Know Act, Congress also passed the Equity in Athletics Disclosure Act, 108 Stat. 3518, 3970, codified at 20 U.S.C. § 1092(g). This Act, like the earlier Student Right-to-Know Act, requires institutions annually to report certain data regarding their athletic programs to the U.S. Department of Education. Both Acts are implemented by regulations codified in 34 C.F.R. Part 668 (the Student Assistance General Provisions) under subpart D (Student Consumer Information Services). The particular focus of the Equity in Athletics Disclosure Act is 34 C.F.R. § 668.48, while the particular focus of the Student Right-to-Know Act is 34 C.F.R §§ 668.46 and 668.49.

The Equity in Athletics Disclosure Act applies to “each co-educational institution that participates in any [Title IV, HEA student aid] program . . . and has an intercollegiate athletic program” (20 U.S.C. § 1092(g)(1)). Such institutions must make a variety of athletic program statistics available to prospective and current students, and the public upon request, including the number of male and female undergraduate students; the number of participants on each varsity athletic team; the operating expenses of each team; the gender of each team’s head coach; the full- or part-time status of each head coach; the number and gender of assistant coaches and graduate assistants; statistics on “athletically-related student aid,” reported separately for men’s and women’s teams and male and female athletes; recruiting expenditures for men’s and for women’s teams; revenues from athletics for men’s and women’s teams; and average salaries for male coaches and for female coaches.

**10.4.5. Athletic scholarships.** An athletic scholarship will usually be treated in the courts as a contract between the institution and the student. Typically the institution offers to pay the student’s educational expenses in return for the student’s promise to participate in a particular sport and maintain athletic eligibility by complying with university, conference, and NCAA regulations (see generally Section 14.4). Unlike other student-institutional contracts (see Section 8.1.3), the athletic scholarship contract may be a formal written agreement signed by the student and, if the student is underage, by a parent or guardian. Moreover, the terms of the athletic scholarship may be heavily influenced by athletic conference and NCAA rules regarding scholarships and athletic eligibility (see Section 14.4).

In NCAA member institutions, a letter-of-intent document is provided to prospective student athletes. The student athlete’s signature on this document functions as a promise that the student will attend the institution and participate in intercollegiate athletics in exchange for the institution’s promise to provide a scholarship or other financial assistance. Courts have generally not addressed the issue of whether the letter of intent, standing alone, is an enforceable contract that binds the institution and the student athlete to their respective commitments. Instead, courts have viewed the signing of a letter of intent as one among many factors to consider in determining whether a contractual relationship exists. Thus, although the letter of intent serves as additional evidence of a contractual relationship, it does not yet have independent legal status and, in effect, must be coupled with a financial aid offer in order to bind

either party. (See generally Michael Cozzillio, "The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name," 35 *Wayne L. Rev.* 1275 (1989); and Robert N. Davis, "The Courts and Athletic Scholarships," 67 *Notre Dame L. Rev.* 163 (1991).)

Although it is possible for either the institution or the student to breach the scholarship contract and for either party to sue, as a practical matter the cases generally involve students who file suit after the institution terminates or withdraws the scholarship. Such institutional action may occur if the student becomes ineligible for intercollegiate competition, has fraudulently misrepresented information regarding his or her academic credentials or athletic eligibility, has engaged in serious misconduct warranting substantial disciplinary action, or has declined to participate in the sport for personal reasons. The following three cases illustrate how such issues arise and how courts resolve them.

In *Begley v. Corp. of Mercer University*, 367 F. Supp. 908 (E.D. Tenn. 1973), the university withdrew from its agreement to provide an athletic scholarship for Begley after realizing that a university assistant coach had miscalculated Begley's high school grade point average (GPA), and that his true GPA did not meet the NCAA's minimum requirements. Begley filed suit, asking the court to award money damages for the university's breach of contract. The court dismissed the suit, holding that the university was justified in not performing its part of the agreement, since the agreement also required Begley to abide by all NCAA rules and regulations. Because Begley, from the outset, did not have the minimum GPA, he was unable to perform his part of the agreement. Thus, the court based its decision on the fundamental principle of contract law that "where one party is unable to perform his part of the contract, he cannot be entitled to the performance of the contract by the other party" (quoting 17 Am. Jur. 2d at 791-92, *Contracts*, § 355). (For a more contemporary case involving issues of academic eligibility and the interpretation of NCAA rules, see *Williams v. University of Cincinnati*, 752 N.E.2d 367 (Ohio Ct. Claims 2001).)

In *Taylor v. Wake Forest University*, 191 S.E.2d 379 (N.C. Ct. App. 1972), the university terminated the student's scholarship after he refused to participate in the football program. Originally, the student had withdrawn from the team to concentrate on academics when his grades fell below the minimum that the university required for athletic participation. Even after he raised his GPA above the minimum, however, the student continued his refusal to participate. The student alleged that the university's termination of his athletic scholarship was a breach and asked the court to award money damages equal to the costs incurred in completing his degree. He argued that, in case of conflict between his educational achievement and his athletic involvement, the scholarship terms allowed him to curtail his participation in the football program in order to "assure reasonable academic progress." He also argued that he was to be the judge of "reasonable academic progress." The court rejected the student's argument and granted summary judgment for the university. According to the court, permitting the student to be his own judge of his academic progress would be a "strange construction of the contract." Further, by accepting the scholarship, the student was obligated to "maintain his athletic eligibility . . . both physically

and scholastically. . . . When he refused to [participate] in the absence of any injury or excuse other than to devote more time to his studies, he was not complying with his contractual agreements.”

In *Conard v. University of Washington*, 814 P.2d 1242 (Wash. Ct. App. 1991), after three years of providing financial aid, the university declined to renew the scholarships of two student athletes for a fourth year because of the students’ “serious misconduct.” Although the scholarship agreement stipulated a one-year award of aid that would be considered for renewal under certain conditions, the students argued that it was their expectation, and the university’s practice, that the scholarship would be automatically renewed for at least four years. The appellate court did not accept the students’ evidence to this effect because the agreement, by its “clear terms,” lasted only one academic year and provided only for the *consideration* of renewal (see generally Section 1.4.2.3). The university’s withdrawal of aid, therefore, was not a breach of the contract.

Due process issues may also arise if an institution terminates or withdraws an athletic scholarship. The contract itself may specify certain procedural steps that the institution must take before withdrawal or termination. Conference or NCAA rules may contain other procedural requirements. And for public institutions, the federal Constitution’s Fourteenth Amendment (or comparable state constitutional provision) may sometimes superimpose other procedural obligations upon those contained in the contract and rules.

In the *Conard* case above, for example, the Washington Court of Appeals held that the students had a “legitimate claim of entitlement” to the renewal of their scholarships because each scholarship was “issued under the representation that it would be renewed subject to certain conditions,” and because it was the university’s practice to renew athletic scholarships for at least four years. Since this “entitlement” constituted a property interest under the Fourteenth Amendment, the court held that any deprivation of this entitlement “warrants the protection of due process” (see Section 10.4.2).

The Washington Supreme Court reversed the court of appeals on the due process issue (834 P.2d 17 (Wash. 1992)). The students’ primary contention was that a “mutually explicit understanding” (see generally Section 6.7.2.1) had been created by “the language of their contracts and the common understanding, based upon the surrounding circumstances and the conduct of the parties.” The court rejected this argument, stating that “the language of the offers and the NCAA regulations are not sufficiently certain to support a mutually explicit understanding, [and] the fact that scholarships are, in fact, normally renewed does not create a ‘common law’ of renewal, absent other consistent and supportive [university] policies or rules.” Consequently, the court held that the students had no legitimate claim of entitlement to renewal of the scholarships, and that the university thus had no obligation to extend them due process protections prior to nonrenewal.

Occasionally student athletes have sued their institutions even when the institution has not terminated or withdrawn the athlete’s scholarship. Such cases are likely to involve alleged exploitation or abuse of the athlete, and may present not only breach of contract issues paralleling those in the cases above but

also more innovative tort law issues. The leading case, highly publicized in its day, is *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992). The plaintiff in this case had been awarded a basketball scholarship from Creighton even though his academic credentials were substantially below those of the average Creighton student. The plaintiff alleged that the university knew of his academic limitations but nevertheless lured him to Creighton with assurances that it would provide sufficient academic support so that he would “receive a meaningful education.” While at Creighton, the plaintiff maintained a D average; and, on the advice of the athletic department, his curriculum consisted largely of courses such as “Theory of Basketball.” After four years, he “had the overall language skills of a fourth grader and the reading skills of a seventh grader.”

The plaintiff based his suit on three tort theories and a breach of contract theory. The trial court originally dismissed all four claims. The appellate court agreed with the trial court on the tort claims but reversed the trial court and allowed the plaintiff to proceed to trial on the breach of contract claim. The plaintiff’s first tort claim was a claim of “educational malpractice” based on Creighton’s not providing him with “a meaningful education [or] preparing him for employment after college.” The court refused to recognize educational malpractice as a cause of action, listing four policy concerns supporting its decision: (1) the inability of a court to fashion “a satisfactory standard of care by which to evaluate” instruction, (2) its inability to determine the cause and nature of damage to the student, (3) the potential flood of litigation that would divert institutions’ attention from their primary mission, and (4) the threat of involving courts in the oversight of daily institutional operations. The plaintiff’s second claim was that Creighton had committed “negligent admission” because it owed a duty to “recruit and enroll only those students reasonably qualified to and able to academically perform at CREIGHTON.” The court rejected this novel theory because of similar problems in identifying a standard of care by which to judge the institution’s admissions decisions. The court also noted that, if institutions were subjected to such claims, they would admit only exceptional students, thus severely limiting the opportunities for marginal students. The plaintiff’s last tort claim was negligent infliction of emotional distress. The court quickly rejected this claim because its rejection of the first two claims left no basis for proving that the defendant had been negligent in undertaking the actions that may have distressed the plaintiff.

Although the court rejected all the plaintiff’s negligence claims, it did embrace his breach of contract claim. In order to discourage “any attempt to repackage an educational malpractice claim as a contract claim,” however, the court required the plaintiff to

do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor. . . . [T]he essence of the plaintiff’s complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all.

Judicial consideration of such a claim is therefore not an inquiry “into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.”

Following this approach, the court reviewed the plaintiff's allegations that the university failed (1) to provide adequate tutoring, (2) to require that the plaintiff attend tutoring sessions, (3) to allow the plaintiff to "red-shirt" for one year to concentrate on his studies, and (4) to afford the plaintiff a reasonable opportunity to take advantage of tutoring services. The court concluded that these allegations were sufficient to warrant further proceedings and therefore remanded the case to the trial court. (Soon thereafter, the parties settled the case.)

The court's disposition of the tort claims in *Ross* does not mean that student athletes can never succeed with such claims. In a similar case, *Jackson v. Drake University*, 778 F. Supp. 1490 (S.D. Iowa 1991), the court did recognize two tort claims—negligent misrepresentation and fraud—brought by a former student athlete. After rejecting an educational malpractice claim for reasons similar to those in *Ross*, the court allowed the plaintiff to proceed with his claims that "Drake did not exercise reasonable care in making representations [about its commitment to academic excellence] and had no intention of providing the support services it had promised." The court reasoned that the policy concerns "do not weigh as heavily in favor of precluding the claims for negligent misrepresentation and fraud as in the claim for [educational malpractice]."

But a student seeking to hold Clemson University responsible for the erroneous advice of an academic advisor, resulting in his ineligibility to play baseball under NCAA rules, was unsuccessful in his attempt to state claims of negligence, breach of fiduciary duty, and breach of contract. In *Hendricks v. Clemson University*, 578 S.E.2d 711 (S.C. 2003), a trial court had granted summary judgment to the university on the student's claims, but a state intermediate appellate court reversed, ruling that the case must proceed to trial. The state supreme court reinstated the summary judgment, ruling that no state law common law precedent could support the assumption by the university of a duty of care to advise the student accurately. Said the court: "We believe recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create" (578 S.E.2d at 715). In addition, said the court, it would not recognize, as a matter of first impression, a fiduciary relationship between the student and the advisor because such relationships are typically recognized between lawyers and clients, or for members of corporate boards of directors. And finally, according to the court, citing *Ross v. Creighton*, it would not allow the breach of contract claim to go forward because the plaintiff's claim involved an evaluation of the adequacy of the university's services, a claim specifically rejected by the court in *Ross*. Here, said the court, the university had not made any written promise to ensure the athletic eligibility of the student.

**10.4.6. Sex discrimination.** The equitable treatment of male and female college athletes remains a major issue in athletics programs. Despite the fact that Title IX has been in existence for more than thirty years, conflict remains as to whether it has provided appropriate standards for equalizing opportunities for men and women to participate in college sports. Litigation under Title IX

has focused on two primary issues: providing equal access to resources for both men's and women's sports, and equal treatment of athletes of both genders. Equal access litigation involves allegedly inequitable resource allocation to women's sports and the elimination of men's teams by some institutions in order to comply with Title IX's proportionality requirements. Equal treatment cases typically involve challenges to individual treatment of female athletes, including the availability of scholarships, the compensation of coaches, and related issues.

Before the passage of Title IX (20 U.S.C. § 1681 *et seq.*) (see Section 13.5.3), the legal aspects of this controversy centered on the Fourteenth Amendment's equal protection clause. As in earlier admissions cases (Section 8.2.4.2), courts searched for an appropriate analysis by which to ascertain the constitutionality of sex-based classifications in athletics. Since the implementation in 1975 of the Title IX regulations (34 C.F.R. Part 106), the equal protection aspects of sex discrimination in high school and college athletics have played second fiddle to Title IX. Title IX applies to both public and private institutions receiving federal aid and thus has a broader reach than equal protection, which applies only to public institutions (see Section 1.5.2). Title IX also has several provisions on athletics that establish requirements more extensive than anything devised under the banner of equal protection. And Title IX is supported by enforcement mechanisms beyond those available for the equal protection clause (see Sections 13.5.8 & 13.5.9).

In addition to Title IX, state law (including state equal rights amendments) also has significant applications to college athletics.<sup>28</sup> In *Blair v. Washington State University*, 740 P.2d 1379 (Wash. 1987), for example, women athletes and coaches at Washington State University used the state's equal rights amendment and the state nondiscrimination law to challenge the institution's funding for women's athletic programs. The trial court had ruled against the university, saying that funding for women's athletic programs should be based on the percentage of women enrolled as undergraduates. In calculating the formula, however, the trial court had excluded football revenues. The Washington Supreme Court reversed on that point, declaring that the state's equal rights amendment "contains no exception for football." It remanded the case to the trial court for revision of the funding formula. (See "Comment: *Blair v. Washington State University*: Making State ERAs a Potent Remedy for Sex Discrimination in Athletics," 14 *J. Coll. & Univ. Law* 575 (1988).)

Although the regulations interpreting Title IX with regard to athletics became effective in 1975, they were not appreciably enforced at the postsecondary level until the late 1980s—partly because the U.S. Supreme Court, in *Grove City College v. Bell* (discussed in Section 13.5.7.3), had held that Title IX's nondiscrimination provisions applied only to those programs that were direct recipients of federal aid. Congress reversed the result in *Grove City* in the Civil Rights

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<sup>28</sup>The cases are collected in Jeffrey H. Ghent, Annot., "Application of State Law to Sex Discrimination in Sports," 66 A.L.R.3d 1262.

Restoration Act of 1987, making it clear that Title IX applies to all activities of colleges and universities that receive federal funds.

Section 106.41 of the Title IX regulations is the primary provision on athletics; it establishes various equal opportunity requirements applicable to “inter-scholastic, intercollegiate, club, or intramural athletics.” Section 106.37(c) establishes equal opportunity requirements regarding the availability of athletic scholarships. Physical education classes are covered by Section 106.34, and extracurricular activities related to athletics, such as cheerleading and booster clubs, are covered generally under Section 106.31. The regulations impose nondiscrimination requirements on these activities whether or not they are directly subsidized by federal funds (see this book, Section 13.5.7.4), and they do not exempt revenue-generating sports, such as men’s football or basketball, from the calculation of funds available for the institution’s athletic programs.

One of the greatest controversies stirred by Title IX concerns the choice of sex-segregated versus unitary (integrated) athletic teams. The regulations develop a compromise approach to this issue, which roughly parallels the equal protection principles that emerged from the earlier court cases.<sup>29</sup> Under Section 106.41(b):

[An institution] may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

This regulation requires institutions to operate unitary teams only for noncontact sports where selection is not competitive. Otherwise, the institution may operate either unitary or separate teams and may even operate a team for one sex without having any team in the sport for the opposite sex, as long as the

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<sup>29</sup>It is still somewhat an open question whether Title IX’s athletic regulations fully comply with constitutional equal protection and due process requirements. There is some basis for arguing that the Title IX regulations do not fully meet the equal protection requirements that courts have constructed or will construct in this area (see W. Kaplin & S. Marmor, “Validity of the ‘Separate but Equal’ Policy of the Title IX Regulations on Athletics,” a memorandum reprinted in 121 *Cong. Rec.* 1090, 94th Cong., 1st Sess. (1975)). One court has ruled on the question, holding Section 86.41(b) (now 106.41(b)) of the Title IX regulations unconstitutional as applied to exclude physically qualified girls from competing with boys in contact sports (*Yellow Springs Exempted Village School District v. Ohio High School Athletic Association*, 443 F. Supp. 753 (S.D. Ohio 1978)). On appeal, however, a U.S. Court of Appeals reversed the district court’s ruling (647 F.2d 651 (6th Cir. 1981)). The appellate court held that, because of the posture of the case and the absence of evidence in the record, “we believe it inappropriate for this court to make any ruling on the matter at this time.” The majority opinion and a concurring/dissenting opinion include extensive constitutional analysis of sex segregation in athletic teams.

institution's overall athletic program "effectively accommodate[s] the interests and abilities of members of both sexes" (34 C.F.R. § 106.41(c)(1)). In a non-contact sport, however, if an institution operates only one competitively selected team, it must be open to both sexes whenever the "athletic opportunities" of the traditionally excluded sex "have previously been limited" (34 C.F.R. § 106.41(b)).

Regardless of whether its teams are separate or unitary, the institution must "provide equal athletic opportunity for members of both sexes" (34 C.F.R. § 106.41(c)). While equality of opportunity does not require either equality of "aggregate expenditures for members of each sex" or equality of "expenditures for male and female teams," an institution's "failure to provide necessary funds for teams for one sex" is a relevant factor in determining compliance (34 C.F.R. § 106.41(c)). Postsecondary administrators grappling with this slippery equal opportunity concept will be helped by Section 106.41(c)'s list of ten nonexclusive factors by which to measure overall equality:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms and practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services;
10. Publicity.

The equal opportunity focus of the regulations also applies to athletic scholarships. Institutions must "provide reasonable opportunities for such awards for members of each sex in proportion to the number of each sex participating in . . . intercollegiate athletics" (34 C.F.R. § 106.37(c)(1)). If the institution operates separate teams for each sex (as permitted in § 106.41), it may allocate athletic scholarships on the basis of sex to implement its separate-team philosophy, as long as the overall allocation achieves equal opportunity.

In 1979, after a period of substantial controversy, the Department of Health, Education and Welfare (now Department of Education) issued a lengthy "Policy Interpretation" of its Title IX regulations as they apply to intercollegiate athletics (44 Fed. Reg. 71413 (December 11, 1979)). This "Policy Interpretation," available on the Web site of the Office for Civil Rights (OCR) (<http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html>), is still considered authoritative and is currently used by federal courts reviewing allegations of Title IX violations. It addresses each of the ten factors listed in Section 106.41(c) of the regulations, providing examples of information the Department of Education will



use to determine whether an institution has complied with Title IX. For example, “opportunity to receive coaching and academic tutoring” would include the availability of full-time and part-time coaches for male and female athletes, the relative availability of graduate assistants, and the availability of tutors for male and female athletes. “Compensation of coaches” includes attention to the rates of compensation, conditions relating to contract renewal, nature of coaching duties performed, and working conditions of coaches for male and female teams (44 Fed. Reg. at 71416). Also on the OCR Web site is a “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>). This Clarification was issued in January 1996.

The debate over Title IX intensified during 2002–2003 when a Commission on Opportunities in Athletics, appointed by then U.S. Secretary of Education Rod Paige, deliberated about the possibility of changing the way that Title IX was enforced. The commission’s final report made various recommendations about the operation and enforcement of “three-prong test” and the Title IX athletics regulations (Secretary of Education’s Commission on Opportunity in Athletics, *Open to All: Title IX at Thirty* (U.S. Dept. of Education, February 28, 2003). On July 11, 2003, the U.S. Department of Education issued a “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” (available at <http://www.ed.gov/ocr/docs/clarific.html>). The ultimate outcome of the commission’s work and the Office of Civil Rights’ response to it was to ratify the “three-prong test” for determining whether an institution’s athletic program is complying with Title IX, a result that disappointed critics of the “proportionality” requirement that had apparently stimulated some institutions to drop certain men’s varsity sports in order to reallocate funding to women’s sports. In March 2005, the Office of Civil Rights issued an “Additional Clarification of Intercollegiate Athletics: Three-Part Test—Part Three” (available at <http://www.ed.gov/print/about/offices/list/ocr/docs/title9guidanceadditional.html>) that allows institutions to use a survey to measure student athletic interest. The NCAA and proponents of gender equity in college sports have criticized the new OCR policy. (For a thorough review and analysis of these “clarifications,” see Catherine Pieronek, “An Analysis of the New Clarification of Intercollegiate Athletics Policy Regarding Part Three of the Three-Part Test for Compliance with the Effective Accommodation Guidelines of Title IX,” 32 *J. Coll. & Univ. Law* 105 (2005).)

Most Title IX disputes have involved complaints to the Office for Civil Rights. In the past, this office has been criticized for its “lax” enforcement efforts and for permitting institutions to remain out of compliance with Title IX (*Gender Equity in Intercollegiate Athletics: The Inadequacy of Title IX Enforcement by the U.S. Office for Civil Rights* (Lyndon B. Johnson School of Public Affairs, University of Texas, 1993)). Perhaps partly for this reason, women athletes in recent years have chosen to litigate their claims in the courts.

Although the first major court challenge to an institution’s funding for intercollegiate athletics ended with a settlement rather than a court order (*Haffer v. Temple University*, 678 F. Supp. 517 (E.D. Pa. 1987)), this case set the tone for

subsequent litigation. In *Haffer*, a federal trial judge certified a class of “all current women students at Temple University who participate, or who are or have been deterred from participating because of sex discrimination[,] in Temple’s intercollegiate athletic program.” Although the case was settled, with the university agreeing to various changes in scholarships and support for women athletes, it encouraged women students at other colleges and universities to challenge the revenues allocated to women’s and men’s sports. (For discussion, see “Comment: *Haffer v. Temple University*: A Reawakening of Gender Discrimination in Intercollegiate Athletics,” 16 *J. Coll. & Univ. Law* 137 (1989).)

The leading case to date on Title IX’s application to alleged inequality in funding for women’s intercollegiate sports is *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993). In that case, a U.S. Court of Appeals upheld a district court’s preliminary injunction ordering Brown University to reinstate its women’s gymnastics and women’s volleyball programs to full varsity status pending the trial of a Title IX claim. Until 1971, Brown had been an all-male university. At that time it merged with a women’s college and, over the next six years, upgraded the women’s athletic program to include fourteen varsity teams. It later added one other such team. It thus had fifteen women’s varsity teams as compared to sixteen men’s varsity teams; the women had 36.7 percent of all the varsity athletic opportunities available at the university, and the men had 63.3 percent. (Brown’s student population is approximately 48 percent women.) In 1991, however, the university cut four varsity teams: two men’s teams (for a savings of \$15,795) and two women’s teams (for a savings of \$62,028). These cuts disproportionately reduced the budgeted funds for women, but they did not significantly change the ratio of athletic opportunities, since women retained 36.6 percent of the available slots.

In upholding the district court’s injunction, the appellate court first noted that an institution would not be found in violation of Title IX merely because there was a statistical disparity between the percentage of women and the percentage of men in its athletic programs. The court then focused on the ten factors listed in Section 106.41(c) of the Title IX regulations (see above) and noted that the district court based its injunction on the first of these factors: “Brown’s failure effectively to accommodate the interests and abilities of female students in the selection and level of sports.” To be in compliance with this factor, a university must satisfy at least one of three tests set out in the Title IX Policy Interpretation:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex have been and are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be

demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program [44 Fed. Reg. at 71418].

The appellate court agreed with the district court that Brown clearly did not fall within the first option. Further, the district court did not abuse its discretion in deciding that, although the university had made a large burst of improvements between 1971 and 1977, the lack of continuing expansion efforts precluded the university from satisfying the second option. Thus, since the university could not comply with either of the first two options, “it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender’s interests and abilities, even if that requires it to give the underrepresented gender . . . what amounts to a larger slice of a shrinking athletic-opportunity pie.” The appellate court then focused on the word “fully” in the third option, interpreting it literally to the effect that the underrepresented sex must be “fully” accommodated, not merely proportionately accommodated as in the first option. Since Brown’s cuts in the women’s athletic programs had created a demand for athletics opportunities for women that was not filled, women were not “fully” accommodated. Thus, since Brown could meet none of the three options specified in the Policy Interpretation, the court concluded that the university had likely violated Title IX, and it therefore affirmed the district court’s entry of the preliminary injunction.<sup>30</sup>

Holding that the plaintiffs had made their required showing and that Brown had not, the court turned to the issue of remedy. Although the appellate court upheld the preliminary injunction, it noted the need to balance the institution’s academic freedom with the need for an effective remedy for the Title IX violation. The appellate court stated that, since the lower court had not yet held a trial on the merits, its order that Brown maintain women’s varsity volleyball and gymnastics teams pending trial was within its discretion. The appellate court noted, however, that a more appropriate posttrial remedy, assuming that a Title IX violation was established, would be for Brown to propose a program for compliance. In balancing academic freedom against Title IX’s regulatory scheme, the court noted:

This litigation presents an array of complicated and important issues at a crossroads of the law that few courts have explored. The beacon by which we must steer is Congress’s unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way [991 F.2d at 907].

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<sup>30</sup>The appellate court’s opinion also contained an important discussion of the plaintiff’s and defendant’s burdens of proof in presenting and rebutting a Title IX athletics claim (991 F.2d at 902). See also *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 831–32 (10th Cir. 1993); and compare *Cook v. Colgate University*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated on other grounds*, 992 F.2d 17 (2d Cir. 1993).

After the appellate court remanded the case to the district court, that court held a full trial on the merits, after which it ruled again in favor of the plaintiffs and ordered Brown to submit a plan for achieving full compliance with Title IX. When the district court found Brown's plan to be inadequate and entered its own order specifying that Brown must remedy its Title IX violation by elevating four women's teams to full varsity status, Brown appealed again. In late 1996, the First Circuit issued another ruling in what it called "*Cohen IV*" (*Cohen II* being its earlier 1993 ruling, and *Cohen I* and *Cohen III* being the district court rulings that preceded *Cohen II* and *Cohen IV*). By a 2-to-1 vote in *Cohen IV*, 101 F.3d 155 (1st Cir. 1996), the appellate court affirmed the district court's ruling that Brown was in violation of Title IX. The court explicitly relied upon, and refused to reconsider, its legal analysis from *Cohen II*. The *Cohen II* reasoning, as further explicated in *Cohen IV*, thus remains the law in the First Circuit and the leading example of how courts will apply Title IX to the claims of women athletes.

One of Brown's major arguments in *Cohen IV* was that women were less interested in participating in collegiate sports, and that the trial court's ruling required Brown to provide opportunities for women that went beyond their interests and abilities. The court viewed this argument "with great suspicion" and rejected it:

Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. . . . [E]ven if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated [101 F.3d at 179-80].

Regarding Brown's obligation to remedy its Title IX violation, however, the *Cohen IV* court overruled the district court, because that court "erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved." The appellate court "agree[d] with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand." Nevertheless, it determined that cutting men's teams "is a permissible means of effectuating compliance with the statute," and that Brown should have the opportunity to submit another plan to the district court. This disposition, said the court, was driven by "our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs."<sup>31</sup>

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<sup>31</sup>On remand from *Cohen IV*, the federal district court approved a settlement of the case. See Jim Naughton, "Settlement Approval in Brown Title IX Case," *Chron. Higher Educ.*, July 3, 1998, at A31. For cases reaching results similar to the *Cohen* case, see *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

In *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), another federal appellate court ruled that the university had engaged in “systematic, intentional, differential treatment of women,” and affirmed a trial court’s ruling that the university had violated Title IX. The plaintiffs, representing a class of all women students at Louisiana State University (LSU) who wished to participate in varsity sports that were not provided by LSU, alleged that the university had

den[ied] them equal opportunity to participate in intercollegiate athletics, equal opportunity to compete for and to receive athletic scholarships, and equal access to the benefits and services that LSU provides to its varsity intercollegiate athletes, and by discriminating against women in the provision of athletic scholarships and in the compensation paid coaches [213 F.3d at 864].

Because the record not only contained evidence of a lack of opportunities for women to play varsity soccer and fast-pitch softball (the sports in question) and substantial differences in the financial resources afforded women’s sports compared with men’s, but also included a multitude of sexist comments to the women athletes by university sports administrators and admissions that they would only add women’s teams “if forced to,” the appellate court ruled that the discrimination was intentional and “motivated by chauvinist notions” (213 F.3d at 882).

Both in *Cohen* and in *Pederson*, the courts appeared to serve warning on institutions that do not provide equivalent funding for men’s and women’s sports. And *Cohen*, in particular, demonstrates that, for institutions that have either a stringently limited athletic budget or one that must be cut, compliance with Title IX can occur only if the institution reduces opportunities for men’s sports to the level available for women’s sports. Both appellate opinions deferred to the institution’s right to determine for itself how it will structure its athletic programs, but once the institution was out of Title IX compliance, these courts did not hesitate to order specific remedies. Financial problems do not exempt an institution from Title IX compliance.<sup>32</sup>

As noted above, individuals who believe that an institution is violating Title IX’s requirements of equity in athletics have two choices: they may file a complaint with the Education Department’s Office of Civil Rights, or they may file a lawsuit in federal court. The ruling of the U.S. Supreme Court in *Alexander v. Sandoval*, discussed in Sections 13.5.7.2 and 13.5.9 of this book, may complicate future litigation challenging the equity of athletics programs by gender. In *Alexander*, the Court ruled that there is no private right of action for disparate impact claims under Title VI (see Section 13.5.2 of this book). Because the language of Title IX is virtually identical to the language of Title VI, courts

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<sup>32</sup>The cases are collected in Brian L. Porto, Annot., “Suits by Female College Athletes Against Colleges and Universities Claiming That Decisions to Discontinue Particular Sports or to Deny Varsity Status to Particular Sports Deprive Plaintiffs of Equal Educational Opportunities Required by Title IX (§§ 20 U.S.C.A. 1681–1688),” 129 A.L.R. Fed. 571.

have applied Title VI jurisprudence to claims brought under Title IX. Thus, the outcome in *Alexander* suggests that courts will reject the attempts of plaintiffs to bring disparate impact claims under Title IX. A federal district court has confirmed this interpretation of *Alexander* in *Barrett v. West Chester University*, 2003 U.S. Dist. LEXIS 21095 (E.D. Pa., November 12, 2003), but found that the university had intentionally discriminated against women students by eliminating the women's gymnastic team, by failing to provide equal coaching resources to male and female teams, and by paying coaches of women's teams less than coaches of men's teams. The court granted the plaintiffs' motion for an injunction, requiring the reinstatement of the women's gymnastic team. Had the plaintiffs been limited to a claim of disparate impact, rather than intentional discrimination, the court would have dismissed their claim.

Under *Alexander v. Sandoval*, therefore, plaintiffs may challenge discrimination in athletics in court only by asserting claims of intentional discrimination brought under § 901 of the Title IX *statute*, which has been interpreted to permit a private right of action. Should the Title IX regulations or ED policy interpretations be interpreted as prohibiting discriminatory actions that are unintentional, but which have a harsher impact on members of one gender, athletes with such disparate impact claims may assert them only in the institution's Title IX grievance process or in ED's administrative complaint process. In addition, under *Alexander*, plaintiffs will not be able to bring private causes of action claiming *intentional* violations of the Title IX regulations or the ED policy interpretations unless they can show that the cause of action is also grounded on the Title IX statute itself and not merely on the regulations and/or policy interpretation(s).

Although federal courts have analyzed cases involving equal access to athletics opportunities using one or more of the factors listed in the regulations (discussed above), the appellate courts are divided as to whether the burden of proof created by the U.S. Supreme Court in 1998 for plaintiffs suing under Title IX for sexual harassment should also be applied to Title IX litigation concerning athletics. In *Gebser v. Lago Vista Independent School District*, discussed in Section 9.3.4, the U.S. Supreme Court ruled that a plaintiff must prove that (1) the school had actual notice of the alleged discrimination, and (2) the school demonstrated "deliberate indifference" in its response to the student's claim. The U.S. Court of Appeals for the Fifth Circuit in *Pederson v. Louisiana State University*, discussed above, rejected the defendant's argument that the *Gebser* test should apply in a lawsuit regarding equal access to athletic opportunities, using instead the traditional three-part test from the OCR's Policy Interpretation.

The *Pederson* court reasoned that the institution itself had intentionally discriminated against the women athletes, so the *Gebser* framework, which addressed whether the school was on notice of discriminatory conduct by an employee, was not relevant. On the other hand, the U.S. Court of Appeals for the Eighth Circuit, in *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), *cert. denied*, 535 U.S. 1054 (2002), dismissed a Title IX lawsuit filed by a woman student seeking compensatory damages for the university's alleged failure to provide equitable funding for the women's soccer team, scholarships,

and other resources. The court, applying the *Gebser* test, ruled that the plaintiff had not proved that a responsible university individual had “actual notice” of the alleged discrimination, and that the plaintiff’s allegations of a funding disparity between men’s and women’s athletics was insufficient proof of intentional discrimination.

In addition to claims from women students that funding is inadequate, courts have also considered Title IX claims of men seeking reinstatement of men’s teams that their institutions had cut. An early example of such a case is *Kelley v. Board of Trustees of University of Illinois*, 35 F.3d 265 (7th Cir. 1994), in which a federal appellate court upheld the university’s discontinuance of the men’s swimming team. The appellate court accorded deference to the Title IX regulations and the Policy Interpretation on intercollegiate athletics. Because the university had done its cutting of teams in accordance with the regulations and the interpretation, seeking to achieve proportionality between men’s and women’s athletic teams, the court affirmed the district court’s grant of summary judgment for the university.

The same appellate court (the Seventh Circuit) later expanded upon its *Kelley* ruling in *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999). That case involved Illinois State University’s decision to cut the men’s soccer and wrestling teams in order to achieve compliance with Title IX. Reiterating its ruling in *Kelley*, the court rejected the plaintiffs’ attempt to distinguish their case from *Kelley* by arguing that the university in *Kelley* cut its men’s athletic teams for budgetary reasons while the university here did so for the sole purpose of Title IX compliance. The court quickly recognized that financial considerations cannot be “neatly separated” from Title IX considerations and that decisions regarding which athletic programs to retain are “based on a combination of financial and sex-based concerns that are not easily distinguished.”<sup>33</sup>

Another leading case on men’s teams is *Neal v. California State University*, 198 F.3d 763 (9th Cir. 1999). In that case, California State University at Bakersfield (CSUB), in the face of shrinking budgetary resources, was working to achieve compliance with Title IX under a consent decree entered in a previous Title IX suit. CSUB decided to limit the size of several of its male athletic teams. After it required the men’s wrestling team to reduce its roster, the wrestlers brought suit under Title IX, and the federal district court enjoined the reduction. On appeal, the Ninth Circuit vacated the injunction and upheld the university’s actions.

The wrestlers argued that the “substantially proportionate” requirement in the Policy Interpretation could be met by providing opportunities in proportion

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<sup>33</sup>The *Boulahanis* court also had the opportunity to address an equal protection clause challenge to the Title IX regulations. Rejecting the argument that the regulations, if interpreted to permit elimination of men’s teams, would violate equal protection, the court explained that the university’s action met the standard of review applicable to gender discrimination under the equal protection clause: “[t]he elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men’s soccer and the men’s wrestling programs were substantially related to that objective.”

to the interest levels of each gender, rather than in proportion to the actual enrollment figures. Rejecting this argument, the court determined that such an interest-based interpretation of the Policy Interpretation “‘limit[s] required program expansion for the underrepresented sex to the status quo level of relative interests’” (198 F.3d at 768, quoting *Cohen IV* (above), 101 F.3d at 174) and does so “‘under circumstances where men’s athletic teams have a considerable head start’” (198 F.3d at 768, quoting *Cohen II*, 991 F.2d at 900).

The appellate court also addressed the wrestlers’ argument that Title IX does not permit cutting of men’s teams as a means to remedy gender inequity in athletics, but provides only for increasing women’s teams. In responding to this argument, the court relied on the decisions of other circuits, such as the Seventh Circuit’s decision in *Kelley v. Board of Trustees* that had already approved of universities’ cutting men’s teams to comply with Title IX. The *Neal* court also asserted that the legislative history of Title IX indicates Congress was aware that compliance might sometimes be achieved only by cutting men’s athletics.

Finally, the appellate court in *Neal* explained that the district court had erred in not deferring to the U.S. Department of Education’s Policy Interpretation. Citing U.S. Supreme Court precedent, the court emphasized that “federal courts are to defer substantially to an agency’s interpretation of its own regulations,” unless that interpretation is plainly inconsistent with the statute or would raise “serious constitutional issues”—neither of which is the case with the Policy Interpretation.

Following *Boulahanis* and *Neal*, federal appellate courts rejected challenges to the elimination of varsity wrestling teams at the University of North Dakota (*Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042 (8th Cir. 2002)), and Miami University (*Miami Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002)). The National Wrestling Coaches Association brought a lawsuit against the U.S. Office for Civil Rights, challenging the 1996 “Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test” as well as the “Policy Interpretation” issued in 1979 (both of which are on the OCR’s Web site, noted above). The district court dismissed the case on the grounds that the plaintiffs did not have standing to pursue that claim, and the appellate court affirmed. *National Wrestling Coaches Assoc. v. U.S. Department of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), *affirmed*, 366 F.3d 930 (D.C. Cir. 2004). According to the appellate court, even if the two documents challenged by the Coaches Association were revoked, the law would still permit an institution to eliminate the men’s wrestling program in order to comply with Title IX’s gender equity mandate.

The plaintiffs filed a motion for an *en banc* review by the appellate court. The panel, in a 2-to-1 decision, rejected the coaches’ request for rehearing, stating that the coaches’ real dispute was with the institutions that had cut wrestling, not with the Department of Education (383 F.3d 1047 (D.C. Cir. 2004)). Rejecting the coaches’ argument that the U.S. Department of Education had “forced” colleges and universities to adopt policies with respect to proportionality that are unlawful under Title IX, the majority noted that the department’s policy statements are not regulations, and that universities are not required to follow them. Because the plaintiffs had a “fully adequate” private



cause of action against the institutions that dropped their wrestling teams, said the court, the coaches needed to look to the institutions for relief. As these cases suggest, male athletes are likely to have a much more difficult time contesting the cutting of men's teams than are female athletes in contesting the cutting of women's teams.

In addition to litigating the allocation of resources to men's and women's teams, individual athletes have occasionally used Title IX to gain a position on a varsity team. For example, in *Mercer v. Duke University*, 32 F. Supp. 2d 836 (M.D.N.C. 1998), *reversed*, 190 F.3d 643 (4th Cir. 1999), a student claimed that Duke University violated Title IX by excluding her from the university's intercollegiate football team. The student had been an all-state place kicker while in high school in New York State. During the first year of college, she sought to join the football team as a walk-on. Although she attended tryouts and practiced with the team for two seasons, the head coach ultimately excluded her from the team. The plaintiff alleged in the lawsuit that the university treated her differently from male walk-on place kickers of lesser ability and failed to give her full and fair consideration for team membership because of her gender. The district court held that, even if the student's allegations were true, the university would nevertheless prevail. Relying on the "contact sport" exception in applicable Title IX regulations prohibiting different treatment in athletics based on gender (34 C.F.R. § 106.41), the court granted the university's motion to dismiss. According to the court, since "football is clearly a 'contact sport,' a straightforward reading of this regulation demands the holding that, as a matter of law, Duke University had no obligation to allow Mercer, or any female, onto its football team."

On appeal, the U.S. Court of Appeals read the applicable regulation differently from the district court and reinstated the case for further proceedings. The appellate court determined that, contrary to providing a "blanket exemption for contact sports," subsection (b) of the regulation (34 C.F.R. § 106.41(b)) merely "excepts contact sports from the tryout requirement," that is, the requirement that members of the excluded sex be allowed to try out for a single-sex team. But "once an institution has allowed a member of one sex to try out for a team operated . . . for the other sex in a contact sport," the institution is subject to "the general anti-discrimination provision" in subsection (a) of the applicable regulation (34 C.F.R. § 106.41(a)). The appellate court therefore held that once a university has allowed tryouts, it is "subject to Title IX and therefore prohibited from discriminating against [the person trying out] on the basis of his or her sex."

The Title IX controversy about dropping and adding men's and women's teams has extended to the area of athletic scholarships. The pertinent regulation is 34 C.F.R. § 106.37(c), as interpreted in 44 Fed. Reg. 71413, 71415-23. This regulation, somewhat like the regulation at issue in *Cohen* (34 C.F.R. § 106.41(c)), uses a proportionality test to determine whether benefits are equitably distributed between men and women. In 1998, the U.S. Department of Education's Office for Civil Rights issued a clarification of its requirements for scholarships. And litigation by male athletes whose teams (and scholarships) have been cut in

order to comply with Title IX has been unavailing. (See, for example, *Harper v. Board of Regents, Illinois State University*, 35 F. Supp. 2d 1118 (C.D. Ill. 1999), *affirmed*, *Boulahanis et al. v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), in which the court awarded summary judgment to the university on grounds that elimination of men's teams and scholarships was not discriminatory; Title IX compliance was a legitimate nondiscriminatory reason for the action.)

**10.4.7. Discrimination on the basis of disability.** Under Section 504 of the Rehabilitation Act of 1973 and its implementing regulations (see Section 13.5.4 of this book), institutions must afford disabled students an equal opportunity to participate in physical education, athletic, and recreational programs. Like Title IX, Section 504 applies to athletic activities even if they are not directly subsidized by federal funds (see Section 13.5.7.4). The Department of Education's regulations set forth the basic requirements at 34 C.F.R. § 104.47(a), requiring institutions to offer physical education courses and athletic activities on a nondiscriminatory basis to disabled students.

By these regulations, a student in a wheelchair could be eligible to participate in a regular archery program, for instance, or a deaf student on a regular wrestling team (34 C.F.R. Part 104 Appendix A), because they would retain full capacity to play those sports despite their disabilities. In these and other situations, however, questions may arise concerning whether the student's skill level would qualify him to participate in the program or allow him to succeed in the competition required for selection to intercollegiate teams.

Litigation involving challenges under Section 504 by disabled athletes has been infrequent, although there are several cases involving student challenges to NCAA eligibility rulings, which are discussed in Section 14.4.5. In an early case, *Wright v. Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981), the court relied on Section 504 to protect a disabled student's right to participate in intercollegiate football. The student had been blind in one eye since infancy; because of the potential danger to his "good" eye, the institution had denied him permission to participate. In issuing a temporary restraining order against the university, the court accepted (pending trial) the student's argument that the institution's decision was discriminatory within the meaning of Section 504 because the student was qualified to play football despite his disability and was capable of making his own decisions about "his health and well-being."

But another federal trial court sided with the university in its determination that participation by a student was potentially dangerous. In *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995), the plaintiff was a football player who had sustained a blow to the head during a scrimmage and consequently experienced tingling and numbness in his arms and legs. After the team physician and a consulting neurosurgeon diagnosed the symptoms as transient quadriplegia caused by a congenitally narrow cervical cord, they recommended that the student be disqualified from play for his senior year—even though he obtained the opinions of three other specialists who concluded he was fit to play. The student then sought a preliminary injunction, claiming that the university's decision violated Section 504. The court disagreed, holding that the

plaintiff (1) was not disabled within the meaning of Section 504 and (2) was not “otherwise qualified” to play football even if he was disabled. As to (1), the court reasoned that the plaintiff’s physical impairment did not “substantially limit” the “major life activity” of learning, since he still retained his athletic scholarship, continued to have the same access to educational opportunities and academic resources, and could participate in the football program in some other capacity. As to (2), the court reasoned that the plaintiff did not meet the “technical standards” of the football program because he had failed to obtain medical clearance, and that the university’s position was reasonable and rational, albeit conservative.

*Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996), uses reasoning similar to—but more fully developed than—that in *Pahulu* to deny relief to a basketball player who had been declared ineligible due to a heart problem. Applying the Section 504 definition of disability, the court ruled that (1) playing intercollegiate basketball is not itself a “major life activit[y],” nor is it an integral part of “learning,” which the Section 504 regulations do acknowledge to be a major life activity; (2) the plaintiff’s heart problem only precludes him from performing “a particular function” and does not otherwise “substantially limit” his major life activity of learning at the university; and (3) consequently, the plaintiff is not disabled within the meaning of Section 504 and cannot claim its protections. The court also ruled that the plaintiff could not claim Section 504 protection because he was not “otherwise qualified,” since he could not meet the physical standards. In reaching this conclusion, the court deferred to the university’s judgment regarding the substantiality of risk and the severity of harm to the plaintiff, stating that, as long as the university and its medical advisors used reasonable criteria to make the decisions, the court should not second-guess those judgments.

In addition to Section 504, the Americans With Disabilities Act (see Section 13.2.11) may also provide protections for student athletes subjected to discrimination on the basis of a disability in institutional athletic programs. Title II of the Act (public services) (42 U.S.C. §§ 12131–12134) would apply to students in public institutions, and Title III (public accommodations) (42 U.S.C. §§ 12181–12189) would apply to students in private institutions. (See generally C. Jones, “College Athletes: Illness or Injury and the Decision to Return to Play,” 40 *Buffalo L. Rev.* 113, 189–97 (1992).)

In addition to the right of disabled students to participate in a particular sport, an emerging issue concerns whether academic eligibility requirements for student athletes may discriminate against learning-disabled athletes. The cases thus far have arisen primarily under the Americans With Disabilities Act rather than under Section 504. Although these cases have focused on eligibility requirements of the NCAA (especially the “core course requirement”) (see Section 14.4.6.2) rather than separate requirements of individual institutions, many of the same legal issues would arise if a learning disabled athlete were to challenge his or her school’s own eligibility requirements or were to challenge the school for following NCAA requirements. These issues would include whether the learning disability is a “disability” within the meaning of the ADA (see the

*Tatum* case, discussed in Section 14.4.6.2); whether the institution's academic eligibility requirements are discriminatory because, for instance, they "screen out or tend to screen out" learning disabled students under Title III of the ADA, § 12182(b)(2)(A)(i) (see the *Ganden* case, discussed in Section 14.4.6.2); whether the student's requested modifications to the eligibility requirements were "reasonable" or, to the contrary, would fundamentally alter the intercollegiate athletic program or the institution's academic mission as it interfaces with athletics (see *Ganden* and also the *Bowers* case in Section 14.4.6.2); and whether the institution has conducted a suitable individualized assessment of the student's need for modifications (see *Bowers* in Section 14.4.6.2).

An emerging issue, albeit one that has yet to see litigation, is whether either Section 504 or the ADA requires a university to provide separate athletic teams for students with disabilities, as is required by Title IX for women students. (For a discussion of this issue that includes a range of opinions by legal experts and proponents of athletics opportunities for students with disabilities, see Welch Suggs, "'Varsity' with an Asterisk: Disabled Students Are Making a Case for Equal Access to College Athletics Budgets," *Chron. Higher Educ.*, February 13, 2004, A35 (available at <http://chronicle.com/weekly/v50/i23/23a03501.htm>). For a critical analysis of the judicial rulings discussed above, see Adam A. Milani, "Can I Play? The Dilemma of the Disabled Athlete in Interscholastic Sports," 49 *Ala. L. Rev.* 817 (1998).)

**10.4.8. Drug testing.** Drug testing of athletes has become a focus of controversy in both amateur and professional sports. Intercollegiate athletics is no exception. Legal issues may arise under the federal Constitution's Fourth Amendment search and seizure clause and its Fourteenth Amendment due process clause; under search and seizure, due process, or right to privacy clauses of state constitutions; under various state civil rights statutes; under state tort law (see generally Section 3.3.2); or under the institution's own regulations, including statements of students' rights. Public institutions may be subject to challenges based on any of these sources; private institutions generally are subject only to challenges based on tort law, their own regulations, civil rights statutes applicable to private action, and (in some states) state constitutional provisions limiting private as well as public action (see generally Section 1.5).

For public institutions, the primary concern is the Fourth Amendment of the federal Constitution, which protects individuals against unreasonable searches and seizures, and parallel state constitutional provisions that may provide similar (and sometimes greater) protections. In *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602, 619 (1989), the U.S. Supreme Court held that the collection of urine or blood for drug testing constitutes a search within the meaning of the Fourth Amendment, and that the validity of such a search is determined by balancing the legitimacy of the government's interest against the degree of intrusion upon the individual's privacy interest.

Drug-testing policies may provide for testing if there is a reasonable suspicion that a student may either have used drugs recently or may be currently impaired; or they may provide for random testing, where a reasonable suspicion of drug

use is not an issue. The courts have examined both types of policies. Although policies that require a reasonable suspicion are more likely to be upheld than those involving random testing, they are still subject to the standards set forth in *Skinner*.

*Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo. Ct. App. 1991), *affirmed*, 863 P.2d 929 (Colo. 1993), provides an example of a university drug-testing program held to be unreasonable under the *Skinner* standard. The university initiated a program for testing its student athletes when it had a “reasonable suspicion” that they were using drugs. As a condition to participation in intercollegiate athletics, all athletes were asked to sign a form consenting to such tests. The university initiated the program “because of a desire to prepare its athletes for drug testing in NCAA sanctioned sporting events, a concern for athletes’ health, an interest in promoting its image, and a desire to ensure fair competition” (832 P.2d at 1032). In a class action suit, student athletes challenged this program on several grounds. The Supreme Court of Colorado held that the program violated both the federal Constitution’s Fourth Amendment and a similar provision of the Colorado constitution. Applying the *Skinner* test, the court determined that the drug-testing program was unconstitutional. In addition, the court held that the university’s consent form was not sufficient to waive the athletes’ constitutional rights. The university bore the burden of proof in showing that the waiver was signed voluntarily. Relying on the trial testimony of several athletes, which “revealed that, because of economic or other commitments the students had made to the University, [the students] were not faced with an unfettered choice in regard to signing the consent” (832 P.2d at 1035), the Colorado Supreme Court invalidated the university’s program and prohibited its continuation.

The U.S. Supreme Court addressed the lawfulness of testing student athletes in K-12 settings twice since its *Skinner* ruling, and in both cases the Court upheld the testing program. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), involved a constitutional challenge to a public school district’s *random* drug testing of student athletes. Seventh grader James Acton and his parents sued the school district after James had been barred from the school football team because he and his parents refused to sign a form consenting to random urinalysis drug testing. In an attempt to control a “sharp increase” in drug use among students, the district had implemented a policy requiring that all student athletes be tested at the beginning of each season for their sport, and that thereafter 10 percent of the athletes be chosen at random for testing each week of the season. In a 6-to-3 decision, the U.S. Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit (23 F. 3d 1514 (9th Cir. 1994)) and upheld the policy.

The majority opinion by Justice Scalia relied on *Skinner v. Railway Labor Executives Association* to conclude that the collection of urine samples from students is a search that must be analyzed under the reasonableness test. The majority then examined three factors to determine the reasonableness of the search: (1) “the nature of the privacy interest upon which the search . . . intrudes”; (2) “the character of the intrusion that is complained of”; and

(3) “the nature and immediacy of the governmental concern at issue . . . , and the efficacy of [the drug test in] meeting it.” Regarding the first factor, the Court emphasized that “particularly with regard to medical examinations and procedures,” student athletes have even less of an expectation of privacy than students in general due to the “communal” nature of locker rooms and the additional regulations to which student athletes are subject on matters such as preseason physicals, insurance coverage, and training rules.

Regarding the second factor, the Court stated that urinalysis drug testing is not a significant invasion of the student’s privacy because the process for collecting urine samples is “nearly identical to those [conditions] typically encountered in restrooms”; the information revealed by the urinalysis (what drugs, if any, are present in the student’s urine) is negligible; the test results are confidential and available only to specific personnel; and the results are not turned over to law enforcement officials. And regarding the third factor, the Court determined that the school district has an “important, indeed perhaps compelling,” interest in deterring schoolchildren from drug use as well as a more particular interest in protecting athletes from physical harm that could result from competing in events under the influence of drugs; that there was evidence of a crisis of disciplinary actions and “rebellion . . . being fueled by alcohol and drug abuse,” which underscored the immediacy of the district’s concerns; and that the drug testing policy “effectively addressed” these concerns. The plaintiffs had argued that the district could fulfill its interests by testing when it had reason to suspect a particular athlete of drug use, and that this would be a less intrusive means of effectuating the interests. The Court rejected this proposal, explaining that it could be abused by teachers singling out misbehaving students, and it would stimulate litigation challenging such testing.

Although *Vernonia* is an elementary/secondary school case, its reasonableness test and the three factors for applying it will also likely guide analysis of Fourth Amendment challenges to drug testing of student athletes at colleges and universities. Some of the considerations relevant to application of the three factors would differ for higher education, however, so it is unclear whether the balance would tip in favor of drug-testing plans, as it did in *Vernonia*. The Court itself took pains to limit its holding to public elementary/secondary education, warning that its analysis might not “pass constitutional muster in other contexts.”

(On remand in *Vernonia*, the Ninth Circuit ruled on the merits that the defendant’s drug-testing program did not violate the Fourth Amendment or the Oregon constitution; 66 F.3d 217 (9th Cir. 1995).)

The Supreme Court issued another ruling in 2002, this time upholding a random drug-testing policy that covered any student who participated in extracurricular school activities, whether or not they involved athletics. In *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822 (2002), a 5-to-4 decision with a vigorous dissent, the Court, following the three-part test it had established in *Vernonia*, found the random drug-testing policy reasonable. *First*, said the Court, the students had a limited expectation of privacy, even though most nonathletic activities did not involve disrobing or regular

physical examinations. The limited expectation of privacy, according to the Court, did not depend upon communal undress, but on the custodial responsibilities of the school for the children in its care. *Second*, the Court found the invasion of the students' privacy to be minimally intrusive, and virtually identical to that found lawful in *Vernonia*. And *third*, the Court found that the policy had a close relationship to the school district's interest in protecting the students' health and safety. There was evidence of some drug use by students who participated in extracurricular activities, although the Court stated that "a demonstrated drug abuse problem is not always necessary to the validity of a testing regime." The dissenting justices found the school district's testing program to be unreasonable because it targeted students "least likely to be at risk from illicit drugs and their damaging effects" (536 U.S. at 843).

Although most of the litigation involving drug-testing policies has involved federal constitutional claims, two cases decided prior to the Supreme Court's *Vernonia* opinion illustrate that state constitutions or civil rights laws provide avenues to challenge these policies. In *Hill v. NCAA*, 273 Cal. Rptr. 402 (Cal. Ct. App. 1990), *reversed*, 865 P.2d 633 (Cal. 1994), Stanford University student athletes challenged the university's implementation of the NCAA's required drug-testing program. The constitutional clause at issue was not a search and seizure clause as such but rather a right to privacy guarantee (Cal. Const. Art. I, § 1). Both the intermediate appellate court and the Supreme Court of California determined that this guarantee covered drug testing, an activity designed to gather and preserve private information about individuals. Further, both courts determined that the privacy clause limited the information-gathering activities of private as well as public entities, since the language revealed that privacy was an "inalienable right" that no one may violate. Although the private entity designated as the defendant in the *Hill* case was an athletic conference (the NCAA) rather than a private university, the courts' reasoning would apply to the latter as well.

In *Hill*, the intermediate appellate court's privacy analysis differed from the Fourth Amendment balancing test of *Skinner* because the court required the NCAA "to show a compelling interest before it can invade a fundamental privacy right"—a test that places a heavier burden of justification on the alleged violator than does the Fourth Amendment balancing test. The Supreme Court of California disagreed on this point, holding that the correct approach "requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test'" (865 P.2d at 655). Under this approach, "[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a legitimate and important competing interest" (865 P.2d at 655–56), rather than a compelling interest, as the lower court had specified. Using this balancing test, the California Supreme Court concluded that "the NCAA's decision to enforce a ban on the use of drugs by means of a drug testing program is reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition" and therefore does not violate the California constitution's privacy guarantee.

In addition to its illustration of state privacy concepts, the *Hill* case also demonstrates the precarious position of institutions that are subject to NCAA or conference drug-testing requirements. As the intermediate appellate court indicated, Stanford, the institution that the *Hill* plaintiffs attended, was in a dilemma: “as an NCAA member institution, if it refused to enforce the consent provision, it could be sanctioned, but if it did enforce the program, either by requiring students to sign or withholding them from competition, it could be sued.” To help resolve the dilemma, Stanford intervened in the litigation and sought its own declaratory and injunctive relief. These are the same issues and choices that other institutions will continue to face until the various legal issues concerning drug testing have finally been resolved.

In *Bally v. Northeastern University*, 532 N.E.2d 49 (Mass. 1989), a state civil rights law provided the basis for a challenge to a private institution’s drug-testing program. The defendant, Northeastern University, required all students participating in intercollegiate athletics to sign an NCAA student athlete statement that includes a drug-testing consent form. The institution’s program called for testing of each athlete once a year as well as other random testing throughout the school year. When a member of the cross-country and track teams refused to sign the consent form, the institution declared him ineligible. The student claimed that this action breached his contract with the institution and violated his rights under both the Massachusetts Civil Rights Act and a state right to privacy statute. A lower court granted summary judgment for Northeastern on the contract claim and for the student on the civil rights and privacy claims.

The Massachusetts Supreme Court reversed the lower court’s judgment for the student. To prevail on the civil rights claim, according to the statute, the student had to prove that the institution had interfered with rights secured by the Constitution or laws of the United States or the Commonwealth and that such interference was by “threats, intimidation, or coercion.” Although the court assumed *arguendo* that the drug-testing program interfered with the student’s rights to be free from unreasonable searches and seizures and from invasions of reasonable expectations of privacy, it nevertheless denied his claim because he had made no showing of “threats, intimidation, or coercion.” Similarly, the court denied the student’s claim under the privacy statute because “[t]he majority of our opinions involving a claim of an invasion of privacy concern the public dissemination of information,” and the student had made no showing of any public dissemination of the drug-testing results. In addition, because the student was not an employee, state case law precedents regarding employee privacy, on which the student had relied, did not apply.

Given the outcomes in *Vernonia* and *Earls*, students challenging random or for-cause drug testing policies in K–12 school districts have sought relief under state constitutions rather than the Fourth Amendment. The results have been mixed. For example, although the New Jersey Supreme Court upheld a random drug- and alcohol-testing program that covered all students participating in extracurricular activities under the state constitution in *Joye v. Hunterdon Central Regional High School Board of Education*, 826 A.2d 624 (N.J. 2003), the Pennsylvania Supreme Court struck a similar policy. In *Theodore v. Delaware*



*Valley School District*, 836 A.2d 76 (Pa. 2003), the state's high court pointed out that the state constitution's privacy protections went beyond those of the U.S. Constitution's Fourth Amendment. While the challenged random drug- and alcohol-screening policy at the Pennsylvania school district may have been permissible under the Fourth Amendment, said the court, the school district had not provided evidence of a drug problem at the high school sufficient to outweigh the students' privacy rights under the Pennsylvania constitution. The court also rejected the school district's explanation that the policy had been extended to the plaintiffs, honor students whose extracurricular activities were only academic, because they were "role models" for other students, stating that this rationale did not justify the invasion of their privacy.

Since the courts have not spoken definitively with respect to higher education, it is not clear what drug-testing programs and procedures will be valid. In the meantime, institutions (and athletic conferences) that wish to engage in drug testing of student athletes may follow these minimum suggestions, which are likely to enhance their program's capacity to survive challenge under the various sources of law listed at the beginning of this Section:

1. Articulate *and document* both the strong institutional interests that would be compromised by student athletes' drug use and the institution's basis for believing that such drug use is occurring in one or more of its athletic programs.
2. Limit drug testing to those athletic programs where drug use is occurring and is interfering with institutional interests.
3. Develop evenhanded and objective criteria for determining who will be tested and in what circumstances.
4. Specify the substances whose use is banned and for which athletes will be tested, limiting the named substances to those whose use would compromise important institutional interests.
5. Develop detailed and specific protocols for testing of individuals and lab analysis of specimens, limiting the monitoring of specimen collection to that which is necessary to ensure the integrity of the collection process, and limiting the lab analyses to those necessary to detect the banned substances (rather than to discover other personal information about the athlete).
6. Develop procedures for protecting the confidentiality and accuracy of the testing process and the laboratory results.
7. Embody all the above considerations into a clear written policy that is made available to student athletes before they accept athletic scholarships or join a team.

**10.4.9. Tort liability for athletic injuries.** Tort law (see Sections 3.3 & 4.7.2) poses special problems for athletic programs and departments. Because of the physical nature of athletics and because athletic activities often require travel to other locations, the danger of injury to students and the possibilities

for institutional liability are greater than those resulting from other institutional functions. In *Scott v. State*, 158 N.Y.S.2d 617 (N.Y. Ct. Cl. 1956), for instance, a student collided with a flagpole while chasing a fly ball during an intercollegiate baseball game; the student was awarded \$12,000 in damages because the school had negligently maintained the playing field in a dangerous condition and the student had not assumed the risk of such danger.

Although most of the litigation involving injuries to student athletes has involved injuries sustained during either practice or competition, students have also attempted to hold their institution responsible for injuries resulting from assaults by students or fans from competing teams, or from hazing activities. Although students have not been uniformly successful in these lawsuits, the courts appear to be growing more sympathetic to their claims.

In considering whether student athletes may hold their institutions liable for injuries sustained in practice, competition, or hazing, courts have addressed whether the institution has a duty to protect the student from the type of harm that was encountered. The specific harm that occurred must have been reasonably foreseeable to the institution in order for a duty to arise. On the other hand, institutions have argued that the athlete assumes the risk of injury because sports, particularly contact sports, involve occasional injuries that are not unusual. The courts have traced a path between these two concepts.

One area of litigation focuses on whether a university can be held liable for its failure to prepare adequately for emergency medical situations. In *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993), parents of a student athlete sued the college for the wrongful death of their son, who had died from a heart attack suffered during a practice session of the intercollegiate lacrosse team. The student had no medical history that would indicate any danger of such an occurrence. No trainers were present when he was stricken, and no plan prescribing steps to take in medical emergencies was in effect. Students and coaches reacted as quickly as they could to reach the nearest phone, more than 200 yards away, and call an ambulance. The parents sued the college for negligence (see generally Section 3.3.2), alleging that the college owed a duty to its student athletes to have measures in place to provide prompt medical attention in emergencies. They contended that the delay in securing an ambulance, caused by the college's failure to have an emergency plan in effect, resulted in their son's death. The federal district court, applying Pennsylvania law, granted summary judgment for the college, holding that the college owed no duty to the plaintiffs' son in the circumstances of this case and that, even if a duty were owed, the actions of the college's employees were reasonable and did not breach the duty.<sup>34</sup>

The appellate court reversed the district court's judgment and remanded the case for a jury trial, ruling that a special relationship existed between the student and the college because he was participating in a scheduled athletic

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<sup>34</sup>The district court's opinion also contains an interesting discussion of the application of the state's Good Samaritan law to athletic injuries. See 786 F. Supp. 449, 457 (M.D. Pa. 1992).

practice supervised by college employees. Thus, the college had a duty of reasonable care. The court then delineated the specific demands that that duty placed on the college in the circumstances of this case. Since it was generally foreseeable that a life-threatening injury could occur during sports activities such as lacrosse, and given the magnitude of such a risk and its consequences, “the College owed a duty to Drew to have measures in place at the lacrosse team’s practice . . . to provide prompt treatment in the event that he or any other members of the lacrosse team suffered a life-threatening injury.” However, “the determination whether the College has breached this duty at all is a question of fact for the jury.”

Similarly, a North Carolina appellate court found that a special relationship may have existed between the University of North Carolina and members of its junior varsity cheerleading squad sufficient to hold the university liable for negligence when a cheerleader was injured during practice. In *Davidson v. University of North Carolina at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001), a cheerleader was injured while practicing a stunt without mats or other safety equipment. The university did not provide a coach for the junior varsity squad, and had provided no safety training for the students. It provided uniforms, transportation to away games, and access to university facilities and equipment. Although certain university administrators had expressed reservations about the safety of some of the cheerleaders’ stunts, including the pyramid stunt on which the plaintiff was injured, no action had been taken to supervise the junior varsity squad or to limit its discretion in selecting stunts.

The appellate court ruled that the degree of control that the university exercised over the cheerleading squad created a special relationship that, in turn, created a duty of care on the part of the university. Relying on *Kleinknecht*, the court limited its ruling to the facts of the case, refusing to create a broader duty of care that would extend to the general activities of college students.<sup>35</sup>

Even when the institution does or may owe a duty to the student athlete in a particular case, the student athlete will have no cause of action against the institution if its breach of duty was not the cause of the harm suffered. In *Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986), for example, the court avoided the issue of whether the defendant university owed a duty to a student athlete to provide for a proper emergency plan, because the delay in treating the athlete, allegedly caused by the university’s negligent failure to have such a plan, caused the athlete no further harm. The athlete had suffered a broken neck in a lacrosse game and was rendered a quadriplegic; the evidence made it clear that, even if medical help had arrived sooner, nothing could have been done to lessen the injuries. In other words, the full extent of these injuries had been determined before any alleged negligence by the university could have come into play.

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<sup>35</sup>An emerging issue involving potential liability for colleges is the combination of performance-enhancing substances and extreme heat, which has led to the deaths of several college football players. For a discussion of this issue, and a call for the NCAA to ban all off-season “voluntary practices” that occur during warm summer months, see Sarah Lemons, “‘Voluntary’ Practices: The Last Gasp of Big-Time College Football and the NCAA,” 5 *Vand. J. Ent. L. & Prac.* 12 (2003).

As the *Kleinknecht* court's reasoning suggests, the scope of the institution's duty to protect student athletes in emergencies and otherwise may depend on a number of factors, including whether the activity is intercollegiate (versus a club team) or an extracurricular activity, whether the particular activity was officially scheduled or sponsored, and perhaps whether the athlete was recruited or not. The institution's duty will also differ if the student athlete is a member of a visiting team rather than the institution's own team. In general, there is no special relationship such as that in *Kleinknecht* between the institution and a visiting athlete; there is only the relationship arising from the visiting student's status as an invitee of the institution (see generally Section 3.3.2.1). In *Fox v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 576 So. 2d 978 (La. 1991), for example, a visiting rugby player from St. Olaf's club team was severely injured when he missed a tackle during a tournament held at Louisiana State University (LSU). The court determined that the injured player had no cause of action against LSU based on the institution's own actions or omissions. The only possible direct liability claim he could have had would have been based on a theory that the playing field onto which he had been invited was unsafe for play, a contention completely unsupported by the evidence.

In addition to the institution's liability for its own negligent acts, there are also issues concerning the institution's possible vicarious liability for the acts of its student athletes or its athletic clubs. In the *Fox* case above, the visiting athlete also claimed that the university was vicariously liable for negligent actions of its rugby club in holding a cocktail party the night before the tournament, in scheduling teams to play more than one game per day (the athlete was injured in his second match of the day), and in failing to ensure that visiting clubs were properly trained and coached. His theory was that these actions had resulted in fatigued athletes playing when they should not have, thus becoming more susceptible to injury. The appellate court held that LSU could not be vicariously liable for the actions of its rugby club. Although LSU provided its rugby team with some offices, finances, and supervision, and a playing field for the tournament, LSU offered such support to its rugby club (and other student clubs) only to enrich students' overall educational experience by providing increased opportunities for personal growth. The university did not recruit students for the club, and it did not control the club's activities. The club therefore was not an agent of the university and could not bind LSU by its actions.

In *Regan v. State*, 654 N.Y.S.2d 488 (N.Y. App. Div. 1997), the court addressed whether a student at a state college who suffered a broken neck while playing rugby, and was rendered a quadriplegic, had assumed the risk of such injury and was therefore barred from recovery against the state. The student had played and practiced with the college's Rugby Club for three years at the time of the incident. During those three years, the student had regularly practiced with student coaches on the same field where the injury occurred, and had witnessed prior rugby injuries. Relying on these factors, the court affirmed summary judgment in favor of the state, finding unpersuasive the plaintiff's

contention that he was unaware of the inherent risk in playing rugby. Reaching a similar conclusion, the court in *Sicard v. University of Dayton*, 660 N.E.2d 1241, 1244 (Ohio Ct. App. 1995), noted that a player assumes the ordinary risks of playing a contact sport, but does not assume the risk of injuries that occur when rules are violated. Because of these assumed risks, according to the court in *Sicard*, injured athletes suing in tort must make a stronger showing of misconduct than persons injured in nonathletic contexts. The defendant's misconduct must amount to more than ordinary negligence and must rise to the level of "intentional" or "reckless" wrongdoing.

Using these principles, the court in *Sicard* reversed the trial court's summary judgment for the defendants—the university and an employee who was a "spotter" in the weight room and allegedly failed to perform this function for the athlete, which could have prevented his injury. The court remanded the case for trial because "[a] reasonable mind could . . . conclude that . . . [the spotter's] acts and omissions were reckless because they created an unreasonable risk of physical harm to Sicard, one substantially greater than that necessary to make his conduct merely negligent . . ." (660 N.E.2d at 1244).

The same conclusion was reached in *Hanson v. Kynast* (cited above), which concerned a university's vicarious liability for a student's actions. During an intercollegiate lacrosse game, Kynast body-checked and taunted a player on the opposing team. When Hanson (another opposing team player) grabbed Kynast, Kynast threw Hanson to the ground, breaking his neck. Hanson sued Kynast and Ashland University, the team for which Kynast was playing when the incident occurred. The court held that Ashland University, which Kynast attended, was not liable for his actions because he received no scholarship, joined the team voluntarily, used his own playing equipment, and was guided but not controlled by the coach. In essence, the court held that Kynast was operating as an individual, voluntarily playing on the team, not as an agent of the university. (See also *Townsend v. State*, 237 Cal. Rptr. 146 (Cal. Ct. App. 1987), in which the court, relying on state statutes, similarly refused to hold a university vicariously liable for a nonscholarship varsity basketball player's assault on another team's player.)

A similar result would also likely obtain when a student is injured in an informal recreational sports activity. In *Swanson v. Wabash College*, 504 N.E.2d 327 (Ind. Ct. App. 1987), for example, a student injured in a recreational basketball game sued the college for negligence. The court ruled that the college had no legal duty to supervise a recreational activity among adult students, and that the student who had organized the game was neither an agent nor an employee of the college, so *respondeat superior* liability did not attach.

An Arkansas case provides fair warning that institutions may incur tort liability not only due to athletic injuries, but also due to the administration of painkillers and other prescription drugs used for athletic injuries. In *Wallace v. Broyles*, 961 S.W.2d 712 (Ark. 1998), a varsity football player at the University of Arkansas shot and killed himself. His mother sued the university's director of athletics, the head athletic trainer, the football team physician, and various doctors, alleging that, after her son had sustained a severe shoulder

injury during a football game, university personnel had supplied him with heavy doses of Darvocet, a “mind-altering drug” with “potentially dangerous side effects.” The Darvocet allegedly caused the state of mind that precipitated the football player’s suicide. The player’s mother claimed that the defendants had been negligent in the way they stored and dispensed prescription drugs and in failing to keep adequate records of inventory or of athletes’ use of prescription drugs; and that the athletic department’s practices were inconsistent both with federal drug laws and with guidelines that the NCAA had issued to the university.

The Supreme Court of Arkansas reversed the trial court’s grant of summary judgment for the defendants and let the case proceed to trial. The court emphasized that “to be negligent, the defendants here need not be shown to have foreseen the particular injury which occurred, but only that they reasonably could be said to have foreseen an appreciable risk of harm to others.” On that basis, the court concluded that “the pleadings and evidentiary documents raise a fact issue concerning whether the defendants’ acts or omissions were negligence in the circumstances described.”

In contrast to their potential liability for injuries to their student athletes during practice or competition, institutions have been more successful in persuading courts that they should not be liable for assaults on their students by students or fans from visiting teams, or for assaults on visitors by their students. An example of the first category is *Blake v. University of Rochester*, 758 N.Y.S.2d 323 (N.Y. App. Div. 2003), in which a student playing in an intramural basketball game was assaulted by a player on the opposing team. Because no one on either team knew the player who assaulted Blake, Blake argued that the university’s security was lax in that it allowed an intruder to gain access to the gymnasium where the game took place. The court rejected Blake’s theory as speculative and dismissed the case.

Similarly, a player for a visiting team who was punched by a Boston University basketball player during a game was unable to persuade the Massachusetts Supreme Court to hold the university vicariously liable for his injury. In *Kavanagh v. Trustees of Boston University*, 795 N.E.2d 1170 (Mass. 2003), the court refused to recognize a special relationship between the university and a student from another institution. Furthermore, according to the court, the assault was not foreseeable, and therefore there was no duty to protect the visiting student.<sup>36</sup>

Hazing in college athletics is a common practice that is only recently receiving the type of attention that hazing by members of fraternal organizations has attracted during the past decade. (Hazing litigation involving fraternal

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<sup>36</sup>But see *Avila v. Citrus Community College*, 4 Cal. Rptr. 3d 264 (Cal. App. 2003), in which a state appellate court refused to apply the “recreational immunity” provision of state law to a college baseball game because that doctrine was intended to apply to inherently dangerous activities such as skydiving or hang-gliding. The court remanded the case for trial. The California Supreme Court agreed to hear an appeal of the appellate court’s ruling (81 P.3d 222 (Cal. 2003)), but no published opinion had been issued as of late 2005.

organizations is discussed in Section 10.2.4.) A national survey of 325,000 athletes participating in intercollegiate sports at more than 1,000 NCAA colleges was conducted by Alfred University in 1999. The survey found that more than three-quarters of the respondents reported that they had experienced some form of hazing as a precursor of joining a college sports team, and 20 percent of the respondents reported “unacceptable and potentially illegal hazing,” including being kidnapped, beaten or tied up and abandoned, forced to commit crimes, and alcohol abuse (Nadine C. Hoover, “National Survey: Initiation Rites and Athletics for NCAA Sports Teams,” August 20, 1999, available at <http://www.alfred.edu/news/hazing.pdf>).

Hazing of college athletes has attracted some recent litigation, but there have been no published court opinions. Kathleen Peay sued the University of Oklahoma for “physical and mental abuse” resulting from hazing activities required by the soccer team and its coach. The case was settled.<sup>37</sup> The University of Vermont was sued by a student hockey team member, Corey LaTulippe, who was required to endure a hazing ritual at the hands of his teammates. The university settled the lawsuit.<sup>38</sup> Given the existence of state laws against hazing, and the lack of any rational relationship between hazing that exposes a student to danger and the educational mission of the institution, it is likely that courts will expect institutions to prevent hazing, to make hazing a violation of the student code of conduct, and to hold students who engage in hazing activities strictly accountable for their actions, whether or not they result in physical or mental injury to students.

## Selected Annotated Bibliography

### Sec. 10.1 (Student Organizations)

Hernandez, Wendy. “The Constitutionality of Racially Restrictive Organizations Within the University Setting,” 21 *J. Coll. & Univ. Law* 429 (1994). Discusses the prevalence of racially restrictive student organizations and reviews the laws and jurisprudence that affect the way a college may respond to a request for official recognition of such organizations. Offers recommendations for working with these organizations.

Paulsen, Michael. “A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on ‘Equal Access’ for Religious Speakers and Groups,” 29 *U.C. Davis L. Rev.* 653 (1996). Part of a symposium entitled “Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality.” In light of *Rosenberger v. Rectors and Visitors of the University of Virginia*, examines the rejection of the premise that the establishment clause creates an exception to First Amendment free speech principles when the speech or speaker in question is of a religious nature.

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<sup>37</sup>For a discussion of the facts of this case and its resolution, see Joshua A. Sussberg, Note, “Shattered Dreams: Hazing in College Athletics,” 24 *Cardozo L. Rev.* 1421 (2003).

<sup>38</sup>This case is discussed in R. Brian Crow & Scott R. Rosner, “Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports,” 76 *St. John’s L. Rev.* 87 (2002).

### **Sec. 10.2 (Fraternities and Sororities)**

Curry, Susan J. "Hazing and the 'Rush' Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts," 16 *J. Coll. & Univ. Law* 93 (1989). Examines the various legal theories used against local and national fraternities, universities, and individual fraternity members to redress injury or death resulting from hazing. Also reviews the response of one university to the hazing death of a pledge and its revised regulation of fraternities. Two state anti-hazing laws are also discussed.

*Fraternal Law Newsletter* (subscription information available at <http://www.manley-burke.com/fraternallaw.html>). Designed for administrators, counsel, and national fraternal organizations; focuses on prevention of legal problems related to housing, alcohol abuse, hazing, and relationships between colleges and fraternal organizations. Tax issues are considered in some issues.

Gregory, Dennis E., et al. *The Administration of Fraternal Organizations on North American Campuses: A Pattern for a New Millennium* (College Administration Publications, 2003). Chapters include historical reviews of male, female, black, and emerging fraternal organizations; the role of national and North American fraternal associations; the oversight of fraternal organizations on campus; risk management issues; and developing responsible leaders for fraternal organizations.

Hauser, Gregory F. "Intimate Associations Under the Law: The Rights of Social Fraternities to Exist and to Be Free from Undue Interference by Host Institutions," 24 *J. Coll. & Univ. Law* 59 (1997). Argues that many attempts by public institutions to restrict the activities and policies of fraternal organizations are unconstitutional. Discusses the doctrine of "intimate association" in detail and its application to the activities of fraternal organizations.

Lewis, Darryll M. H. "The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing," 51 *Miss. L.J.* 111 (1991). Describes state laws that make hazing and associated activities subject to criminal penalties.

MacLachlan, Jenna. "Dangerous Traditions: Hazing Rituals on Campus and University Liability," 26 *J. Coll. & Univ. Law* 511 (2000). Discusses litigation concerning institution of higher education's potential liability for injuries and deaths resulting from hazing. Traces the development of the law from *in loco parentis* to the current tendency of courts to hold institutions legally responsible for injuries that are foreseeable, including injuries that result from hazing.

McBride, Scott Patrick. "Freedom of Association in the Public University Setting: How Broad Is the Right to Participate in Greek Life?" 23 *U. Dayton L. Rev.* 133 (1997). Reviews constitutional protections for freedom of association; discusses their application and their limitations for the activities of fraternal organizations.

Nuwer, Hank. *Wrongs of Passage: Fraternities, Sororities, Hazing, and Binge Drinking* (Indiana University Press, 1999). Reviews anti-hazing laws and discusses the social context in which hazing occurs. Recommends steps institutions can take to reduce hazing and to protect students from hazing.

Rutledge, Gregory E. "Hell Night Hath No Fury Like a Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities," 25 *J. Coll. & Univ. Law* 361 (1998). Discusses the definition, scope, and history of hazing, as well as reviewing litigation concerning hazing. Reviews theories of liability and defenses to liability claims. Suggests strategies for reducing hazing and related liability.



Walton, Spring J., Bassler, Stephen E., & Cunningham, Robert Briggs. "The High Cost of Partying: Social Host Liability for Fraternities and Colleges," 14 *Whittier L. Rev.* 659 (1993). Discusses the implications of state social host laws for local and national fraternities and for colleges and universities. Concludes that increased regulation of fraternities by colleges may prompt judicial imposition of a duty on colleges to prevent injuries related to fraternity social activity.

### **Sec. 10.3 (The Student Press)**

Comment, "Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press," 16 *U.C. Davis L. Rev.* 1089 (1983). Reviews the constitutional status of student newspapers under the First Amendment, analyzes the applicability of the state action doctrine to student newspapers on public campuses, and discusses the question of whether noncampus groups have any right to have material published in campus newspapers on public campuses.

Duscha, Julius, & Fischer, Thomas. *The Campus Press: Freedom and Responsibility* (American Association of State Colleges and Universities, 1973). A handbook that provides historical, philosophical, and legal information on college newspapers. Discusses case law that affects the campus press and illustrates the variety of ways the press may be organized on campus and the responsibilities the institution may have for its student publications.

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Nichols, John E. "Vulgarity and Obscenity in the Student Press," 10 *J. Law & Educ.* 207 (1981). Examines the legal definitions of vulgarity and obscenity as they apply to higher education and secondary education and reviews the questions these concepts pose for the student press.

Note, "Tort Liability of a University for Libelous Material in Student Publications," 71 *Mich. L. Rev.* 1061 (1973). Provides the reader with a general understanding of libel law and discusses the various theories under which a university may be held liable for the torts of its student press. Author also recommends preventive measures to minimize university liability.

Student Press Law Center. *Law of the Student Press* (2d ed., Student Press Law Center, Inc., 1994). Surveys the legal rights and responsibilities of high school and college journalists. Contains extensive discussion of freedom of press and its limits in the education context, including discussion of defamation, invasion of privacy, obscenity, the "underground" press, and electronic media.

See Ugland entry in Selected Annotated Bibliography for Chapter 11, Section 11.6.

### **Sec. 10.4 (Athletics Teams and Clubs)**

Association of Governing Boards. "Statement on Board Responsibilities for Intercollegiate Athletics" (Association of Governing Boards, March 28, 2004). Discusses the board's responsibility to provide oversight of intercollegiate athletics; presidential

authority and the board's review of the use of that authority; fiscal responsibility; the welfare of student athletes, and related issues.

- Berry, Robert C., & Wong, Glenn M. *Law and Business of the Sports Industries: Common Issues in Amateur and Professional Sports* (2d ed., Greenwood, 1993). The second volume of a comprehensive, two-volume overview of the law applicable to athletics. Most of the discussion either focuses on or has direct application to intercollegiate sports. The twelve chapters cover such topics as "The Amateur Athlete," "Sex Discrimination in Athletics," "Application of Tort Law," "Drug Testing," and "Criminal Law and Its Relationship to Sports." Includes numerous descriptions or edited versions of leading cases, set off from and used to illustrate the textual analysis.
- Brake, Deborah. "The Struggle for Sex Equality in Sport and the Theory Behind Title IX," 34 *U. Mich. J.L. Ref.* 13 (2000–2001). Discusses the interpretation of Title IX's equality standard used by the Office of Civil Rights and the courts; reviews the law's "participation test" and discusses its applications in litigation; and suggests that institutions need to provide greater equality of treatment to female athletes.
- Burns, Beverly H. (ed.). *A Practical Guide to Title IX in Athletics: Law, Principles, and Practices* (2d ed., National Association of College and University Attorneys, 2000). Contains selected materials from various sources that illuminate the range of Title IX athletic issues facing colleges and universities. Special attention is given to equal opportunity regarding coaching contracts, access, and gender equity. Also available is an *In-House Legal Audit* that institutions can use to review their compliance with Title IX.
- Davis, Timothy. "An Absence of Good Faith: Defining a University's Educational Obligation to Student Athletes," 28 *Houston L. Rev.* 743 (1991). Examines the relationship between the student athlete and the university, the potential exploitation of the student athlete, and the resulting compromise of academic integrity. Author argues that the good-faith doctrine of contract law should be used to define the university's obligation, so that the contract will be breached if the university "obstructs or fails to further the student-athlete's educational opportunity."
- Davis, Timothy. "College Athletics: Testing the Boundaries of Contract and Tort," 29 *U.C. Davis L. Rev.* 971 (1996). Explores the tort and contract theories of liability by which institutions may become liable to student athletes, the "intersection" of these theories, and their potential expansion. Also criticizes the extent to which courts have deferred to institutional decision making regarding student athletes.
- Davis, Timothy, Mathewson, Alfred, & Shropshire, Kenneth (eds.). *Sports and the Law: A Modern Anthology* (Carolina Academic Press, 1999). Provides a well-organized and carefully selected collection of excerpts from law review articles and other journal articles, books, and government and commission reports. Part III of the anthology (the longest of six parts) covers intercollegiate athletics, including topics such as disabled athletes, gender discrimination, due process, and antitrust issues. A separate Part IV covers tort liability, and Part V covers drug testing.
- Freitas, Mark. "Applying the Rehabilitation Act and the Americans With Disabilities Act to Student-Athletes," 5 *Sports Law. J.* 139 (1998). Compares Section 504, ADA Title II, and ADA Title III in terms of their applicability to disabled student athletes. Elucidates each major step in the legal analysis under the three sources of law. Discusses the *Pahula* case, the *Knapp* case, and the *Bowers* case.

- Jones, Cathy J. "College Athletes: Illness or Injury and the Decision to Return to Play," 40 *Buffalo L. Rev.* 113 (1992). Discusses the rights and liabilities in situations where a student athlete seeks to play or return to play after being diagnosed with a medical condition that could cause injury or death. Analyzes the rights of the athletes under the U.S. Constitution, Section 504 of the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990. Suggests that athletes' autonomy must be respected and that "[l]iability on the part of the institution and its employees should be judged by a reasonableness standard."
- McCaskey, Anthony S., & Biedzynski, Kenneth W. "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries," 6 *Seton Hall J. Sports L.* 7 (1996). Discusses negligence actions brought against coaches by injured athletes; reviews the legal duties of coaches and the defenses available to coaches in such litigation.
- Mitten, Matthew. "Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?" 71 *Neb. L. Rev.* 987 (1992). Discusses the circumstances under which athletes with disabilities may participate in competitive sports. Outlines the problem from the perspectives of the athletic associations, the athlete, the team physician, and university administrators. Traces the rights and obligations of the parties under state statutory law, federal constitutional law, and Section 504 of the Rehabilitation Act. Does not discuss the ramifications of the Americans With Disabilities Act.
- Pieronek, Catherine. "Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality," 27 *J. Coll. & Univ. Law* 447 (2000). Reviews the history of Title IX enforcement in collegiate athletics, and discusses current regulatory enforcement and litigation. Discusses the limitations of the Title IX jurisprudence and suggests areas where greater clarification is needed.
- Pieronek, Catherine. "Title IX Beyond Thirty: A Review of Recent Developments," 30 *J. Coll. & Univ. Law* 75 (2003). Summarizes developments in Title IX jurisprudence since the article cited above. Reviews litigation involving high schools as well as colleges, including the litigation brought by the National Wrestling Coaches Association.
- Ranney, James T. "The Constitutionality of Drug Testing of College Athletes: A Brandeis Brief for a Narrowly-Intrusive Approach," 16 *J. Coll. & Univ. Law* 397 (1990). Identifies the legal and policy issues that institutions should consider in developing a drug-testing program. Author concludes that the threat of "performance-enhancing drugs" justifies random warrantless searches, while the threat of "street drugs" only justifies searches based on reasonable suspicion or probable cause. Article also discusses procedural safeguards to guarantee the reliability of the testing and protect the athletes' due process rights.
- Remis, Rob. "Analysis of Civil and Criminal Penalties in Athlete Agent Status and Support for the Imposition of Civil and Criminal Liability upon Athletes," 8 *Seton Hall J. Sport L.* 1 (1998). Discusses state laws regulating athletes and athlete agents; includes a list of such state laws, and argues that these laws should impose liability upon athletes as well as upon agents.
- Symposium, "Gender & Sports: Setting a Course for College Athletics," 3 *Duke J. Gender L. & Pol'y.* 1-264 (1996). Provides various perspectives on Title IX's effect in combating unequal opportunity in the realm of intercollegiate athletics. Contains six articles: Brian Snow & William Thro, "Still on the Sidelines; Developing the

Non-Discrimination Paradigm Under Title IX”; Deborah Brake & Elizabeth Catlin, “The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics”; Mary Jo Kane, “Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sport, Gender, and Power”; Jeffrey Orleans, “An End to the Odyssey: Equal Athletic Opportunity for Women”; Mary Gray, “The Concept of Substantial Proportionality in Title IX Athletics Cases”; and John Weistart, “Can Gender Equity Find a Place in Commercialized College Sports?”.

Symposium, “Race and Sports,” 6 *Marquette Sports L.J.* 199–421 (1996). Provides various perspectives on racial and ethnic discrimination in athletics. Contains nine articles, including Timothy Davis, “African-American Student-Athletes: Marginalizing the NCC Regulatory Structure”; Alfred Mathewson, “Black Women, Gender Equity, and the Function at the Junction”; Phoebe Williams, “Performing in a Racially Hostile Environment”; Paul Anderson, “Racism in Sports: A Question of Ethics”; and Cathryn Claussen, “Ethnic Team Names and Logos—Is There a Legal Solution?”.

Weistart, John C., & Lowell, Cym H. *The Law of Sports* (Michie, 1979, with 1985 supp.). A reference work, with comprehensive citations to authorities, treating the legal issues concerning sports. Of particular relevance to postsecondary institutions are the chapters on “Regulation of Amateur Athletics,” “Public Regulation of Sports Activities,” and “Liability for Injuries in Sports Activities.”

Wong, Glenn M. *Essentials of Amateur Sports Law* (2d ed., Praeger, 1994). Provides background information and a quick reference guide on sports law issues. Covers contract and tort law problems, sex discrimination in athletics, broadcasting, trademark law, drug testing, and various matters regarding athletic associations and athletic eligibility. Also includes detailed descriptions of the NCAA; sample forms for athletic contracts, financial aid agreements, and releases of liability; and a glossary of legal and sports terms. Of particular interest to nonlawyers such as athletic directors, coaches, and student athletes.

PART FIVE

THE COLLEGE AND LOCAL,  
STATE, AND FEDERAL  
GOVERNMENTS



# 11

## Local Governments and the Local Community

### ***Sec. 11.1. General Principles***

Postsecondary institutions are typically subject to the regulatory authority of one or more local government entities, such as cities, towns, or county governments. Some local government regulations, such as fire and safety codes, are relatively noncontroversial. Other regulations or proposed regulations may be highly controversial. Controversies have arisen, for instance, over local governments' attempts to regulate or prohibit genetic experimentation, nuclear weapons research or production, storage of radioactive materials, laboratory experiments using animals, stem cell or cloning research, and bioterrorism research involving biological agents. Other more common examples of local government actions that can become controversial include ordinances requiring permits for large-group gatherings at which alcohol will be served, ordinances restricting smoking in the workplace, rent control ordinances, ordinances prohibiting discrimination on the basis of sexual orientation, and ordinances requiring the provision of health insurance benefits for domestic partners. (For an example of the latter, see *University of Pittsburgh v. City of Pittsburgh, Commission on Human Relations*, No. G.D. 99-21287 (Pa. Ct. of Common Pleas, Allegheny County, April 20, 2000); and Robin Wilson, "Pitt's Bitter Battle over Benefits," *Chron. Higher Educ.*, June 4, 2004, A8.)

Local land use regulations and zoning board rulings are also frequently controversial, as Section 11.2 below illustrates. In addition, as Section 11.3 illustrates, local governments' exertion of tax powers may become controversial either when a postsecondary institution is taxed on the basis of activities it considers educational and charitable or when it is exempted and thus subject to criticism that the institution does not contribute its fair share to the local

government's coffers. Sections 11.4 to 11.7 below present yet other examples of controversies that may arise between a local government and a postsecondary institution or its students, faculty members, or staff members.

In dealing with local government agencies and officials, postsecondary administrators should be aware of the scope of, and limits on, each local government's regulatory and taxing authority. A local government has only the authority delegated to it by state law. When a city or county has been delegated "home rule" powers, its authority will usually be broadly interpreted; otherwise, its authority will usually be narrowly construed. In determining whether a local government's action is within the scope of its authority, the first step is to determine whether the local government's action is within the scope of the authority delegated to it by the state. In addition to construing the terms of the delegation, the court must also determine whether the scope of the particular local government's authority is to be broadly or narrowly construed. If the local government action at issue falls outside the scope, it will be found to be *ultra vires*, that is, beyond the scope of authority and thus invalid.

In *Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, 879 S.W.2d 485 (Ky. 1994), for example, Urban County Board of Health had sought to apply local health code regulations to the university's construction of a "spa pool" in a university sports facility. The parties agreed that the board of health had authority to enforce *state* regulations against the university; the issue was whether the state legislature had also delegated authority to the board to enforce *local* regulations. The Supreme Court of Kentucky distinguished between these two levels of regulation:

We agree, and the University concedes, that the Board of Health is the enforcement agent for the Cabinet for Human Resources and has the authority to inspect and enforce state health laws and state health regulations against the University. However, we do not believe that when the legislature designated the Board of Health as the enforcement agent of the Cabinet for Human Resources that the legislature intended to grant the Board of Health authority to enforce local health laws or enact local regulations against state agencies . . . [879 S.W.2d at 485-86].

In the key part of its reasoning, the court interpreted the terms of the statute delegating authority to the board, using this rule of construction:

"Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed" [879 S.W.2d at 486, quoting *City of Bowling Green v. T. & E. Electrical Contractors*, 602 S.W.2d 434 (1980)].

Applying this rule, the court held that "the legislature has not made clear its intention to grant authority," and "has [not] granted specific authority," to the board to enforce local health regulations against state agencies. The board's



application of such regulations to the university's construction of the spa pool was therefore invalid.

Where a local body is acting within the scope of its state-delegated authority, but the action arguably violates state interests or some other state law, the courts may use other methods to determine whether local or state laws will govern. For instance, courts have held that (1) a local government may not regulate matters that the state has otherwise "preempted" by its own regulation of the field; (2) a local government may not regulate matters that are protected by the state's sovereign immunity; and (3) a local government may not regulate state institutions when such regulations would intrude upon the state's "plenary powers" granted by the state's constitution. Usually the state will win such contests.<sup>1</sup>

Although these principles apply to regulation (and sometimes taxation) of both public and private institutions, public institutions are more likely than private institutions to escape a local government's net. Since public institutions are more closely tied to the state and are usually "arms" of the state (see Section 12.2), for instance, they are more likely in particular cases to have preemption defenses. Public institutions may also defend against local regulation by asserting sovereign immunity, defenses not available to private institutions.

When the public institution being regulated is a local community college, however, rather than a state college or university, somewhat different issues may arise. The community college may be considered a local political subdivision (community college district) rather than a state entity, and the question may be whether the community college is subject to the local laws of some other local government whose territory overlaps its own (see, for example, *Stearns v. Mariani*, 741 N.Y.S.2d 357 (N.Y. App. Div. 2002)). Or the community college may be established by a county government (pursuant to state law), and the question may be whether the college is an arm of the county government and whether county law or state law governs the college on some particular matter. *Atlantic Community College v. Civil Service Commission*, 279 A.2d 820 (N.J. 1971) (discussed in Section 11.2.1 below), illustrates some of these issues, as do *Appeal of Community College of Delaware County*, 254 A.2d 641 (Pa. 1969) (Section 11.2.2), and *People ex rel. Cooper v. Rancho Santiago College*, 277 Cal. Rptr. 69 (Cal. Ct. App. 1990) (Section 11.2.6).

The preemption doctrine governs situations in which the state government's regulatory activities overlap with those of a local government. For example, in the University of Pittsburgh dispute about domestic partner benefits discussed above, the Pittsburgh City Council enacted an ordinance prohibiting discrimination in employment on the basis of sexual orientation, and the city's Commission on Human Relations agreed to hear a case on whether the ordinance

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<sup>1</sup>State laws may also be held invalid because they regulate matters of "purely local concern" that the state constitution reserves to local "home rule" governments, or because they constitute "local" or "special" legislation that is prohibited by the state constitution. In such a case, there is no conflict, and the local law may prevail. For examples of such an issue in a higher education case, see the two *City of Chicago* cases at the end of this Section.

prohibited employers from denying health insurance benefits to same-sex domestic partners. While the case was pending, the state legislature passed a statute exempting state colleges and universities from any municipal ordinance that required employers to provide health care benefits (53 Pa. Stat. Ann. § 2181). The university could then claim (in addition to any other arguments it had) that the new state law preempted the city council's nondiscrimination ordinance.

If a local government ordinance regulates the same kind of activity as a state law (as in the Pittsburgh situation), the institution being regulated may be bound only by the state law (as claimed in the Pittsburgh situation). Courts will resolve any apparent overlapping of state law and local ordinances by determining, on a case-by-case basis, whether state law has preempted the field and precluded local regulation. A rather unusual case concerning colleges and universities illustrates the application of these principles.<sup>2</sup> In *Board of Trustees v. City of Los Angeles*, 122 Cal. Rptr. 361 (Cal. Ct. App. 1975), a state university had leased one of its facilities to a circus and claimed that the municipal ordinance regulating circus operations was preempted by a state statute authorizing the board of regents to promulgate rules for the governance of state colleges. In rejecting this claim and upholding the ordinance, the court found as follows:

The general statutory grant of authority ([Cal. Educ.] Code §§ 23604, 23604.1, 23751) to promulgate regulations for the governing of the state colleges and the general regulations promulgated pursuant to that authority (Cal. Admin. Code Title 5, § 4000 et seq.) contain no comprehensive state scheme for regulating the conduct of circuses or similar exhibitions with specific references to the safety, health, and sanitary problems attendant on such activities. Nor can the board point to any attempt by it to control the activities of its lessees for the purpose of protecting the public, the animals or the neighboring community.

In the absence of the enforcement of the city's ordinance, there would be a void in regulating circuses and similar exhibitions when those activities were conducted on university property thereby creating a status for tenants of the university which would be preferential to tenants of other landowners. This preferential status, under the circumstances, serves no governmental purpose. The subject matter of Los Angeles Municipal Code section 53.50 has not been preempted by the state [122 Cal. Rptr. at 365].

The state preemption doctrine (above) also has a counterpart in federal law. Under the federal preemption doctrine, courts may sometimes invalidate local government regulations because the federal government has preempted that particular subject of regulation. In *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986), for example, the court invalidated an order of the city's Human Relations Commission that required Temple University's law school to bar

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<sup>2</sup>The Pennsylvania Court of Common Pleas case, discussed above, provides another illustration of preemption principles in the context of the *University of Pittsburgh* same-sex health benefits dispute.

military recruiters from its placement facilities because the military discriminated against homosexuals. By statute, Congress had prohibited the expenditure of defense funds at colleges or universities that did not permit military personnel to recruit on campus. The court held that the city commission's order conflicted with the congressional policy embodied in this legislation and was therefore preempted.

The sovereign immunity doctrine holds that state institutions, as arms of state government, cannot be regulated by a lesser governmental entity that has only the powers delegated to it by the state. In order to claim sovereign immunity, the public institution must be performing state "governmental" functions, not acting in a merely "proprietary" capacity. In *Board of Trustees v. City of Los Angeles*, above, the court rejected the board's sovereign immunity defense by using this distinction:

In the case at bar, the board leases . . . [its facilities] as a revenue-producing activity. The activities which are conducted thereon by private operators have no relation to the governmental function of the university. "The state is acting in a proprietary capacity when it enters into activities . . . to amuse and entertain the public. The activities of [the board] do not differ from those of private enterprise in the entertainment industry" (*Guidi v. California*, 41 Cal. 2d 623, 627, 262 P.2d 3, 6). The doctrine of sovereign immunity cannot shield the university from local regulation in this case. Even less defensible is the university's attempt here to extend its immunity to private entrepreneurs who are involved in the local commercial market where their competitors are subject to local regulation. By the terms of the lease, the university specifically disavowed any governmental status for its lessee [122 Cal. Rptr. at 364].

In contrast, a sovereign immunity defense was successful in *Board of Regents of Universities and State College v. City of Tempe*, 356 P.2d 399 (Ariz. 1960). The board sought an injunction to prohibit the city from applying its local construction codes to the board. In granting the board's request, the court reasoned:

The essential point is that the powers, duties, and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control and supervision by a municipality within whose corporate limits the state agency must act. The ultimate responsibility for higher education is reposed by our Constitution in the State. The legislature has empowered the Board of Regents to fulfill that responsibility subject only to the supervision of the legislature and the governor. It is inconsistent with this manifest Constitutional and legislative purpose to permit a municipality to exercise its own control over the Board's performance of these functions. A central, unified agency, responsible to State officials rather than to the officials of each municipality in which a university or college is located, is essential to the efficient and orderly administration of a system of higher education responsive to the needs of all the people of the State [356 P.2d at 406-7].

A similar result was reached in *Inspector of Buildings of Salem v. Salem State College*, 546 N.E.2d 388 (Mass. App. Ct. 1989). The inspector of buildings for a

city had issued a stop-work order interrupting the construction of six dormitories at the defendant college because they did not adhere to local zoning requirements regarding height and other dimensional criteria. The question for the court was whether the local zoning ordinance could apply to the college, and to the state college building authority, when they were engaged in governmental functions. In answering “No” to this question, the court noted that generally “the State and State instrumentalities are immune from municipal zoning regulations, unless a statute otherwise expressly provides the contrary.” Analyzing the state statute that delegated zoning powers to municipalities, as it applied to state building projects for state educational institutions, the court concluded that the statute’s language did not constitute an “express and unmistakable suspension of the usual State supremacy.” The court therefore held that the college could continue the project without complying with the local zoning laws. The court noted, however, that the college did not have free rein to construct buildings without regard to air pollution, noise, growth, traffic, and other considerations, since it still must comply with state environmental requirements imposed on state instrumentalities.

Under the plenary powers doctrine, a state’s laws creating and authorizing a state postsecondary institution may be considered so all-inclusive that they even prevail over a local government’s home rule powers (see footnote 1 above). In two separate decisions, an appellate court in Illinois held that the state constitution delegated “plenary powers” to the board of trustees of a state university and that a city’s constitutionally granted local home rule powers did not enable the city to enforce local ordinances against the state university without specific authorization by state statute. In *City of Chicago v. Board of Trustees of the University of Illinois*, 689 N.E.2d 125 (Ill. App. 1997), the court rejected the city’s argument that its home rule powers authorized it to require the board to collect certain local taxes from university students and customers and remit them to the city. In a later case concerning the same parties, *Board of Trustees of the University of Illinois v. City of Chicago*, 740 N.E.2d 515 (Ill. App. 2000), the court rejected the city’s argument that its home rule powers authorized it to inspect university buildings, to cite the university for violations, and to collect fees for proven violations of the city’s building, fire safety, and health ordinances. The court held that the state legislature, acting under the Illinois constitution, had granted full “plenary powers” to the board to operate a statewide educational system. “The state has ‘plenary power’ over state-operated educational institutions, and any attempt by a home rule municipality to impose burdens on those institutions, in the absence of state approval, is unauthorized” (740 N.E.2d at 518, quoting *City of Chicago*, 689 N.E.2d at 130). Consequently, the court refused to recognize any city authority to enforce tax collections or to monitor and cite the state university for violations of its fire, safety, and health ordinances.

College counsel and administrators will want to carefully consider all of these principles concerning authority in determining whether particular local government regulations can be construed to apply to the college or university, and whether the college or university will be bound by such regulations.

## **Sec. 11.2. Zoning and Land Use Regulation**

**11.2.1. Overview.** The zoning and other land use regulations of local governments can influence the operation of postsecondary institutions in many ways.<sup>3</sup> The institution's location, the size of its campus, its ability to expand its facilities, the density of its land development, the character of its buildings, the traffic and parking patterns of its campus—all can be affected by zoning laws. Zoning problems are not the typical daily fare of administrators; but when problems do arise, they can be critical to the institution's future development. Local land use laws can limit, and even prevent, an institution's building programs, its expansion of the campus area (see especially the *George Washington University* case in Section 11.2.4), its use of unneeded land for commercial real estate ventures, its development of branch campuses or additional facilities in other locations (see especially the *New York Institute of Technology* case in Section 11.2.4), or program changes that would increase the size and change the character of the student body (see especially the *Marjorie Webster Junior College* case in Section 11.2.4). Thus, administrators should be careful not to underestimate the formidable challenge that zoning and other land use laws can present in such circumstances. Since successful maneuvering through such laws necessitates many legal strategy choices and technical considerations, administrators should involve counsel at the beginning of any land use problem.

Local governments that have the authority to zone typically do so by enacting zoning ordinances, which are administered by a local zoning board. Ordinances may altogether exclude educational uses of property from certain zones (called "exclusionary zoning"). Where educational uses are permitted, the ordinances may impose general regulations, such as architectural and aesthetic standards, setback requirements, and height and bulk controls, which limit the way that educational property may be used (called "regulatory zoning"). Public postsecondary institutions are more protected from zoning, just as they are from other types of local regulation, than are private institutions, because public institutions often have sovereign immunity or the authority to preempt local law.

**11.2.2. Public institutions and zoning regulations.** The courts have employed three tests to determine whether a unit of government, such as a state university, is subject to another government's local zoning law. As summarized in *City of Temple Terrace v. Hillsborough Ass'n.*, 322 So. 2d 571 (Fla. Dist. Ct. App. 1975), *affirmed without opinion*, 332 So. 2d 610 (Fla. 1976), these tests are (1) the superior sovereign test, (2) the governmental/proprietary distinction,

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<sup>3</sup>The relevant cases and authorities are collected in David J. Oliveiri, Annot., "Zoning Regulations as Applied to Colleges, Universities, or Similar Institutions for Higher Education," 64 A.L.R.3d 1138. See also Jeffrey F. Ghent, Annot., "What Constitutes 'School,' 'Educational Use,' or the Like Within Zoning Ordinances," 64 A.L.R.3d 1087.

and (3) the balancing test. The court's opinion summarizes the case law on the first two tests:

One approach utilized by a number of courts is to rule in favor of the superior sovereign. Thus, where immunity from a local zoning ordinance is claimed by an agency occupying a superior position in the governmental hierarchy, it is presumed that immunity was intended in the absence of express statutory language to the contrary. . . . A second test frequently employed is to determine whether the institutional use proposed for the land is "governmental" or "proprietary" in nature. If the political unit is found to be performing a governmental function, it is immune from the conflicting zoning ordinance. . . . On the other hand, when the use is considered proprietary, the zoning ordinance prevails. . . . Where the power of eminent domain has been granted to the governmental unit seeking immunity from local zoning, some courts have concluded that this conclusively demonstrates the unit's superiority where its proposed use conflicts with zoning regulations. . . . Other cases are controlled by explicit statutory provisions dealing with the question of whether the operation of a particular governmental unit is subject to local zoning. . . .

When the governmental unit which seeks to circumvent a zoning ordinance is an arm of the state, the application of any of the foregoing tests has generally resulted in a judgment permitting the proposed use. This has accounted for statements of horn-book law to the effect that a state agency authorized to carry out a function of the state is not bound by local zoning regulations [322 So. 2d at 576; citations omitted].

In applying these tests to postsecondary education, the court in *City of Newark v. University of Delaware*, 304 A.2d 347 (Del. Ch. 1973), used a traditional sovereign immunity analysis combining tests 1 and 2 to decide that, because the University of Delaware was a state agency and had the power of eminent domain, it was immune from local zoning law. Similarly, a Wisconsin appellate court upheld the decision of a county zoning board that the construction of a radio tower in conjunction with a student-run radio station at the University of Wisconsin-Madison was a "governmental use" because the radio station would be an "integral part" of the university's educational system (*Board of Regents of the University of Wisconsin v. Dane County Board of Adjustment*, 618 N.W.2d 537 (Ct. App. Wis. 2000), *review denied*, 629 N.W.2d 784 (Wis. 2001)).

*Rutgers, The State University v. Piluso*, 286 A.2d 697 (N.J. 1972), is the leading case on the third test—the balancing test. A balancing approach weighs the state's interest in providing immunity for the institution against the local interest in land use regulation. In determining the strength of the state's interest, the *Rutgers* court analyzed the implied legislative intent to confer immunity on the university. The court explained that a variety of factors should be considered to determine legislative intent:

the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests. . . . In some instances one factor will

be more influential than another or may be so significant as to completely overshadow all others. No one, such as the granting or withholding of the power of eminent domain, is to be thought of as ritualistically required or controlling. And there will undoubtedly be cases, as there have been in the past, where the broader public interest is so important that immunity must be granted even though the local interests may be great. The point is that there is no precise formula or set of criteria which will determine every case mechanically and automatically [286 A.2d at 702–3].

On the facts of the *Rutgers* case, the court decided that because the university was “performing an essential governmental function for the benefit of all the people of the state,” the legislature must have intended to exempt it from local land use regulation. The court emphasized, however, that immunity is not absolute and may be conditioned by local needs. It cautioned the university against arbitrary action, and counseled it to consult with local authorities and to give “every consideration” to local concerns in order to minimize conflict. The court then held that, under the facts of the case, the local interests did not outweigh the university’s claim of immunity.

State institutions may be in a stronger position to assert sovereign immunity successfully than are community colleges sponsored by local governments. In confrontations with a local zoning board, a state institution is clearly the superior sovereign, whereas an institution of another local government may not be. Moreover, the legislature’s intent regarding immunity may be clearer for state institutions than for local ones. (For an example of a case where a community college was subjected to local zoning laws, see *Appeal of Community College of Delaware County*, 254 A.2d 641 (Pa. 1969).) Constitutionally autonomous state universities (see Section 12.2.2) would usually have the strongest claim to immunity. In *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. 276 (Cal. Ct. App. 1978), for example, the city had attempted to apply various requirements in its zoning and building codes to a construction project undertaken within the city by the university. Relying on various provisions of the California constitution and statutes, and applying a variation of the superior sovereign test; the court held the university to be immune from such regulation.

The university’s power of eminent domain does not depend upon whether the source of funds used to acquire the property is public or private. For example, in *Curators of University of Missouri v. Brown*, 809 S.W.2d 64 (Mo. Ct. App. 1991), the university sought to acquire through condemnation some property owned by Brown. The proposed use was to create a parking lot to serve the Scholars’ Center, which was to be built on land that was privately owned but that would be devoted entirely to university purposes. The funds to purchase the condemned property were contributed by a private trust. The court of appeals found that the Scholars’ Center would be part of the university, and ruled that the source of funding for the land the university was seeking to acquire did not transform the public use into a private one.

**11.2.3. Private institutions and zoning regulations.** In seeking redress against a local government’s zoning regulations, private postsecondary institutions may challenge the zoning board’s interpretation and application of the zoning

ordinance or may argue that the ordinance conflicts with the federal Constitution or some state law limiting the local government's zoning authority. Where those arguments are unavailing, the institution may seek an exception or a variance (Section 11.2.4), or an amendment to the zoning ordinance (Section 11.2.5).

The Constitution limits a local government's zoning power in several ways. The ordinance may not create classifications that burden certain groups of people, unless there is a rational public purpose for its doing so (see Section 11.2.7). And although a municipality may attempt to regulate the use of land through its zoning ordinances and their application, it may not deprive individuals of the use of their land in such a fashion as to constitute a "taking."

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court distinguished between a governmental entity's power to limit the way that land is used and its power to so limit the landowner's rights that the limitation becomes a "taking" without compensation. The Coastal Commission had placed a condition on the permit issued to the owners of beachfront property so that they could rebuild their home—they must give the public access to the beach through their property, which was located between two public beaches. The Court considered the commission's purpose, which was to increase public access to the beach. The Court held that the required easement was a "taking" and that the commission must pay the plaintiffs for the easement. Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the U.S. Supreme Court considered the city's requirement that, as a condition to improving its commercial property, the landowner dedicate certain portions to a public greenway and a bicycle pathway. The Court held these requirements to be an unconstitutional taking because the city had not demonstrated "a reasonable relationship" between the requirements and the adverse impact of the proposed development. For a recent U.S. Supreme Court case approving the use of eminent domain on economic grounds, see *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

Despite these constitutional limitations, however, constitutional challenges to governmental land use restrictions have seldom succeeded. For example, in *Northwestern University v. City of Evanston*, 2002 U.S. Dist. LEXIS 17104 (N.D. Ill., September 11, 2002), the university filed constitutional claims against Evanston when the city decided to designate part of the university's campus as a historic preservation district, which would have required the university to obtain permission before altering or demolishing any structures within the district. The university asked the city to exclude its property from the proposed historic preservation district, but the city refused. The university then sued Evanston, claiming denial of equal protection, substantive due process, and procedural due process, and alleging First Amendment violations. In reviewing the city's motion for summary judgment, the court ruled in the city's favor on all but one of the university's constitutional claims. The court held that the university's claim that the city's actions were motivated by animus against the university, an equal protection claim, raised questions of material fact that necessitated a trial. The parties later settled the litigation (Audrey Williams June, "Northwestern U. Settles Long Property Dispute with Illinois City," *Chron. Higher Educ.*, February 12, 2004, available at <http://chronicle.com/daily/2004/02/2004021206n.htm>).



Similarly, in *In the Matter of Canisius College v. City of Buffalo*, 629 N.Y.S.2d 886 (N.Y. App. Div. 1995), the college had planned to raze a former rectory and use the property for student parking. A preservation group applied for landmark status for the building, and the Buffalo Common Council approved landmark designation, despite a negative recommendation by the Preservation Board. The college challenged the council's action, asserting that it was arbitrary and capricious, lacked a rational basis, and was an unconstitutional taking of its property. The appellate court rejected the college's claims, asserting that the council's action had a reasonable basis in law and was neither arbitrary nor capricious. Furthermore, said the court, there was no evidence that designating the rectory as a landmark prevented the college from carrying out its charitable purposes. On the other hand, in a challenge to a zoning board decision by Northwestern College, the court ruled that, in the particular circumstances, the city's denial of a zoning variance to the college was arbitrary and discriminatory, thus violating constitutional equal protection principles (*Northwestern College v. City of Arden Hills*, 281 N.W.2d 865 (Minn. 1979)).

In several cases, educational institutions have challenged zoning ordinances that exclude educational uses of land in residential zones. In *Yanow v. Seven Oaks Park*, 94 A.2d 482 (N.J. 1953), a postsecondary religious training school challenged the reasonableness of an ordinance that excluded schools of higher or special education from residential zones where elementary and secondary schools were permitted. The court, determining that the former schools could be "reasonably placed in a separate classification" from the latter, upheld the exclusion. But in *Long Island University v. Tappan*, 113 N.Y.S.2d 795 (N.Y. App. Div. 1952), *affirmed summarily*, 114 N.E.2d 432 (N.Y. 1953), the institution won its battle against an exclusionary ordinance. After the university had obtained a certificate of occupancy from the local township, a nearby village annexed the tract of land where the university was located. The village then passed a zoning ordinance that would have prohibited the operation of the university. The court concluded:

Insofar as the zoning ordinance seeks to prohibit entirely the use of plaintiff's lands in the village for the purposes for which it is chartered, the zoning ordinance is void and ineffectual, as beyond the power of the village board to enact and as bearing no reasonable relation to the promotion of the health, safety, morals, or general welfare of the community [113 N.Y.S.2d at 799].

Even when the zoning ordinance permits all or particular kinds of educational institutions to operate in a residential or other zone, the zoning board may not consider all the institution's uses of its land and buildings to be educational use.<sup>4</sup> The distinction is much the same as that drawn in local taxation law (see Section 11.3), where the tax status of an educational institution's property depends not only on the character of the institution but also on whether

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<sup>4</sup>The relevant cases and authorities are collected in Jay M. Zitter, Annot., "What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance," 11 A.L.R.4th 1084; and Phillip E. Hassman, Annot., "Eminent Domain: Right to Condemn Property Owned or Used by Private Educational, Charitable, or Religious Organization," 80 A.L.R.3d 833.

the particular property is being used for educational purposes. When there are no specific definitions or restrictions in the ordinance itself, courts tend to interpret phrases such as “educational use” broadly, to permit a wide range of uses. In *Scheuller v. Board of Adjustment*, 95 N.W.2d 731 (Iowa 1959), the court held that a seminary’s dormitory building was an educational use under an ordinance that permitted educational uses but did not permit apartment houses or multiple dwellings. And in *Property Owners Ass’n. v. Board of Zoning Appeals*, 123 N.Y.S.2d 716 (N.Y. Sup. Ct. 1953), the court held that seating to be constructed adjacent to a college’s athletic field was an educational use.

Where a zoning ordinance prohibits or narrowly restricts educational uses in a particular zone, an educational institution may be able to argue that its proposed use is a permissible noneducational use under some other part of the ordinance. In *Application of LaPorte*, 152 N.Y.S.2d 916 (N.Y. App. Div. 1956), *affirmed*, 141 N.E.2d 917 (N.Y. 1957), a college was allowed to construct a residence to accommodate more than sixty students because the residence came within the ordinance’s authorization of single-family dwelling units. Since the city had not placed any limitations on the number of persons who could constitute a “family,” the court ruled that this use complied with local laws.

Fraternity houses may be excluded from residential districts or may be a permissible educational or noneducational use, depending on the terms of the ordinance and the facts of the case.<sup>5</sup> In *City of Baltimore v. Poe*, 168 A.2d 193 (Md. 1961), a fraternity was permitted in a zone that excluded any “club, the chief activity of which is a service customarily carried on as a business.” The court found that “the chief activities carried on at this fraternity house . . . have clearly been established to be social and educational functions for the benefit of the whole membership.” But in *Theta Kappa, Inc. v. City of Terre Haute*, 226 N.E.2d 907 (Ind. Ct. App. 1967), the court found that a fraternity did not come within the term “dwelling” as defined by the zoning ordinance and was therefore not a permissible use in the residential district in which it was located.

Other problems concerning zoning ordinances arise not because the ordinances exclude a particular use of property but because they regulate the way in which the landholder implements the permitted use. The validity of such “regulatory zoning” also often depends on the interpretation and application of the ordinance and its consistency with state law. In *Franklin and Marshall College v. Zoning Hearing Board of the City of Lancaster*, 371 A.2d 557 (Pa. Commw. Ct. 1977), for example, the college sought to convert a single-family home it owned into a fraternity house. The fraternity house was a permissible use under the ordinance. The town opposed the conversion, however, arguing that it would violate other provisions of the zoning ordinance dealing with the adequacy of parking and the width of side yards. Applying these provisions, the court held that the proposed number of parking spaces was adequate but that the width of the side yard would have to be increased before the conversion would be allowed.

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<sup>5</sup>The relevant cases and authorities are collected in R. A. Shapiro, Annot., “Application of Zoning Regulations to College Fraternities and Sororities,” 25 A.L.R.3d 921.

In *Sisters of Holy Cross v. Brookline*, 198 N.E.2d 624 (Mass. 1964), a state statute was the focus of the dispute about regulatory zoning. A local zoning authority had attempted to apply construction requirements for single-family homes to the facilities of a private college. A state statute provided that “no ordinance or bylaw which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose . . . shall be valid.” The court rejected the town’s claim that the statute did not cover ordinances regulating the dimensions of buildings: “We think that this bylaw, as applied to Holy Cross, ‘limits the use’ of its land and, therefore, we think such application valid.” In contrast, the court in *Radcliffe College v. City of Cambridge*, 215 N.E.2d 892 (Mass. 1966), held that the same state statute did not conflict with a Cambridge zoning ordinance requiring the college to provide off-street parking for newly constructed facilities. The court ruled that providing for parking for students or employees was an “educational use” of the property, and thus did not limit the college’s ability to use its land for educational purposes.

**11.2.4. Special exceptions and variances.** Particular educational or non-educational uses may be permitted as “conditional uses” in an otherwise restricted zone. In this situation, the institution must apply for a special exception to the zoning ordinance. An educational institution may seek a special exception by demonstrating that it satisfies the conditions imposed by the zoning board. If it cannot do so, it may challenge the conditions as being unreasonable or beyond the zoning board’s authority under the ordinance or state law.

The plaintiff in *Marjorie Webster Junior College v. District of Columbia Board of Zoning Adjustment*, 309 A.2d 314 (D.C. 1973), had operated a girls’ finishing school in a residential zone under a special exception granted by the zoning board. The discretion of the zoning board was limited by a regulation specifying that exceptions would be granted only where “in the judgment of the board such special exceptions will be in harmony with the general purpose and intent of the zoning regulations and maps and will not tend to affect adversely the use of neighboring property in accordance with said zoning regulations and maps.” Another regulation specifically authorized exceptions for colleges and universities, but only if “such use is so located that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions.” The college was sold to new owners, who instituted new programs (mostly short-term continuing education programs) that altered the curriculum of the school and attracted a new clientele to the campus. After a citizens’ group complained that this new use was outside the scope of the college’s special exception, the college filed an amendment to the campus plan that the prior owners had filed in order to obtain the special exception. The zoning board rejected the amendment after extensive hearings, concluding that, under the applicable regulations, the new use of the college property would not be in harmony with the general purpose and intent of the zone and would adversely affect neighboring property by attracting large numbers of transient men and women to the campus and increasing vehicular traffic in the neighborhood. On appeal by the college, the court held that the zoning regulations contained adequate

standards to control the board's discretion and that the board's decision was supported by sufficient evidence.

*New York Institute of Technology v. LeBoutillier*, 305 N.E.2d 754 (N.Y. 1973), took up a similar issue. A private college had entered an agreement with the local government regarding the use of the college's existing property. Subsequent to the agreement, the college acquired property not contiguous with the main campus, in a residential zone that permitted educational use by special exception. The college's application for a special exception was denied by the zoning board, and the court upheld the board's decision in an interesting opinion combining fact, policy, and law.

The court noted that the institute already owned more than 400 acres in the town, the main campus had substantial undeveloped land, and the buildings that it needed for a new teacher education program could be built on the main campus without violating the earlier agreement with the town to limit its expansion and enrollments. Although the institute had argued that renovating existing buildings on the new property was less costly than building new buildings on the main campus, the court, although acknowledging that "[t]here is force to the argument that these judgments should be made by college administrators, not zoning boards of appeal or courts . . . at some point, probably not definable with precision, a college's desire to expand, here by the path of least economic resistance, should yield to the legitimate interests of village residents" (305 N.E.2d at 758-59). The court noted that the town had been amenable to previous requests by the institute to expand while maintaining the residential character of the town, and that the latest request by the institute would have a negative impact on the town. (For a case with a similar outcome, see *Lafayette College v. Zoning Hearing Board of the City of Easton*, 588 A.2d 1323 (Pa. Commw. Ct. 1991).)

A series of lawsuits involving George Washington University suggests that local zoning boards may limit a private university's expansion plans and even dictate the mix of buildings that it constructs. The university is located in the Foggy Bottom area of Washington, D.C., in a neighborhood that is partly residential. District of Columbia zoning law permits university use in residential areas as a special exception which must be approved by the Board of Zoning Adjustment (BZA). After local community members challenged the university's planned construction of dormitories and academic buildings near its campus, the Board of Zoning Adjustment placed conditions on its approval of a special exception for the university's long-term campus improvement plan. Under these conditions, the university had to provide additional living quarters on campus for students by 2006; should the university fail to meet this requirement, the BZA would not issue any permit to the university to construct or occupy additional nonresidential buildings, either on or off campus.

The university challenged the rulings of the BZA in federal court, claiming that they were arbitrary and capricious, and violated the due process clause. It also claimed that the BZA's order violated the university's academic freedom by limiting its discretion to decide how to use campus space. Although the federal trial court agreed with some of the university's legal claims, the federal appellate

court reversed those rulings of the trial court (*George Washington University v. District of Columbia*, 2002 U.S. Dist. LEXIS 26729 (D.D.C., April 12, 2002), *affirmed in part and reversed in part*, 318 F.3d 203 (D.C. Cir. 2003)). The appellate court held that the BZA's order was neither arbitrary nor capricious and was consistent with substantive due process. It also rejected the university's academic freedom claim, asserting that this issue was "wholly different" from the restrictions on speech in classic academic freedom cases. Furthermore, said the court, the university's claim that the District of Columbia's zoning regulations were facially discriminatory in violation of the Fifth Amendment's due process clause was unavailing. Because universities are not a specially protected class for equal protection purposes, ordinances may classify persons in any manner "rationally related to legitimate governmental objectives," and the BZA had met that standard.

The university also challenged the BZA's order in the District of Columbia's own courts. In *George Washington University v. District of Columbia Board of Zoning Adjustment*, 831 A.2d 921 (D.C. 2003), the D.C. Court of Appeals considered the university's claims that the BZA's order was arbitrary, capricious, and irrational, and that it violated the District of Columbia's Human Rights Act because it discriminated against students by placing limits on the university's ability to house them off campus in the Foggy Bottom neighborhood. The university also challenged the BZA's ruling that, should any portion of the board's condition that the university increase on-campus student housing be invalidated by a court, no application for a special exception or a permit to occupy or construct any non-residential building on campus could be processed without the board's express authorization. The university argued that this provision chilled its right to seek judicial review of BZA orders. The D.C. court ruled that this BZA ruling intruded upon the separation of powers in an "arbitrary and unreasonable way," and it therefore remanded the issue to the board.

In most other respects, however, the D.C. court upheld the BZA's decisions. It ruled that the board's order that the university provide additional on-campus student housing was based upon sufficient evidence, and was neither arbitrary nor capricious. Furthermore, the BZA's threat to stop construction of nonresidential buildings on or off campus was also a permissible use of its powers because it provided an appropriate incentive for the university to comply with the BZA's order. It also ruled that the order did not violate the D.C. Human Rights Act because the zoning regulations' requirement that the interests of the neighbors be considered suggested that the BZA could balance their needs, and the impact of student housing in the neighborhood, against the university's and students' needs.

On the other hand, George Washington University was successful in other litigation brought by a neighborhood group challenging the BZA's approval of the university's plans to convert a hotel located in a residential district into a student residence hall. In *Watergate West v. District of Columbia Board of Zoning Adjustment*, 815 A.2d 762 (D.C. Ct. App. 2003), the BZA had granted the university a certificate of occupancy (as a dormitory) for the former hotel it had purchased. The objecting neighbors sought judicial review of the BZA's decision.

The court ruled for the BZA, stating that its decision was rational, and that converting a hotel to a dormitory did not reduce the amount of housing stock in the neighborhood.

In addition to these skirmishes with George Washington University, the District of Columbia Board of Zoning Adjustment also imposed a number of conditions on Georgetown University's campus plan. Georgetown challenged several of these conditions before the District of Columbia Court of Appeals as either unsupported by substantial evidence or beyond the authority and competence of the BZA. Georgetown University is also located in a residential neighborhood in the District of Columbia, and much of its campus is zoned for residential use. The university submitted its proposed campus plan to the Board of Zoning Adjustment in 2000. Responding in part to neighbors who objected to the conduct of Georgetown students living off campus, the BZA placed a number of conditions on Georgetown's campus plan. Among other conditions, the BZA required Georgetown to cap its enrollment at the level set in its 1990 campus plan, to seek BZA approval if it decided to change the composition of a disciplinary hearing board that dealt with off-campus infractions, and to operate a full-time "hotline" for complaints about student off-campus misconduct. Another condition required the university to "report a violation of the Code of Conduct to the parents or guardians of the violator to the extent permitted by law," and to investigate alleged violations of housing or sanitation regulations by students living off campus. Failure to comply with these requirements would be grounds for placing a moratorium on any nonresidential construction on campus and for the imposition of fines against the university.

In *President and Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment*, 837 A.2d 58 (D.C. 2003), the D.C. Court of Appeals found many of these conditions "inappropriate and unreasonable," characterizing them as "micromanagement" of the university's disciplinary process and beyond the expertise of the zoning board. The court also stated that the requirement that enrollment be capped was not supported by substantial evidence. On the other hand, the court noted that imposing a moratorium on nonresidential development on campus, "if imposed for a meaningful violation" was not necessarily unreasonable. The court vacated the BZA's decision and remanded the case to the board to remove those conditions that the court had found to be arbitrary, capricious, and beyond the expertise of the board, and to formulate appropriate conditions for granting the exception to Georgetown that were consistent with applicable legal requirements.

If a proposed use by an educational institution does not conform to the general standards of the zone or to the terms of a special exception, the institution may seek a variance.

A variance is an exercise of the power of the governmental authority to grant relief, in a proper case, from the liberal application of the terms of an ordinance. It is to be used where strict application of the ordinance would cause unnecessary and substantial hardship to the property holder peculiar to the property in question, without serving a warranted and corresponding benefit to the public interest [*Arcadia Development Corp. v. Bloomington*, 125 N.W.2d 846, 851 (Minn. 1964)].

Zoning boards may grant variances only in these narrow circumstances and only on the basis of standards created by state or local law. Variances that constitute substantial changes in the zoning plan or alter the boundaries of established zones may be considered in excess of the zoning board's authority. In *Ranney v. Istituto Pontificio Delle Maestre Filippini*, 119 A.2d 142 (N.J. 1955), the college had applied for a variance to expand its existing facilities, located in a restrictive residential zone. The zoning board granted the variance. The New Jersey Supreme Court reversed the board's decision, however, relying on a statutory provision that authorized variances only where there would be no "substantial detriment to the public good" and "the intent and purpose of the zone plan and zoning ordinance" would not be "substantially impair[ed]" (N.J. Stat. Ann. § 40:55-39(d)). The court found that the variance would inappropriately alter the character of the residential neighborhood in which the college was located. (For a contrasting opinion, upholding a college's variance request, see *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878 (R.I. 1991).)

**11.2.5. Amendment of zoning ordinances.** If an educational institution's proposed use is prohibited within a zone, and the institution cannot obtain a special exception or a variance, it may petition the local government to amend the zoning ordinance. Unlike an exception or a variance, an amendment is designed to correct an intrinsic flaw in the zoning ordinance rather than to relieve individual hardship imposed by zoning requirements. An institution seeking an amendment should be prepared to demonstrate that the proposed change is in the public interest rather than just for its own private advantage.

Courts vary in the presumptions and standards they apply to zoning amendments. In some jurisdictions courts give amendments a presumption of reasonableness; in others they presume that the original ordinance was reasonable and require that any amendment be justified. Many courts require that an amendment conform to the comprehensive zoning plan. "Spot zoning," which reclassifies a small segment of land, is frequently overturned for nonconformance with a comprehensive plan.

*Bidwell v. Zoning Board of Adjustment*, 286 A.2d 471 (Pa. Commw. Ct. 1972), illustrates many of the important legal considerations regarding zoning amendments. An amendment reclassified a tract of land from single-family to multi-family residential and granted an exception to a college to allow the construction of a library, a lecture hall, and an off-street parking area. The court upheld the amendment, noting that public hearings concerning the proposed amendment had been held and that it furthered the municipality's general program of land utilization.

Another college prevailed in its fight against a local ordinance that prohibited the college from using buildings it owned in a historical district. The city of Schenectady, New York, amended its zoning ordinance to exclude educational organizations, among others, from using single-family dwellings in a special historic district. Union College, which owned seven properties in the historic district, petitioned the city to amend the ordinance and allow the college to use these

properties for faculty or administrative offices or for residences for guests visiting the college. The city refused, and the college sought a declaratory judgment, arguing that the ordinance, as applied to the college, was unconstitutional.

The trial court, intermediate appellate court, and highest state court agreed with the college. In *Trustees of Union College v. Members of the Schenectady City Council*, 667 N.Y.S.2d 978 (Ct. App. 1997), the court ruled that the ordinance's complete exclusion of educational uses in the historic district was unconstitutional because it bore no substantial relation to the public health, safety, morals, or general welfare, and thus was beyond the zoning authority of the city. The court stated that the city should have weighed the requested educational use against competing interests rather than excluding completely the use of the property by the college.

Some states may have a statute that authorizes the state courts to invalidate certain provisions of, and thus in effect to amend, local zoning ordinances. *Trustees of Tufts College v. City of Medford*, 602 N.E.2d 1105 (Mass. App. Ct. 1992), illustrates the operation of such a statute. The parties could not agree on how the off-street parking provisions in the city's zoning ordinance would apply to three new buildings Tufts was constructing in the heart of its campus. Tufts brought suit under a Massachusetts law that invalidated local zoning ordinances that prohibited or restricted the use for educational purposes of land or buildings owned by a nonprofit educational institution (Mass. Gen. Laws ch. 40A, § 3). The trial court invalidated portions of the city ordinance's parking provisions. The appellate court determined that invalidation was unnecessary, however, and modified the trial court's judgment. Recognizing the incongruity of zoning requirements that assume that all property occurs in "lots," when a college's property may consist of a "green" surrounded by clusters of buildings, the appellate court accepted the city's concession that parking spaces in Tufts' new parking garage, located several blocks away, could "count" as off-street parking for the new buildings.

In at least one state, community colleges (as school districts) have yet another means for securing an amendment to a local zoning ordinance. California's Government Code, Section 53094, provides that a school district may declare a city zoning ordinance inapplicable to a proposed use of its own property unless the proposed use is for "nonclassroom facilities." In *People v. Rancho Santiago College*, 277 Cal. Rptr. 69 (Cal. Ct. App. 1990), the college had contracted with a community group to use the college's parking lot for a weekly "swap meet." The parking lot was zoned for "open space," and the city sued the college, arguing that the use of the parking lot for a "swap meet" was not permitted. The court rejected the college's assertion that it could exempt this use from the zoning ordinance, noting that both uses—as a parking lot and for a swap meet—were "nonclassroom facilities" under Section 53094 and thus were not exempt from the ordinance.

**11.2.6. Rights of other property owners.** In considering the various approaches to zoning problems addressed in subsections 11.2.2 to 11.2.5 above, postsecondary administrators should be aware that other property owners may



challenge zoning decisions favorable to the institution or may intervene in disputes between the institution and the zoning board (see generally the *George Washington University* and *Georgetown University* cases in subsection 11.2.4 above). The procedures of the zoning board may require notice to local property owners and an opportunity for a hearing before certain zoning decisions are made. Thus, zoning problems may require administrators to “do battle” with the local community in a very real and direct way.

Landowners usually can challenge a zoning decision if they have suffered a special loss different from that suffered by the public generally. Adjacent landowners almost always are considered to have suffered such loss and thus to have “standing” (that is, a legal capacity) to challenge zoning decisions regarding the adjacent land. Property owners’ associations may or may not have standing based on their special loss or that of their members, depending on the jurisdiction. In *Peirce Junior College v. Schumaker*, 333 A.2d 510 (Pa. Commw. Ct. 1975), neighboring landowners were denied permission to intervene in a local college’s appeal of a zoning decision because they were not the owners or tenants of the property directly involved. But in *Citizens Ass’n. of Georgetown v. District of Columbia Board of Zoning Adjustment*, 365 A.2d 372 (D.C. 1976), a citizens’ association from the neighboring area was successful in challenging and overturning, on procedural grounds, a special exception granted to Georgetown University.

In *Sharp v. Zoning Hearing Board of the Township of Radnor*, 628 A.2d 1223 (Pa. Commw. Ct. 1993), Villanova University had a tract of its land rezoned from residential to institutional use. The tract, which was to be developed for dormitories, was contiguous to existing dormitory and classroom buildings but had been in a residential zone. The university had negotiated with owners of adjacent property regarding setbacks, lighting, traffic, security measures, and other measures to reduce the impact of the university’s building plans on its neighbors. One of the adjacent property owners challenged the rezoning in court, arguing that the ordinance was invalid because of procedural defects in its enactment and that the zoning board’s action was unconstitutional “spot zoning.” Quickly rejecting the first argument, the court turned to the constitutional claim. Asserting that “a zoning ordinance is presumed to be valid and constitutional, and the challenging party has the heavy burden of proving otherwise” (628 A.2d at 1227), the court upheld the board’s decision. Since most of the land surrounding the rezoned tract was already used by the university for educational purposes, and since the university’s need for additional on-campus student housing had a “substantial relation[ship] to the public health, safety, morals and general welfare,” the zoning board’s action could not be considered to be arbitrary and unreasonable spot zoning.

American University encountered similar objections from some of its neighbors when it proposed a new location for its law school and changes in the campus border. In *Glenbrook Road Ass’n. v. District of Columbia Board of Zoning Adjustment*, 605 A.2d 22 (D.C. 1992), two groups of neighbors challenged the zoning board’s decision to grant the university’s request. The court found that the zoning board had required the university to comply with several actions that

would minimize the effect of the law school on the neighborhood, and had sufficiently taken into consideration the concerns of the neighbors during the hearing process.<sup>6</sup>

In *New York Botanical Garden v. Board of Standards and Appeals and Fordham University*, 671 N.Y.S.2d 423 (Ct. App. 1998), the Botanical Garden had objected to a decision of the New York Board of Standards and Appeals to allow Fordham University to build a radio broadcasting tower on its campus. The board had found that the operation of a radio station of the size and power that necessitated the new tower was clearly incidental to the educational mission of the university and, thus, a permitted use under the zoning laws. New York's highest court upheld the board's decision, affirming the rulings of both the trial court and the intermediate appellate court. The standard of review for the board's zoning decision, according to the court, was one of reasonableness, and the Botanical Garden had made no showing that the board's ruling was unreasonable or irrational. Indeed, commented the court, the Botanical Garden's objection to the tower appeared to be primarily on aesthetic grounds; there was no proof that the Botanical Garden would suffer economic harm, that the tower was dangerous, or that the tower would prompt an "undesirable change in the character of the neighborhood."

When St. Joseph's University decided to convert an existing apartment building, located in a residential zone, to a student dormitory, some neighbors sought review of the zoning board's approval of that plan. In *Greaton Properties v. Lower Merion Township*, 796 A.2d 1038 (Commw. Ct. Pa. 2002), the court ruled that the dormitory was not exclusively residential, but that it was an "integral part of the overall educational experience" and thus was not subject to the zoning code's spacing provisions. Furthermore, there was no showing that the dorm would be a detriment to the health or safety of the community. (For another similar case, see the *Watergate West* case in subsection 11.2.4 above.)

**11.2.7. Zoning off-campus housing.** Zoning ordinances that prevent groups of college students from living together in residential areas may create particular problems for institutions that depend on housing opportunities in the community to help meet student housing needs.<sup>7</sup> Some communities have enacted ordinances that specify the number of unrelated individuals who may live in the same residential dwelling, and many of these ordinances have survived constitutional challenge. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), for example, the U.S. Supreme Court rejected the argument that such a

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<sup>6</sup>For other cases challenging the location of the law school, see *Spring Valley Wesley Heights Citizens Association v. District of Columbia Board of Zoning Adjustment*, 644 A.2d 434 (D.C. 1994); and *Duke v. The American University*, 675 A.2d 26 (D.C. 1996).

<sup>7</sup>Cases and authorities are collected in Vitauts M. Gulbis, Annot., "Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone," 12 A.L.R.4th 238; and James L. Rigelhaupt, Jr., Annot., "What Constitutes a 'Family' Within Meaning of Zoning Regulation or Restrictive Covenant," 71 A.L.R.3d 693.

restriction violates the residents' freedom of association rights. In other cases, however, courts have invalidated particular types of restrictions on student occupancy of residential dwellings.

In *Borough of Glassboro v. Vallorosi*, 568 A.2d 888 (N.J. 1990), the borough had sought an injunction against the leasing of a house in a residential district to ten unrelated male college students. The borough had recently amended its zoning ordinance to limit "use and occupancy" in the residential districts to "families" only. The ordinance defined "family" as "one or more persons occupying a dwelling unit as a single nonprofit housekeeping unit, who are living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency [*sic*] thereof."

Tracking the ordinance's language, the court determined that the ten students constituted a "single housekeeping unit" that was a "stable and permanent living unit" (568 A.2d at 894). The court relied particularly on the fact that the students planned to live together for three years, and that they "ate together, shared household chores, and paid expenses from a common fund" (568 A.2d at 894). The court also cautioned that zoning ordinances are not the most appropriate means for dealing with problems of noise, traffic congestion, and disruptive behavior.

Another type of restriction on off-campus housing was invalidated in *Kirsch v. Prince Georges County*, 626 A.2d 372 (Md. 1993). Prince Georges County, Maryland, had enacted a "mini-dorm" ordinance that regulated the rental of residential property to students attending college. Homeowners and prospective student renters brought an equal protection claim against the county. The ordinance defined a "mini-dormitory" as "[a]n off-campus residence, located in a building that is, or was originally constructed as[,] a one-family, two-family, or three-family dwelling which houses at least three (3), but not more than five (5), individuals, *all or part of whom are unrelated to one another by blood, adoption or marriage and who are registered full-time or part-time students at an institution of higher learning*" (§ 27-107.1(a) (150.1), cited in 626 A.2d at 373-74; emphasis added). For each mini-dorm, the ordinance specified a certain square footage per person for bedrooms, one parking space per resident, and various other requirements. The ordinance also prohibited local zoning boards from granting variances for mini-dorms, from approving departures from the required number of parking spaces, and from permitting nonconforming existing uses.

The court determined that Maryland's constitution provides equal protection guarantees similar to those of the U.S. Constitution's Fourteenth Amendment. Relying on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), as the source of a strengthened "rational basis" test to use for Fourteenth Amendment challenges to restrictive zoning laws, the court determined that this test was the appropriate one to evaluate whether the mini-dorm ordinance was "rationally related to a legitimate governmental purpose." The court then examined the purpose of the ordinance, which was to prevent or control "detrimental effects" upon neighbors (such as increased demands for parking, litter, and noise). The court was careful to distinguish

the *Boraas* case (above), on which the county had relied in its defense of the ordinance:

Unlike the zoning ordinance analyzed in *Boraas*, the Prince Georges County “mini-dorm” ordinance does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house, but rather on the occupation of the persons who would dwell therein. Therefore, under the ordinance a landlord of a building . . . is permitted to rent the same for occupancy by three to five unrelated persons so long as they are not pursuing a higher education without incurring the burdens of complying with the arduous requirements of the ordinance [626 A.2d at 381].

Noting that the problems the ordinance sought to avoid would occur irrespective of whether the tenants were students, the court held that the ordinance “creat[ed] more strenuous zoning requirements for some [residential tenant classes] and less for others based solely on the occupation which the tenant pursues away from that residence,” thus establishing an irrational classification forbidden by both the federal and the state constitutions.

In *College Area Renters and Landlord Association v. City of San Diego*, 50 Cal. Rptr. 2d 515 (Cal. App. 1996), a municipal ordinance regulated the number of individuals over age eighteen who could live in a non-owner-occupied residence in certain areas of the city, based upon the number of rooms and their square footage, the amount of parking per inhabitant, and the size of rooms that were not bedrooms. The ordinance did not apply to owner-occupied housing. An organization of renters and landlords challenged the law under the California constitution’s equal protection clause, as well as under preemption (see Section 11.1 above) and constitutional right to privacy theories. The court, affirming a lower court’s summary judgment for the plaintiffs, ruled that renters and homeowners were similarly situated with respect to the problems that the ordinance sought to ameliorate—noise, congestion, and littering—and thus the ordinance was an unconstitutional violation of equal protection because it irrationally distinguished between owners and renters. Although the court declined to reach the plaintiffs’ other claims, it stated in *dicta* that there was a possible preemption problem because state occupancy standards were more lenient than those of the ordinance, and that the city should follow the statewide standards in dealing with the problem of overcrowding. The court also added, again in *dicta*, that the ordinance could trigger privacy concerns and, thus, should be upheld only if it served a compelling public need.

The federal Fair Housing Act may also provide a source of relief if students with disabilities wish to share an off-campus residence. A Fair Housing Act challenge to a zoning ordinance that restricts single-family homes to four individuals, unless the home’s residents are “family” members, although unsuccessful, provides an example of challenges that might be successful under other circumstances. In *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992), an organization that provided rehabilitation for individuals with alcoholism sought to use a single-family home as a group home, or “halfway house,” for individuals completing their treatment. When the city denied the organization’s application

for an exemption from the zoning regulation, the organization sued the city and claimed that the restrictive definition of family (individuals related by blood, marriage, or adoption) discriminated against individuals with disabilities in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* The court ruled for the city, noting that the Fair Housing Act contains an exemption, Section 3607(b)(1), for “reasonable local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” In this case, the organization wanted to house twelve men in the home. The court reasoned that the organization had not demonstrated that the occupancy restrictions were unreasonable, nor had it demonstrated why the law was a greater burden on individuals with disabilities than it was on students or other unrelated people.

### **Sec. 11.3. Local Government Taxation**

**11.3.1. General tax concepts.** Local government taxation is one of the most traditional problems in postsecondary education law.<sup>8</sup> Although the basic concepts are more settled here than they are in many other areas, these concepts often prove difficult to apply in particular cases. Moreover, in an era of tight budgets, where local governments seek new revenue sources and postsecondary institutions attempt to minimize expenditures, the sensitivity of local tax questions has increased. Pressures to tax institutions’ auxiliary services (Section 15.3.4.2) have grown, for instance, as have pressures for institutions to make payments “in lieu of taxes” to local governments. (See generally D. Kay, W. Brown, & D. Allee, *University and Local Government Fiscal Relations*, IHELG Monograph 89-2 (IHELG, University of Houston Law Center, 1989).)

The real property tax is the most common tax imposed by local governments on educational institutions. Sales taxes and admission taxes are also imposed in a number of jurisdictions. A local government’s authority to tax is usually grounded in state enabling legislation, which delegates various types of taxing power to various types of local governments. Most local tax questions involving postsecondary institutions concern the interpretation of this state legislation, particularly its exemption provisions. A local government must implement its taxing power by local ordinance, and questions may also arise concerning the interpretation of these ordinances.

A public institution’s defenses against local taxation may differ from those of a private institution. Public institutions may be shielded from local taxation by tax exemptions for state government contained in state constitutional provisions or statutes. Public institutions may also make sovereign immunity claims (see Section 11.1) against attempts by a local government to impose taxes or tax collection responsibilities on them. Private institutions, on the other hand,

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<sup>8</sup>Another local government revenue-raising measure, to be distinguished from taxation, is the special assessment—a payment covering a proportionate share of the costs of a particular improvement that confers a “special benefit” on the property owners whose property is assessed. See generally Osborne Reynolds, *Local Government Law* § 99 (West, 1982). Special assessments are imposed less frequently than real estate taxes, and legal issues concerning assessments arise less frequently for colleges and universities than legal issues concerning taxation.

depend on state constitutional or statutory exemptions (or, occasionally, special legislation and charter provisions) that limit the local government's authority to tax. Although the provisions vary, most tax codes contain some form of tax exemption for religious, charitable, and educational organizations. These exemptions are usually "strictly construed to the end that such concession[s] will be neither enlarged nor extended beyond the plain meaning of the language employed" (*Cedars of Lebanon Hospital v. Los Angeles County*, 221 P.2d 31, 34 (Cal. 1950)). The party requesting the exemption has the burden of proving that the particular activity for which it seeks exemption is covered by the exemption provision. The strictness with which exemptions are construed depends on the state and the type of exemption involved.

Determinations on taxability and tax exemptions will depend not only on the particular property or function being taxed and the particular character of the institution, but also on the statutory and constitutional provisions, and judicial interpretations, that vary from state to state. A first and key step in tax planning, therefore, is to identify the particular provisions and exemptions that will apply to each property and function for which taxability is or could become an issue. The cases in subsections 11.3.2 to 11.3.3 below provide numerous examples.

**11.3.2. Property taxes.** Public colleges and universities are often exempt from local property taxation under state law exemptions for state property. As the *Southern University* case below illustrates, one of the threshold issues that may arise when courts apply these exemptions is whether the particular property that the government seeks to tax actually belongs to the institution and, therefore, to the state. Private nonprofit colleges and universities are also often exempt from local property taxation. Generally, as many of the cases below illustrate, the applicable state law provisions will exempt property of institutions organized for an educational purpose if the property at issue is used for that purpose (see, for example, *Berkshire School v. Town of Reading*, 781 A.2d 282 (Vt. 2001)). Sometimes such exemptions will extend to public institutions as well as private.<sup>9</sup> In the *Southern Illinois University* case below, for example, the court held that the property at issue was exempt not only as state property but also as property of an educational institution devoted to an educational use. In some states, private institutions may also obtain exemption from property taxation under an exemption for charities, or "public charities," as the *City of Washington* case below illustrates.

The states vary in the tests that they apply to implement the state property/"public use," "educational use," and "charitable use" exemptions. Some require that the property be used "exclusively" for educational or charitable purposes to qualify for an exemption. Others require only that the property be used "primarily" for such purposes. The cases below illustrate the variety of decisions reached under the different standards of "use" and

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<sup>9</sup>Some of the cases are collected in William B. Johnson, Annot., "What Are Educational Institutions or Schools Within State Property Tax Exemption Provisions," 34 A.L.R.4th 698.

involving different types of institutional property and different types of ownership interests.

In *Southern Illinois University Foundation v. Booker*, 425 N.E.2d 465 (Ill. App. Ct. 1981), the county in which Southern Illinois University is located attempted to assess a property tax on low-cost housing that the university maintained for its married students. The housing consisted of apartments financed by the Federal Housing Administration and the Southern Illinois University Foundation. The foundation was the legal owner of the property. It is a nonprofit corporation whose purpose, under its bylaws, is “to buy, sell, lease, own, manage, convey, and mortgage real estate” and “in a manner specified by the Board of Trustees of Southern Illinois University, to act as the business agent of the said board in respect to . . . acquisition, management, and leasing of real property and buildings.” The university claimed that the married students’ apartments were state property and thus exempt from local government taxation. The county argued, however, that legal ownership vested in the foundation, not the university, thus making the exemption for state property inapplicable. In rejecting the county’s argument, the court relied on the time-honored distinction between “legal title” and “equitable title”:

With respect to control and enjoyment of the benefits of the property, the stipulated facts show that the University, not the Foundation, in fact controls the property and has the right to enjoy the benefits of it in the manner of an owner in fee simple absolute. The Foundation acquired title to the property from the university solely as a convenience to the University with regard to long-term financing. The property is used to house students of the University. The facilities are controlled, operated, and maintained by the University. From funds derived from the operation of the property, the University pays annually as rent the amount of the Foundation’s mortgage payment and, as agent of the Foundation, transmits that sum to the Federal National Mortgage Association. Furthermore, when the mortgage is eventually retired, the university will receive title to the improved property with no further payment whatsoever required as consideration for the transfer. The Foundation holds but naked legal title to property plainly controlled and enjoyed by the University and, hence, the State. Although the Foundation is a corporate entity legally distinct from that of the University, the function of the one is expressly “to promote the interests and welfare” of the other, and some of the highest officers of the University are required, under the bylaws of the Foundation, to serve in some of the highest positions of the Foundation. Thus, a further reality of the ownership of this property is the identification to a certain extent between the holder of bare legal title and the State as holder of the entire equitable interest. In this case, then, not only does the Foundation hold but naked legal title to property controlled and enjoyed by the State, but a certain identity exists as well between the holder of naked legal title and the State. For these reasons we hold the property exempt from taxation as property belonging to the State [425 N.E.2d at 471].

In a similar case involving a real property *ad valorem* tax, *In re Appalachian Student Housing Corp.*, 598 S.E.2d 701 (N.C. App. 2004), the court held that a student apartment complex at a state university was exempt as state property,

even though a separate nonprofit corporation held legal title and operated the complex.

*Appeal of University of Pittsburgh*, 180 A.2d 760 (Pa. 1962), is a leading case concerning the exemption of houses provided by postsecondary institutions for their presidents or chancellors.<sup>10</sup> The court allowed an exemption under a lenient standard of use:

The head of such an institution, whether he be called president or chancellor, represents to the public eye the “image” of the institution. Both an educator and an administrator of the tremendous “business” which any university or college now is, he must also be the official representative to host those who, for one reason or the other, find the university or college a place of interest and, if he is to assume the full scope and responsibility of his duties to the university or college, he must be universal in his contacts. Many years ago the Supreme Court of Massachusetts in *Amherst College v. Assessors*, . . . 79 N.E. 248, stated: “At the same time the usage and customs of the college impose upon the president certain social obligations. . . . The scope, observations, and usage of the character mentioned are not matters of express requirement or exaction. They are, however, required of a president in the use of the house, and noncompliance with them unquestionably would subject him to unfavorable comment from the trustees and others, or, at least, be regarded as a failure on his part to discharge the obligations and hospitality associated with his official position.” . . . The residence of the head of a university or college necessarily renders a real function, tangibly and intangibly, in the life of the institution. While its utility to the purposes and objectives of the institution is incapable of exact measurement and evaluation, it is nonetheless real and valuable [180 A.2d at 763].

Another court, citing the *University of Pittsburgh* case and using the same lenient test, denied an exemption for the house of a president emeritus. The court made a finding of fact that the house was not actually used for institutional purposes:

[The court in the *Pittsburgh* case] held that a president’s or chancellor’s residence could enjoy tax exemption where the record showed that the majority of the events for which the residence was utilized bore a direct relationship to the proper functioning of the University of Pittsburgh and served its aims and objectives. In this appeal the record does not support the test laid down in [that case]. This record reflects that the president emeritus is retained on a consultative basis in development and public relations. The residence provided the president emeritus by the Trustees appears to properly afford him an appropriate dwelling house commensurate with his past worthy service to Albright College. The record does not support, as in the case of the chancellor’s residence of the University of Pittsburgh, that the residence in fact was used for the general purposes of Albright College [*In re Albright College*, 249 A.2d 833, 835 (Pa. Super. Ct. 1968)].

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<sup>10</sup>Cases on housing for institutional personnel are collected in Maurice T. Brunner, Annot., “Tax Exemption of Property of Educational Body as Extending to Property Used by Personnel as Living Quarters,” 55 A.L.R.3d 485.



In *Cook County Collector v. National College of Education*, 354 N.E.2d 507 (Ill. App. Ct. 1976), the court affirmed the trial court's denial of an exemption for the college president's house. The institution had introduced extensive evidence of the institutional use of the president's house. The vice president for business affairs testified that the house, "although used as the residence of the president, . . . is used as well for a number of educational, fund-raising, business, alumni, and social activities of the College," citing many examples. The court held, however, that the evidence did not satisfy the more stringent use test applied in that jurisdiction. The court emphasized that "[o]n cross-examination [the vice president] stated that classes are not held in the home; that access to the home is by invitation only; and that the primary use of the premises is to house the president and his family." Based on such facts, the appellate court agreed with the trial court "that the primary use of the president's mansion was residential and its school use was only incidental." More recently, a Texas court reached the same result in a similar case, denying a tax exemption for a college president's house under a strictly construed "exclusive use" statute (*Bexar Appraisal Dist. v. Incarnate Word College*, 824 S.W.2d 295 (Tex. App. 1992)).

Cases dealing with faculty and staff housing illustrate a similar split of opinions, depending on the facts of the case and the tests applied. In *MacMurray College v. Wright*, 230 N.E.2d 846 (Ill. 1967), for example, the court, applying a "primary use" test, denied tax exemptions for MacMurray College and Rockford College:

The colleges have failed to demonstrate clearly that the faculty and staff housing was primarily used for purposes which were reasonably necessary for the carrying out of the schools' educational purposes. The record does not show that any of the faculty or staff members of either college were required, because of their educational duties, to live in these residences, or that they were required to or did perform any of their professional duties there. Also, though both records before us contain general statements that there were associations between the concerned faculty and students outside the classroom, there was no specific proof presented, aside from one isolated example, to show that student, academic, faculty, administrative, or any other type of college-connected activities were ever actually conducted at home by any member of the faculty or staff of either of the colleges [230 N.E.2d at 850].

The same result was reached by the California Supreme Court in a case involving the taxability of the leasehold interests of faculty and staff members who owned homes situated on land they leased from their employer, a state university that owned the land. In *Connolly v. County of Orange*, 824 P.2d 663 (Cal. 1992), a faculty member, supported by the university and the university housing corporation, sought exemption under a state constitutional provision applicable to "property used exclusively for . . . state colleges, and state universities" (Cal. Const. Art. XIII, § 3(d)). The state university's own ownership interest in the property was tax exempt under another constitutional provision (§ 3(a)), which exempted property owned by the state. In an elaborate opinion, the court held that, although the leasehold interest in the land could qualify as property

under Section 3(d), land that is the site for a private residence is not “used exclusively” for the state university’s purposes, and the leasehold interest in the land is therefore not exempt from taxation.

Student dormitories present a clearer case. They are usually exempt from property taxation, even if the institution charges students rent. Other types of student housing, however, may present additional complexities. In *Southern Illinois University Foundation v. Booker*, 425 N.E.2d 465 (Ill. App. Ct. 1981) (discussed earlier in this Section), the court considered whether apartments for married students were exempt from taxation. The question was whether this housing was more like dormitory housing for single students, which is generally considered an exempt educational use in Illinois, or like faculty and staff housing, which is generally not considered an exempt educational use in Illinois. Making ample use of the facts, the court chose the former:

Without belaboring the point, we think that married students, for purposes of the comparison with faculty members, are first and foremost students. They are, therefore, more nearly analogous to single students, whose dormitory housing, as we have said, has long enjoyed tax-exempt status in Illinois. Married students seeking an education seem analogous to faculty members, for purposes of this comparison, only insofar as faculty members are often married and raising families. Faculty members, however, have usually completed their educations and are obviously employed, whereas students, by their very nature, have not completed their educations and are, if not unemployed, generally living on quite limited incomes. If a student cannot both attend school and afford to support his or her family in private housing, family obligations being what they are, the student cannot attend school, at least in the absence of low-cost family housing of the kind in issue here. Similarly, if a student cannot find available private housing for his or her family in a community crowded by students seeking housing not provided by the educational institution itself, the student cannot attend school. Therefore, we consider married student housing as necessary to the education of a married student as single-student housing is to a single student. Since the use of dormitory housing, serving essentially single students, is deemed primarily educational rather than residential, the use of family housing for married students should likewise be deemed primarily educational, and such property should enjoy tax-exempt status [425 N.E.2d at 474].

Similarly, courts may or may not accord sorority and fraternity houses the same tax treatment as student dormitories. If the institution itself owns the property, it must prove that the property is used for the educational or charitable purposes of the institution. In *Alford v. Emory University*, 116 S.E.2d 596 (Ga. 1960), for example, the court held that fraternity houses operated by the university as part of its residential program were entitled to a tax exemption:

Under the evidence in this case, these fraternity buildings were built by the university; they are regulated and supervised by the university; they are located in the heart of the campus, upon property owned by the university, required to be so located and to be occupied only by students of the university; adopted as a part of the dormitory and feeding system of the college, and an integral part of

the operation of the college. In our opinion these fraternity houses are buildings erected for and used as a college, and not used for the purpose of making either private or corporate income or profit for the university, and our law says that they shall be exempt from taxes [116 S.E.2d at 601].

More recently, *Alford* was followed in *Johnson v. Southern Greek Housing Corp.*, 307 S.E.2d 491 (Ga. 1983). Georgia Southern College, part of the University of Georgia System, organized the Southern Greek Housing Corporation in order to provide the college's fraternities and sororities with housing close to campus. The corporation, not the college, held title to the property on which the fraternity houses were to be built. The Georgia Supreme Court concluded that the fraternity and sorority houses would be "buildings erected for and used as a college" [quoting *Alford*] and that such buildings [would be] used for the operation of an educational institution." The court held that, even though the property was owned by a corporation and not the college, the fact that the corporation "performs an educational function in conjunction with and under the auspices of" the college sufficed to bring the case within *Alford*.

In contrast, the court in *Cornell University v. Board of Assessors*, 260 N.Y.S.2d 197 (N.Y. App. Div. 1965), focused on the social uses of university-owned fraternity houses to deny an exemption under an "exclusive use" test:

It is true, of course, that the fraternities perform the essential functions of housing and feeding students, but it is clear that, in each case, the use of the premises is also devoted, in substantial part, to the social and other personal objectives of a privately organized, self-perpetuating club, controlled by graduate as well as student members. The burden of demonstrating these objectives to be educational purposes was not sustained and thus . . . [the lower court] properly found that the premises were not used "exclusively" for educational purposes, within the intentment of the exemption statute [260 N.Y.S.2d at 199].

But in a later case, *University of Rochester v. Wagner*, 408 N.Y.S.2d 157 (N.Y. App. Div. 1978), *affirmed summarily*, 392 N.E.2d 569 (N.Y. 1979), the court qualified the *Cornell University* holding. The University of Rochester owned nine fraternity houses for which it sought tax-exempt status. Unlike the *Cornell* case, where the houses served "social and other personal objectives" (but somewhat like the *Alford* case), the University of Rochester houses had become integrated into the university's housing program: the university controlled the houses' "exterior grounds, walkways, and access points"; the houses' dining programs were part of the university's dining program; the university periodically "review[ed] the health and viability" of the houses; and the university occasionally assigned nonfraternity members to live in the houses. Applying the "exclusive use" test, and analogizing these fraternity houses to dormitories, the courts granted the university's application for tax exemption:

Like dormitories, the fraternity houses here serve the primary function of housing and feeding students while they attend the University and complete the required curriculum. This use has been held to be in furtherance of the

University's educational purposes. Moreover, the social intercourse and recreational activities that take place in the fraternity houses are similar both in quantity and quality to that which occurs in the dormitories. This social activity, although incidental to the primary use of the facilities, is essential to the personal, social and moral development of the student and should not be found to change the character of the property from one whose use is reasonably incidental to and in furtherance of the University's exempt purposes to a use which is not. For the same reasons that dormitories have traditionally been held tax exempt, we see no reason why under the facts of this case the fraternity houses should not be accorded similar treatment [408 N.Y.S.2d at 164-65].

If an independently incorporated fraternity or sorority seeks its own property tax exemption, it must demonstrate an educational or charitable purpose independent of the university and prove that the property is used for that purpose. Greek letter and other social fraternities usually do not qualify for exemptions. In *Alpha Gamma Zeta House Association v. Clay County Board of Equalization*, 583 N.W.2d 167 (S.D. 1998), for example, tax exemptions were sought by various "house corporations" that owned real estate used as a primary residence for fraternity or sorority members who were students at the University of South Dakota (USD). Each house was located off campus "on property in which USD does not have any ownership interest." Each house corporation rented the real property to an affiliated fraternity or sorority chapter. Each chapter was recognized by USD as a student organization, and the members living in each house were required to comply with the university's housing policies and student code of conduct.

The house corporations sought a charitable exemption available to "benevolent organization(s)" under state law (S.D. Stat. Ann. Tit. 10, ch. 4, § 9.2). The statute required that the organization's property be "used exclusively for benevolent purposes," thus adopting an exclusive use test. The court held that the house corporations could not meet this test:

The House Corporations argue that the purpose of their corporations is to provide lodging for their respective fraternities and sororities and a convenient method of ownership of real property. They assert that all of the benevolent and charitable functions of the chapters should be attributed to the corporations, who associate only for "fraternal purposes." In *South Dakota Sigma Chapter House Ass'n v. Clay County*, 65 S.D. 559, 567, 276 N.W. 258, 263 (1937) we recognized the close ties of the householding corporation to the fraternity, but stated that "notwithstanding its intimate relation to and its solicitude for the chapter," the house corporation may not be characterized by the purposes and practices of the chapter. The House Corporations may be a convenient "legal fiction" standing in for the Greek Chapters themselves, but this does not mandate commensurate legal treatment [583 N.W.2d at 169].

Similarly, in *Kappa Alpha Educational Foundation, Inc. v. Holliday*, 226 A.2d 825 (Del. 1967), the court found that a fraternity house was being held as an investment by the corporation that owned it and therefore did not qualify for exemption.

Professional fraternities may be somewhat more successful in establishing the educational purpose and use of their property in order to qualify for exemption. In *City of Memphis v. Alpha Beta Welfare Ass'n.*, 126 S.W.2d 323 (Tenn. 1939), for example, the Supreme Court of Tennessee upheld a district court's finding of fact that a medical fraternity's house was used exclusively for educational purposes:

It is shown in proof that the student members of the Fraternity by reason of being housed together receive medical, ethical, and cultural instruction that they otherwise would not get. The acquisition of the property in order that the students might be housed together was but the means to the end that the purpose of the Phi Chi Medical Fraternity to promote the welfare of medical students morally and scientifically might be more effectively carried out [126 S.W.2d at 326].

Moreover, even if a campus sorority or fraternity does not qualify for an educational exemption, it may qualify in some jurisdictions under a statutory exemption for certain social organizations. In *Gamma Phi Chapter of Sigma Chi Building Fund Corp. v. Dade County*, 199 So. 2d 717 (Fla. 1967), the court held that the property of a national college fraternity was eligible for a statutory exemption designed for fraternal lodges.<sup>11</sup> (The exemption was denied on a technicality, however, because the fraternity missed the filing date.)

Athletic and recreational facilities owned by an educational institution may be exempt if the institution can prove that the facilities are used for educational purposes. Facilities with capacities far in excess of the institution's potential use may be subject to judicial scrutiny. In *Trustees of Rutgers University v. Piscataway Township in Middlesex County*, 46 A.2d 56 (N.J. 1946), for example, the court held that a stadium with a seating capacity of twenty thousand owned by an institution with a student body of seventeen hundred was not entitled to a property tax exemption.

Facilities for the arts (performance centers, art galleries, and so forth) present similar issues. The case of *City of Fayetteville v. Phillips*, 899 S.W.2d 57 (Ark. 1995), provides an instructive example of an "exclusive use" test's application to *public* arts facilities as well as the special usage issues that can arise when a college or university creates or affiliates with another entity. The case concerned the Walton Art Center, which the University of Arkansas owned jointly with the city of Fayetteville. The Art Center challenged the county assessor's determination that it was subject to real property taxation, relying on a provision of the Arkansas constitution that exempts "public property used exclusively for public purposes." The issue was whether the center was used "exclusively" for public purposes, since it was occasionally rented out to private groups for their own private use. The Supreme Court of Arkansas held that the rental of the center was a private use and could not be converted to a public

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<sup>11</sup>The relevant cases on sorority and fraternity houses are collected in F. M. English, Annot., "Exemption from Taxation of College Fraternity or Sorority House," 66 A.L.R.2d 904.

use merely by applying the rental profits to other university or city public purposes. The focus was on the actual use of the property, not the use of the income derived from the property. Nor was the rental use sufficiently “incidental” to public uses as to be irrelevant.

In reaching its decision to uphold the county’s tax assessment, the court emphasized that, under Arkansas law, “a taxpayer must establish an entitlement to an exemption beyond a reasonable doubt,” and a “presumption operates in favor of the taxing power,” and then proceeded to construe the public purpose exemption very strictly. The case thus stands in sharp contrast to other cases, such as the *Illini Media Company* case below, in which the courts flexibly construe exemption statutes.

Dining facilities that are located on the property of an educational institution and whose purpose is to serve the college community rather than to generate a profit have long been recognized as part of the educational program and therefore entitled to a property tax exemption.<sup>12</sup> In *People ex rel. Goodman v. University of Illinois Foundation*, 58 N.E.2d 33 (Ill. 1944), the court upheld an exemption for dining halls (as well as dormitory and recreational facilities) even though the university derived incidental income by charging for the services. Dining facilities may be tax exempt even if the institution contracts with a private caterer to provide food services. In *Blair Academy v. Blairstown*, 232 A.2d 178 (N.J. Super Ct. App. Div. 1967), the court held:

The use of a catering system to feed the students and faculty of this boarding school cannot be regarded as a commercial activity or business venture of the school. Blair pays for this catering service an annual charge of \$376 per person. It has been found expedient by the management of the school to have such a private caterer, in lieu of providing its own personnel to furnish this necessary service. The practice has been carried on for at least ten years. Nor do we find material as affecting Blair’s nonprofit status that the catering system uses Blair’s kitchen equipment and facilities in its performance, or that some of the caterer’s employees were permitted by the school to occupy quarters at the school, rent-free [232 A.2d at 181–82].

Exemptions of various other kinds of institutional property also depend on the particular use of the property and the particular test applied in the jurisdiction. In *Princeton University Press v. Borough of Princeton*, 172 A.2d 420 (N.J. 1961), a university press was denied exemption under an “exclusive use” test.

There is no question that the petitioner has been organized exclusively for the mental and moral improvements of men, women and children. The Press’s publication of outstanding scholarly works, which the trade houses would not be apt to publish because of insufficient financial returns, carries out not only the purposes for which it was organized but also performs a valuable public

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<sup>12</sup>Cases on dining facilities are collected in D. E. Buckner, Annot., “Property Used as Dining Rooms or Restaurants as Within Tax Exemptions Extended to Property of Religious, Educational, Charitable, or Hospital Organizations,” 72 A.L.R.2d 521.

service. It cannot be likewise concluded, however, that the property is *exclusively used* for the mental and moral improvement of men, women and children as required by the statute. A substantial portion of the Press's activity consists of printing work taken in for the purpose of offsetting the losses incurred in the publication of scholarly books. Such printing, which includes work done for educational and nonprofit organizations other than Princeton University, is undertaken for the purpose of making a profit. Hence, in this sense the printing takes on the nature of a commercial enterprise and, therefore, it cannot be said that the property is *exclusively used* for the statutory purpose [172 A.2d at 424; emphasis added].

But in *District of Columbia v. Catholic Education Press*, 199 F.2d 176 (D.C. Cir. 1952), a university press was granted an exemption:

[T]he Catholic Education Press does not stand alone. It is a publishing arm of the [Catholic University of America]. It is an integral part of it. It has no separate life except bare technical corporate existence. It is not a private independent corporation, but to all intents and purposes it is a facility of the University. . . .

If the Catholic University of America, in its own name, should engage in activities identical with those of its subsidiary, the Catholic Education Press, we suppose its right to exemption from taxation on the personal property used in such activities would not be questioned. We see no reason for denying the exemption to the University merely because it chooses to do the work through a separate nonprofit corporation [199 F.2d at 178–79].

In *City of Ann Arbor v. University Cellar*, 258 N.W.2d 1 (Mich. 1977), the issue was the application of a local personal property tax to the inventory of a campus bookstore at the University of Michigan. The statute provided an exemption for property “belonging to” the state or to an incorporated educational institution. The bookstore, the University Cellar, was a nonprofit corporation whose creation had been authorized by the university's board of regents. The majority of the corporation's board of directors, however, were appointed by the student government. The court determined that the directors did not represent the board of regents or the university administration and that the regents did not control the operation of the bookstore. Distinguishing the *Catholic Education Press* case, where the separately incorporated entity was essentially the alter ego of the university, the court denied the exemption because the property could not be said to “belong to” the university.

As the *University Cellar* case demonstrates, some of the most important tax exemption issues that arise concern the property of separate entities that the institution establishes or with which it affiliates (see Sections 3.6.3 & 15.3.4.2). The cases about fraternities, housing or facilities corporations, and university presses also illustrate this problem. Two other, more recent, illustrations come from a case concerning the property of a nonprofit media corporation created by a state university, and a case concerning the property of an athletic conference whose members were universities.

The first case, *Illini Media Company v. Department of Revenue*, 664 N.E.2d 706 (Ill. App. Ct. 1996), involved three parcels of land owned by the Illini Media

Company, a nonprofit corporation established by the University of Illinois. Pursuant to its corporate purposes, the company operates a campus radio station and publishes the campus newspaper, the university yearbook, and a technical journal. The company's board of directors is composed of university students and faculty members, and its activities are subject to the authority of the university chancellor. Illini Media sought a tax exemption under a state statute exempting property that is used for "college, theological, seminary, university, or other educational purposes . . ." (35 ILCS 205-19.1, formerly Ill. Rev. Stat. ch. 120, par. 500.1). The State Department of Revenue denied the tax exemption, but the Illinois appellate court reversed. The court first affirmed that an activity need not be a "school in a traditional sense," nor need it involve classroom instruction, in order to be exempt from property taxation under the statute. The court then declared that the company's general purpose is "educational development," and that educational development is an educational purpose within the meaning of the statute. It was also important to the court that the company's corporate charter stated that the company was engaged in educational purposes, that the company had close ties to the university, that both faculty and students were involved in company management, and that the corporation employed students from the university. (This case provides a good illustration of how to read a statute broadly or flexibly in order to achieve exempt status.)

In the second case, *In re Atlantic Coast Conference*, 434 S.E.2d 865 (N.C. Ct. App. 1993), the county in which the Atlantic Coast Conference (ACC) maintained its headquarters denied the ACC's request for an exemption from property taxes for the building it used as administrative offices. Reviewing the county's decision, the Court of Appeals of North Carolina examined "the four separate and distinct requirements" of the statute that must be met before an exemption will be granted: (1) the property is owned by an educational institution, (2) the owner is organized and operated as a nonprofit entity, (3) the property must be used for activities incident to the operation of an educational institution, and (4) the property is used by the owner only for educational purposes (N.C. Gen. Stat. § 105-278.4). The court found that, since the ACC was an unincorporated association whose only members were institutions that were themselves exempt from property taxes, the first element was satisfied. The third element was satisfied because "athletic activities are a natural part of the education process," and "in collegiate athletics, the negotiation of network contracts and management of broadcasts [functions of the ACC for which it used its building] are . . . necessarily incidental to the operation of educational institutions. . . ." The fourth element was also satisfied because the ACC's main activities, negotiating TV contracts and managing tournaments, both "qualify as 'educational.'" The court, however, could not determine whether the second element (a nonprofit entity) was met. Because neither the member institutions nor the ACC had disclosed adequate financial information for the court's review, the court remanded the case to the lower court for a ruling on the second element. The Supreme Court of North Carolina affirmed without opinion (441 S.E.2d 550 (N.C. 1994)).



Similar tax exemption problems may also arise when a postsecondary institution enters a lease arrangement with a separate entity. If the institution leases some of its property to another entity, the property may or may not retain its exempt status. In such cases, exemption again depends on the use of the property and the exemption tests applied in the jurisdiction,<sup>13</sup> and particular consideration may be given to the extent to which the institution controls the property in the hands of the separate entity. Parallel tax exemption problems may also be encountered when an institution leases property *from* (rather than *to*) another entity. *Wheaton College v. Department of Revenue*, 508 N.E.2d 1136 (Ill. App. Ct. 1987) (although a case involving the state rather than a local government), is illustrative. The college had entered a thirty-year lease for an apartment building that it used for student housing—concededly a tax-exempt purpose. The question was whether the college had sufficient indicia of ownership to be considered the property’s owner for tax purposes. Although recognizing that “ownership of real estate is a broad concept and can apply to one other than the record titleholder” (508 N.E.2d at 1137), the court held that the college was not the actual owner of the property and was not entitled to the tax exemption. The court found that the “leasing arrangement in question was undertaken primarily for the benefit” of the lessor rather than the college, and “the tax and other advantages of the transaction inured” to the lessors’ benefit (508 N.E.2d at 1138). Moreover, “although the lease gives [the college] several incidents of ownership, including the right to remove existing structures and the right to sublease the property, it does not give others, such as the right to alienate fully the property” (508 N.E.2d at 1138).

If institutional property (or that of a separate entity) is denied an exemption and subjected to property taxation, the institution (or the separate entity) must then deal with the problem of valuation. After a property tax assessor makes the initial assessment, the institution or an affiliated entity may challenge the assessment through procedures established by the local government. The assessment of property used for educational purposes may be difficult because of the absence of comparable market values. In *Dartmouth Corp. of Alpha Delta v. Town of Hanover*, 332 A.2d 390 (N.H. 1975), an independent fraternity challenged the assessment of its property. To arrive at an evaluation, the town had compared the fraternity property to dormitory facilities. The court upheld the assessor’s estimate, reasoning that “in view of the functional similarity between fraternities and dormitories and considering that the college regulates the rents of both types of facilities, it was not unlawful for the board to consider the income and costs of the fraternity buildings if used as dormitories in ascertaining their assessed value.”

If an institution cannot obtain or maintain a property tax exemption, it is limited to challenging the periodic valuation assessments of its property, as in the *Dartmouth Corp.* case above. The far better approach, from the institution’s

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<sup>13</sup>Cases dealing with leased property are collected in Maurice T. Brunner, Annot., “Property Tax: Exemption of Property Leased by and Used for Purposes of Otherwise Tax-Exempt Body,” 55 A.L.R.3d 430.

perspective, is to establish and maintain the conditions necessary for a tax exemption. The case of *City of Washington v. Board of Assessment Appeals of Washington County*, 704 A.2d 120 (Pa. 1997), provides useful suggestions for institutions in this regard, and also indicates for challengers the avenues they may have to travel to challenge an institution's exemption. The city of Washington had challenged the tax-exempt status of Washington and Jefferson College (W&J), a private, nonsectarian, liberal arts college in Pennsylvania. The Supreme Court of Pennsylvania applied Pennsylvania's five-prong test for determining whether an entity could qualify for tax exemption as a "purely public charity" under the state constitution and the applicable statute (72 Pa. Stat. § 5020-204(a)(3)):

The test requires that the entity (1) advance a charitable purpose; (2) donate or render gratuitously a substantial portion of its services; (3) benefit a substantial and indefinite class of persons who are legitimate subjects of charity; (4) relieve the government of some of its burden; and (5) operate entirely free from private profit motive [704 A.2d at 122].

Working through the prongs in order, the court reasoned as follows: (1) "W&J provides education for youths . . . and thereby serves a charitable purpose." (2) The college makes extensive use of scholarships, grants, and contributions from its endowment to provide W&J students with approximately one-half of their education without charge, and did so even when W&J suffered operating losses from 1991 through 1994. In light of Pennsylvania precedent that charities need not provide wholly gratuitous services, W&J's "level of assistance is well above what [the court has] deemed adequate to qualify as a purely public charity." (3) Through its admission and financial aid policies, "W&J makes education attainable for innumerable youths who would not otherwise be able to afford it. . . . The vast majority of the aid that W&J provides is directed to the financially needy . . . , [and] the admissions policies at W&J do not discriminate against applicants who will need such grants." (4) "W&J, like other independent colleges and universities, relieves the load placed on the state-owned system of college and universities." And (5) W&J's continued use of scholarships, grants, and endowment funds in lieu of significant tuition increases to compensate for operating losses was favorable evidence of the college's lack of profit motive. Further, W&J's trustees serve without compensation, and any operating surplus W&J generated would be reinvested in the college. Thus, the court concluded, W&J satisfied all five elements of the test, and could properly maintain a tax exemption as a purely public charity.

Although the institution was victorious, the case nevertheless raises important issues for other colleges and universities to consider in light of increasing fiscal pressures on cash-strapped local governments. Local government leaders are often hesitant to raise their constituents' taxes and may, instead, seek to increase tax revenues by challenging the tax exemptions of an independent college or university located in the community. (This problem is described, and options for managing it are suggested, in Brian C. Mitchell, "Private Colleges Should Stay on Guard Against Challenges to Their Tax-Exempt Status," *Chron.*

*Higher Educ.*, December 12, 1997, B6.) The *City of Washington* court's analysis of Washington and Jefferson's charitable characteristics, and the guidance it provides, should be a help to other institutions needing to defend themselves, either in the political process or in court, against tax-exempt challenges.

**11.3.3. Sales, admission, and amusement taxes.** A local government may have authority to impose a sales tax on the sales or purchases of educational institutions. The institution may claim a specific exemption based on a particular provision of the sales tax ordinance or a general exemption provided by a state statute or the state constitution. The language of the provision may limit the exemption to sales by an educational institution, or to purchases by an educational institution, or may cover both. The institution's eligibility for exemption from these taxes, as from property taxes, depends on the language of the provision creating the exemption, as interpreted by the courts, and on particular factual circumstances concerning the institution and the sales transactions.<sup>14</sup>

*New York University v. Taylor*, 296 N.Y.S. 848 (N.Y. App. Div. 1937), *affirmed without opinion*, 12 N.E.2d 606 (N.Y. 1938), arose after the comptroller of the City of New York tried to impose a sales tax on both the sales and the purchases of a nonprofit educational institution. The law in effect at that time provided that "receipts from sales or services . . . by or to semipublic institutions . . . shall not be subject to tax hereunder." Semipublic institutions were defined as "those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit." The court made a finding of fact that the university was a "semipublic institution" within the meaning of the statute and therefore was not subject to taxation on its sales or purchases.

Sales by an educational institution may be exempt even if some of the institution's activities generate a profit. The exemption will depend on the use of the profits and the language of the exemption. In *YMCA of Philadelphia v. City of Philadelphia*, 11 A.2d 529 (Pa. Super. Ct. 1940), the court held that the sale was not subject to taxation under an ordinance that exempted sales by or to semipublic institutions:

[C]ertainly, the ordinance contemplated a departure by such institutions from the activities of a public charity, which, in its narrowest sense, sells nothing and is supported wholly by public subscriptions and contributions or endowment; and may be said to recognize that many institutions organized for charitable purposes and supported in part by public subscriptions or endowment, do engage in certain incidental activities, of a commercial nature, the proceeds of which, and any profits derived therefrom, are devoted to the general charitable work of the institution and applied to no alien or selfish purpose [11 A.2d at 531].

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<sup>14</sup>The relevant cases on sales taxes, as well as "use" taxes sometimes levied in place of sales taxes, are collected in Roland F. Chase, Annot., "Exemption of Charitable or Educational Organization from Sales or Use Tax," 53 A.L.R.3d 748.

*City of Boulder v. Regents of the University of Colorado*, 501 P.2d 123 (Colo. 1972), concerned the city's attempt to impose an admission tax on various events, including intercollegiate football games, held on the University of Colorado's campus. The trial court held that the city could not impose tax collection responsibilities on the university because its board of regents, as an entity established by the state constitution, had exclusive control of the university's funding and fiscal operations. The Supreme Court of Colorado upheld this part of the trial court's ruling, quoting the trial court's opinion with approval:

"In the instant case the city is attempting to impose duties on the Board of Regents which would necessarily interfere with the Regents' control of the University. The Constitution establishes a statewide Board of Regents and vests control in the Board of Regents. The Board of Regents has Exclusive control and direction of all funds of, and appropriations to, the University. . . . Thus, the City of Boulder cannot force the Regents to apply any funds toward the collection of the tax in question. Even if the City claims that sufficient funds would be generated by the tax to compensate the Regents for collection expense and, arguably, such funds could be paid to the Regents by the City, the Regents are still vested with the 'general supervision' of the University. The University would necessarily be required to expend both money and manpower for the collection, identification, and payment of such funds to the City. This interferes with the financial conduct of the University and the allocation of its manpower for its statewide educational duties. . . .

"Thus, since the Constitution has established a state-wide University at Boulder and vested general supervisory control in a state-wide Board of Regents and management in control of the state, a city, even though a home rule city, has no power to interfere with the management or supervision of the activities of the University of Colorado. If the City of Boulder was allowed to impose duties on the University, such duties would necessarily interfere with the functions of the state institution. There is no authority to permit the City of Boulder to force a state institution to collect such a local tax. Consequently, the City of Boulder cannot require the Board of Regents of the University of Colorado to become involuntary collectors of the City of Boulder's Admission Tax" [501 P.2d at 125, quoting the trial court].

The court also held, over two dissents, that the admission tax was itself invalid as applied to various university functions:

When academic departments of the University, or others acting under the auspices of the University, sponsor lectures, dissertations, art exhibitions, concerts, and dramatic performances, whether or not an admission fee is charged, these functions become a part of the educational process. This educational process is not merely for the enrolled students of the University, but it is a part of the educational process for those members of the public attending the events. In our view the home rule authority of a city does not permit it to tax a person's acquisition of education furnished by the State. We hold that the tax is invalid when applied to University lectures, dissertations, art exhibitions, concerts, and dramatic performances [501 P.2d at 126].

With respect to football games, however, the Colorado court affirmed the tax's validity because the university had not made "a showing that football is so related to the educational process that its devotees may not be taxed by a home rule city." This latter ruling is "probably academic," the court acknowledged, since under sovereign immunity the university could not be required to collect the tax, even if it were valid.<sup>15</sup> Subsequently, another court reached much the same result, but on different reasoning, in *City of Morgantown v. West Virginia Board of Regents*, 354 S.E.2d 616 (W. Va. 1987). At issue was an amusement tax that the city attempted to apply to ticket sales for university entertainment and athletic events. Under the authorizing statute, only amusements conducted "for private gain" could be taxed. Determining that the university's ticket receipts were "public moneys" and that the university did not conduct these events for private profit, the court held the tax to be contrary to the statute and invalid.

## **Sec. 11.4. Student Voting in the Community**

**11.4.1. Registering to vote.** Every citizen over the age of eighteen does not necessarily have the right to vote. All potential voters must register with the board of elections of their legal residence in order to exercise their right. Determining the legal residence of students attending residential institutions has created major controversies. Some small communities near colleges and universities, fearful of the impact of the student vote, have tried to limit student registration, while students eager to participate in local affairs and to avoid the inconveniences of absentee voting have pushed for local registration.

The trend of the cases has been to overturn statutes and election board practices that impede student registration, and sometimes to overturn state statutes that authorize such practices.<sup>16</sup> In *Jolicoeur v. Mihaly*, 488 P.2d 1 (Cal. 1971), the court considered a statute that created an almost conclusive presumption that an unmarried minor's residence was his or her parents' home. The court held that this statute violated the equal protection clause and the Twenty-Sixth Amendment:

Sophisticated legal arguments regarding a minor's presumed residence cannot blind us to the real burden placed on the right to vote and associated rights of political expression by requiring minor voters residing apart from their parents to vote in their parents' district. . . .

An unmarried minor must be subject to the same requirements in proving the location of his domicile as is any other voter. Fears of the way minors may vote or of their impermanency in the community may not be used to justify special presumptions—conclusive or otherwise—that they are not bona fide residents of

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<sup>15</sup>Relevant cases on admission taxes are collected in Kenneth J. Rampino, Annot., "Validity of Municipal Admission Tax for College Football Games or Other College Sponsored Events," 60 A.L.R.3d 1027.

<sup>16</sup>Cases are collected at Donald T. Kramer, Annot., "Validity, Under Federal Constitution, of State Residency Requirements for Voting in Elections," 31 L. Ed. 2d 861.

the community in which they live. . . . It is clear that respondents have abridged petitioners' right to vote in precisely one of the ways that Congress sought to avoid—by singling minor voters out for special treatment and effectively making many of them vote by absentee ballot. . . .

Respondents' policy would clearly frustrate youthful willingness to accomplish change at the local level through the political system. Whether a youth lives in Quincy, Berkeley, or Orange County, he will not be brought into the bosom of the political system by being told that he may not have a voice in the community in which he lives, but must instead vote wherever his parents live or may move to. Surely as well, such a system would give any group of voters less incentive "in devising responsible programs" in the town in which they live [488 P.2d at 4, 7].

Another court invalidated a Michigan statute that created a rebuttable presumption that students are not voting residents of the district where their institution is located. The statute was implemented through elaborate procedures applicable only to students. The court held that the statute infringed the right to vote in violation of the equal protection clause (*Wilkins v. Bentley*, 189 N.W.2d 423 (Mich. 1971)). And in *United States v. State of Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), a three-judge federal court enjoined the voting registrar of Waller County from applying a burdensome presumption of nonresident to unmarried dormitory students at Prairie View A&M University. The U.S. Supreme Court summarily affirmed the lower court's decision without issuing any written opinion (*Symm v. United States*, 439 U.S. 1105 (1979)).

In contrast, courts have upheld statutory provisions making attendance at a local college or university irrelevant as a factor in determining a student's residence. In *Whittingham v. Board of Elections*, 320 F. Supp. 889 (N.D.N.Y. 1970), a special three-judge court upheld a "gain or loss provision" of the New York constitution. This provision, found in many state constitutions and statutes, requires a student to prove residency by indicia other than student status. The *Whittingham* case was followed by *Gorenberg v. Onondaga County Board of Elections*, 328 N.Y.S.2d 198 (N.Y. App. Div. 1972), *modified*, 286 N.E.2d 247 (N.Y. 1972), upholding the New York State voting statute specifying criteria for determining residence, including dependency, employment, marital status, age, and location of property.

A series of New York cases illustrates and refines the principles developed in these earlier cases. In *Auerbach v. Rettaliata*, 765 F.2d 350 (2d Cir. 1985), students from two State University of New York (SUNY) campuses challenged the constitutionality of the New York voting residency statute, a virtually identical successor to the statute upheld in *Gorenberg*. The students claimed that the statute—by authorizing county voting registrars to consider factors such as students' financial independence and the residence of their parents—imposed unduly heavy burdens on their eligibility to vote. The court upheld the *facial* validity of the statute because it did not establish any "presumption against student residency." As interpreted by the court, the statute merely specified criteria that could demonstrate "physical presence and intention to remain for the time at least." Although these criteria would require "classes of likely transients"

to demonstrate more than physical presence in the county, such treatment was permissible under the equal protection clause.

The *Auerbach* court did caution, however, that even though the New York statute was constitutional on its face, courts would nevertheless intervene in residency determinations if election officials administered the law in a manner that discriminated against students. In *Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986), the same U.S. Court of Appeals had occasion to put that caution into practice. Students from another SUNY campus challenged an election board's ruling that a dormitory could not be considered a voting residence under the New York voter residency statute, thus prohibiting college dormitory residents from registering. Building on *Auerbach*, the court agreed that the state election law would allow election boards to make more searching inquiries about the residence of students and other presumably transient groups, as long as the boards did not apply more rigorous substantive requirements regarding residency to these groups than they did to other voters. But the court nevertheless invalidated the election board's action under the equal protection clause because it did impose a more rigorous requirement on dormitory students that barred them from voting regardless of the presence of other circumstances that could demonstrate an intent to remain.

Similarly, in *Levy v. Scranton*, 780 F. Supp. 897 (N.D.N.Y. 1991), another court in a suit brought by students at Skidmore College used *Auerbach* and *Williams v. Salerno* to invalidate a county board of elections policy under which the board disqualified students from voting if they had an on-campus residence. The court enjoined the board from denying the right to vote solely on this basis. At the same time, however, the court reconsidered and upheld the validity of the New York statute itself.

Some general rules for constitutionally sound determinations of student residency emerge from these cases. The mere fact that the student lives in campus housing is not sufficient grounds to deny residency. On the other hand, mere presence as a student is not itself sufficient to establish voting residency. Rather, election boards can require not only physical presence but also manifestation of an intent to establish residency in the community. Present intent to establish residency is probably sufficient. Students who intend to leave the community after graduation do not have such intent. Students who are uncertain about their postgraduate plans, but consider the community to be their home for the time being, probably do have such intent. A statute that required proof of intent to remain indefinitely in the community after graduation was held a denial of equal protection in *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973).

Uncertainties concerning future plans and the difficulties of proving intent complicate the application of these general rules. To address these complexities, election boards may use a range of criteria for determining whether a student intends to establish residence. Such criteria may include vacation activity, the location of property owned by the student, the choice of banks and other services, membership in community groups, location of employment, and the declaration of residence for other purposes, such as tax payment and automobile registration. Election officials must be careful to apply such criteria evenhandedly to all voter

registrants and, if more searching inquiries are made of some registrants, to apply the same level of inquiry to all potential transient groups.

In 1998, Congress amended the Higher Education Act, adding subsection 23 to 20 U.S.C. § 1094(a) (Pub. L. No. 105-244, 112 Stat. 1751, October 7, 1998). This subsection provides that all institutions, as a condition of receiving federal student aid funds, must “make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make such forms widely available to students at the institution.” This provision applies to elections for federal office and for the governor of the state. During the fall of 2004, just prior to the presidential election, a survey found that most colleges and universities who responded to the survey had not fully complied with the law’s requirements (Elizabeth F. Farrell & Eric Hoover, “Many Colleges Fall Short on Registering Student Voters,” *Chron. Higher Educ.*, September 17, 2004, A1).

**11.4.2. Scheduling elections.** A case that deals with the timing of an election in a district with a substantial student population is *Walgren v. Board of Selectmen of the Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975). Walgren, a student at the University of Massachusetts, had asked the selectmen of Amherst, Massachusetts, to change the date of the town’s primary election, which had been scheduled for January 19, a date that fell during the university’s winter recess. After several votes and attempted changes of the date, the selectmen decided to keep the primary election on its original date. The election was held, and Walgren sued on behalf of his fellow students to set aside the election, alleging violations of the Twenty-Sixth Amendment (which lowered the voting age to eighteen) and the equal protection clause.

The lower court refused to set aside the election. Although disagreeing with the lower court’s finding that the burden on students’ and faculty members’ right to vote was insignificant, the appellate court relied on the good-faith efforts of the selectmen to schedule an appropriate date:

In short, we would be disturbed if, given time to explore alternatives and given alternatives which would satisfy all reasonable town objectives, a town continued to insist on elections during vacations or recess, secure in the conviction that returning to town and absentee voting would be considered insignificant burdens.

The critical element which in our view serves to sustain the 1973 election is the foreshortened time frame within which the selectmen were forced to face up to and resolve a problem which was then novel. . . .

We would add that, under the circumstances of this case, even if we had found the burden impermissible, we would have looked upon the novelty and complexity of the issue, the shortness of time, and the good-faith efforts of the defendants as sufficient justification for refusing to order a new election at this late date [519 F.2d at 1368].

The special facts of the case and the narrowness of the court’s holding limit *Walgren’s* authority as precedent. But *Walgren* does suggest that, under some



circumstances, an election deliberately scheduled so as to disenfranchise an identifiable segment of the student electorate can be successfully challenged.

**11.4.3. Canvassing and registration on campus.** The regulation of voter canvassing and registration on campus is the voting issue most likely to require the direct involvement of college and university administrators. Any regulation must accommodate the First Amendment rights of the canvassers; the First Amendment rights of the students, faculty, and staff who may be potential listeners; the privacy interests of those who may not wish to be canvassed; the requirements of local election law; and the institution's interests in order and safety. Not all of these considerations have been explored in litigation.<sup>17</sup>

Although not in the higher education context, the U.S. Supreme Court addressed the constitutionality of restrictions on canvassing in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), ruling that a town ordinance that required a permit for both commercial and noncommercial canvassing violated the First Amendment. The Court noted that not only was religious exercise burdened by the requirement of a permit, but political activity was impermissibly burdened as well. Holding that the permit requirement was overbroad in its application to noncommercial speech, the Court said: "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so" (536 U.S. at 165–66). The Court noted that a permit requirement properly tailored to the town's stated interests—the prevention of fraud and protecting the privacy of its residents—might avoid First Amendment pitfalls if it were limited to commercial activity, although there were "less intrusive and more effective measures" available to further the town's goals, such as "No Solicitation" signs.

*James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill. 1972), illustrates a First Amendment challenge to a campus canvassing regulation. Northern Illinois University had for some time prohibited all canvassing in student living areas. After receiving requests to modify this prohibition, the university proposed a new regulation, which would have permitted canvassing under specified conditions. Before the new regulation could go into effect, however, it had to be adopted in a referendum by two-thirds of the students in each dormitory, after which individual floors could implement it by a two-thirds vote. The court held that this referendum requirement unconstitutionally infringed the freedom of association and freedom of speech rights of the students who wished to canvas or be canvassed. The basis for the *James* decision is difficult to discern. The court emphasized that the proposed canvassing regulation was not "in any way unreasonable or beyond the powers of the university administration to impose in the interests of good order and the safety and comfort of the student body." If the proposed regulation could thus be constitutionally implemented by the university itself, it is

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<sup>17</sup>Cases are collected in John H. Derrick, Annot., "Validity of College or University Regulation of Political or Voter Registration Activity in Student Housing Facilities," 39 A.L.R.4th 1137.

not clear why a referendum to approve the university's proposed regulation would infringe students' constitutional rights. (But see also the *Southworth* litigation in Section 10.1.3 for more on student referenda.) The court's implicit ruling in *James* may therefore be that the university's blanket prohibition on canvassing was an infringement of First Amendment rights, and a requirement that this prohibition could be removed only by a two-thirds vote of the students in each dormitory and each floor was also an infringement on the rights of those students who would desire a liberalized canvassing policy.

*National Movement for the Student Vote v. Regents of the University of California*, 123 Cal. Rptr. 141 (Cal. Ct. App. 1975), was decided on statutory grounds. A local statute permitted registrars to register voters at their residence. University policy, uniformly enforced, did not allow canvassing in student living areas. Registrars were permitted to canvas in public areas of the campus and in the lobbies of the dormitories. The court held that the privacy interest of the students limited the registrars' right to canvas to reasonable times and places and that the limitations imposed by the university were reasonable and in compliance with the law. In determining reasonableness, the court emphasized the following facts:

There was evidence and findings to the effect that dining and other facilities of the dormitories are on the main floor; the private rooms of the students are on the upper floors; the rooms do not contain kitchen, washing, or toilet facilities; each student must walk from his or her room to restroom facilities in the halls of the upper floors in order to bathe or use the toilet facilities; defendants, in order to "recognize and enhance the privacy" of the students and to minimize assaults upon them and thefts of their property, have maintained a policy and regulations prohibiting solicitation, distribution of materials, and recruitment of students in the upper-floor rooms; students in the upper rooms complained to university officials about persons coming to their rooms and canvassing them and seeking their registrations; defendants permitted signs regarding the election to be posted throughout the dormitories and permitted deputy registrars to maintain tables and stands in the main lobby of each dormitory for registration of students; students in each dormitory had to pass through the main lobby thereof in order to go to and from their rooms; a sign encouraging registration to vote was at each table, and students registered to vote at the tables [123 Cal. Rptr. at 146].

Though the *National Movement v. Regents* decision is based on a statute, the court's language suggests that it would use similar principles and factors in considering the constitutionality of a public institution's canvassing regulations under the First Amendment. In a later case, *Harrell v. Southern Illinois University*, 457 N.E.2d 971 (Ill. App. Ct. 1983), the court did use similar reasoning in upholding, against a First Amendment challenge, a university policy that prohibited political candidates from canvassing dormitory rooms except during designated hours in the weeks preceding elections. The court also indicated that the First Amendment (as well as that state's election law) would permit similar restrictions on canvassing by voter registrars. Thus, although public institutions

may not completely prohibit voter canvassing on campus, they may impose reasonable restrictions on the “time, place, and manner” of canvassing in dormitories and other such “private” locations on campus. (See also Section 11.6.4.3.)

**11.4.4. Reapportionment.** A series of U.S. Supreme Court decisions in the early 1960s established that “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state” (*Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964)). This “one person, one vote” standard was extended to local government elections in *Avery v. Midland County*, 390 U.S. 474 (1968), and *Hadley v. Junior College District*, 397 U.S. 50 (1970):

Whenever a state or local government decides to select persons by popular election to perform governmental functions, the equal protection clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elective body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionately equal numbers of officials [*Hadley*, 397 U.S. at 56].

Consistent with this basic constitutional requirement, local and state governments must periodically “reapportion” the populations of election districts and redraw their boundaries accordingly. If the election districts containing the largest percentages of student voters were to include more voters per elected official than other districts, thus diluting the voting strength of district voters (malapportionment), students or other voters could claim a violation of “one person, one vote” principles. Even if the districts with concentrations of student voters have populations substantially equal to those of other districts, students could still raise an equal protection challenge if the district lines were drawn in a way that minimized their voting strength (gerrymandering). Case law indicates, however, that both types of claims would be difficult to sustain. Beginning with *Abate v. Mundt*, 403 U.S. 182 (1971) (local elections), and *Mahan v. Howell*, 410 U.S. 315 (1973) (state elections), the U.S. Supreme Court has accepted various justifications for departing from strict population equality among districts, thus making it harder for plaintiffs to prevail on malapportionment claims. And in *Gaffney v. Cummings*, 412 U.S. 735 (1973), and later cases, the Court has flagged its reluctance to scrutinize gerrymandering that is undertaken to balance or maintain the voting strengths of political groups within the jurisdiction. (But compare *Shaw v. Reno*, 509 U.S. 630 (1993); *Easley v. Cromartie*, 532 U.S. 234 (2001) (racial gerrymandering).)

*In re House Bill 2620*, 595 P.2d 334 (Kan. 1979), illustrates the difficulty of prevailing on such malapportionment claims.<sup>18</sup> The student senate of the

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<sup>18</sup>Although few reported cases deal with student challenges to reapportionment, dilution of minority voting power as a result of inclusion or exclusion of student populations in redistricting has been challenged by other plaintiffs. See, for example, *Fauley v. Forrest County, Mississippi*, 814 F. Supp. 1327 (S.D. Miss. 1993).

University of Kansas (and others) filed suit objecting to the reapportionment of two state legislative districts covering the city of Lawrence. Prior to reapportionment, the three voting precincts with the most concentrated student vote (“L,” “K,” and “O”) were located in one legislative district. The reapportionment plan placed two of these precincts in one district and the third in a separate district. The students contended that this redistricting was done in order to split the student vote, thus diluting student voting power. The Kansas Supreme Court disagreed, holding that the redistricting did not invidiously discriminate against students:

There are presently 22,228 students enrolled in the University of Kansas. It is stated [that] a large portion of the students hold similar political beliefs, and those living in precincts identified as “L,” “K,” and “O” form a cohesive homogeneous unit that cannot be separated without discrimination. . . . In 1978 there were 5,138 “census persons” residing in these three precincts, and 3,156 voters were registered on October 27, 1978. Even assuming that all registered voters in these three precincts were students, which is highly questionable, the three precincts involved would represent no more than 14.2 percent of the students in the university.

Other factors militate against a solid cohesive student body. The students come from different family and political backgrounds and from different localities. Many students vote in their home districts. It is extremely doubtful that all would be of one party. Considering modern trends in higher education, each student is trained for independent thinking. Unanimity among a student body seems unlikely. Keeping all these factors in mind, we cannot say that removing precincts K and O from District 44 and placing them in the newly constituted District 46 was done for the purpose of canceling the voting strength of the 22,228 students attending the University of Kansas. We are not convinced that invidious discrimination resulted [595 P.2d at 343–44].

Students had somewhat more success challenging the reapportionment decisions of the city of Bowling Green, Ohio. In *Regensburger v. City of Bowling Green, Ohio*, 278 F.3d 588 (6th Cir. 2002), a group of individuals, including students at Bowling Green State University, sued the city, alleging that its reapportionment plan violated their rights under the equal protection clause. The city council consisted of three at-large members and one member elected from each of the city’s four wards. The plaintiffs argued that Ward 1, the ward that contained most of the college students, contained more than twice the number of residents as each of the other three wards, thus diluting their votes. A magistrate judge found that the city’s plan deviated from absolute population equality by more than 66 percent, which exceeded constitutional limits, and ordered the city to redesign its reapportionment plan within constitutional guidelines. The appellate court affirmed the findings of the magistrate judge.

### ***Sec. 11.5. Relations with Local Police***

Since the academic community is part of the surrounding community, it will generally be within the geographical jurisdiction of one or more local (town,

village, city, county) police forces. The circumstances under which local police may and will come onto the campus, and their authority once on campus, are thus of concern to every administrator. The role of local police on campus depends on a mixture of considerations: the state and local law of the jurisdiction, federal constitutional limitations on police powers, the adequacy of the institution's own security services, and the terms of any explicit or implicit understanding between local police and campus authorities.

If the institution has its own uniformed security officers, administrators must decide what working relationships these officers will have with local police. This decision will depend partly on the extent of the security officers' authority, especially regarding arrests, searches, and seizures—authority that should also be carefully delineated (see generally Section 8.6.1). Similarly, administrators must understand the relationship between arrest and prosecution in local courts, on the one hand, and campus disciplinary proceedings on the other (see Section 9.1). Although administrators cannot make crime an internal affair by hiding evidence of crime from local police, they may be able to assist local law enforcement officials in determining prosecution priorities. Campus and local officials may also be able to cooperate in determining whether a campus proceeding should be stayed pending the outcome of a court proceeding, or vice versa.

The powers of local police are circumscribed by various federal constitutional provisions, particularly the Fourth Amendment strictures on arrests, searches, and seizures. These provisions limit local police authority on both public and private campuses. Under the Fourth Amendment, local police usually must obtain a warrant before arresting or searching a member of the academic community or searching or seizing any private property on the campus (see Section 8.4.2). On a private institution's campus, nearly all the property may be private, and local police may need a warrant or the consent of whoever effectively controls the property before entering most areas of the campus. On a public institution's campus, it is more difficult to determine which property would be considered public and which private, and thus more difficult to determine when local police must have a warrant or consent prior to entry. In general, for both public and private institutions, police will need a warrant or consent before entering any area in which members of the academic community have a "reasonable expectation of privacy" (see generally *Katz v. United States*, 389 U.S. 347 (1967)). The constitutional rules and concepts are especially complex in this area, however; and administrators should consult counsel whenever questions arise concerning the authority of local police on campus.

In *People v. Dickson*, 154 Cal. Rptr. 116 (Cal. Ct. App. 1979), the court considered the validity of a warrantless search of a chemistry laboratory conducted by local police and campus security officers at the Bakersfield campus of California State University. The search uncovered samples of an illegal drug and materials used in its manufacture—evidence that led to the arrest and conviction of the defendant, a chemistry professor who used the laboratory. The court upheld the search and the conviction because, under the facts of the case (particularly facts indicating ready access to the laboratory by many persons,

including campus police), the professor had no “objectively reasonable expectation of privacy” in his laboratory.

Under a similar rationale, the court in *Commonwealth v. Tau Kappa Epsilon*, 560 A.2d 786 (Pa. Super. Ct. 1989), rejected the argument that undercover police were required to obtain a search warrant before they entered a fraternity party. Two undercover officers, recent graduates of Pennsylvania State University, had entered parties at eleven fraternities and observed the serving of beer to minors. When fraternities were convicted of serving beer to minors, they appealed the convictions, arguing that the police officers’ warrantless entry violated the Fourth Amendment. The court disagreed:

Security was so lax as to be virtually nonexistent; a person could enter and be furnished beverages almost at will. Under these circumstances, the fraternities could be found to have consented to the entry of [the police] and to have surrendered any reasonable expectation of privacy with respect to the events occurring in their houses [560 A.2d at 791].<sup>19</sup>

That these particular searches were upheld even though the officers did not procure a warrant, however, does not mean that local police forces may routinely dispense with the practice of obtaining warrants. In circumstances where the person has a reasonable expectation of privacy that would be invaded by the search, procuring a warrant or the consent of the person to be searched will generally be required.

In 1980, Congress enacted legislation that limits police search and seizure activities on college campuses. The legislation, the Privacy Protection Act of 1980 (42 U.S.C. § 2000aa *et seq.*), was passed in part to counter the U.S. Supreme Court’s decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). In *Zurcher*, the Palo Alto, California, Police Department had obtained a warrant to search the files of the *Stanford Daily*, a student newspaper, for photographs of participants in a demonstration during which several police officers had been assaulted. The lower court found probable cause to believe that the *Stanford Daily*’s files did contain such photographs, but no probable cause to believe that the newspaper itself was engaged in any wrongdoing. The U.S. Supreme Court held that the *Stanford Daily*, even though an innocent third party and even though engaged in publication activities, had no First or Fourth Amendment rights to assert against the search warrant.

The Privacy Protection Act’s coverage is not confined to newspapers, the subject of the *Zurcher* case. As its legislative history makes clear, the Act also protects scholars and other persons engaged in “public communication”—that is, the “flow of information to the public” (see S. Rep. No. 874, 96th Cong., 2d Sess., in 4 *U.S. Code Cong. & Admin. News* 3950, 3956 (1980)).

Section 101(a) of the Act pertains to the “work product materials” of individuals intending “to disseminate to the public a newspaper, book, broadcast,

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<sup>19</sup>The court’s decision was subsequently reversed by the Pennsylvania Supreme Court, but on other grounds not involving the constitutionality of the search (609 A.2d 791 (Pa. 1992)).

or other similar form of public communication.” The section prohibits the searching for or seizure of the work product of such individuals by any “government officer or employee [acting] in connection with the investigation or prosecution of a criminal offense.” There are several exceptions, however, to the general prohibition in Section 101(a). Search and seizure of work product material is permitted (1) where “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate” and this offense does not consist of “the receipt, possession, communication, or withholding of such materials”; (2) where there is probable cause to believe that the possessor has committed or is committing an offense consisting “of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data” prohibited under specified provisions of national security laws; and (3) where “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.”

Section 101(b) of the Act covers “documentary materials, other than work product materials.” This section prohibits search and seizure of such materials in the same way that Section 101(a) prohibits search and seizure of work product. The same exceptions to the general prohibition also apply. There are two additional exceptions unique to Section 101(b), under which search and seizure of documentary materials is permitted if:

- (3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; or
- (4) such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and—
  - (A) all appellate remedies have been exhausted; or
  - (B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

Section 106 of the Act authorizes a civil suit for damages for any person subjected to a search or seizure that is illegal under Section 101(a) or 101(b).

The Act’s language and legislative history clearly indicate that the Act applies to local and state, as well as federal, government officers and employees. It thus limits the authority of city, town, and county police officers both on campus and in off-campus investigations of campus scholars or journalists. The Act limits police officers and other government officials, however, only when they are investigating criminal, as opposed to civil, offenses. Scholars and journalists thus are not protected, for example, from the seizure of property to satisfy outstanding tax debts or from the regulatory inspections or compliance reviews conducted by government agencies administering civil laws. Moreover, the Act’s legislative history makes clear that traditional subpoena powers and limitations are untouched by the Act (see S. Rep. No. 874, 96th Cong., 2d Sess., in 4 *U.S. Code Cong. & Admin. News* 3950, 3956–60

(1980)). (Subpoenas of scholarly information are discussed in Section 7.7.3 of this book.)

Different problems arise when local police enter a campus not to make an arrest or conduct a search but to engage in surveillance of members of the campus community. In *White v. Davis*, 533 P.2d 222 (Cal. 1975), a history professor at UCLA sued the Los Angeles police chief to enjoin the use of undercover police agents for generalized surveillance in the university. Unidentified police agents had registered at the university and compiled dossiers on students and professors based on information obtained during classes and public meetings. The California Supreme Court held that the surveillance was a *prima facie* violation of students' and faculty members' First Amendment freedoms of speech, assembly, and association, as well as a violation of the "right-to-privacy" provision of the California constitution. Such police actions could be justifiable only if they were necessary to accomplish a compelling state interest. The court returned the case to the trial court to determine whether the police could prove such a justification.

The California Supreme Court's opinion differentiates the First Amendment surveillance problem from the more traditional Fourth Amendment search and seizure problem:

The most familiar limitations on police investigatory and surveillance activities, of course, find embodiment in the Fourth Amendment of the federal Constitution and article I, section 13 (formerly art. I, § 19) of the California constitution. On numerous occasions in the past, these provisions have been applied to preclude specific ongoing police investigatory practices. Thus, for example, the court in *Wirin v. Parker*, 48 Cal. 2d 890, 313 P.2d 844, prohibited the police practice of conducting warrantless surveillance of private residences by means of concealed microphones. . . .

Unlike these past cases involving the limits on police surveillance prescribed by the constitutional "search-and-seizure" provisions, the instant case presents the more unusual question of the limits placed upon police investigatory activities by the guarantees of freedom of speech (U.S. Const. 1st and 14th Amends.; Cal. Const., art. I, § 2). As discussed below, this issue is not entirely novel; to our knowledge, however, the present case represents the first instance in which a court has confronted the issue in relation to ongoing police surveillance of a university community.

Our analysis of the limits imposed by the First Amendment upon police surveillance activities must begin with the recognition that with respect to First Amendment freedoms "the Constitution's protection is not limited to direct interference with fundamental rights" (*Healy v. James* (1972) 408 U.S. 169, 183 . . .). Thus, although police surveillance of university classrooms and organizations' meetings may not constitute a direct prohibition of speech or association, such surveillance may still run afoul of the constitutional guarantee if the effect of such activity is to chill constitutionally protected activity. . . .

As a practical matter, the presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students [533 P.2d at 228-29].



The court also emphasized the special danger that police surveillance poses for academic freedom:

The threat to First Amendment freedoms posed by any covert intelligence gathering network is considerably exacerbated when, as in the instant case, the police surveillance activities focus upon university classrooms and their environs. As the United States Supreme Court has recognized time and again: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (*Shelton v. Tucker*, 364 U.S. 479, 487 . . . (1960)).

The police investigatory conduct at issue unquestionably poses . . . [a] debilitating . . . threat to academic freedom. . . . According to the allegations of the complaint, which for purposes of this appeal must be accepted as true, the Los Angeles Police Department has established a network of undercover agents which keeps regular check on discussions occurring in various university classes. Because the identity of such police officers is unknown, no professor or student can be confident that whatever opinion he may express in class will not find its way into a police file. . . . The crucible of new thought is the university classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian regimes that so often condemns developments in art, science, and politics is but a step removed from the inchoate surveillance of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy [533 P.2d at 229–31].

The principles of *White v. Davis* would apply equally to local police surveillance at private institutions. As an agency of government, the police are prohibited from violating any person’s freedom of expression or right to privacy under the federal and state constitutions, whether on a public campus or a private one.<sup>20</sup>

## ***Sec. 11.6. Community Access to the College’s Campus***

***11.6.1. Public versus private institutions.*** Postsecondary institutions have often been the locations for many types of events that attract people from the surrounding community and sometimes from other parts of the state, country, or world. Because of their capacity for large audiences and the sheer numbers of students and faculty and staff members on campus every day, postsecondary institutions provide an excellent forum for lectures, conferences,

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<sup>20</sup>The right-to-privacy reasoning used in *White v. Davis* would apply only to states that recognize an individual right to privacy similar to that created under the California constitution. The applicability of the case’s First Amendment reasoning may be limited to states whose courts would grant professors or students standing to raise claims of illegal surveillance. The *White* plaintiffs obtained standing under a California “taxpayer standing” statute. They apparently would not have succeeded in the federal court, since the U.S. Supreme Court has held, in *Laird v. Tatum*, 408 U.S. 1 (1972), that government surveillance, standing alone, does not cause the type of specific harm necessary to establish federal court standing.

and exhibits, as well as leafleting, posting of notices, circulation of petitions, and other kinds of information exchanges. In addition, cultural, entertainment, and sporting events attract large numbers of outside persons. The potential commercial market presented by concentrations of student consumers may also attract entrepreneurs to the campus, and the potential labor pool that these students represent may attract employment recruiters. Whether public or private, postsecondary institutions have considerable authority to determine how and when their property will be used for such events and activities and to regulate access by outside persons. (Regarding private institutions, see *Commonwealth of Pennsylvania v. Downing*, 511 A.2d 792 (Pa. 1986).) Although a public institution's authority is more limited than that of a private institution, as explained below, the case of *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (discussed in Section 11.6.3 below), indicates that state constitutions (or state statutes) may sometimes limit private as well as public institutions, and thus may diminish the distinction in some states between their respective authority to deny access to outsiders seeking to engage in expressive activities.

Both private and public institutions customarily have ownership or leasehold interests in their campuses and buildings—interests protected by the property law of the state. Subject to this statutory and common law, both types of institutions have authority to regulate how and by whom their property is used.<sup>21</sup> Typically, an institution's authority to regulate use by its students and faculty members is limited by the contractual commitments it has made to these groups (see Sections 6.2 & 8.1.3). Thus, for instance, students may have contractual rights to the reasonable use of dormitory rooms and the public areas of residence halls or of campus libraries and study rooms; and faculty members may have contractual rights to the reasonable use of office space, classrooms, laboratories, and studios. For the outside community, however, such contractual rights usually do not exist.

A public institution's authority to regulate the use of its property is further limited by the federal Constitution, in particular the First Amendment, which may provide rights of access to institutional property not only to students and faculty (see, for example, Sections 9.5.3 & 9.5.4) but also to the outside community (see, for example, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)). As the *Lamb's Chapel* case illustrates, the "public forum doctrine" (Section 9.5.2) is especially important in determining the extent to which particular institutional property is open to outsiders for First Amendment expressive activities. Although the public forum doctrine provides First Amendment access rights for outsiders in some circumstances, it also provides substantial leeway for public institutions to limit outsiders' access to the campus for expressive purposes (see, for example, *Bourgault v. Yudof*, 316 F.

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<sup>21</sup>But institutions are also subject to the tort law of the state when the use of their property leads to injuries to outsiders. For illustrative cases concerning negligence, see *Hayden v. University of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999); *Rothstein v. City University of New York*, 562 N.Y.S.2d 340 (N.Y. Ct. Claims 1990), *affirmed*, 599 N.Y.S.2d 39 (N.Y. App. Div. 1993); *Bearman v. University of Notre Dame*, 453 N.E.2d 119 (Ind. Ct. App. 1983); and see generally Section 3.3.2.1 of this book.

Supp. 2d 411 (N.D. Tex. 2004), *affirmed without opinion*, 2005 WL 3332907, December 8, 2005). Various cases in subsections 11.6.3 and 11.6.4 below illustrate these roles of the public forum doctrine. Although the doctrine does not apply generally to private institutions, it would apply to the extent that public streets or sidewalks traverse or border a private institution's campus. In this circumstance, the public forum doctrine would prohibit—or at least would require that the government prohibit—the private institution from regulating outsiders' access to the public streets and sidewalks because they are “traditional public forums” (see Section 9.5.2).

A public institution's authority over access to its property may also be limited or channeled by state statutes and regulations specifically applicable to state educational institutions or their property. Like constitutional limitations, statutory and regulatory limits may provide access rights to outsiders as well as to students and faculty. Subsections 11.6.2 and 11.6.3 below provide examples of such statutes and regulations. As the trespass cases in subsection 11.6.3 illustrate, these state laws may themselves become subject to constitutional challenge under the First Amendment or the due process clause.

Subsections 11.6.2 to 11.6.4 explore various statutes, regulations, and constitutional considerations that affect outsiders' access to the property of postsecondary institutions.

**11.6.2. Exclusion of speakers and events.** Administrators may seek to exclude particular speakers or events from campus in order to prevent disruption of campus activities, to avoid hate mongering and other offensive speech (see Robert O'Neil, “Hateful Messages That Force Free Speech to the Limit,” *Chron. Higher Educ.*, February 16, 1994, A52), or to protect against other perceived harms. Such actions inevitably precipitate clashes between the administration and the students or faculty members who wish to invite the speaker or sponsor the event, or between the administration and the prospective speakers and participants. These clashes have sometimes resulted in litigation. The rights at issue may be those of the prospective outside speaker (the right to speak) or those of the students and faculty members wishing to hear the speaker (the “right to receive” information). When the institution excluding the speaker or event is a public institution, these rights can be asserted as First Amendment free speech rights. (See generally Sections 7.1.1, 7.1.4, 8.1.4, 9.5, & 9.6 of this book.) Occasionally the rights of outsiders who wish to hear the speaker or attend the event may also become involved. In *Brown v. Board of Regents of the University of Nebraska*, 640 F. Supp. 674 (D. Neb. 1986), for example, a university had cancelled a controversial film that was scheduled to be shown in an on-campus theater open to the public. Outsiders who wished to view the film sued the university and prevailed when the court recognized their First Amendment “right to receive information.”

Under the First Amendment, administrators of public institutions may reasonably regulate the time, place, and manner of speeches and other communicative activities engaged in by outside persons. Problems arise when these basic rules of order are expanded to include regulations under which speakers

or events can be banned because of the content of the speech or the political affiliations or persuasions of the participants.<sup>22</sup> Such regulations are particularly susceptible to judicial invalidation because they are prior restraints on speech (see Section 9.5.4). *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), is an illustrative example. The Board of Trustees for the Institutions of Higher Learning of the State of Mississippi promulgated rules providing, in part, that “all speakers invited to the campus of any of the state institutions of higher learning must first be investigated and approved by the head of the institution involved and when invited the names of such speakers must be filed with the Executive Secretary of the Board of Trustees.” The regulations were amended several times to prohibit “speakers who will do violence to the academic atmosphere,” “persons in disrepute from whence they come,” persons “charged with crime or other moral wrongs,” any person “who advocates a philosophy of the overthrow of the United States,” and any person “who has been announced as a political candidate or any person who wishes to speak on behalf of a political candidate.” In addition, political or sectarian meetings sponsored by any outside organization were prohibited.

When the board, under the authority of these regulations, prevented political activists Aaron Henry and Charles Evers from speaking on any Mississippi state campus, students joined faculty members and other persons as plaintiffs in an action to invalidate the regulations. A special three-judge court struck down the regulations because they created a prior restraint on the students’ and faculty members’ First Amendment right to hear speakers. Not all speaker bans, however, are unconstitutional under the court’s reasoning. When the speech “presents a ‘clear and present danger’ of resulting in serious substantive evil,” a ban would not violate the First Amendment:

For purpose of illustration, we have no doubt that the college or university authority may deny an invitation to a guest speaker requested by a campus group if it reasonably appears that such person would, in the course of his speech, advocate (1) violent overthrow of the government of the United States, the state of Mississippi, or any political subdivision thereof; (2) willful destruction or seizure of the institution’s buildings or other property; (3) disruption or impairment, by force, of the institution’s regularly scheduled classes or other educational functions; (4) physical harm, coercion, intimidation or other invasion of lawful rights of the institution’s officials, faculty members, or students; or (5) other campus disorder of violent nature. In drafting a regulation so providing, it must be made clear that the “advocacy” prohibited must be of the kind which prepares the group addressed for imminent action and steels it to such action, as opposed to the abstract espousal of the moral propriety of a course of action by resort to force; and there must be not only advocacy to action but also a reasonable apprehension of imminent danger to the essential functions and purposes of the institution, including the safety of its property and the protection of its officials, faculty members, and students [306 F. Supp. at 973–74].

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<sup>22</sup>Cases are collected in Jeffrey F. Ghent, Annot., “Validity, Under Federal Constitution, of Regulation for Off-Campus Speakers at State Colleges and Universities—Federal Cases,” 5 A.L.R. Fed. 841.

The court in *Stacy v. Williams* also promulgated a set of “Uniform Regulations for Off-Campus Speakers,” which, in its view, complied with the First Amendment (306 F. Supp. at 979–80). These regulations provide that all speaker requests come from a recognized student or faculty group, thus precluding any outsider’s insistence on using the campus as a forum. This approach accords with the court’s basis for invalidating the regulations: the rights of students or faculty members to hear a speaker. In *Molpus v. Fortune*, 432 F.2d 916 (5th Cir. 1970), the appellate court applied the *Stacy v. Williams* regulations to an administrator’s refusal to permit a student group to invite a student speaker from another campus in the state. The court invalidated the administrator’s action, holding that the university could not show that the speaker would create a clear and present danger to campus operations.

Besides meeting a “clear and present danger” test—or more precisely, an incitement test (as established by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and relied on by the court in *Brooks v. Auburn University*, below)—speaker ban regulations must use language that is sufficiently clear and precise to be understood by the average reader. Ambiguous or vague regulations run the risk of being struck down, under the First and Fourteenth Amendments, as “void for vagueness” (see generally Sections 9.1.3, 9.2.2, & 9.5.3 of this book). In *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968), a special three-judge court relied on this ground to invalidate state statutes and University of North Carolina regulations governing the use of university facilities by any speaker who is a “known member of the Communist party,” is “known to advocate the overthrow of the Constitution of the United States or the State of North Carolina,” or has “pleaded the Fifth Amendment” in response to questions relating to the Communist Party or other subversive organizations.

The absence of rules can be just as risky as poorly drafted ones, since either situation leaves administrators and affected persons with insufficient guidance. *Brooks v. Auburn University*, 412 F.2d 1171 (5th Cir. 1969), is illustrative. A student organization, the Human Rights Forum, had requested that the Reverend William Sloan Coffin speak on campus. After the request was approved by the Public Affairs Seminar Board, the president of Auburn overruled the decision because the Reverend Coffin was “a convicted felon and because he might advocate breaking the law.” Students and faculty members filed suit contesting the president’s action, and the U.S. Court of Appeals upheld their First Amendment claim:

Attributing the highest good faith to Dr. Philpott in his action, it nevertheless is clear under the prior restraint doctrine that the right of the faculty and students to hear a speaker, selected as was the speaker here, cannot be left to the discretion of the university president on a pick and choose basis. As stated, Auburn had no rules or regulations as to who might or might not speak and thus no question of a compliance with or a departure from such rules or regulations is presented. This left the matter as a pure First Amendment question; hence the basis for prior restraint. Such a situation of no rules or regulations may be equated with a licensing system to speak or hear and this has been long prohibited.

It is strenuously urged on behalf of Auburn that the president was authorized in any event to bar a convicted felon or one advocating lawlessness from the campus. This again depends upon the right of the faculty and students to hear. We do not hold that Dr. Philpott could not bar a speaker under any circumstances. Here there was no claim that the Reverend Coffin's appearance would lead to violence or disorder or that the university would be otherwise disrupted. There is no claim that Dr. Philpott could not regulate the time or place of the speech or the manner in which it was to be delivered. The most recent statement of the applicable rule by the Supreme Court, perhaps its outer limits, is contained in the case of *Brandenburg v. Ohio*, [395 U.S. 444]: . . . "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." . . . There was no claim that the Coffin speech would fall into the category of this exception [412 F.2d at 1172-73].

A quite different type of "speaker ban" was at issue in *DeBauche v. Trani*, 191 F. 3d 499 (4th Cir. 1999). The context was a state political campaign in which a public university provided facilities for a candidate's debate held on (and broadcast from) the campus. The debaters were the Democratic and Republican candidates for governor of Virginia; the Reform Party candidate was excluded from the debate. She sued various parties, including the university and the university president, in effect claiming she had been banned from speaking in the debate, in violation of her First Amendment rights to free speech. The court framed the free speech issue as "whether a candidate debate held by a state entity was a 'public forum' such that viewpoint discrimination would be restricted by the Constitution." (See generally the *Rosenberger* case, Section 10.1.5, on public forum and viewpoint discrimination.) The Fourth Circuit avoided any thorough analysis of this issue on the merits by accepting the university's and president's arguments for Eleventh Amendment immunity (see Section 3.5 of this book) and Section 1983 qualified immunity (see Section 4.7.4 of this book). But the court did provide some guidance by stating that the leading precedent to apply is *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), in which the U.S. Supreme Court used the First Amendment public forum doctrine (see generally Section 9.5.2) and the "nonpublic forum" category to invalidate a public broadcaster's decision to exclude a minor party candidate from a televised debate. The Court in *Forbes* also made clear that government entities could still exclude candidates from political campaign debates if the exclusion is a "reasonable, viewpoint-neutral exercise of journalistic discretion" (523 U.S. at 683, quoted in *DeBauche*, 191 F.3d at 506). If the debates were not broadcast or otherwise transmitted by the media, the same guideline would apparently apply, except that the institution's academic or administrative discretion would be substituted for "journalistic discretion."

In contrast to the speaker cases, the case of *Reproductive Rights Network v. President of the University of Massachusetts*, 699 N.E.2d 829 (Mass. App. Ct. 1998), concerns administrators' attempts to exclude an event, rather than a particular speaker, from the campus. The case illustrates how a public institution's

authority to regulate use of its property (here a campus building and meeting rooms) may be limited by the First Amendment, and also illustrates how access claims and free speech claims of outsiders may be strengthened when students or faculty members make property use requests on their behalf.

In the *Reproductive Rights Network* case, several outside organizations advocating pro-choice and gay rights positions, along with various faculty members and graduate students at the University of Massachusetts at Boston, had sought to use a campus classroom for two meetings called for the purpose of planning a demonstration to be held at a cathedral in Boston. A faculty member reserved the room for the meetings, and the public was invited to attend. Before the second meeting could be held, however, university officials closed and evacuated the building, locked it, and posted campus police officers as security guards. When the plaintiffs filed suit challenging this action, the trial court issued, and the appellate court affirmed, an injunction against university officials. According to these courts, the officials' actions were in response to the content of the planned meeting and the organizations' advocacy of particular positions. Moreover, the university's room reservation policy did not include any standards to limit administrators' discretion to determine when room use could be denied. The university's action, therefore, violated the First Amendment's free speech clause and the comparable provision of the Massachusetts state constitution.

Under cases such as those above, regulations concerning outside speakers and events present sensitive legal issues for public institutions, and sensitive policy issues for both public and private institutions. If such regulations are determined to be necessary, they should be drafted with extreme care and with the aid of counsel. The cases clearly permit public institutions to enforce reasonable regulations of "the time or place of the speech or the manner in which it . . . [is] delivered," as the *Brooks* opinion notes. But excluding a speech or event because of its content is permissible only in the narrowest of circumstances, as the *Stacy* and *Brooks* cases indicate; and regulating speech or an event because of viewpoint is virtually never permissible, as the *DeBauche* and *Reproductive Rights Network* cases indicate. The regulations promulgated by the court in *Stacy* provide useful guidance in drafting legally sound regulations. The five First Amendment principles set out in Section 9.6.2 of this book, and the regulatory strategies set out in Section 9.6.3, may also be helpful to administrators and counsel drafting speaker and event regulations.

**11.6.3. Trespass statutes and ordinances, and related campus regulations.** States and local governments often have trespass or unlawful entry laws that limit the use of a postsecondary institution's grounds and facilities by outsiders. (See, for example, Cal. Penal Code §§ 626.2, 626.4, 626.6, & 626.7; Mass. Gen. Laws, chap. 266, §§ 120, 121A, & 123.) Such statutes or ordinances typically provide that offenders are subject to ejection from the property and that violation of an order to leave, made by an authorized person, is punishable as a criminal misdemeanor and/or is subject to damage awards and injunctive relief in a civil suit. Counsel for institutions should carefully examine these laws, and the court decisions interpreting them, to

determine each law's particular coverage. Some laws may cover all types of property; others may cover only educational institutions. Some laws may cover all postsecondary institutions, public or private; others may apply only to public or only to private institutions. Some laws may be broad enough to restrict members of the campus community under some circumstances; others may be applicable only to outsiders. There may also be technical differences among statutes and ordinances in their standards for determining what acts will be considered a trespass or when an institution's actions will constitute implied consent to entry. (See generally *People v. Leonard*, 465 N.E.2d 831 (N.Y. 1984), concerning the applicability of state trespass law to the exclusion of outsiders via a *persona non grata* letter.) There may also be differences concerning when the alleged trespasser has a "privilege" to be on the institution's property. The issue of "privilege" is often shaped by consideration of the public forum doctrine (see Section 9.5.2). If the alleged trespasser sought access to the campus property for expressive purposes, and if the property were considered to be a traditional public forum or a designated forum open to outsiders, the speaker will generally be considered to have a "privilege" to be on the property, and the trespass law cannot lawfully be used to exclude or eject the speaker from the forum property (see *State of Ohio v. Spingola*, 736 N.E.2d 48 (Ohio 1999)). When a trespass law is invoked, there may also be questions of whether or when local police or campus security officers have probable cause to arrest the alleged trespasser. The presence of such probable cause may be a defense to claims of false arrest, false imprisonment, or other torts that the alleged trespasser may later assert against the institution or the arresting officer. (See *Orin v. Barclay*, 272 F.3d 1207, 1218–19 (majority) & 1219–20 (concurrence) (9th Cir. 2001).)

A number of reported cases have dealt with the federal and state constitutional limitations on a state or local government's authority to apply trespass laws or related regulations to the campus setting.<sup>23</sup> *Braxton v. Municipal Court*, 514 P.2d 697 (Cal. 1973), is an early, instructive example. Several individuals had demonstrated on the San Francisco State campus against the publication of campus newspaper articles that they considered "racist and chauvinistic." A college employee notified the protestors that they were temporarily barred from campus. When they disobeyed this order, they were arrested and charged under Section 626.4 of the California Penal Code. This statute authorized "the chief administrative officer of a campus or other facility of a community college, state college, or state university or his designate" to temporarily bar a person from the campus if there was "reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility." The protestors argued that the state trespass statute was unconstitutional for reasons of overbreadth and vagueness (see Sections 9.2.2, 9.5.3, & 9.6.2 of this book).

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<sup>23</sup>Cases are collected in Jeffrey F. Ghent, Annot., "Validity and Construction of Statute or Ordinance Forbidding Unauthorized Persons to Enter upon or Remain in School Building or Premises," 50 A.L.R.3d 340.



The California Supreme Court rejected the protestors' argument, but did so only after narrowly construing the statute to avoid constitutional problems. Regarding overbreadth, the court reasoned:

Without a narrowing construction, section 626.4 would suffer First Amendment overbreadth. For example, reasoned appeals for a student strike to protest the escalation of a war, or the firing of the football coach, might "disrupt" the "orderly operation" of a campus; so, too, might calls for the dismissal of the college president or for a cafeteria boycott to protest employment policies or the use of nonunion products. Yet neither the "content" of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquillity of a campus or offends the tastes of school administrators or the public. Protest may disrupt the placidity of the vacant mind just as a stone dropped in a still pool may disturb the tranquillity of the surface waters, but the courts have never held that such "disruption" falls outside the boundaries of the First Amendment. . . .

Without a narrowing construction, section 626.4 would also suffer overbreadth by unnecessarily restricting conduct enmeshed with First Amendment activities. Although conduct entwined with speech may be regulated if it is completely incompatible with the peaceful functioning of the campus, section 626.4 on its face fails to distinguish between protected activity such as peaceful picketing or assembly and unprotected conduct that is violent, physically obstructive, or otherwise coercive. . . .

In order to avoid the constitutional overbreadth that a literal construction of section 626.4 would entail, we interpret the statute to prohibit only incitement to violence or conduct physically incompatible with the peaceful functioning of the campus. We agree with the Attorney General in his statement: "The word 'disrupt' is commonly understood to mean a physical or forcible interference, interruption, or obstruction. In the campus context, disrupt means a *physical* or *forcible* interference with normal college activities."

The disruption must also constitute "a substantial and material threat" to the orderly operation of the campus or facility (*Tinker v. Des Moines School District*, 393 U.S. 503, 514 (1969)). The words "substantial and material" appear in the portion of the statute which authorizes reinstatement of permission to come onto the campus (Penal Code § 626.4(c)). Accordingly, we read those words as expressing the legislature's intent as to the whole function of the statute; we thus construe section 626.4 to permit exclusion from the campus only of one whose conduct or words are such as to constitute, or incite to, a substantial and material physical disruption incompatible with the peaceful functioning of the academic institution and of those upon its campus. Such a substantial and material disruption creates an emergency situation justifying the statute's provision for summary, but temporary, exclusion [514 P.2d at 701, 703-5].

The court then also rejected the vagueness claim:

Petitioners point out that even though the test of substantial and material physical disruption by acts of incitement of violence constitutes an acceptable constitutional standard for preventing overbroad applications of the statute in specific cases, the enactment still fails to provide the precision normally required

in criminal legislation. Thus, for example, persons subject to summary banishment must guess at *what* must be disrupted (i.e., classes or the attendance lines for athletic events), and *how* the disruption must take place (by picketing or by a single zealous shout in a classroom or by a sustained sit-in barring use of a classroom for several days).

Our examination of the legislative history and purposes of section 626.4 reveals, however, that the Legislature intended to authorize the extraordinary remedy of summary banishment only when the person excluded has committed acts illegal under other statutes; since these statutes provide ascertainable standards for persons seeking to avoid the embrace of section 626.4, the instant enactment is not void for vagueness [514 P.2d at 705].

In comparison with *Braxton*, the court in *Grody v. State*, 278 N.E.2d 280 (Ind. 1972), did invalidate a state trespass law due to its overbreadth. The law provided that “[i]t shall be a misdemeanor for any person to refuse to leave the premises of any institution established for the purpose of the education of students enrolled therein when so requested, regardless of the reason, by the duly constituted officials of any such institution” (Ind. Code Ann. § 10-4533). As the court read the law:

This statute attempts to grant to some undefined school “official” the power to order cessation of *any* kind of activity whatsoever, by *any* person whatsoever, and the official does not need to have any special reason for the order. The official’s power extends to teachers, employees, students, and visitors and is in no way confined to suppressing activities that are interfering with the orderly use of the premises. This statute empowers the official to order any person off the premises because he does not approve of his looks, his opinions, his behavior, no matter how peaceful, or *for no reason at all*. Since there are no limitations on the reason for such an order, the official can request a person to leave the premises solely because the person is engaging in expressive conduct even though that conduct may be clearly protected by the First Amendment. If the person chooses to continue the First Amendment activity, he can be prosecuted for a crime under § 10-4533. This statute is clearly overbroad [278 N.E.2d at 282–83].

The court therefore held the trespass law to be facially invalid under the free speech clause.

Even if a trespass statute or ordinance does not contain the First Amendment flaws identified in *Braxton* and *Grody*, it may be challenged as a violation of Fourteenth Amendment procedural due process. The court in *Braxton* (above), 514 P.2d at 700, ruled in favor of the plaintiffs’ due process arguments, as did the courts in *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971), and *Watson v. Board of Regents of the University of Colorado*, 512 P.2d 1162, 1165 (Colo. 1973). In *Watson*, for example, the plaintiff was a consultant to the University of Colorado Black Student Alliance, with substantial ties to the campus. The university had rejected his application for admission. Believing that a particular admissions committee member had made the decision to reject him, the plaintiff threatened his safety. The university president then notified the plaintiff in writing that he would no longer be allowed on campus. Nevertheless, the

plaintiff returned to campus and was arrested for trespass. Relying on *Dunkel v. Elkins*, the court agreed that the exclusion violated procedural due process:

Where students have been subjected to disciplinary action by university officials, courts have recognized that procedural due process requires—prior to imposition of the disciplinary action—adequate notice of the charges, reasonable opportunity to prepare to meet the charges, an orderly administrative hearing adapted to the nature of the case, and a fair and impartial decision. . . . The same protection must be afforded nonstudents who may be permanently denied access to university functions and facilities.

As part of a valid Regent’s regulation of this type, in addition to providing for a hearing, there should be a provision for the person or persons who will act as adjudicator(s).

In the present posture of this matter we should not attempt to “spell out” all proper elements of such a regulation. This task should be undertaken first by the regents. We should say, however, that when a genuine emergency appears to exist and it is impractical for university officials to grant a prior hearing, the right of nonstudents to access to the university may be suspended without a prior hearing, so long as a hearing is thereafter provided with reasonable promptness [512 P.2d at 1165].

The court in *Watson*, however, appears to overstate the case for procedural due process when it equates an outsider’s rights with those of students. The Fourteenth Amendment requires a hearing or other procedural protections only when the government has violated “property interests” or “liberty interests” (see generally Sections 6.6.1, 6.6.2, & 9.4.2). If a student is ejected from the campus, the ejection will usually infringe a property or liberty interest of the student; that is not necessarily the case, however, if a nonstudent is ejected. For example, in a more recent case, *Souders v. Lucero*, 196 F.3d 1040 (9th Cir. 1999), the court rejected an outsider’s claim to procedural due process protections.

The plaintiff in *Souders* was an alumnus of Oregon State University (OSU) who had been excluded from campus, based on several complaints that he was stalking female students. The women had pursued a procedure provided by the university’s Security Services and had obtained “Trespass on Campus Exclusion Orders.” When Souders appeared on the campus in violation of the orders, he was arrested by a campus security officer. Souders brought a Section 1983 action alleging that the university’s exclusion order deprived him of constitutionally protected liberty and property interests and violated Fourteenth Amendment procedural due process. His reasoning, apparently, was that the campus was a “public forum” under the First Amendment (see generally Section 9.4.2), and he therefore had a constitutionally protected interest in being there. But the court (citing *Widmar v. Vincent*, 454 U.S. 263, at 267, n.5, & 278) determined that a university campus, even when open to the general public, is not the same as traditional fora such as streets or parks. Thus, according to the court:

Souders’ argument—that he has a right to be on the OSU campus, regardless of his conduct, because he is a member of the general public and the campus is open to the public—goes too far. This cannot be the case. Whatever right he has to be on campus must be balanced against the right of the University to exclude

him. The University may preserve such tranquility as the facilities' central purpose requires. See Laurence H. Tribe, *American Constitutional Law* 690 (1980). Not only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it also has a duty to protect its students by imposing reasonable regulations on the conduct of those who come onto campus [196 F.3d at 1045].

The public forum argument having failed, the court concluded that “Souder has not established a constitutionally protected interest in having access to the University” and that, absent such an interest, “we need not decide whether the procedures employed in this case were adequate to afford . . . due process protection. . . .”

Postsecondary institutions may also have their own regulations that prohibit entry of outsiders into campus buildings or certain outside areas of the campus, or that provide for ejecting or banning outsiders from the campus in certain circumstances. For public institutions, such regulations are subject to the same federal constitutional restrictions as the state trespass statutes discussed above. In addition, if the institution's regulation were facially unconstitutional, or if the institution were to apply its regulation in an unconstitutional manner in a particular case, it would be impermissible for the institution to invoke a state trespass law or local ordinance to enforce its regulation. *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001), illustrates these principles.

In *Orin v. Barclay*, the court considered the constitutionality of a speech regulation prohibiting protestors from engaging in religious worship or instruction. The issue arose when members of the anti-abortion group Positively Pro-Life approached the interim dean of Olympic Community College (OCC), Richard Barclay, and asked for a permit to stage an event on the school's main quad. Barclay declined to grant the protestors a permit, but gave them permission to hold a demonstration provided they did not (1) breach the peace or cause a disturbance; (2) interfere with campus activities or access to school buildings; or (3) engage in religious worship or instruction. With the dean's permission, the protestors began their anti-abortion demonstration. After “four factious hours,” the protestors were asked to leave the campus. They refused, and at least one protestor, Benjamin Orin, was arrested for criminal trespass and failure to disperse. Orin subsequently sued Barclay, among others, under 42 U.S.C. § 1983 for violating his First Amendment rights, and the district court granted the defendants' motions for summary judgment.

The appellate court focused on the conditions that Barclay had imposed on the anti-abortion group's protest. The first two conditions—that the protestors not breach the peace or interfere with campus activities or access to school buildings—were permissible content-neutral regulations. “The first two conditions survive constitutional scrutiny because they do not distinguish among speakers based on the content of their message and they are narrowly tailored to achieve OCC's pedagogical purpose” (272 F.3d at 1215). However, the third condition, that the protestors refrain from religious worship or instruction, violated the First Amendment. The court held that Barclay had created a public forum by granting the protestors permission to demonstrate. Consequently, he

could not constitutionally limit the content of the protestors' speech by permitting secular, but prohibiting religious, speech. As the court explained:

The third condition imposed by Barclay constitutes a content-based regulation that we may uphold only if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." Barclay informed Orin that this condition was required by the Establishment Clause in order to maintain the separation of Church and State. The Supreme Court has ruled, however, that the First Amendment does not require public institutions to exclude religious speech from fora held open to secular speakers. In fact, it prohibits them from doing so.

In [*Widmar v. Vincent*, 454 U.S. 263 (1981)] . . . , [t]he Court [held] that allowing religious organizations the same access to school facilities enjoyed by secular organizations did not violate the Establishment Clause. Since the governmental interest that purported to justify regulation was based on a misunderstanding of the Establishment Clause, the Court struck the regulation down as a content-based regulation of First Amendment rights of assembly, free exercise, and free speech that was not narrowly tailored to serve a compelling governmental interest.

Barclay's "no religion" condition runs squarely afoul of *Widmar*. Having permitted Orin to conduct a demonstration on campus, Barclay could not, consistent with the First Amendment's free speech and free exercise clauses, limit his demonstration to secular content [272 F.2d at 1215–16].

The court therefore reversed the district court's grant of summary judgment to the defendants, and held that, based on the facts then in the record, the dean had violated the plaintiff's First Amendment rights and could become liable to the plaintiff in damages under Section 1983.

Other access cases concerning institutional regulations suggest, as *Orin v. Barclay* does, that the most contentious issues are likely to be First Amendment issues, especially free speech issues, and that the analysis will often turn on public forum considerations (see Section 9.5.2) and on the distinction between content-based and content-neutral regulations of speech. The public forum analysis applicable to outsiders' rights may differ from that for students' or faculty members' rights because institutions may establish limited forums (designated limited forums) that provide access for the campus community but not for outsiders. Overbreadth and vagueness analysis (as in the *Braxton* and *Grady* cases above) may also be pertinent in cases challenging institutional regulations.

In *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001), the court used forum analysis and viewpoint discrimination analysis in *protecting* an outsider who had posted notices on university bulletin boards. In *Mason v. Wolf*, 356 F. Supp. 2d 1147 (D. Colo. 2005), the court used forum analysis and time, place, and manner analysis in protecting an outside group seeking to have a demonstration on campus. In contrast, in *State v. Spingola*, above, the court used public forum analysis, content-neutral analysis, and vagueness analysis in *rejecting* the free speech claim of an outside preacher. The court in *Bourgault v. Yudof*, 316 F. Supp. 2d 411 (N.D. Tex. 2004), *affirmed without opinion*, 2005 WL 3332907 (December 8, 2005), used forum analysis and viewpoint discrimination analysis in *rejecting* a traveling evangelist's free speech challenge to University of

Texas System rules that provided no access to outsiders. And in *ACLU Student Chapter v. Mote*, 321 F. Supp. 2d 670 (D. Md. 2004), the court used forum analysis in upholding the validity of a campus policy that allowed limited access to outsiders.

Most of the litigation concerning trespass laws and campus access regulations, such as the cases above, has involved public institutions and has probed federal constitutional limits on states and public postsecondary institutions. The debate was extended to private institutions, however, by the litigation in *State v. Schmid*, 423 A.2d 615 (N.J. 1980), sometimes known as the *Princeton University* case.

In this case, a nonstudent and member of the United States Labor Party, Chris Schmid, was arrested and convicted of trespass for attempting to distribute political materials on the campus of Princeton University. Princeton's regulations required nonstudents and non-university-affiliated organizations to obtain permission to distribute materials on campus. No such requirement applied to students or campus organizations. The regulations did not include any provisions indicating when permission would be granted or what times, manners, or places of expression were appropriate. Schmid claimed that the regulations violated his rights to freedom of expression under both the federal Constitution and the New Jersey state constitution.

First addressing the federal constitutional claim under the First Amendment, the court acknowledged that the "state action" requirement (see Section 1.5.2), a predicate to the application of the First Amendment, "is not readily met in the case of a private educational institution." Extensively analyzing the various theories of state action and their applicability to the case, the court held that Princeton's exclusion of Schmid did not constitute state action under any of the theories.

Although, in the absence of a state action finding, the federal First Amendment could not apply to Schmid's claim, the court did not find itself similarly constrained in applying the state constitution. Addressing Schmid's state constitutional claim, the court determined that the state constitutional provisions protecting freedom of expression (even though similar to the First Amendment provision) could be construed more expansively than the First Amendment so as to reach Princeton's actions. The court reaffirmed that state constitutions are independent sources of individual rights; that state constitutional protections may surpass the protections of the federal Constitution; and that this greater expansiveness could exist even if the state provision is identical to the federal provision, since state constitutional rights are not intended to be merely mirror images of federal rights (see Section 1.4.2.1).

In determining whether the more expansive state constitutional provision protected Schmid against the trespass claim, the court balanced the "legitimate interests in private property with individual freedoms of speech and assembly":

The state constitutional equipoise between expressional rights and property rights must be . . . gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important

rights of speech, assembly, petition, and the like, private property itself remains protected under due process standards from untoward interferences with or confiscatory restrictions upon its reasonable use. . . .

On the other hand, it is also clear that private property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare. . . .

We are thus constrained to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property [423 A.2d at 629].

To strike the required balance, the court announced a “test” encompassing several “elements” and other “considerations”:

We now hold that, under the state constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its “normal” use, (2) the extent and nature of the public’s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multifaceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Even when an owner of private property is constitutionally obligated under such a standard to honor speech and assembly rights of others, private property rights themselves must nonetheless be protected. The owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity, and site for the individual exercise of expressional rights upon his property. It is at this level of analysis—assessing the reasonableness of such restrictions—that weight may be given to whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity. While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights [423 A.2d at 630].

Applying each of the three elements in its test to the particular facts concerning Princeton’s campus and Schmid’s activity on it, the court concluded that Schmid did have state constitutional speech and assembly rights that Princeton was obligated to honor:

The application of the appropriate standard in this case must commence with an examination of the primary use of the private property, namely, the campus and facilities of Princeton University. Princeton University itself has furnished the answer to this inquiry [in its university regulations] in expansively expressing its overriding educational goals, viz:

The central purposes of a university are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom. . . .

Free speech and peaceable assembly are basic requirements of the university as a center for free inquiry and the search for knowledge and insight.

No one questions that Princeton University has honored this grand ideal and has in fact dedicated its facilities and property to achieve the educational goals expounded in this compelling statement.

In examining next the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the university's expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the university. The university itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world"—that is, the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideas and objectives.

The further question is whether the expressional activities undertaken by the defendant in this case are discordant in any sense with both the private and public uses of the campus and facilities of the university. There is nothing in the record to suggest that Schmid was evicted because the purpose of his activities, distributing political literature, offended the university's educational policies. The reasonable and normal inference thus to be extracted from the record in the instant case is that defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the university's overall use of its property for educational purposes. Further, there is no indication that, even under the terms of the university's own regulations, Schmid's activities . . . directly or demonstrably "disrupt[ed] the regular and essential operations of the university" or that, in either the time, the place, or the manner of Schmid's distribution of the political materials, he "significantly infringed on the rights of others" or caused any interference or inconvenience with respect to the normal use of university property and the normal routine and activities of the college community [423 A.2d at 630-31].

Princeton, however, invoked the other considerations included in the court's test. It argued that, to protect its private property rights as an owner and its academic freedom as a higher education institution, it had to require that outsiders



have permission to enter its campus and that its regulations reasonably implemented this necessary requirement. The court did not disagree with the first premise of Princeton's argument, but it did disagree that Princeton's regulations were a reasonable means of protecting its interests:

In addressing this argument, we must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers, and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions (see, for example, *Healy v. James*, 408 U.S. at 180 . . . *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513–14 . . . (1969)). Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

In this case, however, the university regulations that were applied to Schmid . . . contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests of the university as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. . . .

In these circumstances, given the absence of adequate reasonable regulations, the required accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. . . . It follows that, in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's state constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus [423 A.2d at 632–33].

The court thus reversed Schmid's conviction for trespass.

Princeton sought U.S. Supreme Court review of the New Jersey court's decision. The university argued that the court's interpretation of *state* constitutional law violated its rights under *federal* law. Specifically, it claimed a First Amendment right to institutional academic freedom (see Section 7.1.6)<sup>24</sup> and a

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<sup>24</sup>The arguments for and against the existence of a private institution's institutional academic freedom right are well developed in the briefs of the parties and the *amici curiae*. Lawyers facing this important issue may still want to consult these briefs and the resources they cite. See particularly the Brief Amicus Curiae of the American Association of University Professors, filed August 20, 1981, in *Princeton University and State of New Jersey v. Chris Schmid*, No. 80-1576, U.S. Supreme Court, October Term 1980.

Fifth Amendment right to protect its property from infringement by government (here the New Jersey court). In a *per curiam* opinion, the Supreme Court declined to address the merits of Princeton's arguments, declaring the appeal moot (see this volume, Section 1.4.2.3) because Princeton had changed its regulations since the time of Schmid's conviction (*Princeton University and State of New Jersey v. Schmid*, 455 U.S. 100 (1982)). Although the Supreme Court therefore dismissed the appeal, the dismissal had no negative effect on the New Jersey court's opinion, which stands as authoritative law for that state.

The New Jersey Supreme Court's reasoning was subsequently approved and followed by the Pennsylvania Supreme Court in *Pennsylvania v. Tate*, 432 A.2d 1382 (Pa. 1981), in which the defendants had been arrested for trespassing at Muhlenberg College, a private institution, when they distributed leaflets on campus announcing a community-sponsored lecture by the then FBI director. In a later case, however, *Western Pennsylvania Socialist Workers 1982 Campaign*, 515 A.2d 1331 (1986), the Pennsylvania Supreme Court apparently limited its *Tate* ruling to situations in which the private institution has opened up the contested portion of its property for a use comparable to that of a public forum (515 A.2d at 1338). A few other states also have case law suggesting that their state constitution includes some narrow protections for certain speakers seeking to use private property (see the discussion in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 769–70 (N.J. 1994)).

*State v. Schmid* is a landmark case—the first to impose constitutional limitations on the authority of private institutions to exclude outsiders from their campuses. *Schmid* does not, however, create a new nationwide rule. The applicability of its analysis to private campuses in states other than New Jersey will vary, depending on the particular type of speech at issue, the particular individual rights clause in a state's constitution that is invoked, the existing precedents construing the clause's application to private entities, and the receptivity of a state's judges to the New Jersey court's view of the nature and use of private campuses. Even in New Jersey, the *Schmid* precedent does not create the same access rights to all private campuses; as *Schmid* emphasizes, the degree of access required depends on the primary use for which the institution dedicates its campus property and the scope of the public invitation to use that particular property. Nor does *Schmid* prohibit private institutions from regulating the activity of outsiders to whom they must permit entry. Indeed, the new regulations adopted by Princeton after Schmid's arrest were cited favorably by the New Jersey court. Although they were not at issue in the case, since they were not the basis of the trespass charge, the court noted that “these current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth.”

The revised Princeton regulations, which are set out in full in the court's opinion (423 A.2d at 617–18, n.2), thus provide substantial guidance for private institutions that may be subject to state law such as New Jersey's or that as a

matter of educational policy desire to open their campus to outsiders in some circumstances. In addition to consulting these regulations, administrators of private institutions who are dealing with access of outsiders should consult counsel concerning their own state constitution's rights clauses, the applicability of state trespass laws, and their institution's status under them.

#### **11.6.4. Soliciting and canvassing**

**11.6.4.1. Overview.** The university campus may be an attractive marketplace not only for speakers, pamphleteers, and canvassers conveying social, political, or religious messages, but also for companies selling merchandise to college students (see C. Shea, "Businesses Cash in on a Wide-Open Bazaar of Frenzied Consumers: The College Campus," *Chron. Higher Educ.*, June 16, 1993, A33). Whether the enterprising outsider wishes to develop a market for ideas or for commodities, the public institution's authority to restrict contact with its students is limited by the First Amendment. As in other circumstances, because of the First Amendment's applicability, a public institution's authority to regulate soliciting and canvassing is more limited than that of a private institution.

Historically, litigation and discussion of free speech have focused on rights attending the communication of political or social thought. Although the U.S. Supreme Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), made clear that the protection of the First Amendment likewise extends to purely "commercial speech," even when the communication is simply "I will sell you X at Y price," the degree of protection afforded commercial speech remains somewhat less than that afforded noncommercial speech.

The Supreme Court has consistently approved time, place, and manner restrictions on speech where they (1) are not based on the speech's "content or subject matter," (2) "serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information" (*Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); see also *Clark v. Community for Creative Non-Violence*, discussed in Section 9.5.3). Within these guidelines public institutions may subject both non-commercial and commercial speech to reasonable regulation of the time, place, and manner of delivery.<sup>25</sup> In addition, public institutions may regulate the content of commercial speech in some ways that would not be permissible for other types of speech.

Because public institutions have somewhat more leeway to regulate commercial speech and because, in general, courts require restrictions on speech to be "narrowly tailored" to the institution's interest, administrators and counsel may decide to regulate outsiders' commercial speech separately from its

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<sup>25</sup>Cases are collected in Donald M. Zupanec, Annot., "Validity of Regulation of College or University Denying or Restricting Right of Student to Receive Visitors in Dormitory," 78 A.L.R.3d 1109.

regulation of outsiders' noncommercial speech. In *Watchtower Bible & Tract Society v. Stratton, Ohio*, 536 U.S. 150 (2002), for instance, the Court invalidated a broad village ordinance requiring all door-to-door canvassers, regardless of their cause or purpose, to register with the mayor and carry a permit. This regulation, said the Court, was not "narrowly tailored" to the village's "important interests" in preventing fraud, deterring crime, or protecting residents' privacy. The Court explained, however, that had the ordinance applied "only to commercial activities and the solicitation of funds," it "arguably . . . would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud," and therefore have been valid.

**11.6.4.2. Commercial solicitation.** Several court decisions involving American Future Systems, Inc., a corporation specializing in the sale of china and crystal, address the regulation of commercial speech by a public university. In *American Future Systems v. Pennsylvania State University*, 618 F.2d 252 (3d Cir. 1980) (*American Future Systems I*), the plaintiff corporation challenged the defendant university's regulations on commercial activities in campus residence halls. The regulations in question barred "the conducting of any business enterprise for profit" in student residence halls except where an individual student invites the salesperson to his or her room for the purpose of conducting business only with that student. No rules prevented businesses from placing advertisements in student newspapers or on student radio, or from making sales attempts by telephone or mail.

American Future Systems (AFS) scheduled a number of sales demonstrations in Penn State residence halls in the fall of 1977. When Penn State officials attempted to stop the sales demonstrations, AFS argued that such action violated its First Amendment "commercial speech" rights. At this point, Penn State informed AFS "that it would be permitted to conduct the demonstration portion of its show if no attempts were made to sell merchandise to the students during the presentation" (618 F.2d at 254). Claiming that the sales transactions were essential to its presentation, AFS ceased its activity and commenced its lawsuit. AFS based its argument on the *Virginia State Board of Pharmacy* case (cited in Section 11.6.4.1):

Plaintiff AFS is correct that in *Virginia Pharmacy Board* the Supreme Court ruled that commercial speech is entitled to some level of protection by the First Amendment (425 U.S. at 770 . . .). This holding, by itself, does not resolve the issue presented by this case, however. The statutory scheme discussed in *Virginia Pharmacy Board* effectively suppressed all dissemination of price information throughout the state. The case at hand presents a dramatically different fact situation, implicating many different concerns.

Penn State argues that it can restrict the use of its residence halls to purposes which further the educational function of the institution. It urges that transacting sales with groups of students in the dormitories does not further the educational goals of the university and, therefore, can be lawfully prohibited. It emphasizes that AFS seeks a ruling that its sales and demonstrations be permitted in the residence halls, areas which are not open to the general public. In light of all the facts of this case, we believe Penn State is correct [618 F.2d at 255].

In reaching its conclusion, the court inquired whether Penn State had established a “public forum” for free speech activity (see *Widmar v. Vincent*, Section 10.1.5 of this book) in the residence halls:

When the state restricts speech in some way, the court must look to the special interests of the government in regulating speech in the particular location. The focus of the court’s inquiry must be whether there is a basic incompatibility between the communication and the primary activity of an area (*Grayned v. City of Rockford*, 408 U.S. 104, 116 . . . (1972)). . . .

As discussed above, members of the general public do not have unrestricted access to Penn State residence halls. “No Trespassing” signs are posted near the entrances to all the residence halls. Although nonresidents of the halls may enter the lobbies, they may not proceed freely to the private living areas. We believe that these facts demonstrate that the arena at issue here, the residence halls at Penn State, does not constitute a “public forum” under the First Amendment [618 F.2d at 256].

The court then inquired whether, despite the absence of a public forum, AFS could still claim First Amendment protection for solicitation and sales activities occurring in the residence halls. According to the court, such a claim depends on whether the activity impinges on the primary business for which the area in question is used:

We recognize that the absence of a “public forum” from this case does not end our inquiry, however. There are some “non-public-forum” areas where the communication does not significantly impinge upon the primary business carried on there. Penn State asserts that the AFS group sales do impinge significantly on the primary activities of a college dormitory. Penn State argues that its residence halls are “exclusively dedicated to providing a living environment which is conducive to activities associated with being a student and succeeding academically.” It contends that group sales activities within the residence halls would disrupt the proper study atmosphere and the privacy of the students. It reiterates that there is no history of allowing group commercial transactions to take place in the dormitories. We conclude that Penn State has articulated legitimate interests which support its ban on group sales activity in the dormitories. We also conclude that these interests are furthered by the proscription against commercial transactions [618 F.2d at 256–57].

Completing its analysis, the court addressed and rejected a final argument made by AFS: that Penn State cannot distinguish between commercial and non-commercial speech in making rules for its residence halls and that, since Penn State permits political and other noncommercial group activities, it must permit commercial activities as well. The court replied:

In a case decided two years after *Virginia Pharmacy Board*, the Supreme Court explicitly rejected plaintiff’s view that commercial and noncommercial speech must be treated exactly alike. “We have not discarded the ‘common-sense’ distinction between speech proposing a commercial transaction, which

occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohrlick v. Ohio State Bar Association*, 436 U.S. 447, 455–56 (1978). . . .

Here Penn State has not totally suppressed the speech of plaintiff. It has restricted that speech somewhat, however. Although AFS sales representatives are allowed into the residence halls to present demonstrations to groups of students, they cannot consummate sales at these gatherings. Even that restriction is removed if the sales representative is invited to the hall by an individual student who decides to purchase the merchandise marketed by AFS.

As noted above, Penn State has advanced reasonable objectives to support its ban on group commercial activity in the residence halls. Further, it has emphasized that traditionally there has been an absence of such activity in the halls. This places commercial speech in a quite different category from activities historically associated with college life, such as political meetings or football rallies. We cannot say that the record in this case reveals any arbitrary, capricious, or invidious distinction between commercial and noncommercial speech. We therefore conclude that AFS is incorrect in its assertion that the Penn State policy violates the First Amendment because it treats noncommercial speech differently from commercial speech [618 F.2d at 257–59].

Having determined that AFS's activities were commercial speech entitled to First Amendment protection, but that Penn State's regulations complied with First Amendment requirements applicable to such speech, the court in *American Future Systems I* upheld the regulations and affirmed the lower court's judgment for Penn State.

Soon, however, a second generation of litigation was born. In accordance with its understanding of the appellate court's opinion in the first lawsuit, AFS requested Penn State to allow group demonstrations that would not include consummation of sales and would take place only in residence hall common areas. AFS provided the university with a copy of its "script" for these demonstrations, a series of seventy-six cue cards. Penn State responded that AFS could use certain cue cards with information the university considered to have "educational value" but not cue cards with "price guarantee and payment plan information," which the university considered "an outright group commercial solicitation." AFS sued again, along with several Penn State students, arguing that Penn State's censorship of its cue cards violated its right to commercial speech and contradicted the court's opinion in *American Future Systems I*. After losing again in the trial court, AFS finally gained a victory when the appellate court ruled in its favor (*American Future Systems v. Pennsylvania State University*, 688 F.2d 907 (3d Cir. 1982) (*American Future Systems II*)).

The appellate court carefully distinguished this litigation from the prior litigation in *American Future Systems I* and identified the new issue presented:

It is important at the outset to clarify which issues are not before us. Although AFS construes our decision in *American Future Systems I* as having established its constitutional free speech right to conduct demonstrations of a commercial product in common areas within the university's residence halls, we do not read that opinion so broadly. Penn State has not sought to bar all commercial activity from its residence halls. It has limited what ostensibly appears to be such a ban through its definition of "commercial," which excludes student contact with a peddler "if the contact was invited by the individual student involved." Therefore, we need not decide whether a state university may properly ban all commercial activity in its residence halls. Similarly, AFS does not challenge the distinction which the earlier opinion made between an actual consummation or completion of the "commercial transaction" and a group demonstration of AFS's products (618 F.2d at 258–59). Instead, it seeks only to conduct the demonstration in the common areas without censorship of the contents of that demonstration.

Finally, although the university has conceded that portions of the demonstration may have some educational value, and it and the district court sought to draw the line between those portions of the demonstration which they deem educational and those portions which they deem commercial, it is unmistakable that the demonstration is geared to the sales of the products and represents commercial speech. Thus, the only issue is whether Penn State may censor the content of AFS's commercial speech conducted in the dormitory common rooms, where AFS has been permitted by the university to conduct its sales demonstration [688 F.2d at 912].

In resolving this issue, the court applied the "four-step analysis" for ascertaining the validity of commercial speech regulations that the U.S. Supreme Court had established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980):

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest [447 U.S. at 566, quoted in *American Future Systems*, 688 F.2d at 913].

Applying this test, the court determined that Penn State's prohibition of AFS's demonstration violated AFS's First Amendment rights:

In the instant situation, there has been no allegation that AFS's commercial speech activities are fraudulent, misleading, or otherwise unlawful. . . .

We, therefore, must first determine whether the university has advanced a substantial government interest to be achieved by the restrictions at issue. The only interest advanced by Penn State for precluding information on the price of

the company's products and the nature of the contract it enters into with purchasers is that asserted in the prior action before this court—that is, its interest in maintaining the proper study atmosphere in its dormitories and in protecting the privacy of the students residing in those facilities. Restrictions on the contents of the demonstration as distinguished from the conduct of the demonstration cannot further these interests. The Supreme Court cases provide ample precedent for the proposition that price information has value. . . . The university does not contend that the mere act of convening a group in the common areas of the residence halls is inimical to the study atmosphere, since its policy permits such group activity. We conclude that Penn State has failed to show a substantial state interest, much less a plausible explanation, for its policy differentiating between the nature of the information contained in the AFS demonstration [688 F.2d at 913].

The court therefore reversed the lower court's entry of summary judgment for Penn State and remanded the case for trial.

Several students were also plaintiffs in *American Future Systems II*. They claimed that the university had violated their First Amendment rights to make purchases in group settings in the residence hall common areas and to host and participate in sales demonstrations in the private rooms of residence halls. The students argued that these rights are not aspects of commercial speech, as AFS's rights are, but are noncommercial speech, as well as freedom of association and due process, rights that deserve higher protection. The appellate court determined that the lower court's record was not sufficiently developed on these points and remanded the students' claims to the lower court for further consideration—thus leaving these arguments unresolved.

In further proceedings, after remand to the trial court, the plaintiff students and American Future Systems, Inc., obtained a preliminary injunction against Penn State's ban on group sales demonstrations in individual students' rooms (*American Future Systems v. Pennsylvania State University*, 553 F. Supp. 1268 (M.D. Pa. 1982)); and subsequently the court entered a permanent injunction against this policy (*American Future Systems v. Pennsylvania State University*, 568 F. Supp. 666 (M.D. Pa. 1983)). The court emphasized the students' own rights to receive information and, from that perspective, did not consider the speech at issue to be subject to the lower standards applicable to commercial speech. On appeal by the university, however, the U.S. Court of Appeals for the Third Circuit disagreed, considering the speech to be commercial and overruling the district court (*American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1985) (*American Future Systems III*)).

The appellate court decided that a state university's substantial interest as a property owner and educator in preserving dormitories for their intended study-oriented use, and in preventing them from becoming "rent-free merchandise marts," was sufficient to overcome both the commercial vendor's free speech rights to make group sales presentations in students' dormitory rooms and the students' free speech rights to join with others to hear and discuss this information. In applying the *Central Hudson* standards (above), the court found that, although the sales activities involved were lawful, the state university's



substantial interests justified a narrowly drawn regulation prohibiting group demonstrations in students' dormitory rooms.

Subsequent to *American Future Systems III*, students on another campus brought a similar issue to court in another case involving American Future Systems' group demonstrations. The subject of this suit was the defendant's regulation prohibiting "private commercial enterprises" from operating on State University of New York (SUNY) campuses or facilities. The defendant had used this resolution to bar AFS from holding group demonstrations in students' dormitory rooms. This case made it to the U.S. Supreme Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). The Court used the occasion to restate the last part of the *Central Hudson* test ("whether [the regulation] is not more extensive than necessary to serve [the government] interest"); as restated, it now requires only that the regulation be "narrowly tailored" to achieve the government's interest, or that there be a "reasonable fit" between the regulation and the government interest. This restatement makes the standard governing commercial speech more lenient, allowing courts to be more deferential to institutional interests when campus commercial activities are at issue. The Court remanded the case to the lower courts for reconsideration in accordance with this more deferential test. The Court also remanded the question whether the university's regulation was unconstitutionally overbroad on its face because it applied to and limited noncommercial speech (that is, more highly protected speech) as well as commercial speech.<sup>26</sup>

The three appellate court opinions in the complex *American Future Systems* litigation, supplemented by the Supreme Court's decision in the *Fox* case, yield considerable guidance for administrators concerned with commercial activity in public institutions. A public institution clearly has considerable authority to place restrictions on outsiders' access to its campus for such purposes. The institution may reasonably restrict the "time, place, and manner" of commercial activity—for instance, by limiting the places where group demonstrations may be held in residence halls, prohibiting the consummation of sales during group demonstrations, or prohibiting commercial solicitations in libraries or classrooms. The institution may also regulate the content of commercial activity to ensure that it is not fraudulent or misleading and does not propose illegal transactions. Other content restrictions—namely, restrictions that directly advance a substantial institutional interest and are narrowly tailored to achieve that interest—are also permissible.

Administrators cannot comfortably assume, however, that this authority is broad enough to validate every regulation of commercial activity. Regulations that censor or sharply curtail all dissemination of commercial information may

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<sup>26</sup>On remand, the district court dismissed the case as moot (see the discussion of mootness in subsection 2.2.2.2), since the plaintiff students were no longer residing in the dormitory or at the university and AFS had dropped out of the suit (764 F. Supp. 747 (N.D.N.Y. 1991)). The district court also refused to allow the plaintiffs to amend the complaint to add currently enrolled students (148 F.R.D. 474 (N.D.N.Y. 1993)). The appellate court affirmed the trial court's dismissal of the case on mootness grounds in *Fox v. Board of Trustees of State Univ. of New York*, 42 F.3d 135 (2d Cir. 1994).

infringe the First Amendment. *American Future Systems II* is a leading example. (See also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489–95, 514–16 (1996).) Similarly, a regulation prohibiting all in-person, one-on-one contacts with students, even when the representative does not attempt to close a deal or when the student has initiated the contact, may be invalid. In some locations, moreover, the institution’s interest in regulating may be sufficiently weak that it cannot justify bans or sharp restrictions at these locations. Possible examples include orderly solicitations in the common areas of student unions or other less private or less studious places on campus; solicitations of an individual student conducted in the student’s own room by prior arrangement; and solicitations at the request of student organizations in locations customarily used by such organizations, when such solicitations involve no deceptive practices and propose no illegal or hazardous activity.

It is also clear from U.S. Supreme Court precedents (see, for example, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980)), that not all speech activity of commercial entrepreneurs is “commercial” speech. Activity whose purpose is not to propose or close a commercial transaction—for example, an educational seminar or a statement on political, economic, or other issues of public interest—may fall within First Amendment protections higher than those accorded commercial speech. Administrators should also be guided by this distinction when regulating, since their authority to limit access to campus and their authority to restrict the content of what is said will be narrower when entrepreneurs wish to engage in “public-interest” rather than “commercial” speech. While this distinction may become blurred when an entrepreneur combines both types of speech in the same activity, there are discussions in both *American Future Systems III* (752 F.2d at 862) and *Fox* (492 U.S. at 481) that will provide guidance in this circumstance.

**11.6.4.3. Noncommercial solicitation.** As discussed in subsections 11.6.4.1 and 11.6.4.2 above, noncommercial speech is afforded somewhat greater protection under the First Amendment than commercial speech. Consequently, a public institution’s authority to regulate political canvassing, charitable solicitations, public opinion polling, petition drives, and other types of noncommercial speech is more limited than its authority to regulate commercial sales and solicitations. (For discussion of the related topic of voter canvassing and registration, see Section 11.4.3 above.)

In *Brush v. Pennsylvania State University*, 414 A.2d 48 (Pa. 1980), students at Penn State challenged university restrictions on canvassing in residence halls. The regulations permitted canvassing (defined as “any attempt to influence student opinion, gain support, or promote a particular cause or interest”) by registered individuals in the living areas of a dormitory if the residents of that building had voted in favor of open canvassing. A majority vote to ban canvassing precluded access to living areas by canvassers unless they were specifically invited in advance by a resident. All canvassers remained free, however, to reach students by mail or telephone and to contact residents in the dining halls, lobbies, and conference rooms of each dormitory.

The Supreme Court of Pennsylvania upheld these regulations. It determined that the university had substantial interests in protecting the privacy of its students, preventing breaches of security, and promoting quiet study conditions. The regulations reasonably restricted the time, place, and manner of speech in furtherance of these government interests. Additionally, insofar as the regulations did not eliminate effective alternatives to canvassing inside the living areas, the university had afforded canvassers ample opportunity to reach hall residents.

On the basis of *Brush*, public institutions may apparently implement content-neutral regulations excluding canvassers from the actual living quarters of student residence facilities, at least absent a specific invitation, in advance, to visit a particular student resident. Student residents' participation, by referendum, in canvassing decisions is also apparently permissible if the decisions would still remain content-neutral. (See also Section 11.4.3.) Similar restrictions applied to student lounges, dining halls, student unions, and other less private areas, however, may present more difficult issues concerning the rights of the speakers and of the potential listeners who are not in favor of the restriction, especially if the property at issue is a public forum (see generally Sections 9.5.2 & 9.5.6). No-canvassing rules imposed on student living areas with separate living units, such as married students' garden apartments or townhouses, may also be unconstitutional; in such circumstances the institution's interests in security and study conditions may be weaker, and the students' (or student families') interest in controlling their individual living space is greater. (See generally *Watchtower Bible & Tract Society v. Stratton, Ohio*, 536 U.S. 150 (2002); *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).)

Whether rules such as Penn State's would be valid if imposed by the administration without any participation by the student residents was not directly addressed in *Brush*. But given the strong institutional interests in security and in preserving conditions appropriate for study, it is likely that narrowly drawn, content-neutral no-canvassing rules limited to living areas of dormitories and other similar spaces would be constitutional even without approval by student vote. In *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984), the court upheld such a restriction, calling the dormitory living area a "nonpublic forum" (see Section 9.5.2 of this book) for which the institution may prohibit or selectively regulate access. For the same reason, no-canvassing rules would probably be constitutional, even without student vote, as applied to study halls, library stacks and reading rooms, laboratories, and similar restricted areas.

A later case, *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985), provides further support for the validity of such content-neutral restrictions on noncommercial solicitation and also illustrates a different type of regulation that may be constitutionally employed to restrict such activity. The plaintiffs, members of a socialist political party, had sought to solicit donations and sell political publications on campus. The president of West Virginia State College (the defendant in the case) had prohibited this activity by invoking a systemwide policy prohibiting sales and fund-raising activities anywhere on campus by groups that

were not sponsored by the students. The court determined that the plaintiffs' activities were "political advocacy" rather than commercial speech and thus highly protected by the First Amendment. Nevertheless, the regulation was valid because it was a content-neutral regulation of the *manner* of speech in a "limited public forum" and met the constitutional standards applicable to such regulations (see Sections 9.5.2 & 9.5.3):

There has been no direct infringement on Glover's and Measel's expressive activity, simply a prohibition against sales and fund raising on campus. Since the campus area is generally open for all debate and expressive conduct, we do not find that first amendment interests seriously are damaged by the administration's decision to limit the use of its property through uniform application of a sensible "manner" restriction. Plaintiffs' activities may be at the core of the first amendment, but the college has a right to preserve the campus for its intended purpose and to protect college students from the pressures of solicitation. In so ruling, we note that plaintiffs have more than ample alternative channels available to tap the student market for fund raising. The literature itself sets out in plain English requests for donations for the cause. Anyone interested enough to peruse the material learns that the preparation of the materials costs something and that the group is in need of financial (as well as moral and political) support. In addition, if the campus is plaintiffs' key market, they can organize a student group or obtain a student sponsor to raise funds on campus [762 F.2d at 1203].

The features noted by the court are important to the validity of all campus regulations of noncommercial solicitation. First of all, the regulation was narrow—limited to sales and fund-raising—and left other "more than ample" channels for on-campus expression open to outsiders such as the plaintiffs. In addition, the regulation applied neutrally and uniformly to all outside groups, without reference to the beliefs of the group or the viewpoints its members would express on campus.<sup>27</sup> Finally, the university could demonstrate that the regulation was tailored to the protection of significant institutional interests that would be impeded if outsiders could raise funds and sell items on campus. Campus regulation of noncommercial solicitation will not always be supported by such interests. In *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), for example, Southwest Texas State University had a regulation prohibiting the in-person distribution on campus of free newspapers containing advertisements. The plaintiffs—the publishers of a free newspaper distributed countywide, joined by university students—challenged the regulation's application. The court

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<sup>27</sup>In more recent First Amendment free speech cases, the U.S. Supreme Court has increasingly relied on this principle of viewpoint neutrality to strike down government regulations that serve to discriminate against individuals or groups on the basis of viewpoint. See, for example, *R.A.V. v. St. Paul* in Section 9.6.2, *Rosenberger v. Rectors & Visitors of University of Virginia* in Section 10.3.2, and *Board of Regents of University of Wisconsin System v. Southworth* in Section 10.1.3. The application of this viewpoint-neutrality principle to regulations limiting the access of outsiders to public education facilities is well illustrated by *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

invalidated the regulation because the university did not demonstrate any significant interest that the regulation was “narrowly tailored” to protect (see generally *Watchtower Bible & Tract*, discussed in subsections 11.4.3 and 11.6.4.1 above).

### ***Sec. 11.7. Community Activities of Faculty Members and Students***

Besides being part of the academic community, faculty members and students are also private citizens, whose private lives may involve them in the broader local community. Thus, a postsecondary institution may be concerned not only with its authority over matters arising when the community comes onto the campus, as in Section 11.6, but also with its authority over matters arising when the campus goes out into the community.

Generally, an institution has much less authority over the activities of a student or a faculty member when those activities take place in the community rather than on the campus. The faculty-institution contract (Section 6.1) and the student-institution contract (Section 8.1.3) may have little or no application to the off-campus activities that faculty or students engage in as private citizens. In some cases, moreover, these contracts may affirmatively protect faculty members or students from institutional interference in their private lives. An exception to these general principles may apply for faculty members (or staff members), however, when their outside activities may conflict with their duties and responsibilities to the institution. Many institutions, for example, have conflict of interest policies that may prohibit faculty members from simultaneously holding a position (particularly a full-time or tenured position) at another college or university. Similarly, an exception may apply for students when their outside activities may cause harm to the institution.

In an important 1989 opinion, for example, Maryland’s Attorney General ruled that, when an institution can demonstrate that a student’s off-campus activities are “detrimental to the interests of the institution,” it may have the authority to discipline the student for such misconduct, subject (for public institutions) “to the fundamental constitutional safeguards that apply to all disciplinary actions by educational officials” (74 *Opinions of the Attorney General* 147 (Maryland) (1989), Opinion No. 89-002).<sup>28</sup>

In public institutions, faculty members and students also have constitutional rights that protect them from undue institutional interference in their private lives (see especially Sections 7.5 (faculty) and 9.1.3 (students)). In relation to First Amendment rights, a landmark teacher case, *Pickering v. Board of Education*, 391

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<sup>28</sup>The cases are collected in Dale Agthe, Annot., “Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action,” 28 A.L.R.4th 463. For related discussion of the potential criminal liability of students engaging in off-campus protests, see Sheldon R. Shapiro, Annot., “Participation of Students in Demonstration on or Near Campus as Warranting Imposition of Criminal Liability for Breach of Peace, Disorderly Conduct, Trespass, Unlawful Assembly, or Similar Offense,” 32 A.L.R.3d 551.

U.S. 563 (1968) (see Section 7.1.1), created substantial protection for teachers against being disciplined for expressing themselves in the community on issues of public concern. A U.S. Court of Appeals case, *Pickings v. Bruce*, 430 F.2d 595 (8th Cir. 1970), established similar protections for students. In *Pickings*, Southern State College had placed SURE (Students United for Rights and Equality), an officially recognized campus group, on probation for writing a letter to a local church criticizing its racial policies. SURE members claimed that the college's action deprived them of their First Amendment rights. In holding for the students, the court made this general statement concerning campus involvement in the community:

Students and teachers retain their rights to freedom of speech, expression, and association while attending or teaching at a college or university. They have a right to express their views individually or collectively with respect to matters of concern to a college or to a larger community. They are [not] required to limit their expression of views to the campus or to confine their opinions to matters that affect the academic community only. It follows that here the administrators had no right to prohibit SURE from expressing its views on integration to the College View Baptist Church or to impose sanctions on its members or advisors for expressing these views. Such statements may well increase the tensions within the college and between the college and the community, but this fact cannot serve to restrict freedom of expression [430 F.2d at 598, citing *Tinker v. Des Moines Community School Dist.*, 393 U.S. at 508–9].

Similarly, in *Thomas v. Granville Board of Education*, 607 F.2d 1043 (2d Cir. 1979)), the court protected the publication activities of students in the community. This case is discussed in Section 9.1.3 of this book.

Student and faculty activities in the community may occasion not only disputes with the institution, but also disputes with community members and local or state government officials. The cases below provide a variety of examples.

In *Lawrence Bicentennial Commission v. Appleton, Wisconsin*, 409 F. Supp. 1319 (E.D. Wis. 1976), a college student organization sought to rent a local high school gymnasium for a public lecture by Angela Davis, then a college professor and a member of the Communist Party of the United States. The school board refused to rent the gym for this purpose, citing a regulation prohibiting the use of school facilities by outsiders for partisan political purposes. The student organization then filed suit against the city, the school district, and the members of the board of education, challenging the defendants' refusal to rent the gymnasium. The federal district court held that the refusal was an unconstitutional content-based restriction on speech and issued a preliminary injunction ordering the defendants to rent the facilities to the student organization.

In *Woodbridge Terrace Associates v. Lake*, a faculty member's service as an expert witness for a county housing coalition resulted in a defamation claim against the professor by the owner of an apartment complex. The housing coalition's study of racial steering in apartment rentals had led to litigation against the apartment complex. The federal district court ruled that the professor's expert witness report was protected from defamation claims and dismissed

those charges as well as additional charges that the professor had unlawfully interfered with the apartment complex's operations (R. Rudolph, "Judge Rejects Suit Against Prof Who Found Racial Bias in Apartment Rentals," *Newark Star Ledger*, September 19, 1989, at 22).

In *Little v. City of North Miami*, 805 F.2d 962 (11th Cir. 1986), a University of Florida law school professor had represented environmental groups, on a *pro bono* basis, in litigation against the state of Florida and the city of North Miami. The City Council of North Miami passed a resolution censuring the professor for "improper use of public funds to represent private parties in litigation against the State and against the interests of the City of North Miami" (805 F.2d at 964). Copies of the resolution were sent to the president, regents, law school dean, Dade County legislators, and others, and an investigation of Little's activities ensued. Little sued the city under Section 1983 (see Section 3.5 of this book), claiming First Amendment and due process violations, and asserting that his reputation and his relationship with the university had been damaged and that he had suffered emotional distress. After the trial court dismissed all the constitutional claims, the appellate court reversed and held that the city council's actions violated Little's First Amendment rights: "[A] municipality . . . may not retaliate against an individual because of that person's legitimate use of the courts" (805 F.2d at 968). The court also permitted Little's due process claim to go forward: "We see no reason why an attorney is not entitled to property or liberty interests in his or her business (professional) reputation/goodwill when the same rights have been extended to other businesses" (805 F.2d at 969).

Another case concerning *pro bono* legal representation, *Southern Christian Leadership Conference v. Supreme Court*, 252 F.3d 781 (5th Cir. 2001), *affirming* 61 F. Supp. 2d 499 (E.D. La. 1999), involved state court rules restricting law school legal clinics' representation of low-income clients. Students and faculty supervisors in an environmental law clinic at Tulane University's law school had represented local citizens and community associations that sought to prevent a chemical company from locating near poor, largely minority, neighborhoods. The chemical company eventually located in another state, to the consternation of local business and political leaders and state officials concerned about economic development. Business groups then persuaded the Louisiana Supreme Court to investigate the situation and review its student practice rules. The supreme court amended the rules, tightening the low-income requirements that individuals and associations must meet to be eligible for clinic services, and prohibiting students from representing any clients that they or other clinic-affiliated individuals had solicited. Students, faculty members, and various community organizations sued the court, claiming that the amended rule (Rule XX) violated their constitutional rights of free speech and association—in particular by "burdening their ability to associate and advocate for expression of collective views." The federal district court and the federal appellate court each rejected these arguments and upheld both of the restrictions on student representation. According to the appellate court, "Rather than stamping out or suppressing private speech, the [Louisiana Supreme Court]—the highest judicial body in Louisiana exercising its undisputed power and responsibility—had

reduced this support by an across-the-board, wholly prospective and viewpoint-neutral general rule” (252 F.3d at 795). In supporting its conclusion, the federal appellate court noted that the amended Rule XX “imposes no restrictions on the kind of representations the clinics can engage in or on the arguments that can be made on behalf of a clinic client”; that the Rule restricted only the representation of clients by students, and did not restrict the faculty clinic supervisors who were members of the state bar; and that any allegations of retaliation against the Tulane clinic for its involvement in the chemical plant case, or of other improper political motivations, would concern only the actions of the business groups and state officials and could not be attributed to the state supreme court. Had any of those circumstances been involved in the plaintiff’s case, other First Amendment issues could have been present that could have changed the appellate court’s reasoning, and perhaps its result.

Outside activities of public college and university employees may also occasion disputes under state laws or regulations that restrict certain outside activities of public employees. Conflict of interest regulations provide one example (see above, this Section, and see also Section 15.4.7). Another example is provided by state regulations or constitutional provisions that prohibit state employees, or faculty members specifically, from serving concurrently in the state legislature. (See, for example, *State ex rel. Spire v. Conway*, 472 N.W.2d 403 (Neb. 1991); but see *26 Opinions of the Attorney General* (Kansas) (March 2, 1992), Opinion No. 92-31.) Laws that prohibit state employees from serving as advocates before state agencies may also catch faculty or staff in their web, although a New Jersey court extricated a faculty member from the provisions of such a law in the case of *In re Determination of Executive Commission on Ethical Standards*, 561 A.2d 542 (N.J. 1989), discussed in Section 12.5.1.

The case of *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998), provides a highly instructive illustration of a situation where state law limited certain outside activities of faculty members. Both a Texas state law and a policy of Texas A&M University were at issue in the case. Both the law and the policy prohibited faculty members from serving as consultants or expert witnesses against the state, the reason being that such activity would put the faculty member in conflict with the interests of the state that employs him or her. The law and policy were challenged by the Texas Faculty Association, as well as by various professors who had been retained or who had volunteered *pro bono* to testify against the state in various cases. One plaintiff, for instance, was serving as an expert witness for various tobacco companies in the state’s lawsuit against them; and another plaintiff served as *pro bono* counsel to a neighborhood association opposing the issuance of a state permit to construct an incinerator. The plaintiffs argued that the law and policy violated their free speech rights under the First Amendment.

The court first determined that the speech prohibited by the law and the policy did not fall under the lesser protections accorded commercial speech. Rather, much of the speech that the law and policy suppressed could be considered “public concern” speech, subject to the *Pickering* analysis applicable to the speech of public employees and enjoying greater protection (see Section 7.1.1).



Testimony on the health consequences of cigarette smoking, for instance, would involve matters of “public concern.” Accordingly, since the law and policy “can be expected to curtail speech on a wide variety of matters of public concern,” the state and the university bore a heavy burden of justifying the full range of these restrictions. The court concluded that the defendants could not do so. While the state’s interest in promoting the efficiency of the public services it provides (as articulated in *Pickering*) could serve to justify some applications of the law and policy, the law and policy could also be used to silence employees whose testimony would not disrupt the state’s interests. “[T]he notion that the State may silence the testimony of State employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment” (164 F.3d at 226). The law and the policy, therefore, were unconstitutionally overbroad.

In addition, the court also held that the law and policy at issue were unconstitutional as content-based restrictions on free speech. Testimony on behalf of the state would be permitted, for instance, while only testimony against the state would be prohibited. To support this analysis, the court quoted *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984), in which the U.S. Supreme Court stated that “regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”<sup>29</sup>

Caution must be exercised in interpreting the *Hoover* case and applying it to other situations. The opinion does not require that institutions refrain from any limitation whatsoever on the consultant and expert witness activities of their faculty members. Many content-neutral limitations would be permissible under *Hoover*. The institution could limit outside faculty activities that created a conflict of interest for the faculty member (see Section 15.4.7). Some content-based limitations would also be permissible, pursuant to narrowly drafted policies, when the university can demonstrate that particular consulting or expert witness activities would sufficiently disrupt state interests to prevail under the *Pickering/Connick* balancing test. Public institutions’ constitutional leeway in using such “disruption” rationales was apparently expanded by the U.S. Supreme Court’s decision in *Waters v. Churchill*, 511 U.S. 661 (1994) (see Sections 7.1.1 & 7.5.2 of this book). (For guidance, see Diane Krejsa, “*Hoover v. Morales*: Commentary and Analysis,” in *Synfax Weekly Report*, February 22, 1999, at 819–21.)

In yet another variant of campus-community conflict, community members on occasion have sued a college because it restricted faculty members or students from interacting with the community in certain ways. For example, in *Pyeatte v. Board of Regents of the University of Oklahoma*, 102 F. Supp. 407 (W.D. Okla. 1951), *affirmed per curiam*, 342 U.S. 936 (1952), a group of boarding house owners in Norman, Oklahoma (site of the University of Oklahoma), sued the state board of regents when it promulgated a rule requiring all unmarried

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<sup>29</sup>It would be more precise to articulate the Texas law and policy’s restrictions as “viewpoint based” rather than “content based.” The flaw would then be one of “viewpoint discrimination,” and the more appropriate U.S. Supreme Court cases to cite would be those listed in footnote 27 above.

students to live in university dormitories if space was available. The plaintiffs asserted that the rule limited their right to contract with the university to provide student housing and thus violated the Fourteenth Amendment's equal protection clause. The courts viewed the rule as clearly within the regents' power to pass for the benefit of the university's students.

## Selected Annotated Bibliography

### *Sec. 11.1 (General Principles)*

Reynolds, Osborne M. *Handbook of Local Government Law* (West, 1982, plus periodic pocket part). A comprehensive, well-documented review of local government law. Divided into twenty-two chapters, including "Limits on State Control of Municipalities," "Relationship of Municipalities to Federal Government," "Powers of Municipalities," "Finances of Local Government," "Local Control of the Use of Property," and "Local Regulation of Trade, Business, and Other Enterprises."

### *Sec. 11.2 (Zoning and Land Use Regulation)*

Frug, Jerry. "Surveying Law and Borders: The Geography of Community," 48 *Stan. L. Rev.* 1047 (1996). Criticizes current zoning policy that isolates individuals by wealth and education, and perpetuates ghettos, segregation, and urban isolation. This policy tends to discourage interaction among individuals of different races, opinions, values, and cultures.

Juergensmeyer, Julian C., & Roberts, Thomas E. *Land Use Planning and Development Regulation Law* (West, 2003). A thorough survey of land use law. Discusses zoning, the planning process, building and housing codes, and other land use issues. Includes discussion of constitutional limitations on land use law, and the interplay between land use regulation and environmental regulation.

Pearlman, Kenneth. "Zoning and the First Amendment," 16 *Urb. Law.* 217 (1984). Examines the power of local government to zone land and reviews U.S. Supreme Court decisions on zoning, particularly with regard to commercial activity.

"Special Project: The Private Use of Public Power: The Private University and the Power of Eminent Domain," 27 *Vanderbilt L. Rev.* 681 (1974). A lengthy study of eminent domain as a land use planning technique to benefit private universities. Emphasis is on the use of eminent domain in conjunction with federal urban renewal programs. A case study involving Nashville, Tennessee, is included.

Tracy, JoAnn. "Comment: Single-Family Zoning Ordinances: The Constitutionality of Suburban Barriers Against Nontraditional Households," 31 *St. Louis U. L.J.* 1023 (1987). Reviews decisions of the Supreme Court and other courts on the definition of "family" for zoning purposes. Discusses Fourteenth Amendment implications of restrictions on relationships between residents, and suggests alternatives to marriage, blood, or adoption for limiting the number of occupants of single-family homes.

### *Sec. 11.3 (Local Government Taxation)*

Ginsberg, William R. "The Real Property Tax Exemption of Nonprofit Organizations: A Perspective," 53 *Temple L.Q.* 291 (1980). An overview of the issues involved in granting tax-exempt status to nonprofit organizations. Discusses the judicial and

statutory tests used to determine exempt status, the theoretical foundations for property tax exemption, and the problems unique to educational and religious uses of property. Includes numerous citations to state constitutional and statutory provisions on property tax exemption.

See Colombo entry in Selected Annotated Bibliography for Chapter 13, Section 13.3.

### ***Sec. 11.4 (Student Voting in the Community)***

Ostrow, Ashira Pelman. Note, "Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change," 102 *Columbia L. Rev.* 1954 (2002). Argues that prohibiting individuals with two residences from voting in local elections in both localities violates the equal protection clause. Discusses a mechanism for ensuring that the rights of property owners and local residents are protected.

### ***Sec. 11.5 (Relations with Local Police)***

Bickel, Robert. "The Relationship Between the University and Local Law Enforcement Agencies in Their Response to the Problem of Drug Abuse on the Campus," in D. Parker Young (ed.), *Higher Education: The Law and Campus Issues* (Institute of Higher Education, University of Georgia, 1973), 17–27. A practical discussion of the general principles of search and seizure, double jeopardy, and confidentiality in the campus drug abuse context; also discusses the necessity of administrators' having the advice of counsel.

Cowen, Lindsay. "The Campus and the Community: Problems of Dual Jurisdiction," in D. Parker Young (ed.), *Proceedings of a Conference on Higher Education: The Law and Student Protest* (Institute of Higher Education, University of Georgia, 1970), 28–32. A brief discussion of the policy considerations governing the division of authority between the institution and local law enforcement agencies.

Ferdico, John N. *Criminal Procedure for the Criminal Justice Professional* (9th ed., West, 2004). An introductory text on police procedures and criminal court procedure, including arrests, searches, confessions, and identifications, with special emphasis on U.S. Supreme Court cases.

Kalaidjian, Ed. "Problems of Dual Jurisdiction of Campus and Community," in G. Holmes (ed.), *Student Protest and the Law* (Institute of Continuing Legal Education, University of Michigan, 1969), 131–48. Addresses issues arising out of concurrent criminal and disciplinary proceedings and police entry onto campus.

Note, "Privacy Protection Act of 1980: Curbing Unrestricted Third-Party Searches in the Wake of *Zurcher v. Stanford Daily*," 14 *U. Mich. J.L. Reform* 519 (1981). Reviews the constitutional law implications of the *Zurcher* case and analyzes the various provisions of the Act passed by Congress in response to *Zurcher*.

Sklansky, David. "The Private Police," 46 *UCLA L. Rev.* 1165 (1999). Examines the changing dynamics between public and private police work occasioned by the growth of "private policing" and the phenomenon of "police privatization." Indicates that the number of persons doing private police work is now greater than the number doing police work for local, state, and federal governments. Explores the challenges these trends create for the law, and suggests a reexamination of the state action doctrine and public/private distinction as it applies to police and security functions.

***Sec. 11.6 (Community Access to the College's Campus)***

“Comment: The University and the Public: The Right of Access by Nonstudents to University Property,” 54 *Cal. L. Rev.* 132 (1966). Discusses the appropriateness and constitutionality of using state trespass laws to limit the public’s access to state university and college campuses. California’s criminal trespass law designed for state colleges and universities (Cal. Penal Code § 602–7 (West 1965), since amended and recodified as Cal. Penal Code § 626.6 (West 1988)) is highlighted.

Finkin, Matthew. “On ‘Institutional’ Academic Freedom,” 61 *Tex. L. Rev.* 817 (1983).

Considers the collapse of the distinction between institutional autonomy and academic freedom and applies this discussion to *State v. Schmid*, the *Princeton University* case. Further described in Finkin entry in Selected Annotated Bibliography for Chapter 1, Section 1.2.

Ugland, Erik. “Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace,” 20 *J. Coll. & Univ. Law* 935 (1996). Analyzes First Amendment issues that arise when college and university administrators seek to restrict distribution of, and access to, publications on campus. Covers full range of distribution activities and types of publications, and includes consideration of the distribution activities of off-campus publishers from small, alternative press efforts to large major newspapers. Contains a special section on newspaper theft on campus. Addresses educational policy issues, as well as legal issues, and offers suggestions for administrators.

***Sec. 11.7 (Community Activities of Faculty Members and Students)***

McKay, R. “The Student as Private Citizen,” 45 *Denver L.J.* 558 (1968). With three responding commentaries by other authors, provides a legal and policy overview of students’ status as private citizens of the larger community.

# 12

## The College and the State Government

### ***Sec. 12.1. Overview***

Unlike the federal government (see Section 13.1) and local governments (Section 11.1), state governments have general rather than limited powers and can claim all power that is not denied them by the federal Constitution or their own state constitutions, or that has not been preempted by federal law. Thus, the states have the greatest reservoir of legal authority over postsecondary education, although the extent to which this source is tapped varies substantially from state to state.

In states that do assert substantial authority over postsecondary education, questions may arise about the division of authority between the legislative and the executive branches. In *Inter-Faculty Organization v. Carlson*, 478 N.W.2d 192 (Minn. 1991), for example, the Minnesota Supreme Court invalidated a governor's line item vetoes of certain expenditure estimates in the legislature's higher education funding bill, because the action went beyond the governor's veto authority, which extended only to identifiable amounts dedicated to specific purposes. Similar questions may concern the division of authority among other state boards or officials that have functions regarding higher education (see Section 12.2 below).

Questions may also be raised about the state's legal authority, in relation to the federal government's, under federal spending or regulatory programs. In *Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978), for instance, the specific questions were (1) whether, under Pennsylvania state law, the state legislature or the governor was legally entrusted with control over federal funds made available to the state; and (2) whether, under federal law, state legislative control of federal funds was consistent with the supremacy clause of the U.S. Constitution and the provisions of the funding statutes. In a lengthy opinion addressing an array

of legal complexities, the Pennsylvania Supreme Court held that the legislature had control of the federal funds under state law and that such control had not been exercised inconsistently with federal law.

The states' functions in matters concerning postsecondary education include operating public systems, regulating and funding private institutions and programs, statewide planning and coordinating, supporting assessment and accountability initiatives, and providing scholarships and other financial aid for students (see, for example, Sections 1.6.3 & 8.3.7). These functions are performed through myriad agencies, such as boards of regents; departments of education or higher education; statewide planning or coordinating boards; institutional licensure boards or commissions; construction financing authorities; and state approval agencies (SAAs) that operate under contract to the federal Veterans Administration to approve courses for which veterans' benefits may be expended. In addition, various professional and occupational licensure boards indirectly regulate postsecondary education by evaluating programs of study and establishing educational prerequisites for taking licensure examinations.<sup>1</sup>

Various other state agencies whose primary function is not education—such as workers' compensation boards, labor relations boards, ethics boards, civil rights enforcement agencies, and environmental quality agencies—may also regulate postsecondary education as part of a broader class of covered institutions, corporations, or government agencies (see, for example, Sections 12.5.2–12.5.5 below). And in some circumstances, states may regulate some particular aspect of postsecondary education through the processes of the criminal law rather than through state regulatory agencies. Various examples of such legislation are discussed in Section 12.5.1 below.

In addition, states exert authority or influence over postsecondary institutions' own borrowing and financing activities. For instance, states may facilitate institutions' borrowing for capital development projects by issuing tax-exempt government bonds. In Virginia, for example, under the Education Facilities Authority Act (Va. Code §§ 23–30.39 *et seq.*; see also Va. Const. Art. VIII, § 11), the Virginia College Building Authority issues revenue bonds to finance construction projects for nonprofit higher education institutions in the state.<sup>2</sup> States may also influence institutional financing by regulating charitable solicitations by institutions and their fund-raising firms (see generally New York University School of Law, Program on Philanthropy and the Law, “Fundraising into the 1990s: State Regulation of Charitable Solicitation After *Riley*,” 24 *U.S.F. L. Rev.* 571 (1990)). Moreover, a state can either encourage or deter various financial activities (and affect institutions' after-tax bottom line) through its system of taxation. Private institutions, or institutional property and activities within the

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<sup>1</sup>Under federal law (20 U.S.C. § 1099a(a)), each state, acting through one or more of the agencies and boards listed in this paragraph, must assist the U.S. Secretary of Education with a program to ensure the “integrity” of federal student aid programs.

<sup>2</sup>In *Virginia College Building Authority v. Barry Lynn*, 538 S.E.2d 682 (Va. 2000), the Virginia Supreme Court construed and applied the Virginia statute and upheld the issuance of bonds to finance building projects of a private religious university. Regarding the church-state issues implicated in such arrangements, see generally Section 1.6.3 of this book.

state, usually are presumed subject to taxation under the state's various tax statutes unless a specific statutory or constitutional provision grants an exemption. *In re Middlebury College Sales and Use Tax*, 400 A.2d 965 (Vt. 1979), is illustrative. Although the Vermont statute granted general tax-exempt status to private institutions meeting federal standards for tax exemption under the Internal Revenue Code (see Section 13.3.2 of this book), the statute contained an exception for institutional "activities which are mainly commercial enterprises." Middlebury College operated a golf course and a skiing complex, the facilities of which were used for its physical education program and other college purposes. The facilities were also open to the public upon payment of rates comparable to those charged by commercial establishments. When the state sought to tax the college's purchases of equipment and supplies for the facilities, the college claimed that its purchases were tax exempt under the Vermont statute. The court rejected Middlebury's claim, holding that the college had failed to meet its burden of proving that the golfing and skiing activities were not "mainly commercial enterprises." (For other examples of state tax laws applied to higher educational institutions, see Sections 3.6.3 and 15.3.4.2; and see also *Wheaton College v. Department of Revenue*, 508 N.E.2d 1136 (Ill. App. Ct. 1987), discussed in Section 11.3.2.)

In addition to performing these planning, regulatory, and fiscal functions through their agencies and boards, the states are also the source of eminent domain (condemnation) powers by which private property may be taken for public use. The scope of these powers, and the extent of compensation required for particular takings, may be at issue either when the state seeks to take land owned by a private postsecondary institution or when a state postsecondary institution or board seeks to take land owned by a private party. In *Curators of the University of Missouri v. Brown*, 809 S.W.2d 64 (Mo. Ct. App. 1991), for instance, the university successfully brought a condemnation action to obtain Brown's land to use as a parking lot for a Scholars' Center that operated as part of the university but was privately owned. On the other hand, in *Regents of University of Minnesota v. Chicago and North Western Transportation Co.*, 552 N.W.2d 578 (Minn. App. 1996), the university was not successful in a condemnation action. The regents challenged the trial court's dismissal of its petition to acquire a thirty-acre tract of land, owned by the defendant railway company, located near the university's East Bank campus. The appellate court affirmed the trial court's ruling that the university had not shown the requisite necessity for taking the property by means of eminent domain. According to the appellate court:

First, the record indicates that the University has not included this property on its master plan for its anticipated development of the Twin Cities campus. Second, although the University claims to have at least three potential uses for the land, the uses are mutually exclusive, and the Board of Regents has not yet approved a single project for the property. Finally, because of soil contamination problems, it is undisputed that the University could not currently use the property for any of its proposed uses. The parties have not yet agreed on a remediation plan; decontamination of the property will require from approximately two to seven years to complete [552 N.W.2d at 580].

Thus, the university's purposes were speculative, and while the university "may well have the right to purchase this property, . . . it cannot acquire it for speculative future use (stockpiling) by condemnation."

Finally, the states, through their court systems, are the source of the common law (see Section 1.4.2.4) that provides the basis for the legal relationships between institutions and their students, faculties, and staff, and also provides general legal context for many of the transactions and disputes in which institutions may become involved. Common law contract principles, for example, may constrain an institution's freedom to terminate the employment of its personnel (see Section 4.3); tort law principles may shape the institution's responsibilities for its students' safety and well-being (see Sections 3.3.2.1–3.3.2.6); and contract law, tort law, and property law principles may guide the institution's business relationships with outside parties (see Sections 15.2, 15.3, & 15.4.2).

Given the considerable, and growing, state involvement in the affairs of higher educational institutions that is suggested by this discussion and is illustrated by Sections 12.2 through 12.5 below, postsecondary administrators have increasingly bumped against state agencies and state legal requirements in the course of their daily institutional duties. Administrators should therefore stay abreast of pertinent state agency processes, state programs, and state legal requirements affecting the operations of their institutions, and also of the oversight activities and legislative initiatives of the state legislature's education committees. Administrators should also encourage their legal counsel or their government relations office to monitor the growing body of state statutory law and administrative regulations, and to keep key institutional personnel apprised of developments that may potentially impact on the institution. Legal counsel should also be prepared to obtain the services of specialized legal experts when addressing certain complex matters of state law, such as the issuance of bonds.

In addition, presidents, key administrators, and legal counsel (especially for public institutions) should follow, and be prepared to participate in, the vigorous and wide-ranging debates on higher education policy that are now occurring in various states. Prime topics concern structural changes in state governance of higher education (see generally Section 1.3.3), state financing of higher education, and strategies for serving underserved population groups. (For representative commentary, see Ronald G. Ehrenberg & Michael J. Rizzo, "Financial Forces and the Future of American Higher Education," *Academe*, July–August 2004, 28; Peter Schmidt, "A Public Vision for Public Colleges," *Chron. Higher Educ.*, June 11, 2004, A16; Judd Slivka, "University Aims for 2-Tier System," *Arizona Republic*, May 23, 2004; Amy Argetsinger, "3 Public Universities Try to Ease Va.'s Reins," *Washington Post*, January 12, 2004, p. B1; Sara Hebel "To Ease Budget Crunch, Public Universities Seek Freedom from State Concerns," *Chron. Higher Educ.*, June 20, 2003, A19.)

## ***Sec. 12.2. State Provision of Public Postsecondary Education***

**12.2.1. Overview.** Public postsecondary education systems vary in type and organization from state to state. Such systems may be established by the



state constitution, by legislative acts, or by a combination of the two, and may encompass a variety of institutions—from the large state university to smaller state colleges or teachers colleges, to community colleges, technical schools, and vocational schools.

Every state has at least one designated body that bears statewide responsibility for at least some aspects of its public postsecondary system.<sup>3</sup> These bodies are known by such titles as Board of Higher Education, Commission on Higher Education, Board of Regents, Regents, Board of Educational Finance, or Board of Governors. Most such boards are involved in some phase of planning, program review and approval, and budget development for the institutions under their control or within their sphere of influence. Other responsibilities—such as the development of databases and management information systems or the establishment of new degree-granting institutions—might also be imposed. Depending on their functions, boards are classifiable into two groups: governing and coordinating. Governing boards are legally responsible for the management and operation of the institutions under their control. Coordinating boards have the lesser responsibilities that their name implies. Most governing boards work directly with the institutions for which they are responsible. Coordinating boards may or may not do so. Although community colleges are closely tied to their locales, most come within the jurisdiction of some state board or agency.

The legal status of the institutions in the public postsecondary system varies from state to state and may vary as well from institution to institution within the same state. Typically, institutions established directly by a state constitution have more authority than institutions established by statute and, correspondingly, have more autonomy from the state governing board and the state legislature. In dealing with problems of legal authority, therefore, one must distinguish between “statutory” and “constitutional” institutions and, within these basic categories, carefully examine the terms of the provisions granting authority to each particular institution. (See Valerie L. Brown, “A Comparative Analysis of College Autonomy in Selected States,” 60 *West’s Educ. Law Rptr.* 299 (1990).)

State constitutional and statutory provisions may also grant certain authority over institutions to the state governing board or some other state agency or official. It is thus also important to examine the terms of any such provisions that are part of the law of the particular state. The relevant statutes and constitutional clauses do not always project clear answers, however, to the questions that may arise concerning the division of authority among the individual institution, the statewide governing or coordinating body, the legislature, the governor, and other state agencies (such as a civil service commission or a budget office) or officials (such as a commissioner of education). Because of the uncertainties, courts often have had to determine who holds the ultimate authority to make various critical decisions regarding public postsecondary education.

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<sup>3</sup>The information in this paragraph is drawn heavily from Richard M. Millard, *State Boards of Higher Education*, ERIC Higher Education Research Report no. 4 (American Association for Higher Education, 1976).

Disputes over the division of authority among the state, a statewide governing or coordinating body, the legislature, or other entities typically arise in one of two contexts: the creation or dissolution of an institution, and the management and control of the affairs of a public institution. Although public institutions created by a state constitution, such as the flagship universities of California and Michigan, can be dissolved only by an amendment to the state constitution and are insulated from legislative control because of their constitutional status, public institutions created by legislative action (a statute) can also be dissolved by the legislature and are subject to legislative control. In some states, however, the allocation of authority is less clear. For example, in South Dakota, the state constitution created the statewide governing board for public colleges and universities (the board of regents), but the state colleges and universities were created by statute. In *Kanaly v. State of South Dakota*, 368 N.W.2d 819 (S.D. 1985), taxpayers challenged the state legislature's decision to close the University of South Dakota-Springfield and transfer its campus and facilities to the state prison system. The state's supreme court ruled that the decision to change the use of these assets was clearly within the legislature's power. However, under the terms of a perpetual trust the legislature had established to fund state universities, the prison system had to reimburse the trust for the value of the land and buildings.

The court distinguished between the power to manage and control a state college (given by the state constitution to the board of regents) and the "power of the purse" (a legislative power). The state constitution, said the court, did not create the board of regents as "a fourth branch of government independent of any legislative policies." Previous decisions by the South Dakota Supreme Court had established that the board of regents did not have the power to change the character of an institution, to determine state educational policy, or to appropriate funding for the institutions (368 N.W.2d at 825). "The legislature has the power to create schools, to fund them as it has the power of the purse, and to establish state educational policy and this necessarily includes the power to close a school if efficiency and economy so direct" (368 N.W.2d at 825). Transferring the property upon which the university was located to the state prison system was not the same, said the court, as transferring control of the institution itself from the regents to the prison system.

In situations where a state governing or coordinating board has the authority to establish or dissolve a college, a court's powers to review the criteria by which such a decision is made are limited. For example, a group of citizens formed a nonprofit corporation and asked the State of Missouri to approve the corporation's application to form a community college. In *State ex rel. Lake of the Ozarks Community College Steering Committee v. Coordinating Board for Higher Education*, 802 S.W.2d 533 (Mo. Ct. App. 1991), the steering committee of the corporation sued the state coordinating board for rejecting its application. The court dismissed the lawsuit as moot because the board had considered the petition and, having rejected it, had acted within its authority. The court noted that it was not proper in this instance for a court to define the standards by which the board evaluated the application.

Litigated issues related to the management and control of colleges and universities are numerous. They include academic matters, such as the registration of doctoral programs (see *Moore v. Board of Regents of the University of the State of New York*, discussed in Section 12.2.2 below), as well as resource allocation matters, such as the approval of budget amendments and appropriation of funds for the university system (see *Board of Regents of Higher Education v. Judge*, 543 P.2d 1323 (Mont. 1975)).

Part of the state's power to provide postsecondary education is the power to appoint trustees or regents. When a governor and a state legislature are in conflict, such appointments may be adversely affected. In *Tucker v. Watkins*, 737 So. 2d 443 (Ala. 1999), for example, two Alabama State University trustees had been appointed by the former governor of Alabama, but had not been confirmed by the state senate before it recessed. The subsequent governor removed the trustees from their positions and appointed two other trustees in their place. The state supreme court upheld the ruling of a state trial court that the removal was contrary to state law, and that only the state senate could revoke the appointments. In a similar case regarding the appointment of trustees to the board of Auburn University, the state supreme court ruled that trustees appointed by a former governor could remain on the board until their replacements were approved by the state senate (*James v. Langford*, 695 So. 2d 1164 (Ala. 1997)).

**12.2.2. Statutorily based institutions.** A public institution established by state statute is usually characterized, for legal purposes, by terms such as “state agency,” “public corporation,” or state “political subdivision.” Such institutions, particularly institutions considered “state agencies,” are often subject to an array of state legislation applicable to state-created entities. A state agency, for example, is usually subject to the state's administrative procedure act and other requirements of state administrative law. State agencies, and sometimes other statutory institutions, may also be able to assert the legal defenses available to the state, such as sovereign immunity. In *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 366 A.2d 360 (Md. 1976), for instance, the court's holding that the board of a regional community college was a state agency enabled the board to assert sovereign immunity as a defense against a suit for breach of contract.

The case of *Moore v. Board of Regents of the University of the State of New York*, 390 N.Y.S.2d 582 (N.Y. Sup. Ct. 1977), *affirmed*, 397 N.Y.S.2d 449 (N.Y. App. Div. 1977), *affirmed*, 407 N.Y.S.2d 452 (N.Y. 1978), illustrates the problem of dividing authority between a statutory institution and other entities claiming some authority over it. The trustees and chancellor of the State University of New York (SUNY), together with several professors and doctoral students in the affected departments, sought a declaratory judgment that the university trustees were responsible under the law for providing the standards and regulations for the organization and operation of university programs, courses, and curricula in accordance with the state's master plan. The defendants were the state board of regents and the state commissioner of education. The case concerned the

commissioner's deregistration of the doctoral programs in history and English at the State University of New York at Albany. In statements for the news media, each of the opposing litigants foresaw an ominous impact from a decision for the other side: if the commissioner and the state board won, the institution would continue to be subjected to "unprecedented intervention"; if the trustees won, the university would be placed beyond public accountability (*Chron. Higher Educ.*, March 8, 1976, A3).

After analyzing the state's constitution, education law, and administrative regulations, the trial court concluded that the commissioner, acting for the board of regents, which was established by the state constitution, had the authority to make the decision. In reaching this conclusion, the court noted that the New York constitution had created the board of regents with jurisdiction over all institutions of higher education in the state. The regents were given the power to charter colleges and universities, and had, in fact, registered programs within such colleges since 1787. Furthermore, said the court, the legislature created the State University of New York in 1948 as a corporation within the State Education Department, and made it subject to the authority of the board of regents. A 1961 statute gave the Board of Trustees of the State University of New York the authority to administer the university's internal affairs, but included no language to suggest that SUNY was not "subject to the same requirements imposed by the regents and commissioner on private institutions of higher education in this state" (390 N.Y.S.2d at 586).

This decision was affirmed by the Appellate Division of the New York Supreme Court (an intermediate appellate court) and subsequently by the New York Court of Appeals. In affirming, however, the New York Court of Appeals cautioned that the broad "policy-making" and "rule-making" power of the regents "is not unbridled and is not an all-encompassing power permitting the regents' intervention in the day-to-day operations of the institutions of higher education in New York."

A case involving Texas A&M University illustrates the reach of regulation by the state over a statutory university. Texas A&M entered an affiliation agreement with South Texas College of Law, a private institution, in which the two institutions agreed that A&M would appoint some of the law college's board of directors, would appoint a member of the law college's admissions committee, and would have an active role in tenure decisions and in the hiring of the law college's dean and president. Texas A&M had no law school, and had not received permission from the Texas Higher Education Coordinating Board to create one. The coordinating board learned of this agreement and informed both institutions that the agreement could not be implemented until the board had added law to A&M's academic mission. Both institutions sought a declaratory judgment from a state court concerning the validity of the affiliation agreement.

In *South Texas College of Law v. Texas Higher Education Coordinating Board*, 40 S.W.3d 130 (Tex. App. 2000), a state appellate court affirmed the trial court's award of summary judgment to the coordinating board. The court held that the agreement would extend A&M's academic programs, and because the coordinating board had not approved either a law school or a program in law for

A&M, the affiliation agreement infringed upon the coordinating board's statutory authority to determine which degree programs a public university should offer. The colleges appealed to the Texas Supreme Court, which refused to hear the case.

Although state law defines the relationship between statutorily based institutions and relevant state agencies, clashes between these institutions and the state may also raise issues of federal law. Furthermore, third parties may also occasionally be able to use federal civil rights law to intervene in disputes between state boards and statutorily based institutions. For example, in *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), Alabama State University and several faculty, students, and citizens suing as individuals attempted to use Section 1983 (see Section 3.5 of this book) and Title VI (see Section 13.5.2 of this book) to reverse the state board of education's decertification of teacher education programs at that institution. The plaintiffs claimed that the state board's actions were in retaliation for the plaintiffs' involvement in desegregation litigation against the board. Although the appellate court ruled that the institution had no standing to sue the state board (because the university was a creation of the state), the individual plaintiffs could proceed against individual members of the board of education under federal civil rights law.

(For a discussion of an apparent trend toward decentralizing trustee authority to the local college level, see Peter Schmidt, "Weakening the Grip of Multi-campus Boards," *Chron. Higher Educ.*, March 23, 2001, A24.)

**12.2.3. Constitutionally based institutions.** A public institution established by the state's constitution is usually characterized, for legal purposes, as a "public trust," an "autonomous university," a "constitutional university," or a "constitutional body corporate." Such institutions enjoy considerable freedom from state legislative control and generally are not subject to state administrative law. Such institutions also may not be able to assert all the defenses to suit that the state may assert. If the institution is considered a public trust, its trustees must fulfill the special fiduciary duties of public trustees and administer the trust for the educational benefit of the public.

The case of *Regents of the University of Michigan v. State of Michigan*, 235 N.W.2d 1 (Mich. 1975), illustrates both the greater autonomy of constitutional (as opposed to statutory) institutions and the differing divisions of authority that are likely between the institution and other entities claiming authority over it. The University of Michigan, Michigan State University, and Wayne State University, all "constitutional" universities, challenged the constitutionality of various provisions in legislative appropriation acts that allegedly infringed on their autonomy. The court affirmed that, although the legislature could impose conditions on its appropriations to the institutions, it could not do so in a way that would "interfere with the management and control of those institutions." Thus, any particular condition in an appropriation act will be held unconstitutional if it constitutes an interference with institutional autonomy. Since most of the provisions challenged were no longer in effect and the controversy was therefore moot, the court refused to determine whether or not they constituted an interference. But

the court did consider the challenge to a provision that prohibited the institutions from contracting for the construction of any “self-liquidating project” (a project that would ultimately pay for itself) without first submitting to the legislature schedules for liquidation of the debt incurred for construction and operation of the project. The court upheld this provision because it did not give the legislature power over construction decisions, but merely required that a report be made.

The institutions also challenged the State Board of Education’s authority over higher education. The State Board of Education argued that it had the authority to approve program changes or new construction at the universities. Relying on the express terms of a constitutional provision setting out the board’s powers and their relationship to powers of individual institutions, the court held that the State Board of Education’s authority over the institutions was advisory only. The institutions were required only to inform the board of program changes, so that it could “knowledgeably carry out its advisory duties.” Thus, although the state could impose some requirements on the plaintiff universities to accommodate the authority given other state agencies or branches of government, constitutionally created institutions retain exclusive authority to manage and control their own operations.

Similarly, in *San Francisco Labor Council v. Regents of the University of California*, 608 P.2d 277 (Cal. 1980), the court gave substantial protection to a constitutionally based institution’s autonomy. The plaintiff labor council argued that the regents had failed to comply with a requirement set forth in the State Education Code, namely, that the board of regents, in setting salaries, must take account of prevailing minimum and maximum salaries in various localities. The board asserted that the state constitution exempted it from the Education Code’s mandate. The California Supreme Court agreed with the board. The state constitutional provision at issue (as quoted by the court) reads:

The University of California shall constitute a public trust, to be administered by the existing corporation known as “The Regents of the University of California,” with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services [Cal. Const. Art. IX, § 9].

The court discussed the autonomy that the board enjoyed under this constitutional provision, pointing out that the state constitution gives the regents “broad powers to organize and govern the university and limits the legislature’s power to regulate either the university or the regents,” compared with the legislature’s direct authority over state agencies. In addition, said the court, the regents have rule-making power over the university, and have “virtually exclusive” power to “operate, control, and administer the university” (608 P.2d at 278).

On the other hand, the court noted, the regents are not completely independent of control by the legislature. The legislature retained the power to appropriate funds for the university, the legislature’s general police powers that apply to

private persons and corporations also apply to the university, and the legislature could subject the university to laws regulating “matters of statewide concern not involving internal university affairs” (608 P.2d at 278, 279). The court then held that the Education Code provision relied on by the plaintiff did not fit any of these three areas where the legislature could intervene and thus did not bind the board of regents. (For another case with similar facts and a similar outcome, see *Board of Regents of the University of Oklahoma v. Baker*, 638 P.2d 464 (Okla. 1981).)

In *Regents of the University of Michigan v. State*, 419 N.W.2d 773 (Mich. Ct. App. 1988), the University of Michigan was once again required to assert its constitutional autonomy against state attempts to regulate its operations. The Michigan legislature passed a law prohibiting any public educational institution from “making or maintaining . . . an investment in an organization operating in the Republic of South Africa.” Although the University of Michigan had nearly completed its divestiture of South African-related assets, it challenged the law as violating its constitutional autonomy to make its own decisions about its resources. The state appellate court agreed, and the state appealed. The Michigan Supreme Court affirmed the lower courts (453 N.W.2d 656 (Mich. 1990)), despite the state’s argument that the issue was moot because the university had divested its South African-related stocks voluntarily. (For an analysis of the issues in the case, written by the university’s counsel, see R. K. Daane, “*Regents of the University of Michigan v. State of Michigan: South African Divestiture and Constitutional Autonomy*,” 15 *J. Coll. & Univ. Law* 313 (1989).)

Similarly, in *Board of Regents of Oklahoma State University v. Oklahoma Merit Protection Commission*, 19 P.3d 865 (Okla. 2001), the Supreme Court of Oklahoma ruled that the Oklahoma Merit Protection Commission, a state agency that adjudicated grievances by state employees against public employers, had no authority over grievances of employees of Oklahoma State University. The court declared that Article 6 § 31a, Article 13-A, and Article 13-B of the Oklahoma constitution granted the board of regents “exclusive authority to manage the affairs of institutions,” and that the legislature was “powerless to create a body to take over the responsibility” (19 P.3d at 866).

But statutes of general application that regulate the employment relationship between public employers and their employees have usually (but not always) been applied to constitutionally based institutions. For example, the University of Colorado asserted that its constitutional status exempted it from the application of the state’s Civil Rights Act. In *Colorado Civil Rights Commission v. Regents of the University of Colorado*, 759 P.2d 726 (Colo. 1988), the university claimed that the state Civil Rights Commission lacked jurisdiction over a challenge to the university’s decision to deny tenure to a Hispanic professor. Although the university argued that previous state supreme court decisions had required the legislature to “explicitly refer to the Regents in defining the term ‘employer’ for purposes of discriminatory employment practices” (759 P.2d at 733), the court found an implied legislative intent to include the regents within the term “employer” in the state’s antidiscrimination statute.

The court noted that the Colorado constitution provided that colleges and universities “shall be subject to the control of the state, under the provisions of

the constitution and such laws and regulations as the general assembly may provide” (Colo. Const. Art. VIII, § 5(1)). The constitution gives to the governing boards of the state colleges and universities, “whether established by constitution or by law,” the power of general supervision over these institutions “unless otherwise provided by law” (Art. VIII, § 5(2)). This language, said the court, “clearly contemplates a limited power of ‘general supervision’ only” (759 P.2d at 730). The enactment by the Colorado legislature of the nondiscrimination law, and its creation of a Civil Rights Commission to investigate discrimination claims against employers, constituted such a law that limited the authority of the university’s governing board. (See also *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 204 N.W.2d 218 (Mich. 1973), where the court held that the University of Michigan is a public employer subject to the state’s Public Employment Relations Act.)

But a different result was reached in a Minnesota case in which the court was asked to determine whether the state’s Veterans Preference Act applied to non-faculty employment decisions of the University of Minnesota, a constitutionally based university. In *Winberg v. University of Minnesota*, 485 N.W.2d 325 (Minn. Ct. App. 1992), a state appellate court recognized the university’s autonomy but ruled that limits could be placed on that autonomy by the legislature, given the university’s acceptance of public funds. The Minnesota Supreme Court reversed (499 N.W.2d 799 (Minn. 1993)), holding that the Veterans Preference Act did not apply to the university’s employment decisions because the university was not a “political subdivision” of the state. Only if the legislature had specifically referred to the university in the text of the law would it have bound the university, said the court. Having resolved the dispute through statutory interpretation, the court declined to address the constitutional issues raised by the university.

### ***Sec. 12.3. State Chartering and Licensure of Private Postsecondary Institutions***

***12.3.1. Scope of state authority.*** The authority of states to regulate private postsecondary education is not as broad as their authority over their own public institutions (see Section 1.5.1). Nevertheless, under their police powers, states do have extensive regulatory authority that they have implemented through statutes and administrative regulations. This authority has generally been upheld by the courts. In the leading case of *Shelton College v. State Board of Education*, 226 A.2d 612 (N.J. 1967), for instance, the court reviewed the authority of New Jersey to license degree-granting institutions and approve the basis and conditions on which they grant degrees. The State Board of Education had refused to approve the granting of degrees by the plaintiff college, and the college challenged the board’s authority on a variety of grounds. In an informative opinion, the New Jersey Supreme Court rejected all the challenges and broadly upheld the board’s decision and the validity of the statute under which the board had acted.

Similarly, in *Warder v. Board of Regents of the University of the State of New York*, 423 N.E.2d 352 (N.Y. 1981), the court rejected state administrative law and



constitutional due process challenges to New York’s authority to charter post-secondary institutions. The Unification Theological Seminary, a subdivision of the Unification Church (the church of Reverend Sun Myung Moon), sought to incorporate in New York and offer a master’s degree in religious education. It applied for a provisional charter. In reviewing the application, the state education department subjected the seminary to an unprecedented lengthy and intensive investigation. The department had been concerned about charges of brainwashing and deceptive practices directed against the Unification Church. The department’s investigation did not substantiate these charges but did uncover evidence suggesting other deficiencies. Ultimately, the department determined that the seminary had misrepresented itself as having degree-granting status, had refused to provide financial statements, and had not enforced its admissions policies.

The New York Court of Appeals held that, despite the singular treatment the seminary had received, the education department had a rational basis for its decision to deny the charter:

Petitioners do not and cannot dispute that the board validly could deny a provisional charter to an institution that engaged in “brainwashing” and deception. That the broad investigation revealed no evidence of such practices does not mean that it was improperly undertaken in the first instance. The board cannot now be faulted because it discharged its responsibility for ensuring ethical educational programs of quality and in the process discovered serious deficiencies in the conduct of the academic program [423 N.E.2d at 357].

The seminary also charged that the legislature’s grant of authority to the education department was vague and overbroad, and that the department had reviewed the seminary in a discriminatory and biased manner. Dispensing with the latter argument, the court found that the record did not contain evidence of discrimination or bias. Also rejecting the former argument, the court held that the New York statutes constituted a lawful delegation of authority to the state’s board of regents:

The board of regents is charged with broad policy-making responsibility for the state’s educational system (Education Law § 207) and is specifically empowered to charter institutions of higher education (Education Law §§ 216, 217). In the meaningful discharge of those functions and to “encourage and promote education” (Education Law § 201), the regents ensure that acceptable academic standards are maintained in the programs offered (see *Moore v. Board of Regents of University of the State of New York*, . . . 378 N.E.2d 1022 [1978]). Thus, before an institution may be admitted to the academic community with degree-granting status, it must meet established standards (see 8 NYCRR [New York Code, Rules and Regulations] 3.21, 3.22, 52.1, 52.2); its purposes must be, “in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement” (Education Law § 216). Given the broad responsibility of the board of regents for the quality of education provided in this state, it must be given wide latitude to investigate and evaluate institutions seeking to operate within the system [423 N.E.2d at 357].

Authority over private postsecondary institutions is exercised, in varying degrees depending on the state, in two basic ways. The first is incorporation or chartering, a function performed by all states. In some states postsecondary institutions are subject to the nonprofit corporation laws applicable to all nonprofit corporations; in others postsecondary institutions come under corporation statutes designed particularly for charitable institutions; and in a few states there are special statutes for incorporating educational institutions. Proprietary (profit-making) schools often fall under general business corporation laws. The states also have laws applicable to “foreign” corporations (that is, those chartered in another state), under which states may “register” or “qualify” out-of-state institutions that seek to do business in their jurisdiction.

The second method for regulating private postsecondary institutions is licensure.<sup>4</sup> Imposed as a condition to offering education programs in the state or to granting degrees or using a collegiate name, licensure is a more substantial form of regulation than chartering. (An overview of the kinds of provisions that are or can be included in state licensing systems, as well as some of the policy choices involved, can be found in *Model State Legislation: Report of the Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees*, Report no. 39 (Education Commission of the States, June 1973).)

There are three different approaches to licensure:

First, a state can license on the basis of *minimum standards*. The state may choose to specify, for example, that all degree-granting institutions have a board, administration, and faculty of certain characteristics, an organized curriculum with stipulated features, a library of given size, and facilities defined as adequate to the instruction offered. Among states pursuing this approach, the debate centers on what and in what detail the state should prescribe—some want higher levels of prescription to assure “quality,” others want to allow room for “innovation.”

A second approach follows models developed in contemporary regional accreditation and stresses *realization of objectives*. Here the focus is less on a set of standards applicable to all than on encouragement for institutions to set their own goals and realize them as fully as possible. The role of the visiting team is not to inspect on the basis of predetermined criteria but to analyze the institution on its own terms and suggest new paths to improvement. This help-oriented model is especially strong in the eastern states with large numbers of well-established institutions; in some cases, a combined state-regional team will be formed to make a single visit and joint recommendation.

A third model would take an *honest practice* approach. The essence of it is that one inspects to verify that an institution is run with integrity and fulfills basic claims made to the public. The honesty and probity of institutional officers,

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<sup>4</sup>Under federal law, 20 U.S.C. § 1099a (also discussed in footnote 1 above), each state must provide to the U.S. Secretary of Education, on request, information regarding its “process of licensing or other authorization for institutions of higher education to operate within the State” (1099a(a)(1)), and must “notify the Secretary promptly” whenever it “revokes” any such license or authorization (1099a(a)(2)).

integrity of the faculty, solvency of the balance sheet, accuracy of the catalogue, adequacy of student records, equity of refund policies—these and related matters would be the subject of investigation. If an institution had an occupation-related program, employment records of graduates would be examined. It is unclear whether any state follows this model in its pure form, though it is increasingly advocated, and aspects of it do appear in state criteria. A claimed advantage is that, since it does not specify curricular components or assess their strengths and weaknesses (as the other two models might), an “honest practice” approach avoids undue state “control” of education [*Approaches to State Licensing of Private Degree-Granting Institutions* (Postsecondary Education Convening Authority, George Washington University, 1975), 17–19].

Almost all states have some form of licensing laws applicable to proprietary institutions, and the trend is toward increasingly stringent regulation of the proprietary sector (see, for example, M. C. Cage, “Plan Would Increase State Regulation of For-Profit Schools,” *Chron. Higher Educ.*, August 14, 1994, A17). Some states apply special requirements to non-degree-granting proprietary schools that are more extensive than the requirements for degree-granting institutions. In *New York Ass’n. of Career Schools v. State Education Department*, 749 F. Supp. 1264 (S.D.N.Y. 1990), the court upheld the New York regulations on non-degree-granting schools as against an equal protection clause attack.

Regarding licensure of nonprofit institutions, in contrast, there is considerable variance among the states in the application and strength of state laws and in their enforcement. Often, by statutory mandate or the administrative practice of the licensing agency, regionally accredited institutions (see Section 14.3.1 of this book) are exempted from all or most licensing requirements for nonprofit schools.

In addition to chartering and licensure, some states also have a third way of exerting authority over private postsecondary institutions: through the award of financial aid to such institutions or their students. By establishing criteria for institutional eligibility and reviewing institutions that choose to apply, states may impose additional requirements, beyond those in corporation or licensure laws, on institutions that are willing and able to come into compliance and thus receive the aid. A New York case concerning New York’s “Bundy Aid” program, *In the Matter of Excelsior College v. New York State Education Department*, 761 N.Y.S.2d 700 (N.Y. App. Div. 2003), provides a contemporary, but stark, illustration of this point. Excelsior College is chartered by the state board of regents and is authorized to confer degrees. But, as the court emphasized, “the degrees . . . are awarded by [the college] based upon examinations it administers and an ‘assessment’ of the applicant’s aggregate lifetime learning experiences,” and the college “‘does not offer an instructional program’” of its own. The college was therefore ineligible for state aid because the Bundy Law (N.Y. Education Law, § 6401) provides aid only to institutions of “higher education,” which the court construed to mean institutions that provide an instructional program for their students.

State corporation laws ordinarily do not pose significant problems for postsecondary institutions, since their requirements can usually be met easily and

routinely. Although licensing laws contain more substantial requirements, even in the more rigorous states these laws present few problems for established institutions, either because the institutions are exempted by accreditation or because their established character makes compliance easy. For these institutions, problems with licensing laws are more likely to arise if they establish new programs in other states and must therefore comply with the various licensing laws of those other states (see Section 12.4 below). The story is quite different for new institutions, especially if they have innovative (nontraditional) structures, programs, or delivery systems, or if they operate across state lines (Section 12.4). For these institutions, licensing laws can be quite burdensome because they may not be adapted to the particular characteristics of nontraditional education or receptive to out-of-state institutions.

When an institution does encounter problems with state licensing laws, administrators may have several possible legal arguments to raise, which generally stem from state administrative law or the due process clauses of state constitutions or the federal Constitution. Administrators should insist that the licensing agency proceed according to written standards and procedures, that it make them available to the institution, and that it scrupulously follow its own standards and procedures. If any standard or procedure appears to be outside the authority delegated to the licensing agency by state statute, it may be questioned before the licensing agency and challenged in court. Occasionally, even if standards and procedures are within the agency's delegated authority, the authorizing statute itself may be challenged as an unlawful delegation of legislative power. In *Packer Collegiate Institute v. University of the State of New York*, 81 N.E.2d 80 (N.Y. 1948), the court invalidated New York's licensing legislation because "the legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in most general terms, what the subject matter of the regulations is to be." In *State v. Williams*, 117 S.E.2d 444 (N.C. 1960), the court used similar reasoning to invalidate a North Carolina law. However, a much more hospitable approach to legislative delegations of authority is found in more recent cases, such as *Shelton College* and *Warder*, both discussed earlier in this Section, where the courts upheld state laws against charges that they were unlawful delegations of authority.

Perhaps the soundest legal argument for an institution involved with a state licensing agency is that the agency must follow the procedures in the state's administrative procedure act (where applicable) or the constitutional requirements of procedural due process. *Blackwell College of Business v. Attorney General*, 454 F.2d 928 (D.C. Cir. 1971), a case involving a federal agency function analogous to licensing, provides a good illustration. The case involved the withdrawal by the Immigration and Naturalization Service (INS) of Blackwell College's status as a school approved for attendance by nonimmigrant alien students under Section 1101(a)(15)(F) of the Immigration and Nationality Act. The INS had not afforded the college a hearing on the withdrawal of its approved status, but only an interview with agency officials and an opportunity to examine agency records concerning the withdrawal. The appellate court found that "the

proceedings . . . were formless and uncharted” and did not meet the requirements of either the federal Administrative Procedure Act or constitutional due process. Invalidating the INS withdrawal of approval because of this lack of procedural due process, the court established guidelines for future government proceedings concerning the withdrawal of a school’s license or approved status:

The notice of intention to withdraw approval . . . should specify in reasonable detail the particular instances of failure to . . . [comply with agency requirements]. The documentary evidence the school is permitted to submit . . . can then be directed to the specific grounds alleged. In addition, if requested, the school should be granted a hearing before an official other than the one upon whose investigation the [agency] has relied for initiating its withdrawal proceedings. If the evidence against the school is based upon authentic records, findings may be based thereon, unless the purport of the evidence is denied, in which event the school may be required to support its denial by authentic records or live testimony. If, however, the data presented in support of noncompliance [are] hearsay evidence, the college, if it denies the truth of the evidence, shall have opportunity, if it so desires, to confront and cross-examine the person or persons who supplied the evidence, unless the particular hearsay evidence is appropriate for consideration under some accepted exception to the hearsay rule. In all the proceedings the school, of course, shall be entitled to representation and participation by counsel. The factual decision of the [agency] shall be based on a record thus compiled; and the record shall be preserved in a manner to enable review of the decision. . . . We should add that we do not mean that each and every procedural item discussed constitutes by itself a prerequisite of procedural due process. Rather our conclusion of unfairness relates to the totality of the procedure. . . . The ultimate requirement is a procedure that permits a meaningful opportunity to test and offer facts, present perspective, and invoke official discretion [454 F.2d at 936].

The case of *Ramos v. California Committee of Bar Examiners*, 857 F. Supp. 702 (N.D. Cal. 1994), like the *Blackwell College of Business* case, was a procedural due process challenge to a government decision concerning the recognition of educational institutions. But, unlike *Blackwell*, *Ramos* involved a *denial* rather than a *withdrawal* of recognition. The court addressed a threshold due process issue that may present difficulties in denial cases, but generally not in withdrawal or termination cases: whether the government action deprived the institution of a “property interest” or “liberty interest” (see generally Section 6.6.2). The plaintiff in *Ramos* had been denied registration as a law school in the state of California. Focusing on property interests, the court considered whether “the statutory and regulatory provisions pertaining to the availability of registration” created any “right or entitlement” for applicants for state registration. Because the answer was “No,” the plaintiff had no property interest at stake and therefore no basis for a due process claim.

The *Ramos* opinion also indicates that, even if the plaintiff did have a property interest at stake, the due process claim would still fail because the bar examiners committee had provided all the procedure the Fourteenth Amendment would then require. In particular, the committee had provided the plaintiff with

registration forms, had provided the opportunity for a hearing, and had notified the plaintiff of the hearing date. Moreover, the committee's findings apparently were supported by "substantial evidence," and its conclusions were not "arbitrary" (or at least the plaintiff did not contend to the contrary).

Although state incorporation and licensing laws are often sleeping dogs, they can bite hard when awakened. Institutional administrators and counsel—especially in new, expanding, or innovating institutions—should remain aware of the potential impact of these laws and of the legal arguments available to the institution if problems do arise.

**12.3.2. *Chartering and licensure of religious institutions.*** In some respects, religiously affiliated and other religious institutions stand on the same footing as private secular institutions with respect to state chartering and licensure. In the *Warder* case (Section 12.3.1), for example, a religious seminary encountered the same kinds of problems that a secular institution might have encountered and raised the same kinds of legal issues that a secular institution might have raised. In other respects, however, the problems encountered and issues raised by religious institutions may be unique to their religious mission and status. The predominant consideration in such situations is likely to be whether the religious institution may invoke the freedom of religion guarantees in the federal Constitution or the state constitution—thus obtaining a shield against state regulation not available to secular institutions. The following two cases are illustrative.

In the first case, *New Jersey Board of Higher Education v. Shelton College*, 448 A.2d 988 (N.J. 1982) (*Shelton II*),<sup>5</sup> the New Jersey Supreme Court held that a state law requiring a license to grant degrees applied to religious as well as nonreligious private colleges. The court also held that application of the law to Shelton, a small fundamentalist Presbyterian college, did not violate either the free exercise clause or the establishment clause of the First Amendment (see Section 1.6.2). The college had begun offering instruction leading to the baccalaureate degree without first obtaining a state license. The state sought to enjoin Shelton from engaging in this activity within the state, and the New Jersey court granted the state's request.

While acknowledging that the state's licensing scheme imposed some burdens on Shelton's free exercise rights, the court found that the state had an overriding interest in regulating education and maintaining minimum academic standards. Given the strength of the state's interest in regulating and the absence of less restrictive means for fulfilling this interest, the state's interest outweighed the college's religious interests:

Legislation that impedes the exercise of religion may be constitutional if there exists no less restrictive means of achieving some overriding state interest. . . .

The legislation at issue here advances the state's interest in ensuring educational standards and maintaining the integrity of the baccalaureate degree. . . .

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<sup>5</sup>The court referred to this litigation as *Shelton II* to distinguish it from *Shelton I* (*Shelton College v. State Board of Education*, discussed in Section 12.3.1).

That maintenance of minimum educational standards in all schools constitutes a substantial state interest is now beyond question. . . .

[Moreover,] the First Amendment does not require the provision of religious exemptions where accommodation would significantly interfere with the attainment of an overriding state interest. . . .

Here, accommodation of defendants' religious beliefs would entail a complete exemption from state regulation. . . . Such accommodation would cut to the heart of the legislation and severely impede the achievement of important state goals. Furthermore, if an exemption were created here, Shelton College would receive an advantage at the expense of those educational institutions that have submitted to state regulation. Such a development would undermine the integrity of the baccalaureate degree, erode respect for the state higher education scheme, and encourage others to seek exemptions. Thus, the uniform application of these licensing requirements is essential to the achievement of the state's interests. . . .

In sum, although defendants' freedom of religion may suffer some indirect burden from this legislation, the constitutional balance nonetheless favors the state interest in uniform application of these higher education laws [448 A.2d at 995–97].

Nor did the state regulations result in any “excessive entanglement” with religion or otherwise infringe the establishment clause. Instead, the New Jersey law on its face created a religiously neutral regulatory scheme:

The allegation of excessive entanglement rests on speculation about the manner in which these statutes and regulations might be applied. Although one could imagine an unconstitutional application of this regulatory scheme, we are confident that the board of higher education will pursue the least restrictive means to achieve the state's overriding concerns. Of course, should the board exercise its discretion in a manner that unnecessarily intrudes into Shelton's religious affairs, the college would then be free to challenge the constitutionality of such action [448 A.2d at 998].

In a similar case decided the same month as *Shelton II*, the Supreme Court of Tennessee upheld that state's authority to regulate degree granting by religious colleges. In *State ex rel. McLemore v. Clarksville School of Theology*, 636 S.W.2d 706 (Tenn. 1982), the school had also been offering instruction leading to a degree without obtaining a state license. When the state sought to enjoin it from offering degrees, the school argued that application of the state law would infringe its freedom of religion under the First Amendment.

The court agreed with the state's contention that the award of degrees is a purely secular activity and that the state's licensing requirement therefore did not interfere with the school's religious freedoms:

The school is inhibited in no way by the Act as far as religion is concerned, the Act only proscribing the issuance of educational credentials by those institutions failing to meet the minimum requirements. The court holds, therefore, that applying the Act to defendant school does not violate the free exercise of religion clause of the Constitution, state or federal. . . .

If the Act placed a burden upon the free exercise of religion by the defendants or posed a threat of entanglement between the affairs of the church and the state, the state would be required to show that “some compelling state interest” justified the burden and that there exists no less restrictive or entangling alternative (*Sherbert v. Verner*, 374 U.S. 398 . . . (1963); *Wisconsin v. Yoder*, 406 U.S. 205 . . . (1972)).

We conclude, however, that this Act places neither a direct nor [an] indirect burden upon the free exercise of religion by the defendants nor threatens an entanglement between the affairs of church and state. . . .

The Act does not regulate the beliefs, practices, or teachings of any institution; it merely sets forth minimum standards which must be met in order for an institution to be authorized to issue degrees. Moreover, the evidence shows that the granting of degrees is a purely secular activity. It is only this activity that brings the school under the regulation of the Act [636 S.W.2d at 708–9].

The court emphasized that the licensing statute did not interfere with the content of the school’s teaching or with the act of teaching itself. But when the school sought to provide educational credentials as an end product of that teaching, it was properly subject to the state’s authority to regulate a secular activity intimately related to the public welfare:

The fact remains that the state is merely regulating the awarding of educational degrees. The supposed predicament of the school is not a result of the state’s regulation of its religious function of training ministers but of its preeminent role of *awarding degrees*[,] which is, as conceded by its president and founder, a purely secular activity [636 S.W.2d at 711].

The Tennessee court thus rejected the school’s First Amendment claims because the state regulation did not burden any religious activity of the school. In contrast, the New Jersey court recognized that the state regulation burdened Shelton College’s religious activities; nonetheless, the court rejected the school’s First Amendment claims because the state’s educational interests were sufficiently strong to justify the burden. By these varying paths, both cases broadly uphold state licensing authority over religiously affiliated degree-granting institutions.<sup>6</sup> (For a dissenting view on the issues involved, see Russell Kirk, “Shelton College and State Licensing of Religious Schools: An Educator’s View of the Interface Between the Establishment and Free Exercise Clauses,” 44 *Law & Contemp. Probs.* 169 (1981).)

In a later case, *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*, 114 S.W.3d 617 (Tex. App. 2003), a Texas appellate court relied on more

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<sup>6</sup>Later U.S. Supreme Court cases on the free exercise and establishment clauses suggest that the analysis of cases like *Shelton II* and *Clarkesville School of Theology* may be somewhat different now, and that it may be easier for states to prevail against a religious institution’s First Amendment challenges to a state licensing system (see generally Section 1.6.2). In particular, the case of *Employment Division v. Smith*, 494 U.S. 872 (1990) (discussed in Section 1.6.2), would allow for a lower standard of review under the federal free exercise clause when the licensing scheme is “generally applicable” and religiously “neutral.” This approach may not always be available under state constitutions, however, which may require a stricter review similar to that in *Shelton II*.



recent caselaw to reach a result similar to that in the *Shelton II* and *Clarksville* cases. The plaintiff, which operated a theological seminary, challenged the state statute (Tex. Educ. Code Ann. §§ 61.301–.319) and administrative regulations under which Texas requires private institutions to obtain a certificate of authority from the state in order to award postsecondary degrees. The plaintiff based its challenges on the First Amendment’s establishment clause, free exercise clause, and free speech clause, and on the parallel clauses in the state constitution. The appellate court rejected all of these challenges. In rejecting the establishment clause claims, the court applied the *Lemon* test (see Section 1.6.3 of this book) and cited the *Shelton II* case with approval. In rejecting the free exercise claims, the court relied on *Employment Division v. Smith* (see footnote 6 above), a U.S. Supreme Court case decided some years after the *Shelton II* and *Clarksville* cases, to hold that the Texas statute and regulations were religiously neutral within the meaning of *Smith* and that the state’s secular interests justified any minimal burden that the certificate of authority requirement may place on the plaintiff’s operations.

### ***Sec. 12.4. State Regulation of Out-of-State Institutions and Programs***

Postsecondary institutions have increasingly departed from the traditional mold of a campus-based organization existing at a fixed location within a single state. Both established and new institutions, public as well as private, may have branch campuses; off-campus programs; experiential learning programs; computer and Internet-based programs; and other innovative systems for delivering education to a wider audience. These developments have given institutions a presence in states other than the home states where they are incorporated, thus sometimes subjecting them to the regulatory jurisdiction of other (perhaps multiple) states.

For these multistate institutions, whether public or private, legal problems may increase both in number and in complexity.<sup>7</sup> Not only must the institution meet the widely differing and possibly conflicting legal requirements of various states, but it must also be prepared to contend with laws or administrative practices that may not be suited to or hospitable to either out-of-state or nontraditional programs. Institutional administrators contemplating the development of any program that will cross state lines should be sensitive to this added legal burden and to the legal arguments that may be used to lighten it.

A multistate institution may seek to apply the legal arguments in Section 12.3 to states that prohibit or limit the operation of the institution’s programs within their borders; these legal arguments apply to all state regulation, whether it concerns out-of-state institutions or not. Out-of-state institutions may also raise particular questions concerning the state’s authority over out-of-state, as opposed

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<sup>7</sup>Some of the background material in the first part of this Section is drawn from prior work of one of the authors, included in Chapter Nine of *Nova University’s Three National Doctoral Degree Programs* (Nova/N.Y.I.T. Press, 1977), and in Section 4.3 of *Legal and Other Constraints to the Development of External Degree Programs* (report under Grant NE-G-00-3-0208, National Institute of Education, January 1975).

to in-state, institutions. Is the state licensing agency authorized under state law to license out-of-state schools that award degrees under the authority of their home states? Is the licensing agency authorized to apply standards to an out-of-state school that are higher than or different from the standards it applies to in-state schools? And, most intriguing, may the agency's authority be challenged under provisions of the federal or state constitution—in particular, the commerce clause or the First Amendment of the federal Constitution?

The commerce clause (U.S. Const., Art. I, Sec. 8, cl. 3), in addition to being a rich lode of power for the federal government (see Section 13.1.4), also limits the authority of states to use their regulatory powers in ways that interfere with the free movement of goods and people across state lines. As the U.S. Supreme Court has emphasized, “[T]he very purpose of the commerce clause was to create an area of free trade among the several states. . . . By its own force [the clause] created an area of trade free from interference by the states” (*Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976)). The term “commerce” has been broadly construed by the courts. It includes both business and nonbusiness, profit and nonprofit activities. It encompasses the movement of goods or people, the communication of information or ideas, the provision of services that cross state lines, and all component parts of such transactions. As far back as 1910, in *International Textbook Co. v. Pigg*, 217 U.S. 91, the Supreme Court held that interstate educational activities were included in the category of commerce and that, therefore, an out-of-state correspondence school could not constitutionally be subjected to Kansas's foreign corporation requirements.<sup>8</sup>

What protection, then, might the commerce clause yield for multistate institutions? The zone of protection has been clearly identified in one circumstance: when the state subjects an out-of-state program to requirements that are different from and harsher than those applied to in-state (domestic) programs. Such differentiation is clearly unconstitutional. For one hundred years, it has been settled that states may not discriminate against interstate commerce, or goods or services from other states, in favor of their own intrastate commerce, goods, and services (see, for example, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).

An Oregon case, *City University v. Oregon Office of Educational Policy & Planning*, 870 P.2d 222 (Or. 1994), *affirmed on other grounds*, 885 P.2d 701 (Or. 1994), illustrates this principle of nondiscrimination. The court used the federal commerce clause, and the nondiscrimination principle derived from it, to invalidate an Oregon statutory provision. The plaintiff was a regionally accredited private university incorporated in the state of Washington that had a branch campus in Oregon. Oregon law (Ore. Rev. Stat. § 348.835) required degree-granting institutions (including the plaintiff) to submit their degree requirements to the state for approval. Section 2(c) of the statute excepted regionally accredited Oregon schools from this requirement (emphasis added). The intermediate

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<sup>8</sup>Lawyers will want to compare the *Pigg* case with *Eli Lilly and Co. v. Sav-On Drugs*, 366 U.S. 276 (1961), where the Supreme Court distinguished between the intrastate and interstate activities of a foreign corporation engaged in interstate commerce and permitted the state to regulate the corporation's intrastate activities. See generally C. R. McCorkle, Annot., “Regulation and Licensing of Correspondence Schools and Their Canvassers or Solicitors,” 92 A.L.R.2d 522.

appellate court, affirming the trial court, ruled that this provision discriminates on its face against accredited out-of-state schools and thus against interstate commerce. Since the defendant could not justify the distinction between in-state and out-of-state accredited schools, the court held Section 2(c) to be unconstitutional. (On a further appeal, regarding the appropriate remedy, the state conceded the invalidity of Section 2(c), and did not contest the intermediate appellate court's holding of unconstitutionality.)

Beyond the principle of nondiscrimination or evenhandedness, the commerce clause's umbrella of protection against state regulation becomes more uncertain and more dependent on the facts of each particular case. Although a state may evenhandedly regulate the in-state or "localized" activities of out-of-state institutions, a potential commerce clause problem arises when the state regulation burdens the institution's ability to participate in interstate commerce. To resolve such problems, the courts engage in a delicate balancing process, attempting to preserve the authority of states to protect their governmental interests while protecting the principle of free trade and intercourse among the states. After a long period of feeling its way, the Supreme Court in 1970 finally agreed unanimously on this general approach, called the "*Pike* test":

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities [*Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)].

Under this test the state's interest must be "legitimate"—a label that courts have sometimes refused to apply to parochial or protectionist interests prompted by a state's desire to isolate itself from the national economy. In one famous case, which arose after a state had refused to license an out-of-state business because the in-state market was already adequately served, the Court said that the state's decision was "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests" and held that "the state may not promote its own economic advantages by curtailment or burdening of interstate commerce" (*H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949)). On the other hand, under the *Pike* test, state interests in safety, fair dealing, accountability, or institutional competence would be legitimate interests to be accorded considerable weight. States clearly may regulate the localized activities of out-of-state institutions—along with those of in-state institutions—in order to promote such legitimate interests. In doing so, however, states must regulate sensitively, minimizing the impact on the institutions' interstate activities and ensuring that each regulation actually does further the interest asserted.

Commerce clause issues, or other constitutional or statutory issues concerning state authority, are most likely to arise in situations in which a state denies

entry to an out-of-state program or places such burdensome restrictions on its entry that it is excluded in practical effect. A state might, for instance, deny entry to an out-of-state program by using academic standards higher than those applied to in-state programs. A state might impose a “need requirement” to which in-state programs are not subjected. Or a state might institute a need requirement that is applicable to both out-of-state and in-state programs but serves to freeze and preserve a market dominated by in-state schools. A state might also deny entry for lack of approval by a regional or statewide coordinating council dominated by in-state institutions. The relevant legal principles point to the possible vulnerability of state authority in each instance.

In *Nova University v. Board of Governors of the University of North Carolina*, 267 S.E.2d 596 (N.C. Ct. App. 1980), *affirmed*, 287 S.E.2d 872 (N.C. 1982), the North Carolina courts issued the first published court opinions exploring the legal questions raised in this Section. By a 4-to-2 vote, the state’s supreme court held that the state did not have the authority to regulate out-of-state institutions that operate educational programs in North Carolina but award degrees under the auspices of their home states. The plaintiff, Nova University, was licensed to award degrees under Florida law but organized small-group “cluster” programs in other states, including North Carolina. Successful participants received graduate degrees awarded in Florida. The Board of Governors of the University of North Carolina (pursuant to North Carolina General Statute 116-15, which authorized it to license degree-conferring institutions) claimed that Nova’s curriculum was deficient and sought to deny the institution authority to operate its cluster programs in the state. The board claimed that the statute that authorized it to license degree conferrals included, by implication, the power to license teaching as well.

In rejecting the board’s argument, the court acknowledged the important constitutional questions that the board’s position would raise: “Were we . . . to interpret G.S. 116-15 as the Board suggests, serious constitutional questions arising under the First Amendment and the interstate commerce and Fourteenth Amendment due process clauses of the United States Constitution and the law of the land clause of the North Carolina constitution would arise.” Looking to the language of General Statute 116-15, the court determined that it could reasonably be interpreted, and should be interpreted, to avoid these constitutional issues:

All that Nova does in North Carolina is teach. Teaching and academic freedom are “special concern[s]” of the First Amendment to the United States Constitution (*Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 . . . (1967)); and the freedom to engage in teaching by individuals and private institutions comes within those liberties protected by the Fourteenth Amendment to the United States Constitution. . . .

To say that it is conducting a “degree program” which is somehow different from or more than mere teaching, as the Board would have it, is nothing more than the Board’s euphemization. Teaching is teaching and learning is learning, notwithstanding what reward might follow either process. The Board’s argument that the power to license teaching is necessarily implied from the power to license degree conferrals simply fails to appreciate the large difference, in terms

of the state's power to regulate, between the two kinds of activities. The Board accuses Nova of trying to accomplish an "end run" around the statute. In truth, the Board, if we adopted its position, would be guilty of an "end run" around the statutory limits on its licensing authority. . . .

Here the legislature has clearly authorized the Board to license only degree conferrals, not teaching. Because of the statute's clear language limiting the Board's authority to license only degree conferrals and not separately to license the teaching which may lead to the conferral, the statute is simply not reasonably susceptible to a construction which would give the board the power to license such teaching [287 S.E.2d at 878, 881–82].

In a follow-up case, *Nova University v. Educational Institution Licensure Commission*, 483 A.2d 1172 (D.C. 1984), the same university challenged a District of Columbia statute that required all educational institutions seeking to operate in D.C. to obtain a license—even if they did not confer degrees in D.C. In upholding the statute, the court addressed the First Amendment issue outlined but not disposed of in the first *Nova* case. Nova argued that D.C.'s licensing was unconstitutional under the First Amendment, since it was a regulation of teaching and learning activities that were "pure speech." The court held that, even if Nova were engaged in free speech activities, the First Amendment does not immunize such institutions from all state regulation of business conduct determined to be adverse to the public interest. To determine whether the D.C. statute unduly restrained First Amendment activities, the court considered the purpose of the statute. Here the D.C. statute's sole purpose was to ensure that educational institutions in the District of Columbia meet minimal academic standards, regardless of the message being conveyed through their teaching. Since this important interest is content neutral (regarding content neutrality, see Sections 9.5.3, 9.5.6, & 9.6.2 of this book), and since Nova and other out-of-state schools were not being singled out (local schools being subject to the same regulation), the statute was constitutional.

Thus, the courts in the *Nova University* cases not only analyzed the state statutory issues but also outlined the sensitive constitutional issues that may loom on the horizon whenever state licensing authority is broadly construed. In contrast to other recent cases, which broadly construe state licensing authority over in-state institutions (see Section 12.3 above), the first *Nova* case more narrowly construes state authority over out-of-state schools. Moreover, although a more broadly and explicitly worded statute like that in the District of Columbia could resolve the statutory issue in the first *Nova* case, such broader statutes may still be subjected to federal and state constitutional limitations such as those suggested by both *Nova* courts. Although the First Amendment argument in the second *Nova* case did not succeed, the result could be different for a statute that was not applied to out-of-state schools in a content-neutral and evenhanded fashion; or that regulated institutions' programs more than needed to maintain minimal academic standards, prevent fraud, or serve some other obviously legitimate state interest. Moreover, interstate commerce and other constitutional issues may arise, as the first *Nova* court indicated. The *Nova* cases therefore confirm that the legal principles in this Section do provide substantial

ammunition to out-of-state institutions, making it likely that they can hit the mark in some cases where state regulation stifles the development of legitimate interstate postsecondary programs.

The *Nova* cases, however, concerned an institution with a *physical* presence in other jurisdictions. In contrast, and in light of developments in distance learning, both established and newly formed postsecondary institutions extend their presence in other states by technological means. For the most part, state authority over such programs, for which the institution has no physical presence in the state, is subject to the same legal principles as are set out above in this Section. The free speech and press clauses of the First Amendment and parallel state constitutional provisions, however, are likely to be of particular importance. The cases in which the U.S. Supreme Court has protected speech in cyberspace—cases that are set out in Section 13.2.12 of this book—are therefore also particularly important in situations in which a state has regulated distance education.

The federal commerce clause may also have particular applications to distance learning. A New York case provides an example and suggests the need for states to move most cautiously when attempting to regulate Internet-based instructional activities of postsecondary institutions. The court's reasoning in *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), appears to have relevance for both the regulation of out-of-state institutions whose Internet instruction reaches in-state residents, and the regulation of in-state institutions (see Section 12.3.1 above) whose Internet instruction reaches residents of other states. In either context, state regulations could apparently be subject to analysis and possible invalidation under the federal Constitution's commerce clause.

The *American Libraries Association* case concerned a New York law that prohibited the use of computers to disseminate obscene material to minors. The court issued a preliminary injunction against the law's enforcement because of the burden the law imposed on interstate communications. The court's reasoning emphasized the unique characteristics of communication over the Internet:

The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states. . . . Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet. The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution . . . [969 F. Supp. at 168].

As distance education programs become more technologically and educationally sophisticated, and their quality and economic efficiency increases, thus spurring expansion of the interstate market for such services, the constitutional and regulatory problems discussed in this Section will continue to grow in importance. Institutions that plan to be continuing participants in this market will want carefully to track current and future developments—legal, policy, technological, and educational.

## ***Sec. 12.5. Other State Regulatory Laws Affecting Postsecondary Education Programs***

**12.5.1. Overview.** Aside from the body of state law specifically designed to govern the establishment and licensure of colleges and universities, discussed in Sections 12.2 through 12.4, public and private postsecondary institutions are subject to a variety of other state statutes and regulations, most of which are not specifically tailored to educational operations. Many of these laws concern the institution's role as an employer or, in the case of public institutions, as a government agency. Subsections 12.5.2 to 12.5.5 below provide examples of the kinds of legal disputes that may arise under such laws.

In some regulatory areas, especially with regard to private institutions, federal legislation has "preempted the field" (see Section 13.1.1), leaving little or no room for state law. Private sector collective bargaining is a major example (see Section 4.5.2.1). In other areas, where there is little or no federal legislation, state legislation is primary. Major examples include public sector collective bargaining laws (see Section 4.5.2.3); workers' compensation laws; deceptive practices laws (for nonprofit entities); and open meeting laws, administrative procedure acts, ethics codes, civil service laws, and contract and competitive bidding procedures applicable to state agencies. In yet other areas, federal and state governments may share regulatory responsibilities, with some overlap and coordination of federal and state laws. Fair employment laws, environmental protection laws, unfair trade laws, unemployment compensation laws, and laws on solicitation of funds by charitable organizations are major examples. In this latter area, federal law will prevail over state law in case of conflict if the subject being regulated is within the federal government's constitutional powers.

As this discussion suggests, state regulatory laws of general application may restrict the autonomy of public, and in many instances private, colleges and universities in various important respects. There are many examples in addition to those in the preceding paragraph and in subsections 12.5.2 to 12.5.5 below, and their numbers are increasing over time. Traditional examples include social host laws and other beverage control laws (sometimes applicable to campus social events), landlord-tenant laws (sometimes applicable to residence halls and other student or faculty housing), traffic safety laws (applicable to public roads traversing or bordering the campus); and regulations (and state common law) concerning the discharge of employees (see, for example, Mont. Code Ann. Sec. 39-2-901 *et seq.*; and see generally Section 4.3.2 of this book).

Of the newer examples, one of the most important is nondiscrimination laws. Each state has its own nondiscrimination laws, whose protections may be broader than or different from those of federal civil rights laws.<sup>9</sup> State law on sexual harassment, for instance, may provide different standards than those developed

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<sup>9</sup>Some of the cases and authorities are collected in Phillip E. Hassman, Annot., "Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex," 90 A.L.R.3d 158.

under federal legislation.<sup>10</sup> States may also have laws or executive orders that prohibit discrimination on the basis of sexual orientation in employment (see Section 5.3.7), education, or public accommodations, a type of discrimination not covered by federal statutes. (For discussion of a conflict between a Connecticut sexual orientation law and the federal “Solomon Amendment” regarding military recruiting on college campuses, see Section 13.4.4 of this book.)

Other newer examples of laws of general application include toxic waste laws<sup>11</sup> (applicable, for instance, to laboratories); state whistleblower statutes (and common law protections) that prohibit retaliation against employees who “reasonably believe” that their employer or its agents have violated a law or tolerated an unsafe condition (see Section 4.6.8 of this book);<sup>12</sup> and conflict-of-interest laws that restrict some activities of public employees. In *In re Executive Commission on Ethical Standards*, 561 A.2d 542 (N.J. 1989), for example, the New Jersey Supreme Court considered whether a state ethics law (N.J. Stat. Ann. §§ 52:13D-12 to -27) applied to a Rutgers University law school professor in his conduct of a clinical program. The professor represented clients before the state’s Council on Affordable Housing. The court ruled that the law’s purpose was to prohibit state legislators from appearing before state agencies as advocates; and that the state legislature never intended the law to apply to professors in this situation.

In addition to such laws of general application, state legislatures have enacted laws that focus directly on activities on college campuses, including academic activities. Several states, for example, have laws requiring fluency in English for all instructors, including teaching assistants (see Section 5.3.2). One such statute is Pennsylvania’s English Fluency in Higher Education Act (24 Pa. Cons. Stat. Ann. §§ 6801–6806 (2004)). New York and California have passed “truth-in-testing” laws that require disclosure of the questions and answers for standardized tests used to make admission decisions (see Section 13.2.5.8.5). Other state laws affecting admissions decisions include a Texas law that prohibits graduate or professional programs at state institutions from using scores on standardized tests as the sole admission criterion (Tex. Educ. Code § 51.842 (b)). A different kind of example, from 2005, comes from New Jersey, where the legislature enacted a law on smoking on college campuses, in particular requiring the governing boards or responsible administrators of both public and private institutions to prohibit smoking “in any portion of a building used as a student dormitory . . .” (N.J. Stat., c.320, C.26:3D-17, August 22, 2005).

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<sup>10</sup>Cases and authorities are collected in Carol Shultz Vento, Annot., “When Is Work Environment Intimidating, Hostile or Offensive, so as to Constitute Sexual Harassment Under State Law?” 93 A.L.R.5th 47.

<sup>11</sup>Cases and authorities are collected in William B. Johnson, Annot., “Validity, Construction, and Application of State Hazardous Waste Regulations,” 86 A.L.R.4th 401.

<sup>12</sup>Private as well as public institutions may be subject to state whistleblower laws. Pennsylvania’s Whistleblower Law, 43 P.S. § 1421 *et seq.*, provides a remedy for at-will employees of organizations that receive funding from the state or one of its political subdivisions. In *Riggio v. Burns*, 711 A.2d 497 (Pa. Super. 1998) (*en banc*), *appeal denied*, 739 A.2d 161 (Pa. 1999), the court allowed a whistleblower claim against the Medical College of Pennsylvania, a private medical school, because it had received more than \$4 million from the state legislature.



The states have also enacted criminal legislation prohibiting various types of acts that specifically involve postsecondary education. Some states, for instance, make it a crime to sell term papers or theses to students who will use them as course work (see, for example, Md. Code, Education, § 26-201; and compare §§ 66400–66402 of the California Education Code (civil penalties)). Some states have made it a crime to confer academic degrees or use the name university without the formal approval of the state (see, for example, N.Y. Educ. Law, § 224(1)(a)); or to buy or sell an academic diploma or degree or obtain one by fraud (see, for example, N.Y. Educ. Law, § 224(2)); or to make or use a forged or counterfeited transcript or diploma (see, for example, Md. Code, Education, § 26-301); or to misrepresent oneself as having a diploma for a particular profession (see, for example, Mass. Gen. Laws Ann., Ch. 112, § 52). (See generally Joan Van Tol, “Detecting and Punishing the Use of Fraudulent Academic Credentials: A Play in Two Acts, 30 *Santa Clara L. Rev.* 791 (1990).)

Addressing other concerns, many states have passed legislation criminalizing vandalism against research facilities that use animals (see, for example, New York’s Agriculture and Markets Law, which forbids unlawful tampering with animal research (N.Y.C.L.S. Agr. & M. § 378)). A Texas law (§ 4.30(a)&(b)(2) of the Texas Education Code) makes it a misdemeanor to engage in disruptive activity on a university campus. The constitutionality of this law was upheld in *Arnold v. State*, 853 S.W.2d 543 (Tex. Ct. App. 1993). Other state laws make hazing a crime, defining hazing specifically with reference to student organizations (see, for example, Mass. Stat. Ann. Ch. 269, §§ 17–19; Cal. Educ. Code, § 32050); and see generally Section 10.2.3 of this book). Yet other statutes impose certain reporting requirements on student athletes’ agents (see, for example, Fla. Stat. Ann. §§ 468.454 & .456; Mich. Comp. Laws Ann. § 750.411e; and 18 Pa. Cons. Stat. Ann. § 7107); and Nev. Rev. Stat. § 398.482. and some of these statutes impose criminal penalties (see, for example, S.C. Code Ann. § 59-102-30).

Other statutes are civil laws that have a particular relationship to criminal law. Some states, for example, have laws that suspend or exclude students from state-funded financial aid for a period of time if they are convicted of participating in riots (Ohio Rev. Code Ann. 3333.38 (2004); Colorado Rev. Stat. 23-5-124 (2004)). A California law requires individuals convicted of sex crimes to register with campus police if they study or work at a public college or university (Cal. Penal Code § 290(a)(1)(A) (2004)). Various state laws also require institutions to disclose campus crime statistics (see, for example, 24 Pa. Cons. Stat. Ann. § 2502; Wis. Stat. § 36.11(22)).

The power of the purse has motivated legislatures in some states to demand increased faculty productivity. In Ohio, for example, the legislature enacted Ohio Revised Code Section 3345.45, which mandates an increase in teaching time for faculty at public colleges. Litigation related to this statute is discussed in Section 4.5.3 of this book. (This and other state legislative efforts to regulate faculty activities in public higher education are discussed in an American Association of University Professors (AAUP) Report of Committee C, “The Politics of Intervention: External Regulation of Academic Activities and Workloads in Public Higher Education,” *Academe*, January–February 1996, 46–52.)

As the faculty workload legislation suggests, some state laws could have implications for academic freedom. A New Jersey statute, passed during the Desert Storm conflict of the early 1990s, provides an example. The statute required instructors to give final grades to any student who was called to active duty, as long as the student had completed at least eight weeks of course work. A professor at Montclair State University refused to give a student, who had been called to active duty partway through the semester, the grade to which the state law said he was entitled. The student sued the professor and the university. The consequences for the professor are discussed in Section 2.5.3.2. The constitutionality of the law itself was not challenged (*Chasin v. Montclair State University*, 732 A.2d 457 (N.J. 1999)).

State laws attempting to restrict faculty or student use of state-owned computers or Internet access connections may also have implications for academic freedom at public institutions. These problems are discussed in Sections 7.3 and 8.5 of this book. And since the start of the new century, legislative initiatives concerning the “intellectual diversity” of faculties and alleged political bias in the classroom have been considered by legislative committees and legislatures in various states, a few of which had passed legislative resolutions at the time this book went to press. The academic freedom implications of these initiatives are discussed in Sections 7.1.5 and 8.1.5 of this book.

Given the plethora of state laws, both general and specific, that apply to colleges, administrators and counsel will want to monitor legislative and judicial developments in their state just as carefully as they do those at the federal level.

**12.5.2. Open meetings and public disclosure.** Open meetings laws provide a particularly good illustration of the controversy and litigation that can be occasioned when a general state law is applied to the particular circumstances of postsecondary education. In an era of skepticism about public officials and institutions, public postsecondary administrators must be especially sensitive to laws whose purpose is to promote openness and accountability in government. As state entities, public postsecondary institutions are often subject to open meetings laws and similar legislation, and the growing body of legal actions under such laws indicates that the public intends to make sure that public institutions comply. These laws typically require that meetings of decision-making bodies of public agencies be open to the public, that the agendas of these meetings be provided in advance, and that matters not on the agenda not be discussed. In *Sandoval v. Board of Regents of the University and Community College System of Nevada*, 67 P.3d 902 (Nev. 2003), the court rejected claims by the regents that forbidding them to stray from the published agenda violated their First Amendment rights.

Every state in the United States has enacted open public meetings laws,<sup>13</sup> and these laws have often changed the way that boards and committees at public institutions conduct their business. Two primary issues have sparked litigation

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<sup>13</sup>For a list of these statutes, see Stephen Schaeffer, Comment, “Sunshine in Cyberspace? Electronic Deliberation and Open Meetings Laws,” 48 *St. Louis L.J.* 755 (2004).

concerning these laws: which bodies or groups are subject to the law, and under what circumstances are they subject to the law. Because the provisions of open public meetings acts differ by state, the cases below are discussed for illustrative purposes only. Legal counsel and administrators should review the relevant rulings under their own state's law. (For a review of the interplay between these laws and the attorney-client privilege, see Roderick K. Daane, "Open Meetings Acts and the Attorney's 'Privilege' to Meet Privately with the School Board," 20 *Coll. L. Dig.* 193 (March 1, 1990).)

Meetings of the full board of trustees of a public college or university are usually subject to open public meetings laws. Litigation has focused instead on whether meetings of board committees must be conducted in public, and whether communications among board members by telephone or fax, culminating in a decision, constitute a "meeting" for purposes of open public meetings laws. In *Del Papa v. Board of Regents of University and Community College System of Nevada*, 956 P.2d 770 (Nev. 1998), the Nevada Supreme Court ruled that individual telephone calls and faxes between board members that culminated in a statement issued by the board violated the state's open public meeting law, although the court refused to enjoin the board, viewing the violation as a one-time event. The Alabama Supreme Court addressed the question of whether meetings of board committees at which less than a quorum of board members were present were subject to the state's Sunshine Law. The court ruled that they were not (*Auburn University v. Advertiser Co.*, 867 So. 2d 293 (Ala. 2003)).

In New York, a state appellate court reversed a ruling by a trial court that meetings of a community college senate are subject to that state's Open Meetings Law (*Perez v. City University of New York*, 753 N.Y.S.2d 641 (N.Y. Sup. Ct. 2002), *reversed*, 780 N.Y.S.2d 325 (N.Y. App. Div. 2004)). The appellate court was then reversed by the state's highest court (2005 N.Y. LEXIS 3211 (N.Y., November 17, 2005)). The appellate court had reasoned that the university's board of trustees had not delegated decision-making authority to the senate; that, although the senate appointed members to board committees that did have final decision-making authority on some issues, the senate itself was not empowered to make the ultimate decisions on any of those issues; and that the senate and its executive committee therefore were not subject to either New York's open meetings law or the freedom of information law. But the state's highest court disagreed, ruling that the senate is the only legislative body on campus authorized to send proposals to the board of trustees on "all college matters," and thus that the senate was exercising "a quintessentially governmental function" which brought it under the open meetings law.

Other state courts have ruled that open meetings laws apply to meetings of committees as well as to those of the governing board. For example, in *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ark. 1975), a newspaper and one of its reporters argued that committees of the University of Arkansas Board of Trustees, and not just the full board itself, were subject to the Arkansas Freedom of Information Act. The reporter had been excluded from a committee meeting on a proposed rule change that would have allowed students of legal age to possess and consume intoxicating beverages in university-controlled facilities at the Fayetteville

campus. The Arkansas Supreme Court could find no difference between the business of the board of trustees and that of its committees, and applied the open meetings law to both.

Similar results obtained in *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) with respect to the search committee for a new dean of the law school at the University of Florida, and in *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983), which applied the state's open meetings law to the meetings of a tenure committee at the University of Alaska. Although there was an exception in the Alaska open meetings statute for meetings in which the performance of individuals was discussed, the affected individual had the right to request a public meeting. The plaintiff in *Geistauts*, a disappointed candidate for tenure, had not been given that choice. The court held that the statutory exception applied. It then further held, however, that the tenure committee had failed to notify the plaintiff of the committee's meetings and that this failure deprived him of his statutory right to request that the meetings be open. The court therefore concluded that the committee's decision denying tenure was void and ordered that the plaintiff be reinstated for an additional year with the option to reapply for tenure and be considered by the then-current tenure committee. Left undiscussed by the Alaska court is the impact of the statute and decision on third parties whose opinions of the applicant may be sought, perhaps with a tacit or express understanding of confidentiality, in the course of the tenure review. (For a contrary result in a different state, see *Donahue v. State*, 474 N.W.2d 537 (Iowa 1991).)

Courts have also addressed whether committees of students, administrators, or other institutional staff are subject to open meetings laws. Again, the answer depends upon the wording of the statute and on prior state court interpretations of the statute. For example, in *Associated Press v. Crofts*, 89 P.3d 971 (Mont. 2004), the Montana Supreme Court determined that a "Policy Committee" made up of the presidents and chancellors of the University of Montana system was subject to the state's open meeting law. The Policy Committee discussed issues related to changes in policy for the system, tuition and fee changes, budgeting issues, contractual issues, employee salaries, and legislative initiatives. The court weighed seven factors in reaching its decision: (1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the results of the meetings. The court ruled that the significance of the issues that the Policy Committee addressed and its role in providing advice to the state's commissioner of higher education brought the committee within the scope of the open public meetings act.

Litigation has also addressed whether the meetings of private entities that are created to assist or support public institutions are subject to state open meetings laws. For example, in *Hopf v. Topcorp, Inc.*, 628 N.E.2d 311 (Ill. App. Ct. 1993), two private for-profit corporations had been created by Northwestern University and the city of Evanston in order to acquire land and develop a

research park. Several citizens petitioned the court to declare these corporations to be public bodies, and thus subject to the open meetings law. The court ruled that these corporations were not subject to the open meetings law because they were not “subsidiary bodies” of the city, nor was the city able to influence their decisions. But in *Board of Regents of the Regency University System v. Reynard*, 686 N.E.2d 1222 (Ill. Ct. App. 1997), an appellate court in the same state determined that the Athletic Council of Illinois State University is a public body and is subject to the state’s open meeting law. The broad scope of responsibility afforded the council, as well as the significant issues on which it provided advice to the president, persuaded the court that it met the “public body” definition in the Illinois open meeting statute and freedom of information act. This case is discussed further in Section 3.6.4.

Probably the most hotly contested issue with regard to open public meetings laws is whether the public (primarily the press) has the right to attend meetings at which candidates for the institution’s presidency are interviewed, and the right to know the identity of presidential candidates. Litigation results have differed sharply. For example, in *Federated Publications v. Board of Trustees of Michigan State University*, 594 N.W.2d 491 (Mich. 1999), the Michigan Supreme Court rejected a newspaper’s claim that the university had violated the state’s Open Meetings Act by holding private meetings at which the search committee interviewed and discussed presidential candidates. The court stated that, because Michigan State University was created by the state’s constitution, the legislature lacked the authority to regulate the management and control of university operations. The court said that the law applied to formal sessions of the governing board, but not to meetings of committees created by the board. Similarly, the Supreme Court of Nevada ruled that, because community college presidents are not public officers, the process for selecting a community college president in that state was not subject to the open meetings law (*Community College System of Nevada v. DR Partners*, 18 P.3d 1042 (Nev. 2001)).

On the other hand, the fact that the University of Minnesota was created by the state constitution did not prevent the Minnesota Supreme Court from ruling that the state’s Open Meeting Law and its Data Practices Act both applied to the university’s search for a new president (*Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274 (Minn. 2004)). The search committee appointed by the trustees had conducted the search in private in order to avoid losing candidates who did not want their candidacies to be revealed early in the search process. The trustees agreed to meet privately with the top candidates and conferred privately prior to conducting public interviews of the finalists. The trustees selected the interim president for the permanent position. Several newspapers sued the university, seeking the names of other candidates for the presidency. The trial court ruled that the regents had violated the state laws, and the appellate court concurred.

Using a theory similar to that which was used successfully in the case against Michigan State University, the university argued that because it enjoyed constitutional status, the legislature did not have the power to “interfere” with its management and operation. Furthermore, the university reminded the court, it had

ruled in *University of Minnesota v. Chase*, 220 N.W. 951 (Minn. 1928), that a law requiring all state agencies to seek state approval before spending funds or entering contracts did not apply to the university because of its constitutional status. The Minnesota Supreme Court, however, said that *Chase* did not apply to the open meetings act because its intrusion on university autonomy was much more limited than that of the state law at issue in *Chase*. The open meetings law did not intrude on the “internal management of the university,” according to the court, and affected the presidential search process “only in its interface with the outside world,” by providing information to the taxpayers who fund the university.

The legislative intent and clear meaning of the statutory language of open meetings laws has great significance for the outcome of challenges under these laws. For example, the question of whether meetings of a university’s animal use committees (see Section 13.2.3.3) are “public meetings” has been answered differently in several states. In *Animal Legal Defense Fund v. Institutional Animal Care and Use Committee of the University of Vermont*, 616 A.2d 224 (Vt. 1992), the Vermont Supreme Court determined that the animal use committee was a university committee and thus fell under the state law’s ambit. But in *In re American Society for the Prevention of Cruelty to Animals, et al. v. Board of Trustees of the State University of New York*, 568 N.Y.S.2d 631 (N.Y. App. Div. 1991), a New York appellate court ruled that the animal use committee was not a “public body” for purposes of the state law because the committee performed a federal function under federal law. The result was affirmed by the state’s highest court (582 N.Y.S.2d 983 (N.Y. 1992)).

The applicability of state open meeting laws to student disciplinary hearings has been at issue in other cases. In *Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257 (Ga. 1993), Georgia’s highest court ruled that the proceedings of the University of Georgia’s student disciplinary board were subject to that state’s open meetings and open records laws. The university’s student newspaper had sought access to the Student Organization Court’s records and proceedings regarding hazing charges against two fraternities. Although the law provided that meetings of the “governing body” of any state agency must be open to the public, the law also covered the meetings of committees created by the governing body at which official action is taken. The court found that the judicial board was a vehicle through which the university took official action in that it enforced the university’s code of student conduct. Thus, the court ruled that the university must permit members of the public, including the media, to attend the disciplinary board’s hearings.

In contrast, the Supreme Court of Vermont rejected the attempt of a newspaper to obtain student disciplinary records and access to disciplinary hearings. In *Caledonian-Record Publishing Co. v. Vermont State Colleges*, 833 A.2d 1273 (Vt. 2003), the court ruled that an exception in the state public records law for “student records” blocked access to disciplinary records and that, although the state’s Open Meeting Law did not contain such an exemption, allowing the public to attend student disciplinary hearings would make meaningless the exemption in the Public Records Act that protects the records of such hearings from disclosure.

**12.5.3. Open records laws.** Individuals and groups seeking information about a public college or university's activities are making increasing use of state open public records laws. These laws typically contain exceptions for certain kinds of records, and may also exempt from disclosure those records that are required by other laws, both state and federal, to remain confidential (see Section 9.7.2 for a discussion of the interplay between the Family Educational Rights and Privacy Act (FERPA) and state open public records laws). The presumption, however, in applying these laws to requests for information, is that the public should have access to information created or maintained by a public agency, and unless the information is covered by a statutory exception to disclosure, there typically must be strong public policy reason for a court to agree to shield a "public record" from disclosure.

The courts have addressed two primary issues with respect to the application of open public records laws to colleges and universities. First is the issue of whether the institution or organization from which the record is sought is subject to the law. If the answer is in the affirmative, then the second issue is whether the records sought are either exempt by statute or should be shielded from disclosure for some public policy reason—for example, attorney-client privilege or crime victim privacy.

The first issue may have an easy answer if the entity is a public college or university that holds the records itself. But if the entity is, for example, a separately chartered foundation that exists to support the operations of a public college or university, the issue will be more complicated. In *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992), Ohio's Supreme Court determined that the state's public records disclosure statute covered the foundation as a "public office." The plaintiff newspaper had sought the names of donors to the foundation, and the court ruled that these names must be disclosed. Similarly, the Supreme Court of South Carolina held that the state's freedom of information act compelled the Carolina Research and Development Foundation, which acquires and develops real estate for the University of South Carolina, to disclose its records. In *Weston v. Carolina Research and Development Foundation*, 401 S.E.2d 161 (S.C. 1991), the court ruled that, because the foundation received part of its funding from public monies, it met the definition of "public body" in the state freedom of information act.

But in *State ex rel. Guste v. Nicholls College Foundation*, 592 So. 2d 419 (La. Ct. App. 1991) (further discussed in Section 3.6.4), the court found that the foundation, a private nonprofit corporation linked to a state college, was not a public body (although the court said that the state had the authority to inspect records of public funds received by the foundation). Similarly, the court in *Hopf v. Topcorp*, discussed in Section 12.5.2 above, ruled that a private, for-profit corporation created by the city of Evanston and Northwestern University was not subject to the open public records law.

Is a private college or university subject to a state's open public records law? If one component of an otherwise private institution is publicly funded, as is the case with some of the schools within Cornell University, then that component may be subject to open records laws. In *Alderson v. New York State College*

of *Agriculture and Life Sciences*, 749 N.Y.S.2d 581 (N.Y. App. Div. 2002), *affirmed and modified*, 4 N.Y.3d 225 (N.Y. 2005), the plaintiff sought financial information on a proposed agricultural park and on research on genetically modified organisms from the College of Agriculture. The appellate court ruled that the legislation that created the “statutory colleges” (those that are state supported) “bears significant indicia of a public function subject to state oversight.” Therefore, the court ruled that the financial information sought by the plaintiff fell within the “more public aspects of the statutory colleges,” and thus was subject to the state’s freedom of information law. The state’s highest court affirmed the appellate court’s reasoning, but limited the financial information subject to the freedom of information law to documents accounting for the expenditure of state funds.

A contrasting view of the New York law’s application to Cornell’s “statutory colleges” is provided by *Stoll v. New York State College of Veterinary Medicine at Cornell University*, 701 N.Y.S.2d 316 (N.Y. 1999). In *Stoll*, New York’s highest court rejected a claim that Cornell’s disciplinary records are subject to the state’s freedom of information act. The attorney for a professor accused of sexual harassment had filed a freedom of information act request for all of Cornell’s records related to complaints brought under the university’s campus code of conduct. The court ruled that the “statutory colleges” at Cornell were not state agencies, even though those units that receive state funding are subject to certain oversight by the SUNY Board of Trustees. The legislature had vested Cornell’s administration (part of the private entity Cornell University) with the power to impose and maintain discipline at the statutory colleges, and this delegation of authority meant that the university’s actions relating to campus discipline were those of a private, not a public, entity.

In a case against Mercer University (a private institution), a state trial court addressed whether records related to sexual assaults on campus compiled by the university’s campus police were subject to the Georgia Open Records Act. A former student at Mercer, the victim of an alleged rape, had sued the university. The plaintiff’s attorney requested the records, citing the state open records law. Records sought included incident reports, log books, crime logs, radio dispatch logs, and contact person reports prepared by the university’s police department. The university refused to produce the records, saying that it was not subject to the open records law. The law firm sought a temporary restraining order against the university, and made two arguments. First, the law firm argued, the Mercer University Police Department (MUPD) was a “public agency” as defined by the Georgia Open Records Act (O.C.G.A. § 50-18-79 *et seq.*) because its police officers had law enforcement powers under state law. Alternatively, the law firm argued that the MUPD, although a private entity, maintained public records on behalf of a public office or agency, which are also required to be disclosed under Section 50-18-79(b) of the state law. The university asserted that its campus police officers received their authority from the university’s governing board, not from the state, quoting Section 20-8-2 of the Georgia code, which provides that campus police “shall have the same law enforcement powers” as other state police officers “when authorized by the governing body or authority of such



educational facility.” With respect to the second argument, the university responded that the campus police records were maintained on behalf of the university, not the public, and thus they were not public records.

The trial court sided with the law firm, but the appellate court reversed in *Corporation of Mercer University v. Barrett & Farahany, LLP*, 610 S.E.2d 138 (Ga. Ct. App. 2005). The court ruled that Mercer University was not a public agency, and that the legislature had not intended that private entities be covered by the Open Records Act. The court also ruled that MUPD documents were not public records, but were maintained solely on behalf of the university. (For information on a similar lawsuit, seeking access to campus police records under Massachusetts’ open public records law, see Eric Hoover, “Harvard’s Student Newspaper Sues for Access to Police Records,” *Chron. Higher Educ.*, July 30, 2003, available at <http://chronicle.com/daily/2003/07/2003073003n.htm>; and Brad Wolverton, “Harvard U. Can Withhold Campus-Police Records from Student Newspaper, Court Rules,” *Chron. Higher Educ.*, January 16, 2006, available at <http://chronicle.com/daily/2006/01/20060111604n.htm>.)

In *Red & Black Publishing Co. v. Board of Regents* (discussed in Section 12.5.2), the Georgia Supreme Court also ruled that the state’s open records law applied to the records of the student disciplinary board. Although the university argued that releasing the records would violate the federal Family Educational Rights and Privacy Act (FERPA), the state’s high court disagreed. (For subsequent changes in the FERPA regulations, permitting disclosure of disciplinary records in certain circumstances, see Section 9.7.1 of this book; and for discussion of several cases involving press access to student disciplinary proceedings, see Section 9.7.2.) In contrast to the breadth of the Georgia court’s interpretation of its open records law, Connecticut’s Supreme Court, in *University of Connecticut v. Freedom of Information Commission*, 585 A.2d 690 (Conn. 1991), ruled that Connecticut’s open records law did not require disclosure of names of students who worked for the university’s police force.

Inquiries related to college athletics have also spawned litigation over the application of state open records laws. For example, in *University of Kentucky v. Courier-Journal*, 830 S.W.2d 373 (Ky. 1992), the University of Kentucky was required to disclose its response to a National Collegiate Athletic Association (NCAA) investigation of alleged rules violations. Although the university argued that appendices to the report, including documents and transcripts of interviews, came within the law’s exception for “preliminary materials,” the court disagreed, ruling that the entire report was a public document. And in *Milwaukee Journal v. Board of Regents of the University of Wisconsin System*, 472 N.W.2d 607 (Wis. Ct. App. 1991), the court ruled that the University of Wisconsin must disclose the names of applicants for the positions of football coach and athletic director.

Similarly, contracts negotiated by athletics coaches at public universities have caught the interest of the media. In *Cremins v. Atlanta Journal*, 405 S.E.2d 675 (Ga. 1991), the *Atlanta Journal* succeeded in gaining information about the outside income of some university coaches. But in *University System of Maryland v. The Baltimore Sun Co.*, 847 A.2d 427 (Md. 2004), the state’s highest court distinguished between disclosure of coaches’ employment contracts with the state

university and their contracts with third parties (for commercial endorsements, for example). The court ordered an *in camera* review of the contracts in order to determine whether the contracts with third parties were sufficiently related to their university contracts so as to make payments under contracts with third parties part of their official compensation from the university (and thus subject to disclosure).

In some states, curriculum materials at a public institution may be considered a “public record” subject to inspection by the public. In *Russo v. Nassau County Community College*, 603 N.Y.S.2d 294 (N.Y. 1993), an individual filed a request under the state’s freedom of information act for class materials used in a college sex education course. Although a state appellate court denied the request, stating that the materials were not “records” under the law’s definition, the state’s high court reversed and granted access to the materials.

Many other cases deal with the second of the two primary issues set out at the beginning of this subsection—whether there is a statutory exemption or a strong public policy reason for protecting from disclosure certain records that otherwise would be covered by the open records act. State open records laws typically do not require the individual or group requesting disclosure of certain information to demonstrate a particular need for the information. Thus, if the information is covered by the law, and no statutory exemption applies, it must usually be disclosed to anyone for any purpose. Individuals have therefore been able to use these laws for commercial purposes. In *Lieber v. Board of Trustees of Southern Illinois University*, 680 N.E.2d 374 (Ill. 1997), for example, the state supreme court ruled that the university had violated the Illinois Freedom of Information Act by refusing to provide the names and addresses of admitted students to the owner of a private, for-profit residence hall. The court held that the commercial nature of the use to which the information would be put did not serve to exempt the institution from disclosing the information.

Several other commercial cases involve private individuals or groups operating a bookstore near the campus of a public college or university who seek the book lists for courses to be taught at the college. In *Mohawk Book Co. v. State University of New York*, 732 N.Y.S.2d 272 (N.Y. App. Div. 2001), the court ruled that book lists, even though compiled by faculty members rather than compiled centrally by the university, were public records and subject to disclosure. But in *Dynamic Student Services v. State System of Higher Education*, 697 A.2d 239 (Pa. 1997), the Pennsylvania Supreme Court ruled that Millersville University and West Chester University did not have to provide the names of professors, courses, or the number of students enrolled in courses to an entity that sought to purchase used textbooks from students at the universities. At each university, the bookstore was not part of the university and received the course and text information directly from the faculty; the university itself did not create or maintain these records. For that reason, said the court, the universities did not have to provide information that they did not possess.

In other types of cases, there may be a basis to claim that interests in personal privacy provide a strong public policy reason for protecting certain records from disclosure. This argument has arisen, for instance, in cases where organizations

opposed to affirmative action in admissions have requested admissions data from selective public universities and colleges under state open public records acts. The information requested has included grades and standardized test scores of applicants, and of admitted students, by racial and ethnic categories. For example, in *Osborn v. Board of Regents of the University of Wisconsin System*, 647 N.W.2d 158 (Wis. 2002), the Center for Equal Opportunity made open record requests under Wisconsin's law for data on applicants to undergraduate campuses, as well as to the University of Wisconsin Law School and Medical School. The university produced some of the requested records, but refused to provide information in students' application records. After the Center filed a mandamus action, the trial court ruled that the university must provide all requested records, even those containing personally identifiable information. Both parties appealed to the state appellate court, which reversed the trial court's order, stating that the records of individuals who had matriculated and those who had not were protected by the Family Educational Rights and Privacy Act (FERPA) (see Section 9.7.1 of this book). It also affirmed the lower court's decision that the university need not create new records in order to comply with the request.

The Wisconsin Supreme Court then reversed the appellate court's decision, concluding that the plaintiffs had not requested personally identifiable information, which eliminated the conflict with FERPA. The court balanced the public policy interests involved in disclosure with the university's concerns for privacy, and ruled that there was "no overriding public policy interest in keeping the requested records confidential." It also ruled that the university must redact certain records, and that the university could charge the plaintiffs a fee for the "actual, necessary, and direct cost of complying with these open record requests." (For a review of open records requests and related information requests in other states by groups opposing affirmative action, see Peter Schmidt, "Advocacy Groups Pressure Colleges to Disclose Affirmative-Action Policies," *Chron. Higher Educ.*, April 2, 2004, A26.)

State open records laws are being interpreted to cover a wide array of other information. For example, in *Keddie v. Rutgers, The State University*, 689 A.2d 702 (N.J. 1997), the Supreme Court of New Jersey ruled that bills for the services of outside counsel, and documents related to these services, are public records, and must be disclosed to the faculty union upon request. In *State ex rel. James v. Ohio State University*, 637 N.E.2d 911 (Ohio 1994), the Supreme Court of Ohio ruled that a professor's tenure file, including letters from evaluators and their identities, is subject to disclosure under that state's Public Records Act. The *James* case is discussed in Section 7.7.1. And in *An Unincorporated Operating Division of Indiana Newspapers v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), a newspaper had sought investigative materials concerning the behavior of a basketball coach who was eventually fired. Both the police and the trustees had conducted investigations of the coach's behavior. The court exempted the police investigation from disclosure because of a "law enforcement privilege," but said that the portions of the trustees' investigation that did not contain personally identifiable information about students must be produced.

In another case involving personal privacy, *Marder v. Board of Regents of the University of Wisconsin System*, 596 N.W.2d 502 (Wis. Ct. App. 1999), the university was asked by a newspaper and radio station to provide copies of employment records and investigatory files compiled in response to a sexual harassment claim against a faculty member. The university agreed to provide the materials, and the faculty member sued the university. The court ruled that personnel records are not exempt from disclosure under Wisconsin's Open Records Law, and that the public had a "substantial interest in student-faculty relations at our state universities" that outweighed the faculty member's privacy concerns.

State open records laws may be applied as well to e-mail sent to or from state employees. To cover this eventuality, colleges may wish to develop and distribute policies on the use of e-mail that advise employees of the potential for disclosure of what may appear to be private communications. (For a discussion of the application of open records laws to e-mail messages by faculty or students, and several examples of the legal and practical problems that incautious use of e-mail may create, see Andrea L. Foster, "Your E-Mail Message to a Colleague Could Be Tomorrow's Headline," *Chron. Higher Educ.*, June 21, 2002, A31.)

As the cases in this subsection demonstrate, the general problem created by open records statutes and similar laws is how to balance the public's right to know against an individual's right to privacy or an institution's legitimate need for confidentiality. Administrators and counsel must consider the complex interplay of all these interests. Sometimes the legislation provides guidelines or rules for striking this balance. Even in the absence of such provisions, some courts have narrowly construed open records laws to avoid intrusion on compelling interests of privacy or confidentiality. The trend, however, appears to be in the direction of openness and public access, even when the institution considers the information sensitive or private.

**12.5.4. State administrative procedure laws.** State administrative law is another area of state law that has had an impact on the campus. Like the federal government, many states have statutes requiring that state agencies follow prescribed procedures when formulating binding rules. State boards and state institutions of higher education may be considered state agencies subject to these rule-making statutes. In *Florida State University v. Dann*, 400 So. 2d 1304 (Fla. Dist. Ct. App. 1980), for instance, several faculty members challenged university procedures used to determine merit raises and other salary increases. The faculty members argued that the university had not conformed to the state rule-making statute when it created the salary increase procedures. The court agreed and invalidated the procedures.

Similarly, in *Board of Trustees v. Department of Administrative Services*, 429 N.E.2d 428 (Ohio 1981), laid-off employees of Ohio State University argued that they were entitled to reinstatement and other relief because their layoffs were executed under improperly issued rules. The court agreed. It considered the university's rules to be state agency rules subject to the state's Administrative Procedure Act (APA). This Act required public notice of rule making, filing of rules

with the executive and legislative branches of government, a public hearing on proposed rules, and notification of persons who would be especially affected by the rules. The university had failed to follow these procedures. Moreover, it had erroneously issued the rules under the aegis of its board of trustees. The applicable statutory provision grants such rule-making authority to the personnel departments of state universities, not the boards of trustees.

And in *McGrath v. University of Alaska*, 813 P.2d 1370 (Alaska 1991), the Alaska Supreme Court reviewed the claim of state university faculty that the state's Administrative Procedure Act applied to faculty grievance proceedings at the university. The university had promulgated its own policies regarding grievance proceedings; however, the court ruled that the APA superseded the university's policies.

State courts may interpret the state's administrative procedure act to require progressive discipline prior to the termination of a tenured faculty member, whose expectation of continued employment establishes a constitutionally protected property interest in his job (see Section 6.6.2). For example, in *Trimble v. West Virginia Board of Directors, Southern West Virginia Community and Technical College*, 549 S.E.2d 294 (W. Va. 2001), a tenured professor who had been terminated for "insubordination" challenged that decision. West Virginia's Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g) gives the state's courts jurisdiction to review the determination of a state agency (in this case, the college's "Board of Directors"). The court ruled that the college's decision to terminate him without having first afforded him progressive discipline violated his constitutional right to due process. The professor, who led the faculty union, had refused to administer student course evaluations, as all faculty members were required to do. Because he had an otherwise good work record and had received good annual evaluations in prior years, the court ruled that termination was too harsh a penalty and that progressive discipline should have been used.

A faculty member whose contract was not renewed attempted to avoid a review under administrative law, preferring instead to file a breach of contract action in court. In *Gaskill v. Ft. Hays State University*, 70 P.3d 693 (Kan. Ct. App. 2003), the court dismissed the claim, concluding that the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (Kan. Stat. Ann. §§ 77-601 *et seq.*) was the professor's exclusive remedy for his claim of wrongful nonrenewal of his contract. The court noted that the defendant institution was listed in Kansas law (Kan. Stat. Ann. § 76-711(a)) as a state educational institution subject to the Kansas Act for Judicial Review, and thus affirmed the trial court's finding that it lacked jurisdiction to hear the case.

Although administrative procedure act protections typically extend to personnel decisions (such as hiring, promotion, tenure, discipline, and termination), work assignments and other "managerial prerogatives" may not be included within these regulations. For example, in *Johnson v. Southern University*, 803 So. 2d 1140 (La. Ct. App. 1st Cir. 2002), the court ruled that a professor could not challenge his teaching assignments under Louisiana's Administrative Procedure Act because teaching assignments were not reviewable under this law. The decision to

assign him only multisectioned classes did not deprive him of a property or liberty interest, said the court.

On the other hand, administrative procedure acts may provide for judicial review in situations in which an individual might otherwise be required to follow the more limited review by an administrative law judge. For example, in Tennessee, a state statute, Tenn. Code Ann. § 49-8-304, provides that individuals challenging a negative tenure decision are entitled to a *de novo* judicial review rather than the more limited review provided for by the Administrative Procedures Act for other types of challenges to agency decisions. In *Stephens v. Roane State Community College*, 2003 Tenn. App. LEXIS 567 (Tenn. Ct. App., August 12, 2003), the court ruled for a second time in a case involving the plaintiff's six-month suspension for sexual harassment of a student. His first judicial hearing had been a limited one under the more general APA standard, and he had been found guilty of the harassment charge; on remand, the trial judge reviewed the entire record and concluded that the suspension was justified. The appellate court ruled that the trial court's determination was supported by clear and convincing evidence.

Faculty members who challenge denial of tenure, nonreappointment, or termination may find their freedom to litigate these decisions in court circumscribed somewhat by state administrative procedure acts. This is the teaching of the *Gaskill* case, above. Other cases presenting these issues are discussed in Section 6.7.4.

### ***12.5.5. Laws regulating medical services and medical research.***

State laws and court decisions regarding hospitals, clinics, and health care professionals are of particular concern to universities that have a university-affiliated hospital or health care clinical programs that utilize hospitals or clinics as training sites. Some of these laws and decisions also have important applications to campus medical clinics and campus health services for students. The applicable requirements are usually found in state statutes and administrative regulations, but these laws must often be interpreted in light of state common law principles or principles of state or federal constitutional law.

All states have licensing laws for certain health care facilities, and some also have certificate-of-need requirements for the construction of new facilities (see, for example, *Tulsa Area Hospital Council v. Oral Roberts University*, 626 P.2d 316 (Okla. 1981)). All states also have licensing laws for various health care practitioners, as well as unauthorized practice laws. Informed consent laws regarding medical treatment are another common example. Many states also have labor relations laws governing unionization of personnel in public hospitals, and some of these laws also cover medical residents (see Sections 4.5.2.3 & 4.5.3 of this book).

More recent and controversial examples include laws on the disposal of medical and infectious waste (for example, Cal. Health & Safety Code § 7054.4); on human medical experimentation (for example, Cal. Health & Safety Code, ch. 1.3); on anatomical gifts (see Marjorie Shields, Annot., "Validity and Application of Uniform Anatomical Gift Act," 6 A.L.R.6th 365; on living wills and durable medical

powers-of-attorney;<sup>14</sup> on hospitals' authority to regulate use of certain procedures, such as abortion or sterilization (for example, Md. Code Ann., Health—General § 20-214(b), applied in *St. Agnes Hospital v. Riddick*, 668 F. Supp. 478 (D. Md. 1987)); on hospitals' duty to refuse to perform certain services, such as abortion (for example, Ark. Const. Amend. 68, § 1, applied in *Unborn Child Amendment Committee v. Ward*, 943 S.W.2d 591 (Ark. 1997)); on regulating certain controversial research, such as genetic or fetal research (for example, Ill. Rev. Stat. ch. 38, para. 81-26, applied in the *Lifchez* case below); on AIDS testing (for example, 35 Pa. Stat. Ann. § 7602 *et seq.*, applied in *In re Milton S. Hershey Medical Center of the Pennsylvania State University*, 634 A.2d 159 (Pa. 1993)); and on health professionals' obligations to treat AIDS patients (for example, the Minnesota Human Rights Act (Minn. Stat. Ann. § 363 A.01 *et seq.*), applied in *State by Beaulieu v. Clausen*, 491 N.W.2d 662 (Minn. Ct. App. 1992)).

A line of U.S. Supreme Court cases on the constitutional right to privacy provides examples of how state laws on medical services may be limited by federal constitutional law. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), Missouri law required that a comatose patient's desire to withdraw life-sustaining medical treatment be proven by clear and convincing evidence. Although the U.S. Supreme Court upheld the constitutionality of this requirement, it also recognized that the states' regulatory authority in this area is limited because, under the Fourteenth Amendment's due process clause, persons have "a constitutionally protected liberty interest in refusing unwanted medical treatment." In a later case, *Washington v. Glucksberg*, 521 U.S. 702 (1997), a Washington state law prohibited any person, including a physician, from assisting another (including a terminally ill patient) in terminating his or her life. The Court upheld this law under the due process clause.<sup>15</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a Pennsylvania law on abortions included informed consent requirements, a husband notification requirement, and reporting requirements for facilities that perform abortions. The Court upheld the first and third of these restrictions, rejecting arguments that they unduly burdened the right to choose abortion. Regarding the husband notification requirement, however, the Court held that it did unduly burden choice and therefore violated the due process clause.

Other important cases illustrate constitutional issues raised by laws that restrict medical research. In *Lifchez v. Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990), for example, physicians challenged an Illinois statute providing that "[n]o person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced" (Ill. Rev. Stat. ch. 38, para. 81-26, § 6(7)). The court held that the statute was unconstitutionally vague and that it invaded the woman's constitutional freedom to choose procedures such as embryo transfer. Similarly, in *Forbes*

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<sup>14</sup>Federal law requires that Medicare and Medicaid providers inform patients of these state laws (see 42 U.S.C. § 1396a(w)(1) & 42 U.S.C. § 1395c(f)(1)).

<sup>15</sup>At the same time, the Court also upheld a similar New York law under the equal protection clause (*Vacco v. Quill*, 521 U.S. 793 (1997)).

*v. Woods*, 71 F. Supp. 2d 1015 (D. Ariz. 1999), *affirmed*, *Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000), the trial and appellate courts invalidated Arizona statutes that made it a crime to engage in experimentation or investigation using fetal tissue (Ariz. Rev. Stat. §§ 36-2302, 32-1401(25)(x), & 32-1854(45)). In *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), the plaintiff claimed that California property law accorded him ownership rights over the cells from his diseased spleen that researchers had used, and that he was therefore entitled to a share of the profits reaped from the research. Overruling an intermediate appellate court's decision, the California Supreme Court held that California law did not create any such property right for the plaintiff but did create fiduciary duties and informed consent requirements obligating the physician to inform the patient of any personal or economic interest that the physician might have in using the patient's tissue. And in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), the court held that a wife had a constitutionally protected property interest in her deceased husband's body under Ohio law, and that the Fourteenth Amendment's due process clause therefore limited the authority of state employees to use body parts for organ transplants or research without the wife's prior consent. *Brotherton v. Cleveland* was relied upon in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), in which the court held that relatives had a property interest in the deceased's body parts under Michigan law that was protected by the due process clause; and that the defendant's removal of the deceased's eyeballs and corneas without the relatives' consent was therefore a violation of procedural due process. (For another, similar, case in which the court also relies on state common law, see *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).)

In addition, a New York court and a Maryland court have provided important examples of legal problems that may arise regarding human subject research. In *T.D. v. New York State Office of Mental Health*, 650 N.Y.S.2d 173 (N.Y. App. Div. 1996), a case brought by medical patients incapable of giving their own informed consent, the court invalidated state regulations of human subject research. According to the court, analysis of such regulations—and human subject research regulations generally—

necessarily requires a balancing of this State's responsibility to protect individuals who, because of mental illness, age, birth defect, other disease or some combination of these factors, are incapable of speaking for themselves, from needless pain, indignity and abuse, against its worthwhile goal of fostering the development of better methods to diagnose, treat and otherwise care for these same individuals through cooperation with the medical community and private industry [650 N.Y.S.2d at 176].

The court held that the state's regulations did not suitably strike this balance, since they did not adequately safeguard the constitutional and common law rights of the patients:

The provisions concerning the assessment of a potential subject's capacity do not adequately protect the common law privacy and due process rights of potential subjects. The regulations do not identify or set out specific or even minimum



qualifications for the individual or individuals who initially assess a potential subject's capacity, and do not contain a specific protocol for how the assessment is to be carried out. Further, there are no provisions requiring any notice to the patient that his or her capacity to provide or withhold consent for a particular study is being questioned. Consequently, there is no provision for review of a determination of lack of capacity at the patient's request [650 N.Y.S.2d at 189].

In addition, the court held that the New York State Office of Mental Health "lacked the authority to promulgate the challenged regulations governing human subject research as such authority is given exclusively to the Commissioner of the Department of Health pursuant to Article 24-A of the Public Health Law."

In a subsequent case, *Grimes v. Kennedy Krieger Institute, Inc.*, 782 A.2d 807 (Md. 2001), the highest court of Maryland dealt specifically with human subject research involving children. The state did not have an applicable statute or administrative regulation, but the court used common law principles of tort and contract to limit researchers' use of children as human subjects. *Grimes* is further discussed below and also in Section 15.4.2.

As *Grimes* indicates, state tort law (see generally Section 3.3.1) is also very important in the health care context.<sup>16</sup> Malpractice law (setting professional standards of care for health care workers), the law on releases and waivers (see Section 2.5.3.3), products liability law (regarding the safety of drugs and medical equipment), and the tort of battery (covering physical, and sometimes emotional, harm from invasive medical procedures performed without informed consent) are all pertinent, as well as the duty of care that negligence law establishes for researchers using human subjects in their research. In *Grimes v. Kennedy Krieger Institute* (above), for example, the court established the circumstances in which researchers owe a duty of care to children who are human subjects in research projects; and in addition the court limited the circumstances in which researchers may seek, and parents may grant, informed consent for the participation of children. And in *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978), the court held that the women plaintiffs had a cause of action for battery against the university and the drug manufacturer for administering a drug as part of a medical experiment without their knowledge or consent; that the plaintiffs did not have a products liability claim against the manufacturer absent evidence of physical injury; and that the plaintiffs would have a claim for failure to notify of the drug's risks only if they had been physically injured. (Compare *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003), in which the Texas Supreme Court ruled for the defendants in another type of battery case involving the birth of a premature infant.)

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<sup>16</sup>For a sampling of the many types of cases that may arise, see Thomas M. Fleming, Annot., "Hospital's Liability for Injury Resulting from Failure to Have Sufficient Number of Nurses on Duty," 2 A.L.R.5th 286; David B. Harrison, Annot., "Application of Rule of Strict Liability in Tort to Person or Entity Rendering Medical Services," 100 A.L.R.3d 1205; Marc L. Carmichael, Annot., "Liability of Hospital or Medical Practitioner Under Doctrine of Strict Liability in Tort, or Breach of Warranty, for Harm Caused by Drug, Medical Instrument, or Similar Device Used in Treating Patient," 54 A.L.R.3d 258; A. M. Swarthout, Annot., "Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient," 6 A.L.R.3d 704.

Tort liability issues may be especially complex in health care cases because of the numbers of parties potentially involved: the university; the medical center or hospital, which may be an entity separate from the university (see Section 3.6); physicians, who may or may not be employees or agents of the university; nurses, laboratory technicians, and other allied health personnel; and outside parties such as laboratories, drug and equipment manufacturers, and drug and equipment suppliers. (See, for example, *Jaar v. University of Miami*, 474 So. 2d 239 (Fla. Dist. Ct. App. 1985).) When the defendants are governmental entities or their employees, issues concerning sovereign or “official” immunity and waiver of immunity may also be involved. (See, for example, *Texas Tech University Health Sciences Center v. Mendoza*, 2003 WL 1359549, 2003 Tex. App. LEXIS 2370 (March 20, 2003); and *Crannan v. Maxwell*, 1999 WL 1065051 (Ala. 1999).)

## Selected Annotated Bibliography

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### *Sec. 12.2 (State Provision of Public Postsecondary Education)*

Beckham, Joseph. “Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status,” 7 *J. Law & Educ.* 177 (1978).

Author argues for a constitutional grant of “limited autonomy” to “the state’s higher education system” in order to “insure reasonable autonomy on selected issues of college and university governance.” Article also discusses related issues, such as the constitutionality of legislative attempts to transfer power from an autonomous system, the effect “legislation relating to statewide concerns” has on an autonomous system, and the distinction between “appropriations and expenditures.”

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### ***Sec. 12.3 (State Chartering and Licensure of Private Postsecondary Institutions)***

- Committee on Nonprofit Corporations. *Guidebook for Directors of Nonprofit Corporations* (2d ed., American Bar Association, 2002). This Guidebook appraises directors and trustees of nonprofit corporations of a range of legal and governance issues that arise under state corporation law and federal and state tax laws. Topics addressed include the roles of the board of directors, the duties and rights of directors, director liability, and risk management.

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Millard, Richard M. "Postsecondary Education and 'The Best Interests of the People of the States,'" 50 *J. Higher Educ.* 121 (1979). Discusses the status of licensing in the fifty states and other developments with respect to licensing.

Oleck, Howard. *Nonprofit Corporations, Organizations, and Associations* (6th ed., Prentice-Hall, 1994). A comprehensive survey of all types of nonprofit and tax-exempt institutions, foundations, and corporations. Has numerous chapters covering hundreds of subjects. Issues addressed include formation and dissolution of nonprofit entities, organization, tax exemptions, and lobbying. Also includes model forms.

O'Neill, Joseph P., & Barnett, Samuel. *Colleges and Corporate Change: Merger, Bankruptcy and Closure* (Conference of Small Colleges, 1981). A handbook primarily for trustees and administrators but also useful to attorneys. Chapters include "Indicators of Institutional Health," "Options for Collegiate Corporate Change," "Merger," and "Dissolution of the College Corporation." Discusses procedures for amending the college charter, disposition of assets, placement of faculty, and reorganization under federal bankruptcy law. Also includes state-by-state summary of laws and regulations governing collegiate corporate changes and state-by-state summary of regulations regarding institutional responsibility for student records.

Postsecondary Education Convening Authority. *Approaches to State Licensing of Private Degree-Granting Institutions*, Institute for Educational Leadership Report no. 8 (George Washington University, 1975). A report on the first conference of state officials who license private degree-granting institutions. Explores the concepts of chartering and licensing, the status of licensing in the fifty states, and the policy and legal problems facing licensing officials. Makes recommendations for the future.

Stewart, David, & Spille, Henry. *Diploma Mills: Degrees of Fraud* (American Council on Education/Macmillan, 1989). Addresses the problem of the sale of phony diplomas. Analyzes the businesses that engage in such activities, the lax state laws under which these businesses are licensed and allowed to sell the degrees, and the role of the federal government in alleviating the problem. Includes an appendix listing relevant state laws. Authors call for strengthening of the current laws that allow fraudulent degree-granting businesses to operate, and propose other steps to alleviate the problem.

### **Sec. 12.4 (State Regulation of Out-of-State Institutions and Programs)**

Hughes, Earl, et al. *Nova University's Three National Doctoral Degree Programs* (Nova University, 1977). A Ford Foundation-funded case study on the development of multistate education programs. Chapter Nine (by Fred Nelson & William Kaplin)

provides a discussion of “Legal and Political Constraints on Nova University’s External Degree Programs.”

### ***Sec. 12.5 (Other State Regulatory Laws Affecting Postsecondary Education Programs)***

- Bakaly, Charles, & Grossman, Joel. *Modern Law of Employment Contracts: Formation, Operation and Remedies for Breach* (Harcourt Brace Jovanovich, 1983, and periodic supp.). A practical handbook on the legal relationship between employer and nonunionized employee. Topics include application of state contract law principles to employment contracts, issues regarding employee handbooks and employment manuals, wrongful discharge and the employment-at-will doctrine, and internal dispute resolution mechanisms for employment disputes. Also includes appendices with state-by-state review of wrongful discharge law, sample provisions for employee handbooks, and sample employment contract provisions.
- Brown, Kimberly, Fishman, Phillip, & Jones, Nancy. *Legal and Policy Issues in the Language Proficiency Assessment of International Teaching Assistants* (Institute for Higher Education Law and Governance, University of Houston, 1990). Reviews the laws of eleven states that require English proficiency and discusses various legal theories that could be used to attack the application of these laws. An appendix includes the text of the laws.
- Cleveland, Harlan. *The Costs and Benefits of Openness: Sunshine Laws and Higher Education* (Association of Governing Boards of Universities and Colleges, 1985). A research report that reviews state open meeting laws and the court decisions and state attorney general opinions construing these laws. Compares the various state laws, using a list of twenty-three characteristics relating to openness. Author analyzes the costs and benefits of openness under these laws, concluding that the costs generally outweigh the benefits. Report includes an appendix of attorney general opinions and a bibliography. Reprinted in 12 *J. Coll. & Univ. Law* 127 (1985).
- Davis, Charles N. “Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches,” 21 *J. Coll. & Univ. Law* 353 (1994). Examines the decisions of state courts and state laws relating to presidential searches. Suggests guidelines for search committees, the press, and the candidates for determining the scope of these laws.
- Greer, Darryl G. “*Truth-in-Testing Legislation*”: *An Analysis of Political and Legal Consequences, and Prospects* (Institute for Higher Education Law and Governance, University of Houston, 1983). Reviews the history and origins of testing legislation and discusses in depth two laws—those of California and New York—that mandate disclosure of standardized test questions and answers. An evaluation of the educational, legal, and political consequences of the laws is provided.
- Hopkins, Bruce. *The Law of Fundraising* (3d ed., Wiley, 2002). Describes and analyzes governmental systems for regulating fundraising by nonprofit organizations. Presents state-by-state summary of laws on charitable solicitations; analyzes legal issues raised by government regulation of fund-raising; explores federal IRS oversight of tax-exempt organizations and the activities of private agencies as part of the overall regulatory scheme; and offers advice on how to comply with existing rules. Supplemented annually.

Madsen, Helen H. "New State Legislation on Informing Workers About Hazardous Substances in the Workplace: Will It Impact on University Teaching and Research?" 9 *J. Coll. & Univ. Law* 325 (1982-83). Reviews the legal situation in states that have enacted "laws giving employees the right to obtain basic information about hazardous substances with which they work." Provides an overview of some major issues involved in this area of regulation, contrasting different states' responses (or lack of response) to these issues. Also discusses factors that could improve state regulation of hazardous substances in the higher education context.

Remis, Rob. "Analysis of Civil and Criminal Penalties in Athletic Agent Statutes and Support for the Imposition of Civil and Criminal Liability upon Athletes," 8 *Seton Hall J. Sport L.* 1 (1998). Reviews state laws that impose civil penalties or damages on athletes' agents, but not on athletes, for violations of the law's provisions. Argues that athletes should also be subject to these laws. Reviews civil and criminal proceedings under these laws, and provides appendices in which the athlete agent statutes are summarized.

Rich, Ben A. "Malpractice Issues in the Academic Medical Center," 13 *J. Coll. & Univ. Law* 149 (1986). Considers the "standards of care applicable to health care practitioners," and the "special problems of patient care delivery" in academic medical centers, as well as the "special status of public academic medical centers and their employees." Gives special attention to problems of informed consent and to legal relations between universities and affiliated medical institutions.

See Bell & Majestic entry in Selected Annotated Bibliography for Chapter 13, Section 13.2.

See Dutile & Gaffney entry for Section 12.3.

# 13

## The College and the Federal Government

### ***Sec. 13.1. Federal Constitutional Powers over Education***

**13.1.1. Overview.** The federal government is a government of limited powers; it has only those powers that are expressly conferred by the U.S. Constitution or can reasonably be implied from those conferred. The remaining powers are, under the Tenth Amendment, “reserved to the states respectively, or to the People.” Although the Constitution does not mention education, let alone delegate power over it to the federal government, it does not follow that the Tenth Amendment reserves all authority over education to the states or the people (see *Case v. Bowles*, 327 U.S. 92 (1946)). Many federal constitutional powers—particularly the spending power, the taxing power, the commerce power, and the civil rights enforcement powers (see subsections 13.1.2 through 13.1.5 below)—are broad enough to extend to many matters concerning education. Whenever an education activity falls within the scope of one of these federal powers, the federal government has authority over it.

When Congress passes a law pursuant to its federal constitutional powers, and the law is within the scope of these powers, it will “preempt” or supersede any state and local laws that impinge on the effectuation of the federal law.<sup>1</sup> The application of this federal “preemption doctrine” to postsecondary education is illustrated by *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986), discussed briefly in Section 11.1 of this book. Noting that the federal military recruiting laws and policies at issue in that case were within the scope of

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<sup>1</sup>For summaries of preemption law and examples, see *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 712–13 (1985); and *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm’n.*, 461 U.S. 190, 203–4 (1983).

Congress's constitutional powers to raise and support armies, the court held that they preempted a local civil rights ordinance prohibiting discrimination against homosexuals. In addition, when Congress passes a federal law pursuant to its constitutional powers, it sometimes may abrogate the states' Eleventh Amendment immunity from suit and permit private individuals to enforce the law by suing the states for money damages (see subsection 13.1.6 below).

In a number of cases since the early 1990s, the U.S. Supreme Court has emphasized principles of federalism and the limits that they place on federal power. In so doing, the Court has created new protections against federal authority for the states and state agencies. In *Printz v. United States*, 521 U.S. 898 (1997), for example, the Court relied on a principle of state sovereignty. The question was whether Congress could compel state officers (in this case sheriffs) "to execute Federal Laws." The Court answered this question in the negative, thus invalidating provisions of the federal Brady Handgun Violence Prevention Act that commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers. According to the Court, these provisions of the federal Brady law violated state sovereignty protections: "[I]t is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty. . . . It is the very *principle* of separate state sovereignty that such a law offends. . . ." Tying its holding in *Printz* to an earlier holding in the case of *New York v. United States*, 505 U.S. 144 (1992), the Court concluded:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program [521 U.S. at 944].

Similarly, in *Seminole Tribe v. Florida* (1996), in several successor cases relying on *Seminole Tribe*, in *Alden v. Maine* (1999), and in *Federal Maritime Comm'n. v. South Carolina Ports Authority* (2002), the Court again cited state sovereignty principles in providing states a broad immunity from private plaintiffs' suits raising federal claims in federal and state courts and before federal administrative agencies. (These cases are discussed in Section 13.1.6 below.) In 1997 in *City of Boerne v. Flores*, in several successor cases relying on *Boerne*, and in 2000 in *United States v. Morrison*, the Court narrowed Congress's authority to regulate the states under its civil rights enforcement powers. (These cases are discussed in Section 13.1.5 below.) And in 1995 in *United States v. Lopez*, and in 2000 in *United States v. Morrison*, the Court limited Congress's commerce power not only over the states but, more particularly, over private individuals and institutions. (These cases are discussed in Section 13.1.4 below.) All of these cases were controversial. The extent of the controversy, and the contested nature of the law in this arena, are illustrated by the Court's voting patterns in these cases; *Printz*, *Seminole Tribe*, *Alden*, *South Carolina Ports Authority*, *City of*



*Boerne, Morrison, and Lopez*, and most of the cases following them, were all decided by 5-to-4 votes.

**13.1.2. Spending power.** Contemporary federal involvement in education stems primarily from Congress's power under Article I, Section 8, Clause 1 to spend its funds for the "general welfare of the United States." (See generally A. Rosenthal, "Conditional Federal Spending and the Constitution," 39 *Stan. L. Rev.* 1103 (1987).) The spending power is the basis of the federal aid-to-education programs and "cross-cutting" requirements discussed in Section 13.4 below, the student aid programs discussed in Section 8.3.2, the civil rights requirements discussed in Section 13.5 below, and the Family Educational Rights and Privacy Act (FERPA) requirements discussed in Section 9.7.1. The placement of conditions on grants for postsecondary education has been an accepted practice at least since the Morrill Acts (see Section 13.4.1 of this book) and the case of *Wyoming ex rel. Wyoming Agricultural College v. Irvin*, 206 U.S. 278 (1907)). The constitutional validity of such conditions has also been clear at least since the late 1930s, when the U.S. Supreme Court broadly construed the spending power in the course of upholding innovative New Deal spending programs (see *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)). Thereafter, the courts have been willing to uphold virtually any spending program that Congress believes will further the general welfare (see, for example, *Helvering v. Davis*, 301 U.S. 619 (1937)) and any condition on spending, whether imposed on governmental or private entities, that is "germane" to (or related to) the activities and objectives for which the federal government is expending the funds (see *South Dakota v. Dole*, 483 U.S. 203, 208, n.3 (majority opinion), & 213–16 (dissenting opinion)). The spending power, however, does not give the federal government a roving commission to regulate postsecondary education. What leverage the federal government exerts through the spending power arises from its establishment of the purposes and conditions for its expenditure of funds. Although fund recipients may be under considerable financial pressure to accept the funds, and although they are subject to all the federal requirements of the program if they accept the funds, they can avoid the requirements by declining the funds.

In a 1981 case, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court made its most important pronouncement on the spending power since the New Deal cases of the 1930s. The plaintiff, a mentally retarded resident of a special school and hospital operated by the State of Pennsylvania, claimed that she had a right to "appropriate treatment"—a right derived in part from conditions that the federal government had attached to certain grants received by the school. The Court rejected the plaintiff's claim, asserting that Congress had not conditioned the grants on the state's willingness to guarantee appropriate treatment and that the language about treatment in the grant statute "represent[s] general statements of federal policy, not newly created legal duties." In reaching its decision, the Court adopted an interpretation of the spending power that emphasizes Congress's responsibility to speak clearly if it seeks to create "entitlements" or "rights" that state entities (and apparently

private sector grantees as well) must recognize as a condition to receiving federal money:

[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the states. . . . However, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the "contract" (see *Steward Machine Co. v. Davis*, 301 U.S. 548, 585–98 . . . (1937)). There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation [451 U.S. at 17; see also 451 U.S. at 24–25].

Although this interpretation clearly benefits states in their dealings with the federal government, it does not create new substantive limits on the number or type of conditions that Congress may impose under the spending power. Instead, *Pennhurst* limits the circumstances in which courts may recognize, and federal agencies may enforce, grant conditions upon grantees. If Congress and the federal agencies fit within these circumstances by defining their conditions clearly before they award grants, they may impose such conditions to the same extent after *Pennhurst* as they could before. The best contemporary guide to the extent of this power of conditional spending is *South Dakota v. Dole* (above).

While the spending power has been an important source of congressional authority throughout the history of higher education, and particularly since the 1950s (see Section 13.4.1), the power has taken on added importance since the closing years of the twentieth century. In a line of cases beginning with *United States v. Lopez*, 514 U.S. 549 (1995), the U.S. Supreme Court cut back on the scope of Congress's commerce power (see subsection 13.1.4 below). These developments have created an impetus for Congress and interest groups to seek other sources of power to accomplish objectives that can no longer be accomplished under the commerce power, and for courts and litigants to consider other sources of power that might be used to uphold legislation that can no longer be upheld under the commerce power. (See Lynn Baker, "Constitutional Federal Spending After Lopez," 95 *Columbia L. Rev.* 1911 (1995).) Similarly, in a related set of developments, the Supreme Court has prohibited Congress from using the commerce clause to abrogate state sovereign immunity from suit and limited Congress's authority to do so under its Fourteenth Amendment enforcement power (see subsections 13.1.5 & 13.1.6 below). These developments have also created an impetus to seek other sources of power by which states' assertions of sovereign immunity may be nullified or avoided. For both sets of developments, the federal spending power has been the chief power to be tapped as an alternative. In *College Savings Bank v. Florida Prepaid Postsecondary*

*Education Expense Board*, 527 U.S. 666 (1999), the Court emphasized that “Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions” (527 U.S. at 686). Using the spending power in this way, Congress may not only impose conditions on recipients (including states) that it could once, but can no longer, impose under the commerce power; it may also condition a state’s receipt of federal funds upon its waiver of its immunity from suit on particular federal claims (see, for example, *Litman v. George Mason University*, 186 F.3d 544, 551–53, 554–57 (4th Cir. 1999)); and see generally subsection 13.1.6 below). Any such conditions, of course, must be stated with the clarity required by the *Pennhurst State School* case above.

**13.1.3. Taxing power.** The federal taxing power also comes from Article I, Section 8, clause 1, which authorizes Congress “to lay and collect taxes” in order to raise the money it spends for the general welfare, and from the Sixteenth Amendment, which specifically authorizes Congress to impose an income tax. The tax power is the basis for the laws discussed in Section 13.3. Though the purpose of the tax power is to raise revenue rather than to regulate as such, the power has been broadly construed to permit tax measures with substantial regulatory effects. The application of the tax power to postsecondary education, including in some cases public postsecondary education, was upheld in *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938), which concerned an admissions tax that the federal government had levied on state college football games. The tax power may be somewhat greater over private than over public institutions, however, since public institutions may sometimes enjoy a constitutional immunity from federal taxation of their sovereign functions (see *South Carolina v. Baker*, 485 U.S. 505 (1988)), and the federal tax laws often treat public and private institutions differently (see Section 13.3.2 below).

**13.1.4. Commerce power.** The federal commerce power stems from Article I, Section 8, Clause 3 of the Constitution, which authorizes Congress to “regulate commerce with foreign nations, and among the several states. . . .” This is the primary federal regulatory power that has been applied to postsecondary education and is the basis for most of the laws discussed in Section 13.2 below. The commerce power has been broadly construed to permit the regulation of activities that are in or that “affect” interstate or foreign commerce. As the U.S. Supreme Court has often acknowledged, “Congress’s power under the commerce clause is very broad. Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations” (*Fry v. United States*, 421 U.S. 542, 547 (1975)).

In a series of opinions in the late 1970s and early 1980s, the U.S. Supreme Court did attempt to limit Congress’s use of the commerce power as a basis for

regulating state and local governments. The key case was *National League of Cities v. Usery*, 426 U.S. 833 (1976). By a 5-to-4 vote, the Court relied on the Tenth Amendment to invalidate federal wage and hour laws as applied to state and local government employees, reasoning that “their application will significantly alter or displace the states’ abilities to structure employer-employee relationships . . . in areas of traditional governmental functions.” The Court premised this decision on a general principle that “Congress may not exercise . . . [the commerce] power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.” In subsequent years, however, lower courts and the Supreme Court itself struggled to understand and apply *National League’s* enigmatic distinctions between “traditional” and “nontraditional,” and “integral” and “nonintegral,” government functions. Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), by a 5-to-4 vote, the Court overruled *National League*:

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is “integral” or “traditional.” . . .

[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in constraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated. . . .

[T]he model of democratic decision making [that] the Court [identified in *National League*] underestimated, in our view, the solicitude of the national political process for the continued vitality of the states. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair [469 U.S. at 546–47, 556–57].

In the 1990s, the U.S. Supreme Court made another attempt—analytically distinct from the *National League* line of cases in the 1970s and 1980s—to limit Congress’s commerce power. The key case is *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court invalidated the Gun-Free School Zones Act, a federal statute making it a crime to possess a firearm on or within 1,000 feet of school grounds. The statute exceeded the scope of the commerce power because Congress had not required prosecutors to prove that the defendant’s actions had some “nexus” to interstate commerce, nor had Congress made findings or produced evidence that gun possession on or near school grounds “substantially affects” interstate commerce. Regarding the second point, the Court emphasized that “education” is an area “where States historically have been sovereign,” thus making it especially important that Congress develop findings or evidence to justify federal involvement under the commerce power. The commerce power does not extend to the regulation of all “activities that adversely affect the learning environment,” and the Court will not presume

(absent congressional findings or evidence) that all such activities adversely affect interstate commerce:

We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools [514 U.S. at 565–66].

*United States v. Lopez* was confirmed and extended in *United States v. Morrison*, 529 U.S. 598 (2000), affirming *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999) (*en banc*). The issue was whether the federal Violence Against Women Act (42 U.S.C. § 13981) was a valid exercise of Congress’s commerce power. The U.S. Supreme Court struck down the Act as beyond the scope of congressional power. Relying heavily on *United States v. Lopez*, the Court majority held that Congress had not demonstrated that the violent acts targeted by the statute had a substantial adverse effect on interstate commerce. The Court majority also extended *Lopez* by limiting the types of congressional findings that will justify resort to the commerce power. Unlike the *Lopez* case, in passing the Violence Against Women Act, Congress had made numerous findings regarding adverse effects on interstate commerce (something it had not done for the firearms statute in *Lopez*). Nevertheless, the Court considered these findings to be based on a “but-for causal chain” that was too “attenuated” and too focused on “noneconomic” conduct to justify the Act under the commerce clause.

Thus *Lopez* and *Morrison*, taken together, indicate that the courts are now less deferential to Congress than they previously were in commerce clause cases, that the Supreme Court has developed (or is in the process of developing) judicially enforceable limits on the scope of the commerce power, and that these limits apply to Congress’s regulation of education. A later case, however, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), limits the reach of *Lopez* and *Morrison* by indicating that they apply to Congress’s regulation of intrastate noneconomic activity (like gun possession on school grounds) under statutes that directly target such activity (like the Gun-Free School Zones Act), but do not apply to Congress’s regulation of intrastate noneconomic activity under broader statutes that “directly regulate[ ] economic, commercial activity” and include coverage of the intrastate noneconomic activity only as a means (among others) of making the broader economic regulation effective.

In addition to *Lopez* and *Morrison*, the Court has limited the reach of the commerce power in another way, having particular application to the state agencies and instrumentalities. In 1996, in *Seminole Tribe v. Florida*, the Court held that Congress cannot use the commerce power to abrogate the states’ immunity from private suits in federal court, thus removing a major means for enforcing commerce clause regulations of the type authorized in *Garcia v. Metropolitan Transit Authority* (above). Then, in *Alden v. Maine*, the Court held that states also have an immunity from private suits on federal law claims brought in the

state's own courts, and that Congress cannot use the commerce power to abrogate this immunity; and in *Federal Maritime Comm'n. v. South Carolina Ports Authority*, the Court held that states are immune from private claims brought against them in adjudicatory proceedings of federal administrative agencies, and that Congress cannot use the commerce power to abrogate this immunity. (These cases are discussed in Section 13.1.6 below.) As a result of these cases, even though Congress may still regulate the states (and state colleges and universities) under the commerce power, it may not provide for the enforcement of commerce clause regulations against the states through lawsuits by the individuals whom such regulations protect. If a state were to violate the Fair Labor Standards Act (FLSA), for example, by denying state employees certain rights regarding wages and hours (see Section 4.6.2 of this book), these employees can no longer sue the state for damages in order to enforce their rights.

**13.1.5. Civil rights enforcement powers.** The civil rights enforcement powers are the fourth major federal power source applicable to education. These powers derive from the enforcement clauses of various constitutional amendments, particularly the Fourteenth Amendment (due process and equal protection), whose fifth Section provides that “the Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the U.S. Supreme Court held that Section 5 of the Fourteenth Amendment empowers Congress to “exercise its discretion in determining whether and what legislation is needed to secure the [Amendment’s] guarantees,” as long as the legislation is “adapted to carry out the objects the . . . [Amendment has] in view” and is not otherwise prohibited by the Constitution.

The civil rights enforcement powers are the basis for many of the federal employment discrimination laws (see Section 5.2 of this book) insofar as they apply to state and local government entities. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), for instance, the Court upheld the 1972 extension of the Title VII employment discrimination law to state and local governments as an appropriate exercise of the Fourteenth Amendment (Section 5) enforcement power. This power is also the basis for the generic federal civil rights law known as Section 1983 (see Sections 3.5 & 4.7.4 of this book). As interpreted in *United States v. Morrison*, 529 U.S. 598 (2000), however, the Fourteenth Amendment enforcement power authorizes Congress to regulate only states and local governments, and not the private sector; Congress therefore cannot use Section 5 of the Fourteenth Amendment to create civil remedies against private entities or individuals that are not engaged in state action.<sup>2</sup>

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<sup>2</sup>The plaintiff in *Morrison* was a female college student who sued two male students who she alleged had raped her. The plaintiff claimed that the two students' actions violated Congress's Violence Against Women Act, 42 U.S.C. § 13981, which provided a civil remedy against private individuals for their acts of gender-motivated violence. Since the enforcement power extended only to state and local governments, and could not be used by Congress to regulate private conduct, the Court invalidated the statute.

In contrast, the Thirteenth Amendment enforcement power, which empowers Congress to eradicate “badges” and “incidents” of slavery, extends to both the private and the public sector, as the U.S. Supreme Court affirmed in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976), both discussed in Section 8.2.4.1).<sup>3</sup>

In *City of Boerne v. Flores*, 521 U.S. 507 (1997) (see Section 1.6.2), the U.S. Supreme Court clarified the limits on Congress’s enforcement power under Section 5 of the Fourteenth Amendment and thus alleviated some of the uncertainty that had existed regarding this power. In particular, the Court emphasized that:

Congress’ power under § 5 . . . extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial,” *South Carolina v. Katzenbach*, [383 U.S.] at 326. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of [rights incorporated into the due process clause] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment]” [521 U.S. at 519].

The Court has reaffirmed and applied *Boerne* in several important cases involving postsecondary education. In the two *College Savings Bank* cases (see Section 13.1.6 below and Sections 13.2.6 & 13.2.7), the Court invalidated applications of two federal laws to the states because these laws did not remedy or deter violations of property rights under the Fourteenth Amendment’s due process clause. Similarly, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), by a 5-to-4 vote, the Court invalidated the Age Discrimination in Employment Act (see Section 5.2.6 of this book) insofar as it authorizes private damages actions against the states, and specifically against state colleges and universities. After noting that age discrimination is not a “suspect” classification under the Fourteenth Amendment’s equal protection clause and receives only a minimal “rational basis” review, the Court determined that:

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *City of Boerne*, 521 U.S. at 532. The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard [528 U.S. at 64].

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<sup>3</sup>For a review of enforcement issues under Section 1981 and the Thirteenth Amendment, see “Developments in the Law—Section 1981,” 15 *Harv. Civil Rights—Civil Liberties L. Rev.* 29 (1981).

And in another 5-to-4 decision, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court relied on *Kimel* to invalidate Congress's application of Title I of the Americans With Disabilities Act (42 U.S.C. §§ 12111–12117) to the states. Noting that disability discrimination, like age discrimination, as in *Kimel*, receives only a “rational basis” review under the equal protection clause, the Court held that Congress had not identified “a pattern of [disability] discrimination by the States which violates the Fourteenth Amendment.” “[T]he remedy imposed by Congress [was therefore not] congruent and proportional to the targeted violation.” Under these circumstances, “to uphold the Act’s application to the State would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court. . . . Section 5 does not so broadly enlarge congressional authority” (531 U.S. at 374). In other words, according to the majority, upholding Congress’s action would have accorded Congress a substantive (rather than a remedial) power under Section 5—a result that the line of cases subsequent to *Katzenbach v. Morgan* had rejected. The holding was the product of a 5-to-4 vote, with Justices Breyer, Stevens, Souter, and Ginsburg dissenting. (The Court remanded the case to the district court, at which point the plaintiff advanced a different claim; this claim is discussed in subsection 13.1.6 below.)

Two later cases, however, have softened the hard edges of these developments limiting the scope of Congress’s authority to impose civil rights requirements on the states. In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court upheld Congress’s use of its enforcement power to apply the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2611 *et seq.*) to the states. The six-Justice majority, in an opinion by Chief Justice Rehnquist, noted that “[w]hen it enacted the FMLA, Congress had before it significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the States” (*Id.* at 730), and that “the FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest . . . (*Id.* at 738). The Court also distinguished *Kimel* and *Garrett* because age discrimination (as in *Kimel*) and disability discrimination (as in *Garrett*) are subject only to rational basis scrutiny under the equal protection clause, while gender discrimination (as in this case) is subject to heightened judicial scrutiny. Since the heightened scrutiny makes it more difficult for the states to justify gender classifications, compared to age and disability classifications that are subject only to rational basis scrutiny, “it was easier for Congress” to demonstrate the “pattern of state constitutional violations” that Section 5 requires (*Id.* at 722). Congress’s evidence was “weighty enough to justify enactment of [the FMLA as] prophylactic § 5 legislation,” and the “narrowly targeted” provisions of the FMLA are “congruent and proportional to [their] remedial object,” as required by *City of Boerne* (*Id.* at 740). The FMLA was thus a constitutional exercise of Congress’s Section 5 power and could be enforced against the states.

In the second case, *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court upheld a particular application of Congress’s Section 5 enforcement power to the states under Title II of the Americans With Disabilities Act (as opposed to Title I, as in



*Garrett*). The application of Title II that was at issue in *Lane* concerned Congress's enforcement of the Fourteenth Amendment's due process clause rather than the equal protection clause, as in *Garrett*. The *Lane* decision is the first Section 5 case to focus on a particular application of a federal statute to a state entity, rather than on a facial challenge to an entire statute (or title of a statute) regulating the states; it is also the first decision to make clear that particular applications of a statute may be upheld as within the scope of Congress's enforcement power even if other applications of the same statute are not upheld. The importance of these aspects of *Lane* are illustrated by the subsequent case of *Constantine v. The Rectors & Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005). In that case, the court, relying on *Lane*, considered the validity of ADA Title II as applied to "the class of cases implicating the right to be free from irrational disability discrimination in public higher education." Reviewing Title II's legislative history and the Court's statements in *Lane*, the U.S. Court of Appeals held that this application of Title II is within the scope of Congress's Section 5 power, and that the plaintiff student could proceed with her claim that the defendant, a public university and its law school, had irrationally discriminated against her on grounds of disability. (To the same effect, see *Association for Disabled Americans v. Florida International University*, 405 F.3d 954 (11th Cir. 2005).)

The Court's decisions from *Boerne* to *Lane* emphasize and clarify that Congress's Fourteenth Amendment, Section 5, power may be used only to remedy actual violations, or to deter potential violations, of the Fourteenth Amendment's equal protection and due process clauses; in other words, legislation must be either remedial or "reasonably prophylactic" (see, for example, *Lane*, above, at 1988) to fit within the scope of Section 5. Congress must have "identified a history and pattern of unconstitutional [actions] by the States," and must have included sufficient documentation of such actions in the legislative record to support its determination that the legislation was needed to remedy or deter these equal protection or due process violations (*Garrett*, 531 U.S. at 368; see also *Kimel*, 528 U.S. at 90). The remedy that Congress creates in its legislation must also be "congruent" with and "proportional" to the pattern of violations that Congress has identified in the legislative record and targeted in the legislation (*Kimel*, 528 U.S. at 81–83; *Garrett*, 531 U.S. at 374). Parallel restrictions would apparently apply to Congress's exercise of its enforcement powers under the Thirteenth and Fifteenth Amendments.

**13.1.6. State sovereign immunity from suit.** In many situations, effective exertion of Congress's powers and enforcement of federal law may depend on the capacity of the courts to enforce the law directly against the states, state government agencies, and state institutions. Traditionally, states have argued that the Eleventh Amendment protects them from attempts to enforce federal law against them in federal courts (see generally Section 3.5; and see also Brian Snow & William Thro, "The Significance of Blackstone's Understanding of Sovereign Immunity for America's Institutions of Higher Education," 28 *J. Coll. & Univ. Law* 97, 110–25 (2001)). This amendment limits the judicial power of the federal courts under Article III of the U.S. Constitution. As the U.S. Supreme

Court explained in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984), the Eleventh Amendment affirms “that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III.” The immunity from suit therefore extends to federal court suits brought against states and state agencies by their own citizens (*Hans v. Louisiana*, 134 U.S. 1 (1890)), or by persons in other states. The immunity does not extend to local governments such as cities, counties, and school districts, however (*Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)), or to other “political subdivision(s)” of the state that are not “arm(s) of the state,” for Eleventh Amendment purposes (*Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401–2 (1979)). In more recent cases, the U.S. Supreme Court has extended state sovereign immunity to suits filed against the state by private parties in state court and in certain federal *administrative agency* proceedings (see the *Alden* and *Federal Maritime Commission* cases, discussed below).

Although it is clear that states, including state colleges and universities, may waive their immunity and consent to suit, there must be exceedingly clear evidence of a waiver before a court will recognize it (see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238–41, 247 (1985)). If the waiver is to be effective in federal courts, the courts will require an “unequivocal waiver specifically applicable to federal court jurisdiction” (473 U.S. at 241). Arguments for implied waiver or implied consent based on implications from a relevant text (for example, a state statute), or from background facts and circumstances, will not be accepted unless the implication is exceedingly clear (see *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 941 (6th Cir. 1990)). Thus, the inclusion of a provision in a state institution’s charter or enabling legislation, authorizing the institution to “sue and be sued,” is generally not sufficient to constitute a waiver of sovereign immunity (see, for example, *Power v. Summers*, 226 F.3d 815, 818–19 (7th Cir. 2000)). But if a state institution is sued in state court and voluntarily removes the case to federal court, this action generally will be considered to constitute a waiver of immunity and consent to be sued in the federal court. In *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), for example, a professor’s suit alleging Section 1983 and tort law claims had been removed to federal court upon the motion of the defendant state university. When the university then moved to dismiss the suit in federal court on grounds of sovereign immunity, the district court held that the university had waived its immunity. After the court of appeals reversed, the U.S. Supreme Court sided with the district court and the professor, holding that the university’s removal request constituted a waiver of its immunity because it necessarily implied that the university was submitting itself to the jurisdiction of the federal court.

Before 1996, state sovereign immunity was usually not a major impediment to the enforcement of federal laws against the states, and their state colleges and universities, because Congress could usually “abrogate” or cancel this state immunity if it chose to do. Congress’s authority to abrogate has been greatly restricted, however, by a series of U.S. Supreme Court cases, beginning with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which overruled *Pennsylvania v.*

*Union Gas*, 491 U.S. 1 (1989). By a 5-to-4 vote, the Court in *Seminole Tribe* declared that “[e]ven when the Constitution vests in Congress complete law-making authority over a particular area [for example, interstate commerce], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” The Court also acknowledged, however, that this principle does not apply to Congress’s power to enforce the Fourteenth Amendment because—according to earlier cases other than *Union Gas*—that amendment permits Congress to authorize private suits against unconsenting states that have allegedly violated its provisions. (See especially *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).) The dissenters in *Seminole Tribe* complained that the majority’s decision “prevents Congress from providing a federal [judicial] forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”

After *Seminole Tribe*, Congress can abrogate state sovereign immunity and authorize suits against state institutions only if (1) Congress has clearly indicated its intention to abrogate state immunity (see *Atascadero State Hospital* above, 473 U.S. at 242); and (2) the statute authorizing the particular suit is within the scope of Congress’s Fourteenth Amendment enforcement power (or, apparently, its Thirteenth or Fifteenth Amendment enforcement powers).<sup>4</sup> In numerous cases since *Seminole Tribe*, both in the U.S. Supreme Court and in the lower courts, these two considerations have framed the sovereign immunity analysis. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), for instance, the Court stated that “[t]o determine whether [immunity has been abrogated], we must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority” (528 U.S. at 73). Analysis of the second of these questions is now guided by another of the Court’s post-*Seminole* decisions, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussed in Section 13.1.5 above), which restricted the scope of Congress’s regulatory authority under Section 5 of the Fourteenth Amendment. Thus, not only has the Court strengthened state immunity in *Seminole Tribe* by prohibiting Congress from using the commerce clause to abrogate immunity, but at almost the same time the Court has also strengthened state immunity in *Boerne* by narrowing the scope of the only other clause giving Congress substantial authority to abrogate immunity, thus limiting the occasions in which this clause (Section 5) may serve as a tool of abrogation. The combination of events makes it extremely difficult for private plaintiffs to enforce federal laws directly against the states, including state colleges and universities and state postsecondary education agencies.

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<sup>4</sup>In a subsequent case, *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court refined the second part of this analysis to allow for abrogation when the *particular application* of the statute involved in the suit is within the scope of Congress’s Section 5 power. See the discussion of *Lane* below in this Section and in Section 13.1.5 above.

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (discussed in Section 13.2.6), for instance, the Court (again by a 5-to-4 vote) held that a 1992 federal patent infringement law was not within the scope of Congress's power under Section 5 of the Fourteenth Amendment and therefore could not be enforced in federal court against a Florida state education agency. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, discussed in Section 13.2.7, the Court held (by another 5-to-4 vote) that a federal false advertising law was not within the scope of Congress's Section 5 power and therefore could not be enforced in federal court against the same Florida education agency. In *Kimel v. Florida Board of Regents* (discussed above in this Section and in Section 13.1.5 above), by another split vote, the Court held that the federal Age Discrimination in Employment Act (Section 5.2.6 of this book) "does contain a clear statement of Congress's intent to abrogate the states' immunity," but that "the abrogation exceeded Congress's authority under § 5 of the Fourteenth Amendment" (528 U.S. at 67). The plaintiffs—faculty members and librarians—therefore could not pursue their age discrimination claims against state universities in Florida and Alabama. And in yet another 5-to-4 decision, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court majority relied on *Kimel* in holding that Congress did not have authority, under Section 5 of the Fourteenth Amendment, to abrogate the state's sovereign immunity from private party claims for damages brought under Title I of the Americans With Disabilities Act (ADA) (Section 5.2.5 of this book). The Court therefore dismissed the ADA claim of a former director of nursing at the university's hospital who was demoted to a lower-paying position after missing a substantial amount of work due to treatment for breast cancer.

All these post-*Seminole* cases focus on the Eleventh Amendment, which prohibits suits against the states in *federal* court. Suits in *state* courts to enforce federal law against state agencies were thus considered to be an option for prospective plaintiffs both before and after *Seminole Tribe* (see, for example, Section 3.5). That option was drastically limited in a U.S. Supreme Court case, *Alden v. Maine*, 527 U.S. 706 (1999), which imported state sovereign immunity protections into the state court arena. Thus, at the same time that the Court has been using the Eleventh Amendment to strengthen the states' sovereign immunity from federal court suits, it has begun to use other constitutional principles to strengthen state sovereign immunity in state courts.

*Alden* concerned the federal Fair Labor Standards Act (see Section 4.6.2 of this book), in particular the provisions authorizing state employees to enforce their FLSA rights against the states in their own courts (29 U.S.C. § 216(b) & § 203(x)). Claiming a violation of the FLSA overtime pay provisions, employees of the State of Maine filed suit against the state in state court. (They had originally sued the state in federal court but refiled in state court after the federal court held the state immune from suit in federal court.) The state courts also held the state immune from suit on grounds of sovereign immunity, and the U.S. Supreme Court affirmed by a 5-to-4 vote. Although the Eleventh Amendment does not itself apply to suits in state court and thus could not itself provide

the basis for the Court's decision, the Court determined that sovereign immunity, in a broader sense, "derives not from the Eleventh Amendment but from the structure of the original Constitution itself" and that the "scope of the states' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design" (527 U.S. at 729).

The *Alden* plaintiffs nevertheless relied on FLSA provisions permitting suits against states (above) as a clear congressional abrogation of state sovereign immunity. Echoing *Seminole Tribe*, the Court ruled that Congress had no authority under the commerce clause, or its other powers under Article I of the Constitution, to abrogate state sovereign immunity in state courts. The Court therefore affirmed the state courts' dismissal of the case because Maine could successfully assert a sovereign immunity defense against its employees' attempts to enforce federally created FLSA rights. (Three years later, the Court extended its *Alden* reasoning to provide states sovereign immunity from private parties' federal law claims filed in adjudicative proceedings before federal administrative agencies (*Federal Maritime Comm'n. v. South Carolina Ports Authority*, 535 U.S. 743 (2002)).)

Taken together, the cases from *Seminole Tribe* to *Alden* and *Federal Maritime Comm'n.* provide state colleges and universities with strong protection against liability for violations of federally created rights. But these cases should not be construed as an invitation to be less than vigilant about compliance with federal laws, or to be in any measure insensitive to the federal rights of students, faculty, and other members of the academic community. Legally speaking, that would be unwise, because, even after these recent cases, avenues are still open for enforcing federal rights against the states. Congress can still use Section 5 of the Fourteenth Amendment to abrogate state immunity from various federal civil rights claims (see, for example, *Nevada Dept. of Human Resources v. Hibbs*, discussed in Section 13.1.5; and see also *Okruhlik v. University of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001); *Lesage v. University of Texas*, 158 F.3d 213, 216–19 (5th Cir 1998)). Courts may hold that *particular applications* of a civil rights statute are within the scope of Congress's Section 5 power (even though other applications of the same statute are not) and that the state's sovereign immunity is thus abrogated as to those particular applications (see *Tennessee v. Lane* and *Constantine v. The Rectors & Visitors of George Mason University* in subsection 13.1.5 above). Moreover, private suits for prospective injunctive relief may still be brought against a state institution's officers and administrators using the *Ex Parte Young* exception (see *Garrett*, above, 531 U.S. at 374, n.9; and see generally Section 3.5 of this book);<sup>5</sup> and they may also be sued for damages in their *personal* (or *individual*) capacities in some circumstances. It has also long

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<sup>5</sup>But see *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), in which the Court majority suggested a reconsideration and limitation of *Ex Parte Young* in light of *Seminole Tribe* (see 521 U.S. at 267–70). See also *Seminole Tribe*, 517 U.S. at 74, where the Court indicated that *Ex Parte Young* would not apply in situations where Congress had created a "detailed remedial scheme" for enforcement of the federal right at issue.

been established that state sovereign immunity does not prevent the federal government itself from suing the states for damages and other relief for federal law violations. The Court in *Seminole Tribe* distinguished such suits from those in which a private party is the plaintiff: “[T]he Federal Government can bring suit in federal court against a State . . . (517 U.S. at 71, n.14, citing *United States v. Texas*, 143 U.S. 621, 644–45 (1892)). Similarly, in *Alden*, the Court emphasized that “[i]n ratifying the Constitution, the States consented to suits brought by . . . the Federal Government” (527 U.S. at 755; see also *Garrett*, 531 U.S. at 374, n.9).<sup>6</sup>

In addition to these avenues for enforcing federal law against the states, Congress also apparently has authority under its spending power (subsection 13.1.2 above) to require that state institutions waive their immunity from certain private suits as a condition of their participation in federal grant programs (see generally the discussion of abrogation and waiver in Section 13.5.9). The litigation in the *Garrett* case, above, illustrates this point and its significance. After the U.S. Supreme Court held that the plaintiff nurse’s ADA claim was barred by state sovereign immunity, she returned to the federal district court to pursue a similar disability discrimination claim under Section 504 of the Rehabilitation Act (see Sections 5.2.5 & 13.5.4 of this book), which she had pleaded in the original court suit (989 F. Supp. 1409 (N.D. Ala. 1998)). After the district court granted summary judgment for the state (223 F. Supp. 2d 1244 (N.D. Ala. 2002)), finding that Section 504 did not abrogate the state’s sovereign immunity and had not established a waiver of such immunity, the circuit court reversed, focusing on the plaintiff’s waiver argument (*Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288 (11th Cir. 2003)). The court asserted that waiver is different from abrogation, and that the spending power allowed Congress to condition “the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act. By continuing to accept federal funds, the [university has] waived [its] immunity.” The plaintiff was therefore able to proceed against the state university under Section 504, using the waiver theory, even though she could not bring a similar claim under the ADA due to Congress’s lack of authority to abrogate. Similarly, in *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), discussed in Section 13.5.9, the court used the waiver argument to reject the sovereign immunity defense of a university in a Title IX action. (See also *Pace v. Bogalusa City School Board*, 403 F.3d 272, 277–287 (5th Cir. 2005) (*en banc*)). The result in these cases is supported by the Court’s statement in *Alden* that, under the spending power, “the Federal Government lack[s] [neither] the authority or means to seek the States’ voluntary consent to private suits” (527 U.S. at 755).

Because these various avenues for enforcing federal rights against the states remain open, the legal consequences of noncompliance should continue to propel state institutions toward a healthy respect for federal rights that

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<sup>6</sup>This distinction between the federal government and private plaintiffs has also become critically important in cases brought against state institutions under the federal False Claims Act; see Section 13.2.15 of this book.

counterbalances the obvious temptation to broadly limit liability by invoking sovereign immunity. As a matter of policy, if not law, institutions should not emphasize the use of immunity claims to protect themselves from federal legal liability, rather than maintaining an ongoing legal planning process (see Section 2.4.2) that assures legal compliance. As even the *Alden* Court noted, there should be “a sense of justice” that mitigates the “rights of sovereign immunity” (527 U.S. 755).

## **Sec. 13.2. Federal Regulation of Postsecondary Education**

**13.2.1. Overview.** Despite the attempts of institutions and their national associations to limit the impact of federal regulations and federal funding conditions on postsecondary education, the federal presence on campus continues to expand. Although higher education has experienced some successes, particularly in the area of autonomy over “who may teach, what may be taught, how it shall be taught, and who may be admitted to study” (*Sweezy v. New Hampshire*; see Section 7.1.4), federal regulation affects even the academic core of a college or university. Although mandated self-regulation is still used in some areas of federal regulation, such as restrictions on the use of human subjects or research on animals, self-regulatory actions by institutions have been criticized as insufficient or self-serving. And while the federal government has relied on the private accrediting agencies to help ensure the integrity of certain federal aid programs, these agencies’ standards and practices have been periodically criticized by federal officials, and federal regulation of the accrediting process has increased over time (see Section 14.3.3).

In the following subsections of this Section, the regulatory issues with the broadest application to postsecondary education have been selected for analysis. In addition to those discussed, other federal statutes and regulations may also become important in particular circumstances. The federal bankruptcy law (11 U.S.C. § 101 *et seq.*), for instance, is important when a student loan recipient declares bankruptcy (see Section 8.3.8.1) and when an institution encounters severe financial distress. The Military Selective Service Act (50 U.S.C. § 451 *et seq.*) is important when the federal government seeks to prohibit individuals who have not registered from receiving federal student aid (see Section 8.3.2).

The Lobbying Disclosure Act of 1995 (2 U.S.C. § 1601 *et seq.*) requires the disclosure of efforts by paid lobbyists to affect decisions by the executive and legislative branches of the federal government. An organization that spends at least \$20,000 every six months and has at least one employee who spends more than 20 percent of his or her time in lobbying activities, as defined in the Act, must be listed on a registration form; reports must be filed with Congress every six months.

The National Voter Registration Act, 42 U.S.C. § 1973gg5(a)(2)(B), commonly known as the “motor voter” law, requires states to designate as voter registration agencies all offices that are primarily engaged in providing services to persons with disabilities. A federal appellate court has ruled that the offices at two public universities in Virginia that provide services to disabled students are subject

to this law. The case, *National Coalition for Students with Disabilities Education and Legal Defense Fund v. Allen*, is discussed in Section 8.7 of this book.

Corporate accounting scandals of the early twenty-first century prompted Congress to enact the Sarbanes-Oxley Act (15 U.S.C. § 7201 *et seq.*), which applies to publicly traded organizations. Although most of its provisions do not apply directly to colleges and universities, the law nevertheless raises significant issues concerning governance of organizations, transparency in accounting for financial matters, and the responsibilities of top executives. As such, the law has importance as guidance for trustees and senior administrators of colleges and universities. (For an analysis of the Sarbanes-Oxley Act and suggested “best practices” for academic organizations, see “The Sarbanes-Oxley Act of 2002: Recommendations for Higher Education,” National Association of College and University Business Officers Advisory Report 2003-3 (2003).)

The CAN-SPAM Act of 2003 (“Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003”), 15 U.S.C. § 7701 *et seq.*, is important for institutions that use broadcast e-mail to contact alumni, potential students, or other audiences. Regulations implementing the law are found at 16 C.F.R. Part 316. The law imposes limitations on the use of unsolicited e-mail that is sent for a commercial purpose, and provides for penalties for its violation. Non-profit organizations are not exempt from this law.

The laws mentioned briefly above have important consequences for post-secondary institutions’ ability to manage their affairs efficiently and to exchange information. The arena of federal regulation has expanded even more in areas related to terrorism and technology. The subsections below can only hint at the scope and complexity of regulation in these and other areas. The assistance of expert counsel is recommended when issues arise for institutions in these areas.

**13.2.2. Immigration laws.** Many citizens of other countries come to the United States to study, teach, lecture, or do research at American higher education institutions. The conditions under which such foreign nationals may enter and remain in the United States are governed by a complex set of federal statutes codified in Title 8 of the *United States Code* and by regulations promulgated and administered primarily by the U.S. Department of State and the Department of Homeland Security (DHS). The Department of Labor is involved when a nonresident applies for an H1-B visa, which allows the foreign national to work in the United States (discussed in Section 4.6.5 of this book). The statutes and regulations establish numerous categories and subcategories for aliens entering the United States, with differing eligibility requirements and conditions of stay attaching to each.

After the terrorist attacks of September 11, 2001, Congress amended the immigration laws to place further restrictions on entry of noncitizens into the United States, and also reorganized the federal agencies that administer immigration laws. A foreign national who is employed at a college or university is now subject to laws enforced by the Department of Homeland Security (available at <http://www.dhs.gov>). Within the DHS, the U.S. Citizenship and Immigration Services (<http://www.uscis.gov>), Immigration and Customs Enforcement



(<http://www.ice.gov>), and the Customs and Border Protection Bureau (<http://www.Customs.treas.gov>) enforce various aspects of U.S. immigration law.

Under the Immigration and Nationality Act and its various amendments (codified at 8 U.S.C. § 1101 *et seq.*), aliens may enter the United States either as immigrants or as nonimmigrants. Immigrants are admitted for permanent residence in the country (resident aliens). Nonimmigrants are admitted only for limited time periods to engage in narrowly defined types of activities (nonresident aliens). Eligibility for the immigrant class is subject to various numerical limitations and various priorities or preferences for certain categories of aliens (8 U.S.C. §§ 1151–1159). The nonimmigrant class is subdivided into eighteen specific categories (A through R) which define, and thus serve to limit, eligibility for nonimmigrant status.

Of particular importance to postsecondary institutions are the “H” category (see Section 4.6.5) for aliens who will be employed in the United States, the “F” and “M” categories for students (see Section 8.7.4), and the “J” category for exchange visitors. This subsection discusses the application of immigration laws and regulations to individuals who are not employees or students of the institution, such as international visitors. Requirements for hiring noncitizens, on either a permanent or temporary basis, are discussed in Section 4.6.5 of this book, and requirements for enrolling and monitoring foreign students are discussed in Section 8.7.4.

Beginning with the Iranian crisis in 1979–80, when the federal government imposed new restrictions on students from Iran, and continuing through the aftermath of the terrorist attacks of September 11, 2001, higher education institutions have been directly and increasingly affected by immigration law. Institutions are required to know and document the immigration status of each foreign national whom they enroll as a student, hire as an employee, or invite to the campus as a temporary guest, and to help these foreign nationals adapt to this country and maintain their legal status for the term of their stay. To fulfill these responsibilities, administrators and counsel will need a sound grasp of the federal laws and regulations governing immigration. (For an overview of the effect of immigration law on both faculty and staff, see Laura W. Khatcheressian, *Immigration Law: Faculty and Staff Issues* (National Association of College and University Attorneys, 2004).)

One provision of the statute, 8 U.S.C. § 1182(e), establishes the conditions under which an alien who has been an exchange visitor may remain in the United States, or return to the United States after returning to his or her country of nationality, for purposes of employment.<sup>7</sup> Three nonimmigrant categories are particularly important: “exchange visitor” (8 U.S.C. § 1101(a)(15)(J)), “temporary visitor” (8 U.S.C. § 1101(a)(15)(B)), and “temporary worker” in a

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<sup>7</sup>The statute defines various categories of exchange visitors who must have returned to their homeland or last foreign residence, and been physically present there for at least two years after departing the United States, to be eligible for a visa or permanent residence. See Russell G. Donaldson, Annot., “Foreign Residence Requirement for Educational (Exchange) Visitors Under § 212(e) of Immigration and Nationality Act [8 U.S.C. § 1182(e)],” 48 A.L.R. Fed. 509.

“specialty occupation” (8 U.S.C. § 1101(a)(15)(H)). For the first and third, but not the second, of these categories, the statute also provides that the “alien spouse and minor children” of the alien may qualify for admission “if accompanying him or following to join him.”

The first category, the exchange visitor or “J” category, includes any alien (and the family of any alien):

who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training [8 U.S.C. § 1101(a)(15)(J)].

This statutory definition is broad enough to include some types of employees as well. The second or “B” category is for aliens “visiting the United States temporarily for business or temporarily for pleasure,” except those “coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation” (8 U.S.C. § 1101(a)(15)(B)). Visitors for business are B-1’s, and visitors for pleasure are B-2’s.

The Department of State regulates the exchange visitor program. Regulations implementing the program are codified in 22 C.F.R. Part 62. Obligations of sponsors of exchange visitors appear at 22 C.F.R. § 62.9. Exchange visitors, who are typically professors or research scholars, must also demonstrate that they intend to return to their home country. The college or university must also maintain current data on its exchange visitors in the Student and Exchange Visitors Information System (SEVIS). J-1 visas may be granted for periods between three weeks and three years. Regulations governing visits by professors and research scholars may be found at 22 C.F.R. § 62.20.

Three additional categories have relevance for higher education institutions. The “O” visa is for nonimmigrant visitors who have extraordinary ability in the areas of arts, sciences, education, business, or athletics and are to be employed for a specific project or event such as an academic-year appointment or a lecture tour (8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)). The “P” visa is for performing artists and athletes at an internationally recognized level of performance who seek to enter the United States as nonimmigrant visitors to perform, teach, or coach (8 U.S.C. § 1101(a)(15)(P); 8 C.F.R. § 214.2(p)). The “Q” visa is designated for international cultural exchange visitors

coming temporarily (for a period not to exceed fifteen months) to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien’s nationality [8 U.S.C. § 1101(a)(15)(Q); 8 C.F.R. § 214.2(q)].

A personal interview is required for all applicants for nonimmigrant visas, which has greatly lengthened the time needed to obtain a visa, and has resulted in the denial of visas to some international applicants. The requirement of maintaining current data in SEVIS, the additional documentation required for international applicants, and the stricter standards for obtaining H1-B visas (for employment of faculty or staff) have affected offices serving international students and faculty, creating both administrative burdens and heightened potential legal liability.

Various federal income tax issues may arise concerning colleges' and universities' payments to students, employees, and visitors who are nonresident aliens (see Section 13.3.1).

Federal law provides that aliens may be denied visas on a variety of grounds, such as health conditions, prior criminal behavior, or participation in terrorist activities. 8 U.S.C. § 1182 details these categories of exclusion, and contains language of relevance to potential visitors to U.S. colleges or universities. Section 1182(a)(3)(C) permits exclusion of aliens whom "the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States." There are, however, two important exceptions to this exclusion. One is for foreign officials (§ 1182(a)(3)(C)(ii)). The other is for aliens whose "past, current, or expected beliefs, statements, or associations" might otherwise raise foreign policy concerns but are "lawful within the United States" (§ 1182(A)(3)(C)(iii)), unless the Secretary of State "personally determines that the alien's admission would compromise a compelling United States foreign policy interest."

The ideology-based exclusions were the subject of a U.S. Supreme Court case involving higher education. *Kleindienst v. Mandel*, 408 U.S. 753 (1976), concerned a Belgian citizen, Mandel, whose writings involved Marxist economics and revolution. He had been invited to present a lecture at Stanford University, among other institutions. The American Consulate in Brussels denied him a visa on the basis of two provisions in Section 1182 (since repealed) concerning writings on communism and totalitarianism. Mandel brought suit, and was joined in the litigation by several professors at the institutions that had invited Mandel to speak. The Court held that Congress had plenary authority to enact legislation excluding aliens with certain political affiliations and beliefs, and that Mandel had no constitutional right to enter the United States. And although the Court agreed that the other plaintiffs had First Amendment rights to receive information from Mandel, their First Amendment rights were subordinate to the right of Congress to exclude certain aliens and the right of the executive branch to exercise the discretion provided to it in the immigration law. The case demonstrates the plenary power of Congress in the area of immigration, and its ability to overcome the constitutional rights of U.S. citizens to receive information.

Administrators should be aware that the federal government's treatment of visitors, as well as other foreign nationals within or seeking to enter the United States, may depend on contemporary trends in U.S. foreign policy. At various times in the past decades, Congress has either broadened or tightened

immigration laws (with corresponding changes in federal regulations) for individuals from certain countries. Given the complexity and volatility of the regulation of the entry of foreign nationals, there is no substitute for experienced legal counsel and well-trained staff to manage these matters.

### **13.2.3. Regulation of research**

**13.2.3.1. Overview.** Federal agencies that fund academic research have developed a complex system for overseeing this research on campus, assuring that there are appropriate financial controls on spending under research grants and contracts, and reviewing research proposals to ensure the safety of the subjects of the research, whether they are human or animal. Federal regulations also prescribe the manner in which research misconduct must be investigated and the timing and content of reports that investigatory committees make to the funding agency. (These regulations are discussed in subsection 13.2.3.4 below.) Other regulations prescribe conflict of interest guidelines (see the discussion in subsection 15.4.7). In addition, statutes and regulations cover various aspects of scientific research that may have national security implications. (These laws are discussed in subsection 13.2.4 below.)

The regulations of several federal agencies that fund research require that each institution that receives federal research funding establish an Institutional Review Board (IRB) to approve research that involves humans as subjects. Requirements for IRBs with respect to research involving human subjects are discussed in Section 13.2.3.2. A similar committee, the Institutional Animal Care and Use Committee (IACUC), must be established at institutions that receive federal funding for research involving animals. Regulations for conducting research using animals are discussed in Section 13.2.3.3. Although not all academic research is funded by the federal government, most colleges and universities use the federally mandated system for reviewing research proposals and investigating research misconduct for all human subject and animal research conducted by faculty, staff, or students.<sup>8</sup>

**13.2.3.2. Laws governing research on human subjects.** Federal law regulates scientific and medical research, especially research on human subjects and genetic engineering. This body of law has been a focal point for the ongoing debate concerning the federal regulatory presence on the campuses. A number of interrelated policy issues have been implicated in the debate: the academic freedom of researchers, the burden and efficiency of federal “paperwork,” the standards and methods for protecting safety and privacy of human subjects, and the interplay of legal and ethical standards.

Regulations on human subjects and related research are promulgated by various federal agencies. Regulations promulgated by the Department of Health

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<sup>8</sup>For a case not involving federal regulation, but discussing the legal liability faced by a university for intentional infliction of emotional distress, libel per se, negligent and fraudulent misrepresentation, and punitive damages claims resulting from a research project that falsely claimed that several restaurants had served tainted food, see *164 Mulberry Street Corp. v. Columbia Univ.*, 771 N.Y.S.2d 16 (N.Y. Sup. App. Div. 2004). The research project had apparently not been reviewed by the university’s Institutional Review Board.

and Human Services are codified at 45 C.F.R. Part 46. Similar regulations promulgated by the Food and Drug Administration (FDA) are codified at 21 C.F.R. Parts 50 and 56. FDA regulations cover research on any product under its regulatory purview, whether or not that research is federally funded. Other federal agencies require that researchers receiving funds from their agencies follow certain guidelines with regard to the protection of human subjects.

The unit of HHS with the responsibility for enforcing regulations protecting human subjects is the Office for Human Research Protections (OHRP). Information and guidance concerning regulatory matters under the purview of OHRP may be found at <http://www.hhs.gov/ohrp>. The primary unit of the FDA with responsibility for enforcing regulations protecting human subjects (especially those involving clinical trials of drugs) is the Office for Good Clinical Practice Staff, although other FDA units perform inspections and monitor IRB actions. That office's Web site, containing information and resources, is available at <http://www.fda.gov/oc/gcp/default.htm>.

The primary regulatory approach of these agencies is to require that institutions receiving research funding evaluate the research projects proposed for funding, using both their own staff and external individuals, to ensure that human research subjects are protected from harm. The regulations require institutions to set up review panels (Institutional Review Boards) and to determine when informed consent must be obtained from the research subjects and what information must be provided to them. The regulations also require these individuals to receive training, to follow written guidelines, and to act within the scope of the regulations' policies for the protections of human subjects.

The HHS and FDA regulations require that IRBs perform the following responsibilities:

1. Ensure that risks to human subjects are minimized (45 C.F.R. § 46.111(a)(1) and 21 C.F.R. § 56.111(a)(1));
2. Determine that risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects (45 C.F.R. § 46.111(a)(2) and 21 C.F.R. § 56.111(a)(2));
3. Determine that methods for selecting subjects are equitable (45 C.F.R. § 46.111(a)(3) and 21 C.F.R. § 56.111(a)(3));
4. Ensure that informed consent will be sought from each prospective subject (45 C.F.R. § 46.111(a)(4) and 21 C.F.R. § 56.111(a)(4));
5. Ensure that the possibility of coercion or undue influence over subjects is minimized (45 C.F.R. § 46.116 and 21 C.F.R. § 50.20)).

The regulations also give the IRB the authority to require that additional information be given to subjects when such information "would meaningfully add to protection of the rights and welfare of subjects" (45 C.F.R. § 46.109(b) and 21 C.F.R. § 56.109(b)).

The FDA regulations apply to clinical investigations regulated by the FDA under the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 *et seq.*) and to

clinical investigations that support applications for research or marketing permits regulated by the FDA. If an institution fails to comply with the FDA regulations, the agency may impose any of a number of sanctions. It may “(1) withhold approval of new studies . . . that are conducted at the institution” or reviewed by its institutional review board; “(2) direct that no new subjects be added to ongoing studies subject to [the FDA rules]; (3) terminate ongoing studies subject to [the FDA rules] where doing so would not endanger the subjects”; and “(4) when the apparent noncompliance creates a significant threat to the rights and welfare of human subjects,” the agency may “notify the relevant State and Federal regulatory agencies and other parties with a direct interest” in the FDA’s actions (21 C.F.R. § 56.120). If the institution’s “IRB has refused or repeatedly failed to comply with” the FDA regulations and “the noncompliance adversely affects the rights or welfare of the subjects of a clinical investigation,” the FDA commissioner may, when he or she deems it appropriate, disqualify the IRB or the parent institution from participation in FDA-governed research. Further, the FDA

will [refuse to] approve an application for a research permit for a clinical investigation that is to be under the review of a disqualified IRB or that is to be conducted at a disqualified institution, and it may refuse to consider in support of a marketing permit the data from a clinical investigation that was reviewed by a disqualified IRB [or] conducted at a disqualified institution [21 C.F.R. § 56.121(d)].

The commissioner may reinstate a disqualified IRB or institution upon its submission of a written plan for corrective action and adequate assurances that it will comply with FDA regulations (21 C.F.R. § 56.123).

The Department of Health and Human Services and several other federal agencies have issued common final rules regarding the protection of human subjects (“Federal Policy for the Protection of Human Subjects,” 56 Fed. Reg. 28003 (June 18, 1991)), but each agency has retained control over the enforcement of these regulations for its own grantees. The FDA did not adopt the Federal Policy, given the FDA’s broader mandate to regulate all research involving human subjects.

The following federal agencies have adopted the joint final rules:

Department of Agriculture (7 C.F.R. Part 1c)

Department of Energy (10 C.F.R. Part 745)

National Aeronautics and Space Administration (14 C.F.R. Part 1230)

Department of Commerce (15 C.F.R. Part 27)

Consumer Product Safety Commission (16 C.F.R. Part 1028)

International Development Cooperation Agency, Agency for International Development (22 C.F.R. Part 225)

Department of Housing and Urban Development (24 C.F.R. Part 60)

Department of Justice (28 C.F.R. Part 46)

Department of Defense (32 C.F.R. Part 219)  
 Department of Education (34 C.F.R. Part 97)  
 Department of Veterans Affairs (38 C.F.R. Part 16)  
 Environmental Protection Agency (40 C.F.R. Part 26)  
 Department of Health and Human Services (45 C.F.R. Part 46)  
 National Science Foundation (45 C.F.R. Part 690)  
 Department of Transportation (49 C.F.R. Part 11)

Subsections of each agency's regulations are numbered identically for each provision (for example, the "Definitions" section under Department of Health and Human services regulations is 45 C.F.R. § 46.102, and the same section under Department of Housing and Urban Development regulations is 24 C.F.R. § 60.102).

The regulations, except for specifically enumerated exemptions set out below (or authorized by a department or agency head and published in the *Federal Register*), apply to all research involving human subjects conducted by these agencies or research funded in whole or part by a grant, contract, cooperative agreement, or fellowship from one of these agencies. Under Section .103(b)<sup>9</sup> of the regulations,

[d]epartments or agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB [institutional review board] provided for in the assurance, and will be subject to continuing review by the IRB.

The joint regulations do not provide elaborate sanctions for noncompliance, as do other agency regulations, but only general provisions on fund termination (§§ .122 & .123).

As noted above, both the FDA and the joint federal agency regulations specify that an IRB must review research proposals involving the use of human subjects before the research is conducted. IRBs are fairly recent phenomena; until the early 1960s, only a small minority of research facilities had such committees. As now conceived by the federal agencies, the IRB is designed to ameliorate the tension that exists between institutional autonomy and federal supervision of research. Under these regulations, the IRB must have at least five members with backgrounds sufficiently varied to supervise completely the common research activities conducted by the

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<sup>9</sup>As noted in the previous paragraph, regulations pertaining to human subjects are identical for fifteen agencies. In this discussion of various subsections of the joint regulations, the chapter of the *Code of Federal Regulations* would correspond to the agency that provided the research funds, but the section number for each agency's human subjects regulations is identical. For the Department of Agriculture, for example, the section noted here would read "7 C.F.R. § 1c.103(b)."

particular institution. Since the IRB must “ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice” (§ .107), the IRB must include members knowledgeable in these areas. No IRB may consist entirely of members of the same sex or the same profession. The IRB must also include at least one member whose primary expertise is nonscientific, such as an attorney, an ethicist, or a member of the clergy. Each IRB must have “at least one member who is not otherwise affiliated with the institution” and who is not a member of a family immediately affiliated with the institution. And no IRB may have a member participate in the IRB’s initial or continuing review of any project “in which the member has a conflicting interest, except to provide information requested by the IRB” (§ .107).

The IRB has the duty, under the regulations, “to approve, require modifications in (to secure approval), or to disapprove” all research conducted under the regulations (§ .109(a)). The IRB must also monitor the information provided subjects to ensure informed consent (§ .109(b)). In addition, the IRB must conduct follow-up reviews of research it has approved “at intervals appropriate to the degree of risk, but not less than once per year” (§ .109(e)). The institution may also review research already approved by an IRB and may either approve or disapprove such research, but an institution may not approve research disapproved by the IRB (§ .112). If research is being conducted in violation of IRB requirements or if subjects have been seriously and unexpectedly harmed, the IRB may suspend or terminate the research (§ .113). The FDA regulations governing IRB responsibilities and functions are similar to the joint regulations on these points (see 21 C.F.R. §§ 56.108–56.112).

Informed consent, a doctrine arising from the law of torts, concerns the information that must be provided about the research to the human subject. The regulations are fairly typical in what they establish as the basic elements of informed consent:

- (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject’s participation, a description of the procedures to be followed, and identification of any procedures which are experimental;
- (2) A description of any reasonably foreseeable risks or discomforts to the subject;
- (3) A description of any benefits to the subject or to others which may reasonably be expected from the research;
- (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;
- (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
- (6) For research involving more than minimal risk, an explanation as to whether any compensation [will be given] and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;



- (7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and
- (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled [§ .116(a)(1)–(8)].

The regulations also require that, in “appropriate” circumstances (a concept the regulations do not define), additional elements of informed consent must be met, as outlined in § .116(b)(1)–(6). The FDA regulations contain the same informed consent requirements (21 C.F.R. § 50.25(a) & (b)).

The FDA informed consent regulations create an exception to the requirement that research subjects provide an informed consent. The exception applies in emergency situations in which the subject is unable to consent (for example, because he or she is unconscious). The investigator and a physician who is not participating in the research must both certify all of the following:

- (1) The human subject is confronted by a life-threatening situation necessitating the use of the [experimental substance].
- (2) Informed consent cannot be obtained from the subject because of an inability to communicate with, or obtain legally effective consent from, the subject.
- (3) Time is not sufficient to obtain consent from the subject's legal representative.
- (4) There is available no alternative method of approved or generally recognized therapy that provides an equal or greater likelihood of saving the life of the subject.

The documentation described above must then be submitted to the IRB. The revised rules may be found at 21 C.F.R. § 50.23.

The joint regulations also contain requirements for documenting informed consent. Unlike their FDA counterparts, the joint regulations set out several circumstances in which the IRB may either alter the elements of informed consent or waive the informed consent requirement (see § .116(c)(1) & (2), and compare 21 C.F.R. § 50.25).

The joint regulations contain several broad exemptions for specific areas of research (§ .101(b)(1)–(5)). The department or agency head has final authority to determine whether a particular activity is covered by the joint regulations (§ .101(c)). The department or agency head may also “require that specific research activities . . . conducted by [the department or agency], but not otherwise covered by this policy, comply with some or all of the requirements of this policy” (§ .101 (d)). And the department or agency head may “waive the applicability of this policy to specific research activities otherwise covered by this policy” (§ .101(i)).

Both the Office for Human Research Protections (OHRP, which is part of HHS) and the FDA have issued proposed rules regarding the registration of IRBs. The proposed OHRP rules will add a subpart F to 45 C.F.R. Part 46 that specifies how IRBs are to register with the Office for Human Research Protections, what information must be provided, how the IRB can register, and how IRB information may be revised. The required information includes the name, gender, contact information, and professional credentials of each member of the IRB, the number of full-time staff supporting the IRB's work, and the number of active protocols undergoing initial and continuing review. The OHRP proposed regulations are found at 69 Fed. Reg. 40584–40590. The FDA's proposed regulations, which will amend 21 C.F.R. Part 56, apply to IRBs that review clinical investigations regulated by the FDA, and are similar to the OHRP proposed regulations. They can be found at 69 Fed. Reg. 40556–40562.

In 2004, the Office of Public Health and Science of the Department of Health and Human Services issued a final guidance entitled “Financial Relationships and Interests in Research Involving Human Subjects: Guidance for Human Subjects Protection” (69 Fed. Reg. 26393–26397, May 12, 2004). The guidance provides suggested questions for IRBs to ask during their deliberations about proposed research projects that may involve financial conflicts of interests (such as whether the research is funded by a private company that is also a business partner with the principal investigator, or whether the principal investigator has received payments from the sponsor of the proposed research). (For a summary of the regulations and guidance, as well as a discussion of the areas of financial conflicts of interest that are of particular concern to institutions and funding agencies, see Lance Shea, *Managing Financial Conflicts of Interest in Human Subjects Research*, available at <http://www.nacua.org>.)

(For general discussion of informed consent and the role of IRBs, see Robert J. Katerberg, “Institutional Review Boards, Research on Children, and Informed Consent of Parents: Walking the Tightrope Between Encouraging Vital Experimentation and Protecting Subjects' Rights,” 24 *J. Coll. & Univ. Law* 545 (1998).)<sup>10</sup>

Federally funded research using recombinant DNA is regulated differently from other federally funded research. Research projects are proposed to the National Institutes of Health (NIH) Recombinant DNA Advisory Committee. This committee recommends either approval or rejection, and the proposed action is published in the *Federal Register*. NIH “Guidelines for Research Involving Recombinant DNA Molecules” are revised several times a year, focusing on how such research may be conducted, and are published on the Web site of the Centers for Disease Control at <http://www.cdc.gov>. Because of the volatility of this

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<sup>10</sup>A former student dismissed on academic grounds attempted to argue that a private institution, Boston University, was a “state actor” because of the involvement of the Institutional Review Board in the research that graduate students conduct on human subjects. In *Missert v. Trustees of Boston University*, 73 F. Supp. 2d 68 (D. Mass. 1999), *affirmed*, 248 F.3d 1127 (1st Cir. 2000), a federal district court dismissed the student's state and federal constitutional claims, ruling that because the IRB had not been involved in the decision to dismiss the student, no state action had occurred. This case is discussed further in Section 1.5.2.

regulatory area, the only safe prediction is that frequent and substantial change can be expected, and that expert assistance is advisable.

As reflected in the various regulatory actions discussed above, the law of human subject research is complex and rapidly evolving. The impact of this law on individual campuses will vary considerably, depending on their own research programs. Postsecondary administrators responsible for research will want to stay abreast of their institution's research emphases and issues of concern. In consultation with counsel, administrators should also keep abreast of changes in federal regulations and engage in a continuing process of extracting from the various sets of regulations the particular legal requirements applicable to their institution's research programs, particularly with respect to institutional review boards. Given the recent growth and volatility of legal developments and the sensitivity of some current areas of research emphasis, institutions that do not have a particular office or committee to oversee research may wish to reconsider their organizational structure.

**13.2.3.3. Laws governing animal research.** Although all states have statutes forbidding cruelty to animals, and antivivisection movements have been active in certain states for more than a century, federal legislation to protect animals was not enacted until 1966. Activity by both scholars and animal rights activists has focused government, press, and scholarly attention on the issue of using animals in scientific research. Entire scholarly journals (for example, the *International Journal of the Study of Animal Problems*, founded in 1979) are devoted to this issue.

The Animal Welfare Act (AWA) (7 U.S.C. § 2131 *et seq.*) governs the treatment of animals used for research (whether or not it is federally funded) in or substantially affecting interstate or foreign commerce. The law "insure[s] that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment." Amended in 1970, 1976, and 1985, the law covers "any live or dead dog, cat, or monkey, guinea pig, hamster, or such warm-blooded animal as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet" (§ 2132(g)). Although the regulations promulgated under this law did not originally include rats, mice, and birds, a federal judge ruled that the exclusion of these animals was arbitrary and capricious (*Animal Legal Defense Fund v. Madigan*, 781 F. Supp. 797 (D.D.C. 1992)). A federal appellate court overturned this ruling on procedural grounds (23 F.3d 496 (D.C. Cir. 1994)). Section 2132(g) of the AWA was amended in 2002 to specifically exclude rats, birds, and mice bred for research purposes (Pub. L. No. 107-171, Title X, Subtitle D, § 10301, 116 Stat. 491, May 13, 2002).

The AWA is enforced by the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture (whose regulations are codified at 9 C.F.R. ch. 1, subch. A, Parts 1, 2, and 3). The regulations, amended and substantially strengthened in 1991, require an institution, whether or not it receives federal funds, to appoint an Institutional Animal Care and Use Committee (IACUC), which operates in a manner similar to the IRBs that are used to review the use of human subjects in research. The IACUC must include at least one doctor of

veterinary medicine, at least one member who is not affiliated (and who has no family members affiliated) with the institution, and no more than three members from the same administrative unit. The regulations are silent on whether, or how, a member of the IACUC may be removed.

The IACUC is required to

- (1) Review, once every six months, the research facility's program for humane care and use of animals. . . .
- (2) Inspect, at least once every six months, all of the research facility's animal facilities, including animal study areas. . . .
- (3) Prepare reports of its evaluations conducted as required by paragraphs (1) and (2) of this section, and submit the reports to the Institutional Official of the research facility.

The IACUC must also investigate public or employee complaints regarding the care and use of animals; it must review and approve, require modifications in, or withhold approval of proposed changes in the use or care of animals; and it may also suspend activity involving animals (9 C.F.R. § 2.31(c)).

In order to conduct research using animals or to modify an approved research proposal, the researcher must submit the following information to the IACUC:

- (1) Identification of the species and the approximate number of animals to be used;
- (2) A rationale for involving animals, and for the appropriateness of the species and numbers of animals to be used;
- (3) A complete description of the proposed use of the animals;
- (4) A description of procedures designed to assure that discomfort and pain to animals will be limited to that which is unavoidable for the conduct of scientifically valuable research, including provision for the use of analgesic, anesthetic, and tranquilizing drugs where indicated and appropriate to minimize discomfort and pain to animals; and
- (5) A description of any euthanasia method to be used [9 C.F.R. § 2.31(e)].

In addition to the elements required to be present in the proposal, the regulations charge the IACUC with the responsibility of determining whether a research project meets a number of requirements, including minimizing discomfort or pain to the animals, a discussion of why alternatives to painful procedures are not available, and a statement that animals will be housed appropriately and will be cared for by trained and qualified individuals (9 C.F.R. § 2.31(d)). The regulations also specify the procedures to be used if surgery is performed.

The training of laboratory personnel is detailed in the regulations, as are the responsibilities of the attending veterinarian and record-keeping requirements. The regulations further detail how handling, housing, exercise, transportation, and socialization of the animals should be carried out. Institutions must develop written plans for providing exercise for dogs and improving the psychological well-being of primates (9 C.F.R. ch. 1, subch. A, Part 3). Penalties for violating

the AWA include civil and criminal sanctions, civil money penalties, imprisonment for not more than one year, and/or a fine of \$2,500 or less. Termination of federal funds, if relevant, is also provided for.

The Agriculture Department's regulations have been criticized by animal rights activists as providing insufficient protection for laboratory animals and as contrary to congressional intent. In early 1993, a federal trial judge agreed, ruling that the regulations implementing the 1985 Animal Welfare Act were too lax and gave too much authority to colleges and universities to regulate researchers' use and treatment of animals (*Animal Legal Defense Fund v. Madigan*, 781 F. Supp. 797 (D.D.C. 1992), *vacated and remanded sub nom Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994)). This ruling was overturned in 1994 because the appellate court ruled that the fund did not have the legal right to sue the government.

The Public Health Service (PHS) policy governing the use and treatment of animals in federally funded research has provisions similar to many of those in the AWA. The PHS policy covers all vertebrates, including rats and mice, and requires institutions to follow the guidelines in the "Guide for the Care and Use of Laboratory Animals" (1996), prepared by the Institute of Laboratory Animal Resources, Commission on Life Sciences of the National Research Council. The guidelines include a section on "institutional policies and responsibilities" regarding the IACUC, housing and caring for animals, staff training and safety, and other issues. They may be found at <http://oacu.od.nih.gov/regs/guide/guidex.htm>.

Animal rights activists have had little success in using the AWA to challenge the use or treatment of animals at particular research locations. For example, a federal appellate court held that the AWA does not provide a private right of action for individuals or organizations, nor does it authorize the court to name them guardians of certain animals taken from a medical research institute (*International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1988)). In *People for the Ethical Treatment of Animals (PETA) v. Institutional Animal Care and Use Committee*, 817 P.2d 1299 (Or. 1991), the Oregon Supreme Court ruled that the animal rights group lacked standing to seek judicial review of an IACUC's approval of a University of Oregon professor's research proposal involving the auditory systems of barn owls. The court said that the public's interest in the treatment of animals was represented by the IACUC, and that the plaintiffs had no personal stake in the outcome of the litigation. (For a discussion of the merits of amending the Animal Welfare Act to provide for a private cause of action, see Cass R. Sunstein, "A Tribute to Kenneth L. Karst: Standing for Animals (With Notes on Animal Rights)," 47 *UCLA L. Rev.* 1333 (2000).)

A federal trial court ruled that an academic researcher's grant application was subject to disclosure under the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552). In *Physicians Committee for Responsible Medicine v. National Institutes of Health*, 2004 U.S. Dist. LEXIS 12464 (D.D.C., June 29, 2004), an animal rights group sought an unredacted copy of a professor's grant proposal, which had been funded by NIH. The agency argued that the

requested material was exempt under FOIA's exemption for trade secrets, commercial information, or interagency memoranda (5 U.S.C. § 552(b)(4) & (5)). The court ruled that, because the professor was a noncommercial research scientist, the design of his research was not a trade secret, so exemption 4 did not apply. The court rejected the professor's and agency's assertions that disclosure would limit his ability to publish his work as "conclusory and generalized allegations" that did not establish "substantial competitive harm." With respect to exemption 5, the court ruled that the professor was not a consultant to the government, nor was the proposal part of the agency's deliberative process, and thus exemption 5 did not protect the proposal from disclosure. The court awarded summary judgment to the plaintiffs, and ordered certain portions of the proposal released to them.

Animal rights groups have also used state open meetings laws (see Section 12.5.2) to seek access to the deliberations of IACUCs. In *Medlock v. Board of Trustees of the University of Massachusetts*, 580 N.E.2d 387 (Mass. App. Ct. 1991), plaintiffs argued that Massachusetts' open meetings law required the IACUC to hold public meetings. The court ruled that the state law applied only to the university's board of trustees and that the IACUC did not "consider or discuss public policy matters in order to arrive at a decision on any public business" (580 N.E.2d at 392). A similar result, with different reasoning, occurred in *In re American Society for the Prevention of Cruelty to Animals, et al. v. Board of Trustees of the State University of New York*, 582 N.Y.S.2d 983 (N.Y. 1992), where the state's highest court ruled that the powers of the IACUC derived solely from federal law and thus that the committee was not a "public body" for purposes of New York's open meetings law. But the Supreme Court of Vermont determined, in *Animal Legal Defense Fund v. Institutional Animal Care and Use Committee of the University of Vermont*, 616 A.2d 224 (Vt. 1992), that the university's IACUC was a public body under the state's open meetings law, and was also subject to the state's Public Records Act.

In *In re: Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York*, 703 N.E.2d 1218 (N.Y. 1998), an animal rights group sought records related to the source of animals used by research laboratories at a State University of New York (SUNY) campus. New York's highest court ruled that SUNY's Health Science Center at Brooklyn was an "agency" for purposes of the state Freedom of Information Law (FOIL), stating that the purpose of the FOIL was broad disclosure of the activities of government agencies.

Some laboratories that use animals and related research facilities have sustained damage, allegedly at the hands of animal rights activists. In 1992, Congress passed legislation that made destruction of or serious damage to animal research facilities a federal crime. The Animal Enterprise Protection Act of 1992 (Pub. L. No. 102-346, 106 Stat. 928) amends Title 18 of the *United States Code* by adding Section 43, directed at persons who cross state lines to disrupt or inflict serious damage on an animal enterprise. "Animal enterprise" is defined as a "commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing." "Serious damage" is defined as stealing, damaging, or causing property loss exceeding \$10,000; causing serious

bodily injury to another individual; or causing an individual's death. Penalties include fines, imprisonment, or both, and restitution is required.

**13.2.3.4. Research misconduct.** Academic norms have long viewed research misconduct, such as the falsification of data or the use of another's work without attribution, as a major failing in an individual—a failing that can lead to termination of a faculty member's tenure, expulsion of a student, or dismissal of a staff member. Federal agencies that fund research have become more active in the oversight of institutions' responses to allegations of misconduct in research, and have prescribed standards and procedures that they expect institutions to use in investigating and responding to such allegations. The federal government's general policy, to be implemented by all federal agencies that fund research, is contained in the Federal Research Misconduct Policy promulgated by the Office of Science and Technology Policy and published at 65 Fed. Reg. 76260–76264 (December 6, 2000).

The Department of Health and Human Services, the National Science Foundation (NSF), and the National Aeronautics and Space Administration (NASA) have issued regulations that establish procedures to be used when either the institution or the agency receives a report of alleged research misconduct. The regulations allow for an investigation by the institution, by the agency, or both. They also detail the possible sanctions that the agency may levy should research misconduct be established, and provide opportunity for an appeal of the finding and the sanctions. Regulations issued by the National Science Foundation are codified at 45 C.F.R. Part 689, and became effective in 2002. NASA's regulations are codified at 14 C.F.R. Part 1275, and became effective in 2004.

The Department of Health and Human Service issued proposed regulations, published at 69 Fed. Reg. 20778–20803 (April 16, 2004), that are designed to replace the previous regulations, which were codified at 42 C.F.R. Part 50, and which were issued in 1989. The new rules will be codified at 42 C.F.R. Part 93, and implement Section 493 of the Public Health Act (42 U.S.C. § 289b). That law established the Office of Research Integrity (ORI) within the Department of Health and Human Services and requires each institution receiving a grant from the Public Health Service to submit

- (1) assurances that it has established an administrative process to review reports of research misconduct in connection with biomedical and behavioral research conducted at or sponsored by such entity;
- (2) an agreement that the entity will report to the Director any investigation of alleged research misconduct in connection with projects for which funds have been made available under this Act that appears substantial; and
- (3) an agreement that the entity will comply with regulations issued under this section [42 U.S.C. § 289b(b)].

The law also charges the HHS with developing protections for whistleblowers who make allegations of misconduct in research funded by the Public Health Service.

The proposed HHS regulations are substantially more detailed than the regulations of either the National Science Foundation or NASA. The HHS definition of research misconduct, which tracks NSF's definition, includes fabrication of data or results, falsification of results (including manipulating research materials or equipment to obtain false results), and plagiarism; it does not include "honest error or differences of opinion" (42 C.F.R. § 93.103). In order to make a finding of research misconduct, a three-part test must be met:

- (a) there [was] a significant departure from accepted practices of the relevant research community; and
- (b) the misconduct [was] committed intentionally, knowingly, or recklessly; and
- (c) the allegation [has been] proven by a preponderance of the evidence [42 C.F.R. § 93.104].

This three-part test is identical to the test in the NSF regulations (45 C.F.R. § 689.2(c)).

The proposed HHS regulations include a series of definitions, including definitions of "research" and "research record" (42 C.F.R. §§ 93.224 & 93.226, respectively). They specify that, when an allegation of research misconduct is made, the institution must conduct an inquiry in order to "conduct an initial review of the evidence to determine whether to conduct an investigation" (42 C.F.R. § 93.307). Should the inquiry conclude that an investigation is warranted, it must be begun within thirty days of that determination (42 C.F.R. § 93.310). Due process protections for the individual(s) accused of research misconduct are included in the regulations throughout the inquiry and investigation processes. Time limits for the conduct of the inquiry and the investigation are also included (42 C.F.R. §§ 93.308 & 93.311, respectively). The proposed regulations also specify what type of information must be included in the investigation report (42 C.F.R. § 93.313) and the type of information that must be transmitted to the Office of Research Integrity at the conclusion of the investigation (42 C.F.R. § 93.315). Responsibilities of HHS are also detailed in the regulations, including provisions for HHS to take enforcement actions against institutions that HHS finds have not maintained appropriate policies and practices with respect to research integrity (42 C.F.R. § 93.413).

The Web site of the Office of Research Integrity, available at <http://ori.dhhs.gov/html/publications/guidelines.asp>, contains a list of resources for administrators and faculty, including the *ORI Introduction to the Responsible Conduct of Research* (2004) and the *ORI Handbook for Institutional Research Integrity Officers* (n.d.).

**13.2.4. USA PATRIOT Act and related laws.** Congress passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001" in October 2001 as a response to the terrorist attacks of September 11, 2001. The law, Pub. L. No. 107-56, 115 Stat. 272, is codified in scattered sections of the *United States Code* and affects numerous activities of colleges and universities, including scientific research, the record-keeping policies of academic libraries, the



monitoring of international students' immigration status, the release of information about students, and operation of the campus's computer systems. A discussion of the application of the USA PATRIOT Act with respect to computer systems is found in Section 13.2.12.2 of this book. The effect of the USA PATRIOT Act on FERPA is discussed in Section 9.7.1. (For a general review of the effects of the USA PATRIOT Act on colleges and universities, see David Lombard Harrison, "Higher Education Issues After the USA PATRIOT Act," available at <http://www.nacua.org>.)

Section 416 of the law amends and expands the Illegal Immigration Reform and Immigrant Responsibility Act (8 U.S.C. § 1372(a)) to provide for the collection of information on nonimmigrant foreign students and exchange visitors who are nationals of countries that are on a list developed by the U.S. Attorney General. This information system (SEVIS) is more fully discussed in Section 8.7.4 of this book. This provision of the law also exempts information in SEVIS from the requirements of FERPA.

Section 817 of the law amends Title 18, chapter 10 of the *United States Code* to create criminal sanctions for the use and possession of certain biological agents and toxins. The law provides for fines and/or imprisonment of up to ten years for "restricted persons" who "ship or transport in or affecting interstate or foreign commerce, or possess in or affecting interstate or foreign commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent" under the Public Health Service Act or is not otherwise exempted from these provisions. "Restricted persons" include any individual who:

- (A) is under indictment for a crime punishable by imprisonment for a term exceeding 1 year;
- (B) has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;
- (C) is a fugitive from justice;
- (D) is an unlawful user of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));
- (E) is an alien illegally or unlawfully in the United States;
- (F) has been adjudicated as a mental defective or has been committed to any mental institution;
- (G) is an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State, pursuant to section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of chapter 1 of part M of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 40(d) of chapter 3 of the Arms Export Control Act (22 U.S.C. 2780(d)), has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism; or
- (H) has been discharged from the Armed Services of the United States under dishonorable conditions (18 U.S.C. § 175b(d)(2)).

Individuals who possess or use select agents must register with the Public Health Service under the provisions of 42 U.S.C. § 262a; penalties for transfer of these substances to an unregistered person include fines and/or imprisonment for up to five years. The law also provides for up to ten years imprisonment for an individual who “knowingly” possesses a biological agent, toxin, or “delivery system” of a type or quantity that “is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose” (18 U.S.C. § 175(b)).

These provisions have the potential to conflict with institutional policies on employee privacy, background checks, and risk assessment policies. (For an in-depth discussion of the effect on colleges and universities of the bioterrorism provisions of the USA PATRIOT Act (and of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002), see Jamie Lewis Keith, “The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies That Apply to College and Universities,” 30 *J. Coll. & Univ. Law* 239 (2004).)

The USA PATRIOT Act also amends several federal laws concerning surveillance. Some of the statutes so amended are the federal law restricting wiretaps (18 U.S.C. § 2510 *et seq.*);<sup>11</sup> the Foreign Intelligence Surveillance Act (50 U.S.C. § 1801 *et seq.*); and the Cable Act (47 U.S.C. § 551 (which regulates privacy of individuals subscribing to cable service)), among others.

The law also permits government officials to require colleges to provide stored voice mail messages without the authorization typically required by the wiretap statutes, and expands the list of information that telephone and Internet access providers must disclose if required by an administrative subpoena, including local and long distance telephone call records, and sources of payment (including credit card and bank account numbers). It also permits the Federal Bureau of Investigation (FBI) to obtain a court order for business records that are believed to be relevant to a terrorism or intelligence investigation.

This latter provision, “Access to Certain Business Records for Foreign Intelligence Purposes” (50 U.S.C. § 1861) is of particular concern to librarians and scholars. The law provides that the FBI may apply for an *ex parte* order from a judge or federal magistrate if the agency specifies that “the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities”) (50 U.S.C. § 1861(b)(2)). Furthermore, the law prohibits any individual receiving such a request for records from disclosing that the FBI has sought or obtained these records (50 U.S.C. § 1861(d)). (For a review and discussion of the effects of the USA PATRIOT Act on libraries and their patrons, and suggestions for policy and practice in light of this law, see Lee S. Strickland, Mary Minow, & Tomas Lipinski, “Patriot in the Library: Management

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<sup>11</sup>These amendments “sunsetted” at the end of 2005. Congress voted to extend the Act in March 2006.

Approaches When Demands for Information Are Received from Law Enforcement and Intelligence Agents,” 30 *J. Coll. & Univ. Law* 363 (2004).)

Title III of the USA PATRIOT Act, known as the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001 (codified in scattered Sections of titles 12, 15, 18, 21, 22, 28, and 31 of the *United States Code*), amends banking laws to prohibit banks and other financial institutions from participating in money laundering of funds used to support terrorism. This portion of the USA PATRIOT Act amends the Bank Secrecy Act of 1970 (codified in scattered Sections of Title 31), to which college and university credit unions have been subject since its enactment. The law expands the definition of a “financial institution” that is subject to the record-keeping and reporting requirements of the Bank Secrecy Act, including travel agencies and offices that cash and process checks, traveler’s checks, and money orders, or that operate credit card systems. A college or university’s financial aid office, campus credit union, and other offices in which financial transactions are accomplished may be subject to the requirements of the Bank Secrecy Act. (For a discussion of the additional requirements under the amendments to the Bank Secrecy Act, see Cynthia J. Larose, “International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001,” 30 *J. Coll. & Univ. Law* 417 (2004).)

Another law, The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (BPARA), codified at 42 U.S.C. § 262a, imposes controls on research using certain biological materials and limits the ability of foreign nationals to participate in or have access to such research unless they are given permission by the U.S. Attorney General. The regulations implementing this law are found at 42 C.F.R. Part 73, 7 C.F.R. Part 331, and 9 C.F.R. Part 121. The law provides that all persons possessing, using, or transferring such agents or toxins must notify the U.S. Department of Health and Human Services. In addition, persons possessing, using, or transferring agents or toxins that could harm animals or plants must notify the U.S. Department of Agriculture (USDA). Universities whose faculty or staff members use these substances in research must register with HHS and report the names of all persons who use or who request access to these substances. The university must wait until it has either received permission from HHS to provide the substance(s) to the requesting individual, or has been informed that the individual requesting the substance is on a list compiled by the Attorney General of the United States of “restricted persons” under the USA PATRIOT Act. In that case, access to the substance(s) must be denied.

This legislation has significant implications for faculty, staff, and students involved in biochemical research. Faculty and administrators involved in such research need to familiarize themselves with the laws’ and regulations’ requirements and ensure compliance. Policies may have to be revised to comply with this legislation, and the impact of the investigation and reporting requirements on noncitizen employees and graduate students is not only severe, but will create delays in their ability to participate in research that is subject to these requirements.

The Centers for Disease Control and Prevention (CDC) is responsible for providing guidance to HHS, and the Animal and Plant Health Inspection Service provides guidance to the USDA in implementing this law. Further information is provided on the CDC's Web site at <http://www.cdc.gov/od/ohs/lrsat/faq.htm>. Guidelines for complying with this statute are published at 67 Fed. Reg. 51058–64.

Export control regulations are another concern for colleges and universities in the post-9/11 world. Although these regulations were in place well before September 11, 2001, the federal government is applying them in new ways to attempt to limit the ability of potential terrorists to benefit from substances or information supplied by individuals in the United States. An example of such regulations is the Department of State's International Traffic in Arms Regulations (ITAR) (15 C.F.R. §§ 120–130). These regulations implement the Arms Export Control Act (22 U.S.C. § 2278), which regulates the export of technology and research results that could have military applications. Another example is the Department of Commerce's Export Administration Regulations (EAR) (15 C.F.R. §§ 730–774), which interpret the Export Administration Act of 1979 (50 U.S.C. §§ 2401–2420). EAR controls the exports of technology or materials that have commercial applications, but which could also have military applications. Under both the Arms Export Control Act and the Export Administration Act, "fundamental research" conducted by colleges and universities has, in the past, been exempt from export control regulations, even if the faculty and staff members involved in the research were foreign nationals. Now, however, if foreign nationals are involved in U.S.-based research that may fall within the ambit of the export control regulations, the institution may have to obtain an export license from the relevant agency. In addition, the Treasury Department's Office of Foreign Assets Control (31 C.F.R. § 500) regulates the transfers and travel to certain countries of individuals who may be involved in terrorism, drug trafficking, or other illegal activities. (For a summary of export controls legislation and enforcement, see Jamie Lewis Keith, "The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies That Apply to Colleges and Universities," 30 *J. Coll. & Univ. Law* 239 (2004). And for developments during 2004 with respect to export controls regulation and related federal regulation, see Jamie Lewis Keith, "Recent Developments in Export Controls," Outline for Annual Conference of National Association of College and University Attorneys, June 2004, available at <http://web.mit.edu/srcounsel>.)

### 13.2.5. Copyright law<sup>12</sup>

**13.2.5.1. Overview.** Congress is authorized in Article I, Section 8, Clause 8 of the U.S. Constitution to create the Copyright Act "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This purpose, simply stated, is to increase knowledge. Every one of the more than 230 Sections of the Act (17 U.S.C. § 101 *et seq.*) should contribute to the achievement

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<sup>12</sup>This Section was updated and expanded by Georgia Harper, Senior Attorney and Manager, Intellectual Property Section, Office of General Counsel, the University of Texas System.

of this purpose, and, in fact, many recent statutory amendments and court opinions are controversial because it is not clear whether or to what extent they do so or, on the contrary, whether they undermine the achievement of those goals. Until recently, copyright law merited little attention within the academy, but the rapid integration of digital technologies into American life has increased the relevance of this body of law and made necessary a broader understanding of its basis, how it works, and the role it plays in the controversies that are shaping how faculty and students will use technology and information in the future.

In a broad attempt to keep the law up to date and “bring it into the twenty-first century” after its complete overhaul in the mid-1970s, there was considerable activity in the late 1980s and 1990s: Congress passed amendments affecting state sovereign immunity, artists’ moral rights, the fair use of unpublished manuscripts, penalties (including criminal sanctions for significant infringements), the term of copyright protection, digital archiving in university libraries, special procedures to protect works on the Internet, and legal status for technological protections of copyrighted works, among other things. Courts tried cases involving, among other issues, the commercial preparation of coursepacks, making research copies of journal articles, Internet service provider liability limitations, authorship and ownership of creative works, states’ sovereign immunity for claims for damages in federal courts, and whether copyright protects the exact photographic reproduction of a two-dimensional artwork in the public domain.

By 2000, most legislative and court battles were pitched around digital themes: legislative efforts slowed down somewhat, but included continuing efforts to eliminate state sovereign immunity as a bar to suits for money damages, refine the scope of educational performance rights to encourage the use of digital technologies in distance education, protect databases and incorporate copy prohibition technology in all computing devices. While Congress appeared to be moving somewhat slowly, activity in the courts went on unabated. There were challenges to what seems to be perpetual term extension for existing works, to the technological protection of works without regard to the statutory limitations on copyright owners’ rights contained in the Copyright Act (that is, anti-circumvention), and to the use of peer-to-peer file-sharing technology to share music and other works more freely, among others.

Certain core issues have emerged for universities: fair use; performance rights; ownership; vicarious liability; the implications of the shift from acquiring books to licensing digital databases of information; and anti-circumvention. Of interest to state universities is the explosive issue of Eleventh Amendment immunity from damage awards for infringement. These and other issues are discussed below.

**13.2.5.2. The fair use doctrine.** Section 107 of the Act states that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.” The section lists four factors that one must consider in determining whether a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the

copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

*13.2.5.2.1. GUIDELINES.* Application of these rather vague standards to individual cases is left to the courts. Some guidance on their meaning may be found, however, in a document included in the legislative history of the revised Copyright Act: the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions (in H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), available at <http://www.copyright.gov/circs/circ21.pdf>). A second document in the legislative history, the Guidelines for the Proviso of Subsection 108(g)(2) (the “Contu Guidelines”) (Conf. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976)), also available at <http://www.copyright.gov/circs/circ21.pdf>, provides comparable guidance on the provision within Section 108 dealing with copying for purposes of interlibrary lending. Although the Guidelines for Classroom Copying were adopted by thirty-eight educational organizations and the publishing industry to set minimum standards of educational fair use under Section 107 of the Act, the Association of American Law Schools and the American Association of University Professors (AAUP) did not endorse the provisions and described them as too restrictive in the university setting (H.R. Rep. No. 94-1476, pp. 65–74). The Guidelines establish limits for “Single Copying for Teaching” (for example, a chapter from a book may be copied for the individual teacher’s use in scholarly research, class preparation, or teaching) as well as for “Multiple Copies for Classroom Use” (for example, one copy per pupil in one course may be made, provided that the copying meets several tests; these tests, set out in the House Report, concern the brevity of the excerpt to be copied, the spontaneity of the use, and the cumulative effect of multiple copying in classes within the institution).

During the mid-1990s, the Conference on Fair Use produced additional guidelines covering synchronous distance education, image archives, and multimedia works; however, there was insufficient consensus on these documents to confer upon them the status enjoyed by the Guidelines for Classroom Copying and the Contu Guidelines for copying for interlibrary lending by libraries. Nevertheless, these guidelines are useful starting points for evaluating educational uses: if a use fits within them, the user need go no further to determine whether the use is fair. On the other hand, if a use does not fit within them, the user still has recourse to the statute.

For example, guidelines for the fair use of copyrighted material used to create CD-ROMS and other multimedia projects were approved by the Consortium of College and University Media Centers and several copyright owner groups. The Guidelines limit the amount of a work of music or other copyrighted material that can be used in multimedia projects created by professors and students. The Guidelines permit the resulting works to be used for distance learning, so long as their access is limited to enrolled students (Goldie Blumenstyk, “Educators and Publishers Reach Agreement on ‘Fair Use’ Guidelines for CD-ROMS,” *Chron. Higher Educ.*, October 25, 1996, at A28). These and other guidelines are available at <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm>.

The fair use doctrine applies to all works that are protected by the copyright laws, including works posted on the Internet and materials used in distance education courses, whether transmitted in real time via interactive video or presented in an asynchronous format, such as an online course. According to an expert on computer technology and copyright law, “[T]he more you can make the online classroom resemble a traditional classroom—limiting access through the use of passwords for registered students, posting materials for only a short time, including statements about copyright restrictions, and so forth—the stronger your fair use argument will be” (Steven J. McDonald, *Synfax Weekly Report*, February 8, 1999, 813. This article also includes a brief summary of the Digital Millennium Copyright Act (see discussion in Section 13.2.5.5 below) and applications of the fair use doctrine to distance learning courses.)

13.2.5.2.2. *COURSEPACKS*. The Guidelines for Classroom Copying were cited by a federal appeals court in the first higher education copyright case resulting in a judicial opinion, *Basic Books v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). A group of publishers brought a copyright infringement action against a chain of copying shops for copying excerpts from their books without permission, compiling those excerpts into packets (“coursepacks”), and selling them to college students. Kinko’s argued that its actions fit within the fair use doctrine of Section 107 of the Copyright Act. The trial judge wrote: “The search for a coherent, predictable interpretation applicable to all cases remains elusive. This is so particularly because any common law interpretation proceeds on a case-by-case basis” (758 F. Supp at 1530). Using the four factors in the statute, as well as the Guidelines for Classroom Copying, the court ruled that (1) Kinko’s was merely repackaging the material for its own commercial purposes; (2) the material in the books was factual (which would suggest a broader scope of fair use); (3) Kinko’s had copied a substantial proportion of each work; and (4) Kinko’s copying reduced the market for textbooks. Furthermore, the court ruled that for an entire compilation to avoid violating the Act, each item in the compilation must pass the fair use test. The judge awarded the plaintiffs \$510,000 in statutory damages plus legal fees. Kinko’s decided not to appeal the decision, and settled the case in October 1991 for \$1.875 million in combined damages and legal fees.

More recently, the Sixth Circuit added to our understanding of the fair use doctrine in the context of preparing commercial coursepacks. In *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), the full appellate court, in an 8-to-5 opinion, reversed an appellate panel’s finding that the copying at issue constituted fair use. Michigan Document Services (MDS) is a commercial copying service that creates coursepacks and sells them to students at the University of Michigan. Although other copy shops near the university had paid copyright fees and royalties, MDS did not, and stated this policy in its advertising. Despite the earlier holding in *Basic Books v. Kinko’s Graphics Corp.*, the owner of MDS had been advised by his attorney that the opinion was “flawed”; he believed that production of coursepacks was protected under the fair use doctrine. Although the trial court found that the copying was not protected under the fair use doctrine, an appellate panel reversed; however, the full court sided with the trial court in most respects.

The full court analyzed the copying under the four elements of the fair use test and found that, because MDS profited from the sale of coursepacks, the purpose of the copying was commercial; furthermore, the loss of copyright permission fees diminished the value of the books to their owners. In response to the defendant's argument that under the fourth factor the court should look only at the effect on actual sales of the books, rather than the diminished revenue from copyright fees, the court stated that there was a strong market for copyright permission fees, and that the reduction in such fees should be considered in an analysis of the market impact of the alleged infringement.

With respect to the remaining factors, the court ruled that the copied material was creative and that the excerpts were lengthy (8,000 words and longer), given the 1,000-word "safe harbor" established in the Guidelines for Classroom Copying.

Although the trial court had ruled that MDS's behavior had been a willful violation of the Copyright Act, and thus supported enhanced damages, the full appellate court stated that the fair use doctrine was "one of the most unsettled areas of the law," and thus the defendant's belief that his interpretation of the fair use doctrine was correct was not so unreasonable that the violation could be termed willful.

Further, five judges joined a dissenting opinion that noted that the fair use doctrine permits the making of "multiple copies for classroom use," which these judges believed applied to the copying by MDS. Characterizing the majority's opinion as a narrow reading of the fair use doctrine, they predicted that costs would increase and student access to publications would be limited as a result of this ruling. The U.S. Supreme Court denied review (520 U.S. 1156 (1997)).

Today, most colleges and universities obtain permission to make coursepacks, even in their own internal copy shops, especially for repeated use of the same article by the same faculty member for the same course. Permission for most materials can be efficiently handled through the Copyright Clearance Center (CCC). The CCC "manages rights relating to over 1.75 million works and represents more than 9,600 publishers and hundreds of thousands of authors and other creators, directly or through their representatives." (See <http://www.copyright.com> for more information. For a discussion of the fair use doctrine in the higher education classroom, see R. Kasunic, "Fair Use and the Educator's Right to Photocopy Copyrighted Material for Classroom Use," 19 *J. Coll. & Univ. Law* 271 (1993).)

13.2.5.2.3. *RESEARCH COPIES.* The existence of the CCC may undercut a fair use argument in cases involving the kinds of materials it licenses. In *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), a federal trial judge found that Texaco had infringed the copyrights of several scientific journals by making multiple copies of scientific articles for its scientists and researchers to keep in their files. The judge noted that Texaco could have obtained a license that permits copying of the journals licensed by the CCC, and found that Texaco's failure to take advantage of that license weighed against fair use in consideration of the fourth factor. The court also acknowledged, however, that to avoid using circular reasoning in the analysis of the fourth factor



(that is, assuming the use is unfair and would therefore result in lost permission fees in the process of trying to determine whether it is fair), the availability of a license might not have weighed against fair use were the results of the evaluation of the first three factors to have shown the use to be likely a fair use. In this case, however, the court found that two of the first three factors also weighed in favor of getting permission, so it took the lost revenues into account.

The result in *American Geophysical Union v. Texaco* was affirmed by the court of appeals at 60 F.3d 913 (2d Cir. 1994). Although the court of appeals subsequently amended its earlier opinion to distinguish between institutional researchers, such as Texaco, and individual scientists or professors (1994 U.S. App. LEXIS 36735 (2d Cir., December 23, 1994)), some copyright experts believe that the opinion may require universities to enter licensing agreements with publishers to avoid infringement (Goldie Blumenstyk, "Court's Revisions in Copyright Case Add to Confusion for Scholars," *Chron. Higher Educ.*, August 11, 1995, at A14). Others believe that the distinction drawn between Texaco researchers and university professors admits that the results would be different were internal university research copying analyzed.

**13.2.5.2.4. USE OF AUTHOR'S OWN WORK.** Even the authors of published articles must seek permission from their publishers to copy their own articles unless they retain their copyrights or reserve the right to make copies in their publishing agreements.

**13.2.5.2.5. USE OF UNPUBLISHED MATERIAL.** The copyright laws cover unpublished as well as published material. Although the unauthorized use of unpublished material would ordinarily result in liability for the researcher, the college or university could also face vicarious liability if the research were funded by an external grant made to the institution or if the faculty member is otherwise performing the research within the scope of his or her employment.

A pair of cases in the late 1980s interpreted the scope of fair use in publishing unpublished materials so narrowly as to nearly bar any use of such materials (*New Era Publications International v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir. 1989); *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987)).

Legal scholars so criticized this pair of decisions that Congress reacted by passing the Copyright Amendments Act in late 1992 (Pub. L. No. 102-492, 106 Stat. 3145). The law amends the fair use doctrine by adding: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." This restored the balance inherent within the fair use statute as it applies to unpublished works.

**13.2.5.2.6. FAIR USE OF OTHER TYPES OF EXPRESSION.** For a useful summary of the fair use doctrine and the application of copyright law to videotapes, software, images, performances, and music, as well as written material, see Georgia Harper, "A Guide to Copyright Issues in Higher Education" (National Association of College and University Attorneys, 2005, available at <http://www.nacua.org/publications/pamphlets/copyright2000.html>). Faculty may wish to consult "Using Software: A Guide to the Ethical and Legal Use of Software for Members of the Academic Community" (1987) (available at <http://www.cni.org/docs/EDUCOM.html>).

Those who use thumbnail images as indices in the online environment received long-awaited guidance in the Ninth Circuit's opinion in *Kelly v. Arriba Soft Corporation*, 280 F.3d 934 (9th Cir. 2002), *amended by* 336 F.3d 811 (9th Cir. 2003). Kelly is a well-known photographer who publishes images on his Web site. Arriba Soft, which has since changed its name to Ditto.com, is a search engine that searches for images, rather than text, and displays search results in the form of a "list" of thumbnail copies of the original images that meet the search criteria. Kelly complained that this use, and the subsequent displays of the images in full size outside the original Web site environment where they were located, was an infringement. Although the trial court found both uses to be fair use, the Ninth Circuit agreed only with respect to the thumbnails.

This is very good news to university image archive managers who use thumbnail images to provide students, faculty, and staff a way to access images for educational purposes. While it was believed that such use was fair, it is encouraging to know now that an appellate court agrees.

Finally, for the tens of millions of users of peer-to-peer file-sharing technologies who transfer music and other media files among themselves, there is bad news about fair use. In *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001), the court rejected the defendant's defenses, including the claim that its users made fair uses of plaintiffs' recordings. Napster operated a Web site that permitted users of its software to establish direct peer-to-peer connections to download files stored on the peer machines and make files stored on the user's machine available to others for download. Napster provided a current directory of the locations of requested files on peer machines that were connected to the network at a given time. Thus, Napster did not actually make or transfer copies of music files, but it facilitated their transfer through its own computer network. Napster argued that its users' activities were fair use and its activities could not be contributory infringement if there were substantial non-infringing uses of its software system. This argument is based on the Supreme Court's decision in the *Sony* case decided in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)). The *Sony* court had determined that the manufacturers of videocassette recorders were not vicariously liable for the infringements of their customers because the recorders had substantial non-infringing uses, namely, timeshifting of television programming. The court found that taping a broadcast television program off the air to view it later was a fair use. The Napster court rejected the "substantial non-infringing use" argument in this new context. In assessing whether Napster's customers' uses would qualify as fair use, it determined under the first factor that the purpose and character of the use was repeated and exploitative, aimed at avoiding purchases; under the second factor, that the works were creative; under the third factor, that whole works were copied and distributed; and under the fourth factor, that the copies reduced CD sales and raised barriers to plaintiffs' entry into the digital download market, thus harming the value of the copyrighted works to their owners. Overall, all four factors weighed against fair use. (See below for a discussion of this and other cases with respect to Internet service provider liability.)

Several years later, in a different case with slightly different facts, a court determined that there is a valid defense to contributory infringement in the file-sharing context (*MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004)). Grokster and Streamcast Networks disseminate Grokster and Morpheus software, respectively, popular programs that have filled the void created by Napster's demise. Their networks work differently from Napster's: at no time is any hardware or software over which the companies have any control involved in the activities of potential infringers. Once the companies have distributed their software, their control over what happens with it is over. Thus, the court determined that Grokster could not contribute to customer infringements because contributory liability only attached if the companies had specific knowledge of infringement at a time when they could do something about it and failed to act on the information. This inability to control what people do with their software also provided the companies a defense against vicarious liability, which only applies where the company has a right and ability to supervise and control customer activity.

The plaintiffs in this case appealed the decision to the U.S. Supreme Court, and approached Congress as well with proposed legislation that would overturn the *Sony* rule on which the *Grokster* decision was based. The Supreme Court vacated the appellate court's decision (125 S. Ct. 2764 (2005)), ruling that the case must be tried. The Court distinguished *Sony*, noting that the facts in this case were significantly different. These distributors could be liable for a particular type of contributory infringement, labeled "inducement," because they promoted the software as a device for infringing copyright. Furthermore, said the Court, the distributors clearly expressed their intent to target former users of Napster, and made no attempt to develop filtering mechanisms that would prohibit unauthorized file sharing. Finally, the Court noted, most of the profits that would accrue to the distributors would be from activities that infringed copyright.

13.2.5.2.7. *FAIR USE SUMMARY.* Given many courts' strict interpretations of the fair use doctrine and the opportunities provided by computer networks and other technology for violation of the copyright laws, it may be surprising that publishers have not pursued colleges and universities more aggressively; however, university responses to good-faith efforts by publishers to address these issues by promptly responding to allegations of infringement and by providing education and compliance training may explain why so few complaints against universities make it to the courthouse. This attitude has not prevailed with respect to the direct infringers themselves. The Recording Industry Association of America (RIAA) began in 2003 to sue its customers directly. (See Section 13.2.5.5 below, on Liability for Infringement, for more on these cases.)

In light of developments in copyright law, postsecondary institutions should thoroughly review their policies and practices on photocopying and digitizing supplementary reading materials, the use of others' works in the creation of online courses and multimedia works, and the copying and distribution of computer software. Institutions are now required to provide faculty and staff with

accurate information on the use of copyrighted material, including text, unpublished material, computer software, images, and music, in order to take advantage of certain limits on their liability. The institution's policy and educational materials should be published online for staff and students as well as faculty members, and a notice apprising users of the policy's existence and location should be posted at campus photocopying and computer facilities. (Visit "The Copyright Crash Course," a comprehensive Web site devoted to a large variety of copyright matters, developed by Georgia Harper of the University of Texas System, at <http://www.utsystem.edu/ogc/intellectualproperty/cprtindex.htm#top>. It offers good information on copyright that is comprehensible to nonlawyers. Other Web sites providing useful information on copyright to colleges and their employees and students include the Copyright Management Center at Indiana University-Purdue University Indiana, at <http://copyright.iupui.edu>, and "Ten Big Myths About Copyright Explained," by Brad Templeton, at <http://www.templetons.com/brad//copymyths.html>.)

**13.2.5.3. Performance rights.** In addition to fair use, the Copyright Act provides educators with rights to show (perform or play) and display others' works in the classroom and to a limited extent, in distance education. Section 110(1), authorizing displays and performances for face-to-face teaching, and Section 110(2), authorizing more limited rights to transmit works to distant learners, were intended to authorize the performances and displays of others' works that were common in classrooms and in distance education at the time the statute was written (1976).

When Congress enacted the Digital Millennium Copyright Act in 1998 (discussed in Section 13.2.5.5 below), it instructed the U.S. Copyright Office to study how best to facilitate the use of digital technologies in distance education and to report back with recommendations within six months. The "Report on Copyright and Digital Distance Education" was released on May 19, 1999. It can be found at <http://www.copyright.gov/disted>.

The report discussed the nature of distance education, the technologies used, and the different positions of educational institutions and copyright owners on whether Section 110(2) should be broadened in order to provide additional protection for providers of distance learning. The report recommended amending Section 110 of the Copyright Act to ensure, among other things, that it would apply to digital distribution, and to ensure that permitted performances and displays would be available only in a setting of "mediated instruction" in order to prevent multiple or unprotected uses of the otherwise lawfully used copyrighted material. It also recommended expanding the categories of materials covered by Section 110(2) to close the gap between what educators may show in their classrooms and what they may show via transmissions to distant learners, among other things.

The report's recommendations were introduced as the TEACH Act and signed into law in November 2002. It may still be necessary for educators to rely on fair use to bridge the gap between what is authorized for face-to-face teaching and the expanded but still significantly smaller scope of performances and displays authorized for distance education. Nevertheless,

the TEACH Act has broadened what distance educators may perform to include the following:

1. Transmitting performances of all of a non-dramatic literary or musical work [this is a very slim category because (1) the definition of a literary work excludes audiovisual works, and (2) nondramatic works are limited to those that do not “tell a story,” so to speak; thus, examples might include a poetry or short story reading and performances of all music other than opera, music videos, and the like];
2. Transmitting reasonable and limited portions of any other performance [this category includes all audiovisual works such as films and videos of all types, and the dramatic musical works excluded above];
3. Transmitting displays of any work in amounts comparable to typical face-to-face displays [this category would include still images of all kinds].

There are several explicit exclusions, however. Section 110(2) only applies to accredited nonprofit educational institutions. The rights granted do not extend to the use of works primarily produced or marketed for the digital distance education market, works the instructor knows or has reason to believe were not lawfully made or acquired, or textbooks, coursepacks, and other materials typically purchased by students individually. This last exclusion results from the definition of “mediated instructional activities,” a key concept within the expanded Section 110(2) meant to limit it to the kinds of materials an instructor would actually incorporate into a classtime lecture.

Further affecting the exercise of these rights is a series of limits regarding the circumstances under which the permitted uses may be made:

1. The performance or display must be:
  - a. A regular part of systematic mediated instructional activity;
  - b. Made by, at the direction of, or under the supervision of the instructor;
  - c. Directly related and of material assistance to the teaching content; and
  - d. For and technologically limited to students enrolled in the class.
2. The institution must:
  - a. Have policies and provide information about and give notice that the materials used may be protected by copyright;
  - b. Apply technological measures that reasonably prevent recipients from retaining the works beyond the class session and further distributing them; and
  - c. Not interfere with technological measures taken by copyright owners that prevent retention and distribution.

Finally, new Section 112(f) (ephemeral recordings) permits those authorized to perform and display works under Section 110 to digitize analog works and duplicate digital works in order to make authorized displays and performances so long as:

1. Such copies are retained only by the institution and used only for the activities authorized by Section 110; and
2. No digital version of the work is available free from technological protections that would prevent the uses authorized in Section 110.

**13.2.5.4. The “work made for hire” doctrine.** Although the Copyright Act’s work made for hire doctrine has seldom been applied in the higher education context, the issues associated with ownership and use of works created by university employees are raising awareness of the implications of this law for the university community. The work made for hire doctrine is an exception to the Act’s presumption that the creator of a work is its author and holds its copyright. In a work made for hire, the employer is considered the “author” and owns the copyright unless the parties enter a written agreement that gives the copyright to the employee. A work is “made for hire” if (1) it is created by an employee within the scope of his or her employment, or (2) if not created within an employment relationship, it is part of a larger work (such as a motion picture, a compilation, a text, or an atlas) and the parties agree in writing that it is made for hire. Thus, there are two “arms” of the work for hire statute, that is, two ways a person or entity may be the author and owner of a work created by someone else.

In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Supreme Court was asked to decide who owned the copyright in a statue commissioned by Community for Creative Non-Violence (CCNV), an organization devoted to helping homeless people. The Court decided that the work made for hire doctrine did not apply to Reid because he was neither an employee of CCNV nor was there a contract between him and CCNV that satisfied the rigorous requirements of the contractual arm of the work for hire statute.

The case is significant because it rejected approaches to the Act’s interpretation used by federal appellate courts, which had ruled that a work was made for hire if an employer exercised control over its production (see, for example, *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909 (2d Cir. 1974)). The Reid Court stated that the controlling issue for the employer arm of the statute is whether the author is an “employee,” listing the factors relevant to such a determination; but, because the Court found that Reid was an independent contractor and not an employee, it did not go on to explain how to determine whether work is “within the scope of employment.” Some clarification of this would have been helpful.

Brown University became a defendant in a lawsuit regarding whether statements in its Intellectual Property Policy were sufficient to overcome the presumption that works created by an employee within the scope of employment belong to the university (*Forasté v. Brown University*, 248 F. Supp. 2d 71 (D.C.R.I. 2003)). Forasté was undisputedly an employee, and taking

photographs was clearly within his scope of employment, but Brown’s intellectual property policy gave ownership of copyrighted works to their authors. The statute, however, requires a written agreement, signed by both employer and employee, to rebut the presumption of employer ownership (17 U.S.C. § 201(b)). The Court determined that an intellectual property policy was inadequate to rebut this presumption.

As it is likely that many universities have policies that grant ownership of certain copyrighted works to their authors (scholarly texts, articles, and literary, artistic, and musical works in the author’s field of expertise), this case strongly suggests that more is required to effectuate the intentions that policies embody. Employment contracts *signed by both parties* that refer to the policies may better survive judicial scrutiny.

The mushrooming of distance learning, in both synchronous and asynchronous formats, has stimulated concern among some faculty about their right to participate in decisions concerning distance learning, and in the ownership and use of online courses. Although the former issue may involve principles of contract law or academic custom and usage (see Section 1.4.3.3 of this book), the latter issue is controlled in the first instance by copyright law. Traditionally, educational institutions do not claim ownership of faculty writings and publications (such as books, lecture notes, or research reports). Without application of the work for hire doctrine, copyright would have to be transferred from the faculty member to the institution in order for the institution to be the owner of the copyright. No such transfer is required, however, if the work is made for hire. In the development of online distance learning courses, institutions may argue that because the faculty member has made extensive use of institutional resources (computer hardware and software, technical experts and advisors, institutional licenses to use certain software packages, and so forth) that go far beyond what a faculty member uses in conducting research or writing a book or article, the materials produced should be considered within the scope of employment. Some institutions are developing policies that state that the institution is the owner of any online course that a faculty member develops and teaches, but that the faculty member will receive a royalty each time the course is taught or that the faculty member has the right to make use of the course at another institution upon terminating employment. Faculty members are concerned that in some cases where the institution owns a work, the faculty member may not have control over whether the course is repeated, updated, or taught by some other individual. These are issues that can easily be addressed in a policy statement. Even though the law takes an “all or nothing” approach to ownership (either the creator owns it or the employer owns it, completely), universities need not leave it at that, but can provide the non-owner with rights to use course materials, based on academic norms as well as practicalities.

A special committee of the AAUP has developed statements on distance education and on copyright, as well as suggested guidelines and sample language for policies and contracts. The Association’s “Statement on Distance Education, Statement on Copyright, Suggestions and Guidelines: Sample Language for Institutional Policies and Contract Language for Distance Education and

for Ownership of Intellectual Property” may be found at <http://www.aaup.org/spcintro.htm>.

*13.2.5.4.1. COPYRIGHT AND COAUTHORSHIP.* On occasion, coauthors (or former coauthors) become involved in copyright disputes when one bases a new publication on earlier, coauthored material. In *Weismann v. Freeman*, 868 F.2d 1313 (2d Cir. 1989), *cert. denied*, 493 U.S. 883 (1989), a former research assistant sued her medical school professor, with whom she had researched and coauthored many scholarly works on nuclear medicine, when the professor put his name on a subsequent work she alone had authored. Because the work (a syllabus reviewing the state of scientific knowledge on a medical issue) was based in large part on work the two had coauthored, the professor believed that he was a coauthor of the subsequent work as well. He also claimed that his use of the material was a fair use.

The former assistant, now a professor herself, argued that the work in question contained new material and was solely her work for copyright purposes. The appellate court ruled that joint authorship in prior existing works did not make the defendant a joint author in a derivative work: “[W]hen the work has been prepared in different versions, each version constitutes a separate work”; Section 103(b), according to the court, gives copyright protection to new portions of the derivative work but not to preexisting portions (868 F.2d at 1317). The court added: “The joint authorship of the underlying work does not confer any property right in the new work, save those rights which the co-author . . . of the previous works retains in the material used as part of the compilation of the derivative work” (868 F.2d at 1319), and, “To support a copyright, a derivative work must be more than trivial, and the protection afforded a derivative work must reflect the degree to which the derivative work relies on preexisting material, without diminishing the scope of the latter’s copyright protection” (868 F.2d at 1321). The court also rejected the defendant’s fair use defense, noting in its discussion of the fourth factor (impact on the value of a work) that professional advancement in academe depends, in large part, on publication, and even if the plaintiff had no money damages, the defendant’s appropriation of her work could “impair [her] scholarly recognition” (868 F.2d at 1325–26).

*13.2.5.5. Liability for infringement.* Infringement is similar to a strict-liability tort. Ignorance of the law is no excuse, although it may affect the amount of damages awarded. The penalties are stiff; nevertheless, copyright owners have sought many increases in the penalties for infringement over the last decade and Congress has obliged them.

Advances in computer technology and the spread of digital copies prompted Congress to enact amendments entitled “Criminal Penalties for Copyright Infringement” (Pub. L. No. 102-561, 106 Stat. 4233) in 1992. These amendments to the criminal code make certain types of copyright infringement a felony (18 U.S.C. § 2319(b)). They provide that willful violations of 18 U.S.C. § 2319(a) shall result in imprisonment for not more than five years or fines in the amount set forth in the criminal law, or both, if the offense consists of reproduction or distribution or both during any 180-day period of at least ten copies or records of one or more copyrighted works with a retail value of over \$2,500. Stiffer



penalties are prescribed for second and subsequent violations. In 1997, Congress enacted the “No Electronic Theft Act” (the “NET Act,” Pub. L. No. 105-147, 111 Stat. 2678), which, among other things, closed a loophole in the law that prevented criminal prosecution of willful infringing distributions over the Internet if the infringer did not profit financially. The NET Act provided a definition of financial gain in 17 U.S.C. § 101 that includes receipt of anything of value, including other copyrighted works, and made it a criminal violation to distribute works valued at more than \$1,000 over a 180-day period without permission.

Congress further reacted to the concerns of publishers, Internet service providers, and the music and entertainment industries by passing the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (October 28, 1998), affecting institutions, faculty, and students. The DMCA was passed to implement the World Intellectual Property Organization Copyright Treaty and the Performances and Phonograms Treaty, as well as to deal with issues of potential liability for Internet service providers (ISPs) and other matters. This law provides a potential “safe harbor” for ISPs whose subscribers use the ISP’s network to transmit or post copyrighted material without legal authorization (for example, where the use does not constitute fair use) or without having received permission to do so from the copyright holder. The law states that an ISP can limit its own liability for infringements caused by its subscribers if the ISP designates an agent to receive notices of alleged infringements, removes allegedly infringing posted material quickly, and notifies the individual who posted the material that it has been removed. The law also protects ISPs from liability for removing material if, in fact, no infringement occurred.

Regarding materials posted on the ISP’s servers, for the most part the law only protects university ISPs from liability for the infringements of students. Most faculty and staff who place materials online do so as employees. If the alleged infringer is an employee of the institution that owns or is the ISP, the institution will likely be vicariously liable. The law gives university ISPs a narrow exception from vicarious liability for infringements by faculty or graduate student employees who post materials online, but only for those materials not required or recommended for courses taught at the institution within the past three years, so long as the alleged infringer was not the subject of more than two good-faith infringement notices during that same period of time, and so long as the institution provides its employees with accurate information about and promotes compliance with copyright laws.

Regarding materials that merely pass through the provider’s network, such as materials traded or stored over peer-to-peer networks, university ISPs enjoy very broad protection so long as they are not involved in the selection or routing of the infringing materials.

Many cases refine the scope of the ISP liability limitations. In the *Napster* case, described above in the discussion of fair use, the court rejected Napster’s claim that its activities were protected by the ISP safe harbors. The court indicated that if ISPs wish to take advantage of limits on their liability for files stored on their computers, they should take action when they have actual

knowledge of infringement, know facts from which it can be inferred, or receive notice sufficient to identify works alleged to infringe. They also must have policies in place that require copyright compliance and provide for termination of accounts of repeat infringers. The court's admonitions in this regard simply state the statutory requirements, which Napster failed to follow.

Three recent cases discuss in more detail the adequacy of ISPs' policies of terminating the accounts of repeat infringers (*Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003)). In *Ellison*, Harlan Ellison sued (among others) America Online (AOL) because it offered its subscribers a Usenet newsgroup to which one subscriber uploaded Ellison's literary works without his permission. In *Perfect 10*, the defendant, Cybernet, operated an adult verification service that provided authorization to adult customers to access participating adult content Web sites. Perfect 10 alleged that some of the participating sites contained photos from Perfect 10's site.

The *Ellison* court initially found that AOL needed only to provide a realistic threat of termination and considered AOL's policy adequate even though it had never terminated an account for repeat infringement. Two years later, however, the Ninth Circuit reversed the lower court's grant of summary judgment. It was troubled by the fact that AOL did not have an adequate notification system in that it had changed its e-mail address for complaints, waited months to register the new address with the copyright office, and provided no forwarding function for e-mails continuing to go to the old address. The *Perfect 10* court also found a defendant's efforts unavailing, concluding that it was not likely that Cybernet would be able to satisfy the termination policy requirement without evidence that it had actually terminated accounts under appropriate circumstances, such as but not limited to where it had knowledge of blatant, repeated infringement.

*In re Aimster* goes even further. In this case, the defendant had a policy and informed users of it, but it was impossible for it ever to know that its users were infringing because the Aimster software encrypted all information traveling among users of its private networks. The court found that "by teaching its users how to encrypt their unlawful distribution of copyrighted materials [it] disabled itself from doing anything to prevent it" (334 F.3d at 655). The court affirmed the lower court's finding that Aimster did not qualify for ISP protection.

The statute also requires that ISPs designate an agent to receive notices of infringement in order to be eligible for the limitations on its liability contained in Section 512(c). Thus, an ISP cannot claim the safe harbors for infringements that occur before it registers its agent (*CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001), *affirmed*, 373 F.3d 544 (4th Cir. 2004)); however, an agent need not be a person, but can be a department or office (*Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001), discussed below).

On the issue of what kind of a notice is sufficient, *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001), indicates that all that is required of the copyright owner is "substantial" compliance with the law's notice

provisions. RemarQ, the defendant ISP, declined to stop carrying two newsgroups posted on its servers and identified by the plaintiff as containing “virtually all Federally Copyrighted images,” but agreed to take down images identified with “sufficient specificity.” The plaintiff sued, and the district court granted the defendant’s motion to dismiss on the grounds that the notice was not sufficient under Section 512; it did not include a representative list of the infringing works and did not provide sufficient detail to allow the works to be located and disabled. The Fourth Circuit reversed on the grounds that the statute only requires “substantial” compliance with the notice provisions, and that by directing the ISP to the newsgroups, the plaintiff supplied the equivalent of a representative list.

On the other hand, *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y., August 28, 2002), tells us that “citation to a handful of performers does not constitute a representative list of infringing material.” In this case, the plaintiff’s first two notices to the ISP noted merely that the defendant’s site contained links to infringing files on the Internet by artists it represented, naming ten artists. The third notice was different: it included, in addition to the general allegation, printouts of screen shots of defendant’s pages with asterisks by 662 links to files the plaintiff alleged were infringing. The court found that the third notice complied with the requirements of the statute.

*Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001), indicates that a simple cease and desist letter that does not enable the ISP to distinguish pirated from legitimate copies of a DVD is not adequate to identify the allegedly infringing material. eBay received a cease and desist letter from Robert Hendrickson regarding copies of a DVD entitled *Manson*. Hendrickson did not specifically identify the allegedly infringing copies, nor did he comply with other requirements of the statute: he did not state under oath that the information he provided was accurate, that he was authorized to act on behalf of the owner, or that the use was not authorized. When eBay requested additional information, he refused to provide it and instituted suit instead. The court had little trouble finding that eBay’s response was appropriate under the circumstances. It also confirmed that an inadequate notice cannot be used to establish actual or constructive knowledge, nor can having policies that block access or that require the service provider to terminate the accounts of repeat infringers be used to show ability to control, an element of vicarious liability. *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003), involved the timing of notifications. The court found that a notice sent in January advising Amazon.com that “all copies of *Manson* on DVD infringe [Hendrickson’s] copyright” was inadequate to require Amazon.com to remove material posted by a user ten months later.

Verizon Internet Services, Inc., battled the Recording Industry Association of America several times in 2003 regarding whether the subpoena power contained in Section 512(h) applies to ISPs availing themselves of the protections contained in the conduit provisions of Section 512(a) (those that apply to peer-to-peer transfers), and if it does, whether Section 512(h) as so construed is constitutional. The district court twice ruled against Verizon, and the court of

appeals refused to permit Verizon to delay its compliance with the subpoenas while the appeal on the merits went forward (*In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24, 257 F. Supp. 2d 244 (D.D.C. 2003), *stay vacated* by 2003 U.S. App. LEXIS 11250 (D.C. Cir., June 4, 2003)). Verizon argued initially that the subpoena power, which allows copyright owners to obtain a subpoena requesting identifying information about subscribers in any U.S. district court, only applied when an ISP's subscribers were accused of placing infringing materials on the ISP's servers (§ 512(c)). The court found that the subpoena provision applied to all four safe harbors, referencing the legislative history of the Act that indicated that in exchange for limitations on their liability, ISPs agreed to assist copyright owners in identifying and dealing with infringers.

The court also rejected Verizon's secondary constitutional argument, finding that Congress had authority to authorize court clerks to issue subpoenas in the absence of a pending case or controversy, pointing to other examples such as criminal warrants and wiretapping applications, among others. It also found that subscribers had no right to anonymously infringe copyrights and that safeguards within the Act were sufficient to prevent encroachment on protected anonymous speech, disposing of Verizon's First Amendment claim. In December 2003, the court of appeals reversed the lower court, finding that Section 512(h) did not authorize subpoenas against ISPs who were only transmitting files that resided on subscribers' machines (*Recording Industry Assn. of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004)).

In an unexpected and surprising turn of events in spring 2003, the RIAA sued four university students directly, without first sending the universities a notice under the DMCA. The cases alleged that the students were operating file-sharing networks using institutional resources. All four cases settled within one month. With this easy victory and the subpoena power established by the lower court in *Verizon*, the RIAA embarked on an ambitious campaign to sue individuals directly, serving subpoenas on thousands of ISPs and later filing hundreds of lawsuits. When the District of Columbia Circuit ruled that the Section 512(h) subpoena process could not be used to learn the names of subscribers who were utilizing their ISP's network (conduit) services only and not storing files on the network servers, RIAA began to file "John Doe" lawsuits against individuals. This activity continues.

In addition to the DMCA, Congress most recently passed the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (Pub. L. No. 106-160, 113 Stat. 1774 (December 9, 1999)), which amends 17 U.S.C. § 504(c) by providing for enhanced statutory damages for certain copyright violations.

**13.2.5.6. Licensing.** As college and university libraries license more extensive amounts of their collections from digital database providers, copyright law, the backdrop against which owners' and users' rights are balanced in the analog world, risks becoming irrelevant: contract law, not copyright, controls the terms of access and use in a license agreement. Problems emerge when licenses do not permit the typical uses of digital materials that users have come to expect

they may make of the same materials in analog form. For example, library patrons are entitled to request, and libraries are authorized to provide, copies of works that are out of print, or copies of portions of more recent works (17 U.S.C. § 108(d) & (e)). Patrons are permitted to make their own fair use copies of items in library collections, such as copies of journal articles for personal use, research, or scholarship (17 U.S.C. § 107). Faculty members may supply photocopies to library reserve rooms in accordance with fair use (*Id.*). These and other typical university uses are protected by the Copyright Act; however, unless it is carefully negotiated, a database contract may contain specific or general prohibitions that prevent such university, library, and patron activities.

**13.2.5.7. Sovereign immunity.** Following several appellate court rulings in the late 1980s that the Eleventh Amendment to the U.S. Constitution prohibited the application of the Copyright Act's damages provisions to state agencies, Congress passed the Copyright Remedy Clarification Act in 1990 (Pub. L. No. 101-553, 104 Stat. 2749) to allow copyright holders to collect damages from public colleges and universities. Only six years later, however, this law's constitutionality became questionable when the U.S. Supreme Court ruled in a series of cases beginning with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (discussed in Section 13.1.6) that state agencies in those states that had not waived sovereign immunity against federal court litigation could not be sued by private parties and that sovereign immunity protected them from suits for money damages in federal court for patent infringement (discussed in Section 13.2.6) and trademark infringement (discussed in Section 13.2.7) (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627(1999)).

The issue arose with respect to copyright claims in *Chavez v. Arte Publico Press*, 180 F.3d 674 (5th Cir. 1999). After the Supreme Court's *Seminole* decision, but prior to its decisions in *Florida Prepaid* and *College Savings Bank*, a panel of the Fifth Circuit Court of Appeals ruled that plaintiff Denise Chavez's claims of copyright infringement were barred by the Eleventh Amendment. The full court vacated the earlier opinion (59 F.3d 539) and granted a rehearing (178 F.3d 281), after which it reached the same conclusion, this time basing its decision on the two Supreme Court cases decided in the interim.

Arte Publico Press is part of the University of Houston, a Texas state university. The Press became involved in a contract dispute with one of its authors, Denise Chavez. When her contract claims failed because of the state's immunity under state law, she raised federal claims to which the state's immunity would not apply. The University of Houston contended that its Eleventh Amendment immunity protected it from Chavez's copyright and trademark claims for damages. The Fifth Circuit agreed, stating that the Eleventh Amendment denies Congress the power to create a cause of action in federal court against a state for damages for violations of federal copyright or trademark laws, except under special circumstances, which were not met in this case: Congress could not legally act under Article I of the Constitution (where Congress is authorized to enact the copyright and patent laws), nor under subsection 5 of the Fourteenth Amendment (where Congress is given the power to enforce against the states

the Fourteenth Amendment's prohibition on taking property without compensation or denying anyone due process under the law). Without proper authority for its actions, Congress's enactment of the Copyright Remedy Clarification Act was unconstitutional.

Thus, *Seminole* and its progeny indicate that public colleges and universities that are protected by the sovereign immunity doctrine (discussed in Section 13.1.6, this book) are immune from this litigation. This fact has motivated additional congressional effort to force states to waive their immunity. Bills to do so are regularly introduced; however, none has passed as of the printing of this book. Administrators should consult counsel for further developments in this regard.

While the *Seminole* line of cases appears to afford a measure of relief to public colleges and universities against copyright infringement litigation for money damages in federal courts, these institutions and their faculty and staff still face some types of liability for copyright infringement, and private institutions do not share the immunity of public colleges. For example, a copyright holder can file a motion in federal court for injunctive relief against an alleged infringer. Institutions or individuals who have entered licensing agreements with copyright holders (an increasingly common requirement to access software and databases) can be sued for breach of contract in either state or federal court. Furthermore, individual employees of public colleges and universities may be sued under federal copyright law; they do not enjoy the sovereign immunity protection afforded to their institutions if they are acting outside the scope of the copyright statutes.

**13.2.5.8. Other copyright issues.** Both the courts and Congress have addressed many other issues of interest to universities. Below are some of the more significant developments.

**13.2.5.8.1. SCOPE OF COPYRIGHT PROTECTION.** The scope of copyright protection has been interpreted in a case of interest to scholars who use copyrighted compilations of material that is in the public domain, such as the decisions of state and federal courts. In *Matthew Bender and Co., Inc. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999), a federal appellate court ruled that the plaintiffs, Matthew Bender and Hyperlaw, could include "star pagination" used by West's versions of published court opinions in the plaintiffs' CD-ROM versions of these court opinions. The court ruled that the only material inserted by West that the plaintiffs wished to use was the page breaks in the otherwise uncopyrighted judicial opinions. The court ruled that page breaks were not protected by the copyright law. Although compilations of uncopyrighted materials may be protected under the copyright laws, said the court, the protection extends only to original creative material contributed by the author of the compilation. "Because the internal pagination of West's case reporters does not entail even a modicum of creativity," the court ruled that these items were not "original contributions" by West and thus were not protected (158 F.3d at 699).

A federal trial court addressed the issue of whether photographic reproductions of art in the public domain have the requisite originality to qualify for

copyright protection. In *Bridgeman Art Library, Ltd. v. Corel Corporation*, 36 F. Supp. 2d 191 (S.D.N.Y. 1998), the plaintiffs attempted to secure copyright protection for color photographs of public domain paintings. The court ruled that because the photographs were copies of the paintings, they were not “creative” and therefore were not entitled to copyright protection. This ruling confirms the ability of college and university image archives to use photographic reproductions of art that is in the public domain.

*13.2.5.8.2. MUSIC.* In addition to its chapter on ISP liability limitations, the DMCA contained other chapters relevant to universities. Among them were provisions affecting music. Although institutions may pay blanket royalty fees for all copyrighted music in the American Society of Authors, Publishers and Composers/Broadcast Music, Inc. (ASCAP/BMI) repertory that is publicly performed at their institutions, these fees do not cover copying or distribution of music or streaming radio broadcasts over the Web (“Webcasting”). As digital audio transmissions are now protected by law, Webcasting must be licensed. In May 2003, college Webcasters negotiated fees with the recording industry that are low enough that most college radio stations will be able to pay them. The fees are based on the enrollment at the university and the number of listeners logged on the Webcast over the course of a month. Noncommercial university radio stations with fewer than 10,000 students paid a blanket fee of \$250 for 2004. A station at a college with more than 10,000 students paid \$500 for that year. If listeners exceed 146,000 hours’ worth of music per month, the station pays two-hundredths of a cent per song per listener above the limit. Most stations do not expect to exceed the limit. For 2003 and 2004, any station that paid did not have to track and provide information on each song played. Left for later determination is the difficult issue of whether the stations will be required to track such information starting in 2005. Information on this licensing process is available at <http://www.riaa.com/issues/music/webcasting.asp>.

*13.2.5.8.3. ANTI-CIRCUMVENTION.* The DMCA also prohibits the circumvention of copyright protection systems that control access to digital material that is copyrighted. This law is quite controversial because, with few exceptions as discussed below, the reason a person might circumvent a technology is irrelevant to the determination of whether circumvention violates the law. In other words, it is illegal to circumvent a technology protecting a work, even if one’s purpose is to make an authorized use of the work, for example, to make a fair use of it, to make an archival copy for a library, to make an adapted copy for a handicapped person, to lend a work, or to access parts of it that are in the public domain or not protected by copyright at all (facts and ideas). All of these examples are uses protected by the Copyright Act, but they do not provide one any authority to circumvent technologies protecting works. This restriction appears to create an unlimited right rather than the original intent of Congress to create limited rights for limited times (Pub. L. No. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 1201 *et seq.*).

Although the law contains several exemptions, such as an exemption for libraries, archives, and educational institutions to gain access to a copyrighted work in order to make a good-faith determination about acquiring a copy of that

work, the exceptions are of little or no value to universities for two reasons: (1) the devices that would be needed to exercise the rights to circumvent are made illegal by the statute; and (2) the rights themselves are generally so narrow as to be useless as a practical matter. For example, one may easily obtain permission to try a product before buying it, making the right to circumvent a protective technology for that purpose of little value.

The constitutionality of this law has been challenged on the grounds that it bans more speech than is necessary to achieve the government's goals by interfering with fair uses and restricting access to the public domain (*Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), affirmed sub nom *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Felton v. Recording Industry Association of America*, 63 PTCS 115 (D.N.J. 2001); *U.S. v. Elcom, Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002)). So far, no challenge has succeeded. Further, Congress included a provision calling for triennial rule making by the Library of Congress. The Library of Congress is authorized to establish classes of works to which the anti-circumvention provisions will not apply (for the three years until the next rule making) where the provisions are shown to have adversely affected the public's ability to make non-infringing uses of particular classes of copyrighted works. Even though the Library of Congress has interpreted its authority to exempt classes of works very narrowly, this mechanism may nevertheless be deemed adequate to protect First Amendment values. For example, on October 27, 2003, the Library of Congress exempted literary works distributed as e-books whose access controls disabled read-aloud and screen-reader functions if the e-book publisher offered no e-book edition permitting such adaptive uses. This rule accommodates anti-circumvention to the needs of the blind by permitting adaptive uses as permitted in 17 U.S.C. § 121 even if the work in question is technologically protected.

**13.2.5.8.4. TERM EXTENSION.** The Sonny Bono Copyright Term Extension Act (CTEA) extends copyright protection for an additional twenty years for all works currently subject to protection by copyright law. It contains provisions that permit libraries to make certain scholarly, preservation, and research uses of works during their final twenty years of copyright protection so long as the work is not being commercially exploited, as specifically defined in the statute. The exemption does not apply to any subsequent uses by users other than such library or archives (§ 104, Pub. L. No. 105-298, codified at 17 U.S.C. § 108(h)). CTEA has also been unsuccessfully challenged as unconstitutional. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme Court determined that Congress did have the authority under Article I of the Constitution to extend the term of existing copyrights, that a term of life plus seventy years is "a limited time" as required by the Constitution, and that the fair use provision and the idea/expression distinction (copyright only protects expression, not ideas) adequately protected rights of free speech, blunting any complaint on First Amendment grounds. Petitioners were various individuals and businesses that relied upon the public domain for their livelihood and who had suffered direct financial loss as a result of CTEA's delay for twenty years of the entry of hundreds of thousands of works



into the public domain. The case has far-reaching implications regarding Congress's power to modify the law.

**13.2.5.8.5. COPYRIGHT AND STANDARDIZED TESTS.** One further issue in copyright law of interest to colleges and universities, and most particularly to testing agencies, is whether states can require disclosure of test questions, answers, and other copyrighted information under “truth-in-testing” laws. New York’s Standardized Testing Act (N.Y. Educ. Law §§ 340–348) requires developers of standardized tests to disclose to test takers and to the public test questions, answers, answer sheets, and related research reports. In *Ass’n. of American Medical Colleges v. Carey*, 728 F. Supp. 873 (N.D.N.Y. 1990), the Association of American Medical Colleges (AAMC), which develops the Medical College Admissions Test, sought a declaratory judgment that the Copyright Act preempted such disclosure. A federal trial court issued a permanent injunction barring enforcement of Sections 341, 341(a), and 342 of the law. The state argued that two of the Copyright Act’s exemptions permitted disclosure of the test materials (the “fair use” exemption and the “archives” exemption). The U.S. Court of Appeals for the Second Circuit vacated the permanent injunction and reversed and remanded the case for trial, stating that genuine issues of fact were unresolved concerning the effect of disclosure of test questions and answers on reuse of the test (the fourth, or “market impact,” test under the fair use doctrine) (*Assn. of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991)).

In *College Entrance Examination Board v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the board argued that the New York Standardized Testing Act was preempted by the Copyright Act. The court ruled that the board had established a *prima facie* case of copyright infringement sufficient to support the entry of a preliminary injunction; however, in order to partially implement the policy goals of the New York law, the court fashioned a compromise requiring the board to disclose several Scholastic Aptitude Tests (SATs), Graduate Record Exams (GREs), and Tests of English as a Foreign Language until the litigation was resolved on the merits (893 F. Supp. 152 (N.D.N.Y. 1995)). No further proceedings have been reported.

### **13.2.6. Patent law<sup>13</sup>**

**13.2.6.1. Overview.** The basis for all patent law (as well as copyright law) is Article I, Section 8, Clause 8 of the Constitution, which authorizes Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The patent laws, contained in Title 35 of the *United States Code*, are critical to the research mission of higher education. They establish the means by and the extent to which institutions or their faculty members, laboratory staffs, students, or external funding sources may protect and exploit the products of research, and they tell us what inventions or discoveries may be patented, who may hold the patents, and what arrangements may be made for licensing them.

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<sup>13</sup>This Section was updated and expanded by Georgia Harper, Senior Attorney and Manager, Intellectual Property Section, Office of General Counsel, the University of Texas System.

Behind these legal issues, however, lurk serious policy questions: What degree and type of protection will allow researchers to share information without fear that their discoveries will be “stolen” by others? As among the institution and its faculty, staff, and students, and government or industry sponsors of university research, who should hold the patents or license rights for patentable research products? The complexity of new research in fields such as biotechnology, nanotechnology, and computer sciences, growing research relationships between industry and academia, substantial government support for university research, and the development of university research consortia underscore the importance of both the legal and policy questions.

**13.2.6.2. Patentability.** Section 101 of the Patent Act provides: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title” (35 U.S.C. § 101).

An invention must also be “novel” (§ 102) and “nonobvious” (§ 103). The patent holder has the right to exclude others from using the invention from the date the patent issues until twenty years after the date the application was filed.

The U.S. Supreme Court has explained what kinds of processes, inventions, or discoveries Congress intended to protect as follows:

In choosing such expansive terms as “manufacture” and “composition of matter,” modified by the comprehensive “any,” Congress plainly contemplated that the patent laws would be given wide scope. . . .

This is not to suggest that Section 101 has no limits or that it embraces every discovery. The laws of nature, physical phenomena, and abstract ideas have been held not patentable (see *Parker v. Flook*, 437 U.S. 584 (1978)). . . . Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that  $E = mc^2$ ; nor could Newton have patented the law of gravity. Such discoveries are “manifestations of . . . nature, free to all men and reserved exclusively to none” [*Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948), quoted in *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)].

The scope of potentially patentable items has expanded geometrically with our increasing sophistication in biotechnology and genetics. Two U.S. Supreme Court cases decided in 1980 and 1981 laid the foundation for current interpretations of what is patentable and demonstrate how difficult it is to determine what products of modern research are “patentable subject matter” under 35 U.S.C. § 101. The first of these cases, *Diamond v. Chakrabarty*, concerned a microbiologist with General Electric who sought to patent a strain of bacteria he developed by genetic manipulation of a naturally occurring bacterium. The new organism broke down multiple components of crude oil, a property possessed by no bacterium in its natural state, and was an important discovery in the control of oil spills. The patent examiner rejected the application on the grounds that microorganisms are “products of nature” and, as living things, are not patentable subject matter. Chakrabarty, on the other hand, argued that his

microorganism constituted a “manufacture” or “composition of matter” within 35 U.S.C. § 101.

In a 5-to-4 decision, the Court agreed with Chakrabarty, concluding that his microorganism was patentable because it was not a previously unknown natural phenomenon but a non-naturally occurring manufacture—a product of human ingenuity. Rejecting the argument that patent law distinguishes between animate and inanimate things and encompasses only the latter, the Court found the relevant distinction to be between products of nature, whether living or not, and man-made inventions.

In the second case, *Diamond v. Diehr*, 450 U.S. 175 (1981), Diehr sought a patent on a method for molding uncured synthetic rubber into cured products. He developed a computer program that continuously recalculated the cure time based on information from sensors inside the mold and opened the mold at the right time to ensure a perfect cure. The Court concluded by a narrow 5-to-4 margin that the invention qualified as a “process” under Section 101 rather than a “mathematical formula” and that the involvement of a computer did not affect patentability. The dissenters, in contrast, concluded that the invention made “no contribution to the art that is not entirely dependent upon the utilization of a computer in a familiar process” and was therefore unpatentable under *Gottschalk v. Benson*, 409 U.S. 63 (1971), and *Parker v. Flook*, 437 U.S. 584 (1978), which held that computer programs for solving mathematical problems were not patentable.

Another controversy involves the patentability of business methods. Until recently, business methods were generally protected by keeping them secret. If secrecy were not possible, competitors were free to emulate each others’ business methods. *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (1998), *cert. denied*, 535 U.S. 1093 (1999), changed this. *State Street Bank* upheld a patent on a software program that was used to make mutual fund asset allocation calculations. Soon, patent applications on business methods soared. Unfortunately, these patents present unique problems: since secrecy was the dominant method for protecting business methods until *State Street Bank*, published “prior art” (information that is already known and thus not patentable) is difficult if not impossible to uncover. Thus, patents issue on methods of doing business that may be quite obvious and not at all new—to everyone but the patent examiner. The business community and even the patent bar wants improvement in this process, and we may expect legislative guidance as well as changes at the U.S. Patent and Trademark Office in response.

As the range of patentable subject matter broadens, so, too, does the debate about the propriety of issuing patents on certain discoveries. For example, the U.S. Patent and Trademark Office routinely issues patents on computer software today, even though software is already protected by federal copyright law and state trade secret laws. Patent infringement proceedings are a much stronger disincentive than the remedies available under the Copyright Act. Experts in software design, however, worry that software patents will “slow the rate of development and limit opportunities for the individual and collaborative genius that created much of the best software in the past” (B. Kahin, “Software

Patents: Franchising the Information Infrastructure,” *Change*, May/June 1989, at 24; but see Ronald J. Mann, “The Myth of the Software Patent Thicket: An Empirical Investigation of the Relationship Between Intellectual Property and Innovation in Software Firms,” The University of Texas School of Law, Law and Economics Working Paper No. 022, February 2004, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=510103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=510103)).

The decision of the Patent and Trademark Office to consider non-naturally occurring, nonhuman multicellular organisms, including animals, to be patentable subject matter within the scope of 35 U.S.C. § 101 is even more controversial. Although animal rights groups mounted both procedural and substantive challenges to this interpretive notice, the federal courts dismissed their case for lack of standing (*Animal Legal Defense Fund v. Quigg*, 710 F. Supp. 728 (N.D. Cal. 1989), *affirmed*, 932 F.2d 920 (Fed. Cir. 1991)). The first animal patent issued in 1988, protecting a genetically altered mouse with genes sensitive to cancer. In 2002, however, the same mouse was rejected as unpatentable subject matter by Canada’s Supreme Court (*Harvard College v. Canada*, 2002 SCC 76, available at [www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol4/html/2002scr4\\_0045.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol4/html/2002scr4_0045.html)).

Some commentators have suggested that a “research exemption” should be added to the law to permit scientists to experiment without fear of patent infringement proceedings. Many universities place severe restrictions on how patented cell material, processes, and genetically altered animals may be used because biotechnical research has become such a high-stakes game. (For an assessment of policy issues related to these patents, see R. Merges, “Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies,” 47 *Maryland L. Rev.* 1051 (1988).)

Patents have been awarded for discoveries made under the human genome project; every element of that sophisticated gene-mapping program might eventually be patented, although experts doubt that patents would extend to human beings because of constitutional limitations (see Human Genome Project Information, available at [http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/patents.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/patents.shtml)).

**13.2.6.3. Ownership of patents.** The level of patenting activity and the potential for high profits and even higher penalties make it essential that institutions, their employees, and funding sources clearly identify who will apply for and own patents resulting from university research. Fortunately, the patent law provides considerable guidance on these two issues when research is federally funded. Chapter 18, entitled “Patent Rights in Inventions Made with Federal Assistance,” contains thirteen provisions applicable to colleges and universities. Sections 200 to 212 embody the “Bayh-Dole Act” or simply, “Bayh-Dole,” as it is commonly called, after the congressional sponsors of the bill that added the chapter to the Patent Act.

The goals of Bayh-Dole were to “promote the utilization of inventions arising from federally supported research or development”; “promote collaboration between commercial concerns and nonprofit organizations, including universities”; and “ensure that inventions made by nonprofit organizations . . . are used

in a manner to promote free competition and enterprise” (35 U.S.C. § 200). The Act achieves these goals by establishing uniform policy for licensing patentable inventions discovered in the course of federally funded research applicable to any contract, grant, or cooperative agreement between a federal agency and a nonprofit organization, even if the federal agency only partly funds the research (35 U.S.C. § 201).

Colleges and universities may obtain title to inventions made with the assistance of federal funding (35 U.S.C. § 202). Although the funding agency may refuse to grant title, in practice this is rarely, if ever, done (35 U.S.C. § 202(a)(i)–(iii)).

If the fund recipient obtains title, the funding agency receives a nonexclusive royalty-free license on behalf of the United States (35 U.S.C. § 202(c)(4)). In addition, the Act reserves “march-in” rights to federal agencies to ensure adequate utilization of inventions where the fund recipient has not fully exercised its right to use the patented invention (35 U.S.C. § 203). Other provisions deal with assignment and licensing of patent rights by the fund recipient (35 U.S.C. § 202(c)(7) & (f)) and withholding information about patentable inventions from third parties filing Freedom of Information Act requests (35 U.S.C. §§ 202(e)(5) & 205).

When research is privately funded, ownership and licensing rights are generally controlled by the funding agreement. Institutions typically agree not to disclose research results until patent applications are filed, and to provide the research sponsors with an opportunity to review research results.

While *inventorship* is determined in accordance with federal patent laws, state property law governs *ownership* of a patented invention or discovery, since a patent is considered personal property. Ownership of a patented (or patentable) discovery created by an individual in the course of employment would depend on the factual circumstances surrounding the invention and the nature of the employment relationship. In the absence of language in an employment contract requiring assignment of ownership of any patentable discoveries to the employer, the employee generally would be the owner, but the employer might retain “shop rights” (the right to the royalty-free use of the patented invention or discovery for its business purposes).

The law today is quite settled that universities may claim ownership of patents where there has been a knowing and voluntary waiver by the faculty inventor, such as signing an agreement to abide by institutional policies or an agreement to assign inventions.

A case decided by a New York state appellate court illustrates the waiver method of clarifying the relative rights of the institution, the faculty member, and other employees. In *Yeshiva University v. Greenberg*, 644 N.Y.S.2d 313 (S. Ct. N.Y. App. Div. 1996), Greenberg and Yeshiva University disagreed about the ownership of an antibody Greenberg developed while employed in a laboratory at the university’s medical school. The antibody was potentially useful in diagnosing and treating patients with Alzheimer’s disease. Greenberg asserted that she had the right to patent, sell, or license her discovery, but the university filed a motion for a preliminary injunction to prevent Greenberg from doing so.

Greenberg had agreed in writing to abide by the university's patent policy, which gave the university the right to seek a patent on the discovery. The court found that the patent policy reserved all rights in the discovery to the university, and affirmed the trial court's preliminary injunction against Greenberg.

Unfortunately, in many circumstances, there is no signed agreement. A separate line of cases discussed in detail in Section 15.4.3 has established that institutions may bind not only employee inventors but even university graduate students to assign inventions to the institution even in the absence of a signed agreement (*University Patents, Inc. v. Kligman et al.*, 762 F. Supp. 1212 (E.D. Pa. 1991); *E. I. DuPont de Nemours and Co. v. Okuley*, 2000 U.S. Dist. Lexis 21385 (S.D. Ohio, December 21, 2000); *Chou v. University of Chicago and Arch Development Corp.*, 254 F.3d 1347 (Fed. Cir. 2001); *University of West Virginia Board of Trustees v. Van Voorhies*, 278 F.3d 1288 (Fed. Cir. 2002)). Generally, the policy must clearly require assignment of all inventions by all persons likely to be inventors, and the inventor must have known about the policy.

**13.2.6.4. Infringement lawsuits.** A patent owner may bring infringement proceedings against unauthorized use or manufacture of the patented item or use of a patented process, among other things. Remedies include (1) lost profits or a reasonable royalty, with interest and costs (35 U.S.C. § 284); (2) treble damages, if infringement is willful; and (3) in exceptional cases, reasonable attorney's fees (35 U.S.C. § 285). The federal courts hear infringement proceedings and the U.S. Court of Appeals for the Federal Circuit, a special court designed to create a uniform body of federal patent law, hears all appeals.

Persons and entities deprived of rightful ownership of an invention by fraud or deception may also bring an infringement lawsuit. The *Cyanimid* case described in Section 15.4.3 provides useful guidance for institutions in this regard.

**13.2.6.5. Sovereign immunity.** Although the U.S. Congress amended the patent laws in 1992 to permit suits against states for infringing patent rights (the Patent and Plant Variety Protection Remedy Clarification Act of 1992), the U.S. Supreme Court ruled that the amendment was an unconstitutional abrogation of states' sovereign immunity. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), involved a private bank located in New Jersey and the state of Florida. The bank patented a methodology that guaranteed investors in its certificates of deposit sufficient funds to cover future college tuition costs. Florida created a competing product that allegedly infringed the bank's patent.

Although the bank argued that Congress abrogated sovereign immunity under the authority of the Fourteenth Amendment's due process clause (Section 5 of the amendment), the Court disagreed in a 5-to-4 decision written by Justice Rehnquist. The Court found no pattern of widespread violations by states of the patent laws, and no indication that state courts could not provide an appropriate remedy if a state were charged with infringement. The Court agreed that a patent could be considered property, and that infringement of it could jeopardize a property right, but it ruled that patent infringement by a state would not violate the Constitution unless the state provided either no remedy

or an inadequate remedy for that infringement. Since Congress produced no findings on the adequacy of state law remedies for patent infringement, the Court was not willing to assume they were inadequate.

The four dissenting Justices were skeptical about the willingness of states to provide adequate remedies for their own violations of the patent rights of others, and in a pointed reference to public research universities, noted that since states had taken advantage of the protections of federal patent law on numerous occasions, they should be regarded as having waived their sovereign immunity with respect to patent infringement lawsuits.

Waiver appears to be the more popular approach for subsequent congressional attempts to pass legislation that would subject states to suit in federal court now that a long series of cases has firmly established that abrogation theories are not likely to succeed. To date, none of these bills has passed, but administrators should confer with university counsel for developments in this area.

(For a discussion of the application of *Seminole Tribe* to patents (anticipating the ruling in *Florida Prepaid*) and a criticism of the application of Eleventh Amendment immunity to states in patent cases, see Carlos Manuel Vazquez, “What Is Eleventh Amendment Immunity,” 106 *Yale L.J.* 1683 (1997). For a discussion of the importance of the Eleventh Amendment to the federalist system of government, see William Thro, “Why You Cannot Sue State U: A Guide to Sovereign Immunity,” available at the National Association of College and University Attorneys publication Web site: <http://www.nacua.org/publications/spring2002.pdf>.)

**13.2.7. Trademark law.** A trademark, trade name, or service mark is a symbol of a product (or, in the cases of colleges and universities, of an institution) that identifies that product, service, or institution to the general public. Princeton University’s tiger, Yale’s bulldog, and Wisconsin’s badger are symbols of the institutions (and, of course, their athletic teams). Trademark law confers a property right on the user of the symbol. Any other entity that uses a similar mark—if that mark could confuse the general public (or the consumer) about the entity the mark represents or about the maker of the product symbolized by the mark or name—may be subject to legal action for trademark infringement.

Trademark is governed by federal, state, and common law. The Trademark Act of 1946 (known as the Lanham Act), 15 U.S.C. § 1051 *et seq.*, as amended, regulates the registration of trademarks and establishes the rights of the trademark holder and the remedies for infringement. Many states also have statutes similar to the Lanham Act, and the common law of unfair competition (discussed briefly in Section 13.2.8) is also used to challenge unauthorized use of trademarks.

The U.S. Department of Commerce’s Office of Patent and Trademark records all federal registrations of trademarks, including those that have expired or been abandoned or canceled. Registration provides constructive notice on a national level to all potential infringers that this mark belongs to another. It also allows the mark to become “incontestable” after five years of continuous use, which

confers the right to exclusive use of the trademark. Most state laws provide for registration of trademarks or service marks that are not used in interstate commerce, and thus would not qualify for Lanham Act protection.

Although the Lanham Act specifies how a trademark may be registered, and registration is generally recommended, it is not required in order to bring a trademark infringement action under the Lanham Act or state law. A federal cause of action for trademark infringement is created by 15 U.S.C. § 1114, which permits a cause of action when a mark is registered and an individual reproduces or copies it without the registrant's consent, and uses it in interstate commerce in connection with a sale, where such use is likely to cause confusion or mistake, or to deceive. The plaintiff must demonstrate that its use of the trademarked symbol preceded the use by the alleged infringer. The plaintiff typically seeks a preliminary injunction and temporary restraining order. Under similar state laws, the trademark holder may also state a cause of action for trademark dilution (the diminution in value of the "good will" attached to the trademark by unauthorized use and application to inferior products or services, or the blurring of the product's identity) or misappropriation (appropriation of another's time and/or economic investment and resulting injury to the trademark holder).

Remedies under both federal and state laws include injunctive relief and other equitable remedies, such as product recalls, destruction of the infringing materials, halting of advertising, or a requirement that the trademark infringer disclose the unauthorized trademark use in an advertisement. Monetary relief is available under federal law in the form of lost profits, royalties, or even treble damages. Attorney's fees are available in "exceptional cases" under Section 1117 of the Lanham Act. Punitive damages are not available under the Lanham Act, but may be available under some state laws.

Not all names or symbols may be registered with the U.S. Office of Patent and Trademark. The courts have developed four categories, in increasing degrees of protection:

1. Generic names, such as "aspirin," "tea" or "cola" cannot be a trademark.
2. Descriptive marks are protected only if they have a secondary meaning (such as Georgia Bulldog) and the public recognizes the mark as naming a specific product or entity.
3. Suggestive names, such as Coppertone and Sure, are protected if they suggest a characteristic of the product.
4. Distinctive names—fabricated words such as Exxon or words whose meaning has no direct connection to the product, such as Ivory soap or Apple computers—are protected [Robert Lattinville, "Logo Cops: The Law and Business of Collegiate Licensing," 5 *Kan. J.L. & Pub. Pol'y.* 81 (1996)].

Amendments to the Lanham Act by the Trademark Law Revision Act of 1988 resulted in extensive changes designed to bring U.S. trademark law closer to the



law of other industrialized nations. Current law now permits registration of a trademark before it is actually used, as long as the trademark owner demonstrates a bona fide intent to use the trademark and then uses the trademark within six months to two years after registration. The term of trademark registration was reduced from twenty to ten years (at which time it may be renewed), and various definitions in the law were clarified and conformed to judicial precedent. Significant requirements for registration are also included in the law, and counsel inexperienced in trademark practice should seek expert advice before embarking on registration of licensing of trademarks.

Another section of the Lanham Act may be of interest to administrators and counsel because it provides similar protection to trademark protection without requiring registration. Section 1125(a) of the Lanham Act provides that a person who uses in commerce “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact” that can cause confusion or mistake, or that may deceive, either with respect to its origin or its quality, may be liable to the injured party (15 U.S.C. § 1125(a)).

Section 1125(a) “evolved into something of a federal law of unfair competition, encompassing the infringement of unregistered marks, names, and trade dress” (R. S. Brown & R. C. Denicola, *Cases on Copyright: Unfair Competition and Related Topics* (5th ed., Foundation Press, 1990), at 531). Cases under Section 1125 are brought in federal court.

Trademark issues related to higher education typically involve an action by the college or university to prevent (or stop) an unrelated business or organization from using the name of the institution or a picture of its symbol. In order to avoid the appropriation of the institution’s name or symbol for the sale of unlicensed products, institutions develop a licensing program for the college’s symbols for clothing, souvenirs, and related items, for which the college receives a royalty.<sup>14</sup> Technically, these are “educational service marks” because the mark identifies a service—higher education—rather than a consumer product. Because the trademark laws provide protection to the trademark as a symbol of the product’s integrity, a licensor must monitor the quality of the goods to which the trademark is attached in order to protect its rights in the mark.

Given the popularity of intercollegiate sports, institutions have been required to initiate trademark infringement litigation for the unlawful appropriation of the name or the likeness of the institution’s symbol. For example, in *Board of Governors of the University of North Carolina v. Helpingstine*, 714 F. Supp. 167 (M.D.N.C. 1989), the university filed a trademark infringement action against the owner of a local T-shirt shop who had imprinted clothing with the name and symbols of the university. The university had created a licensing program in 1982, and had registered four trademarks with the U.S. Patent Office. Despite

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<sup>14</sup>For analysis of cases relating to trademark protection for symbols or logos, see Martin J. McMahon, Annot., “Design of Recreational Object as Valid Trademark,” 82 A.L.R. Fed. 9; and Marjorie A. Shields, Annot., “What Constitutes ‘Famous Mark’ for Purposes of Federal Trademark Dilution Act (15 U.S.C. §1125(c)) Which Provides Remedies for Dilution of Famous Marks,” 165 A.L.R. Fed. 625.

the university's offer to grant the owner of the T-shirt store a license to sell authorized products bearing the university's name and symbol, the owner had refused, and had sold unlicensed apparel since 1983. The defendant argued that the university had abandoned its right to its name and symbols because it had allowed uncontrolled use of them for many years prior to 1982. The court, in awarding summary judgment to the university, rejected the abandonment theory, ruling that the university had used its name and symbols continuously, and simply the fact that the university had not previously prosecuted trademark infringers did not mean that it had abandoned its rights to its name and symbol.

Similarly, in *University Book Store v. Board of Regents of the University of Wisconsin System*, 1994 TTAB LEXIS 8 (Trademark Trial and Appeal Board, 1994), the Trademark Trial and Appeal Board explained that the 1988 amendments changed the definition of "abandonment" of a trademark to state that abandonment only occurs when a mark loses its significance as a mark. The practical result of this amendment is to remove the requirement that some courts had imposed on applicants who seek to register a trademark that the applicants prove that they acted to oppose unauthorized use of the mark as soon as they were aware of that unauthorized use. As a result of this and similar cases (see, for example, *Board of Trustees of the University of Arkansas v. Professional Therapy Services*, 873 F. Supp. 1280 (W.D. Ark. 1995)), as well as the 1988 amendments, colleges are meeting with greater success in protecting their names, insignia, and other marks.

In *White v. Board of Regents of the University of Nebraska*, 614 N.W.2d 330 (Neb. 2000), the University of Nebraska found itself on the receiving end of a trademark infringement lawsuit brought by a local businessman, White, who had registered the trade name "Husker Authentics" and produced merchandise with the university's name and symbol. When the university attempted to register the same name with the state, its application was rejected because White had already registered it. The university opened a store selling "Husker Authentic" merchandise, and White filed an action in state court to enjoin the university from using the registered name. The supreme court affirmed the cancellation of White's registration, and ruled that the university had a common law right to the name "Husker Authentics" because it had been used on correspondence and in a merchandise catalog that the university had approved for marketing its logo clothing.

Licensing of the university's name and symbols is important for colleges and universities because it gives them control of the quality and identity of businesses that use these marks, and also serves as an important source of income for the institution. (For advice on creating and enforcing a licensing program, see Scott Bearby & Bruce Siegal, "From the Stadium Parking Lot to the Information Superhighway: How to Protect Your Trademarks from Infringement," 28 *J. Coll. & Univ. Law* 633 (2002).)

In addition to opposing the manufacture and sale of unlicensed merchandise, colleges and universities have also filed infringement proceedings against businesses that use the same or similar names. For example, in *The Pennsylvania State University v. University Orthopedics*, 706 A.2d 863 (Pa. Super. Ct. 1998),

Penn State University sought to enjoin University Orthopedics (UO), a medical practice unrelated to the university, from using “University” in its name. Penn State filed a federal trademark law claim, a state breach of contract claim, an unfair competition claim under common law, and a claim under Pennsylvania’s anti-dilution law.

Several years earlier, Penn State and UO had entered an agreement under which the university agreed not to sue UO for trademark infringement if UO promised to include a disclaimer in all its advertisements and literature that it was not affiliated with Penn State. Two years later, Penn State argued that UO was not including the disclaimer in many of its materials, and that the public confused the university’s own network of health care facilities with University Orthopedics, citing numerous examples of UO patients mistakenly calling the university health care centers. A trial court awarded summary judgment to UO, stating that the word “university” is a generic term, unprotected by trademark law.

The appellate court reversed and remanded the case for trial. Although the appellate court agreed with the trial court that “university” is a generic term, that determination was not the end of the analysis. A party may claim unfair competition because of the use of a generic name if “a company’s use of the competitor’s generic name confuses the public into mistakenly purchasing its product in the belief it is the product of the competitor.” UO’s occasional omission of the disclaimer from its materials, its practice of distributing advertisements at Penn State sporting events, and the patients’ confusion about the two organizations raised issues of material fact to be determined at trial. Furthermore, said the court, the university might be able to establish its other claims, given the evidence of consumer confusion and UO’s apparent breach of its earlier agreement with the university.

On the other hand, Columbia University was unable to persuade a federal trial court that “Columbia Healthcare Corporation” was either infringing on its trademark or diluting its value. In *Trustees of Columbia University v. Columbia/HCA Healthcare Corp.*, 964 F. Supp. 733 (S.D.N.Y. 1997), the court ruled that Columbia did not have exclusive use of its mark under federal trademark law because it had not registered that name in connection with medical or health care services. The court also rejected Columbia’s assertion that the use of its name for a health care provider would cause confusion. But in a case where the infringing user provided the same services as a university, the court enjoined the use of the university’s name. In *Temple University v. Tsokas*, 1989 U.S. Dist. LEXIS 19682 (E.D. Pa., September 11, 1989), the university argued that the dentist who used the name “Temple Dental Laboratories” created confusion with Temple’s own dental school. The court agreed, noting that the fact that the infringing business was located near the university campus also created confusion. The fact that businesses such as restaurants and jewelry stores also used the university’s name was not relevant, according to the court, because the university did not provide those services.

In *University of Florida v. KPB, Inc.*, 89 F.3d 773 (11th Cir. 1996), the court rejected the University of Florida’s trademark claims against a company that

provides “class notes” for university students. A-Plus Notes, a private corporation, hires students to attend lectures and take notes, and then markets those notes to students at the University of Florida. In its lawsuit against A-Plus notes, the university claimed that A-Plus’s use of the university’s course numbering system to market its “study guides” violated the Lanham Act because this use constituted false representation of the origin of the information and deceptive advertising. The federal district court awarded summary judgment to A-Plus on the Lanham Act claim, and the university appealed.

The appellate court examined the various types of unfair competition that the Lanham Act forbids. The law prohibits unfair trade practices that make false representations as to the origins or descriptions of certain products. In this case, the university was asserting that A-Plus’s use of the university’s course numbering system was deceptive and confused the purchasers as to the origin of the materials (in other words, the purchasers might believe that the “study guides” were produced by the university rather than by A-Plus). The university characterized its course numbering system as a service mark, which is a word or symbol used by a person (here, the university) to identify and distinguish a service that it provides (here, college courses). In order to satisfy the elements of a Lanham Act claim, said the court, the university had to prove that its service mark was distinctive, that it was primarily nonfunctional, and that the defendant’s service mark was confusingly similar. Since the “marks” that the university was attempting to protect were numbers, locations of classes, and the times that classes met, the court determined that this information was functional. The university, thus, could not establish all three elements of the claim, and the appellate court affirmed the district court’s summary judgment award for A-Plus.

The Internet has provided a fertile ground for trademark infringement, as individuals and companies have registered Internet addresses or domain names that use an institution’s name or symbol, and then have insisted that the institution purchase from the domain name holder the right to use the institution’s own name on the Internet. In order to prevent such “cybersquatting,” Congress passed the Anticybersquatting Consumer Protection Act (ACPA), Pub. L. No. 106-113, § 3002, 113 Stat. 1501, 1537 (1999), codified at 15 U.S.C. § 1125(d). The victim of such cybersquatting can file an action in federal court, alleging that the registration of the domain name was done in bad faith. There is no requirement that the plaintiff demonstrate that the cybersquatter has used the domain name in a way that infringes the plaintiff’s trademark. The law provides for civil liability if the defendant “has a bad faith intent to profit from that mark . . . [and] registers, traffics in, or uses a domain name that . . . is identical or confusingly similar” to the plaintiff’s registered mark. The defendant’s offer to sell the domain name to the owner of the trademark is one statutory factor that the court may use to determine bad faith. Plaintiffs may be awarded either actual damages or up to \$100,000 per domain name. (For a discussion of the use of ACPA by Harvard University to halt the use of the domain name “notHarvard.com” in one case, and the registration of sixty-five domain names including the words “Harvard” or “Radcliffe,” see Alayne E. Manas, “NOTE & COMMENT: Harvard as a Model in Trademark and Domain Name Protection,”

29 *Rutgers Computer & Tech. L.J.* 475 (2003). See also Aaron L. Melville, “New Cybersquatting Law Brings Mixed Reactions from Trademark Owners,” 6 *B.U. J. Sci. & Tech. L.* 13 (2000).)

The U.S. Supreme Court’s foray into the area of federalism versus states’ rights has reached trademark law. The Court invalidated a provision of the Trademark Remedy Clarification Act (TRCA), Pub. Law No. 102-542, 106 Stat. 3567 (1992), that amended Section 43(a) of the Lanham Act to provide that states could be sued under that law for using false descriptions or making false representations in commerce (15 U.S.C. § 1125(a)), and that also provided that Eleventh Amendment immunity defenses would not be effective (15 U.S.C. § 1122). The College Savings Bank, a private bank that marketed certificates of deposit to finance college tuition, sued the state of Florida for patent infringement when the state developed a very similar program (see Section 13.2.6 of this book). The bank also sued Florida for an infringement of its trademark under the Lanham Act, accusing the state of making misstatements about Florida’s tuition savings plan. The state argued that it had not waived sovereign immunity, and also that the TRCA was not a valid exercise of congressional authority to waive a state’s immunity from suit in federal court. The trial and appellate courts agreed with Florida, and the bank appealed to the Supreme Court.

In a 5-to-4 decision, whose majority opinion was written by Justice Scalia, the Supreme Court affirmed the rulings of the lower courts in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U. S. 666 (1999). The bank had argued that the TRCA had been enacted not only under the commerce clause (which, the Court had ruled earlier in *Seminole Tribe*, would not provide the basis for a valid abrogation of sovereign immunity; see Section 13.1.6), but also under Section 5 of the Fourteenth Amendment (which would provide a valid basis for abrogation). The Court rejected the Fourteenth Amendment argument, stating that the bank’s interests in this dispute were not property rights under the Fourteenth Amendment’s due process clause and, thus, Section 5 could not authorize the TRCA. Said the Court: “[T]he hallmark of a protected property interest is the right to exclude others” (527 U.S. at 673). The false advertising provisions of Section 43(a) of the Lanham Act were unrelated to any right to exclude. The Court distinguished trademark infringement actions from actions brought under Section 43(a), stating that, because a trademark was a property right, infringement could implicate constitutional issues, but false advertising claims did not. Nor had the state waived sovereign immunity by entering the prepaid college savings market.

The Court did not address whether states were protected against enforcement of other provisions of the Lanham Act by Eleventh Amendment immunity. The discussion of possible constitutional claims for trademark infringement is *dicta*, and is speculative rather than dispositive of the issue.

The key to protecting the institution’s trademarks and service marks is vigilance. The institution should assign at least one individual the responsibility to monitor the use of the institution’s name and symbols: on the Internet, on clothing and other merchandise, and in the local or regional community. License

agreements should be carefully drafted to require the institution's approval prior to the sale or distribution of merchandise using the institution's name or symbol. Preventing the unauthorized use of the trademark is critical to success in trademark infringement or unfair competition litigation. Records of the activities taken to protect the trademark are also critical to success in this arena. Registration does not ensure trademark protection—it is only the beginning of the process.

**13.2.8. Antitrust law.** There are three primary federal antitrust laws, each focusing on different types of anticompetitive conduct. The Sherman Act (15 U.S.C. § 1 *et seq.*), the basic antitrust statute, prohibits “every contract, combination . . . , or conspiracy, in restraint of trade or commerce.” The Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 12 *et seq.*), supplements the Sherman Act with special provisions on price discrimination, exclusive dealing arrangements, and mergers. The Federal Trade Commission (FTC) Act (15 U.S.C. § 41 *et seq.*), which is discussed separately in Section 13.2.9, prohibits “unfair methods of competition.” These three statutes are enforceable by federal agencies: the Sherman and Clayton Acts by the Antitrust Division of the U.S. Department of Justice; the Clayton Act and the FTC Act by the Federal Trade Commission. The Sherman and Clayton Acts may also be enforced directly by private parties, who may bring “treble-damage” suits against alleged violators in federal court; if victorious, such private plaintiffs will be awarded three times the actual damages the violation caused them. Postsecondary institutions, whose activities have been ruled to be in interstate commerce, are subject to these laws, and could thus find themselves defendants in antitrust suits brought by either government or private parties, as well as plaintiffs bringing their own treble-damage actions.

The constitutions of twenty states include antitrust provisions, and most states have statutes of general application that parallel, in most respects, the Sherman and Clayton Acts. Plaintiffs often combine state and federal claims in their federal court actions; the long history of common law remedies against monopolies and unfair business practices makes federal preemption of state antitrust laws unlikely. (For an analysis of state antitrust law, see *State Antitrust Practice and Statutes (Third)*, ABA Section on Antitrust Law (2004), available at <http://www.abanet.org>.)

The courts use three standards, in descending order of severity, to determine whether the actions of an organization (or group) violate the antitrust laws. *First*, the “*per se*” rule applies to activities, such as price fixing, bid rigging, group boycotts, or dividing markets in order to compete, that are examples of activities that are *per se* illegal under both federal and state antitrust laws. *Second*, the “rule of reason” examines all of the circumstances surrounding the allegedly anticompetitive act(s), using a balancing test to determine whether the benefits of the action outweigh the limitation to competition. For example, an allegedly anticompetitive action that provided significant benefits to students might enable a college to prevail under the rule of reason. And *third*, the “quick look” test evaluates restraints on competition in special markets, such as

educational services. In these cases, the defendant college must provide a “sound procompetitive justification” for the limitation on competition. This test is described further in *U.S. v. Brown University*, discussed below. (For a review of antitrust law’s applications to higher education, see Eliot G. Disner & Kenneth H. Abbe, “You Can’t Always Get What You Want: A Primer on Antitrust Traps for the Unwary,” National Association of College and University Attorneys Conference Outline (1999), available from <http://www.nacua.org>.)

In the past, it was thought that the antitrust laws had little, if any, application to colleges and universities. Being institutions whose mission was higher education, they were said to be engaged in the “liberal arts and learned professions” rather than in “trade or commerce” subject to antitrust liability (see generally *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 435–36 (1932)). Moreover, public institutions were considered immune from antitrust liability under the “state action” exemption developed in *Parker v. Brown*, 317 U.S. 341 (1943).<sup>15</sup> Postsecondary institutions, however, can no longer rest comfortably with this easy view of the law. Restrictions in the scope of both the “liberal arts and learned professions” exemption and the state action exemption have greatly increased the risk that particular institutions and institutional practices will be subjected to antitrust scrutiny.

The first chink in postsecondary education’s armor was made in *Marjorie Webster Junior College v. Middle States Assn. of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970), discussed in Section 14.3.2.1. Although the court in that case affirmed the applicability of the “liberal arts and learned professions” exemption, it made clear that antitrust laws could nevertheless be applied to the “commercial aspects” of higher education and that educational institutions and associations could be subjected to antitrust liability if they acted with “a commercial motive.” Then, in 1975, the U.S. Supreme Court went beyond the *Marjorie Webster* reasoning in establishing that “the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act” (*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)). The *Goldfarb* opinion refuted the existence of any blanket “learned professions” or (apparently) “liberal arts” exemption. The Court did caution, however, in its often-quoted footnote 17 (421 U.S. at 788–89, n.17), that the “public service aspect” or other unique aspects of particular professional activities may require that they “be treated differently” than typical business activities. Finally, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Supreme Court reaffirmed its rejection of a blanket “learned professions” exemption and emphasized that footnote 17 in *Goldfarb* should not be read as fashioning any broad new defense for professions. According to *Professional Engineers*, the learned professions (and presumably the liberal arts) cannot defend against antitrust claims by

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<sup>15</sup>This state action concept is a term of art with its own special meaning under the federal antitrust statutes and has no relation to the state action doctrine used in constitutional interpretation and discussed in Section 1.5.2. Cases and authorities are collected at John E. Theuman, Annot., “Applicability of ‘State Action’ Doctrine Granting Immunity from Federal Antitrust Laws for Activities of, or Directed by, State Governments—Supreme Court Cases,” 119 L. Ed. 2d 641.

relying on an ethical position “that competition itself is unreasonable.” And in *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150 (1983), the Court, in the special context of a Robinson-Patman Act price discrimination claim, held that the Act applies to a state university’s purchases “for the purpose of competing against private enterprise in the retail market” but assumed, without deciding, that the Act would not apply to the state university’s purchases “for consumption in traditional governmental functions.”

Another Supreme Court case expands postsecondary education’s exposure to antitrust liability in yet another way. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court held that nonprofit organizations may be held liable under the antitrust laws not only for the actions of their officers and employees but also for the actions of unpaid volunteers with apparent authority (see Section 3.1) to act for the organization. As applied to postsecondary education, this decision could apparently subject institutions to antitrust liability for anticompetitive acts of volunteer groups—such as alumni councils, booster clubs, recruitment committees, and student organizations—if these acts are carried out with apparent authority.

In response to several U.S. Supreme Court cases in the 1970s and 1980s that refused to extend the antitrust immunity enjoyed by states to municipalities, Congress passed the Local Government Antitrust Act of 1984, which is codified at 15 U.S.C. §§ 34–36. The law provides that no damages, interest on damages, costs, or attorney’s fees may be recovered under the Clayton Act “in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity” (15 U.S.C. § 36(a)). “Local government” is defined as “a city, county, parish, town, township, village, or any other general function governmental unit established by State law” as well as a school district (15 U.S.C. § 33(1)). As a result, community colleges that are agencies of municipal or county governments will share the same antitrust immunity as state-controlled institutions. Hospitals that are controlled by municipalities or counties (as well as hospitals that are part of state-controlled universities) would also be immune from antitrust liability for their “government functions,” but not when acting in a commercial context. This legislation could be important for an institution in its capacity as a landlord or if the institution entered a joint venture with a municipality to build a mixed-use project that included student housing.

Another area of antitrust immunity protects lobbying by higher education organizations and the institutions they represent. The U.S. Supreme Court ruled in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), that an attempt to influence the passage of laws or decisions of the executive branch of the government does not violate the Sherman Act, even if the purpose is anticompetitive and would otherwise violate the Sherman Act. The Court reasoned that where the restraint is the result of valid governmental action, as opposed to private action, those urging the government action enjoy absolute immunity (under the First Amendment) from antitrust liability.

Despite these limitations on antitrust liability, both public and private colleges may face antitrust liability in a variety of areas. Financial aid price fixing, the subject



of a case against the “Overlap Group,” is discussed below. Antitrust law has also been used to challenge a college’s campus housing policy (*Hack v. President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998); and *Hamilton Chapter of Alpha Delta Phi v. Hamilton College*, 128 F.3d 59 (2d Cir. 1997), discussed in Section 8.4.1), and the regulation of intercollegiate athletics (see Section 14.4.3). When the college acts as a purchaser or seller, it is acting in a commercial context and may face antitrust liability (see Section 15.3.3). The actions of accrediting associations have been attacked under antitrust law (see Section 14.3.2.4).

The most serious antitrust issue facing private higher education in recent years is the decision by the U.S. Department of Justice to investigate the practices of the “Overlap Group,” a loose confederation of twenty-three northeastern colleges that, since 1956, have met annually to compare financial aid offers made to applicants. The members of the group adjusted their financial aid awards to students accepted at more than one of the colleges in the Overlap Group so that the cost to the student was approximately the same, no matter which institution the student attended. In addition to the Justice Department’s investigation, a student from Wesleyan University initiated a class action antitrust lawsuit against the Ivy League members of the Overlap Group and two other institutions. The financial stakes were high in this case, for prevailing parties could be awarded treble damages. Eight Ivy League institutions entered a consent decree with the U.S. Department of Justice (*United States v. Brown University et al.*, Civil Action No. 91-CV-3274 (E.D. Pa., May 22, 1991)), in which they agreed to stop sharing financial aid information, but the Massachusetts Institute of Technology (MIT) refused to sign the consent decree and chose to defend the Justice Department’s antitrust action in court. In September 1992, a federal trial judge ruled that MIT’s participation in the Overlap Group violated federal antitrust law (*United States v. Brown University*, 805 F. Supp. 288 (E.D. Pa. 1992)). The judge conceded that some educational functions might be exempt from antitrust legislation, but he also held that any function that was “commercial in nature” was not exempt. To MIT’s argument that providing financial aid was “charitable,” rather than commercial, activity, the judge replied: “M.I.T.’s attempt to disassociate the Overlap process from the commercial aspects of higher education is pure sophistry. . . . The court can conceive of few aspects of higher education that are more commercial than the price charged to students” (805 F. Supp. at 289).

Although the judge believed that the Overlap process constituted price fixing *per se*, “in light of the Supreme Court’s repeated counsel against presumptive invalidation of restraints involving professional associations,” the judge evaluated the Overlap Group’s conduct under the rule of reason.<sup>16</sup>

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<sup>16</sup>Under the rule of reason, a court makes a factual determination of whether the restraint promotes competition through regulation or whether it suppresses competition. Relevant issues are the history of the restraint, the problem the restraint was designed to solve, the reason for selecting the remedy, and the purpose to be attained. See *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

No reasonable person could conclude that the Ivy Overlap Agreements did not suppress competition. . . . [T]he member schools created a horizontal restraint which interfered with the natural functioning of the marketplace by eliminating students' ability to consider price differences when choosing a school and by depriving students of the ability to receive financial incentives which competition between those schools may have generated. Indeed, the member institutions formed the Ivy Overlap Group for the very purpose of eliminating economic competition for students [805 F. Supp. at 302].

On appeal, the Third Circuit upheld the trial court's determination that tuition policies were not exempt from antitrust law, but it remanded the case for further consideration of the university's argument that the benefits of information sharing could be achieved only through the anticompetitive practices with which the Overlap Group was charged (*United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993)). The court, in a 2-to-1 opinion, explained:

We note the unfortunate fact that financial aid resources are limited even at the Ivy League schools. A trade-off may need to be made between providing some financial aid to a large number of the most needy students or allowing the free market to bestow the limited financial aid on the very few most talented who may not need financial aid to attain their academic goals. Under such circumstances, if this trade-off is proven to be worthy in terms of obtaining a more diverse student body (or other legitimate institutional goals), the limitation on the choices of the most talented students might not be so egregious as to trigger [an antitrust violation] [5 F.3d at 677].

In December 1993, MIT and the U.S. Department of Justice announced a settlement of the case. The settlement permits MIT, and the other colleges that are members of the Overlap Group, to share applicants' financial data, through a computer network, on the assets, income, number of family members, and other relevant information for individuals accepted at more than one college in the Overlap Group. Although the amount of financial aid offered to these students may not be shared, the settlement permits the group to develop general guidelines for calculating financial aid awards, and will permit auditors to report imbalances in awards to other institutions (W. Honan, "MIT Wins Right to Share Financial Aid Data in Antitrust Accord," *New York Times*, December 23, 1993, p. A13).

The outcome of *U.S. v. Brown University* stimulated an amendment to the Sherman Act in 1994. In the "Improving America's Schools Act of 1994," a statutory note was added to 15 U.S.C. § 1 that essentially codifies the settlement agreement. Entitled "Application of Antitrust Laws to Award of Need-Based Educational Aid," the note permits institutions of higher education to collaborate on financial aid award amounts, provided that they award such financial aid on a need-blind basis. The note originally expired in 1997; it was extended until 2001, and in that year, Congress passed the "Need-Based Educational Aid Act of 2001" (Pub. L. No. 107-72, 115 Stat. 648), which extends the exemption until September 30, 2008.

(For an analysis of the application of antitrust law to higher education, and a discussion of *U.S. v. Brown University*, see Jeffrey C. Sun & Philip T. K. Daniel, “The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be a Continued Exception for the Business of the University?” 25 *J. Coll. & Univ. Law* 451 (1999); and for a critique of the court opinions in *U.S. v. Brown University*, see Julie L. Seitz, Comment, “Consideration of Noneconomic Procompetitive Justifications in the MIT Antitrust Case,” 44 *Emory L.J.* 395 (1995). For other issues related to financial aid and tuition packages, see Section 8.3.)

The national system of computerized medical residency matching was challenged using antitrust and constitutional theories. The plaintiffs, a class of current and former medical residents, alleged that the national matching system, which places residents in medical school or hospital residency programs, violated the Sherman Act because it “displace[s] competition in the recruitment, hiring, employment, and compensation of resident physicians” and depresses compensation for residents by removing competition. Early in 2004, the trial court refused to dismiss certain of the claims (*Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119 (D.D.C. 2004)).

In response, Congress enacted, as part of the Pension Funding Equity Act of 2004 (Pub. L. No. 108-218, 118 Stat. 596 (2004)), a provision exempting medical residency matching programs from antitrust liability. The provision, “Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs,” codified as 15 U.S.C. § 37b, states that: “It shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program.” Furthermore, the law makes evidence of any such conduct inadmissible in federal court to support any antitrust claim, and makes the amendment retroactive, applying to any cases or claims pending on the date of its enactment (April 10, 2004). However, the amendment makes it clear that “any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs” is not protected by this exemption.

The plaintiffs in the *Jung* case returned to court, arguing that the new legislation violated their constitutional rights to due process, equal protection, and access to courts. The court, in a second opinion, 339 F. Supp. 2d 26 (D.D.C. 2004), ruled that the new legislation did not create a due process violation, and that Congress’s purpose in enacting the legislation was a rational use of its power, so the access to courts claims failed as well. And because medical residents were not a suspect class for constitutional purposes, the plaintiffs’ equal protection claims were dismissed.

Universities with hospitals also face antitrust claims, but those in the public sector may be protected from antitrust liability by Eleventh Amendment sovereign immunity (see Section 13.1.6). In *Neo Gen Screening, Inc. v. University of Massachusetts*, 187 F.3d 24 (1st Cir. 1999), a federal appellate court affirmed the dismissal of an antitrust case against the university and its medical center by a private entity that performed testing on newborn babies. The court upheld the

district court's ruling that the university, in conducting the screening program, was acting as an "agency or arm" of the state and was therefore covered by the Eleventh Amendment. Furthermore, said the court, because the state Department of Public Health had contracted with the university medical center to conduct the testing, the university shared the state's immunity from antitrust liability because it was engaging in state action.

Similarly, in *Daniel v. American Board of Emergency Medicine, et al.*, 988 F. Supp. 127 (W.D.N.Y. 1996), a federal trial judge dismissed antitrust claims against several hospitals affiliated with public universities, including the University of California at Los Angeles and Irvine, the University of Massachusetts, and the University of Arizona, but denied motions to dismiss by some hospitals affiliated with private colleges, such as Johns Hopkins Hospital and Loma Linda University Medical Center. The plaintiffs were challenging a change in the American Board of Emergency Medicine's (ABEM) policy that would no longer permit an alternate route to certification as an emergency room physician, claiming that previously certified emergency doctors and the ABEM were conspiring to limit entry into the profession. The hospitals affiliated with public entities claimed they were immune from suit, while the private hospitals claimed that the court lacked personal jurisdiction over them. Regarding the former hospitals, the court noted that, because they were affiliated with public universities, and because public higher education is a purpose of state government for each of the states sponsoring these hospitals, the hospitals were protected by the state's Eleventh Amendment immunity. Alternatively, said the court, these public hospitals were engaging in state action and, for that reason, were immune from liability under the federal antitrust laws. In addition, two hospitals owned by municipalities were found to be immune under the Local Government Antitrust Act. But the court rejected the jurisdictional defense of the hospitals affiliated with private universities, finding that the defendants that were domestic corporations were subject to personal jurisdiction under Section 12 of the Clayton Act.

Universities with hospitals may also face antitrust liability when peer review committees determine which doctors and other health care professionals may have hospital practice privileges. This is a complicated area of the law, and counsel to institutions with hospitals may wish to consult *Antitrust Health Care Handbook* (3d ed., American Bar Association, Section on Antitrust Law, 2004).

As a result of these various developments, administrators and counsel should accord antitrust considerations an important place in their legal planning.<sup>17</sup> At the same time they plan to avoid antitrust liability, administrators and counsel should also consider the protections that antitrust law may provide them against the anticompetitive acts of others. In *NCAA v. Board of Regents of the University*

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<sup>17</sup>In one situation, nonprofit postsecondary institutions are still, by express statutory provision, excluded from antitrust liability for alleged price discrimination: "Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" (15 U.S.C. § 13c) (see this book, Section 15.3.3). See also Section 13.2.9 regarding the limited application of the Federal Trade Commission Act to postsecondary institutions.

of *Oklahoma*, 468 U.S. 85 (1984) (discussed in Section 14.4.4), for instance, two institutions used the antitrust laws to secure the right to negotiate their own deals for television broadcasting of their sports events. Antitrust law, then, has two sides to its coin; while one side may restrain the institution's policy choices, the other side may free it from restraints imposed by others.

**13.2.9. Federal Trade Commission Act.** The Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) prohibits covered entities from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce” (§ 45(a)(1)). The Act defines the entities it covers as “any company, trust, . . . or association, incorporated or unincorporated, which is organized to carry on business for its own profit or for that of its members” (15 U.S.C. § 44). This language clearly covers proprietary postsecondary institutions, thus subjecting them to the Act's prohibitions. Public institutions, on the other hand, are not covered. Nor, in most situations, could private nonprofit institutions be covered. In a leading precedent regarding nonprofit entities, *Community Blood Bank of Kansas City Area v. FTC*, 405 F.2d 1011 (8th Cir. 1969), the court refused to subject a blood bank to FTC jurisdiction, reasoning in part that the organization was “not organized for the profit of members or shareholders [and] [a]ny profit realized in [its] operations is devoted exclusively to the charitable purposes of the corporation.”

The Supreme Court has held, however, that the Act's definition of covered entities is broad enough to include a nonprofit entity if it is engaging in activities designed to benefit other, profit-making, entities economically. In *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999), the Court held that, because the dental association “provided substantial economic benefits to its for-profit members,” it was subject to the Act. And in the *Community Blood Bank* case, above, the court suggested that “trade associations” organized for the “pecuniary profits” of their members would be a classic example of nonprofit entities covered by the Act. Although the principles of these cases would usually not apply to private, nonprofit postsecondary institutions, an institution's activities could apparently come within these principles if the institution entered into a profit-making business venture with another entity. A real estate syndicate, for example, or a research joint venture with industry might fall within the Act's definition, thus subjecting the institution's activities within that relationship to FTC jurisdiction.

The FTC's primary activity regarding proprietary postsecondary institutions has been its attempts to regulate certain practices of proprietary vocational and home-study schools. In 1998, the FTC issued “Guides for Private Vocational and Distance Education Schools” (16 C.F.R. Part 254), covering programs of instruction that “purport [ ] to prepare or qualify individuals for employment in any occupation or trade, or in work requiring mechanical, technical, artistic, business, or clerical skills, or that is for the purpose of enabling a person to improve his appearance, social aptitude, personality, or other attributes” (§ 254.0(a)). Excluded, however, are “institutions of higher education offering

at least a 2-year program of accredited college level studies generally acceptable for credit toward a bachelor's degree."

Proprietary schools have been faced with another potential source of problems under the FTC Act. In some cases proprietary schools have recruited students, assisted them in obtaining federally guaranteed student loans, and then declared bankruptcy, leaving the students without an education but with a loan to repay. In several of these cases, the proprietary schools have had close relationships with one or more banks that provide federally guaranteed student loans to the proprietary schools' students. The FTC's "Holder Rule" allows the purchaser or borrower to hold a related lender responsible for the seller's misconduct (16 C.F.R. § 433.2(d)) and requires that such language appear in the loan document. Two federal courts have ruled that the Holder Rule does not provide a federal remedy for recipients of federally guaranteed student loans (*Jackson v. Culinary School of Washington*, 788 F. Supp. 1233 (D.D.C. 1992), *affirmed on other grounds*, 27 F.3d 573 (D.C. Cir. 1994);<sup>18</sup> *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990)). However, the FTC has issued a letter stating that the rule does apply (J. DeParle, "Indebted Students Gain in Battle on Fraudulent Trade Schools," *New York Times*, August 4, 1991, at p. 32). If the Holder Rule does apply and the required language is not in loan documents, students whose loans have been obtained through the now defunct proprietary school may be able to avoid repaying the loan. (For discussion of these issues, see C. Mansfield, "The Federal Trade Commission Holder Rule and Its Applicability to Student Loans—Reallocating the Risk of Proprietary School Failure," 26 *Wake Forest L. Rev.* 635 (1991). And for an argument that the Department of Education should increase its monitoring of the practices of proprietary schools, see Patrick F. Linehan, Note, "Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations," 89 *Georgetown L.J.* 753 (2001).)

Congress has reversed an interpretation by the FTC of the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 *et seq.*) that had required employers using third parties to conduct investigations of employee misconduct to comply with the FCRA's requirements for disclosing information to the "consumer" (the subject of the investigation) (see Section 4.8). In the "Fair and Accurate Credit Transactions Act of 2003," Pub. L. No. 108-159, 117 Stat. 1953 (2003), Congress amended the earlier definition of "consumer report" to exclude such investigatory reports, provided that the report is disclosed only to the employer or relevant government officials, and that if adverse action is taken against the employee as a result of the report, the employer must give a summary of the report to the employee (15 U.S.C. § 1681a(x)).

**13.2.10. Environmental laws.** A complex web of federal and state laws regulates landowners and disposers of waste that may pollute water, soil, or

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<sup>18</sup>The U.S. Supreme Court (515 U.S. 1139 (1995)) vacated and remanded the case to the appellate court, ordering it to reconsider its ruling in light of *Wilton v. Seven Falls Company*, 515 U.S. 277 (1995), a case involving the propriety of federal courts entertaining actions for declaratory judgment when a parallel state proceeding was under way. The appellate court, at 59 F.3d 254, remanded the case to the trial court. There were no further proceedings.

air. Institutions of higher education fall into both of these categories and thus are subject to the strict regulation and the heavy civil and criminal penalties provided by these laws.<sup>19</sup> Although most environmental laws have been in effect for twenty-five years or more, enforcement activities against colleges and universities have escalated in recent years, and many institutions have been fined for violations ranging from storage of laboratory chemicals to disposing of certain toxic materials without a permit.<sup>20</sup> Compliance with environmental laws is particularly difficult for colleges and universities because the sites at which regulated materials are located or activities using such materials take place are typically spread throughout the campus (science laboratories, maintenance storage areas, hospitals, art rooms, campus heating plants, and so forth). Furthermore, a wide array of individuals, including students, laboratory staff, faculty, maintenance workers, and even patients may be involved with the handling and disposal of materials that are regulated under these laws.

Most of the federal environmental protection laws are enforced by the Environmental Protection Agency (EPA). The two laws of major importance to institutions of higher education are the Resource Conservation and Recovery Act of 1976 (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as the Superfund Law). The Toxic Substances Control Act (TSCA) is also important to most colleges and universities, and most must also comply with the Clean Air Act and the Clean Water Act. The handling, storage, and disposal of radioactive materials are regulated by the Nuclear Regulatory Commission; the Occupational Safety and Health Administration (OSHA) regulates the communication of information about hazardous substances to workers (see Section 4.6.1, this book). The Emergency Planning and Community Right-to-Know Act (EPCRA, 42 U.S.C. §§ 11001–11050, also known as Title III of the Superfund Amendments and Reauthorization Act (SARA)) requires institutions to disclose all chemicals that they use or store. Other laws regulate the use and disposal of asbestos, PCBs (polychlorinated biphenyls), lead paint, and other potentially harmful substances.

The Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. § 6901 *et seq.*) regulates the generation, transportation, storage, and disposal of

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<sup>19</sup>Pertinent summaries of case law on environmental regulation include John F. Wagner, Jr., Annot., “Validity and Construction of § 106(a) and (b)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9606(a) and (b)(1)), Authorizing Equitable Abatement Actions and Administrative Orders and Prescribing Fines for Noncompliance with Such Orders,” 87 A.L.R. Fed. 217; Annot., “Governmental Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 *et seq.*),” 70 A.L.R. Fed. 329; and Carol A. Crocca, Annot., “Liability Insurance Coverage for Violations of Antipollution Laws,” 87 A.L.R.4th 444.

<sup>20</sup>See, for example, Jeffrey Brainard, “Kent State U. Agrees to Settlement for Smokestack Violations,” *Chron. Higher Educ.*, May 7, 2003, available at <http://chronicle.com/daily/2003/05/200305073n.htm>. See also Jeffrey Selingo, “Long Island U. Settles with EPA over Hazardous Waste,” *Chron. Higher Educ.*, June 18, 2004, available at <http://chronicle.com/weekly/v50/i41/41a02301.htm>.

hazardous waste.<sup>21</sup> The law defines which “hazardous waste” is regulated, and excludes some substances, such as household products and specified industrial wastes. The law covers products intended to be recycled as well as those that are discarded, and specifies record-keeping requirements for tracking the waste from the time it is obtained until the time it is discarded. Generators, transporters, and owners of storage and disposal sites are covered by RCRA. Penalties include administrative compliance orders and revocation of RCRA permits; civil penalties of up to \$25,000 per day per violation and criminal penalties of two to five years’ imprisonment and fines of up to \$50,000 per day per violation; and, for “knowing endangerment,” imprisonment of up to fifteen years and fines of up to \$250,000 for individuals and \$1 million for corporations (42 U.S.C. § 6928). Under RCRA, improper disposal of a hazardous substance by an employee or a student could result in criminal penalties.

Other federal environmental laws, such as CERCLA and the Clean Water and Clean Air Acts, contain similar civil and criminal penalties. Furthermore, federal judges are interpreting the laws’ *scienter* (knowledge) requirements for individual liability to permit juries to infer that a corporate officer, depending on his or her position in the organization, would know about the violation. (For a discussion of these issues, see R. Marzulla & B. Kappel, “Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s,” 16 *Columbia J. Env’tl. L.* 201 (1991).) Most insurers do not include coverage for toxic waste cleanup or liability in their directors’ and officers’ policies, potentially leaving corporations and their officers and directors personally liable. (See Comment, “Whistling Past the Waste Site: Directors’ and Officers’ Personal Liability for Environmental Decisions and the Role of Liability Insurance Coverage,” 140 *U. Pa. L. Rev.* 241 (1991), which, among other issues, discusses retroactive liability of officers and directors for disposal that was not unlawful prior to CERCLA.)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 U.S.C. § 9601 *et seq.*) and its amendments (Superfund Amendments and Reauthorization Act) govern the cleanup of hazardous waste sites. Under CERCLA, the generator of toxic material, the transporter of the material, and the owner of the dump site have joint and several liability for cleanup costs. Institutions face potential liability under CERCLA when property that they own is contaminated, whether or not the institution generated the hazardous waste or even knew that it was on the site. They may also share the legal responsibility with others for cleanup of a contaminated site if they generated any of the waste that was dumped at the site.<sup>22</sup> The only way that a property owner may be able to avoid CERCLA liability is by establishing a “due

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<sup>21</sup>Cases and authorities are collected in William B. Johnson, Annot., “Liability Under § 7003 of Resource Conservation and Recovery Act (RCRA) (42 U.S.C.S. § 6973) Pertaining to Imminent Danger from Solid or Hazardous Waste,” 115 A.L.R. Fed. 491.

<sup>22</sup>For an example of a concerted response by approximately one hundred colleges and universities involved in the Maxey Flats (Ky.) Superfund cleanup, see “Maxey Flats Superfund Proceeding Settled,” 77 *Educ. Record* 53 (1996).



diligence” defense: that it did not know, nor did it have reason to know, that the property was contaminated. To establish this defense, the purchaser of property must demonstrate that an investigation was made to determine whether the property was contaminated, and possibly that extensive testing was conducted. Such precautions are particularly important in cases where the property was formerly an industrial site. (For an overview of this subject, see P. Marcotte, “Toxic Blackacre: Unprecedented Liability for Landowners,” *A.B.A. J.*, November 1, 1987, 67–70.)

CERCLA contains provisions for actions against “potentially responsible parties” to recover cleanup costs, even if the cleanup is not mandated by a government agency (42 U.S.C. § 9607(a)(B)). Thus, institutions of higher education could take advantage of this provision if they purchase contaminated property, or they could be liable for contamination of property they no longer own, even if they did not cause the contamination. (For a general overview of CERCLA and RCRA, see John S. Applegate, *Environmental Law—RCRA and CERCLA: The Management of Hazardous Waste* (West, 2004).)

Other federal laws that regulate the actions of most colleges and universities include the Clean Air Act (42 U.S.C. § 7401 *et seq.*, and § 7551 *et seq.*), which regulates emissions of substances into the air. Emission sites on campuses may include laboratories, boilers, incinerators, and print shops. The Clean Water Act (33 U.S.C. § 1251 *et seq.*) prohibits the discharge of any pollutant into navigable waters, unless the EPA has issued a permit for such discharge. The law also prohibits the discharge of pollutants into storm sewers through such actions as landscape irrigation, air conditioning condensation, lawn watering, or swimming pool discharge. This law also regulates the treatment of wetlands. The Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*) regulates the use and disposal of “chemical substances which present an unreasonable risk of injury to health or the environment” (§ 2601(b)(2)), including PCBs and asbestos; it also imposes record-keeping and labeling requirements. Underground storage tanks and the land-based disposal of certain hazardous substances are regulated by the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. § 6924 *et seq.*).

Most of the federal environmental laws allow individuals to bring claims against anyone alleged to be violating these laws, as well as against the Administrator of the EPA for failure to enforce these laws (see, for example, the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. § 1365; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 7002; and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659). For example, in *Adair v. Troy State University of Montgomery*, 892 F. Supp. 1401 (M.D. Ala. 1995), workers engaged in renovating a building at the university alleged that asbestos was released during the renovation in violation of the Clean Air Act. The Act specifically provides that “any person” may bring a cause of action against anyone alleged to have violated the emission standards of the Act (42 U.S.C. § 7604a). The court ruled that the sixty-day notice provision in the law (42 U.S.C. § 7604(b)) did not apply in this case because the violation had already occurred. The court ruled that the

plaintiffs could sue for past violations of the Act if the plaintiff could demonstrate that the violations were repeated.

Public institutions, however, may be able to avoid liability from litigation under the federal environmental laws by employees. In *Rhode Island Department of Environmental Management v. United States*, 304 F.3d 31 (1st Cir. 2002), three employees of the Rhode Island Department of Environmental Management, a state agency, sued their employer under the “whistleblower” provision of the Solid Waste Disposal Act (SWDA) (42 U.S.C. § 6971(a)), alleging that they had been retaliated against after reporting what they believed were violations of the SWDA. The SWDA provides that any individual who believes he or she has been retaliated against for complaining of actions made unlawful under the Act may request a review of the adverse employment action by the Secretary of Labor (29 C.F.R. Part 24). A similar administrative review provision is included in several other environmental statutes (see 15 U.S.C. § 2622 (Toxic Substances Control Act); 33 U.S.C. § 1367 (Water Pollution Control Act); 42 U.S.C. § 300j-9 (Safe Drinking Water Act); 42 U.S.C. § 5851 (Energy Reorganization Act); 42 U.S.C. § 7622 (Clean Air Act); and 42 U.S.C. § 9610 (Comprehensive Environmental Response, Compensation, and Liability Act). The court ruled that nothing in the SWDA abrogated the state’s sovereign immunity (see Section 13.1.6, this book), but that if the Secretary of Labor intervened in the proceeding, then sovereign immunity would not protect the state defendant.

Many states have passed environmental laws that are even more restrictive than federal law. Administrators and counsel should secure expert advice on compliance with both sets of laws, particularly in situations where the laws differ or cannot be complied with simultaneously.

Faced with the myriad laws and the severe penalties they carry, colleges and universities should consider, if they have not already done so, adding one or more individuals with expertise in environmental regulation to their administrative staff. Training for students, staff, and faculty who work with substances regulated by these laws must be conducted in order to make these users aware of regulatory requirements and the potential for institutional and individual liability. Institutional counsel should consider the wisdom of an environmental compliance audit, both to ascertain the institution’s compliance with these laws and to demonstrate the institution’s good faith should a violation be alleged. (For guidance on conducting such audits, see J. Moorman & L. Kirsch, “Environmental Compliance Assessments: Why Do Them, How to Do Them, and How Not to Do Them,” 26 *Wake Forest L. Rev.* 97 (1991), as well as M. E. Kris & G. L. Vannelli, “Today’s Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit,” 16 *Columbia J. Envntl. L.* 227 (1991).)

The Web site of the EPA contains important information on the laws and compliance issues. In addition, the EPA has created a “Colleges and Universities Sector Partnership,” which is described at <http://www.epa.gov/sectors/colleges/index.html>. The partnership is developing “outreach tools, training resources, and support” to assist colleges in managing compliance with environmental laws. The American Council on Education and the National

Association of College and University Business Officers, among other organizations, are working with the EPA. (For additional information and links to additional resources, see Sheldon E. Steinbach, “Why Your College May Run Afoul of Environmental Laws, and What to Do Next,” *Chron. Higher Educ.*, June 25, 2004, available at <http://chronicle.com/weekly/v50/i42/42b01402.htm>. See also the resources included in the Selected Annotated Bibliography.)

**13.2.11. Americans with Disabilities Act.** The Americans With Disabilities Act of 1990 (ADA) (Pub. L. No. 101-336, codified at 42 U.S.C. § 12101 *et seq.*) provides broad protections for individuals with disabilities in five areas: employment (see Section 5.2.5), public accommodations (see Section 8.2.4.3, this book), state and local government services, transportation, and telecommunications. Similar in intent to Section 504 of the Rehabilitation Act (see Section 13.5.4), the ADA provides broader protection, since a larger number of entities are subject to it (they need not be recipients of federal funds) and a larger number of activities are encompassed by it.<sup>23</sup>

The law protects an “individual with a disability.” “Disability” is defined as “a physical or mental impairment that substantially limits one or more major life activities” of the individual; “a record of such impairment; or being regarded as having such impairment” (42 U.S.C. § 12102). This definition, while covering current disabilities, also would prohibit discrimination against an individual based on a past disability that no longer exists, or a perceived disability that does not, in fact, exist. The definition of “impairment” includes contagious diseases, learning disabilities, HIV (whether symptomatic or asymptomatic), drug addiction, and alcoholism (36 C.F.R. § 104), although the employment provisions exclude current abusers of controlled substances from the law’s protections.

Title I of the ADA covers employment, and is discussed in Section 5.2.5. Title II requires nondiscrimination on the part of state and local government, a category that specifically includes state colleges and universities. Title II provides that “no qualified individual with a disability shall, by reason of such disability[,] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity” (42 U.S.C. § 12132). For purposes of Title II, an individual with a disability is “qualified” when “with or without reasonable modification to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, [the individual] meets the essential eligibility requirements for the receipt of services or his participation in programs or activities provided by a public entity” (42 U.S.C. § 12131). Title II also incorporates the provisions of Titles I and III (public accommodations), making them applicable to public institutions.

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<sup>23</sup>Cases and authorities are collected at Ann K. Wooster, Annot., “When Does a Public Entity Discriminate Against Disabled Individuals in Provision of Services, Programs, or Activities Under the Americans With Disabilities Act, 42 U.S.C.A. § 12132,” 163 A.L.R. Fed. 339; and John A. Bourdeau, Annot., “Validity, Construction, and Application of § 302 of Americans With Disabilities Act (42 U.S.C.A. § 12182), Prohibiting Discrimination on Basis of Disability by Owners or Operators of Places of Public Accommodation,” 136 A.L.R. Fed. 1.

The U.S. Department of Justice has the responsibility for providing technical assistance for, and for enforcing, Titles II and III of the ADA. Regulations interpreting Title II appear at 28 C.F.R. Part 35.

Title III extends the nondiscrimination provisions to places of public accommodation, whose definition includes colleges and universities, whether public or private, if they “affect commerce” (42 U.S.C. § 12181). Title III focuses on ten areas of institutional activity:

1. Eligibility criteria for the services provided by colleges and universities (28 C.F.R. §36.301).
2. Modifications in policies, practices, or procedures (such as rules and regulations for parking or the policies of libraries) (28 C.F.R. § 36.302).
3. Auxiliary aids and services (such as interpreters or assistive technology) (28 C.F.R. § 36.303).
4. Removal of architectural barriers (28 C.F.R. § 36.304).
5. Alternatives to barrier removal (if removal is not readily achievable) (28 C.F.R. § 36.305).
6. Personal devices and services, which the law does not require the public accommodation to provide (28 C.F.R. § 36.306).
7. Conditions under which the public accommodation must provide accessible or special goods upon request (28 C.F.R. § 36.307).
8. Accessible seating in assembly areas (28 C.F.R. § 36.308).
9. Accessibility to and alternatives for examinations and courses that reflect the individual’s ability rather than the individual’s impairment (28 C.F.R. § 36.309).
10. Accessible transportation (28 C.F.R. § 36.310).

Title III imposes a wide range of requirements on colleges and universities, from admissions policies to residence hall and classroom accessibility to the actions of individual faculty (who may, for instance, be required to modify examinations or to use special technology in the classroom). Issues involving the admission or accommodation of students are discussed in this book in Sections 8.2.4.3 and 9.3.5, respectively. The regulations also affect the college’s planning for public performances, such as plays, concerts, or athletic events, and provide detailed guidelines for making buildings accessible during their renovation or construction. The implications of the ADA for a college’s responsibility to provide auxiliary aids and services is discussed in Section 8.7. Public telephones must also be made accessible to individuals with disabilities, including those with hearing impairments. (For an overview of some of the implications of the ADA for institutions of higher education, see F. Thrasher, “The Impact of Titles II and III of the Americans With Disabilities Act of 1990 on Academic and Student Services at Colleges, Universities, and Proprietary Schools,” 22 *Coll. L. Dig.* 257 (June 18, 1992).)

The Supreme Court's activity in enlarging the arena of state sovereign immunity has included attention to the ADA. In *Board of Trustees of University of Alabama v. Garrett*, discussed in Section 5.2.5 of this book, the Supreme Court ruled that Congress had not abrogated the immunity of states under Title I of the ADA, and thus state agencies could not be sued in federal court for money damages for alleged employment discrimination. The Court's *Garrett* ruling has been applied to claims against public universities brought under Title II of the Act (see, for example, *Robinson v. University of Akron School of Law*, 307 F.3d 409 (6th Cir. 2002)). The Court, however, refused to apply the reasoning of *Garrett* to a case brought under Title II of the ADA by a disabled individual with paraplegia who was unable to gain physical access to a courthouse. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court reviewed the legislative history of the ADA, noting the "pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights" (541 U.S. at 524). Because the plaintiff had framed the ADA violation as an infringement on his constitutional access to the courts, the Supreme Court ruled that Title II, "as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment." The narrow basis upon which the Court decided this case does not answer the question of whether Congress validly abrogated state sovereign immunity in Titles II or III under circumstances not involving access to courts.

In *Barnes v. Gorman*, 536 U.S. 181 (2002), the high Court ruled that courts may not award punitive damages in private suits brought under Section 202 of the ADA and Section 504 of the Rehabilitation Act. Although the Court acknowledged that Title II of the ADA could be enforced through a private cause of action, it ruled that Title II's remedies are "coextensive" with those of Title VI of the Civil Rights Act of 1964 (discussed in this book, Section 13.5.2). Because punitive damages are not available in private causes of action brought under Title VI, said the court, they are similarly unavailable under Title II of the ADA.

The case involving the Professional Golfers Association (PGA) and Casey Martin may be of interest to athletics administrators because of its language concerning the scope of the reasonable accommodation requirement. In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the plaintiff, Casey Martin, met the eligibility criteria for playing professional golf on PGA events. Because he had a documented disability that made walking the golf course very difficult, he asked for permission to use a motorized golf cart during tournaments, although tournament rules required participants to walk the course. The PGA denied his request. Martin sued the PGA, and the Supreme Court ruled that PGA tournaments were a "public accommodation" because Section 12181 of the ADA specifically included golf courses as public accommodations. Because the tour was subject to the ADA, the Court addressed the issue of whether allowing a player to use a motorized cart would be an undue hardship for the tour. Under Rehabilitation Act and ADA jurisprudence, an accommodation is an undue hardship if it fundamentally alters the nature of the program or activity (see this book, Section 9.3.5.4). The Court found that allowing Martin the use of a golf cart

would not fundamentally alter the nature of the tournament because it did not give a disabled player any advantage over players without disabilities, nor did it alter the nature of the game itself.

A final rule to implement both the ADA and the Architectural Barriers Act (42 U.S.C. § 4151 *et seq.*) has been published. The “ADA Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Guidelines” were published at 69 Fed. Reg. No. 141 (July 23, 2004), and are codified at 36 C.F.R. Parts 1190 and 1191.

### ***13.2.12. Laws regulating computer network communications***

**13.2.12.1. Overview.** Under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (110 Stat. 56), the federal government is the primary regulator of radio, television, and telephone communications. As new communication technologies have evolved, the federal government has also included them within its regulatory reach. The newest focus of regulatory activity and legal and policy concerns is computer technology and the Internet.<sup>24</sup>

As the subsections below indicate, the applications of federal laws to computer networks are expanding rapidly, and the laws are complex and technical. These developments carry multiple messages for higher educational administrators and counsel. *First*, administrators and counsel should be vigilant in ascertaining when the First Amendment (or other constitutional rights) may protect the institution or its faculty members, staff, or students from excesses of government regulation. *Second* (assuming valid statutes), administrators and counsel should be sensitive to the increased risks of liability that federal statutes may present for the institution and the members of its campus community when third parties claim harm resulting from the use of the institution’s computer networks. *Third*, administrators and counsel should assure that their institution has well-drafted computer use policies that comply with federal (and state) law, that fill in gaps not covered by federal (or state) law, and—equally important—that clearly specify the rights and responsibilities of computer users as determined by campus policy makers (see also Section 8.5.2 of this book). *Fourth*, administrators and counsel should consider the role that *external* federal (and state) law enforcement agencies should play in the institution’s own strategies for dealing with computer misuse. Most institutions, of course, will have their own internal computer policies and other regulations—for example, student disciplinary codes—that can be used to combat computer misuse. But when the misuse may be a crime, institutional interests regarding computer abuse may sometimes be better served by seeking the assistance of external law enforcement authorities in addition to or in lieu of processing the matter internally. (The strategy and policy issues here are similar to those the institution faces when it confronts problems such as drug abuse or sexual assaults.)

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<sup>24</sup>State governments have also initiated various attempts to regulate computer technology and the Internet. For examples of such legislation and resultant judicial challenges, see Section 7.3 (the *Urofsky* case from Virginia), Section 8.5.1 (the *Miller* case from Georgia), and Section 12.4 (the *American Libraries Association* case from New York; and see also Amy Keane, Annot., “Validity of State Statutes and Administrative Regulations Regulating Internet Communications Under the Commerce Clause and the First Amendment of the Federal Constitution,” 98 A.L.R. 5th 167.

**13.2.12.2. Computer statutes.** The first major federal legislation regarding computers was enacted in 1986. In that year, Congress passed the Computer Fraud and Abuse Act of 1986 (18 U.S.C. § 1030) and the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510 *et seq.* & § 2701 *et seq.*). The former act, substantially amended in 1996 (Pub. L. No. 104-294, §§ 201 & 204), is a computer crime statute. It prohibits various types of unauthorized access to “protected computer(s)” (computers used by or for government or a “financial institution,” or computers used in interstate or foreign commerce), and also prohibits unauthorized communication of various types of information obtained through unauthorized access to a computer. (See Scott Charney & Kent Alexander, “Computer Crime,” 45 *Emory L.J.* 931, 950–53 (1996).) The unauthorized access provisions of the Computer Fraud and Abuse Act (specifically 18 U.S.C. § 1030(a)(5)(A)) were the basis for the prosecution of Robert Morris, the Cornell University graduate student in computer science who, in 1988, experimentally introduced a “worm” into the Internet that caused various computers at educational institutions and military installations to crash. Morris’s conviction was upheld in *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991). The Act was further amended in 2001 by the USA PATRIOT Act (Pub. L. No. 107-56, 115 Stat. 272) (see below in this subsection) to criminalize knowing transmission of malicious code, such as a virus, over a computer network (18 U.S.C. § 1030(a)(5)(A)(i)) and unauthorized access to a protected network (18 U.S.C. § 1030(a)(5)(A)(ii)–(iii)).

The latter act, the Electronic Communications Privacy Act (ECPA), creates limited privacy rights for computer users. Title I of the ECPA generally prohibits interception of communications, disclosure of intercepted communications, and use of the contents of intercepted communications (18 U.S.C. § 2511(1)(a), (c), (d)). Title II generally prohibits unauthorized access to, and alteration or disclosure of, stored computer communications (18 U.S.C. §§ 2701(a), 2702(a)). These prohibitions apply to colleges and universities as systems operators as well as to individual faculty, students, and staff members. There are various important exceptions, however, that permit system operators to intercept or disclose in certain circumstances (18 U.S.C. §§ 2511(2), 2701(c)). Under Section 2511(2)(a)(i), for instance, certain operators may intercept when it is necessary to view the content in order to forward the message; and under Section 2511(2)(a)(ii) an operator may disclose information to federal agents in certain circumstances pursuant to an appropriate court order or written certification.

ECPA’s Title I provisions concerning “interception” and its Title II provisions concerning access to communications in “electronic storage” were both helpfully examined in *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3d Cir. 2004), a case in which the court rejected an employee’s challenge to his employer’s search of his e-mail stored on the employer’s central file server. In particular, the court of appeals used an exception to Title II contained in 18 U.S.C. § 2701(c)(1) to hold that Title II does not protect an employee from the employer’s access to his stored e-mail when the employer is the service provider and the e-mail is stored on its own system (352 F.3d at 115). The ECPA Title I provisions on intentional disclosure of intercepted communications, particularly

Section 2511(1)(c), were also examined in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which the Supreme Court held the “privacy concerns” protected by Title I must sometimes “give way” to the First Amendment “interest in publishing matters of public importance.”

The ECPA was significantly modified by the USA PATRIOT Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272).<sup>25</sup> Prior to the PATRIOT Act, the ECPA required the government to obtain an administrative subpoena before seizing transactional records (such as Internet addressing records) of computer communications service subscribers. The ECPA also required government to obtain a warrant supported by probable cause before seizing e-mail stored “for one-hundred eighty days or less.” Section 210 of the PATRIOT Act broadens the information available by administrative subpoena to include more subscriber information than previously permitted (see 18 U.S.C. § 2703), including access to e-mail older than six months. (Information that a computer communications provider now “shall disclose” to a government entity is listed in 18 U.S.C. § 2703(c).) Section 217 of the PATRIOT Act permits “a person acting under color of law to intercept the . . . electronic communications of a computer trespasser” if the person is authorized to do so by the owner of the “protected computer,” is “lawfully engaged in an investigation,” and “has reasonable grounds to believe that the contents of the computer trespasser’s communications will be relevant to the investigation,” and if the “interception does not acquire communications other than those transmitted to or from the computer trespasser” (18 U.S.C. § 2511(2)(i)). Section 217 of the PATRIOT Act further permits a person acting under color of law to intercept an “electronic communication” if “one of the parties to the communication has given prior consent” to the communication, and permits the owner of a protected computer to authorize such interception (18 U.S.C. § 2511(2)(c)). Section 212 of the PATRIOT Act permits, but does not require, an Internet service provider to disclose subscriber records, not including the content of the messages, “if the provider reasonably believes that an emergency involving immediate danger of death or serious injury to any person justifies disclosure of the information” (18 U.S.C. § 2702 (c)(4)), or if disclosure is necessary to the “protection of the rights or property of the provider of that service” (18 U.S.C. § 2702(c)(3)).<sup>26</sup>

More recently, the Cyber Security Enhancement Act of 2002 (enacted as one title of the Homeland Security Act of 2002), Pub. L. No. 107-296, § 225(d), 116 Stat. 2135, 2157 (2002)), relaxed the ECPA provisions in 18 U.S.C. § 2702(b)

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<sup>25</sup>For a more thorough examination of the impact of the USA PATRIOT Act amendments on law enforcement and intelligence surveillance activities pertinent to higher education, see Lee S. Strickland, Mary Minow, & Tomas Lipinski, “PATRIOT in the Library: Management Approaches When Demands for Information Are Received from Law Enforcement and Intelligence Agents,” 30 *J. Coll. & Univ. Law* 363 (2004); Nancy Tribbensee, “Privacy and Security in Higher Education Computing Environments After the USA PATRIOT Act,” 30 *J. Coll. & Univ. Law* 337 (2004); and David Harrison, “The USA PATRIOT Act: A New Way of Thinking, An Old Way of Reacting, Higher Education Responds,” 5 *N.C. J.L. & Tech.* 177 (2004).

<sup>26</sup>The amendments from Section 212 of the USA PATRIOT Act expired on December 31, 2005 (Pub. L. No. 107-56, 115 Stat. 272 § 224). In early March 2006, Congress voted to extend the Act.



concerning when a provider of an electronic communication service may “divulge the contents of a communication” to a “government entity.” Such disclosure may now be made upon “a good faith belief that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay” (18 U.S.C. § 2702 (b)(8)).

When enacted in 1986, ECPA required communications service providers to disclose subscriber information to the FBI upon receipt of a so-called National Security Letter (NSL) from the FBI certifying that the information is relevant to a “counterintelligence investigation” and that there is “specific and articulable . . . reason to believe” the target of the request is a “foreign power or agent of a foreign power” (18 U.S.C. § 2709 (b) (1988)). Section 505(a) of the USA PATRIOT Act replaced this requirement with a more relaxed requirement that the information sought is “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities . . .” (18 U.S.C. § 2709(b) (2005)). In addition, Section 2709(c) of ECPA states that “[n]o wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.” In *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), a federal district court held, in a lengthy opinion, that the National Security Letter authority in Section 2709 violates the Fourth Amendment because it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request. The court also held that Section 2709(c) violates the First Amendment because its “permanent ban on disclosure . . . operates as an unconstitutional prior restraint on speech . . .” (334 F. Supp. 2d at 475).

In the years after 1986, Congress also passed legislation to restrict obscenity, pornography, and “indecent” speech in computer communications—especially with respect to communications accessible to children. The first major statute of this type was the Communications Decency Act of 1996 (CDA), enacted as Title V of the Telecommunications Act of 1996 (110 Stat. 56). The CDA amended Title 47, Section 223 of the *United States Code* to add a new Section 223(a)(1)(B), called the “indecency” provision, and a new Section 223(d), called the “patently offensive” provision. The indecency provision applied criminal penalties to anyone who “knowingly” used the Internet to transmit any “communication *which is obscene or indecent*, knowing that the recipient of the communication is *under 18 years of age* . . .” (emphasis added). The “patently offensive” provision applied criminal penalties to anyone who “knowingly” used “an interactive computer service” to send to or display for a person “*under 18 years of age*” any “communication *that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs* . . .” (emphasis added). These provisions were challenged in court and invalidated first by a three-judge U.S. district court and then by the U.S. Supreme Court in *Reno v. American Civil Liberties Union* (discussed below). (Section 223(a)(1)(B)’s application to “obscenity” was not challenged in this case.)

Other provisions of the CDA, § 223(a)(1)(A)(ii) and § 223(a)(2), imposed criminal penalties for the transmission over the Internet of “obscene, lewd,

lascivious, filthy, or indecent” communications that are intended to “annoy, abuse, threaten, or harass another person.” These sections apply regardless of the age of the recipient. The courts construed these sections to apply only to obscene communications that meet the U.S. Supreme Court’s definition of obscenity; and so construed, their constitutionality was upheld. (See *Apollo Media Corp. v. Reno*, 19 F. Supp. 2d 1081 (N.D. Cal. 1998), *affirmed summarily*, 526 U.S. 1061 (1999).)

In 2003, in response to the court cases above, Congress amended all of these CDA Sections to apply only to communications that are “obscene” or “are child pornography” (Pub. L. No. 108-21, §§ 603(1)(A), 603(1)(B), & 603(2)). These amendments apparently resolve the constitutional issues concerning the prior sections, since the U.S. Supreme Court permits regulation of both “obscenity” and “child pornography,” as the Court has narrowly defined those terms. (Regarding obscenity, see *Apollo Media Corp.* above; and regarding child pornography, see *New York v. Ferber*, 458 U.S. 747 (1982).)

Sections 223(a)(1)(B), 223(d), 223(a)(1)(A), and 223(a)(2), as now amended, apply not only to persons who transmit the prohibited communications but also to any person who “knowingly permits” computer facilities “under [the person’s] control to be used for” the prohibited communications (47 U.S.C. § 223(a)(2) & (d)(2)). There are several affirmative defenses (47 U.S.C. § 223(e)), including a defense that partially absolves employers from the prohibited actions of their employees and agents (47 U.S.C. § 223(e)(4)).

Another computer statute that regulated obscene and pornographic speech (and that also ran into difficulties in the courts), is the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 *et seq.*, which extended existing prohibitions against child pornography to cover virtual images of children created with computer technology. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court struck down this provision of the CPPA. The Court explained that the virtual images of minors covered by the statute did not fall within the Court’s definition of obscenity; and since they did not involve “real children,” they did not fall within the Court’s definition of child pornography. The statutory provision therefore prohibited “a substantial amount of lawful speech” without adequate justifications and was “overbroad and unconstitutional” (535 U.S. at 256).

In 1998, after *Reno v. American Civil Liberties Union* but well before the 2003 amendments to the CDA (above), Congress sought to remedy the legal shortcomings of Sections 223(a)(1)(B) and 223(d) in a manner that would still permit regulation of “indecent” and “patently offensive” computer speech. The statute, the Child Online Protection Act (COPA), 112 Stat. 2681–2736, 47 U.S.C. § 231, provides criminal penalties for any knowing “communication *for commercial purposes* that is available to any minor and that includes any material that is harmful to minors” (47 U.S.C. § 231(a)(1)) (emphasis added). The “commercial purposes” limitation was not part of the CDA. COPA also provides that “material that is harmful to minors” is to be identified, in part, with reference to “contemporary community standards” (47 U.S.C. § 231(e)(6)(A)), a phrase that was used in the CDA.

COPA, like the CDA, was challenged on First Amendment grounds once it went into effect. In *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), the district court rejected the argument that COPA regulated only “commercial speech” subject to a lower level of scrutiny from the courts and issued a preliminary injunction prohibiting the federal government from enforcing COPA. Aspects of this ruling led to two U.S. Supreme Court decisions, *Ashcroft v. ACLU*, 535 U.S. 564 (2002), and *Ashcroft v. ACLU*, 542 U.S. 656 (2004), as a result of which the district court’s injunction was upheld pending a full trial on the merits. As this book went to press, the preliminary injunction against COPA’s enforcement remained in effect.

Another section of the CDA that was not at issue either in *Reno v. American Civil Liberties Union* or in *Apollo Media Corp. v. Reno* is Section 509, which added a new Section 230 to 47 U.S.C. Rather than imposing any criminal penalties on computer transmissions, this section provides protection for “provider(s)” of “interactive computer service(s)” against certain types of liability regarding computer communications (47 U.S.C. § 230(c)), including liability for “good faith” uses of software to filter or block “material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” (47 U.S.C. § 230(c)(2)(A)). Section 230 is further discussed in Section 8.5.2 of this book.

Other computer statutes of interest to colleges and universities include the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201 *et seq.*, enacted in 1998, which protects copyright holders from certain infringements via the Internet and establishes various rules regarding the liability of Internet service providers, and which is discussed in subsection 13.2.5 above and in Section 8.5.2 of this book; the Anti-Cybersquatting Consumer Protection Act, codified in various sections of Title 15, U.S.C., enacted in 1999, which protects trademark holders and others from persons who traffic in domain names, and which is discussed in Section 13.2.7 of this book; the Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506, which prohibits the online collection or disclosure of private information from children under thirteen; and the TEACH Act, codified in various sections of Title 17, U.S.C., enacted in 2002, which addresses copyright issues concerning distance education via computer technology, and which is discussed in subsection 13.2.5 above.

Issues concerning computer statutes are increasingly being resolved by the courts, as the cases above suggest. The leading case to date—the one that provides the most extensive discussion and the best guidance on how the First Amendment applies to, and limits government’s authority to regulate, the content of computer communications—is *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), *affirming* 929 F. Supp. 824 (E. D. Pa. 1996), in which the U.S. Supreme Court struck down two provisions of the Communications Decency Act. The plaintiffs argued that the two provisions, Section 223(a)(1)(B) and Section 223(d) (see above), were unconstitutional under the First Amendment because they were “overbroad” and “vague.” Seven of the nine Justices agreed that these provisions were unconstitutional, and the other two Justices agreed that they were unconstitutional in most of their applications. Justice Stevens wrote the

majority opinion for the seven Justices; Justice O'Connor wrote a concurring and dissenting opinion for the other two.

The Court majority relied primarily on the First Amendment “overbreadth” arguments and did not directly rule on “vagueness” issues. The Court did, however, “discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry. . . .” Reasoning that the challenged provisions of the CDA were content-based restrictions on speech that, due to their overbreadth, created “an unacceptably heavy burden on protected speech,” the Court held these provisions to be facially overbroad. Regarding Section 223(a)(1)(B), the Court invalidated the “indecent” provision but not the “obscenity” provision, which was not challenged and remains valid because, as the Court noted, “obscene speech . . . can be banned totally because it enjoys no First Amendment protection.”<sup>27</sup>

The Court left no doubt about its view of the capacities and importance of cyberspace as a communication medium. At various points, the Court described the Internet as a “vast democratic for[um]”; a “new marketplace of ideas”; a “unique and wholly new medium of worldwide human communication” (agreeing with the district court); and a “dynamic, multifaceted category of communication ‘providing’ relatively unlimited low-cost capacity for communication of all kinds.” The World Wide Web itself, according to the Court, is “comparable, from the readers’ viewpoint, to both a vast library, including millions of readily available and indexed publications, and a sprawling mall offering goods and services;” and “from the publishers’ point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.” Moreover, the Internet:

includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap box. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer [521 U.S. at 896-97].<sup>28</sup>

The Court was also clear about the substantial burdens that the CDA placed on cyberspace communications. “[T]he CDA is a content-based blanket restriction on speech.” There are “many ambiguities concerning the scope of its coverage” because the statute does not define the term “indecent” or the term “patently offensive.” “Given the vague contours of the coverage of the statute, it

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<sup>27</sup>Obscenity law may need to be modified, however, if it is to have any sensible application to obscene materials transmitted in cyberspace (or perhaps may ultimately need to be abandoned as to cyberspace because it can have no sensible application there). See, for example, Randolph Sergent, “The ‘Hamlet’ Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation,” 23 *Hastings Const. L.Q.* 671 (1996); but compare *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (*Ashcroft I*), discussed briefly above in this subsection.

<sup>28</sup>[Author’s footnote] This does not mean, however, that courts would treat the entire Internet as a “public forum” for First Amendment purposes. See *United States v. American Library Association*, 539 U.S. 194 (2003).

unquestionably silences some speakers whose messages would be entitled to constitutional protection. . . . In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”

Nor did the defenses provided in the statute (§ 223(e)(5)) alleviate the statute’s burden on cyberspace communication. These defenses depend upon the use of technology to screen communications or to identify users. According to the Court, either the “proposed screening software does not currently exist,” or “it is not economically feasible for most noncommercial speakers to employ” the identification or verification technology that is currently available. Thus, “[g]iven that the risk of criminal sanctions ‘hovers over each content provider, like the proverbial sword of Damocles’ [quoting the district court], the District Court correctly refused to rely on unproven future technology to save the statute.<sup>29</sup> The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays” (551 U.S. at 880–81).

In language particularly important to educational institutions, the Court specifically recognized that the CDA would burden not only adult speech in general, but, more specifically, speech that is used to convey academic or instructional content. The CDA omits any requirement that the covered speech lack “serious literary, artistic, political, or scientific value” (indeed, Congress had “rejected amendments that would have limited the proscribed materials to those lacking redeeming value” (551 U.S. at 871, n.37)); and therefore, the CDA covers “large amounts of nonpornographic material with serious educational or other value.” Thus, for instance, the speech covered by the statute could “extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.”

It is settled constitutional law that a regulation burdening the content of speech, as the CDA did, is subject to strict judicial scrutiny—a standard of review requiring the government to demonstrate that its regulation is supported by a “compelling” government interest and that there are no “less restrictive alternatives” by which the government could effectuate its interest. In *Reno*, the Court refused to craft any exception to these standards for the new medium of cyberspace and emphatically subjected the statute to “the most stringent review.” According to the Court, the medium of cyberspace could not be analogized to the broadcast media and treated more leniently under the law, nor is there any other “basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”

Applying strict scrutiny review to the two challenged CDA provisions, the Court in *Reno* acknowledged that the federal government had a compelling

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<sup>29</sup>[Author’s footnote] For later U.S. Supreme Court analysis regarding the constitutionality of government regulations that permit or require the use of “filtering” or “blocking” technology, see *United States v. American Library Association*, 539 U.S. 194 (2003); and see generally Patrick Garry, “The Flip Side of the First Amendment: A Right to Filter,” 2004 *Mich. St. L. Rev.* 57.

interest in protecting children from indecency. But neither provision, in the view of the Court, was drafted with sufficient specificity or “narrow tailoring” to survive the “less restrictive alternative” portion of the test:

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. . . . [The CDA’s] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. . . .

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. . . . [T]he CDA is not narrowly tailored if the requirement has any meaning at all. . . .

In *Sable [Communications v. FCC]*, 492 U.S. at 127, we remarked that the speech restriction at issue there amounted to “burn[ing] the house to roast the pig.” The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community [551 U.S. at 874, 878, 882].<sup>30</sup>

The government also argued that “in addition to its interest in protecting children,” it has a compelling interest in “fostering the growth of the Internet” that “provides an independent basis for upholding the constitutionality of the CDA.” The Court quickly and strongly rejected this alternative argument:

We find this argument singularly unpersuasive. . . . As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship [521 U.S. at 885].

In her concurring/dissenting opinion, Justice O’Connor attempted to soften the impact of the Court’s opinion by preserving some room in which the government may constitutionally implement content restrictions on cyberspace speech. In particular, Justice O’Connor advocated a theory of “cyberspace zoning” similar to the theory advocated by the government. But Justice O’Connor’s argument depends entirely on future technological advances. She admitted that the technology needed to make “adults only” zones and other zones feasible in cyberspace did not yet exist.<sup>31</sup> If and when it does come into being in a form economically accessible to all, Justice O’Connor would then permit the kind of

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<sup>30</sup>[Author’s footnote] For further, extensive analysis of the “least restrictive alternative” test, as applied to cyberspace speech, see *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (*Ashcroft II*), discussed briefly above in this subsection.

<sup>31</sup>Since *Reno*, Congress has amended child abuse statutes to impose penalties for use of a “misleading domain name” with “intent to deceive a person into viewing . . . obscenity,” and has created the “Dot Kids” second-level domain to provide material suitable for “any person under 13 years of age.” Both of these statutes, which move toward something like Internet zoning, are discussed in Sec. 13.2.12.3, below.

regulation represented by the CDA. According to Justice O'Connor, "[T]he prospects for the eventual zoning of the Internet appear promising," and "our precedent indicates that the creation of such zones can be constitutionally sound."

Overall, neither the Court's reasoning nor its use of precedent in *Reno* is surprising. The Court's decision is clearly the correct one, although the forecast in Justice O'Connor's opinion is also worth taking to heart. What is somewhat surprising, and noteworthy, is the degree of consensus the Court achieved. In an era when the Court is frequently divided, the near consensus in *Reno* indicates that the constitutional question was not a close one and that the government's position had little support in precedent.

The good news in *Reno* for both public and private educational institutions is that they and their campus communities are free from the burden of a statute that the Court admitted would have prohibited much communication having educational value. More broadly, *Reno* provides a solid First Amendment foundation upon which public and private institutions can defend themselves from other governmental attempts to regulate the content of their cyberspace speech and that of their faculty and students. Conversely, the no-so-good news for some public institutions is that they are also bound by the principles espoused by the Court in *Reno* and, therefore, will be prohibited from regulating cyberspace communications on their own campuses in much the same way that Congress and the state legislatures are prohibited from doing so under *Reno* (see Section 8.5.1). Private institutions, of course, will not be subject to these same limitations, since the First Amendment binds only the public sector (see Section 1.5.2).

**13.2.12.3. General statutes.** In addition to federal statutes focusing predominantly on computer communications (subsection 13.2.12.2 above), there are various regulatory and spending statutes that do not focus on computers or cyberspace but nevertheless may have some applications to computer communications or stored computer data. A sex discrimination law that covers sexual harassment, such as Title VII (see Section 5.2.1 of this book) or Title IX (see Section 13.5.3 of this book), for example, would apply to e-mails that constitute such harassment. A research misconduct law (see Section 13.2.3.4 above) would apply to misconduct that involves the use of computers. In short, cyberspace and the users of cyberspace are not freed from the coverage of generally applicable laws merely because the statute does not specifically mention computers or computer communications. (The First Amendment, however, does establish limits on such statutes' applications to computer communications, just as it does with statutes that specifically focus on computers (see subsection 13.2.12.2 above).)

In addition, some general statutes have been specifically extended to computers by congressional amendment, administrative regulation, or judicial interpretation. The federal obscenity statute that prohibits the sale or distribution of obscene material in interstate commerce (18 U.S.C. § 1465), for instance, has been amended to cover obscene communications using interactive computer services (Pub. L. No. 104-104, Title V, § 507, 110 Stat. 56, 137; see *United States*

*v. Thomas*, 74 F.3d 701 (6th Cir. 1996); and see generally Donald Stepka, “Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material,” 82 *Cornell L. Rev.* 905 (1997)). The federal child pornography laws, 18 U.S.C. §§ 2251, 2252, 2252A, and 2256, have also been amended to proscribe computer transmissions of materials that sexually exploit minors (see Pub. L. No. 100-690, Title VII, § 7511, 102 Stat. 4485; Pub. L. No. 104-208, Title I, § 121(3)(a), 110 Stat. 3009–3028). In *Ashcroft v. Free Speech Coalition* (discussed in subsection 13.2.12.2 above), however, the U.S. Supreme Court invalidated portions of these amendments that extended to “virtual” pornography created by computer simulation and not involving actual children). Similarly, a 2003 amendment (Pub. L. No. 108-21) to a child abuse law, 18 U.S.C. § 2252B, Pub. L. No. 108-21, Title V, § 521(a), extended its coverage to include the knowing use of “a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity,” or “the intent to deceive a minor into viewing material that is harmful to minors on the Internet” (18 U.S.C. § 2252B(b)).

The federal copyright law (Section 13.2.5 of this book) has been amended to provide criminal penalties for distribution of software that infringes the copyright holder’s interests (Pub. L. No. 102-307 and Pub. L. No. 102-561, 106 Stat. 4233, amending 18 U.S.C. § 2319(b), (c)(1), & (c)(2)). It has also been amended to increase protections against criminal copyright infringements that occur over the Internet (Pub. L. No. 105-147, 111 Stat. 2678, the No Electronic Theft Act). (The Digital Millennium Copyright Act, another and more comprehensive amendment, is discussed in subsection 13.2.12.2 above.)

In addition, the USA PATRIOT Act of 2001 (also discussed in subsection 13.2.12.2 above) expands the federal crime of terrorism (18 U.S.C. § 2332b) to include computer network intrusions and dissemination of malicious code (18 U.S.C. § 1030(a)(1) & (a)(5)(B)(ii) & (v)) and “destruction of communication lines, stations or systems” (18 U.S.C. § 1362). The Arms Export Control Act and the Export Administration Act (Section 13.2.4 of this book) have been extended by regulation to cover encryption software used to maintain the secrecy of computer communications (see the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 121.1, Category XIII(b)(1), and the Export Administration Regulations (EAR), 15 C.F.R. §§ 738.2(d)(2), 772, & 774 supp. I). (Courts have warned, however, that encryption software may be considered expression for purposes of the First Amendment, thus raising constitutional issues concerning the EAR’s (and other similar federal regulations’) applicability to such software; see, for example, *Junger v. Daly*, 209 F.3d 481 (6th Cir. 2000).) The Fraud by Wire, Radio, or Television Communications Act (18 U.S.C. § 1343) has also been interpreted by the courts to cover some computer network communications; see *United States v. Seidlitz*, 589 F.2d 152 (4th Cir. 1978); and *United States v. Riggs*, 739 F. Supp. 414, 420 (N.D. Ill. 1990). And a federal statute that prohibits communications containing threats to kidnap or injure another person (18 U.S.C. § 875(c)) has been applied by the courts to computer communications (see the *Baker* and *Morales* cases below).

Among the most interesting cases to date concerning these various statutes are the cases concerning the applicability of 18 U.S.C. § 875(c) (above) to



threats conveyed by computer communication. In *United States v. Alkhabaz aka Jake Baker*, 104 F.3d 1492 (6th Cir. 1997), *affirming (on other grounds)* 890 F. Supp. 1375 (E.D. Mich. 1995), a U.S. Court of Appeals considered the applicability of 18 U.S.C. § 875(c) to a former University of Michigan student who had sent e-mail messages over the Internet. The student, Mr. Baker, had exchanged e-mail messages with a Mr. Gonda expressing an interest in the rape and torture of women and girls. In addition, Baker had posted various fictional stories involving the “abduction, rape, torture, mutilation, and murder of women and young girls.” One of these stories had a character with the same name as one of Baker’s classmates at the University of Michigan. Baker was indicted and charged with exchanging e-mail messages that threatened to injure (or, in one instance, to kidnap) another person in violation of 18 U.S.C. § 875(c).

The federal district court had agreed that the statute applies to computer communications: “While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment” (890 F. Supp. at 1390). Nevertheless, the court dismissed the indictment against Baker because the e-mail messages sent and received by Baker and Gonda were “pure speech” that is “constitutionally protected” under the First Amendment. Although threats are excepted from the Amendment’s protection, the district court determined that the e-mail messages did not constitute “true threats.” The district court made clear that “statements expressing musings, considerations of what it would be like to kidnap or injure someone, desires to kidnap or injure someone, however unsavory, are not constitutionally actionable . . . absent some expression of an intent to commit the injury or kidnaping.” In addition, while the statement need not identify a specific individual as its target, it must be sufficiently specific as to its potential target or targets to render the statement more than hypothetical” (890 F. Supp. at 1386). Applying these standards to Baker, the court found that his messages communicating a desire to kidnap or injure young girls, and detailing a method for abducting of a female student in his dormitory, merely expressed his desire to commit these acts, not an actual intention to act on those desires. As a result, the district court held that the statements in the defendant’s private e-mail messages to Gonda did not meet the First Amendment “true threat” requirement.

While the district court decision focused heavily on First Amendment analysis, the court of appeals, in upholding the decision, focused on the interpretation of the statute under which Baker was indicted. Title 18, Section 875(c) states:

Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

According to the appellate court, “to constitute a ‘communication containing any threat,’ under Section 875 (c), a communication must be such that a reasonable person (1) would take the statement as a serious expression of an

intention to inflict bodily harm . . . , and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation.”

In applying this standard to the facts of the case, the appellate court determined that the messages sent and received by Baker did not constitute a “communication containing any threat” under Section 875(c). The court reasoned that, “even if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation.” “Although it may offend our sensibilities,” the court remarked, “a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is also conveyed for the purpose of furthering some goal through the use of intimidation.” Since the indictment failed to meet the requirements of Section 875(c) as it interpreted them, the appellate court declined to address the First Amendment issue. (In contrast, a dissenting judge argued that “by publishing his sadistic Jane Doe story on the Internet, Baker could reasonably foresee that his threats to harm Jane Doe would ultimately be communicated to her (as they were), and would cause her fear and intimidation, which in fact ultimately occurred.”)

In contrast to *Baker*, another U.S. Court of Appeals found the requirements of Section 875(c) satisfied in *U.S. v. Morales*, 272 F.3d 284 (5th Cir. 2001). The defendant Morales, an eighteen-year-old high school student, had made statements about killing students at his high school in Houston, Texas. The statements were communicated in a chatroom on the Internet. One of the participants, a resident of Washington, subsequently alerted the principal at Morales’s high school, who increased security measures at the school. Police investigators traced the statements to Morales, who admitted making the statements, but claimed he was only joking and pretending to be the ghost of one of the assailants from the Columbine High School shooting. Nevertheless, a jury convicted Morales of violating Section 875(c). The appellate court, in affirming Morales’s conviction, asserted that “a communication is a threat under Section 875(c) if ‘in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor’” and if the statement was made “voluntarily and intentionally, and not because of mistake or accident.” Section 875(c) required only proof that the statement was made; the threshold for a communication to be evaluated as a threat was therefore fairly low. The evidence in the record, in particular Morales’s own admissions, was sufficient to meet this requirement. In addition, the appellate court required that the statement, in context, must have a “reasonable tendency to create apprehension that its originator will act according to its tenor”—a requirement designed to assure that the threat amounted to a “true threat” and was thus not subject to First Amendment protection. The evidence indicated that Morales repeated his threat several times during the chatroom conversation and that he gave no indication that he was joking. Furthermore, because Morales admitted that he was seeking to tie his statements to the Columbine High School

shootings, his remarks could not be “divorced from the reality of that tragedy.” Even though Morales’s chatroom statements did not correctly identify the Columbine assailant that Morales attempted to represent, the court nevertheless found that the general context in which he made his remarks was sufficient to permit a reasonable juror to find that Morales’s statements were a “true threat” covered by Section 875(c).

As a comparison of *Baker* and *Morales* indicates, the “threat” language of 18 U.S.C. § 875(c) has created interpretive difficulties for the courts that are not yet resolved. This statutory language has also raised issues of whether computer communications considered to be within the scope of Section 875(c) may nevertheless sometimes be protected by the First Amendment’s free speech clause; the district court’s opinion in *Baker* illustrates this concern.

**13.2.13. Medicare.** Medicare is a two-part program through which the federal government provides a form of health insurance for individuals age sixty-five and over, younger individuals with disabilities, and people with permanent kidney failure (end-stage renal disease). Part A covers inpatient hospital services, skilled nursing facilities, home health services, and hospice care. Part B covers part of the costs of physician services, outpatient hospital services, medical equipment and supplies, and some other health services and supplies. Hospitals and other health care facilities that have contracts with and that treat individuals covered by Medicare must seek reimbursement from the federal government for the care received by Medicare patients. The federal rules governing Part A reimbursement, especially for teaching hospitals, are highly technical and intricate, and are of particular interest to institutions with medical schools and affiliated teaching hospitals and medical centers.

Generally, Part A pays hospitals and similar providers for services prospectively in a predetermined amount on a per-discharge basis, under a diagnosis-related grouping system. This “prospective payment system” is based on what the federal government determines under a complex formula to be the “reasonable costs” of providing the care. Part B pays for medical services on the basis of “reasonable charges” or maximum allowable amounts set by Medicare.

Under Part A, a Medicare service provider enters into an agreement with the Secretary of Health and Human Services (“Secretary”) to receive reimbursement for the “reasonable cost” of services provided to Medicare recipients (42 U.S.C. §§ 1395cc, 1395ww). Although the patient may be required by Medicare to pay copayments or deductibles, the provider agrees not to charge the patient otherwise “for items or services for which such individual is entitled to have payment made under [Medicare]” (42 U.S.C. § 1395cc(a)(1)(A)). Under 42 U.S.C. § 1395cc(a)(F)(i), in-patient hospitals must agree to:

maintain an agreement with a professional standards review organization . . . or with a utilization and quality control peer review organization . . . [that will] review the validity of diagnostic information provided by such hospital, the completeness, adequacy and quality of care provided, the appropriateness of admissions and discharges, and the appropriateness of care provided for which

additional payments are sought under section 1393ww(d)(5) [a provision on hospital stays that exceed the “mean length of stay”].

From Medicare’s inception, reimbursements have been an important means of support for graduate medical education (GME), that is, the clinical internship and residency programs for doctors who have received their M.D. degrees. Hospital costs associated with GME include the salaries of residents and interns and costs of recruiting and maintaining an experienced teaching staff. Under the “related organization principle,” costs incurred by an affiliated medical school in connection with the GME program may also be allowable. The regulations provide that “costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization” (42 C.F.R. § 413.17(a)).

Teaching hospitals are reimbursed by Medicare for their direct and indirect GME costs (42 C.F.R. § 412.2(f)(2), (7); see 42 C.F.R. § 413.75, *et seq.*, regarding direct GME costs of certain approved residency programs and 42 C.F.R. § 12.105 regarding indirect GME). Certain other costs of approved nursing and allied health education activities are also paid by Medicare (42 C.F.R. § 413.85). Medicare will not pay for “costs incurred for research purposes, over and above usual patient care . . .” (42 C.F.R. § 413.90(a)).

In order to receive reimbursement, a provider must file a reimbursement claim with an intermediary fiscal agent (“intermediary”). An intermediary, often a private insurance company, acts under contract with the Secretary and is responsible for reviewing the provider claims and making initial reimbursement determinations (42 U.S.C. § 1395h). Intermediaries may also subcontract with auditing or other firms to assist in the determination of which costs of graduate medical education are reimbursable under the current version of Medicare regulations. A provider may contest denial of reimbursement by requesting a hearing before the Provider Reimbursement Review Board (PRRB), a board within the Department of Health and Human Services that has exclusive jurisdiction over Medicare reimbursement claims (42 U.S.C. § 1395oo). The Secretary may, on his or her own motion, review the decision of the PRRB. In addition, providers have the right “to obtain judicial review of any action of the fiscal intermediary which involves a question of law or regulations relevant to the matters in controversy where the [PRRB] determines (on its own motion or at the request of a provider of services . . .) that it is without authority to decide the question” (42 U.S.C. § 1395oo(f)(1)). The civil action must be initiated within sixty days of the adverse determination.

In addition, the services of staff physicians at teaching hospitals who render services to Medicare recipients may also be eligible for reimbursement. According to the statute:

[P]ayment under this part [Part A] shall be made to such fund as designated by the organized medical staff of the hospital in which such services were furnished or, if such services were furnished in such hospital by the faculty of a medical school, to such fund as may be designated by such faculty, but only

if—(1) such hospital has an agreement with the Secretary under section 1395cc of this title, and (2) the Secretary has received written assurance that (A) such payment will be used by such fund solely for the improvement of care of hospital patients or for educational or charitable purposes and (B) the individuals who were furnished such services or any other persons will not be charged for such services (or if charged, provision will be made for return of any moneys incorrectly collected) [42 U.S.C. § 1395f(g)].

The regulations also provide that Medicare will not reimburse a hospital for direct GME expenses that have previously been covered by “community support,” which includes “all non-Medicare sources of funding (other than payments made for furnishing services to individual patients), including State and local government appropriations” (42 C.F.R. § 413.81(a)(1); see the definition of “community support” at 42 C.F.R. § 413.75).<sup>32</sup> The intent of this provision is to avoid the shifting of costs that would otherwise be paid by the hospital or other sources to Medicare.

Reimbursement for the costs of graduate medical education has been the subject of several lawsuits by academic medical centers over the past decade. Because the law and regulations have changed several times during this period, the cases are discussed briefly as an indicator of the standards used by the courts to analyze challenges, either to the regulations themselves or to the government’s interpretation and application of these regulations.

An earlier version of the GME reimbursement regulation was at issue in a case decided by the U.S. Supreme Court: *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994). In 1985, Thomas Jefferson University Hospital hired an independent accounting firm to review and calculate the hospital’s GME costs, particularly in light of the 1984 amendments to the Medicare statute, and to refine its “cost allocation techniques.” On the advice of the accounting firm, the hospital submitted to the intermediary a reimbursement claim for \$8.8 million, \$2.9 million of which represented previously unclaimed direct and indirect administrative costs associated with the hospital’s residency program. Previously, the hospital had claimed and received reimbursement for three categories of salary-related GME costs: (1) salaries paid by the hospital to medical college faculty for services rendered to the hospital’s Medicare patients; (2) salaries paid by the hospital to residents and interns; and (3) funds transferred internally from the hospital to the medical college as payment for faculty time devoted to the hospital’s GME program. It was not until after the accounting firm review that the hospital sought reimbursement for non-salary-related GME costs, such as the cost of administering the hospital’s GME program.

The intermediary denied the hospital’s claim as to all non-salary-related GME costs. At the hospital’s request, the PRRB reviewed and reversed the

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<sup>32</sup>“Community support means funding that is provided by the community and generally includes all non-Medicare sources of funding (other than payments made for furnishing services to individual patients), including State and local government appropriations. Community support does not include grants, gifts, and endowments of the kind that are not to be offset in accordance with section 1134 of the Act.”

intermediary's decision. The Secretary intervened on her own motion and reinstated the decision of the intermediary, basing her decision on the anti-redistribution principle: "[s]ince the non-salary GME costs here in issue were borne in prior years by the Medical College, . . . reimbursement of these costs would constitute an impermissible 'redistribution of costs' under § 413.85(c) [of the regulations]" (512 U.S. at 511). Furthermore, the Secretary reasoned that the hospital's failure to claim the costs in years past indicated "community support" for the costs of the program under Section 413.85(c).

Following general principles of administrative law, the Court in *Thomas Jefferson* deferred to the Secretary's interpretation of the regulations, determining that it was neither "plainly erroneous nor inconsistent with the regulation" (512 U.S. at 513). By a 5-to-4 vote, the Supreme Court upheld the Secretary's decision to deny reimbursement to the hospital. Interestingly, the Secretary did not assert that the types of nonsalary costs for which the hospital sought reimbursement were unallowable, but rather that the hospital's timing and procedure for seeking reimbursement made these costs unallowable. Had the hospital claimed the nonsalary administrative costs from the beginning (it is not clear from the record why the hospital did not do so), Medicare apparently would have reimbursed these costs.

(For a review of the *Thomas Jefferson* decision and its implications, along with background on the Medicare statute and regulations, see Kellyann Horger, "Medicare Reimbursement to Provider University Hospitals for Graduate Medical Education Expenses in Light of *Thomas Jefferson University v. Shalala*," 23 *J. Coll. & Univ. Law* 122 (1996); and Paul Koster, "*Thomas Jefferson University v. Shalala*: Dollars or Sense? The Illogical Restriction of Medicare's Funding of Graduate Medical Education," 12 *J. Contemp. Health L. & Pol'y.* 269 (1995).)

The second U.S. Supreme Court case, *Regions Hospital v. Shalala*, 522 U.S. 448 (1998),<sup>33</sup> resolved other technical issues concerning federal audits of GME costs, in particular audits under the so-called reaudit rule (42 C.F.R. § 413.86(e)), which was later removed and replaced with Subpart F (42 C.F.R. §§ 413.75–413.83). As a result of such a reaudit, Regions Hospital's cost basis for annual GME cost reimbursements was lowered by almost \$4 million, thus substantially reducing its "per resident amount" used to compute reimbursements. The hospital (a teaching hospital) challenged the validity of the reaudit rule, arguing that it was invalid because it operated retroactively and because it was not authorized by the terms of Congress's GME Amendment. In an opinion filled with technical statutory interpretation, the Court rejected these arguments and upheld the reaudit rule as a "reasonable interpretation" of the GME Amendment that was within the Secretary's discretion.

In *University of Iowa Hospitals and Clinics v. Shalala*, 180 F.3d 943 (8th Cir. 1999), a teaching hospital challenged the Secretary's calculation of Medicare reimbursement for graduate medical education. The trial court upheld the Secretary's determinations in total and granted her motion for summary

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<sup>33</sup>In the courts below, the case was styled *St. Paul-Ramsey Medical Center v. Shalala* (see 91 F.3d 57 (8th Cir. 1996)). The hospital changed its name after it was granted Supreme Court review.

judgment. The appellate court agreed with all but one ruling, reversing the summary judgment award on the issue of the documentation of the use of office space. The Secretary had rejected the hospital's claim for reimbursement of the costs of teaching physicians' office space because the hospital did not have contemporaneous documentation of that usage. The court ruled that the rule had been applied retroactively and was not enforceable. Another challenge to the same rule, however, was rejected in *Presbyterian Medical Center of the University of Pennsylvania Health System v. Shalala*, 170 F.3d 1146 (D.C. Cir. 1999).

Another teaching hospital successfully challenged the calculation of GME reimbursement by the intermediary. In *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142 (3d Cir. 2004), during a reaudit, the hospital had challenged the intermediary's calculations of the hospital's GME costs (classifying them instead as operating costs, which would not be reimbursable as GME costs). The PRRB upheld the intermediary's recommendations. The interpretation of former 42 C.F.R. § 413.86 (now 42 C.F.R. §§ 413.75–413.83) was at issue. The court agreed with the hospital, ruling that the PRRB should have considered the documentation provided during the reaudit process and thus should have reclassified the costs as requested by the hospital.

Increasingly, the federal False Claims Act (FCA) (Section 13.2.15 of this book) is used to enforce Medicare requirements. Private individuals have brought FCA suits, on behalf of the federal government, against health care providers alleging Medicare fraud. (See, for example, *U.S. ex rel. Thompson v. Columbia/HCA Healthcare*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998).) In addition, the civil Monetary Penalty Act (CMPA), codified at 42 U.S.C. § 1320a-7a in the Medicare legislation, provides for monetary penalties and “assessment[s] . . . in lieu of damages” as administrative remedies against persons and organizations that file improper reimbursement claims or engage in other forms of Medicare abuse. (See Pamela Bucy, “Civil Prosecution of Health Care Fraud,” 30 *Wake Forest L. Rev.* 693, 737–45 (1995).) Penalties and assessments are levied in proceedings before the Secretary of Health and Human Services, who may also “make a determination . . . to exclude the person [or organization] from participation in Medicare.” (See Bucy, above, 30 *Wake Forest L. Rev.* at 720–37.)

On a more global scale, the federal government, through the U.S. Department of Justice (including its U.S. Attorneys' regional offices) and the Office of the Inspector General at the U.S. Department of Health and Human Services, has been conducting investigations and “national enforcement initiatives” on Medicare billing and other forms of Medicare abuse. The threat of a False Claims Act lawsuit is the underlying basis for these investigatory efforts. (For a review of issues related to the investigation of claims of fraud or the misuse of Medicare funds, see Christopher M. Patti, “Managing the Difficult Research Misconduct Case,” June 2004, available at <http://www.nacua.org>.)

### **13.2.14. Health Insurance Portability and Accountability Act.**

This law (the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), codified in various sections of Titles 18, 29, and 42 of the *United States Code*) has important implications

for colleges and universities if they provide health insurance to employees, provide health care to staff or the general public, or transmit personally identifiable health information electronically. Although the law's primary purpose is to assist individuals who were moving from one employer to another to obtain health insurance, it also covers the privacy of an individual's health care information. The law's Privacy Rule creates compliance, training, and data protection issues (and potential liability) for many colleges and universities.<sup>34</sup> The Office of Civil Rights, part of the Department of Health and Human Services, enforces the law. Regulations related to HIPAA are found at 45 C.F.R. Parts 160 and 164. Although HIPAA preempts state laws that conflict with its provisions, state privacy laws that are more protective of individuals' health care information are not preempted by HIPAA. (For a partial summary of relevant state privacy laws, see <http://www.healthprivacy.org/resources/statereports/contents.html>.)

HIPAA specifically excludes from the definition of personal health information "education records" covered by the Family Educational Rights and Privacy Act (FERPA) (see Section 9.7.1), or education records that are exempt from FERPA under 20 U.S.C. § 1232g(a)(4)(b)(iv) (records made by a doctor, psychiatrist, or other health care provider that are "made, maintained, or used only in connection with the provision of treatment to the student"). For this reason, student health records are not covered by HIPAA, but by FERPA.

Universities with medical schools are covered by HIPAA, as well as those colleges that treat staff at campus health centers, provide counseling for staff, and who use electronic transactions for billing, determining health plan eligibility of employees, or health plan enrollment and disenrollment (45 C.F.R. § 160.103). The regulations define "covered entities" as health plans, health care clearinghouses, and health care providers who transmit "any health information in electronic form in connection with a transaction covered by" the regulations (45 C.F.R. § 160.103).

HIPAA applies to organizations that meet its definition of "covered entity." Organizations that contract with institutions to provide employer-sponsored health plans may be considered to be "covered entities" under HIPAA (45 C.F.R. § 164.501). Such plans include medical insurance plans, dental plans, vision care plans, employee assistance plans, and flexible medical spending accounts. The definition does not include workers' compensation plans, disability insurance, or plans that are self-administered and include fewer than fifty participants. The health plan is the covered entity, and any "outside" individuals or organizations that provide services to the "covered entity" and with which the plan shares information are defined as "business associates" of the "covered entity" and must enter into agreements with respect to the privacy of information that is exchanged (45 C.F.R. §§ 164.502(e), 164.504(e)). Sample business associate contract language can be found at <http://www.hhs.gov/ocr/hipaa/contractprov.html>.

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<sup>34</sup>Cases and authorities are collected at Deborah F. Buckman, Annot., "Validity, Construction, and Application of Health Insurance Portability and Accountability Act of 1966 (HIPAA) and Regulations Promulgated Thereunder," 194 A.L.R. Fed. 133.



Institutions that provide health care services, which are defined as any “care, services or supplies related to the health of an individual” (45 C.F.R. § 160.103), must comply with HIPAA. The regulations define health care services as:

- (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
- (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

Therefore, health centers or counseling centers for staff could be included in the definition, if they transmit personally identifiable health information electronically. Athletic training operations involving medication or physical therapy for student athletes are covered by FERPA.

The regulations allow an institution to decide whether the entire institution will be the “covered entity,” or whether it will be a “hybrid entity,” in which case only those units that actually meet the definition of providing “health care” will be covered (45 C.F.R. § 164.504(a)–(c)). If the institution chooses to be a “hybrid entity,” then release of health information to units that are not involved in HIPAA-related activities will be treated like a “disclosure” to a separate organization. (For a discussion of the policy issues related to deciding whether or not to use the “hybrid entity” provision, as well as a thorough overview of HIPAA and its implications for colleges and universities, see Pietrina Scaraglino, “Complying With HIPAA: A Guide for the University and Its Counsel,” 29 *J. Coll. & Univ. Law* 525 (2003).)

HIPAA requires the covered entity to appoint an individual who will develop, supervise, and update privacy policies. It also requires that an individual be designated to receive complaints and to provide information upon request (45 C.F.R. § 164.530(a)(1)). The covered entity must also provide training concerning the Privacy Rule to all employees who work with personal health information or other information covered by HIPAA, to all new employees with such responsibilities, and whenever a “material change” in the covered entity’s policies and procedures occurs (45 C.F.R. § 164.530(b)). It must also adopt a procedure for individuals to make complaints about the covered entity’s policies and procedures or its compliance with HIPAA regulations (45 C.F.R. § 164.530(d)(1)).

Record-keeping requirements include accounting for disclosures of personal health information, except for those disclosures for which the individual has signed a written authorization and in certain other circumstances. The record of disclosure must be made available to the individual who requests it about him- or herself. Records of disclosures must be maintained for six years. Special provisions are included for disclosures of information for research purposes.

The HIPAA requirements are lengthy, and there is no substitute for careful review of the regulations, reading Department of Health and Human Services guidance documents (including sample contract language), and consulting experienced counsel. Many resources exist to assist administrators and counsel with HIPAA compliance. A good beginning, in addition to the Scaraglino article

cited above, is the “Summary of the HIPAA Privacy Rule,” available from the Office for Civil Rights at <http://www.hhs.gov/privacysummary.pdf>. Another helpful resource is Gerald W. Woods, “HIPAA Privacy Rule Primer for the College or University Administrator,” available at [www.acenet.edu/washington/legalupdate](http://www.acenet.edu/washington/legalupdate).

The impact of HIPAA is particularly important for research using personal health information, clinical trials, medical school education, and other health-related research and training programs. For example, researchers who may not otherwise be subject to HIPAA nevertheless may be affected by it if they must acquire protected health information from a covered entity. Individual students, staff, and faculty, as well as the institution, may face civil and criminal penalties under HIPAA for unlawful disclosure of personal health information. Individuals who believe their rights under HIPAA have been violated may file complaints with the “covered entity” or with the Office for Civil Rights, Department of Health and Human Services. The law provides for both civil and criminal penalties, including imprisonment (42 U.S.C. § 1320d-6). (For resources on the application of HIPAA to academic research, see *Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule*, available at [http://privacyruleandresearch.nih.gov/pr\\_02.asp](http://privacyruleandresearch.nih.gov/pr_02.asp). For a variety of resources on HIPAA compliance, see <http://www.hhs.gov/ocr/hipaa>.)

**13.2.15. False Claims Act and other fraud statutes.** In addition to enforcement actions that may be brought against the recipients of federal funds, and criminal prosecutions for fraudulent actions involving federal funds, the federal government may bring civil suits under statutes such as the False Claims Act (FCA). Such actions may be brought against institutions or their employees who have engaged in fraudulent activities relating to federal grant or contract funds. When such suits arise from allegations initially made by an employee of the institution that is the subject of the suit (or when an employee makes such allegations even if they are not followed by any lawsuit), the employee will often be protected from retaliation by a federal or state “whistleblower” statute (see Section 4.6.8 of this book).

There has been considerable litigation in recent years under the False Claims Act, 31 U.S.C. § 3729 *et seq.* Not only does the FCA authorize the federal government to bring an action against those who defraud the government, it also authorizes private persons, under a “*qui tam*” provision, to bring suit on behalf of the United States against a “person” who has allegedly made a false monetary claim or false statement to the United States. The successful private plaintiff who proves a violation of the Act may receive between 25 and 30 percent of the damages assessed against the defendant (31 U.S.C. § 3730). The private plaintiff’s share may be limited to 10 percent if action is based on publicly disclosed information and to 15 to 25 percent if the government intervenes in the action. The statute provides for civil penalties of not less than \$5,500 nor more than \$11,000 (see 28 C.F.R. § 85.3 for periodic inflationary adjustments to the penalties), plus three times the amount of damages actually sustained by the federal government. If the U.S. Department of Justice decides to join the litigation, the

amount that plaintiffs can recover drops, but the government bears most of the cost of the litigation. In addition to a portion of the damages, the successful *qui tam* plaintiff may receive reasonable attorney's fees as well.

Various legal issues have arisen, especially the issue of whether *public* institutions may be sued under the Act. Following recent trends regarding sovereign immunity (see Section 13.1.6 of this book), various state government agencies, including state colleges and universities, have argued that they are immune under the Eleventh Amendment from False Claims Act suits or, alternatively, that they are not "persons" within the meaning of the FCA and therefore are not covered by it.

Although the federal appellate courts were originally split as to whether states and their agencies were "persons" subject to the False Claims Act, the U.S. Supreme Court settled this issue in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). A division of the Vermont Agency of Natural Resources (VANR) had allegedly required its employees to submit false timesheets that reflected the time that the Agency had submitted to the federal Environmental Protection Agency rather than actual hours the employees had worked. A VANR employee brought suit against the state of Vermont and the VANR under the False Claims Act. The state defended the suit by arguing that the FCA did not impose liability on the states, and furthermore, that such claims against the state would be barred by the Eleventh Amendment. The plaintiff countered by arguing that the statute gives no indication that a state is an improper defendant and that, since the claim is brought on behalf of the federal government, to whom the Eleventh Amendment does not apply, there can be no defense of state sovereign immunity, even if the United States does not intervene in the particular case. The Supreme Court ruled that the False Claims Act's use of "person" did not include states for the purposes of *qui tam* liability. The Court did not address the issue of whether the federal government could sue a state or one of its agencies under the False Claims Act.

The anti-retaliation provisions of the FCA have given rise to attempts to hold individual supervisors liable for alleged FCA violations. In *Yesudian ex rel. United States v. Howard University*, 270 F.3d 969 (D.C. Cir. 2001), the court ruled that only the employer would be liable for FCA violations. (For an overview of the False Claims Act and the litigation process under this statute, see Anna Mae Walsh Burke, "Qui Tam: Blowing the Whistle for Uncle Sam," 21 *Nova L. Rev.* 869 (1997).)

The federal government may fight fraud and abuse in federal spending programs not only by using the False Claims Act, but also by using the Program Fraud Civil Remedies Act of 1986 (PFCRA) (31 U.S.C. §§ 3801–3812), an administrative analogue to the False Claims Act. The PFCRA provides for civil monetary penalties and "assessment(s) in lieu of damages" (31 U.S.C. § 3802) that may be imposed in administrative proceedings of the federal agency operating the spending program in which the alleged fraud occurs (31 U.S.C. § 3803). (A separate but similar statute applicable to Medicare claims is discussed in Section 13.2.13.) The PFCRA does not raise the issue about coverage of the states that is being litigated under the False Claims Act (see above), since the Act

expressly omits states from the definition of “persons” subject to the Act (31 U.S.C. § 3801(a)(6)).

Another statute under which the federal government may bring criminal prosecutions against institutions and their employees is 20 U.S.C. § 1097(a), which provides fines and imprisonment for “[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under” the federal student assistance programs. The U.S. Supreme Court case of *Bates v. United States*, 522 U.S. 23 (1997), concerned the application of Section 1097(a) to a technical school’s treasurer who had been indicted for allegedly misapplying federally guaranteed loan funds (see this book, Section 8.3.2). The federal district court had dismissed the indictment because it did not allege an intent to injure or defraud the United States. In reversing and reinstating the prosecution, the U.S. Supreme Court held that, although proof of intentional conversion of student aid funds was required, “specific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of funds proscribed by § 1097(a).”

### ***Sec. 13.3. Federal Taxation of Postsecondary Education***<sup>35</sup>

***13.3.1. Introduction and overview.*** Colleges and universities have a substantial stake in the federal tax system. They are subject to numerous filing, reporting, disclosure, withholding, and payment requirements imposed on them by a complex array of Internal Revenue Code provisions and regulations<sup>36</sup> implemented pursuant to Congress’s taxing power (see Section 13.1.3). Four categories of federal taxes are of particular importance: (1) income taxes (I.R.C. §§ 1–1563); (2) estate and gift taxes (I.R.C. §§ 2001–2704); (3) employment taxes (including Social Security and Medicare taxes under the Federal Insurance Contributions Act (FICA) and unemployment taxes under the Federal Unemployment Tax Act (FUTA)) (I.R.C. §§ 3101–3501); and (4) excise taxes (I.R.C. §§ 4001–5000). Institutions have large potential financial exposure if they fail to comply with these various federal tax requirements.

Perhaps the most important aspect of the tax laws for colleges and universities is the institutions’ tax-exempt status. The tax rules regarding tax-exempt status are discussed below in subsection 13.3.2. The benefits and requirements that tax-exempt status entails for colleges and universities are discussed below in subsections 13.3.3 (the “intermediate sanctions” penalty regime for violations of tax-exempt status requirements) and 13.3.6 (taxes on business income that is unrelated to an organization’s tax-exempt purpose).

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<sup>35</sup>This Section was reorganized and drafted primarily by Randolph M. Goodman, partner at Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Washington, D.C., and Patrick T. Gutierrez, an associate at Wilmer, Cutler, Pickering, Hale and Dorr, LLP.

<sup>36</sup>The Internal Revenue Code (“I.R.C.” or the “Code”) is Title 26 of the *United States Code*. All statutory Sections cited below are from the Code, unless otherwise indicated. The regulations implementing the Code are in Volume 26 of the *Code of Federal Regulations* and are cited as “Treas. Reg.”

In addition to the responsibilities and burdens of tax-exempt status, colleges and universities have many other substantial tax and tax-compliance concerns. For example, they must withhold income and FICA taxes from wages paid to their employees, including students whom they employ, and they must follow detailed rules on taxability, withholding, and reporting for scholarships and fellowships they award to students (see subsection 13.3.4 below for special rules regarding students).

The tax rules may also affect a college or university indirectly. For example, donors to colleges and universities may deduct their gifts from their personal income taxes. This provides a strong incentive to donors and a large source of revenue to institutions, both private and public. Gifts come from many sources (from individuals, corporations, foundations, and trusts) and in many forms (for example, cash, securities, real estate, and intellectual property). The basic rules for charitable contributions are discussed in subsection 13.3.5 below.

Moreover, as colleges and universities become more sophisticated in their corporate structuring and commercialization efforts, these activities add additional levels of tax considerations. Subsection 13.3.7 below discusses some of the considerations involved with related entities and commercialization.

Since federal tax law in general is complex and technical, and the consequences of noncompliance can be substantial, expert advice and support services are essential for most colleges and universities. Ready access to accountants, compensation consultants, and other tax professionals, and to the institution's counsel or outside tax counsel, will all be important.

Moreover, the Internal Revenue Service (the IRS or the Service) and state taxing authorities have become increasingly attentive to tax compliance by colleges and universities. The Service has issued detailed audit guidelines to its agents, discussed in subsection 13.3.8 below, and has been conducting comprehensive tax audits on colleges and universities throughout the country.<sup>37</sup> Congress has likewise become more attentive to tax issues regarding tax-exempt organizations, and in some cases colleges and universities in particular, in areas such as charitable giving, corporate sponsorship, compensation practices, and employee benefit plans.

Today, colleges and universities are often big, and increasingly sophisticated, businesses that employ a large and diverse group of employees and have

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<sup>37</sup>The IRS also publishes various types of guidance to aid in interpreting the Code and the Treasury regulations. The IRS may issue revenue rulings (stating an IRS position on how the law is applied to a specific set of facts), revenue procedures (providing guidance on procedures to follow in certain situations), technical advice memoranda (publishing guidance furnished by the IRS's Chief Counsel's office in response to an internal IRS request for an interpretation on a technical issue), and Treasury Decisions (providing public pronouncement by the Department of Treasury used for publishing proposed regulations for comment and for issuing temporary and final regulations). On occasion, when the law is unclear and the institution is in need of guidance for some major undertaking with potential tax consequences, counsel may need to obtain a "private letter ruling" from the IRS, which will state the IRS's position on the requestor's particular set of facts (as opposed to a revenue ruling, which involves a generic set of facts). See, for example, H. Massler, "How to Get and Use IRS Private Letter Rulings," 33 *Practical Lawyer* 11 (1987); Rev. Proc. 2005-1, 2005-1 I.R.B. 1 (providing current guidance on how to apply for letter rulings).

operations that range far beyond the traditional campus setting. They have payroll and accounts payable functions requiring internal expertise. They provide pension benefits, health benefits, and other welfare benefits for their employees, often guided by special tax rules that apply exclusively to nonprofits or, in some cases, exclusively to colleges and universities. They also have large numbers of foreign faculty, scholars, researchers, and students that are subject to special tax rules, including rules imposed by tax treaties that have been entered into between the United States and other countries (see Donna E. Kepley & Bertrand M. Harding, Jr., *Nonresident Alien Tax Compliance: A Guide for Institutions Making Payments to Foreign Students, Scholars, Employees, and Other International Visitors* (Artic International, 1996)). They conduct activities in other states and countries, requiring that they pay careful attention to the separate tax laws of these other jurisdictions.

A discussion of all the innumerable tax and tax-related considerations that colleges and universities might face is beyond the scope of this text; only the most important and pervasive aspects of tax law are addressed below. Other examples of important tax concerns include: the taxability of prizes and awards for scientific, educational, artistic, or literary achievements (see I.R.C. § 74); the availability of tax credits for sponsoring university research (see I.R.C. § 41); the taxability of employer-provided educational benefits for employees and their spouses and dependents (see I.R.C. § 127); qualification requirements for employer-sponsored retirement or pension plans (see Randolph M. Goodman, *Retirement and Benefit Planning—Strategy and Design for Businesses and Tax-Exempt Organizations* (Butterworth Legal Publishers, 1994)); and the taxability of grants and fellowships awarded to U.S. and foreign students and scholars (see I.R.C. §§ 117, 871).<sup>38</sup>

**13.3.2. Tax-exempt status.** Private, nonprofit colleges and universities receive their tax exemptions under I.R.C. Section 501(c)(3). They must apply for exemptions with the IRS by filing federal Form 1023—Application for Recognition of Exemption Under 501(c)(3) of the Internal Revenue Code.<sup>39</sup> Public colleges and universities are automatically exempt from federal income taxes under Section 115, which exempts income of states and their political subdivisions, including public colleges and universities. Some public colleges and universities

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<sup>38</sup>For a more detailed discussion of various tax issues facing nonprofit organizations in general, see Frances R. Hill & Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* (Warren, Gorham & Lamont, 1994).

<sup>39</sup>In most cases, colleges and universities routinely receive their tax exemptions. However, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the U.S. Supreme Court upheld the Internal Revenue Service's denial of tax-exempt status for Bob Jones University as well as a second plaintiff, Goldsboro Christian Academy, based on their racially discriminatory policies. Bob Jones University prohibited students from interracial dating or marriage, and Goldsboro denied admission to most blacks. The Court determined that "[r]acially discriminatory educational institutions cannot be viewed as conferring a public benefit" within the common law concept of "charity" or "within the congressional intent" underlying both Section 50(c)(3) and Section 170, the provision authorizing deductions for charitable contributions (461 U.S. at 595-96).

have still applied, successfully, for tax exemption under Section 501(c)(3). Although this “extra” status is not required, these public institutions have obtained it largely for symbolic reasons (for example, because Section 501(c)(3) status would be more understandable to potential donors).

A college or university’s tax-exempt status provides a number of key advantages that are central to financial stability and accomplishment of long-term objectives. *First*, the institution is exempt from income taxes on its receipts from tuition and, in general, on its endowment earnings (for example, interest, dividends, royalties, and capital gains). An important exception is “unrelated business income taxes,” which require private and public institutions to pay income taxes on net income when they conduct an unrelated trade or business (such as selling golf club memberships to the public for a university-owned golf facility) or when they make certain debt-financed investments. These rules are discussed in subsection 13.3.6 below. Another important exception is income from research. These rules are discussed in Section 15.4.4 of this book.

*Second*, donors to tax-exempt colleges and universities may deduct their gifts from their income taxes. The basic rules for charitable contributions are discussed in subsection 13.3.5 below.

*Third*, tax-exempt colleges and universities may finance their facilities using not only gifts, internal resources, or regular borrowings from banks or other financial institutions, but also using tax-exempt bonds, which enable colleges and universities to obtain financing at below-market rates. Tax-exempt bonds are typically issued on behalf of private universities by state agencies that assist state educational institutions with facilities financing (see, for example, Section 1.6.3 of this book). These state agencies may also issue tax-exempt bonds for public universities, although it is possible for public universities to issue such bonds directly. Once a tax-exempt bond is issued, the holders of the bonds (which may be institutions, such as banks or insurance companies, or private investors) may exclude the “interest” that is received from their taxable income. Section 103 of the Code excludes from gross income the interest on state or local bonds, even if the bonds are being issued on behalf of another entity such as a college or university. This exclusion provides a very substantial tax benefit to the bondholders, who would otherwise have to pay tax on the interest. This benefit to bondholders allows the issuer to offer a lesser rate of interest than would be offered if the interest were taxable to the holders—that is, holders are willing to accept a lesser interest rate return, often by several percentage points, because their return is tax free. Likewise, of course, universities enjoy the advantage of paying below-market interest, which can reduce substantially the cost of financing academic facilities. Tax-exempt bonds are increasingly the subject of IRS audit activity. The rules regarding them are very complex, and there is a perceived potential for inappropriate use of funds, such as through arbitrage or by private use of the financed facilities.

*Fourth*, tax-exempt status permits colleges and universities to seek funding from sources that are usually made available only to tax-exempt organizations. These include federal grants and contracts for research or other purposes, as well as funding from private foundations and other charitable organizations.

*Fifth*, tax-exempt status carries with it a series of other benefits, including exemptions from state property and sales taxes, postal privileges, and some special exemptions and rules that apply in various federal and state statutory schemes, such as the securities and pension laws.

The benefits of tax-exemption for colleges and universities come with responsibilities and burdens. Institutional administrators will need to be aware of, and ensure institutional compliance with, the various filing requirements and public disclosure requirements (see, for example, I.R.C. § 6033(a)(1), and I.R.C. § 6104(e)), that are applicable to colleges and universities, both at the federal and state levels. For example, private institutions must file federal Form 990 on an annual basis, which discloses a great amount of information about their activities, including the compensation paid to officers, trustees, and the five most highly compensated employees. Private and public institutions must properly acknowledge gifts from donors (see I.R.C. § 170(f) for substantiation requirements for contributions of \$250 or more). Private institutions must conduct their activities in ways that avoid private inurement and excess benefits or compensation to their key insiders, under threat of losing tax-exempt status or facing intermediate sanctions (see subsection 13.3.3 below). Private and public institutions must monitor their activities to track “unrelated business income” (see subsection 13.3.6 below) and must follow complex operating and reporting rules for tax-exempt bond financing.

**13.3.3. Tax-exempt status and intermediate sanctions.** For private colleges and universities, one of the main requirements for tax exemption under Section 501(c)(3) is that “no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual.” This is commonly referred to as the “private inurement test” and is meant to ensure that trustees, officers, and other insiders do not improperly benefit from an organization’s tax-exempt status. A college or university that violates the private inurement test is subject to revocation of its tax-exempt status.<sup>40</sup>

Prior to the Taxpayers’ Bill of Rights 2 (Pub. L. No. 104-168, signed on July 30, 1996), the IRS did not have a penalty or enforcement mechanism for violations of the private inurement prohibition by public charities, short of revoking the public charity’s tax-exempt status. From the point of view of the Service, the threat of revocation of an organization’s tax-exempt status was an unwieldy tool for enforcement, impractical for properly addressing other than the most serious violations. From the point of view of the exempt organization, actual revocation of tax-exempt status was an extreme and often unreasonable response that would cripple the organization’s operations. In situations in which it deemed revocation inappropriate, the Service was left with negotiating individual closing agreements (settlement agreements) with exempt organizations that had

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<sup>40</sup>There is also another doctrine known as the “private benefit” doctrine, under which providing excess benefits to any person or entity, whether an insider or not, can be grounds for loss of tax-exempt status. In general, this doctrine is applied to major abuses, whereas the private inurement test can, theoretically, apply even to very small abuses.



engaged in private inurement transactions, allowing the organization to maintain its exempt status while addressing the areas of concern raised by the Service. Such individual agreements were an excessive drain on the Service's time and resources. Moreover, enforcement through individual agreements not only risked unfair and inconsistent application of the law, but these inherently private agreements also did not provide any public guidance upon which other organizations could model their actions.

Another failing of the prior law was that it provided for penalties against the public charity and not against the private individuals who improperly benefited from the violation. Even in situations in which private individuals may have been responsible for the violation, such as through improper use of their authority or influence, it was the public charity that was the most at risk by the revocation of its tax-exempt status.

In the Taxpayers' Bill of Rights 2, Congress sought to address this lack of a proper enforcement mechanism by adding Section 4958—commonly referred to as the “intermediate sanctions”—to the Code. Intermediate sanctions provide for an excise tax (essentially a penalty) upon a disqualified person (and not the public charity) for engaging in an excess benefit transaction.<sup>41</sup> Section 4958 defines a “disqualified person” generally as (1) a person who at any time during the five years preceding the transaction is in a position to exercise substantial influence over the exempt organization, such as a director, president, treasurer, or similar officer; (2) a member of such a person's family; or (3) an entity that is 35 percent controlled by such a person. An “excess benefit” is defined generally as non-fair market value transactions and certain “revenue sharing” transactions that result in private inurement. The excise tax is equal to 25 percent of the excess benefit. An additional tax equal to 200 percent of the excess benefit is imposed on the disqualified person if the excess benefit transaction is not corrected within a certain period, thus ensuring that the disqualified person does not benefit from the transaction. In addition to the tax on the disqualified person, Section 4958 also imposes a tax equal to 10 percent of the excess benefit on an organizational manager (such as an officer, director, or trustee) who knowingly approves such a transaction. Accordingly, in contrast to prior law, under intermediate sanctions it is the individuals who are responsible for, or who benefit from, the improper transaction who are penalized and not the public charity.

Intermediate sanctions constituted a dramatic change in the legal landscape for public charities. The Service recognized the scope of the change and the importance of involving the affected taxpayers in drafting regulations to flesh

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<sup>41</sup>*The Committee to Save Adelphi v. Diamandopoulos* (New York Board of Regents 1997) represents an alternative approach for dealing with private inurement issues. The case was a private action brought not against a nonprofit institution itself but against the individual trustees of the school for breach of duty regarding, among other things, the excessive salary and benefits of the school president (including an \$82,000 Mercedes and reimbursed expenses such as cognac at \$150 a glass). In the action brought before the New York Board of Regents, the governing body for educational institutions in New York, the board removed eighteen of the nineteen trustees of Adelphi University.

out the new rules, a lengthy process that took nearly three and a half years. Final regulations for the intermediate sanctions were issued on January 22, 2002. The regulations provide examples of disqualified persons. In respect to universities, a disqualified person would include voting members of the governing board (that is, the board of trustees or regents), the chief executive officer or chief operating officers (that is, president or chancellor), and the treasurer and chief financial officers. Beyond providing the necessary details to implement Section 4958, the final regulations also provide for a procedure for a public charity to establish a rebuttable presumption of reasonableness for its transactions that involve compensation of a disqualified person. If the public charity follows the proper steps in approving and documenting the approval, the compensation is presumed to be reasonable and the burden shifts to the Service to prove that it is not. This presumption provides a significant procedural benefit in the case of an IRS challenge, and thus is considered a best practices standard.

**13.3.4. Tax rules regarding students.** Colleges and universities must be aware of their obligations under the complex tax rules applicable to students, including their obligations to withhold taxes on student wages. Students themselves also often have independent tax reporting and payment obligations regarding amounts they receive as scholarships or fellowships, as well as amounts received as wages if they perform services for their university employers.

Section 117(a) provides that gross income does not include any amount received as a “qualified scholarship” by degree candidates at educational organizations. A qualified scholarship is an amount given as a scholarship or fellowship grant if the amount is used for “qualified tuition and related expenses.” These qualified expenses include tuition and required fees for enrollment or attendance, as well as books, supplies, equipment, and fees required for courses of instruction. Notably, expenses for room and board are not included. Under an important exception, qualified scholarships do not include payments by the college or university for teaching, research, or other services that the student performs as a condition for receiving the scholarship.<sup>42</sup>

This statutory tax scheme provides, in effect, three types of treatment for amounts paid or credited to students by universities. *First*, if the payment is a “qualified scholarship” used for qualified expenses, it is completely excludable from the student’s income. *Second*, if the payment is not a qualified scholarship, but no services are performed by the student, the payment is taxable to the student as nonwage income. This treatment applies, for example, to the portion of scholarships covering room and board—that is, amounts of the scholarship that exceeded qualified expenses. This treatment also applies to fellowships given to nondegree students, for example, postdoctoral fellows, where there are no services

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<sup>42</sup>In *Bingler v. Johnson*, 394 U.S. 741 (1969), the U.S. Supreme Court established the requirement that a grantor must have a lack of self-interest in making a payment in order for the payment to be considered a scholarship pursuant to Section 117. The requirement of disinterest distinguishes a scholarship from bargained-for-consideration, such as a promise to work for the grantor.

performed for the university. *Third*, when students perform services for the university, the amounts paid to the students for the services are taxable as wages. This rule applies whether the work by the students is directly related to their education (such as teaching or research assistantships) or is unrelated (such as working in the cafeteria or library as part of a student work-study award).

It is important to allocate properly the amounts paid to students in order to determine the correct reporting and withholding treatment. Generally, amounts paid as qualified scholarships or as nonqualifying scholarships and fellowships for research do not need to be reported on Form 1099 or other tax forms that the institution provides to students. While students must include as income on their personal tax returns any amounts that exceed qualified expenses under a qualified scholarship, this reporting obligation is the students' responsibility. Often, the college or university will provide students with adequate information to permit accurate reporting, and some universities issue Form 1099 for the portion of scholarships or fellowships that are taxable even if they are not required to do so.

A key issue when wages are paid to students is the university's obligations to withhold Federal Insurance Contributions Act (FICA) employment taxes (which serve to fund both Social Security and Medicare). These withholding issues have tended to be an important item for review during IRS audits (see subsection 13.3.8 below). Amounts paid to certain students are exempted from FICA taxes by various statutory provisions. For example, Section 3121(b)(13) exempts income earned by student nurses "in the employ of a hospital or a nurses' training school," provided the individual "is enrolled and is regularly attending classes." For foreign students and scholars, Section 3121(b)(19) provides that "service which is performed by a nonresident alien individual for the period he is temporarily present in the United States" under certain categories of nonimmigrant status, such as a bona fide student, scholar, trainee, teacher, professor, or research assistant (see Section 8.7.4 of this book) is exempted from FICA if the services are performed to carry out the purposes of the visa status.

A broader FICA exemption for students is provided by Section 3121(b)(10), which states that income earned from "services performed in the employ of a school, college, or university," or a related Section 509(a)(3) supporting organization,<sup>43</sup> is not wages subject to FICA taxes "if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." There has been an extended series of rulings and guidance over the years from the IRS on the student FICA exemption (see, for example, Revenue Procedure 98-16, 1998-5 I.R.B. 19; Technical Advice Memorandum 9332005 (May 3, 1993); Revenue Ruling 78-17, 1978-1 C.B. 306). On December 21, 2004, the Service issued final regulations that provide additional guidance (Treasury Decision 9167, 69 Fed. Reg. 76404-01), and also issued Revenue Procedure 2005-11, 2005-2 I.R.B. 307, which provides new safe harbor standards superceding those established in the prior

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<sup>43</sup>A 509(a)(3) supporting organization is a separate tax-exempt organization that is affiliated with and operated for the benefit of a college or university. Supporting organizations are often used as special purpose vehicles, for example, university presses or fund-raising foundations.

guidance under Revenue Procedure 98-16. The new final regulations clarify the definitions of “school, college, or university” and “classes,” as used in Section 3121(b)(10), and provide factors to be considered in determining whether the person performing the employment services should be treated as a student, as opposed to a regular employee, for purposes of the exemption. One factor, for example, is whether the person is a career employee, or is entitled to certain employment benefits.

Similar exemption issues may also arise under the Federal Unemployment Tax Act (FUTA) with respect to colleges’ and universities’ obligation to contribute to the federal, or a state, unemployment compensation fund.<sup>44</sup> There are exemptions for FUTA regarding contributions on behalf of student workers that mirror the withholding exemptions for FICA. For example, Section 3306(c)(10)(B) provides an exemption regarding wages paid to students; Section 3306(c)(13) provides an exemption regarding student nurses and medical interns; and Section 3306(c)(19) provides an exemption for nonresident aliens who are bona fide students or scholars.

There are various other tax issues, and available tax benefits, that affect students. Among the most pertinent are the following:

- Section 117(d) governs the tax status of qualified tuition reduction plans for employees and their dependents. In general, this section excludes from gross income the amount of any tuition reduction for employees or their dependents who are taking undergraduate courses either at the institution where they are employed or at another college or university that grants a tuition reduction to employees of that institution. To maintain this tax-free treatment, however, the institution must award tuition reduction assistance in a way that does not discriminate in favor of highly compensated employees.
- Section 117(d) also has special rules for tuition reduction for teaching and research assistants, authorizing graduate students engaged in teaching and research to exclude from gross income a reduction in tuition that is not compensation for their teaching and research.
- Section 529 governs “qualified state tuition programs” (QSTPs), which are prepaid tuition programs or contribution programs sponsored by the states. Section 529 exempts QSTPs from federal taxation except for any unrelated business income they may generate. It also governs the tax treatment of contributions to a QSTP and of payments to beneficiaries from a QSTP.
- Section 108(f) provides an exclusion from income for the forgiveness of student loans where forgiveness is contingent upon the person agreeing

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<sup>44</sup>The purpose of the Federal Unemployment Tax Act is to generate revenues that may be used for unemployment benefits for qualifying employees who are temporarily out of work. The federal government and the states share responsibility for the Act’s operation. The Act provides a very narrow exemption for some church-related postsecondary institutions (see § 3309(b)(1), and *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981)).

to public service work (for instance, providing medical services in rural or isolated areas where there is a shortage).

- Section 135 provides that, for certain taxpayers and their dependents, the proceeds from redemption of U.S. Savings Bonds are not taxable if they are used for “qualified higher education expenses.”
- Section 221 provides for deductions for interest paid on “qualified education loans.”
- Section 222 provides deductions for “qualified tuition and related expenses.”
- Section 25A establishes tuition tax credits—the HOPE Scholarship Credit and the Lifetime Learning Credit—that are intended to be a widely available type of indirect financial aid for students. The tuition credits, however, also impose substantial reporting requirements on colleges and universities, which must file information returns with the IRS and issue payee statements to students who receive one of the tuition credits (see I.R.C. § 6050S).

**13.3.5. Gifts and contributions.** The tax laws have an enormous impact on the ability of colleges and universities to attract gifts from alumni and other donors who wish to support higher educational institutions or specific institutional programs or activities.

The tax rules that apply to gifts made to Section 501(c)(3) public charities likewise apply generally to colleges and universities, whether private or public institutions. The rules for donors’ charitable deductions are set forth in Section 170. An individual donor is permitted to take a deduction not to exceed 50 percent of the individual’s “contribution base” for the year with respect to contributions to eight listed types of organizations, including “an educational organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where the educational activities are regularly carried on” (see I.R.C. § 170(b)(1)(A)(ii)). Charitable deductions by a corporation are generally limited to 10 percent of taxable income. There are many intricate rules that apply to charitable gifts, including limits on contributions of capital gain property, valuation and substantiation requirements, and carryovers and carrybacks of excess contributions in a year.

In addition, there are rules that allow unlimited charitable deductions for estate and gift tax purposes (see I.R.C. §§ 2055, 2522).<sup>45</sup>

Charitable contributions to colleges and universities take many forms, including cash, securities, real estate, oil and gas property interests, insurance policies and proceeds, limited liability company and partnership interests, retirement plan assets and Individual Retirement Accounts, intellectual property, art, and

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<sup>45</sup>*The Harvard Manual on Tax Aspects of Charitable Giving* (8th ed., Harvard University Planned Giving Office, 1999), by David M. Donaldson & Carolyn M. Osteen, provides an excellent discussion of the various rules and requirements, as well as other insights on charitable giving to colleges and universities.

books. Colleges and universities are often wary of taking certain kinds of gifts for reasons such as environmental liabilities from real property, or exposure to unrelated business income taxes for S corporation, limited liability company (LLC), or partnership interests.

Donors often make charitable contributions directly (for example, by check, credit card, transfer of title, or actual delivery) as straightforward transfers or, in some cases, as bargain sales. Major donors also frequently use techniques that accomplish their own individual and estate planning needs, and that sometimes provide them with income generated from the funds donated for a period of years or for their lives and the lives of their spouses or beneficiaries. Examples of the latter include gift annuities, pooled income funds, pledges, and charitable lead trusts, charitable remainder annuity trusts, and unitrusts. (See David M. Donaldson & Carolyn M. Osteen, *The Harvard Manual on Tax Aspects of Charitable Giving* (8th ed., Harvard University Planned Giving Office, 1999); and BNA Tax Management Portfolios 521–2d, *Charitable Contributions: Income Tax Aspects*, by Barbara L. Kirschten & Carla Neeley Freitag, which provide excellent discussions of various methods used for charitable contributions.) Many gifts are also restricted to a particular use—for example, an endowed chair—or are subject to subsequent donor advice regarding their use.

A detailed explanation of the tax rules on giving is well beyond the scope of this book. However, some special charitable rules that primarily or exclusively affect colleges and universities have received particular attention in recent years. For example, one subsection of Section 170 limits the deduction available to donors for amounts contributed to a university in exchange for the right to purchase school athletic tickets. The American Jobs Creation Act of 2004 revised another subsection of Section 170 to limit the amount that can be immediately deducted for donations of patent or other intellectual property (other than certain copyrights), but provides for future deductions for the next twelve years based on the “qualified donee income” resulting from the donated intellectual property (see I.R.C. § 170(m), as amended by the American Jobs Creation Act of 2004, Pub. L. No. 108-311, § 882, signed on October 22, 2004). In the gift tax area, the Code provides for an exclusion from gift tax for prepaid tuition (see I.R.C. § 2503(e)). One of the more unique rules is the exclusion from income available to “officers or employees of the Federal Government” who assign income that they are entitled to receive to a charity—for instance, a Senator who has a speaking honorarium paid to a college instead of himself or herself (see I.R.C. § 7701(k)).

**13.3.6. The unrelated business income tax.** Income that a public or private college or university generates from unrelated business activities, regularly carried on, is subject to the unrelated business income tax, often referred to as UBIT.<sup>46</sup> Under I.R.C. §§ 511–514, this income is subject to UBIT

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<sup>46</sup>The unrelated business income tax explicitly applies not only to private colleges and universities that are exempt under Section 501(c)(3), but also to public colleges and universities (see I.R.C. § 512(a)(2)).

if the activities are conducted directly or through partnerships (including an LLC that is treated as a partnership) in which the institution is a member (see I.R.C. § 512(c)).

UBIT applies when the institution or partnership receives income from providing services or selling goods unless these activities are within the exempt purposes of the organization—for example, teaching and research, but typically excluding product and clinical testing. (See I.R.C. § 513(a); Treas. Reg. § 1.513-1(a), (d); see also I.R.C. § 512(b)(7), (8), (9) with respect to income derived from research activities.) Services that are arguably related to the institution’s exempt purposes, such as management and administrative services, must be carefully analyzed to determine whether they have become “unrelated” under developing IRS interpretations (see, for example, Tech. Adv. Mem. 9711002 (April 21, 1995); IRS Private Letter Ruling 9617031 (January 26, 1996)). Rents from equipment or personal property are also generally taxable unless the personal property is rented with real property, and the rent attributable to the personal property is incidental to the total rent paid (see I.R.C. § 512(b)(3)). The mere fact that the revenues from such activities subsidize the exempt organization is not a sufficient basis for avoiding UBIT (see I.R.C. § 513(a)).

There are important statutory exemptions from UBIT. One of the most important is the exemption for a trade or business that is conducted “by the organization primarily for the convenience of its members, students, patients, officers, or employees” (see I.R.C. § 513(a)(2)).<sup>47</sup> This exemption covers a number of basic activities of a college or university, such as a laundry the institution operates for the purpose of laundering dormitory linens and the clothing of students, officers, or employees; or vending machines located in dormitories and other campus buildings. Sales of textbooks by a campus bookstore are directly related to a school’s educational purpose and thus not subject to UBIT, but the exemption would also allow a bookstore to sell noneducational related supplies, such as toiletries, snacks, and beverages.

Another important exemption from UBIT is passive investment income. Thus, dividends, interest, royalties, rents from real property, and gains or losses from the sale or disposition of property that is not inventory or property held primarily for sale in a trade or business, are not generally subject to UBIT (see I.R.C. § 512(b)).<sup>48</sup> On the other hand, some categories of income that include passive income may be taxable in limited circumstances. Payments from controlled entities (more than 50 percent ownership

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<sup>47</sup>By statute, UBIT also does not apply to income from a trade or business where “substantially all the work in carrying on [the] trade or business is performed for the organization without compensation” (see I.R.C. § 513(a)(1)), or to income from the “selling of merchandise substantially all of which has been received by the organization as gifts or contributions” (see I.R.C. § 513(a)(3)).

<sup>48</sup>Section 512(b) also provides rules for measuring the amount of income; for example, royalties may be measured by production or by gross or net receipts (see I.R.C. § 512(b)(2); Treas. Reg. § 512(b)-1(b)), while rents may be measured by gross, but not by net, revenue from the property (see I.R.C. § 512(b)(3)).

in a corporation or partnership, and including exempt and nonexempt organizations) are considered unrelated income if the controlled entity claims the payment as a deduction in computing its own taxes, for example, interest payments on a debt, royalties, or real property rentals (see I.R.C. § 512(b)(13)). The proportionate share of income generated by an S corporation (that is, a small business corporation that elects pass-through treatment for income of the corporation) is also taxable to the exempt organization even if it is passive income (see I.R.C. § 512(e)), as is gain on the sale of S corporation stock.

There is another category of UBIT—unrelated debt-financed income under Section 514—that applies the tax to income generated from debt-financed property owned by the exempt organization directly or indirectly through an interest in a partnership or LLC. There are certain exceptions, such as an exemption for property used in research or in performing exempt functions (see I.R.C. § 514(b)(1)(A), (C)). Debt-financed property is property with respect to which there is acquisition indebtedness, such as a mortgage or an equity indebtedness incurred to improve the property. If property is only partially debt financed, then a pro rata share of the income is subject to UBIT. There is a special exemption from UBIT for real property if the property is subject to indebtedness incurred to acquire or improve the property (see I.R.C. § 514(c)(9)).

When a college or university receives unrelated business income, it must file a federal UBIT tax return, as well as a tax return in any state in which it is doing business (see I.R.C. § 6033; Treas. Reg. § 1.6033-2(a)(2); Federal Form 990T and instructions).<sup>49</sup>

UBIT is imposed on the net income from unrelated business activities, meaning that the exempt organization may claim appropriate deductions that are directly connected to the gross income from unrelated business activities (see I.R.C. § 512(a)(1)). Also, net losses from one taxable activity may be used to offset net income from other taxable activities. However, losses from exempt activities may not offset taxable income (see IRS Private Letter Ruling 8532009 (April 29, 1985); see also I.R.C. § 512(b)(6) regarding the allowance of net operating loss deductions in computing UBIT).

Institutions must maintain careful records that permit the identification of taxable and exempt income, as well as related expenses. Some organizations have faced taxation on gross unrelated business income due to the failure to account properly (or maintain proper records) for expenses that are directly attributable to taxable, as opposed to exempt, income. A common problem, for example, concerns segregating the costs attributable to exempt royalty income from the costs attributable to taxable sales or services. Provisions for proper accounting and record keeping are necessary in any joint venture that may produce both exempt and taxable income. Similarly, institutions need to consider

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<sup>49</sup>If the unrelated business income is received from a pass-through entity, such as a partnership or LLC, then state returns need to be filed by the exempt organization in any state where the pass-through entity is doing business.



whether a revenue stream that is typically exempt from UBIT, such as royalties, can become subject to UBIT because there are additional services performed as part of the arrangement.<sup>50</sup>

The fact that a particular investment opportunity may result in unrelated business income should not in itself counsel rejection. Exempt status is not placed at risk where unrelated activities are not substantial in relation to overall exempt function activities. UBIT arising from a potential revenue stream should, of course, be taken into account in valuing a particular business opportunity.

**13.3.7. Related entities and commercialization.** Colleges and universities have become increasingly complex legal enterprises. Many institutions exist as single legal entities (or as an arm of a state or local government). It has become common, however, for colleges and universities to have various parts of their operations conducted through other entities (see generally Section 3.6 of this book). Academic medical centers and affiliated or controlled hospitals, for instance, are often separately incorporated from their “parent” universities. In addition, there may be a host of other entities that are affiliated with or controlled by college or universities. These include supporting organizations, related foundations, and nonprofit affiliates whose boards of directors are appointed in whole or part by the university. Often colleges and universities also own substantial, controlling, or sole interests in for-profit entities. These for-profit entities may be corporations, S corporations, partnerships, or LLCs.

The reasons for conducting activities through separate entities vary widely with the particular facts. Most of the time, the reasons are not tax related (except, notably, when a for-profit activity is so large that it could endanger the institution’s tax-exempt status). Common reasons are to achieve limited liability, to have a separate management or governance structure, to have focused financial accountability, to commercialize an invention or other intellectual property, or to allow different forms of compensation than the university typically uses (for example, equity-based compensation in a for-profit subsidiary). University presses, technology transfer operations, investment operations, spin-offs of commercial entities, and foreign ventures are frequently, but certainly not universally or exclusively, considered as appropriate activities to place in a separate entity.

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<sup>50</sup>In a series of highly publicized cases, organizations have been successful in challenging the imposition of UBIT on royalties received from affinity card arrangements, where the IRS had argued that additional services “tainted” the royalty stream. See *Sierra Club v. Commissioner*, T.C. Memo 1999-86; *Sierra Club v. Commissioner*, 86 F.3d 1526 (9th Cir. 1996); *Mississippi State Alumni Association, Inc. v. Commissioner*, T.C. Memo 1997-397; *Oregon State University Alumni Association v. Commissioner*, T.C. Memo 1996-34; *Alumni Association of the University of Oregon v. Commissioner*, T.C. Memo 1996-63. See generally *Texas Farm Bureau v. Commissioner*, 53 F.3d 120 (5th Cir. 1995); Tech. Adv. Mem. 9440001 (June 17, 1994). To the extent that any significant services performed are otherwise exempt from UBIT, such as education or research, or are performed under a separate and distinct arrangement, such as for administrative or marketing services unrelated to the royalties, there should presumably be no tainting of royalties for UBIT purposes.

Tax considerations become important in deciding what type of entity the college or university should use to accomplish its purposes. A separate tax-exempt affiliate will need to apply for and obtain Section 501(c)(3) status (see subsection 13.3.2 above). A for-profit corporation pays taxes on its net income, so a college or university would not want to conduct activities through this type of entity that it could otherwise conduct directly on a tax-free basis. Examples would be nondegree education and research. A college or university that is a partner in a partnership, or a member of a limited liability company, will be treated as receiving directly its share of the income, deductions, and losses of that entity for tax purposes. This could result in unrelated business income tax exposure to the college or university, depending on the nature of the activities conducted by the partnership or LLC. Separate entities will also frequently require separate payrolls, with the attendant tax reporting and withholding obligations, as well as separate benefit programs. The separate entity may not be eligible to provide certain types of benefits, such as a Section 403(b) retirement program, if the entity is not itself tax exempt under Section 501(c)(3); and it will not be able to provide tuition reduction benefits if it does not qualify as an educational organization (see subsection 13.3.4 above).

There may be additional tax consequences to consider if the separate entity is dissolved, sold, or its assets are distributed to its parent. The unrelated business income tax rules (see I.R.C. § 512(b)(13)) provide that payments from controlled entities (more than 50 percent ownership in a corporation or partnership, and including exempt and nonexempt organizations) are considered unrelated income if the controlled entity claims the payment as a deduction in computing its own taxes (for example, a deduction for interest on a debt, royalties, or real property rentals). The general rule is that a sale of stock by a Section 501(c)(3) organization is exempt from unrelated business income taxes. The sale of partnership and limited liability company interests may have greater complexity, particularly where the partnership or LLC has debt that could result in unrelated business income taxes on the sale based on treatment as debt-financed property taxable under Section 514.

The IRS has instructed its agents to examine affiliates as part of its audit process (see subsection 13.3.8 below). While there are many issues that may arise, one area that is drawing increased attention is ensuring that multiple entities are not used as a means to pay excessive compensation.

**13.3.8. IRS audit guidelines.** The IRS has increased its audit activities regarding colleges and universities. This development is not surprising given the size of many institutions, the expanding scope of their operations, and the complexity of the laws affecting them. In the early 1990s, the IRS recognized that both its agents and the colleges and universities themselves would benefit from guidelines for audits. After receiving comments from the public on a proposed version, the IRS released “Final Examination Guidelines for Colleges and Universities,” Announcement 94-112 (August 25, 1994), commonly called the “IRS Guidelines.” They “are intended to provide a framework which agents may follow in conducting the examination.” They also serve as a roadmap and a

primer for colleges and universities on the various tax issues the IRS is likely to pursue in an audit and on the various document requests it is likely to make.

The IRS Guidelines identify various documents that an examiner may want to review during an audit. These include traditional documents such as financial statements and minutes of board of trustees' meetings, as well as more college-specific documents such as accreditation reports, student newspapers, and athletic coaches' financial disclosures to the NCAA.

The IRS Guidelines also identify specific issues that an examiner will want to review during the course of the audit. The following are examples of some of these issues:

- *Employment taxes.* Colleges and universities typically have a large number of employees, so there are a number of basic tax issues that would apply to any large employer, such as ensuring proper reporting. More specific to colleges and universities are issues such as the student FICA/FUTA exemptions discussed in subsection 13.3.4 above. Colleges and universities also often have independent contractor tax issues, specifically whether they have properly classified someone as an independent contractor as opposed to an employee (see generally Section 4.2 of this book).
- *Services performed by nonresident aliens.* When foreign students or scholars perform compensated services for their university, federal tax issues may arise (see above), as well as special issues concerning tax treaties.
- *Fringe benefits.* In addition to exploring traditional fringe benefit issues, such as qualifications for a cafeteria plan, IRS examiners are advised to focus on numerous college and university issues such as the provision of automobiles, parking, flights on school aircraft, personal transportation for postseason athletics, awards, prizes, free or discounted tickets to school functions, subsidized dining rooms, meals, insurance, housing allowances, club memberships, use of athletic facilities, tuition assistance, and other educational assistance. There are a number of school-specific exemptions for colleges and universities in the Internal Revenue Code, such as the Section 119(d) exclusion for qualified campus lodging and the Section 117(d) qualified tuition reduction rules.
- *Retirement or pension plans and other deferred compensation arrangements.* In addition to standard qualification issues that must be reviewed for qualified retirement plans, there are also plans that are specific to 501(c)(3) entities or public schools, such as Section 403(b) retirement plan or eligible deferred compensation plans under Section 457.
- *Contributions.* Universities and colleges, like other tax-exempt organizations, receive large amounts of money from contributions. The IRS Guidelines advise examiners to review traditional issues such as the provision of receipts, appraisals, or benefits to the donor (*quid pro quo* contributions), and reporting requirements such as Form 8283 for gifts

in excess of \$5,000 and Form 8282 (Donee Information Return) for property that is disposed of by the donee within two years of the donation. Examiners also review the terms and management of endowment funds and other restricted donations. In addition, there are university-specific and college-specific issues, such as donations made for the right to purchase athletic tickets or for naming rights, as with a building. (See generally subsection 13.3.5 above.)

- *Financing activities.* In regard to financing activities, examiners are advised to review interest rates and terms of loan agreements, compared to rates that were available on the market, to determine (among other things) if there was an improper benefit conveyed. If the college or university raises funds through the issuance of tax-exempt bonds, there will also be numerous issues that a tax-exempt bond specialist will need to review.
- *Research and contracts.* The IRS Guidelines advise examiners to review the funding of research, whether it is through research contracts, joint ventures, spin-off companies, commercial licenses, clinical trial agreements, or other means. In addition to the potential UBIT issues, there may be issues with accounting for the sharing of royalties with the faculty inventors and even non-tax issues such as conflicts of interest. (See Randolph M. Goodman & Linda A. Arnsbarger, “Trading Technology for Equity: A Guide to Participating in Start-Up Companies, Joint Ventures and Affiliates” (Matthew Bender, 1999) (reprinted from the Proceedings of the New York University 27th Conference on Tax Planning for 501(c)(3) Organizations).)
- *Scholarships and fellowships.* As discussed in subsection 13.3.4, there are special rules for the award of scholarships and fellowships. The guidelines advise the examiner to confirm the proper application of these rules and the reporting of the amounts of awards.
- *Legislative and political activities and expenses.* Tax-exempt status under Section 501(c)(3) requires that “no substantial part of the activities of [the college or university] is carrying on propaganda, or otherwise attempting, to influence legislation.” Moreover, the college and university must “not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office” (see I.R.C. § 501(c)(3)). Because a private school’s tax exemption is tied to this restriction, the examiner must look into this matter, especially since the restriction has been interpreted to permit some on-campus activities (for example, open debates, or certain activities for a course on campaigning) (see IRS Guidelines § 342.(12); Rev. Rul. 72-512, 1972-2 C.B. 246).
- *University bookstores.* Nearly all colleges and universities have a bookstore, a large part of whose sales are exempted from UBIT. As discussed in subsection 13.3.6, institutions are able to sell supplies and other items that are necessary for the courses that the institution offers, since

the courses and thus the supplies are substantially related to the institution's tax-exempt purposes. Sales of other materials that further the intellectual life of the campus community—for example, books, tapes, records, and computer hardware and software—are also exempt from UBIT. In addition, proceeds from items sold primarily for the convenience of the student or employee—such as toiletries, wearing apparel, candy, and cigarettes are also exempt. The exemption, however, is not a blanket exemption; it is limited, for example, to sales to students, officers, and employees of the institution.

- *Other UBIT issues.* The guidelines also advise examiners to review various other UBIT issues. One example concerns income from the rental of university facilities for purposes unrelated to the school, such as the rental of an auditorium for a private party. Another example concerns income from auxiliary enterprises that many colleges and universities operate, such as hotels, motels, and parking lots (see Section 15.3.4.1).
- *Related entities.* As discussed in subsection 13.3.7 above, subsidiaries and other affiliated entities are becoming more common among colleges and universities. Examiners are therefore advised to review carefully the interactions between the various entities for issues such as improper accounting, improper reporting, and private inurement.

## ***Sec. 13.4. Federal Aid-to-Education Programs***

***13.4.1. Functions and history.*** The federal government's major function regarding postsecondary education is to establish national priorities and objectives for federal spending on education and to provide funds in accordance with those decisions. To implement its priorities and objectives, the federal government attaches a wide and varied range of conditions to the funds it makes available under its spending power (Section 13.1.2) and enforces these conditions against postsecondary institutions and against faculty members, students, and other individual recipients of federal aid. Some of these conditions are specific to the program for which funds are given. Other "cross-cutting" conditions apply across a range of programs; they are discussed in Section 13.4.4 below. The nondiscrimination requirements discussed in Section 13.5 are also major examples of cross-cutting conditions. Cumulatively, such conditions have exerted a substantial influence on postsecondary institutions, and have sometimes resulted in institutional cries of economic coercion and federal control. There have periodically also been charges that the federal government provides insufficient funds for higher education or that its priorities are misguided. In light of such criticisms, the federal role in funding postsecondary education has for many years been a major political and policy issue. The particular national goals to be achieved through funding and fund conditions, the adjustment of priorities, and the delivery and compliance mechanisms best suited to achieving these goals will likely remain subjects of debate for the foreseeable future.

Federal spending for postsecondary education has a long history. Shortly after the founding of the United States, the federal government began endowing public higher education institutions with public lands. In 1862, Congress passed the first Morrill Act, providing grants of land or land scrip to the states for the support of agricultural and mechanical colleges, for which it later provided continuing appropriations. The second Morrill Act, providing money grants for instruction in various branches of higher education, was passed in 1890. In 1944, Congress enacted the first GI Bill, which was followed in later years by successive programs providing funds to veterans to further their education. The National Defense Education Act, passed in 1958 after Congress was spurred by Russia's launching of *Sputnik*, included a large-scale program of low-interest loans for students in institutions of higher education. The Higher Education Facilities Act of 1963 authorized grants and low-interest loans to public and private nonprofit institutions of higher education for constructing and improving various educational facilities. Then, in 1965, Congress finally jumped broadly into supporting higher education with the passage of the Higher Education Act of 1965 (20 U.S.C. § 1001 *et seq.*). The Act's various titles authorized federal support for a range of postsecondary education activities, including community educational services; resources, training, and research for college libraries and personnel; strengthening of developing institutions; and student financial aid programs (see Section 8.3.2). The Act has been frequently amended since 1965 and continues to be the primary authorizing legislation for federal higher education spending.

#### ***13.4.2. Distinction between federal aid and federal procurement.***

Funds provided under the Higher Education Act and other aid programs should be sharply distinguished from funds provided under federal procurement programs. Many federal agencies, such as the U.S. Department of Defense, enter into procurement contracts with postsecondary institutions or consortia, the primary purpose of which is to obtain research or other services that meet the government's own needs. True aid-to-education programs, in contrast, directly serve the needs of institutions, their students and faculty, or the education community in general, rather than the government's own needs for goods or services. The two systems—assistance and procurement—operate independently of one another, with different statutory bases and different regulations, and often with different agency officials in charge. Guidelines for differentiating the two systems are set out in Chapter 63 of Subtitle V of 41 U.S.C.: "Using Procurement Contracts and Grant and Cooperative Agreements."

The bases of the federal procurement system are Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 *et seq.*), the Office of Federal Procurement Policy Act of 1974 (41 U.S.C. § 401 *et seq.*), the Armed Services Procurement Act (10 U.S.C. § 2301 *et seq.*), the Federal Acquisition Regulation (FAR) (48 C.F.R. ch. 1); and other miscellaneous public contract provisions (found particularly in 41 C.F.R. chs. 50–61). These sources establish uniform policies and procedures that individual agencies implement and supplement with regulations specific to their own procurement activities. The individual agency regulations are set out in 48 C.F.R. Chapters 2–49.

Federal procurement law permits federal agencies to exercise more substantial control over the details of procurement contracts than is typical with grants and other forms of federal aid; many standard clauses that must be used in procurement contracts are prescribed by federal regulations (see 48 C.F.R. §§ 16.1–16.7). Unlike assistance, moreover, procurement contracts “shall terminate . . . , whether for default or convenience, only when it is in the government’s interest” (48 C.F.R. § 49.101(b) (1992)). Government contractors found guilty of fraud, embezzlement, antitrust violations, or other criminal or civil offenses impugning business integrity may be debarred or suspended for a specified time from obtaining other government contracts (48 C.F.R. §§ 3.104–3.111 (1992)). Contractors may appeal disputes concerning their government contracts to agency Boards of Contract Appeals, established pursuant to the Contract Disputes Act (41 U.S.C. § 601 *et seq.*), or may bypass this appeals process and bring an action directly in the U.S. Court of Federal Claims (41 U.S.C. § 609(a)(1)).

Other important federal laws also establish requirements applicable to the federal procurement system. Executive Orders 11246 and 11375 (Section 5.2.8 of this book), for instance, establish affirmative action requirements for federal government contractors. Similarly, the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*), as implemented by Department of Labor regulations (29 C.F.R. Part 5), establishes rate-of-pay requirements for employees working under federal construction contracts. The Service Contract Labor Standards Act (41 U.S.C. § 351 *et seq.*) and its implementing regulations (29 C.F.R. Part 4) establish comparable requirements for employees working under federal service contracts.

Although laws such as these are designed for the procurement system rather than the federal aid system, they are often extended to federal aid recipients who enter procurement contracts as a means of accomplishing part of their work under a federal grant, loan, or cooperative agreement. (See, for example, 20 U.S.C. § 1232b (application of Davis-Bacon Act to procurement contracts of Department of Education (ED) aid recipients); 48 C.F.R. § 22.300 *et seq.* (application of Davis-Bacon Act, Executive Orders 11246 and 11375, and Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*), to procurement contracts of ED aid recipients); 29 C.F.R. § 5.2(h) and 41 C.F.R. § 60-1.1 (application of Davis-Bacon Act and Executive Order 11246 to procurement contracts of other federal aid recipients).)

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have proposed a series of amendments to the Federal Acquisition Regulation. The proposed rule is published at 64 Fed. Reg. 37360–37361 (July 9, 1999). One section of the proposed rule, which would amend 48 CFR § 9.104-1(d), apparently supports the disqualification of a prospective federal contractor for “lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, anti-trust laws or consumer protection laws. . . .”

**13.4.3. Legal structure of aid programs.** Federal aid for postsecondary education is disbursed by a number of federal agencies. The five most important are the U.S. Department of Education, the U.S. Department of Health and Human Services, the National Foundation on the Arts and Humanities

(comprised of the National Endowment for the Humanities, the National Endowment for the Arts, and the Institute of Museum Services), the National Science Foundation, and (at least with respect to student aid) the Department of Veterans Affairs.

Federal aid to postsecondary education is dispensed in a variety of ways. Depending on the program involved, federal agencies may award grants or make loans directly to individual students; guarantee loans made to individual students by third parties; award grants directly to faculty members; make grants or loans to postsecondary institutions; enter “cooperative agreements” (as opposed to procurement contracts) with postsecondary institutions; or award grants, make loans, or enter agreements with state agencies, which in turn provide aid to institutions or their students or faculty. Whether an institution is eligible to receive federal aid, either directly from the federal agency or a state agency or indirectly through its student recipients, depends on the requirements of the particular aid program. Typically, however, the institution must be accredited by a recognized accrediting agency or demonstrate compliance with one of the few statutorily prescribed substitutes for accreditation (see Section 14.3).

The “rules of the game” regarding eligibility, application procedures, the selection of recipients, allowable expenditures, conditions on spending, records and reports requirements, compliance reviews, and other federal aid requirements are set out in a variety of sources. Postsecondary administrators will want to be familiar with these sources in order to maximize their institution’s ability to obtain and effectively utilize federal money. Legal counsel will want to be familiar with these sources in order to protect their institution from challenges to its eligibility or to its compliance with applicable requirements.

The starting point is the statute that authorizes the particular federal aid program, along with the statute’s legislative history. Occasionally, the appropriations legislation funding the program for a particular fiscal year will also contain requirements applicable to the expenditure of the appropriated funds. The next source, adding specificity to the statutory base, is the regulations for the program. These regulations, which are published in the *Federal Register* (Fed. Reg.) and then codified in the *Code of Federal Regulations* (C.F.R.), are the primary source of the administering agency’s program requirements. Title 34 of the *Code of Federal Regulations* is the Education title, the location of the U.S. Department of Education’s regulations.

Published regulations have the force of law and bind the government, the aid recipients, and all the outside parties. In addition, agencies may supplement their regulations with program manuals, program guidelines, policy guidance or memoranda, agency interpretations, and “Dear Colleague” letters. These materials generally do not have the status of law; although they may sometimes be binding on recipients who had actual notice of them before receiving federal funds, more often they are treated as agency suggestions that do not bind anyone (see 5 U.S.C. § 552(a)(1); 20 U.S.C. § 1232). Additional requirements or suggestions may be found in the grant award documents or agreements under which the agency dispenses the aid, or in agency grant and contract manuals that establish general agency policy.



Yet other rules of the game are in executive branch directives or congressional legislation applicable to a range of federal agencies or their contractors or grantees. The circulars of the executive branch's Office of Management and Budget (OMB), for instance, set government-wide policy on matters such as allowable costs, indirect cost rates, and audit requirements. These circulars are available from OMB's home page at <http://www.whitehouse.gov/omb/circulars>. One of the most important of these circulars is OMB Circular A-21, titled "Cost Principles for Educational Institutions."

Another circular of particular importance to higher education is OMB Circular A-110, "Uniform Administration Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations." This circular seeks to standardize the administration of federal grants in the various executive branch administrative agencies. A revision to OMB Circular A-110, published at 64 Fed. Reg. 54926 (October 8, 1999), clarifies an institution's obligation to respond to federal Freedom of Information Act (FOIA) requests for research data gathered under federal research grants. The revisions require that such data be made available only after publication in a journal or upon citation or use by an agency official as part of an agency action that has the force and effect of law. Accordingly, FOIA requesters may not obtain any preliminary part of researchers' work or any physical object associated with the research. Nor, under this revision, may requesters obtain research material that contains trade secrets, commercial information, or certain other confidential matter such as personal medical information.

An example of legislation that sets general requirements is the Single Audit Act of 1984, as amended, codified at 31 U.S.C. § 7501 *et seq.*, which establishes uniform requirements for audits of state and local governments and non-profit organizations that receive federal financial assistance or federal "cost-reimbursement contracts" from federal agencies. This Act has been implemented by the OMB via OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

Another example of general legislation is the Byrd Amendment (31 U.S.C. § 1352), which limits the use of federal funds for lobbying activities. This provision provides in part that:

- (a)(1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection.
- (2) The prohibition in paragraph (1) of this subsection applies with respect to the following Federal actions:
  - (A) The awarding of any Federal contract.
  - (B) The making of any Federal grant.
  - (C) The making of any Federal loan.
  - (D) The entering into of any cooperative agreement.
  - (E) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Applicants for federal assistance must certify that they are and will remain in compliance with this requirement, and they must also disclose certain lobbying activities paid for with nonfederal funds. The Office of Management and Budget promulgated Interim Final Guidance for implementing the Byrd Amendment in December 1989 (54 Fed. Reg. 52306–52311 (December 20, 1989)). The OMB guidance required that the executive departments and agencies promulgate two sets of common rules to implement the amendment: one set for procurement contracts to appear in the Federal Acquisition Regulation; and one set for nonprocurement contracts, grants, loans, cooperative agreements, loan insurance commitments, and loan guarantee commitments. Both the Department of Defense and the Department of Education have issued final regulations implementing the Byrd Amendment (32 C.F.R. § 28.100 *et seq.*, and 34 C.F.R. § 82.100 *et seq.*).

There is also a federal statute, the General Education Provisions Act (GEPA) (20 U.S.C. § 1221 *et seq.*), that applies specifically and only to the U.S. Department of Education. The Act establishes numerous organizational, administrative, and other requirements applicable to ED spending programs. For instance, the Act establishes procedures that ED must follow when proposing program regulations (20 U.S.C. § 1232). The GEPA provisions on enforcement of conditions attached to federal funds do not apply, however, to Higher Education Act programs (20 U.S.C. § 1234i(2)). To supplement GEPA, the Department of Education has promulgated extensive general regulations published at 34 C.F.R. Parts 74–81. These “Education Department General Administrative Regulations” (EDGAR) establish uniform policies for all ED grant programs. The applicability of Part 74 of these regulations to higher education institutions is specified at 34 C.F.R. §§ 74.1(a), 74.4(b), and 81.2. Running to well over 100 pages in the *Code of Federal Regulations*, EDGAR tells you almost everything you wanted to know but were afraid to ask about the legal requirements for obtaining and administering ED grants.

Other funding agencies also have general regulations that set certain conditions applicable to a range of their aid programs. Several agencies, for example, have promulgated regulations on research misconduct. These regulations are discussed in Section 13.2.3.4 of this book. Similarly, some agencies have promulgated “rules of the game” on financial conflicts of interest. These provisions are discussed in Section 15.4.7 of this book.

**13.4.4. “Cross-cutting” aid conditions.** In addition to the programmatic and fiscal requirements discussed in Section 13.4.2 above, various statutes and agency regulations establish requirements that are not specific to any particular aid program but, rather, implement broader federal policy objectives that “cut across” a range of programs or agencies. The civil rights statutes and regulations discussed in Section 13.5 are a prominent example. Others are the requirements concerning the privacy of student records (discussed in Section 9.7.1) and campus security (discussed in Section 8.6). Other leading examples are discussed in Sections 13.4.4.1 through 13.4.4.3 below. The growth and increasing variety of these “cross-cutting” requirements mark what is perhaps the most significant contemporary trend regarding federal involvement in postsecondary education.

Concern over student alcohol and drug use has stimulated Congress to enact cross-cutting provisions that impose additional reporting and compliance requirements on the recipients of federal funds. In 1998, Congress enacted the "Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption" as Section 119 of the Higher Education Amendments of 1998, which includes mandates for federally funded colleges and universities (112 Stat. 1596, codified at 20 U.S.C. § 1011i). This provision conditions federal funding on a requirement that an institution has "implemented a program to prevent the use of illicit drugs and the abuse of alcohol by students and employees . . ." (20 U.S.C. § 1011i(a)). The standards that each program must meet are set out in the legislation. The institution must disseminate certain information to students and employees annually and to the U.S. Department of Education and the public on request. In conjunction with these requirements, there is also a system of grants and contracts for the development of innovative drug and alcohol abuse programs on campus (20 U.S.C. § 1011i(e)).

In addition, in yet another section of the 1998 Higher Education Amendments, Congress took more drastic action concerning campus drug abuse. Section 483(f)(1), codified at 20 U.S.C. § 1091(r), bars students who have been convicted of certain drug-related offenses from receiving federal financial assistance. This law is discussed further in Section 8.3.2.

Congress has also passed various federal funding restrictions designed to prevent institutional interference with Reserve Officer Training Corps (ROTC) programs and with military recruiting on campus. These restrictions are often popularly referred to as the "Solomon Amendment," after the congressman who originally introduced them. The law, codified at 10 U.S.C. § 983, provides that institutions of higher education or their "subelements" that prevent ROTC access or military recruiting on campus will be denied grants and contracts from the Departments of Defense, Homeland Security, Transportation, Education, Health and Human Services, Labor, and certain "Related Agencies" (10 U.S.C. § 983(d)). Federal student financial aid funds are exempt from this legislation (Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999)). If the institution has no such restrictions, but one or more of its "subelements" prevent military recruiting, the "subelement" loses federal funding from all of the federal agencies listed above, while the institution loses only funds from the Department of Defense (32 C.F.R. § 216.3(b)(1)). Such funds may not be provided to any college or university (or one or more subelements) that has, as determined by the Secretary of Defense, "a policy or practice" that either prohibits the military from "obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, or access to directory information on students (student recruiting information)" or prohibits the military from "maintaining, establishing, or efficiently operating a unit of the Senior ROTC at the covered school," or prevents a student from enrolling in an ROTC unit at another college or university (32 C.F.R. §§ 216.3 & 216.4). Exceptions to the funding limitations are found at 32 C.F.R. § 216.4.

Law school faculty, students, and law student organizations filed several legal challenges to the Solomon Amendment. In *Forum for Academic and Institutional*

*Rights (FAIR), Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), *reversed and remanded*, 390 F.3d 219 (3d Cir. 2004), a coalition of law schools, law faculty, and student associations challenged the constitutionality of the Solomon Amendment in federal court. The plaintiffs claimed that the Solomon Amendment conditioned federal funding on the law schools' giving up their First Amendment freedom of speech and expressive association rights by requiring that the schools admit military recruiters to campus. The plaintiffs also claimed that the law discriminated on the basis of viewpoint because it required the law schools to espouse a pro-military recruiting message, punishing those schools (by making them ineligible for federal grants and contracts) that found the military's position on homosexuality "morally objectionable." Finally, the plaintiffs alleged that the statute was unconstitutionally vague in that it allowed the military "unbridled discretion" in determining which institutions to target for noncompliance. The plaintiffs sought a preliminary injunction to halt the enforcement of the law.

The U.S. government filed a motion to dismiss, arguing that the association of law schools lacked standing to bring the lawsuit because their parent universities were the appropriate parties to the litigation. The federal trial judge disagreed, ruling that because the law schools had the autonomy to develop their own nondiscrimination policies, which the Solomon Amendment required them to suspend in order to allow military recruitment at the law schools, they had demonstrated a "concrete injury fairly traceable to the Solomon Amendment," which was "the government-induced abandonment of the schools' nondiscrimination" (291 F. Supp. 2d at 286). Similarly, the court determined that the law student associations and the association of law professors also had standing to challenge the law.

The court rejected the plaintiffs' motion for a preliminary injunction, however, ruling that the Solomon Amendment did not violate the Constitution. Despite the fact that the statute requires law schools to offer "affirmative assistance" to military recruiters, said the court, it did not restrict either speech or academic freedom of students or faculty, nor did it limit the plaintiffs' ability to openly and publicly disagree with the military's policy on homosexuals. Because the recruiters' presence did not significantly intrude on the ability of the plaintiffs to express their views, and because the forbidden behavior and its potential consequences were very clear in the language of the statute, said the court, the plaintiffs did not have a strong probability of prevailing on the merits, and thus the preliminary injunction motion was denied.

A three-judge panel of the U.S. Court of Appeals for the Third Circuit, in a 2-to-1 decision, reversed the district court and remanded the case for the entry of a permanent injunction against the enforcement of the Solomon Amendment. With respect to the plaintiffs' claim that the Solomon Amendment violated their First Amendment right of expressive activity, the court, relying on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (discussed in Section 10.1 of this book), applied strict scrutiny (discussed in Section 8.2.5 of this book). Under *Dale*, said the court, the group claiming a violation of its right of expressive association must demonstrate (1) that it is an expressive association, (2) that the state

action being challenged "significantly affects the group's ability to advocate its viewpoint," and (3) that the state's interest "justifies the burden it imposes on the group's expressive association" in that the state's interest is compelling and is narrowly tailored to achieve that interest. The court concluded that law schools are "highly" expressive organizations, and that the Solomon Amendment placed a substantial burden on the law school's expressive associational rights under the deferential standard articulated in *Dale*. Furthermore, said the court, the law's provisions to deny federal funding to institutions or "subelements" was not narrowly tailored, as there was no evidence that on-campus recruiting was the most effective mechanism for attracting talented lawyers to military service.

With respect to the plaintiffs' claim that the Solomon Amendment was a form of compelled speech, the court ruled that the law required the law schools to "propagate, accommodate, and subsidize" the military's recruiting message. Providing services to help military recruiters schedule appointments, communicating with students about the presence of military recruiters at the law school, and providing resources to assist the military in arranging for its campus visits constitute compelled speech, said the court, and the recently added provision that military recruiters must be given the same quality of access to students as that given to other types of employers did not even allow the law school to disclaim the military's policies on homosexuals. Given the requirements of the law, said the court, it conflicted with the First Amendment's prohibition on compelled speech.

Although the court stated firmly that the Solomon Amendment should be analyzed under the strict scrutiny test because of its burdens on expressive association, the court briefly considered whether the law would survive the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968), which is applied to governmental regulations that only incidentally burden expressive conduct rather than burdening speech. While disavowing the *O'Brien* test as inappropriate in this case, the court concluded that the Solomon Amendment was likely to impair expressive conduct as well. Because the United States had not presented evidence that enforcement of the Solomon Amendment had enhanced on-campus recruiting, there was no showing of an important governmental interest at stake, a necessity to a finding that a law survives the *O'Brien* test. In fact, said the court, it was equally plausible that stricter enforcement of the Solomon Amendment actually hampered military recruiting because of the strong negative reaction on campus to the military's policies with respect to homosexuals.

The U.S. government sought review by the U.S. Supreme Court, which ruled unanimously (8-0) that the Solomon Amendment does not violate the First Amendment (*Rumsfeld v. FAIR*, 126 S. Ct. 1297). Chief Justice Roberts, for the Court, rejected the appellate court's reasoning in full, ruling that the Solomon Amendment neither requires the law schools to endorse the military's policies nor prohibits the law schools from criticizing them, and thus does not regulate or compel speech. Nor, said the Court, does the Solomon Amendment regulate expressive conduct, in that the conduct required of the law schools by the Solomon Amendment is not "inherently expressive." Said the Court: "If

combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it” (2006 U.S. LEXIS 2025 at \*34). And finally, the Court rejected the appellate court’s ruling that the Solomon Amendment violated the law schools’ freedom of expressive association, noting that the law merely required law school employees to interact with military recruiters, not to offer them membership (unlike the state law requiring the Boy Scouts to allow gay scoutmasters to join, as discussed in the *Dale* case, cited above). The Court concluded with this observation:

Students and faculty are free to associate to voice their disapproval of the military’s message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school’s First Amendment rights. A military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message [2006 U.S. LEXIS 2025 at \*39–40].

State colleges and universities in Connecticut found themselves caught between the Solomon Amendment and the state’s nondiscrimination law that prohibited discrimination on the basis of sexual orientation. In 1996, the Connecticut Supreme Court ruled that the state’s nondiscrimination law precluded state colleges and universities from allowing military recruiters on campus (*Gay Law Students v. Board of Trustees*, 673 A.2d 484 (Conn. 1996)). The Department of Defense threatened to cut off federal funding to the state university in response to the court ruling. In 1997, the Connecticut legislature enacted Conn. Gen. Stat. § 10a-149c, which states that each public college and university “shall provide access to directory information and on-campus recruiting opportunities to representatives of the armed forces . . . to the extent necessary under federal law to prevent the loss of federal funds . . .” (§ 10a-149c(a)).

As an additional condition for obtaining federal funding, colleges and universities in states that are not covered by certain parts of the National Voter Registration Act (see Section 13.2.1) are required to encourage students to register to vote. Section 489(b) of the Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1750, codified at 20 U.S.C. § 1094(a)(23). This section requires that institutions “make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make such forms widely available to students at the institution.”

**13.4.4.1. Drug-Free Workplace Act of 1988.** The Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 *et seq.*) applies to institutions of higher education that contract with a federal agency to provide services or property worth at least the amount of the “simplified acquisition threshold” (currently \$100,000 (41 U.S.C. § 403(11))) or that receive a grant from a federal agency for any amount.<sup>51</sup> To

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<sup>51</sup>In addition to the requirements of the Drug-Free Workplace Act, some higher education institutions that contract with the Department of Defense will also be subject to that department’s separate Drug-Free Workplace regulations, which are found at 32 C.F.R. Part 26.

qualify for such a contract or grant, an applicant institution must certify to the contracting or granting agency that it will undertake various activities to provide a drug-free workplace. Grantees' activities must include:

- (A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
- (B) establishing a drug-free awareness program to inform employees about—
  - (i) the dangers of drug abuse in the workplace;
  - (ii) the grantee's policy of maintaining a drug-free workplace;
  - (iii) any available drug counseling, rehabilitation, and employee assistance programs; and
  - (iv) the penalties that may be imposed upon employees for drug abuse violations;
- (C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);
- (D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such grant, the employee will—
  - (i) abide by the terms of the statement; and
  - (ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;
- (E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;
- (F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 7033 of this title; and
- (G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F) [41 U.S.C. § 702(a)(1)].

Section 706(2) of the Act defines "employee" as any employee of the grantee or contractor "directly engaged in the performance of work pursuant to the provisions of the grant or contract."

The Act also applies to individuals who receive a grant from a federal agency or who contract with a federal agency for any amount. Such individuals must certify that they "will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" in conducting grant activities or performing the contract (41 U.S.C. §§ 701(a)(2) & 702(a)(2)). Recipients of Pell Grants (see Section 8.3.2) are not considered to be individual grantees for purposes of this Section (20 U.S.C. § 1070a(i)).

Under Sections 701(b)(1) and 702(b)(1), contracts and grants (including contracts and grants to individuals) are "subject to suspension of payments . . . or termination . . . or both" and contractors and grantees are "subject to suspension or debarment" if they make a false certification, or violate their certification, or if so many of their employees have been convicted under criminal

drug statutes for violations occurring in the workplace as to indicate the contractor's or grantee's failure to "make a good faith effort to provide a drug-free workplace."

The final regulations for grantees, entitled "Government-Wide Requirements for Drug-Free Workplace (Grants)" (55 Fed. Reg. 21681 (May 25, 1990)), are in the form of a common rule that was codified in various sections of the *Code of Federal Regulations* in the form adopted by each individual agency. The Department of Education regulations, for example, are codified in 34 C.F.R. Part 84. The regulations for contractors are in a separate final rule amending the Federal Acquisition Regulation, codified at 48 C.F.R. subpart 23.5.

The final grantee regulations include helpful advice in the form of public comments on the previous interim final rule, followed by the agencies' responses (55 Fed. Reg. at 21683–21688). The responses indicate, among other things, that the Act does not require grantees to have alcohol and drug abuse programs, nor does the Act require drug testing (at 21684–85). There are also responses prepared by the U.S. Department of Education that address several matters, including the certifications required under the various student financial aid programs (at 21688).

(See generally Larry White, *Complying with "Drug-Free Workplace" Laws on College and University Campuses* (National Association of College and University Attorneys, 1989).)

**13.4.4.2. Drug-Free Schools and Communities Act Amendments.** The Drug-Free Schools and Communities Act Amendments of 1989 (103 Stat. 1928) require institutions receiving federal financial assistance to establish drug and alcohol programs for both students and employees. Specifically, the Act, now codified at 20 U.S.C. § 7101, was incorporated into the Higher Education Act in 2002 (Pub. L. No. 107-110, § 401). Regulations implementing the law are codified at 34 C.F.R. Part 86, and require institutions to distribute the following materials annually to all students and employees:

- (1) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as a part of any of its activities;
- (2) a description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
- (3) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
- (4) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
- (5) a clear statement that the institution will impose sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) [34 C.F.R. § 86.100].



In addition, institutions must biennially review their programs to determine their effectiveness, to implement changes if needed, and to ensure that the required sanctions are being carried out. Upon request, institutions must provide to the Secretary of Education or to the public a copy of all materials they are required to distribute to students and employees and a copy of the report from the biennial review.

The statute does not require institutions to conduct drug tests or to identify students or employees who abuse alcohol. However, if an institution has notice that a student or an employee has violated one of the standards of conduct promulgated under the statute, it must enforce its published sanctions. The statute also does not require institutions to operate treatment programs; institutions must, however, notify students of counseling and treatment programs that are available to them.

In enforcing the standards of conduct and sanctions required by the statute, institutions should, of course, comply with the requirements of constitutional due process (Sections 6.6.2 & 9.4.2; see also Section 1.5.2) as well as the record-keeping requirements of FERPA (Section 9.7.1).

**13.4.4.3. Student Right-to-Know Act.** The Student Right-to-Know Act (Title I of the Student-Right-to-Know and Campus Security Act) (104 Stat. 2381–2384 (1990)) amended Section 485 of the Higher Education Act (20 U.S.C. § 1092) to impose information-sharing requirements on higher education institutions that participate in federal student aid programs. Section 103 (20 U.S.C. § 1092(a)(1)(L)) requires such institutions to compile and disclose “the completion or graduation rate of certificate-or-degree-seeking, full-time students” entering the institutions. Disclosure must be made both to current students and to prospective students. Section 104 of the Act (20 U.S.C. § 1092(e)) includes additional compilation and disclosure requirements applicable to those institutions that are “attended by students receiving athletically related student aid”; these requirements are discussed in Section 10.4.1 of this book.

**13.4.5. Enforcing compliance with aid conditions.** The federal government has several methods for enforcing compliance with its various aid requirements. The responsible agency may periodically audit the institution’s expenditures of federal money (see, for example, 20 U.S.C. § 1094(c)(1)(A)) and may take an “audit exception” for funds not spent in compliance with program requirements (see, for example, 20 U.S.C. § 1094(c)(1)(A) & (c)(5)–(7)). The institution then owes the federal government the amount specified in the audit exception. In addition to audit exceptions, the agency may suspend or terminate the institution’s funding under the program or programs in which noncompliance is found (see 34 C.F.R. §§ 74.61, 75.901, & 75.903). Special provisions have been developed for the “limitation, suspension, or termination” of an institution’s eligibility to participate in the Department of Education’s major student aid programs (20 U.S.C. § 1094(c)(1)(D), (c)(1)(F), & (c)(3)(A); 34 C.F.R. §§ 668.85–668.98); see also 34 C.F.R. § 682.713 (disqualifications in FFEL programs) and 34 C.F.R. §§ 668.185–668.198 (loan default rate proceedings)). Agencies are sometimes also authorized to impose civil monetary penalties on institutions that fail to comply with program requirements. Under Title IV of the Higher Education Act, for

example, the U.S. Department of Education may impose a civil monetary penalty on institutions that have violated any program requirements in Title IV or its implementing regulations, or have “engaged in substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates” (20 U.S.C. § 1094(c)(1)(F) & (c)(3)(B); 34 C.F.R. §§ 668.84 & 668.92). And under the Clery Act (Campus Security Act), 20 U.S.C. § 1092(f), the department may impose civil penalties on any institution that has “substantially misrepresented the number, location, or nature of the crimes required to be reported . . .” (20 U.S.C. § 1092(f)(13)). The procedures to be used are those in 20 U.S.C. § 1094(c)(3)(B) (above).

Federal funding agencies also apparently have implied authority to sue fund recipients in court to enforce compliance with grant and contract conditions, although agencies seldom exercise this power. In *United States v. Frazer*, 297 F. Supp. 319 (M.D. Ala. 1968), a suit against the administrators of the Alabama state welfare system, the court held that the United States had standing to sue to enforce welfare grant requirements that personnel for federally financed programs be hired on a merit basis. In *United States v. Institute of Computer Technology*, 403 F. Supp. 922 (E.D. Mich. 1975), the court permitted the United States to sue a school that had allegedly breached a contract with the U.S. Office of Education, under which the school disbursed funds for the Basic Educational Opportunity Grant program. In *United States v. Duffy*, 879 F.2d 192 (6th Cir. 1989), and other similar cases, courts have permitted the federal government to sue recipients of health professions scholarships for breach of contract for failing to perform their required service commitments. And in *United States of America v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the court permitted the United States, on behalf of the U.S. Secretary of Education, to sue two universities to enforce compliance with the nondisclosure provisions of the Federal Education Rights and Privacy Act (FERPA) (see Section 9.7.1 of this book). According to the court: “Even in the absence of statutory authority, the United States has the inherent power to sue to enforce conditions imposed on the recipients of federal grants” (*Id.* at 808, citing U.S. Supreme Court cases).

The federal government may also bring both civil suits and criminal prosecutions under the False Claims Act, 31 U.S.C.A. § 3729, against institutions or institutional employees who have engaged in fraudulent activities relating to federal grant or contract funds (see S. D. Gordon, “The Liability of Colleges and Universities for Fraud, Waste, and Abuse in Federally Funded Grants and Projects,” 75 *West’s Educ. Law Rptr.* 13 (August 13, 1992)). In addition, the federal government may fight fraud and abuse in federal spending programs by using the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. No. 99-509, codified as 31 U.S.C. §§ 3801–3812, which is an administrative analogue to the False Claims Act. The PFCRA provides for civil monetary penalties and “assessment(s) in lieu of damages” (31 U.S.C. § 3802) that may be imposed in administrative proceedings of the federal agency operating the spending program in which the alleged fraud occurs (31 U.S.C. § 3803). The PRCRA expressly omits states from the definition of “persons” subject to the Act (31 U.S.C. § 3801 (a)(6)). (The False Claims Act and the PFCRA are

further discussed in Section 13.2.15 of this book; a separate but similar statute applicable to Medicare claims is discussed in Section 13.2.13.) When such suits and claims arise from allegations initially made by an employee of the institution that is the subject of the complaint (or when an employee makes such allegations even if they are not followed by any lawsuit or administrative hearing), the employee will often be protected from retaliation by the False Claims Act or a state “whistleblower” statute (see P. Burling & K. A. Mathews, *Responding to Whistleblowers: An Analysis of Whistleblower Protection Acts and Their Consequences* (National Association of College and University Attorneys (1992))).

In addition to the False Claims Act, another statute under which the federal government may bring criminal prosecutions against institutions and their employees is 20 U.S.C. § 1097(a), which provides fines and imprisonment for “[a]ny person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement, or forgery, or fails to refund any funds, assets, or property provided or insured under” the federal student assistance programs. The case of *Bates v. United States*, 522 U.S. 23 (1997), concerned the application of Section 1097(a) to a technical school’s treasurer who had been indicted for allegedly misapplying Guaranteed Student Loan Program funds. The federal district court had dismissed the indictment because it did not allege an intent to injure or defraud the United States. In reversing and reinstating the prosecution, the U.S. Supreme Court held that, although proof of intentional conversion of student aid funds was required, “specific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of funds proscribed by § 1097(a).”

In some circumstances private parties may also be able to sue institutions to enforce federal grant or contract conditions. For example, courts permit persons harmed by institutional noncompliance to bring an implied “private cause of action” to enforce the nondiscrimination requirements imposed on federal aid recipients under the civil rights spending statutes (see Section 13.5.9 of this book). For other types of requirements, however, courts have been less willing to permit such causes of action. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), for example, the U.S. Supreme Court rejected an implied private cause of action to enforce the Family Educational Rights and Privacy Act (FERPA) (discussed in Section 9.7.1 of this book). According to the Court, it will recognize such causes of action only when the federal statute “create(s) new individual rights.” The “text and structure of [the] statute” must clearly and unambiguously indicate “that Congress intends to create” such rights before a court will permit private plaintiffs to enforce the statute by implied causes of action. FERPA did not meet this test. Similarly, courts usually have not permitted plaintiffs to use private causes of action to enforce the Higher Education Act (HEA) (see Section 13.4.1 of this book). In *L’ggrke v. Benkula*, 966 F.2d 1346 (10th Cir. 1992), and *Slovinec v. DePaul University*, 332 F.3d 1068 (7th Cir. 2003), for example, federal appellate courts held that student borrowers do not have any implied private cause of action against postsecondary institutions that allegedly have violated the HEA. And in *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217 (11th

Cir. 2002), another federal appellate court held that parents of college-bound students do not have any private cause of action against student loan marketers and lenders for alleged violations of HEA requirements.

In other circumstances, some federal statutes may create an express private cause of action by which private parties may sue institutions in their own name, or in the name of the federal government. The False Claims Act (discussed above), for example, authorizes not only suits by the federal government but also “*qui tam*” suits—suits by a private individual or “informer” on behalf of himself and the United States. State colleges and universities, however, are not subject to *qui tam* suits under the False Claims Act (see *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, 529 U.S. 765 (2000)). *Qui tam* suits under the False Claims Act are further discussed in Section 13.2.15 of this book.

In addition to all these means of enforcement, Executive Order 12549 requires that departments and agencies in the executive branch participate in a government-wide system for debarment and suspension of eligibility for nonprocurement federal assistance. The Office of Management and Budget has promulgated debarment and suspension guidelines, as provided in Section 6 of the Executive Order, and individual agencies have promulgated their own agency regulations implementing the executive order and the OMB guidelines. The Department of Education’s regulations are published at 34 C.F.R. Part 85. These regulations apply to any person “against whom the Department . . . has initiated a debarment or suspension action,” as well as any person “who has been, is, or may reasonably be expected to be a participant” in transactions under Federal nonprocurement programs (§ 85.105). The covered transactions are set out in §§ 85.200–85.220. Section 85.811 contains special provisions concerning the effect of debarment or suspension on an educational institution’s participation in student aid programs under Title IV of the Higher Education Act.

**13.4.6. Protecting institutional interests in disputes with funding agencies.** Given the number and complexity of the conditions attached to federal spending programs, and the federal government’s substantial enforcement powers, postsecondary institutions will want to keep attuned to all the procedural rights, legal arguments, and negotiating leverage they may have if a dispute with a federal funding agency arises.<sup>52</sup> The institution’s legal position and negotiating strength, and the available avenues for settling disputes, will depend in large part on the applicable “rules of the game” (see subsection 13.4.3 above) for the program and agency involved. They will also depend on whether the institution is applying to receive aid or participate in a funding program, being subjected to a compliance review, being threatened with an audit exception, or being threatened with a fund cut-off or termination of program participation. Typically, applicants have fewer procedural rights than recipients do; and

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<sup>52</sup>This Section deals primarily with “adjudicative” types of disputes. For discussion of rulemaking, see Section 13.6.1 below.

recipients subject to a fund cut-off or termination of program participation typically have the greatest array of procedural rights.

Under the various statutes and regulations applicable to federal aid programs, fund recipients usually must be given notice and an opportunity for a hearing prior to any termination of funding (see, for example, 20 U.S.C. § 1094(c)(1)(D) & (c)(2)(A)) or any termination (or suspension or limitation) of program participation (see 20 U.S.C. § 1094(b) & (c)(1)(F), and *Continental Training Services, Inc., v. Cavazos*, 893 F.2d 877, 881–89 (7th Cir. 1990)). Hearings may also be required before finalization of audit exceptions taken by federal auditors (see, for example, 20 U.S.C. § 1094(b)). If the applicable statutes and regulations do not specify notice and hearing requirements prior to termination or suspension of federal funding, or prior to recoupment of funds by audit exception, fund recipients may assert the Fifth Amendment due process clause as a source of procedural rights. The argument would be that the recipient of the funds has a property or liberty interest in retention of the funds and benefits, and that the funding agency cannot infringe this interest without first according the recipient basic procedural safeguards (see *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 892–94 (1990)). In addition to such formal dispute resolution procedures, federal funding agencies may also have various informal mechanisms—for example, mediation—for the settlement of disputes. (See Section 13.6.1 below for discussion of these mechanisms.)

Postsecondary institutions have two basic types of legal arguments that they may use in formal or informal agency proceedings to challenge an agency action: procedural arguments and substantive arguments. Using procedural arguments, an institution may assert that the dispute resolution procedures that the agency is using are inconsistent with an applicable statute, an agency regulation, or (alternatively) the procedures courts have required under the Fifth Amendment due process clause. In addition, an institution may occasionally be able to argue that the rule the agency is enforcing was not promulgated in compliance with applicable rule-making procedures. Using substantive arguments, an institution may assert that the agency is acting beyond the scope of its authority, that the agency has incorrectly interpreted the statutory provision or agency regulation at issue, or that the agency has incorrectly applied the statute or regulation to the facts of the case.

In addition to these various ways that institutions may represent their interests within an agency's administrative processes, institutions may also be able to obtain judicial review of federal funding agency decisions that affect them adversely. Questions about the availability of judicial review arise when an institution is unsuccessful defending itself in the administrative process and seeks to have an unfavorable administrative decision reversed by a court, or when an institution seeks to bypass the available administrative process by going directly to court. Judicial review questions may also arise when no administrative review process is available, and the only potential forum for contesting an adverse administrative action is a court.

Whether or not judicial review is available to an institution will depend on the judicial review provisions in the statutes that establish the particular federal funding program at issue or that otherwise govern the operations of the funding agency that has made the adverse decision. Absent any such statutory provisions, the availability of judicial review will be governed by 28 U.S.C. § 1331, which grants the federal courts jurisdiction over, among others, suits against federal administrative agencies and their officers and employees (see *Califano v. Sanders*, 430 U.S. 99, 104–7 (1977)). Generally, some form of judicial review will be available to institutions that are subjected to a termination of funding or other penalty, or are otherwise adversely affected by a federal funding agency action. (See, for example, *Atlanta College of Medical & Dental Careers, Inc. v. Riley*, 987 F.2d 821 (D.C. Cir. 1993).) Judicial review may also sometimes be available to higher education associations whose members are adversely affected by agency action (see, for example, *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997)). Often, however: (1) the “exhaustion” of administrative remedies will be a prerequisite to judicial review; or (2) the availability of judicial remedies against other parties may preclude suit against the agency; or (3) the plaintiff may be precluded from suing by a technical doctrine such as the “standing” doctrine or “ripeness” doctrine; or (4) there will be limits on the types of judicial relief that a court may order.

The first type of problem is illustrated by *Career Education v. Department of Education*, 6 F.3d 817 (D.C. Cir. 1993). In this case, a proprietary postsecondary school claimed that the department had failed to act on the school’s reeligibility application for HEA federal student loan programs. The school sued the department and asked the court to order the department to act. The court dismissed the case because the school had administrative remedies available to it which it had failed to exhaust, and there was no basis for concluding that pursuit of these remedies would ultimately be unfair or futile for the school. And in *American Association of Cosmetology Schools v. Riley*, 170 F.3d 1250 (9th Cir. 1999), the plaintiff challenged the validity of the departmental appeals process for schools facing termination from certain Title IV, HEA, student loan programs. The court dismissed the association’s suit because individual schools could raise these issues through the administrative processes available to them. According to this court, the departmental appeals process affects different schools in different ways and thus, “as a practical matter,” a court would need to have “a complete administrative record to review.” Moreover, after resorting to the available administrative process for challenging a departmental termination decision, an individual school could then go to court to “raise precisely the same systemic flaws [the plaintiff association] raises here.”

Regarding the second type of problem, if suit is brought against an agency under the federal Administrative Procedure Act (APA), 5 U.S.C. § 704 *et seq.*, the court may dismiss the challenge because there is some other “adequate [judicial] remedy” for contesting the agency action. In *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930, 945–47

(D.C. Cir. 2004), for instance, the court rejected a challenge to the department's Title IX policy interpretations on intercollegiate athletics programs, reasoning that the "availability of a private cause of action under Title IX directly against the universities themselves constitutes an adequate remedy that precludes judicial review under § 704" (366 F.3d at 933–34).<sup>53</sup>

Regarding the third type of problem (technical doctrines precluding suit), plaintiffs must, in general, demonstrate that they have been, or imminently will be, adversely affected by the agency action being challenged and that they have a "personal stake" in the dispute (see generally Section 2.2.2.2). The "standing" doctrine is the most likely source of such problems for plaintiffs. The doctrine is particularly likely to become an issue when the challenge is brought by an association or other third party rather than by the postsecondary institution itself. In the *National Wrestling Coaches* case (above), for example, the court also dismissed the case because the plaintiff association could not meet the applicable tests for standing (366 F.3d at 936–45).

Regarding the fourth type of problem (limits on judicial relief), there sometimes will be a statutory provision limiting the types of relief that are available in suits against the federal funding agency. For example, the Higher Education Act expressly provides that, with respect to Title IV of the Act, the Secretary of Education may "sue and be sued" in state and federal courts, but that injunctive relief may not be granted against the Secretary (20 U.S.C. § 1082(a)(2)). In *Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988), the court acknowledged that Section 1082(a)(2) prohibited the plaintiff from obtaining an injunction against the Secretary of Education, but also made clear that this Section did not prohibit the entry of a declaratory judgment against the Secretary. In *American Association of Cosmetology Schools v. Riley*, 170 F.3d 1250 (9th Cir. 1999), the court generally recognized this distinction between injunctive and declaratory relief under Section 1082(a)(2), but then added that Section 1082(a)(2) does prohibit courts from entering declaratory judgments that "would have the same coercive effect as an injunction." Characterizing the requested declaratory relief as "plainly coercive," the court concluded that such relief was barred by Section 1082(a)(2). These rules barring injunctive relief and its equivalent in Title IV actions, however, may not apply to an "across-the-board" or "facial" challenge to the validity of departmental regulations (see *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997); and see generally *American Association of Cosmetology Schools*, above, 170 F.3d at 1257 (Reinhardt, J., dissenting)).

Equally as important as questions concerning the availability of judicial review are questions about the types of challenges on the merits that higher education institutions (or associations of institutions) may bring to court. (See generally Philip Lacovara, "How Far Can the Federal Camel Slip Under the Academic Tent?" 4 *J. Coll. & Univ. Law* 223, 229–39 (1977).) As with internal

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<sup>53</sup>The universities that the court had in mind are those that have eliminated their men's varsity wrestling programs, presumably in order to comply with the department's Title IX policy interpretations. For discussion of implied private causes of action under Title IX, see Section 13.5.9 of this book.

agency proceedings, judicial challenges may be either procedural or substantive (see above). Substantive challenges generally pose greater difficulties for institutions. Such challenges are usually based either on federal administrative law or on federal constitutional law.

Using federal administrative law, an institution may challenge: (1) the facial validity of an agency rule or regulation that has adversely affected the institution; (2) an agency's interpretation of one of its rules or of a provision of the federal funding statute at issue; or (3) a particular result that an agency reaches or decision that it makes regarding the institution (see generally 5 U.S.C. § 706 (APA)).

The first type of challenge usually arises when a condition on federal aid is created by an agency rule or regulation rather than by the funding statute itself. Such a rule or regulation may sometimes be challenged on its face on grounds that it is *ultra vires*—that is, beyond the bounds of the authority delegated to the agency under the funding statute or other pertinent statutes. In *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278 (S.D.N.Y. 1992), for example, the plaintiff challenged grant conditions of the Centers for Disease Control (CDC) on grounds that they went beyond the statutory authority under which CDC operated the grant program. This program provided grants for the development and use of AIDS educational materials. In the authorizing legislation, Congress included a condition that “any informational materials used are not obscene” (42 U.S.C. § 300ee(d)). CDC's grant terms for the program, however, provided that the materials used must not be “offensive.” CDC argued that Congress's standard was merely a floor or minimum and did not prevent CDC from adopting a higher standard. The court disagreed:

Congress . . . addressed the precise issue addressed by the CDC grant terms, i.e., the funding of potentially “offensive” materials, and expressly limited the funding restriction to “obscene” materials. Thus, in enacting section 300ee Congress did not merely apply additional restrictions to supplement those promulgated by the CDC, but rather clearly articulated its own standard for limitations on the content of HIV prevention materials, which can only be plausibly construed as inconsistent with the [CDC's] “offensiveness” standard.

Because Congress has directly spoken on the precise issue in question by enacting an “obscenity” standard, and has made its intent clear both in the language of the statute and in its legislative history, “that is the end of the matter.” . . . Accordingly, the court finds that the CDC has exceeded its statutory authority, and the [CDC grant terms] are without effect [792 F. Supp. at 292; citations omitted].

(For another example of a successful *ultra vires* challenge, see *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997).)

The second type of administrative law challenge arises when an agency has issued an interpretation of a statutory provision (or agency regulation) and an institution claims that the agency's interpretation is incorrect. Under the standard of review for such challenges, a court will uphold the agency's interpretation if it is not “arbitrary, capricious, or manifestly contrary to the statute” that the agency is implementing (*Chevron U.S.A. v. Natural Resources Defense*



*Council*, 467 U.S. 837, 844 (1984); but see also *Christensen v. Harris County*, 529 U.S. 576 (2000)). This type of challenge is very difficult to mount because courts usually accord considerable deference (called “*Chevron* deference”) to the agency’s interpretations, especially interpretations of the statute that are embodied in formal agency regulations and the agency’s interpretations of its own regulations. In *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002), for instance, the court rejected a challenge to the U.S. Department of Education’s interpretation of Title IX’s applicability to intercollegiate athletics (see Section 10.4.6 of this book). Finding that the interpretation was “reasonable,” the court deferred to ED’s judgment. But in *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142 (3d Cir. 2004), the court held that a written interpretation of the Secretary of Health and Human Services was arbitrary and capricious. Finding the interpretation was “plainly inconsistent” with language of the regulation being interpreted, the court declined to defer to the Secretary’s judgment. (To the same effect, see *Continental Training Services, Inc., v. Cavazos*, 893 F.2d 877, 884–86 (7th Cir. 1990).) For further discussion of judicial deference to administrative agency interpretations, see Section 13.6.1 below.

The third type of administrative law challenge may arise if an institution has grounds for arguing that, under the facts and circumstances of the case, a particular result that the agency reached was unreasonable or irrational. When such a claim is based on the Administrative Procedure Act, the pertinent provision is 5 U.S.C. § 706(2)(A), which provides that “the reviewing court shall” invalidate an agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” (See generally *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).)

In addition to the administrative law challenges suggested above, federal constitutional law challenges may also be available to institutions (or associations of institutions) in some circumstances. In particular, constitutional law may be used to challenge the substantive validity of a particular condition that Congress or a federal agency has attached to the expenditure of federal funds. Because the federal government’s constitutional power to tax and spend is so broad (see Sections 13.1.1 & 13.1.2), such substantive challenges are difficult and speculative. But they also provide an arena ripe for creative arguments by institutions and higher education associations, and their legal counsel. The following cases are illustrative.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court considered the constitutionality of regulations promulgated by the U.S. Department of Health and Human Services to implement Title X of the Public Health Service Act, which provides federal funding for family-planning services. The Act states that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning” (42 U.S.C. § 300a-6). The implementing regulations then in effect created three basic conditions that fund recipients must meet: (1) the funded project “may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning”; (2) the funded project may not engage in activities that “encourage, promote

or advocate abortion as a method of family planning”; and (3) the funded project must be “physically and financially separate” from any abortion-related activities that the fund recipient may engage in (53 Fed. Reg. 2922, 2945 (February 2, 1998), §§ 59.8(a)(1), 59.9, & 59.10(a)). Doctors from Title X clinics challenged the validity of the regulations on the ground that they violated their First Amendment free speech rights.

The doctors first argued that the regulations constituted a form of “viewpoint discrimination” because recipients who remained silent about or opposed abortion could retain their funding but recipients who advocated abortion could not. The Supreme Court rejected this argument:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other [500 U.S. at 192].

The doctors also argued that the regulations unconstitutionally conditioned the receipt of a benefit (Title X funding) on the grantee’s relinquishment of a constitutional right (freedom of speech regarding abortion-related matters). The Court rejected this argument as well and thus upheld the regulations:

[H]ere the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health care organization, may receive funds from a variety of sources for a variety of purposes. . . . The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. . . . The regulations govern the scope of the Title X *project’s* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. . . .

In contrast, our “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program [500 U.S. at 196; citations omitted].

Despite the Court’s strong statements in *Rust*, it is still possible in some circumstances to argue that particular aid conditions violate constitutional individual rights principles. *Rust* itself apparently establishes that the government’s funding conditions may not substantially restrict the grantee’s freedom of speech in a *nonproject* context. Furthermore, *Rust* contains cautionary language

emphasizing that special sensitivities arise whenever funding conditions arguably restrict speech in an academic setting:

This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has . . . recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment [500 U.S. at 199–200].

These limitations on the scope of *Rust* have been influential in several subsequent cases.

*Board of Trustees of the Leland Stanford Junior University v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991), directly presented questions concerning a federal funding agency's restrictions on speech in an academic context. The National Institutes of Health (NIH) had issued a notice of its intention to award two contracts of \$1.5 million each to universities to do research on an artificial heart device. Stanford submitted a proposal in response to this notice, in which it objected to a "Confidentiality of Information Clause" that NIH intended to insert into the contract (see Section 7.7.3 for further discussion of this clause and this case). Stanford and NIH entered a contract contingent on the resolution of this objection (and several others). When the parties could reach no resolution, NIH withdrew the contract from Stanford and awarded it to St. Louis University Medical Center.

Stanford sued, arguing that the confidentiality clause was an unconstitutional prior restraint (see generally Sections 9.5.4 & 10.3.3 of this book) on the free speech of its researchers. The district court agreed with the university and ordered that the contract, minus the clause, be reawarded to Stanford. The court relied on *Rust* for the proposition that, although the government may place certain free speech restrictions upon project activities that receive federal funding, it may not so restrict other activities of the grantee. Distinguishing the situation before it from that in *Rust*, the court reasoned:

The regulations at issue in the instant case broadly bind the grantee and not merely the artificial heart project. Dr. Oyer and the other individuals working for Stanford on the project are prohibited by defendants' regulations from discussing preliminary findings of that project without permission. Unlike the health professionals in *Rust*, the Stanford researchers lack the option of speaking regarding artificial heart research on their own time, or in circumstances where their speech is paid for by Stanford University or some other private donor, or not paid for by anyone at all. . . .

The regulation at issue here is not tailored to reach only the particular *program* that is in receipt of government funds; it broadly forbids the *recipients* of the funds from engaging in publishing activity related to artificial heart research at any time, under any auspices, and wholly apart from the particular program that is being aided [773 F. Supp. at 476; footnotes omitted].

The court was also favorably impressed by *Rust*'s language emphasizing the university's special role in society and the need for special care to avoid government conditions that are vague or overbroad (see generally Section 6.6.1). Relying on this language, the court concluded:

The regulations permit the contracting officer to prevent Stanford from issuing "preliminary invalidated findings" that "could create erroneous conclusions which might threaten public health or safety if acted upon," or that might have "adverse effects on . . . the Federal agency." 48 C.F.R. § 352.224-70. In the view of this Court, these standards are impermissibly vague. . . .

There is the related problem of the chilling effect of these vague and overbroad conditions. . . . [N]o prudent grantee is likely to publish that which the contracting officer has not cleared even if the reason for the refusal to clear appears to be wholly invalid. In sum, this case fits snugly in the "free expression at a university" category that *Rust* carved out of its general ruling . . . [773 F. Supp. at 477-78].

(See also *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 292-304 (S.D.N.Y. 1992), another post-*Rust* case in which a court invalidated federal grant conditions—this time those of the Centers for Disease Control—on grounds of vagueness and overbreadth.)

The U.S. Supreme Court clarified the scope and limits of the *Rust* case in its later decision in *Rosenberger v. Rector and Visitors of the University of Virginia* (Section 10.1.5 of this book). The Court drew a distinction in *Rosenberger* between situations (like *Rust*) in which the government is a speaker and "enlists private entities to convey its own [favored] message"; and situations (like *Rosenberger*) in which the government subsidizes "private speakers who convey their own messages" and are not the government's agents:

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan*, *supra*, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S. at 194. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id.*, at 196-200.

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the

University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles [515 U.S. at 833–34].

In a subsequent case, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the U.S. Supreme Court upheld the facial constitutionality of the “decency and respect” clause in legislation governing the grant-making process of the National Endowment for the Arts (NEA), expressly rejecting the plaintiffs’ arguments that the “decency and respect” provision is overbroad and vague. Key to the Court’s overbreadth analysis was its conviction that the provision played only a modest role in the NEA’s decisions on grant applications. The language was only “advisory,” according to the Court; it “admonishes the NEA merely to take ‘decency and respect’ into consideration” in assessing artistic merit and “imposes no categorical requirement.” Thus, “the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.” Moreover, the provision was contained in government funding legislation rather than in a criminal or regulatory statute:

Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose “artistically excellent” projects. . . . The “very assumption” of the NEA is that grants will be awarded according to the “artistic worth of competing applications,” and absolute neutrality is simply “inconceivable.” *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795–796 (1st Cir.), cert. denied, 429 U.S. 894 (1976) [524 U.S. at 585–86].

The Court also relied on its distinction between subsidies and direct regulations to reject the plaintiffs’ void-for-vagueness challenge to the “decency and respect” provision. The language is “undeniably opaque,” the Court admitted, and “could raise substantial vagueness concerns” if used in a regulatory or criminal statute. But the Court did not believe similar concerns would arise in “the context of selective subsidies” where “it is not always feasible for Congress to legislate with clarity.” Thus, “*when the Government is acting as patron rather than as sovereign*, the consequences of imprecision are not constitutionally severe” (emphasis added).

In reaching its result in *Finley*, the Supreme Court distinguished *Rosenberger*:

We held [in *Rosenberger*] that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints. [*Rosenberger*, 515 U.S.] at 837. Although the scarcity of NEA funding does not distinguish this case from *Rosenberger*, . . . the competitive process according to which the grants are allocated does. In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately “encourage a diversity of views from private speakers,” *Id.* at 834. The NEA’s mandate is to make aesthetic

judgments, and the inherently content-based “excellence” threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were “‘related to the educational purpose of the University;” *Id.* at 824—and from comparably objective decisions on allocating public benefits . . . [524 U.S. at 586].

Although the result in *Finley* is clearly unfavorable to individual and institutional grant applicants, the Court’s opinion is actually quite narrow. First, the Court had to go to great lengths to dilute the force of the “decency and respect” provision. (Justice Scalia, in a concurring opinion, asserted that the NEA had “distorted” the provision and the Court had “gutted” it.) The constitutionality of a more direct or specific provision that affected speech would presumably not be controlled by the Court’s opinion. Second, the Court carefully noted that it was determining only the *facial* constitutionality of the provision:

Respondents do not allege discrimination in any particular funding decision. (In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants. . . .) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not “ai[m] at the suppression of dangerous ideas,” *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) (internal quotation marks omitted), and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be appropriate. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); see also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”). In addition, as the NEA itself concedes, a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive “certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). . . . Unless and until § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision [524 U.S. at 586–87].

The Court thus leaves an open channel for *as applied* challenges of funding criteria that affect speech, even if the criteria on their face are as diluted as those in *Finley*.

In another post-*Rust* case, *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the U.S. Supreme Court indicated what analysis would apply to a situation in which government seeks to regulate the content of a grantee or contractor’s private speech that is not within the scope of the activities government has funded. In particular, *Umbehr* addresses the situation where government officials terminate or refuse to renew a contract or grant because they disagree with or take offense at views expressed by the contractor or grantee. The Court ruled

in *Umbehr* that contractors and grantees have First Amendment protections in such circumstances that are comparable to those of public employees (see Section 7.1.1 of this book). Thus, if a government agency or official were to penalize a contractor or grantee for speech on matters “of public concern” (*Connick v. Myers*, 461 U.S. 138 (1983)), the government could not rely on *Rust* or *Finley*, and the contractor or grantee would often be protected.

## **Sec. 13.5. Civil Rights Compliance**

**13.5.1. General considerations.** Postsecondary institutions receiving assistance under federal aid programs are obligated to follow not only the programmatic and technical requirements of each program under which aid is received (see Section 13.4 above) but also various civil rights requirements that apply generally to federal aid programs. These requirements are a major focus of federal spending policy, importing substantial social goals into education policy and making equality of educational opportunity a clear national priority in education. As conditions on spending, the civil rights requirements represent an exercise of Congress’s spending power (see Section 13.1.1), implemented by delegating authority to the various federal departments and agencies that administer federal aid programs. There has often been controversy, however, concerning the specifics of implementing and enforcing such civil rights requirements. Some argue that the federal role is too great, and others say that it is too small; some argue that the federal government proceeds too quickly, and others insist that it is too slow; some argue that the compliance process is too cumbersome and costly for the affected institutions; others argue that such effects are inevitable for any system that is to be genuinely effective. Despite the controversy, it is clear that these federal civil rights efforts, over time, have provided a major force for social change in America.

Four different federal statutes prohibit discrimination in educational programs receiving federal financial assistance. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex. Section 504 of the Rehabilitation Act of 1973, as amended in 1974, prohibits discrimination against individuals with disabilities. The Age Discrimination Act of 1975 prohibits discrimination on the basis of age. Title IX is specifically limited to educational programs receiving federal financial assistance, while Title VI, Section 504, and the Age Discrimination Act apply to all programs receiving such assistance.

Each statute delegates enforcement responsibilities to each of the federal agencies disbursing federal financial assistance. Postsecondary institutions may thus be subject to the civil rights regulations of several federal agencies, the most important one being the Department of Education (ED), created in 1979. At that time, ED assumed the functions of the former Department of Health, Education, and Welfare’s (HEW) Office for Civil Rights with respect to all educational programs transferred from the U.S. Office of Education that was a constituent part of HEW. ED has its own Office for Civil Rights (OCR) under an assistant secretary for civil rights. The HEW civil rights regulations, formerly published in Volume 45 of the *Code of Federal Regulations* (C.F.R.), were

redesignated as ED regulations and republished in 34 C.F.R. Parts 100–106. These administrative regulations, as amended over time, have considerably fleshed out the meaning of the statutes. ED’s Office for Civil Rights has also published “policy interpretations” and “guidance” regarding the statutes and regulations in the *Federal Register*. Judicial decisions contribute additional interpretive gloss on major points and resolve major controversies, but the administrative regulations and OCR interpretations remain the initial, and usually the primary, source for understanding the civil rights requirements.

Although the nondiscrimination language of the four statutes is similar, each statute protects a different group of beneficiaries, and an act that constitutes discrimination against one group does not necessarily constitute discrimination if directed against another group. “Separate but equal” treatment of the sexes is sometimes permissible under Title IX, for instance, but such treatment of the races is never permissible under Title VI. Similarly, the enforcement mechanisms for the four statutes are similar, but they are not identical. There may be private causes of action for damages under Title VI, Title IX, and Section 504, for instance, but under the Age Discrimination Act only equitable relief is available (see subsection 13.5.9 below).

Over the years, various issues have arisen concerning the scope and coverage of the civil rights statutes (see subsection 13.5.7 below). During their time in the limelight, these issues have become the focus of various U.S. Supreme Court cases as well as a legislative battle in Congress that led to a major new piece of legislation, the Civil Rights Restoration Act of 1987 (see subsection 13.5.7.4 below). As the volume of the litigation has increased, it has become apparent that the similarities of statutory language among the four civil rights statutes give rise to similar scope and coverage issues. Answers to an issue under one statute will thus provide guidance in answering comparable issues under another statute, and the answers will often be the same from one statute to another. There are some critical differences, however, in the statutory language and implementing regulations for each statute. For example, as explained in subsection 13.5.7.1 below, Title VI and the Age Discrimination Act have provisions limiting their applicability to employment discrimination, whereas Title IX and Section 504 do not. Each statute also has its own unique legislative history, which sometimes affects interpretation of the statute in a way that may have no parallel for the other statutes. Title IX’s legislative history on coverage of athletics is an example. Therefore, to gain a fine-tuned view of particular developments, administrators and counsel should approach each statute and each scope and coverage issue separately, taking account of both their similarities to and their differences from the other statutes and other issues.

**13.5.2. Title VI.** Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) declares:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.



Courts have generally held that Title VI incorporates the same standards for identifying unlawful racial discrimination as have been developed under the Fourteenth Amendment's equal protection clause (see the discussion of the *Bakke* case in Section 8.2.5, and see generally Section 8.2.4.1). But courts have also held that the Department of Education and other federal agencies implementing Title VI may impose nondiscrimination requirements on recipients beyond those developed under the equal protection clause (see *Guardians Assn. v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), discussed in Section 13.5.7.2).

The Education Department's regulations, found at 34 C.F.R. § 100.3(b), provide the basic, and most specific, reference point for determining what actions are unlawful under Title VI. The regulations prohibit a recipient of federal funds from denying, or providing a different quality of service, financial aid, or other benefit of the institution's programs, on the basis of race, color, or national origin. The regulations also prohibit institutions from treating individuals differently with respect to satisfying admission, enrollment, eligibility, membership, or other requirements, as well as denying individuals the opportunity to participate in programs or on planning or advisory committees on the basis of race, color, or national origin.

To supplement these regulations, the Department of Education has also developed criteria, as discussed below, that deal specifically with the problem of desegregating statewide systems of postsecondary education.

The dismantling of the formerly *de jure* segregated systems of higher education has given rise to considerable litigation over more than three decades. Although most of the litigation has attacked continued segregation in the higher education system of one state, the lengthiest lawsuit involved the alleged failure of the federal government to enforce Title VI in ten states. This litigation—begun in 1970 as *Adams v. Richardson*, continuing with various Education Department secretaries as defendant until it became *Adams v. Bell* in the 1980s, and culminating as *Women's Equity Action League v. Cavazos* in 1990—focused on the responsibilities of the Department of Health, Education and Welfare, and later the Education Department, to enforce Title VI, rather than examining the standards applicable to state higher education officials. The U.S. District Court ordered HEW to initiate enforcement proceedings against these states (*Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973)), and the U.S. Court of Appeals affirmed the decision (480 F.2d 1159 (D.C. Cir. 1973)). (See the further discussion of the case in Section 13.5.8.) In subsequent proceedings, the district judge ordered HEW to revoke its acceptance of desegregation plans submitted by several states after the 1973 court opinions and to devise criteria for reviewing new desegregation plans to be submitted by the states that were the subject of the case (see *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977)). Finally, in 1990, the U.S. Court of Appeals for the D.C. Circuit ruled that no private right of action against government enforcement agencies existed under Title VI, and dismissed the case for lack of jurisdiction (*Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990)).

After developing the criteria (42 Fed. Reg. 40780 (August 11, 1977)), HEW revised and republished them (43 Fed. Reg. 6658 (February 15, 1978)) as criteria applicable to all states having a history of *de jure* segregation in public higher education.<sup>54</sup> These “Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education” require the affected states to take various affirmative steps, such as enhancing the quality of black state-supported colleges and universities, placing new “high-demand” programs on traditionally black campuses, eliminating unnecessary program duplication between black and white institutions, increasing the percentage of black academic employees in the system, and increasing the enrollment of blacks at traditionally white public colleges.

Litigation alleging continued *de jure* segregation by state higher education officials resulted in federal appellate court opinions in four states; the U.S. Supreme Court ruled in one of these cases. Despite the amount of litigation, and the many years of litigation, settlement, or conciliation attempts, the standards imposed by the equal protection clause of the Fourteenth Amendment and by Title VI are still unclear. These cases—brought by private plaintiffs, with the United States acting as intervenor—were brought under both the equal protection clause (by the private plaintiffs and the United States) and Title VI (by the United States); judicial analysis generally used the equal protection clause standard. Although the U.S. Supreme Court’s opinion in *United States v. Fordice*, 505 U.S. 717 (1992), is controlling, appellate court rulings in prior cases demonstrate the complexities of this issue and illustrate the remaining disputes over the responsibilities of the states with histories of *de jure* segregation.

*Fordice* and other related federal court opinions must be read in the context of Supreme Court precedent in cases related to desegregating the public elementary and secondary schools. It is clear under the Fourteenth Amendment’s equal protection clause that, in the absence of a “compelling” state interest (see Section 8.2.5 of this book), no public institution may treat students differently on the basis of race. The leading case, of course, is *Brown v. Board of Education*, 347 U.S. 483 (1954). Though *Brown* concerned elementary and secondary schools, the precedent clearly applies to postsecondary education as well, as the Supreme Court affirmed in *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956).

Cases involving postsecondary education have generally considered racial segregation within a state postsecondary system rather than within a single institution. One case, for instance, *Alabama State Teachers Assn. v. Alabama Public School and College Authority*, 289 F. Supp. 784 (D. Ala. 1968), affirmed without majority opinion, 393 U.S. 400 (1969), concerned the state’s establishment of a branch of a predominantly white institution in a city already served by a predominantly black institution. The court rejected the plaintiff’s argument that this action unconstitutionally perpetuated segregation in the

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<sup>54</sup>Counsel concerned about the legal status of these criteria, and the extent to which they bind ED and the states, should consult *Adams v. Bell*, 711 F.2d 161, 165–66 (majority opinion), 206–7 (dissent) (D.C. Cir. 1983).

state system, holding that states do not have an affirmative duty to dismantle segregated higher education (as opposed to elementary and secondary education). This interpretation of the equal protection clause is clearly questionable after *Fordice*. Another case, *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), *affirmed without opinion*, 404 U.S. 907 (1971), concerned a state plan to expand a predominantly white two-year institution into a four-year institution in an area where a predominantly black four-year institution already existed. In contrast to the Alabama case, the court overturned the action because it impeded desegregation in the state system.

The crux of the legal debate in the higher education desegregation cases has been whether the equal protection clause and Title VI require the state to do no more than enact race-neutral policies (the “effort” test), or whether the state must go beyond race neutrality to ensure that any remaining vestige of the formerly segregated system (for example, racially identifiable institutions or concentrations of minority students in less prestigious or less well-funded institutions) is removed. Unlike elementary and secondary students, college students select the institution they wish to attend (assuming they meet the admission standards); and the remedies used in elementary and secondary school desegregation, such as busing and race-conscious assignment practices, are unavailable to colleges and universities. But just how the courts should weigh the “student choice” argument against the clear mandate of the Fourteenth Amendment was sharply debated by several federal courts prior to *Fordice*.

In *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979), the court ordered the merger of two Tennessee universities, despite the state’s claim that the racial imbalances at the schools were created by the students’ exercise of free choice. The state had proposed expanding its programming at predominantly white University of Tennessee-Nashville; this action, the plaintiffs argued, would negatively affect the ability of Tennessee A&I State University, a predominantly black institution in Nashville, to desegregate its faculty and student body. Applying the reasoning of *Brown* and other elementary/secondary cases, the court ruled that the state’s adoption of an “open admissions” policy had not effectively dismantled the state’s dual system of higher education, and ordered state officials to submit a plan for desegregating public higher education in Tennessee. In a separate decision, *Richardson v. Blanton*, 597 F.2d 1078 (6th Cir. 1979), the same court upheld the district court’s approval of the state’s desegregation plan.

The court found that open admissions and the cessation of discrimination were not enough to meet the state’s constitutional obligation in this situation, “where segregation was once required by state law and ‘egregious’ conditions of segregation continued to exist in public higher education in the Nashville area. What was required, the [district] court found, was affirmative action to remove these vestiges” (597 F.2d at 1065). Furthermore, the Sixth Circuit rejected the state’s argument that elementary/secondary desegregation

precedent, most specifically *Green v. County School Board*, 391 U.S. 430 (1968), did not apply to higher education.<sup>55</sup>

Desegregation cases brought in Mississippi and Louisiana, both within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit, show the complexities of these issues and the sharply differing interpretations of the equal protection clause and Title VI. These cases proceeded through the judicial system at the same time; and, considered together, they illustrate the significance of the U.S. Supreme Court's pronouncements in *Fordice*.

The case that culminated in the Supreme Court's *Fordice* opinion began in 1975, when Jake Ayers and other private plaintiffs sued the governor of Mississippi and other state officials for maintaining the vestiges of a *de jure* segregated system. Although HEW had begun Title VI enforcement proceedings against Mississippi in 1969, it had rejected both desegregation plans submitted by the state, and this private litigation ensued. The United States intervened, and the parties attempted to conciliate the dispute for twelve years. They were unable to do so, and the trial ensued in 1987.

Mississippi had designated three categories of public higher education institutions: comprehensive universities (three historically white, none historically black); one urban institution (black); and four regional institutions (two white, two black). Admission standards differed both among categories and within categories, with the lowest admission standards at the historically black regional institutions. The plaintiffs argued, among other things, that the state's admission standards, institutional classification and mission designations, duplication of programs, faculty and staff hiring and assignments, and funding perpetuated the prior segregated system of higher education; among other data, they cited the concentration of black students at the black institutions (more than 95 percent of the students at each of the three black institutions were black, whereas blacks comprised fewer than 10 percent of the students at the three white universities and 13 percent at both white regional institutions). The state asserted that the existence of racially identifiable universities was permissible, since students could choose which institution to attend, and that the state's higher education policies and practices were race neutral in intent.

Although the district court acknowledged that the state had an affirmative duty to desegregate its higher education system, it rejected the *Green* precedent as inapplicable to higher education systems and followed the Court's ruling in *Bazemore*, described above. The district court said that the proper inquiry was

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<sup>55</sup>Subsequent to *Geier I*, the Sixth Circuit ruled that the consent decree's requirement to develop an affirmative action program for seventy-five black preprofessional students was lawful, and that *Bazemore v. Friday*, 478 U.S. 385 (1986), did not apply to education (*Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) (*Geier II*)). For a discussion of the court's analysis of the affirmative action provisions of the consent decree, see Section 8.2.5 of this book. In 1994, the State of Tennessee moved to vacate the 1984 settlement approved in *Geier II*, relying on the Supreme Court's decision in *Fordice*. The trial court did not rule on this motion, and the parties eventually reached a new settlement, culminating in a consent decree (*Geier v. Sundquist*, 128 F. Supp. 2d 519 (M.D. Tenn. 2001)). For a discussion of *Geier* and the 2001 settlement, see Deon D. Owensby, Comment, "Affirmative Action and Desegregating Tennessee's Higher-Education System: The *Geier* Case in Perspective," 69 *Tenn. L. Rev.* 701 (2002).

whether state higher education policies and practices were racially neutral, not whether there was racial balance in the various sectors of public higher education. Applying this standard to the state's actions, and relying on the voluntariness of student choice under *Bazemore*, the court found no violation of law.

A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit initially did not view *Bazemore* as controlling, and overruled the district court. Because the plaintiffs in *Ayers* had alleged *de jure* segregation (*Bazemore* involved *de facto* segregation), the court ruled that the correct standard was that of *Geier v. Alexander*. The panel cited lower admission standards for predominantly black institutions, the small number of black faculty at white colleges, program duplication at nearby black and white institutions, and continued underfunding of black institutions as evidence of an illegal dual system (*Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990)). The state petitioned the Fifth Circuit for a rehearing *en banc*, which was granted. The *en banc* court reversed the panel, reinstating the decision of the district court (914 F.2d 676 (5th Cir. 1990)).

The *en banc* court relied on a case decided two decades earlier, *Alabama State Teachers Assn. v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *affirmed per curiam*, 393 U.S. 400 (1969), which held that the scope of the state's duty to dismantle a racially dual system of higher education differed from, and was less strict than, its duty to desegregate public elementary and secondary school systems. The *en banc* court said that *Green* did not apply to the desegregation of higher education and that the standard articulated in *Bazemore* should have been applied in this case. Furthermore, it saw no conflict between *Green* and *Bazemore*, stating that *Green* had not outlawed all "freedom-of-choice" desegregation plans outside elementary and secondary education. The opinion in *Geier*, on which the earlier panel opinion had relied, received sharp criticism as an overreading of *Bazemore*.

Despite its conclusion that the state's conduct did not violate the equal protection clause (and, without specifically addressing it, Title VI), the court did find some present effects of the former *de jure* segregation. The majority concluded that the inequalities in racial composition were a result of the different historical missions of the three sectors of public higher education, but that current state policies provided equal educational opportunity irrespective of race.

The *en banc* majority interpreted the legal standard to require affirmative efforts, but not to mandate equivalent funding, admission standards, enrollment patterns, or program allocation. The plaintiffs appealed the *en banc* court's ruling to the U.S. Supreme Court.

At the same time, similar litigation was in progress in Louisiana. In 1974, the U.S. Department of Justice sued the state of Louisiana under both the equal protection clause and Title VI, asserting that the state had established and maintained a racially segregated higher education system. The Justice Department cited duplicate programs at contiguous black and white institutions and the existence of three systems of public higher education as examples of continuing racial segregation. After seven years of pretrial conferences, the parties agreed to a consent decree, which was approved by a district court judge in 1981. Six years later, the United States charged that the state had not implemented the

consent decree and that almost all of the state's institutions of higher education were still racially identifiable. The state argued that its good-faith efforts to desegregate higher education were sufficient.

In *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988), a federal district judge granted summary judgment for the United States, agreeing that the state's actions had been insufficient to dismantle the segregated system. In later opinions (718 F. Supp. 499 (E.D. La. 1989), 718 F. Supp. 525 (E.D. La. 1989)), the judge ordered Louisiana to merge its three systems of public higher education, create a community college system, and reduce unwarranted duplicate programs, especially in legal education. Appeals to the Supreme Court followed from all parties,<sup>56</sup> but the U.S. Supreme Court denied review for want of jurisdiction (*Louisiana, ex rel. Guste v. United States*, 493 U.S. 1013 (1990)).

Despite the flurry of appeals, the district court continued to seek a remedy in this case. It adopted the report of a special master, which recommended that a single governing board be created, that the board classify each institution by mission, and that the graduate programs at the state's comprehensive institutions be evaluated for possible termination. The court also ordered the state to abolish its open admissions policy and to use new admissions criteria consisting of a combination of high school grades, rank, courses, recommendations, extracurricular activities, and essays in addition to test scores (751 F. Supp. 621 (E.D. La. 1990)). After the Fifth Circuit's *en banc* opinion in *Ayers v. Allain* was issued, however, the district court judge vacated his earlier summary judgment, stating that although he disagreed with the Fifth Circuit's ruling, he had no choice but to follow it (*United States v. Louisiana*, 751 F. Supp. 606 (E.D. La. 1990)). The Governor of Louisiana appealed this ruling, but the judge stayed both the appeal and the remedies he had ordered, pending the Supreme Court's opinion in *Ayers v. Allain*, now titled *United States v. Fordice*.<sup>57</sup>

The U.S. Supreme Court was faced with the issue addressed in *Geier*: Which Supreme Court precedents control equal protection and Title VI jurisprudence

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<sup>56</sup>For a description of the litigation history of this case, see Note, "Realizing the Dream: *U.S. v. State of Louisiana*," 50 *La. L. Rev.* 583 (1990).

<sup>57</sup>In proceedings subsequent to the Supreme Court's opinion in *Fordice*, the legal skirmishes in Louisiana continued. After *Fordice* was announced, the Fifth Circuit vacated the district court's summary judgment for the state and remanded the case for further proceedings in light of *Fordice*. The district court then ordered the parties to show cause why the 1988 liability determination and remedy should not be reinstated. It also reinstated its earlier liability finding and entered a new remedial order at 811 F. Supp. 1151 (E.D. La. 1993). By the end of 1993, the U.S. Court of Appeals for the Fifth Circuit had overturned a district court's order to create a single higher education system for the state's public colleges, to create new admissions criteria for state colleges, to create a community college system, and to eliminate duplicative programs in adjacent racially identifiable state institutions (*United States v. Louisiana*, 9 F.3d 1159 (5th Cir. 1993)). The case was remanded to the trial court for resolution of disputed facts and determination of whether program duplication violated *Fordice*. The Department of Justice and a federal judge approved a plan that would increase spending at several historically black institutions, and create one governing board for the state's public colleges rather than four, but would not result in the merger of any institutions ("Court Backs College Plan in Louisiana," *New York Times*, October 15, 1994, p. A24; "The Country's Only Historically Black Public-College System Would Be Split Up . . .," *Chron. Higher Educ.*, February 2, 1996, A26).

in higher education desegregation—*Bazemore* or *Green*? In *United States v. Fordice*, 505 U.S. 717(1992), the Court reversed the decision of the Fifth Circuit’s *en banc* majority, sharply criticizing the court’s reasoning and the legal standard it had applied. First, the Court refused to choose between the two precedents. Justice White, writing for the eight-Justice majority, rejected the Fifth Circuit’s argument that *Bazemore* limited *Green* to segregation in elementary/secondary education.

The Court also criticized the lower courts for their interpretation of the *Alabama State Teachers Association* case: “Respondents are incorrect to suppose that *ASTA* validates policies traceable to the *de jure* system regardless of whether or not they are educationally justifiable or can be practicably altered to reduce their segregative effects” (505 U.S. at 730).

White’s opinion articulated a standard that appears to be much closer to *Green* than to *Bazemore*, despite his insistence that *Bazemore* can be read to require the outcome in *Fordice*. He rejected the lower courts’ assertion that a state’s adoption of race-neutral policies was sufficient to cure the constitutional wrongs of a dual system.

. . . In a system based on choice, student attendance is determined not simply by admission policies, but also by many other factors. Although some of these factors clearly cannot be attributed to State policies, many can be. Thus, even after a State dismantles its segregative *admissions* policy, there may still be state action that is traceable to the State’s prior *de jure* segregation and that continues to foster segregation. . . . If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices [505 U.S. at 729].

The Court asserted that “there are several surviving aspects of Mississippi’s prior dual system which are constitutionally suspect” (at 733). Although it refused to list all these elements, it discussed four policies that, in particular, appeared to perpetuate the effects of prior *de jure* discrimination: admission policies (for discussion of this portion of the case, see Section 8.2.4.1), the duplication of programs at nearby white and black colleges, the state’s “mission classification,” and the fact that Mississippi operates eight public institutions. For each category, the court noted the foundations of state policy in previous *de jure* segregation and a failure to alter that policy when *de jure* segregation officially ended. Furthermore, the Court took the lower courts to task for their failure to consider that state policies in each of these areas had influenced student access to higher education and had perpetuated segregation.

The Court emphasized that it was not calling for racial quotas; in its view, the fact “that an institution is predominantly white or black does not in itself make out a constitutional violation” (at 743). It also refused the plaintiffs’ invitation to order the state to provide equal funding for the three traditionally black institutions. The Court remanded the case so that the lower court could determine whether the state had “met its affirmative obligation to dismantle its prior dual system” under the standards of the equal protection clause and Title VI.

Although they joined the Court's opinion, two Justices provided concurring opinions, articulating concerns they believed were not adequately addressed in the majority opinion. Justice O'Connor reminded the Court that only in the most "narrow" of circumstances should a state be permitted to "maintain a policy or practice traceable to *de jure* segregation that has segregative effects" (at 744). O'Connor wrote: "Where the State can accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith." Even if the state could demonstrate that "maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals," O'Connor added, "it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible" (505 U.S. at 744–45). O'Connor's approach would appear to preclude a state from arguing that certain policies that had continued segregative impacts were justified by "sound educational policy."

Justice Thomas's concurrence articulates a concern expressed by many proponents of historically black colleges, who worry that the Court's opinion might result in the destruction of black colleges.<sup>58</sup> Because the black colleges could be considered "vestiges of a segregated system" and thus vulnerable under the Court's interpretation of the equal protection clause and Title VI, Thomas wanted to stress that the *Fordice* ruling did *not* require the dismantling of traditionally black colleges. Thomas wrote:

Today, we hold that "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational policies." . . . In particular, because [this statement] does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions [505 U.S. at 745].

The majority opinion, Thomas noted, focused on the state's policies, not on the racial imbalances they had caused. He suggested that, as a result of the ruling in this case, district courts "will spend their time determining whether such policies have been adequately justified—a far narrower, more manageable task than that imposed under *Green*" (505 U.S. at 746). Thomas emphasized the majority opinion's use of "sound educational practices" as a touchstone for determining whether a state's actions are justifiable:

In particular, we do not foreclose the possibility that there exists "sound educational justification" for maintaining historically black colleges *as such*. . . .

I think it indisputable that these institutions have succeeded in part because of their distinctive histories and traditions. . . . Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or

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<sup>58</sup>The unique issues facing historically black colleges with regard to desegregation are discussed later in this Section.



historically black, to particular racial groups. . . . Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such . . . I do not understand our opinion to hold that a State is *forbidden* from doing so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges [505 U.S. at 747–49; emphasis in original].

Thomas’s concurrence articulates the concerns of some of the parties in the Louisiana and Mississippi cases—namely, that desegregation remedies would fundamentally change or even destroy the distinctive character of historically black colleges, instead of raising their funding to the level enjoyed by the public white institutions in those states (see P. Applebome, “Epilogue to Integration Fight at South’s Public Universities,” *New York Times*, May 29, 1992, pp. A1, A21).

Justice Scalia wrote a blistering dissent, criticizing the “effectively unsustainable burden the Court imposes on Mississippi, and all States that formerly operated segregated universities” and stating unequivocally that *Green* “has no proper application in the context of higher education, provides no genuine guidance to States and lower courts, and is as likely to subvert as to promote the interests of those citizens on whose behalf the present suit was brought” (505 U.S. at 750–51).

In Scalia’s view, the Court’s tests for ascertaining compliance with *Brown* were confusing and vague. He questioned how one would measure whether policies that perpetuate segregation have been eliminated to the extent “practicable” and consistent with “sound educational” practices (at 750). According to Scalia, “*Bazemore*’s standard for dismantling a dual system ought to control here: discontinuation of discriminatory practices and adoption of a neutral admissions policy. . . . Only one aspect of an historically segregated university system need be eliminated: discriminatory admissions standards” (at 757, 758). In this regard, Scalia agreed with the majority opinion that the state’s sole reliance on standardized admission tests appeared to have a racially exclusionary purpose and was not evidence of a neutral admissions process.

Scalia then argued that the majority opinion would harm traditionally black colleges, because it did not require equal funding of black and white institutions. Equal funding, he noted, would encourage students to attend their own-race institutions without “paying a penalty in the quality of education” (at 759).

What the Court’s test is designed to achieve is the elimination of predominantly black institutions. . . . There is nothing unconstitutional about a “black” school in the sense, not of a school that blacks *must* attend and that whites *cannot*, but of a school that, as a consequence of private choice in residence or in school selection, contains, and has long contained, a large black majority [at 760].

Despite Scalia’s criticism, the opinion makes it clear that, although many elementary/secondary school desegregation remedies are unavailable to higher education, *Green* controls a district court judge’s analysis of whether a state has eliminated the vestiges of a *de jure* segregated system of higher education.

On remand, the U.S. Court of Appeals for the Fifth Circuit reversed the prior ruling of the district court and remanded for further proceedings (*Ayers v. Fordice*, 970 F. 2d 1378 (5th Cir. 1992)). The ruling of the district court (879 F. Supp. 1419 (N.D. Miss. 1995)) considers a wide range of issues including admission standards, collegiate missions and the duplication of academic programs, racial identifiability of the campuses, the campus climate, and how the institution's and state's policies and practices interacted to perpetuate segregation. The court rejected the defendants' proposal that the state merge two pairs of historically white and historically black colleges, ordering them to consider other alternatives to ascertain if they would be more successful in reducing racial identifiability of the campuses.

The court found that the admissions standards proposed by the state were discriminatory, and that use of scores on the American College Test (ACT) as the sole criterion for admission was also discriminatory, but that the use of ACT scores for awarding scholarships was not discriminatory. The court approved the defendants' proposal for uniform admission standards for all Mississippi colleges and universities, rejecting the plaintiffs' argument that some of the colleges should have open admissions policies until greater racial balance was achieved. Regarding institutional missions, the court ruled that the limited missions allocated to the historically black institutions were a vestige of segregation, and ordered a study of program duplication, commenting that not all duplication necessarily resulted in segregation. The judge also ruled that funding should not be completely tied to institutional mission, given that mission assignments were made during the period of segregation.

The U.S. Department of Justice appealed the district court's decision. In April 1997, the U.S. Court of Appeals for the Fifth Circuit upheld part of the district court's findings, reversed another part, and remanded for further proceedings (111 F.3d 1183 (5th Cir. 1997)). The appellate court held that the financial aid policies of the historically white colleges perpetuated prior discrimination on the basis of race, but that the uniform admissions standards proposed by the state were appropriate. The court also directed the district court to amend the remedial decree to require the state to submit proposals for increasing the enrollment of white students at several historically black institutions. The U.S. Supreme Court denied review (522 U.S. 1084).<sup>59</sup>

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<sup>59</sup>After several more rulings by the district court on funding issues and an attempt by some of the private parties to opt out of the class (which was denied by the trial court and affirmed on appeal), a settlement was reached that set uniform admission policies for the state colleges and provided for additional funding for the historically black colleges in order that they might attract white students. Upon receiving assurances from the state legislature that it would provide \$500 million in funding over the next seventeen years to enhance current and create new academic programs at the historically black state institutions, as well as funding for remedial summer programs for underprepared students, the trial and appellate courts approved the settlement (*Ayers v. Thompson*, 358 F.3d 356 (5th Cir. 2004)). The plaintiffs appealed to the U.S. Supreme Court, which denied review (543 U.S. 951 (2004)), ending nearly thirty years of litigation. See Sara Hebel, "Supreme Court Clears Way for Settlement of College-Desegregation Case," *Chron. Higher Educ.*, October 29, 2004, A26.

The cases pending in Louisiana, as well as in Alabama, at the time of the *Fordice* ruling were influenced by it. For example, in *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), a case that began in 1983, the plaintiffs, a group of black citizens that had joined the Justice Department's litigation, had argued that the state's allocation of "missions" to predominantly white and black public colleges perpetuated racial segregation because the black colleges received few funds for research or graduate education. They also argued that the white colleges' refusal to teach subjects related to race, such as black culture or history, had a discriminatory effect on black students.

A trial court had found, prior to *Fordice*, that the public system of higher education perpetuated earlier *de jure* segregation, but it had ruled against the plaintiffs on the curriculum issue. Both parties appealed. The state argued that its policies were race neutral and that public universities had a constitutionally protected right of academic freedom to determine what programs and courses would be offered to students, and the plaintiffs took issue with the academic freedom defense. A federal appellate court affirmed the trial court in part (14 F.3d 1534 (11th Cir. 1994)), and applied *Fordice*'s teachings to the actions of the state. The court held that, simply because the state could demonstrate legitimate, race-neutral reasons for continuing its past practice of limiting the types of programs and degrees offered by historically black colleges, it was not excused from its obligation to redress the continuing segregative effects of such a policy. But the appellate court differed with the trial court on the curriculum issue, stating that the First Amendment did not limit the court's power to order white colleges and universities to modify their programs and curricula to redress the continuing effects of prior discrimination. The court remanded the case to the trial court to determine whether the state's allocation of research missions to predominantly white colleges perpetuates segregation, and, if so, to determine "whether such effects can be remedied in a manner that is practicable and educationally sound" (14 F.3d at 1556). The trial court entered a remedial decree, to be in effect until 2005, creating trust funds to promote "educational excellence" for two historically black colleges and scholarship funds to be used by historically black institutions to attract white students, and ordering other actions by the state to strengthen the historically black institutions (see 900 F. Supp. 272 (N.D. Ala. 1995)).

(For analysis of the Mississippi and Alabama cases post-*Fordice*, see Scott L. Sroka, "Discrimination Against Students in Higher Education: A Review of the 1995 Judicial Decisions," 23 *J. Coll. & Univ. Law* 431 (1997). For a discussion of the implications of *Fordice* for historically black colleges and universities, see Kenneth S. Tollett, Sr., "The Fate of Minority-Based Institutions After *Fordice*: An Essay," 13 *Rev. Litig.* 447 (1994).)

The *Fordice* opinion has been criticized by individuals of all races and political affiliations as insufficiently clear to provide appropriate guidance to states as they attempt to apply its outcome to desegregation of the still racially identifiable public institutions in many states. (For a discussion of some of the unresolved issues, see S. Jaschik, "Whither Desegregation?" *Chron. Higher Educ.*, January 26, 1991, A33.)

As the history of the past three decades of Title VI litigation makes clear, the desegregation of higher education is very much an unfinished business. Its completion poses knotty legal, policy, and administrative enforcement problems and requires a sensitive appreciation of the differing missions and histories of traditionally black and traditionally white institutions. The challenge is for lawyers, administrators, government officials, and the judiciary to work together to fashion solutions that will be consonant with the law's requirement to desegregate but will increase rather than limit the opportunities available to minority students and faculty.

**13.5.3. Title IX.** The central provision of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) declares:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .

Unlike Title VI, Title IX has various exceptions to its prohibition on sex discrimination. It does “not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization” (20 U.S.C. § 1681 (a)(3)). It does “not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine” (20 U.S.C. § 1681 (a)(4)). There are also several exceptions concerning admissions (20 U.S.C. § 1681 (a)(1), (2), (5)). In addition, Title IX excludes from its coverage the membership practices of tax-exempt social fraternities and sororities (20 U.S.C. § 1681 (a)(6)(A)); the membership practices of the YMCA, YWCA, Girl Scouts, Boy Scouts, Campfire Girls, and other tax-exempt, traditionally single-sex “youth service organizations” (20 U.S.C. § 1681 (a)(6)(B)); American Legion, Boys State, Boys Nation, Girls State, and Girls Nation activities (20 U.S.C. § 1681 (a)(7)); and father-son and mother-daughter activities if provided on a reasonably comparable basis for students of both sexes (20 U.S.C. § 1681 (a)(8)).

The Department of Education's regulations implementing Title IX (34 C.F.R. Part 106) specify in much greater detail the types of acts that are considered to be prohibited sex discrimination. Educational institutions may not discriminate on the basis of sex in admissions and recruitment, with exceptions for certain institutions as noted above (see Section 8.2.4.2 of this book). Institutions may not discriminate in awarding financial assistance (see Section 8.3.3 of this book), in athletic programs (see Section 10.4.6), or in the employment of faculty and staff members (see Sections 5.2.3 & 13.5.7.1). Section 106.32 of the Title IX regulations prohibits sex discrimination in housing accommodations with respect to fees, services, or benefits, but does not prohibit separate housing by sex (see Section 8.4.1 of this book). Section 106.33 of the regulations requires that separate facilities for toilets, locker rooms, and shower rooms be comparable. Section 106.34 prohibits sex discrimination in student access to

course offerings. Sections 106.36 and 106.38 require that counseling services and employment placement services be offered to students in such a way that there is no discrimination on the basis of sex. Section 106.39 prohibits sex discrimination in health and insurance benefits and services (see Section 8.7.2 of this book). Section 106.40 prohibits certain discrimination on the basis of “parental, family, or marital status” or on the basis of pregnancy or childbirth. In addition to these regulations, the Department of Education has published guidelines and interpretive advice on certain, particularly difficult, applications of Title IX. The most important of these documents are *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, which is discussed in Sections 8.1.5 and 9.3.4 of this book; and the Policy Interpretation on intercollegiate athletics, which is discussed in Section 10.4.6.

Litigation brought under Title IX has primarily addressed alleged sex discrimination in the funding and support of women’s athletics (see Section 10.4.6 of this book), the employment of women faculty and athletics coaches (male or female) (see Section 5.3.3), and sexual harassment of students by faculty members (see Section 9.3.4) or by other students (see Section 8.1.5). In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), discussed in subsection 13.5.9 below, the U.S. Supreme Court ruled unanimously that private parties who are victims of sex discrimination may bring “private causes of action” for money damages to enforce their nondiscrimination rights under Title IX. As a result of this 1992 ruling, which resolved a long-standing split among the lower courts, an increasing number of both students and faculty have used Title IX to sue postsecondary institutions. The availability of a money damages remedy under Title IX is particularly important to students, for whom typical equitable remedies, such as back pay and orders requiring the institution to refrain from future discriminatory conduct, are of little use because students are usually due no pay and are likely to have graduated or left school before the litigation has been completed. The Court’s ruling in *Franklin* thus has great significance for colleges and universities because it increases the incentives for students, faculty members, and staff members to challenge sex discrimination in court. (See generally E. J. Vargyas, “*Franklin v. Gwinnett County Public Schools* and Its Impact on Title IX Enforcement,” 19 *J. Coll. & Univ. Law* 373 (1993).) It also may persuade individuals considering litigation over alleged employment discrimination to use Title IX instead of Title VII, since Title IX has no caps on damage awards and no detailed procedural prerequisites, as Title VII does (see Section 5.2.1 of this book). Courts are split, however, on whether the availability of express private causes of actions for employment discrimination under Title VII precludes the use of Title IX for the same purpose (see Section 5.2.3 of this book).

As litigation has progressed after *Franklin*, courts have emphasized the distinction between institutional liability and individual (or personal) liability under Title IX. Title IX imposes liability only on the institution (the college, university, or college or university system as an entity) and not on its officers, administrators, faculty members, or staff members as individuals. This is

because individual officers and employees are not themselves “education programs or activities” within the meaning of Title IX and usually are not themselves the recipients of the “federal financial assistance.” In *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999), for instance, the court enumerated cases—including *Franklin* but particularly *Davis v. Monroe County Board of Education*, 526 U.S. 629 at 639–40 (see Section 8.1.5)—supporting the view that individuals cannot be sued in their individual capacities under Title IX.

Courts have seldom addressed whether institutional employees can be sued in their official, rather than individual, capacities under Title IX. In *Doe v. Lance*, 1996 WL 663159, 1996 U.S. Dist. LEXIS 16836 (N.D. Ind. 1996), the court seemed willing to permit a Title IX suit against a school superintendent in her official capacity, but held that such a suit against the superintendent was the same as a suit against the school district itself. Because the school district was already a party to the lawsuit, the court dismissed the claim against the superintendent in her official capacity because it afforded the plaintiff “no additional avenue of relief.”

Sex discrimination that is actionable under Title IX may also be actionable under the federal civil rights statute known as Section 1983 (see Sections 3.5 & 4.7.4 of this book) if the discrimination amounts to a “deprivation” of rights “secured by the [federal] Constitution.” The Fourteenth Amendment’s equal protection clause would be the basis for this type of claim. The advantage for victims of discrimination is that they may sue the individuals responsible for the discrimination under Section 1983, which they cannot do under Title IX. Section 1983 claims, however, may be brought only against individuals who are acting “under color of law,” such as faculty and staff members at public institutions.

Although defendants have sometimes asserted that Title IX “subsumes” or “precludes” Section 1983 claims covering the same discriminatory acts, it is clear that courts will reject such arguments, at least when the Section 1983 equal protection claim is asserted against individuals rather than the institution itself. In *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997), for instance, the court emphatically recognized that Title IX “in no way restricts a plaintiff’s ability to seek redress under § 1983 for the violation of independently existing constitutional rights,” such as equal protection rights. And in *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004), the court reached the same result as to a student’s Section 1983 claim against the alleged harasser (a professor), while adding nuance to the analysis.

**13.5.4. Section 504.** Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), states:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The Department of Education’s regulations on Section 504 (34 C.F.R. Part 104) contain specific provisions that establish standards for postsecondary

institutions to follow in their dealings with “qualified” students and applicants with disabilities, “qualified” employees and applicants for employment, and members of the public with disabilities who are seeking to take advantage of institutional programs and activities open to the public. A “qualified individual with a disability” is “any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment” (34 C.F.R. § 104.3(j)). In the context of postsecondary and vocational education services, a “qualified” person with a disability is someone who “meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity” (34 C.F.R. § 104.3(l)(3)). Whether an individual with a disability is “qualified” in other situations depends on different criteria. In the context of employment, a qualified individual with a disability is one who, “with reasonable accommodation, can perform the essential functions of the job in question” (34 C.F.R. § 104.3(l)(1)). With regard to other services, a qualified individual with a disability is someone who “meets the essential eligibility requirements for the receipt of such services” (34 C.F.R. § 104.3(l)(4)).<sup>60</sup>

Although the Section 504 regulations resemble those for Title VI and Title IX in the types of programs and activities considered, they differ in some of the means used for achieving nondiscrimination. The reason for these differences is that “different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity” (42 Fed. Reg. 22676 (May 4, 1977)). Institutions receiving federal funds may not discriminate on the basis of disability in admission and recruitment of students (see this book, Section 8.2.4.3); in providing financial assistance (Section 8.3.3); in athletic programs (Section 10.4.7); in housing accommodations (Section 8.4.1); or in the employment of faculty and staff members (Section 5.2.5) or students (see 34 C.F.R. § 104.46(c)). The regulations also prohibit discrimination on the basis of disability in a number of other programs and activities of postsecondary institutions.

Section 104.43 requires nondiscriminatory “treatment” of students in general. Besides prohibiting discrimination in the institution’s own programs and activities, this section requires that, when an institution places students in an educational program or activity not wholly under its control, the institution “shall assure itself that the other education program or activity, as a whole,

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<sup>60</sup>Cases and authorities are collected in Francis M. Dougherty, Annot., “Who Is ‘Individual with Handicaps’ Under Rehabilitation Act of 1973 (29 U.S.C.S. §§ 701 et seq.),” 97 A.L.R. Fed. 40; Colleen Courtade, Annot., “Who Is ‘Qualified’ Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 (29 U.S.C.S. §§ 701 et seq.) and Regulations Promulgated Thereunder,” 80 A.L.R. Fed. 830; James Lockhart, Annot., “Who Is Recipient of, and What Constitutes Program or Activity Receiving Federal Financial Assistance for Purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), Which Prohibits Any Program or Activity Receiving Financial Assistance from Discriminating on Basis of Disability,” 160 A.L.R. Fed. 297; James Lockhart, Annot., “What Constitutes Federal Financial Assistance for Purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), Which Prohibits Any Program or Activity Receiving Federal Financial Assistance from Discriminating on Basis of Disability,” 147 A.L.R. Fed. 205.

provides an equal opportunity for the participation of qualified handicapped persons.” In a student teaching program, for example, the “as a whole” concept allows the institution to make use of a particular external activity even though it discriminates, provided that the institution’s entire student teaching program, taken as a whole, offers student teachers with disabilities “the same range and quality of choice in student-teaching assignments afforded nonhandicapped students” (42 Fed. Reg. at 22692 (comment 30)). Furthermore, the institution must operate its programs and activities in “the most integrated setting appropriate”; that is, by integrating disabled persons with nondisabled persons to the maximum extent appropriate (34 C.F.R. § 104.43(d)).

The Education Department’s regulations recognize that certain academic adjustment may be necessary to protect against discrimination on the basis of disability. However, those academic requirements that the institution “can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement” need not be adjusted. Adjustments that do not affect the academic integrity of a program, such as changes in the length of time to earn a degree or the modification of certain course requirements, are examples of adjustments that may be required by the regulations. The regulations also limit the institution’s right to prohibit tape recorders or service animals if a disabled student needs these accommodations to participate in the educational program. The regulations also discuss the modification of examination formats and the provision of “auxiliary aids” such as taped texts or readers (34 C.F.R. § 104.44).

Section 104.47(b) provides that counseling and placement services be offered on the same basis to disabled and nondisabled students. The institution is specifically charged with ensuring that job counseling is not more restrictive for disabled students. Under Section 104.47(c), an institution that supplies significant assistance to student social organizations must determine that these organizations do not discriminate against disabled students in their membership practices.

The institution’s programs or activities—“when viewed in their entirety”—must be physically accessible to students with disabilities, and the institution’s facilities must be usable by them. The regulations applicable to existing facilities differ from those applied to new construction; existing facilities need not be modified in their entirety if other methods of accessibility can be used (34 C.F.R. § 104.22). All new construction must be readily accessible when it is completed.<sup>61</sup>

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<sup>61</sup>A final rule to implement both the ADA and the Architectural Barriers Act (42 U.S.C. § 4151 *et seq.*) has been published. The “ADA Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Guidelines” were published at 69 Fed. Reg. No. 141 (July 23, 2004), and are codified at 36 C.F.R. Parts 1190 and 1191. Under 26 U.S.C. § 190, recipients who pay federal income tax are eligible to claim a tax deduction of up to \$15,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See also 42 U.S.C. § 4151 *et seq.* (Architectural Barriers Act of 1968) and 29 U.S.C. § 792 (the Act’s federal Compliance Board) for further requirements applicable to buildings constructed, altered, or leased with federal aid funds.



In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), set forth in Section 8.2.4.3 of this book, the U.S. Supreme Court added some important interpretive gloss to the regulation on academic adjustments and assistance for disabled students (34 C.F.R. § 104.44). The Court quoted but did not question the validity of the regulation’s requirement that an institution provide “auxiliary aids”—such as interpreters, taped texts, or braille materials—for students with sensory impairments. It made very clear, however, that the law does not require “major” or “substantial” modifications in an institution’s curriculum or academic standards to accommodate disabled students. To require such modifications, the Court said, would be to read into Section 504 an “affirmative action obligation” not warranted by its “language, purpose, [or] history.” Moreover, if the regulations were to be interpreted to impose such obligation, they would to that extent be invalid.

The Court acknowledged, however, that the line between discrimination and a lawful refusal to take affirmative action is not always clear. Thus, in some instances programmatic changes may be required where they would not fundamentally alter the program itself. In determining where this line is to be drawn, the Court would apparently extend considerable deference to postsecondary institutions’ legitimate educational judgments respecting academic standards and course requirements. While *Davis* thus limits postsecondary institutions’ legal obligation to modify their academic programs to accommodate disabled students, the opinion does not limit an institution’s obligation to make its facilities physically accessible to qualified students with disabilities, as required by the regulations (34 C.F.R. § 104.22)—even when doing so involves major expense. In *Davis*, the Court found that, because of her hearing disability, the plaintiff was not “otherwise qualified” for admission to the nursing program. When a person with a disability is qualified and has been admitted, however, Section 104.22 requires that facilities as a whole be “readily accessible” to that person.

The U.S. Supreme Court spoke a second time on the significance of Section 504—this time with regard to whether individuals with contagious diseases are protected by Section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Court held that a teacher with tuberculosis was protected by Section 504 and that her employer was required to determine whether a reasonable accommodation could be made for her. Subsequent to *Arline*, Congress, in amendments to Section 504 (42 U.S.C. § 706 (8)(D)), and the Equal Employment Opportunity Commission (EEOC), in regulations interpreting the employment provisions of the Americans With Disabilities Act (ADA) (29 C.F.R. § 1630.2(r)), provided other statutory protections for students and staff with contagious diseases. (For a discussion of the relevant legal principles under Section 504 in a case where a university dismissed a dental student suffering from AIDS, see *Doe v. Washington University*, 780 F. Supp. 628 (E.D. Mo. 1991).)

The availability of compensatory damages under Section 504 was addressed in *Tanberg v. Weld County Sheriff*, 787 F. Supp. 970 (D. Colo. 1992). Citing *Franklin v. Gwinnett County Public Schools* (Section 13.5.9), the federal trial judge ruled that a plaintiff who proves intentional discrimination under Section 504 can be entitled to compensatory damages.

The significance of *Davis* may be limited for an additional reason, in that the Americans With Disabilities Act affords broader rights of access and accommodation to students, employees, and, in some cases, the general public than contemplated by *Davis*. The employment provisions of the Americans With Disabilities Act are discussed in Section 5.2.5, while its public accommodations and other provisions are discussed in Section 13.2.11. Remedies are broader than those provided for by Section 504, and apply to all colleges and universities, whether or not they receive federal funds. (For a comparison of Section 504 and the ADA with regard to access to colleges and universities for students with disabilities, see H. Kaufman, *Access to Institutions of Higher Education for Students with Disabilities* (National Association of College and University Attorneys, 2005). See also Note, “Americans With Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities,” 18 *J. Coll. & Univ. Law* 389 (1992).)

The U.S. Supreme Court has ruled that the federal government may not be sued for damages for violating Section 504 because Congress did not explicitly waive the federal government’s sovereign immunity. In *Lane v. Pena*, 518 U.S. 187 (1996) a student at the U.S. Merchant Marine Academy was dismissed after he was diagnosed with diabetes during his first year at the academy. The Merchant Marine Academy is administered by a unit of the U.S. Department of Transportation. Although the trial court initially ordered him reinstated and awarded him damages, it vacated the damages award when a higher court stated, in a different case, that plaintiffs could not be awarded damages against the federal government for claims under Section 504. The appellate court affirmed summarily, and Lane appealed to the U.S. Supreme Court. In a 7-to-2 decision written by Justice O’Connor, the Court ruled that Congress had not “unequivocally expressed” its intent to waive federal sovereign immunity. Examining both the language of the statute and its legislative history, the Court declined to read into the statute a waiver that had not been clearly articulated by Congress.

As with Title IX (see Section 13.5.3 of this book), Section 504 apparently imposes liability only on institutions as such and not on individual officers or employees of the institution. In *Coddington v. Adelphi University*, 45 F. Supp. 2d 211 (E.D.N.Y. 1999), a suit by a former nursing student alleging discrimination based on learning disabilities, the district court dismissed four individual defendants—the former university president, the current president, the nursing school dean, and an associate professor of law—and let the case proceed only against the university itself. In an earlier case, however, the court in *Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37 (D.N.H. 1997), did indicate that a “person who discriminates in violation of [Section 504] may be personally liable if he or she is in a position to accept or reject federal funds” (958 F. Supp. at 45).

Despite the broader reach of the ADA, Section 504 remains an important source of rights for students, employees, and visitors to the campus. For public institutions that now cannot be sued in federal court under the ADA (see Section 13.2.11 of this book), Section 504 may become a more significant source of remedies for plaintiffs who seek damages from these institutions.

**13.5.5. Age Discrimination Act.** The Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*) contains a general prohibition on age discrimination in federally funded programs and activities. Under the Age Discrimination Act's original statement-of-purpose clause, the prohibition applied only to "unreasonable" discrimination—a limitation not found in the Title VI, Title IX, or Section 504 civil rights statutes (see Sections 13.5.2–13.5.4). Congress postponed the Act's effective date, however, and directed the U.S. Commission on Civil Rights to study age discrimination in federally assisted programs. After considering the commission's report, submitted in January 1978, Congress amended the Age Discrimination Act in October 1978 (Pub. L. No. 95-478) to strike the word "unreasonable" from the statement-of-purpose clause, thus removing a critical restriction on the Act's scope.

Regulations interpreting the Age Discrimination Act are codified in 45 C.F.R. Part 90, and "state general, government-wide rules" for implementing this law (45 C.F.R. § 90.2(a)). Every federal agency administering federal aid programs must implement its own specific regulations consistent with the general regulations. The law does not cover age discrimination in employment, which is prohibited by the Age Discrimination in Employment Act (ADEA; see Section 5.2.6, this book).

The general regulations, together with the extensive commentary that accompanies them (44 Fed. Reg. 33768–33775, 33780–33787), provide a detailed explanation of the Age Discrimination Act. The regulations are divided into several subparts. Subpart A explains the purpose and coverage of the Act and regulations and defines some of the regulatory terminology. Subpart B of the regulations explains the law's prohibition against age discrimination in programs covered by the Act. It also lists the exceptions to this prohibition. Exceptions involve using age as a proxy for some other qualification where age and that qualification are closely linked (for example, being at least age eighteen if a program requires that the student be at or beyond the age of majority).

Although the regulations and commentary add considerable particularity to the brief provisions of the Act, the full import of the Act for postsecondary institutions can be ascertained only by a study of the specific regulations that agencies have promulgated or will promulgate to fulfill the mandate of the general regulations. The Department of Health and Human Services' (HHS) specific regulations, for example, are codified in 45 C.F.R. Part 91.

The Education Department published final rules to interpret the Age Discrimination Act as it applies to the department's financial assistance programs (most notably, the student financial assistance programs) at 34 C.F.R. Part 110. The Education Department's regulations track the general regulations in many respects, and require institutions to provide the same type of assurance of compliance that they must provide under Titles IV and IX and Section 504. The regulations establish a procedure for filing a complaint with the department under the Age Discrimination Act (34 C.F.R. § 110.31), provide for mediation of disputes under the Act by the Federal Mediation and Conciliation Service (34 C.F.R. § 110.32), and describe the department's investigation process if

mediation fails to resolve the complaint (34 C.F.R. § 110.33). Penalties for violations of the Act, including termination of funding or debarment from future funding, are contained at 34 C.F.R. § 110.35. A person filing a complaint under the Act must exhaust the administrative remedies provided by the regulations before filing a civil complaint in court (34 C.F.R. § 110.39).

Postsecondary administrators and counsel should consult both the specific and the general agency regulations, in conjunction with the Act itself, when reviewing institutional policies or practices that employ explicit or implicit age distinctions.

A federal appellate court was asked to examine the circumstances under which a plaintiff using the Age Discrimination Act would be considered to have exhausted the administrative remedies that must be pursued before filing civil lawsuit. In *Williams v. Trevecca Nazarene College*, 1998 U.S. App. LEXIS 20546 (6th Cir. 1998) (unpublished), a student dismissed from a physician assistant program on academic grounds challenged the college's refusal to readmit him under the Age Discrimination Act. The plaintiff claimed that younger students who had been dismissed were readmitted despite their poor academic performance.

The plaintiff first had filed a complaint with the Office for Civil Rights. OCR regulations require that complaints go through a mediation process for sixty days before the agency begins an investigation. But, about a month after filing the OCR claim, the plaintiff filed an action in state court against the college (although he did not include an age discrimination claim). OCR then dismissed his complaint because he had filed the lawsuit instead of pursuing mediation. The OCR's letter informed the plaintiff that he could refile his claim within sixty days of the termination of legal proceedings. The litigation was dismissed, and the plaintiff refiled his claim with OCR, which refused to accept it. When the plaintiff then filed an Age Discrimination Act suit in federal district court, the court dismissed his claim for failure to exhaust administrative remedies.

The appellate court reversed the trial court's dismissal, ruling that the plaintiff had done "all that he had to do" under Section 6104(f) of the Age Discrimination Act. OCR's refusal to reopen the complaint, said the court, was an error, and the plaintiff should be regarded as having exhausted his administrative remedies such that the federal court now had jurisdiction to hear his age discrimination claim. The case was remanded for trial.

Faculty and administrators who develop admissions or grading policies that have the potential to exclude or disfavor older applicants or students should ensure that these policies have a firm foundation in the institution's mission and the needs of its academic programs. For example, Georgetown University's policy of not admitting applicants who had already earned a bachelor's degree was challenged as having a discriminatory effect on older applicants. The Education Department's Office for Civil Rights ruled that, although Georgetown's policy clearly impacted more negatively on older applicants than those who had just completed secondary school, the university's justification—that the normal operation of its regular undergraduate admission program is to offer a

postsecondary educational opportunity to students who have not yet had that opportunity—fell within the exception to the Age Discrimination Act in 34 C.F.R. § 110.13 (OCR Compliant #11-98-2025, July 13, 1998). The university’s ability to articulate a non-age-related justification for its policy was important to the successful outcome of this complaint.

**13.5.6. Affirmative action.** Affirmative action poses a special problem under the federal civil rights statutes. The Department of Education’s Title VI regulations, for example, both require and permit affirmative action under certain circumstances:

- (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
- (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin [34 C.F.R. § 100.3(b)(6)].

Similarly, the Title IX regulations require and permit affirmative action to alleviate sex discrimination (34 C.F.R. § 106.3). However, the Title IX regulations use the phrase “remedial action” rather than “affirmative action” to describe the institution’s obligation to overcome the effects of its own prior discrimination (34 C.F.R. § 106.3(a))—a phrase also used in the Section 504 regulations (34 C.F.R. § 104.6(a)). The Section 504 regulations also use the phrase “voluntary action” rather than “affirmative action” to denote the institution’s discretion to correct conditions that resulted in limited participation by disabled persons (34 C.F.R. § 104.6(b)). But none of the regulations define “affirmative action,” “remedial action,” or “voluntary action,” or set out particular requirements for permissible or required actions.

One federal district court has ruled in a Title VI case that “affirmative action” may sometimes itself constitute a Title VI violation. In *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976), the issue was that Georgetown Law Center had allocated 60 percent of its scholarship funds to minority students, who constituted only 11 percent of the class. The university claimed that the program was permissible under Section 100.3(b)(6)(ii) of the Title VI regulations. The court disagreed, holding that the scholarship program was not administered on a “racially neutral basis” and was “reverse discrimination on the basis of race, which cannot be justified by a claim of affirmative action.” Subsequently, in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (see Section 8.2.5), the first U.S. Supreme Court case on affirmative action under Title VI, a 5-to-4 majority of the Court agreed that Title VI did not require complete racial neutrality in affirmative action. But no majority of Justices could agree on the extent to which Title VI and its regulations permit racial or ethnic preferences to be used as one part of an affirmative action program.

In 2004, the U.S. Supreme Court ruled in two cases involving the University of Michigan that affirmative action in admissions was permissible under Title VI (and the equal protection clause) if the admissions program could survive strict scrutiny. The two cases are discussed in Section 8.2.5 of this book.

Like the Title VI, Title IX, and Section 504 regulations, the HHS general regulations under the Age Discrimination Act of 1975 (see subsection 13.5.5 of this book) also include a provision on affirmative action. A recipient of federal funds may take action to remedy prior discrimination or to overcome prior limits in accessibility of these programs to older individuals. Furthermore, programs that provide special benefits to the elderly or to children are permissible as voluntary affirmative action as long as they do not exclude other eligible individuals (45 C.F.R. § 90.49). Like the Title IX and Section 504 regulations, this regulation specifies that “remedial action” is permitted only when the recipient has discriminated in the past against the class of persons whom the regulations protect. In addition, the Age Discrimination Act regulation contains a unique provision (subsection (c) of Section 90.49) that, under certain circumstances, brings the provision of special benefits to two age groups—the elderly and children—under the protective umbrella of “voluntary affirmative action.” The Act’s regulations do not include explanatory commentary on Section 90.49. Nor, in common with the other civil rights regulations, do they define “remedial action” or “affirmative action” or (except for subsection (c)) the scope of permissible action.

Thus, the federal regulations give postsecondary administrators little guidance concerning the affirmative or remedial actions that they must take to maintain compliance, or that they may take without jeopardizing compliance. Insufficient guidance, however, is not a justification for avoiding affirmative action when it is required by the regulations, nor should it deter administrators from taking voluntary action when it is their institution’s policy to do so. Rather, administrators should proceed carefully, seeking the assistance of legal counsel and keeping abreast of the developing case law and agency policy interpretations on affirmative action. (See also Sections 5.4, 6.5, 8.2.5, & 8.3.4 of this book.)

### ***13.5.7. Scope and coverage problems***

***13.5.7.1. Coverage of employment discrimination.*** One question concerning the scope and coverage of the civil rights statutes is whether they prohibit discrimination not only against students but also against employees. Both Title VI and the Age Discrimination Act contain provisions that permit coverage of discrimination against employees only when a “primary objective” of the federal aid is “to provide employment” (42 U.S.C. § 2000d-3; 42 U.S.C. § 6103(c)). Title IX and Section 504 do not contain any such express limitation. Consistent with the apparent open-endedness of the latter two statutes, both the Title IX and the Section 504 regulations have provisions comprehensively covering discrimination against employees (see Sections 5.2.3 & 5.2.5 of this book), while the Title VI and the Age Discrimination Act regulations cover employment discrimination only in narrow circumstances (34 C.F.R. §§ 100.2 & 100.3(c); 45 C.F.R. § 90.3(b)(2)).

The first major U.S. Supreme Court case on scope and coverage issues—*North Haven Board of Education v. Bell*, 456 U.S. 512 (1982)—concerned employment. *North Haven* was a Title IX case. The plaintiffs, two school boards in Connecticut, challenged the validity of subpart E of the Department of Health, Education and Welfare’s (HEW) (now ED) Title IX regulations, which prohibits federal fund recipients from discriminating against their employees on the basis of sex. Looking to the wording of Title IX, the statute’s legislative history, and the statute’s “postenactment history” in Congress and at HEW, the Court (with three dissenters) rejected the challenge and upheld the subpart E regulations:

Our starting point in determining the scope of Title IX is, of course, the statutory language. . . . Section 901(a)’s broad directive that “no person” may be discriminated against on the basis of gender appears, on its face, to include employees as well as students. Under that provision, employees, like other “persons,” may not be “excluded from participation in,” “denied the benefits of,” or “subjected to discrimination under” education programs receiving federal financial support. . . . Because Section 901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these “persons” unless other considerations counsel to the contrary. After all, Congress easily could have substituted “student” or “beneficiary” for the word “person” if it had wished to restrict the scope of Section 901(a) [456 U.S. at 520–21].

The U.S. Supreme Court has also upheld Section 504’s applicability to discrimination against employees. In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), a locomotive engineer had been dismissed after having had his left hand and forearm amputated as a result of an accident. When the engineer claimed that he was fit for work and had been discriminated against because of his disability, the employer argued that Darrone was not protected by Section 504. That law, argued the railroad, applies to employment discrimination “only if the primary objective of the federal aid that [the employer] receives is to promote employment.” In other words, unless the employee was paid with federal funds, the railroad argued, Section 504 did not apply. The Court rejected this argument:

It is clear that Section 504 itself contains no such limitation . . . ; rather, that section prohibits discrimination against the handicapped under “any program or activity receiving Federal financial assistance.” And it is unquestionable that the section was intended to reach employment discrimination. Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether Section 504 was intended to prohibit other types of discrimination as well (see § 111(a), Pub. L. 93-516, 88 Stat. 1617, 1619 (1974)). Thus, the language of Section 504 suggests that its bar on employment discrimination should not be limited to programs that receive federal aid the primary purpose of which is to promote employment.

The legislative history, executive interpretation, and purpose of the 1973 enactment all are consistent with this construction [465 U.S. at 632–33].

These Supreme Court rulings on Title IX's and Section 504's applicability to employment discrimination do not end the matter. Once this coverage is affirmed, the next question is how the two statutes and their employment regulations may be enforced: by private causes of action in court (see subsection 13.5.9 below) or only by administrative enforcement (see subsection 13.5.8 below). Regarding Title IX, the Court has not answered this question, and the lower courts are split on whether a victim of sex discrimination in employment may bring a Title IX private cause of action in court. The courts answering in the negative argue that the availability of private causes of action for employment discrimination under Title VII precludes them from being maintained under Title IX (see Section 5.2.3 of this book, and see also *Duello v. Board of Regents of the University of Wisconsin System*, 583 N.W.2d 863 (Wis. Ct. App. 1998)). Regarding Section 504, the U.S. Supreme Court did permit a private cause of action for employment discrimination in the *Darrone* case (above). But *Darrone* was decided before passage of the Americans With Disabilities Act of 1990. Since Title I of this Act, covering employment discrimination, is structurally similar to Title VII, it is possible that some courts will determine that the Americans With Disabilities Act now serves to preclude private causes of action for employment discrimination under Section 504 in the same way that (according to some lower courts) Title VII precludes such causes of action under Title IX.

**13.5.7.2. Coverage of unintentional discriminatory acts.** None of the four civil rights statutes explicitly states whether they prohibit actions whose effects are discriminatory (that is, actions that have a disproportionate or disparate impact on the class of persons protected) or whether such actions are prohibited only if taken with a discriminatory intent or motive. The regulations for Title VI and the Age Discrimination Act, however, contain provisions that apparently prohibit actions with discriminatory effects, even if those actions are not intentionally discriminatory (34 C.F.R. § 100.3(b)(2); 45 C.F.R. § 90.12); and the Section 504 regulations prohibit actions that have the effect of subjecting a qualified individual to discrimination on the basis of disability (34 C.F.R. § 104.4(b)(4) & (5)). Title IX's regulations prohibit testing or evaluation of skill that has a discriminatory effect on the basis of sex (34 C.F.R. §§ 106.21(b)(2) & 106.34), and prohibit the use of "any rule concerning a student's actual or potential parental, family, or marital status" that would have the effect of discriminating on the basis of sex (34 C.F.R. § 106.40). The Title IX regulations also prohibit certain employment practices with discriminatory effects (34 C.F.R. § 106.51(a)(3)). In addition, some of the Title IX regulations on intercollegiate athletics programs could be construed to cover unintentional actions with discriminatory effects, especially as those regulations are interpreted in the 1979 Policy Interpretation (see Section 10.4.6).

In a leading U.S. Supreme Court case, *Guardians Ass'n. v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), the Court could not agree on the legal status of disparate impact cases under Title VI. The Justices issued six opinions in the case, none of which commanded a majority and which, according to Justice Powell, "further confuse rather than guide." The Court's



basic difficulty was reconciling *Lau v. Nichols*, 414 U.S. 563 (1974), which held that the Department of Health, Education and Welfare's (now the Department of Education's) Title VI regulations validly prohibit actions with discriminatory effects, with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which indicated that Title VI reaches no further than the Fourteenth Amendment's equal protection clause, which prohibits only intentional discrimination.

Although the Court could not agree on the import of these two cases, or on the analysis to adopt in the case before it, one can extract some meaning from *Guardians* by pooling the views expressed in the various opinions. A majority of the Justices did hold that the discriminatory intent requirement is a necessary component of the Title VI statute. A different majority, however, held that, even though the *statute* embodies an intent test, the ED *regulations* that adopt an effects test are nevertheless valid. In his opinion, Justice White tallied the differing views of the Justices on these points (463 U.S. at 584, n.2 & 607, n.27). He then rationalized these seemingly contradictory conclusions by explaining that "the language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so." The statute should therefore be amenable to a broader construction by ED, "at least to the extent of permitting, if not requiring, regulations that reach" discriminatory effects (463 U.S. at 592; see also 463 U.S. at 643–45 (opinion of Justice Stevens)).

The result of this confusing *mélange* of opinions is to validate the Education Department's regulations extending Title VI coverage to actions with discriminatory effects. At the same time, however, the *Guardians* opinions suggest that, if the department were to change its regulations so as to require proof of discriminatory intent, such a change would also be valid. Any such change, though, would in turn be subject to invalidation by Congress, which could amend the Title VI statute (or other statutes under which the issue arose) to replace its intent standard with an effects test. Such legislation would apparently be constitutional (see Sections 13.1.2 and 13.1.5 of this book; and see *City of Rome v. United States*, 446 U.S. 156 (1980)).

In *Alexander v. Choate*, 469 U.S. 287 (1985), the Court also considered the discriminatory intent issue under Section 504. After reviewing the various opinions in the *Guardians* case on Title VI, the Court determined that that case does not control the intent issue under Section 504 because Section 504 raises considerations different from those raised by Title VI. In particular:

Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.

In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims

of the Act (see, for example, S. Rep. No. 93-318, p. 4 (1973), U.S. Code Cong. & Admin. News 1973, pp. 2076, 2080), yet such barriers were clearly not erected with the aim or intent of excluding the handicapped [469 U.S. at 295-97].

Although these considerations suggest that discriminatory intent is not a requirement under Section 504, the Court also noted some countervailing considerations:

At the same time, the position urged by respondents—that we interpret Section 504 to reach all action disparately affecting the handicapped—is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents’ position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden [469 U.S. at 298].

Faced with these difficulties, the Court declined to hold that one group of considerations would always have priority over the other: “While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under Section 504, we assume without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.” Thus “splitting the difference,” the Court left for another day the specification of what types of Section 504 claims will not require evidence of a discriminatory intent.

A related, but different, issue is whether private plaintiffs (the victims of discrimination) may bring private causes of action in court to enforce ED’s (or other agencies’) disparate impact regulations, rather than relying solely on the administrative complaint process. (See subsection 13.5.9 below on private causes of action and subsection 13.5.8 on administrative enforcement.) If disparate impact regulations are valid under the four civil rights statutes, it necessarily follows that they may be enforced through the administrative processes of the agencies that promulgate the regulations. It does not automatically follow, however, that disparate impact regulations may be enforced through the implied private cause of action that, under *Cannon* and *Franklin* (subsection 13.5.9 below), may be used to enforce the statutes themselves. The Court’s *Lau v. Nichols* ruling in 1974 did permit a private cause of action to enforce Title VI impact regulations, but the status of *Lau* became unclear after *Bakke*. *Guardians* then validated the Title VI impact regulations, and a bare majority of the Justices seemed willing to permit their enforcement by private causes of action. Most lower courts took this position as well. But in *Alexander v. Sandoval*, 532 U.S. 275 (2001), in an opinion by Justice Scalia, the Court reconsidered these cases and ruled directly on the issue of private causes of action to enforce Title VI’s impact regulations. The Court majority assumed, for purposes of the case, that the Title VI impact regulations

are valid, and it acknowledged that five Justices in *Guardians* had taken that position. But in a hotly contested 5-to-4 decision, the Court prohibited private causes of action to enforce these regulations. Since there is no private cause of action to enforce the disparate impact regulations, and since private causes of action to enforce the Title VI statute itself require a showing of discriminatory intent, it follows from *Sandoval* that victims of race discrimination may not sue fund recipients under Title VI for actions that have discriminatory effects but are not intentionally discriminatory. The same conclusion apparently applies to Title IX, since the courts have treated the two statutes in much the same way, and probably also to the Age Discrimination Act. Section 504 is different, however, since the Section 504 statute does not require proof of discriminatory intent for all claims of statutory violations (see *Alexander v. Choate*, above).

**13.5.7.3. Scope of the phrase “receiving federal financial assistance.”** Each of the four civil rights statutes prohibits discrimination in (1) “a program or activity” that is (2) “receiving federal financial assistance.” Uncertainties about the definitions of these two terms, and their interrelation, have created substantial questions about the scope of the civil rights statutes. Most of these questions have not been resolved. The “program or activity” issues are discussed in subsection 13.5.7.4 below; the “receiving . . . assistance” (or “recipient”) issues are discussed in this subsection.

The statutes do not define the phrase “receiving federal financial assistance.” But the Education Department’s regulations for each statute do contain a definition of “federal financial assistance” and a definition of “recipient” (the derivative of the statutory phrase “receiving”). Under the Title IX regulations, for instance:

“Federal financial assistance” means any of the following, when authorized or extended under a law administered by the department:

- (1) A grant or loan of federal financial assistance, including funds made available for:
  - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
  - (ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal government.
- (3) Provision of the services of Federal personnel.
- (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use federal property or any interest therein without consideration.
- (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty [34 C.F.R. § 106.2(g)].

And:

“Recipient” means any public or private agency, institution, or organization, or other entity, or any other person, to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof [34 C.F.R. § 106.2(h)].

These definitions, however, left several questions open.

The leading case addressing the meaning of “receiving federal financial assistance,” and raising the most notable issue, is *Grove City College v. Bell*, 465 U.S. 555 (1984), a Title IX case. The college, a private liberal arts institution, received no direct federal or state financial assistance. Many of the college’s students, however, did receive Basic Educational Opportunity Grants (now Pell Grants), which they used to defray their educational costs at the college. The Education Department determined that Grove City was a recipient of “federal financial assistance” under 34 C.F.R. § 106.2(g)(1) and advised the college to execute an Assurance of Compliance (a form certifying that the college will comply with Title IX) as required by 34 C.F.R. § 106.4. The college refused, arguing that the indirect aid received by its students did not constitute federal financial assistance to the college.

The U.S. Supreme Court unanimously held that the student aid constituted aid to the college and that, if the college did not execute an Assurance of Compliance, the Education Department could terminate the student aid:

The linchpin of Grove City’s argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of Section 901(a). Nothing in Section 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation (*Bob Jones University v. Johnson*, 396 F. Supp. 597, 601–04 (D.S.C. 1974), *affirmed*, 529 F.2d 514 (4th Cir. 1975) [reaching a similar conclusion under Title VI regarding veterans’ education benefits]). As the Court of Appeals observed, “by its all-inclusive terminology [Section 901(a)] appears to encompass *all* forms of federal aid to education, direct or indirect” (687 F.2d at 691 (emphasis in original)) [465 U.S. at 564].<sup>62</sup>

In a later case, *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), the Court clarified the meaning of

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<sup>62</sup>[Author’s footnote] Another part of the *Grove City* case is discussed in subsection 13.5.7.4 below. That part (concerning the “program or activity” issue) was later overridden legislatively by Congress. The part of *Grove City* discussed in this subsection (the “receiving . . . assistance” issue) is still good law in all respects.

“recipient” under Section 504 by addressing the difference between a recipient and a “beneficiary” of federal funds. The Court rejected the argument that a beneficiary of federal funding granted to another entity can be considered an indirect recipient of the funds. *Paralyzed Veterans* was followed and applied to Title IX in *Smith v. NCAA*, 525 U.S. 459 (1999) (discussed in Section 14.4.6), in which the Court asserted that economic benefit alone does not make an entity a “recipient” of Title IX funds, and that an entity must actually “receive” the funds, “directly or through an intermediary,” in order to be a recipient under Title IX.

**13.5.7.4. Scope of the phrase “program or activity.”** The civil rights spending statutes proscribe discrimination in a “program or activity” that is “receiving” federal aid. Prior to 1988, when Congress passed the Civil Rights Restoration Act (discussed below), it was not clear whether the entire institution was considered a “program or activity” for purposes of the civil rights statutes, or whether only the particular “programs” or “activities” that received the funding were subject to the statutes. The Title VI regulations did contain a comprehensive definition of “program,” including within it the concept of “activity” (34 C.F.R. § 100.13(g)), that was of some help; but the Title IX, Section 504, and Age Discrimination Act regulations had only sketchy references to these terms (34 C.F.R. § 106.31(a); 34 C.F.R. § 104.43(a); 45 C.F.R. § 90.3(a)).

Numerous questions about the “program or activity” concept had arisen in litigation prior to 1988. The most controversial was the question of how to apply this concept to indirect or student-based aid, such as Pell Grants or veterans’ education benefits. Did the entire institution “receive” this aid, thus binding the entire institution to nondiscrimination requirements whenever its students used federal student aid to defray the costs of their education? Or was only the institution’s financial aid office, or some lesser portion of the institution, considered to be the “program” that “received” the student aid and was thus bound by the nondiscrimination requirements? Another set of questions related to both indirect student-based aid and direct (or earmarked) institution-based aid, such as construction grants. If a program or an activity in an institution did not directly receive federal funds but benefited from the receipt of funds by other institutional programs or activities, was it subject to nondiscrimination requirements? (See *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982), applying the “benefit theory” for extending the scope of a civil rights statute.) Or if a program or an activity did not directly receive federal funds but engaged in discriminatory practices that “infected” programs or activities that did directly receive funds, was it subject to nondiscrimination requirements? (See *Iron Arrow Honor Society v. Heckler*, 702 F.2d 549 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983), adopting the “infection theory” for extending the scope of a civil rights statute.)

In *Grove City College v. Bell*, 465 U.S. 555 (1984), discussed in subsection 13.5.7.3, the Court also addressed the definition of “program or activity.” Having unanimously agreed that the students’ receipt of Basic Educational Opportunity Grants (BEOGs) constituted “federal financial assistance” for the college, the Justices then faced the problem of identifying the “program” that received this assistance and was therefore subject to Title IX. With three of the Justices

dissenting, the Court held that the program was not the entire institution (as the lower court had determined) but only the college's financial aid program: "We conclude that the receipt of BEOGs by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the college's own financial aid program, and it is that program that may properly be regulated under Title IX" (465 U.S. at 574).

The *Grove City* analysis of the "program or activity" issue proved to be highly controversial. Members of Congress criticized the analysis as being inconsistent with congressional intent. Civil rights groups and other interested parties criticized the decision's narrowing effect on federal enforcement of civil rights—not only under Title IX but also under the other three civil rights statutes using the same "program or activity" language, and not only for federal aid to education but for other types of federal assistance as well. Several bills were introduced in Congress to overturn the *Grove City* decision. In 1987, Congress passed the Civil Rights Restoration Act (CRRA) of 1987 (Pub. L. No. 100-259, 102 Stat. 28). When President Reagan vetoed the legislation, Congress voted to override the veto, and the Act became effective on March 22, 1988.

The CRRA amends all four civil rights spending statutes (Title VI, Title IX, Section 504, and the Age Discrimination Act) by defining "program or activity" as "all the operations of . . . a college, university, or other postsecondary institution . . . any part of which is extended federal financial assistance" (20 U.S.C. § 1687). This language clearly indicates that postsecondary institutions will be covered in their entirety by these laws if any part of their operations is extended federal aid.<sup>63</sup> (For analysis of the effect of the CRRA on colleges and universities, see R. Hendrickson, B. Lee, F. Loomis, & S. Olswang, "The Impact of the Civil Rights Restoration Act on Higher Education," 60 *West's Educ. Law Rptr.* 671 (1990).)

Other cases, before and after passage of the CRRA, have addressed additional aspects of the "program or activity" definition that are unique to Title IX. Unlike the other three statutes, Title IX covers only "education" programs and activities. Questions have thus arisen concerning whether the particular program or activity at issue is an "education" program or activity, whether a particular activity (for example, an off-campus activity) is an activity of *the educational institution* (the college or university), and whether another entity's program or

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<sup>63</sup>This does not mean, however, that all of the institution's funds would be subject to termination if any part of the institution's operations were out of compliance with Title IX. Each statute has a separate provision, called a "pinpoint provision," that more narrowly limits the scope of any fund cut-off. Title IX's pinpoint provision (Section 902, codified at 20 U.S.C. § 1682), requires that any fund termination by a federal agency "be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found." Title VI has a similar provision (42 U.S.C. § 2000d-1). Section 504 incorporates the "remedies, procedures, and rights" available under Title VI, thus apparently including the same pinpoint provision (29 U.S.C. § 794a(2)). The Age Discrimination Act's pinpoint provision (42 U.S.C. § 6104(b)), as developed in the general regulations (45 C.F.R. § 90.47(b)), is the most exacting of all, since it appears to prohibit the agency from using the infection theory (see text above) to expand the scope of the fund cut-off.

activity may be considered an “education” program or activity for purposes of Title IX.

In *Preyer v. Dartmouth College*, 968 F. Supp. 20 (D.N.H. 1997), for example, the plaintiff alleged that, as a result of sex discrimination, she had not been extended a permanent employment offer with Dartmouth College Dining Services. The U.S. District Court explained that, in order to give effect to the word “education” that precedes the phrase “program or activity” in Title IX, the statute applied only to the institution’s programs or activities “that are educational in nature or bear some relation to the educational goals of the institution.” The court then analogized to an earlier decision in which another federal district court determined that the building and grounds department of Harvard University is not an education program or activity for purposes of Title IX. In *Walters v. President & Fellows of Harvard College*, 601 F. Supp. 867 (D. Mass 1985), the plaintiff alleged that she had been forced to leave her job with the building and grounds department because of sexual harassment and intimidation. The *Walters* court determined that the building and grounds department did not have a sufficiently direct relation to the “delivery of educational services” and that including such custodial services under the definition of “education program or activity” would unnecessarily “strain” the language of Title IX. Although the *Walters* case was decided before the Civil Rights Restoration Act of 1987 had broadened the “program or activity” definition, the *Preyer* court was nevertheless quick to follow *Walters*. It held that Dartmouth College Dining Services was not an “education” program or activity and therefore dismissed the plaintiff’s Title IX complaint. This reasoning seems inconsistent with Congress’s intentions in passing the CRRRA (see *Lam v. Curators of University of Missouri*, 122 F.3d 654, 656 (8th Cir. 1997)) and would create the incongruous result that all operations of a college or university (including dining services and buildings and grounds services) would now be covered by Title VI, Section 504, and the Age Discrimination Act, but only some operations (excluding dining services and buildings and grounds) would be covered by Title IX.

In a second case, *Lam v. Curators of University of Missouri* (above), the court considered a sexual harassment claim based on events that occurred at an off-campus, private dental office. The plaintiff (Lam) was a student in the university’s dental program. The alleged harasser (Kim) was a clinical instructor in the dental program and was also the operator of the private dental office where he allegedly made sexual advances to the student. These advances allegedly occurred on two occasions when the instructor hired the student to assist him in his private dental practice. The student argued that, due to Kim’s dual relationship with the university’s dental program and the private dental office, the off-campus dental practice was sufficiently connected to the university to be considered a university program or activity. The court rejected this argument and emphasized four considerations that supported its conclusion:

Kim conferred no benefit to the Dental School by operating a separate, competing dental clinic. Correspondingly, the university exercised no control over

the conduct of business at Kim’s office. The University did not provide staff, funding, or any other support. There was no University requirement of private clinical work for students like Lam [122 F. 3d at 656].

In another case involving alleged harassment of a student engaged in an off-campus activity, *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), the court considered whether a student assigned by her college to intern at a state hospital for mentally disabled persons could sue the hospital under Title IX. The student argued that, even if the hospital was not itself an “education” program, the college’s operation of its education program could be “imputed” to the hospital. Even though the college had required the student to complete an internship (unlike the college in the *Lam* case), the court rejected the student’s argument:

[T]he fact that Marymount operates an “education program” may not be imputed to Rockland simply because O’Connor was a student at the former while she performed volunteer work with the latter. Factors that could lead to a different conclusion simply are not present here: the two entities have no institutional affiliation; there is no written agreement binding the two entities in any way; no staff are shared; no funds are circulated between them; and, indeed, Marymount students had previously volunteered at Rockland on only a few occasions. The only hint of a connection between Marymount and Rockland lies in the fact that (1) Marymount contacted Rockland for the purpose of placing O’Connor in an internship, and (2) Marymount appears to base its evaluation of its students’ performance during their internships in part on an evaluation prepared by the person who supervised the student on-site. . . . Such connections are insufficient to establish Rockland as an agent or arm of Marymount for Title IX purposes [126 F.3d at 118–19].

Had the student in *O’Connor* sued the college rather than the hospital (as the student did in *Lam*), she would probably have avoided this result because the internship would likely have been considered part of the college’s educational program. But in such a situation, it would be questionable whether the college could be held liable in money damages for the actions of the alleged harasser, a psychiatrist on staff at the hospital (see Section 9.3.4).

**13.5.7.5. Coverage of retaliatory acts.** The thrust of a retaliation claim is that the defendant has taken some kind adverse action against the plaintiff because the plaintiff has complained about or otherwise opposed the defendant’s alleged violation of some statutory or constitutional duty of nondiscrimination. In some circumstances (for example, those concerning employment discrimination; see Section 5.2.3 of this book), a retaliation claim may be as important to a plaintiff as the discrimination claim itself. Indeed, a plaintiff may often maintain a retaliation claim even if he or she was not the victim of the alleged discrimination.

None of the four civil rights spending statutes contains a provision prohibiting retaliation against an individual who complains that a federal fund recipient has violated the statute’s antidiscrimination provision. The U.S. Department



of Education’s regulations for each of these statutes, however, do include a retaliation provision. The Title VI regulations provide:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part [34 C.F.R. § 100.7(e)].

The Title IX regulations include the same provision (34 C.F.R. § 106.71), as do the Section 504 regulations (34 C.F.R. § 104.61). The provision in the Age Discrimination Act regulations is somewhat different:

[A] recipient may not engage in acts of intimidation or retaliation against any person who: (a) Attempts to assert a right protected by the Act or these regulations; or (b) Cooperates in any mediation, investigation, hearing, or other part of ED’s investigation, conciliation, and enforcement process [34 C.F.R. § 110.34; see also 45 C.F.R. § 91.45].

It is clear that these retaliation regulations may be enforced by the U.S. Department of Education through its administrative processes. But it is a separate question whether they may be enforced in court through private causes of action (see subsection 13.5.9 below) brought by the victims of retaliation. This question became particularly important and complicated as a result of the U.S. Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Section 13.5.9 below), a Title VI case. The essential holding of *Sandoval*—which applies as well to the other three statutes—is that courts may consider only the “text and structure” of the Title VI statute when determining whether a plaintiff may bring a private cause of action to enforce the statute; and agency regulations not based directly on the statute may not provide the basis for a private cause of action.

Under *Sandoval*, therefore, the retaliation regulations above could not be enforced in court by a private cause of action unless Congress had intended that acts of retaliation would be considered discrimination prohibited by the statutes themselves. After *Sandoval*, the lower courts differed on whether Congress’s intent could be so construed. (Compare *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), permitting a private cause of action for retaliation, with *Litman v. George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001), prohibiting such a cause of action.) In 2005, however, the U.S. Supreme Court resolved this issue in favor of private causes of action in a Title IX case, *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005), whose reasoning will likely apply to all four civil rights statutes.

The plaintiff in *Jackson* was a teacher and the former coach of the girls’ basketball team at a public high school. He alleged that he was removed as the coach because he had complained to his supervisors about unequal treatment of the girl’s basketball team regarding funding, equipment, and facilities; and he claimed that this removal constituted retaliation violative of

Title IX. The federal district court and the U.S. Court of Appeals both determined that the coach's complaint failed to state a claim under Title IX, but by a 5-to-4 vote, the U.S. Supreme Court reversed and remanded the case for further proceedings.

According to Justice O'Connor's majority opinion in *Jackson*:

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. . . . Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination [125 S. Ct. at 1504].

*Sandoval* did not affect this conclusion because the Court in *Jackson* did not rely directly on the Department of Education's Title IX *regulation* on retaliation (see above) but relied instead on the Title IX *statute*. As Justice O'Connor explained: "In step with *Sandoval*, we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination. . . ."

The Court in *Jackson* also made clear that "the victim of the retaliation" need not also have been "the victim of discrimination that is the subject of the original complaint." Even if Jackson had complained only about discrimination against members of the girls' basketball team, and not about discrimination against him as coach, he could still maintain a cause of action for retaliation. Thus, whenever a plaintiff can show that he or she had complained about or opposed sex discrimination by a federal fund recipient and that the recipient had taken adverse action against him or her because of this complaint or opposition, the statutory requirements for a retaliation claim are met—regardless of whether the plaintiff was also the target of the original discrimination. The claim is against the institution itself, as with other private causes of action under the four civil rights statutes, and money damages is a permissible remedy in such cases (see Section 13.5.9 below).

**13.5.7.6. Coverage of extraterritorial acts of discrimination.** Another coverage issue concerns the applicability of the Civil Rights spending statutes to discrimination that occurs in a foreign country. In other words, does or to what extent do these statutes have "extraterritorial" application? When examining questions of whether laws apply extraterritorially, courts have historically employed a presumption against extraterritorial application. (See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281 (1941); see also Arlene Kanter, "The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?" 14 *Stan. L. & Pol'y. Rev.* 291, 292 (2003).) The courts, however, have not applied this presumption to the federal civil rights spending statutes. On the one hand, these statutes do protect only persons "in the United States" from discrimination (see, for example, Title VI, 42 U.S.C.

§ 2000d)—language that seems to preclude extraterritorial application. On the other hand, however, these statutes explicitly apply to “all the operations” of a college or university receiving federal financial assistance (see, for example, Title IX, 20 U.S.C. § 1687; and see generally subsection 13.5.7.4 above).

In *King v. Board of Control of Eastern Michigan University*, 221 F. Supp. 2d 783 (2002), the leading case thus far, the question was whether the protections of the Title IX statute applied to six female students participating in their university’s study abroad program in South Africa. The students alleged that they were sexually harassed by males also participating in the program. They alleged that an assistant to the program director had joined in the sexual harassment and that the program director had done nothing to stop the harassment, even though one of the students had notified him of it, and he had also been present on several occasions when the female students had been sexually harassed. Ultimately, the female students left the program and returned to the States.

The university emphasized the phrase “No person in the United States” in Title IX, reasoning that the phrase illustrates the congressional intent to apply the statute only “within the borders of the United States.” The court rejected this argument, stating that “study abroad programs are operations of the university which are explicitly covered by Title IX and which *necessarily* require students to leave U.S. territory in order to pursue their educations.” Moreover:

Equality of opportunity in study abroad programs, unquestionably mandated by Title IX, requires extraterritorial application of Title IX. Holding otherwise could clearly create discrimination within the United States. That is, allowing sex discrimination to occur unremedied in study abroad programs could close those educational opportunities to female students by requiring them to submit to sexual harassment in order to participate. This is exactly the situation that Title IX was meant to remedy: female students should not have to submit to sexual harassment as the price of educational opportunity [221 F. Supp. 2d at 790].

The court in *King* also examined “the broad language of Title IX itself, including the limited number of exceptions to Title IX’s broad reach,” as well as the legislative history and the implementing regulations, concluding that they all confirmed Congress’s intent that Title IX applied “to every single program of a university or college, including study abroad programs.” The court therefore ruled that Title IX’s provisions did apply extraterritorially, and protected the plaintiff students from discrimination in the study abroad program in South Africa.

Two years before the *King* case, a federal district court in Oregon issued a similar ruling in a similar case involving Section 504. In *Bird v. Lewis & Clark College*, 104 F. Supp. 2d 1271 (D. Ore. 2000), a paraplegic student argued that the college did not provide her with appropriate accommodations while she participated in the college’s study abroad program in Australia. In an unpublished pretrial Order Ruling on Extraterritoriality (October 13, 1999), the federal district court ruled that Section 504 did have extraterritorial application. “Rejecting the college’s argument in support of the application of the presumption against extraterritoriality, the court stated that if Section 504 [was] not applied

extraterritorially, ‘students in overseas programs would become the proverbial “floating sanctuaries from authority” not unlike stateless vessels on the high seas.’ And even a stateless vessel . . . ‘may be subject to United States jurisdiction where defendants are all citizens or resident aliens of the United States’” (Kanter, above, 14 *Stan. L. & Pol’y. Rev.* at 308, quoting Order Ruling on Extraterritoriality). On the merits of the claim, however, the federal district court denied the student equitable relief under Section 504 because, viewing the program and her experience in its entirety, she was not denied accommodations in the Australia program solely because of her disability.<sup>64</sup>

In contrast to *King* and *Bird*, the case of *Wolff v. South Colonie Central School District*, 534 F. Supp. 758 (1982), involved a class trip abroad rather than a study abroad program. (The case also involved a high school rather than a college, but the court’s reasoning would apparently apply to colleges as well.) The student-plaintiff had a congenital limb deficiency that limited her mobility. The school denied her permission to participate in a class trip to Spain after determining that there would be a substantial degree of physical risk to her safety. When the student brought suit under Section 504, the court determined that Section 504 did apply extraterritorially to the trip to Spain:

The trip to Spain can be considered an activity or program receiving Federal financial assistance within the meaning of the Act since, although the students pay for a substantial portion of the expenses of the trip, regular salaried teachers will be attending as chaperones while school is in session, the School District has sponsored and planned the program, and students will be under the supervision of teacher and School District personnel during this trip [534 F. Supp. at 761].

On the merits, however, the court rejected the student’s claim under the Rehabilitation Act even though it found that Section 504 had extraterritorial application. The claim failed, the court determined, because the student was not “otherwise qualified” to participate in the program within the meaning of Section 504.

Taken together, *King*, *Bird*, and *Wolff* suggest that the four civil rights spending statutes will apply extraterritorially whenever the victim of the discrimination is a participant in or applicant for a “program or activity” offered abroad by an American college or university receiving federal funds. In addition, the victim of the discrimination must apparently be a continuing student or employee at an American campus of an American college or university (even though engaged in study abroad at the time of the alleged discrimination) in order to be considered a person “in the United States” as required by each of the four nondiscrimination statutes (see *King*, above, 104 F.Supp.2d at 791).

**13.5.8. Administrative enforcement.** Compliance with each of the four civil rights spending statutes is enforced through a complex system of

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<sup>64</sup>The district court did, however, find for *Bird* on her claim for breach of fiduciary duty. On appeal, the U.S. Court of Appeals affirmed the district court’s rulings in the case without explicitly addressing the issue of extraterritoriality (303 F.3d 1015 (9th Cir. 2002)).

procedures and mechanisms administered by the federal agencies that provide financial assistance.

Administrative enforcement of these statutes has always been important for higher educational institutions and aggrieved members of the academic community, but it has taken on added importance since the mid-1990s as courts have increasingly imposed limits on the use of private lawsuits to enforce the four civil rights statutes and the spending statutes providing aid to higher education. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), for example, the U.S. Supreme Court disallowed private lawsuits to enforce Title VI regulations that prohibit actions with discriminatory “effects” (see subsections 13.5.7.2 above and 13.5.9 below)—a ruling that apparently applies to the Title IX regulations as well, and may also apply to some suits to enforce Section 504 regulations. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court imposed strict limits on the availability of money damages suits to challenge sexual harassment under Title IX (see Sections 8.1.5 & 9.3.4 of this book). These rulings would also apparently limit harassment claims for money damages under Title VI and Section 504 and have some limiting effect as well on other types of discrimination claims under these statutes. In the *Women’s Equity Action League* case below in this subsection and the *Wrestling Coaches Association* case in subsection 14.1, courts used the technical doctrine of “standing” to dismiss cases under Title VI and Title IX. In the *Marlow* and *Salvador* cases below in this subsection, the courts used administrative law doctrines to dismiss cases under Section 504. And in the line of cases from *City of Boerne* to *Garrett* (see Section 13.1.5), the U.S. Supreme Court rejected private damages suits against the states under the Age Discrimination in Employment Act and Title I of the Americans With Disabilities Act—rulings that some courts have also applied to suits under Title IX and Section 504 (see Section 13.1.6, and compare the discussion of abrogation and waiver in Section 13.5.9).

Other examples of judicial limits on private lawsuits can be found in cases where the courts have declined to recognize private causes of action to enforce the student aid program requirements of the Higher Education Act. These cases are discussed in Section 13.4.5. Similarly, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (Section 9.7.1), the U.S. Supreme Court disallowed private causes of action to enforce the Family Educational Rights and Privacy Act (FERPA) and regulations. And in other cases, courts have used administrative law doctrines to forestall institutions and aggrieved parties from suing the U.S. Department of Education. (See, for example, the *Career Education* case and the *American Association of Cosmetology Schools* case in subsection 13.4.6.)

The less available the judicial forum becomes, either for suits against institutions or for suits against the U.S. Department of Education or other federal agencies, the more likely it is that complaints and disputes will be processed through the department’s administrative mechanisms (and those of other agencies). For these reasons, postsecondary administrators and counsel should take special care to develop a sound understanding of this administrative process, so that they can effectively represent their institution’s interests should

compliance issues arise about nondiscrimination (or other matters regarding the federal aid programs).

The first of the civil rights spending statutes, Title VI, delegates enforcement responsibility to the various federal funding agencies. Under Executive Order 12250, 45 Fed. Reg. 72995 (1980), the U.S. Attorney General is responsible for coordinating agency enforcement efforts. The Attorney General has implemented enforcement regulations (28 C.F.R. Part 42) as well as “Guidelines for the Enforcement of Title VI” (28 C.F.R. § 50.3), which impose various requirements on agencies responsible for enforcement. Each agency, for instance, must issue guidelines or regulations on Title VI for all programs under which it provides federal financial assistance (28 C.F.R. § 42.404). These regulations and guidelines must be available to the public (28 C.F.R. § 42.405). The Justice Department’s regulations require the agencies to collect sufficient data, on such items as the racial composition of the population eligible for the program and the location of facilities, to determine compliance (28 C.F.R. § 42.406). All Title VI compliance decisions must be made by or be subject to the review of the agency’s civil rights office. Programs found to be complying must be reviewed periodically to ensure continued compliance. A finding of probable noncompliance must be reported to the Assistant Attorney General (28 C.F.R. § 42.407). Each agency must establish complaint procedures and publish them in its guidelines. All Title VI complaints must be logged in the agency records (28 C.F.R. § 42.408). If a finding of probable noncompliance is made, enforcement procedures shall be instituted after a “reasonable period” of negotiation. If negotiations continue for more than sixty days after the finding of noncompliance, the agency must notify the Assistant Attorney General (28 C.F.R. § 42.411). If several agencies provide federal financial assistance to a substantial number of the same recipients for similar or related purposes, the agencies must coordinate Title VI enforcement efforts. The agencies shall designate one agency as the lead agency for Title VI compliance (28 C.F.R. § 42.413). Each agency must develop a written enforcement plan, specifying priorities, timetables, and procedures, which shall be available to the public (28 C.F.R. § 42.415).

Under the Title VI regulations of the Department of Education, fund recipients must file assurances with ED that their programs comply with Title VI (34 C.F.R. § 100.4) and must submit “timely, complete and accurate compliance 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 Title VI (34 C.F.R. § 100.6(b)). ED may make periodic compliance reviews and must accept and respond to individual complaints from persons who believe that they are victims of discrimination (34 C.F.R. § 100.7). If an investigation reveals a violation that cannot be resolved by negotiation and voluntary compliance (34 C.F.R. § 100.7(d)), ED may refer the case to the Justice Department for prosecution (see this volume, Section 13.5.9) or commence administrative proceedings for fund termination (34 C.F.R. § 100.8). Any termination of funds must be “limited in its effect to

the particular program, or part thereof, in which . . . noncompliance has been . . . found” (42 U.S.C. § 2000d-1; 34 C.F.R. § 100.8(c)). The regulations specify the procedural safeguards that must be observed in the fund termination proceedings: notice, the right to counsel, a written decision, an appeal to a reviewing authority, and a discretionary appeal to the Secretary of Education (34 C.F.R. §§ 100.9 & 100.10).

Title IX enforcement, like that for Title VI, is coordinated by the Attorney General under Executive Order 12250. Title IX also includes the same limit as Title VI on the scope of fund termination (20 U.S.C. § 1682) and utilizes the same procedures for fund termination (34 C.F.R. § 106.71). An institution subject to Title IX must appoint at least one employee to coordinate its compliance efforts and must establish a grievance procedure for handling gender discrimination complaints within the institution (34 C.F.R. § 106.8).

Section 504 is also subject to Executive Order 12250, and funding agencies’ enforcement efforts are thus also coordinated by the Attorney General. The Attorney General’s coordination regulations, setting forth enforcement responsibilities of federal agencies for nondiscrimination on the basis of disability, are published in 28 C.F.R. Part 41. The Section 504 statute also establishes an Inter-agency Coordinating Council for Section 504 enforcement, the membership of which includes, among others, the Attorney General and the Secretary of Education (29 U.S.C. § 794c). The Department of Education’s Section 504 regulations for its own programs impose compliance responsibilities similar to those under Title IX. However, recipients with fewer than fifteen employees need not conform to certain requirements: (1) having a copy of the remedial plan available for inspection (34 C.F.R. § 104.6(c)(2)); (2) appointing an agency employee to coordinate the compliance effort (34 C.F.R. § 104.7(a)); and (3) establishing a grievance procedure for handling discrimination complaints (34 C.F.R. § 104.7(b)). Most postsecondary educational institutions are not excepted from these requirements, since most have more than the minimum number of employees. Section 504 also adopts the Title VI procedural regulations concerning fund terminations.

Under the Age Discrimination Act, federal funding agencies must propose implementing regulations and submit them to the Secretary of Health and Human Services for review; all such agency regulations must be consistent with HHS’s “general regulations” (42 U.S.C. § 6103(a)(4); 45 C.F.R. § 90.31). Each agency must hold “compliance reviews” and other investigations to determine adherence to the Act’s requirements (45 C.F.R. § 90.44(a)). Each agency must also follow specified procedures when undertaking to terminate a recipient’s funding (45 C.F.R. § 90.47). Termination of funds is limited to the “particular program or activity, or part of such program or activity, with respect to which [a] finding [of discrimination] has been made,” and may not be based “in whole or in part on any finding with respect to any program or activity which does not receive Federal financial assistance” (42 U.S.C. § 6104(b)). The Act contains a number of substantive exceptions to coverage, more expansive than the exceptions to the other civil rights statutes (see subsection 13.5.5 above).

The federal courts exercise a limited review of federal agencies' enforcement efforts. If a federal agency terminates an institution's funding, the institution may appeal that decision to the courts once it has exhausted administrative review procedures within the agency.<sup>65</sup> In addition, if a federal agency abuses its enforcement authority during enforcement proceedings and before a final decision, an affected educational institution may also seek injunctive relief from such improper enforcement efforts.

In *Mandel v. U.S. Department of Health, Education and Welfare*, 411 F. Supp. 542 (D. Md. 1976), the State of Maryland brought suit after the Department of Health, Education, and Welfare (HEW) had commenced fund termination proceedings against the state, alleging Title VI violations in its system of higher education. The state sought judicial intervention, claiming that HEW had not in good faith sought voluntary compliance. Maryland complained that HEW delayed review of the state's original desegregation plan, prematurely cut off negotiations, did not provide guidelines on how to effect desegregation, and refused to rule either on the importance of statistics in assessing compliance or on the future of traditionally black educational institutions. The court found that HEW did not seek voluntary compliance in good faith. Maryland also complained that HEW failed to "pinpoint" which of the state's programs violated Title VI. The court held that HEW must pinpoint the offending programs before enforcement proceedings are begun:

[I]n . . . the State system . . . there are multitudinal programs receiving federal financing which, due to the non-programmatic approach assumed, are being condemned by defendants en masse. . . . [In the state system] there is federal funding to programs within twenty-eight institutions of higher education ranging from a unique cancer research center to the student work study program. To compel all of these programs, regardless of whether or not each is discriminatory, to prepare a defense and endure protracted enforcement proceedings is wasteful, counterproductive, and probably inimical to the interests of the very persons Title VI was enacted to protect. It is far more equitable, and more consistent with Congressional intent, to require program delineation prior to enforcement hearings than to include all programs in enforcement proceedings [411 F. Supp. at 558].

The U.S. Court of Appeals for the Fourth Circuit subsequently modified the lower court's ruling to allow HEW to take a systemic approach if it first adopted systemwide guidelines and gave Maryland time to comply voluntarily (*Mayor and City Council of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir. 1977)). A rehearing was scheduled, however, because one judge had died before the court's opinion was issued. On rehearing, three appellate judges voted to affirm

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<sup>65</sup>Such judicial review is expressly authorized by the Title VI and Title IX statutes (see 42 U.S.C. § 2000d-2; 20 U.S.C. § 1683). The Section 504 statute incorporates the remedies available under Title VI, thus apparently authorizing judicial review to the same extent authorized by Title VI (29 U.S.C. § 794(a)(c)). The Age Discrimination Act also specifically authorizes judicial review of administrative agency actions, but in terms somewhat different from those in Title VI and Title IX (42 U.S.C. § 6105).



the lower court and three voted to reverse, and the equally divided vote had the effect of automatically affirming the lower court (571 F.2d 1273 (4th Cir. 1978)).

Different questions are presented when judicial review of federal agency enforcement is sought not by postsecondary institutions but by the victims of the institutions' alleged discrimination. Such victims may seek judicial orders requiring a federal agency to fulfill its statutory duty to enforce the civil rights statutes; or, on a smaller scale, an alleged victim may challenge in court an agency's failure or refusal to act on a complaint that he or she had filed with an agency responsible for enforcing the civil rights statutes. The case law indicates that courts will not be receptive to such requests for judicial intervention in administrative enforcement activities—at least not unless Congress itself authorizes victims to seek such redress from the courts.

In *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *judgment modified* by 480 F.2d 1159 (D.C. Cir. 1973), some victims of unlawful discrimination sought judicial intervention to compel enforcement of Title VI. The plaintiffs accused HEW of failure to enforce Title VI in the southern states. In the part of the case dealing with higher education, HEW had found the higher education systems of ten states out of compliance with Title VI and had requested each state to submit a desegregation plan within four months. Three years later, after the lawsuit had been filed and the court was ready to rule, five states still had not submitted any plan and five had submitted plans that did not remedy the violations. HEW had not commenced administrative enforcement efforts or referred the cases to the Justice Department for prosecution. The district court ordered HEW to commence enforcement proceedings:

The time permitted by Title VI of the Civil Rights Act of 1964 to delay the commencement of enforcement proceedings against the ten states for the purpose of securing voluntary compliance has long since passed. The continuation of HEW financial assistance to the segregated systems of higher education in the ten states violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having once determined that a state system of higher education is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, defendants have a duty to commence enforcement proceedings [356 F. Supp. at 94].

The appellate court agreed with the district court's conclusion but expressed more sympathy for HEW's enforcement problem, in particular its need to "carefully assess the significance of a variety of new factors as it moves into an unaccustomed area" of enforcement. The appellate court therefore modified the terms of the district court's injunction, so that HEW would be given more time to initiate enforcement proceedings.

After the appellate court's decision, the district court maintained jurisdiction over the case in order to supervise compliance with its injunction. The judge issued a number of other decisions after 1973, some of which were reviewed by the appellate court. In April 1977, the district court revoked HEW's approval of several states' higher education desegregation plans and ordered HEW to devise criteria (see Section 13.5.2) by which it would evaluate new plans to be

submitted by these states. In March 1983, the court entered another order requiring HEW (by then ED) to obtain new plans from five states that had defaulted on plans previously accepted by HEW. This order established time limits by which ED was required to initiate formal enforcement proceedings against these states, and several others whose plans had never been approved, if they had not submitted new acceptable plans. The order also required ED to report systematically to the plaintiffs on enforcement activities regarding the states subject to the suit.

On the government's appeal of the district court's 1983 order, the appellate court remanded the case to the district court for a determination of whether the plaintiffs continued to have the legal "standing" necessary to maintain the lawsuit and justify judicial enforcement of the order (*Women's Equity Action League v. Bell* and *Adams v. Bell*, 743 F.2d 42 (D.C. Cir. 1984)). In 1987, the district court dismissed the case, ruling that the plaintiffs lacked standing to pursue the litigation (*Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987)). The district judge reasoned that ED's Office for Civil Rights had not caused the segregation that the plaintiffs were subjected to, and that the degree to which ED's continued monitoring of state acts would redress this segregation was "speculative."

Although initially the appellate court reversed the district court, ordering additional hearings on what remedies should be granted to desegregate the dual systems, in 1990 it decided to dismiss the case, by then titled *Women's Equity Action League v. Cavazos* (906 F.2d 742 (D.C. Cir. 1990)). In the opinion, Judge Ruth Bader Ginsburg said that "Congress has not explicitly or implicitly authorized the grand scale action plaintiffs delineate" and called the plaintiffs' action an attempt to make the trial court a "nationwide overseer or pacer of procedures government agencies use to enforce civil rights prescriptions controlling educational institutions that receive federal funds" (906 F.2d at 744). If suits directly against a discriminating entity (for which a private right of action does exist under Title VI; see Section 13.5.9) are adequate to redress injuries, "'federal courts will not oversee the overseer'" (906 F.2d at 748, quoting *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990)). The court further stated:

Suits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement. But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy. So far as we can tell, the suit targeting specific discriminatory acts of fund recipients is the only court remedy Congress has authorized for private parties, situated as plaintiffs currently are [906 F.2d at 751].

Only if Congress creates such a private right of action, said the court, may plaintiffs file claims directly against the government agency charged with enforcing the law.

Two other cases have reached similar results in situations where an individual victim has challenged an agency's enforcement activities. In *Marlow v. United States Department of Education*, 820 F.2d 581 (2d Cir. 1987), the court dismissed a lawsuit challenging ED's decision to take no action on an

administrative complaint the plaintiff had filed under Section 504. The court held that there is no statutory or implied right of action against the federal funding agency for individual complainants who seek only judicial review of the agency's disposition of a particular complaint. And in *Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986), the court held that an individual complainant cannot enjoin ED from continuing to fund the institution against which the individual had filed a Section 504 complaint.

**13.5.9. Other enforcement remedies.** Compliance reviews, administrative negotiations, and fund terminations are not the only means federal agencies have for enforcing the federal civil rights statutes. In some cases the responsible federal agency may also go to court to enforce the civil rights obligations that recipients (including postsecondary institutions) have assumed by accepting federal funds. Title VI, for instance, authorizes agencies to enforce compliance not only by fund termination but also by “any other means authorized by law” (42 U.S.C. § 2000d-1). The Title VI regulations of the U.S. Department of Education explain that “such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States . . . , or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law” (34 C.F.R. § 100.9(a)). ED may not pursue these alternatives, however, “until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least ten days from the mailing of such notice to the recipient or other person” (34 C.F.R. § 100.8(d)).

Similar enforcement alternatives and procedural limitations apply to enforcement of Title IX, Section 504, and the Age Discrimination Act. ED's Title IX and Section 504 regulations incorporate the enforcement regulations for Title VI (see 34 C.F.R. § 106.71; 34 C.F.R. § 104.61). The Title IX statute also contains the same “other means authorized by law” language found in Title VI (see 20 U.S.C. § 1682), and the Section 504 statute incorporates the remedies and procedures available under Title VI (29 U.S.C. § 794a(a)). The Age Discrimination Act has its own enforcement scheme, set out in the statute (42 U.S.C. § 6104) and the general regulations (45 C.F.R. §§ 90.41–90.50).

Besides court suits by administrative agencies enforcing the civil rights statutes, educational institutions may also be subject to private lawsuits brought by individuals who claim that their rights under the civil rights statutes and regulations have been violated. In legal terminology, the issue is whether the civil rights statutes afford these victims of discrimination a “private cause of action” against the institution that is allegedly discriminating. Sometimes statutes provide explicitly for such private causes of action. That is the case with the Age Discrimination Act, which authorizes private suits in federal district courts by “any interested person” alleging that a fund recipient has violated the Act (42 U.S.C. § 6104(e)). But Title VI, Title IX, and Section 504 are silent on this

question; the issue, therefore, is whether courts will recognize an “implied private cause of action” to enforce these statutes.

The basic requisites for an implied private cause of action are outlined in *Cort v. Ash*, 422 U.S. 66 (1975):

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [422 U.S. at 78; citations omitted].

If an individual can meet these requirements, three related issues may then arise: whether the individual must “exhaust” any available “administrative remedies” before bringing a private suit; whether the individual may obtain monetary damages, in addition to or instead of injunctive relief, if successful in the private suit; and whether the individual may obtain attorney’s fees from the defendant if successful in the suit.

For many years courts and commentators disagreed on whether Title VI, Title IX, and Section 504 could be enforced by private causes of action. Developments since the late 1970s, however, have established a strong basis for private causes of action under all three statutes. The case of *Cannon v. University of Chicago*, 441 U.S. 677 (1979), arising under Title IX, is illustrative.

The plaintiff in *Cannon* had been denied admission to the medical schools of the University of Chicago and Northwestern University. She sued both institutions, claiming that they had rejected her applications because of her sex and that such action violated Title IX. The U.S. Court of Appeals for the Seventh Circuit held that individuals cannot institute private suits to enforce Title IX. The U.S. Supreme Court reversed. While acknowledging that the statute does not expressly authorize a private cause of action, the Court held that one can be implied into the statute under the principles of *Cort v. Ash*. In applying the four considerations specified in that case, the Court in *Cannon* concluded: “Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel application of a cause of action in favor of private victims of discrimination.”

The discussion of the third consideration in *Cort*—whether a private cause of action would frustrate the statute’s underlying purposes—is particularly illuminating. The Court identified two purposes of Title IX: to avoid the use of federal funds to support sex discrimination and to give individual citizens effective protection against such practices. While the first purpose is served by the statutory procedure for fund termination (see subsection 13.5.8 above), the Court determined that a private remedy would be appropriate to effect a second purpose:

[Termination] is . . . severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has

occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded. Moreover, in that kind of situation it makes little sense to impose on an individual whose only interest is in obtaining a benefit for herself, or on HEW [now ED], the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—ordinary enforcement of the statute [441 U.S. at 705–6].

In a statement of particular interest to postsecondary administrators, the Court in *Cannon* also addressed and rejected the universities' argument that private suits would unduly interfere with their institutional autonomy:

Respondents' principal argument against implying a cause of action under Title IX is that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis. They argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.

This argument is not original to this litigation. It was forcefully advanced in both 1964 and 1972 by the congressional opponents of Title VI and Title IX, and squarely rejected by the congressional majorities that passed the two statutes. In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.

History has borne out the judgment of Congress. Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965, respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner [441 U.S. at 709–10].<sup>66</sup>

Subsequently, in the case of *Guardians Ass'n. v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), the Supreme Court affirmed the availability of implied private causes of action under Title VI. The Court issued no majority opinion, however, so the case's teaching on the issue is limited and can be gleaned only from tallying the views of those Justices who accepted private causes of action under Title VI. A year after *Guardians*, and relying in part on that case, the Supreme Court also held that individuals may bring private

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<sup>66</sup>The courts are divided on whether the Title IX implied private cause of action recognized in the *Cannon* case is available to plaintiffs claiming gender discrimination in employment. When the plaintiff is an employee or prospective employee, rather than a student or prospective student, some courts have reasoned that the Title IX private cause of action is not available because Title VII (see Section 5.2.1 of this book) provides an express private cause of action and suitable remedies for gender discrimination in employment, thus making a Title IX cause of action unnecessary. For further discussion, see Section 5.2.3.

lawsuits to enforce Section 504 (*Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984))—a conclusion that the Court later affirmed and further explicated in *Barnes v. Gorman*, 536 U.S. 181, 185–89 (2002).

Courts usually have not required plaintiffs to exhaust administrative remedies before filing a private cause of action under the civil rights statutes. In the *Cannon* case, for instance, the U.S. Supreme Court noted that it had “never withheld a private remedy where the statute explicitly confers a benefit on a class of persons . . . [but] does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute.” Title IX not only contains no such mechanism, according to the Court, but even HEW’s (now ED’s) procedures do not permit the complainant to participate in the administrative proceedings. Moreover, even if HEW were to find an institution to be in violation of Title IX, the resulting compliance agreement need not necessarily include relief for the particular complainant. Accordingly, the Court concluded that individuals may institute suits to enforce Title IX without exhausting administrative remedies (441 U.S. at 706–8, n.41). Similarly, relying on *Cannon*, federal appeals courts have held that exhaustion is not required under Title VI (see, for example, *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012 (6th Cir. 1989) or under Section 504 (see, for example, *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1380–83 (10th Cir. 1981)). The exception to this trend is the Age Discrimination Act, for which Congress itself has provided an exhaustion requirement. The provision of that statute authorizing private causes of action (see above) also prohibits bringing such suits “if administrative remedies have not been exhausted” (42 U.S.C. § 6104(e)(2)(B)). Section 6104(f) and the general ADA regulations (45 C.F.R. § 90.50) indicate when such exhaustion shall be deemed to have occurred.

Authorization of private causes of action, even when exhaustion has occurred or is not required, does not necessarily mean that a complainant may obtain every kind of remedy ordinarily available in civil lawsuits. *Cannon* did not itself resolve the remedies question, and in the wake of *Cannon*, a number of lower courts ruled that private causes of action under Title IX were limited to injunctive relief and that money damages were not available (see, for example, *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981)). In the *Guardians Ass’n* case (above) however, a majority of the Justices asserted that they would permit a damages remedy under Title VI when the plaintiff could prove that the defendant had discriminated *intentionally* (463 U.S. at 607 n.27; see also subsection 13.5.7.2 above). And in *Darrone*, although the Court declined to determine “the extent to which money damages are available” in a Section 504 case, it did authorize back-pay awards for employees who were victims of intentional discrimination.

In 1992, the Supreme Court alleviated much of the remaining uncertainty concerning remedies under the civil rights statutes. In *Franklin v. Winnnet County Public Schools*, 503 U.S. 60 (1992), a student brought an action under Title IX seeking compensatory damages for alleged intentional sex discrimination—particularly, sexual harassment by a coach/teacher at her high school and the school administration’s failure to protect her from this harassment despite having

knowledge of it.<sup>67</sup> The school district had agreed to close its investigation in return for the teacher’s resignation. Although the U.S. Department of Education had investigated and determined that the school district had violated the student’s Title IX rights, the department terminated the investigation after the school and the school district came into compliance with Title IX. The student then filed her cause of action for damages, which was rejected by the lower courts.

Reversing, the Supreme Court identified several bases for holding that money damages is a permissible remedy under Title IX. In particular, it relied on the firmly established principle that, once a cause of action exists, courts may use all appropriate remedies to enforce the plaintiff’s rights unless Congress has expressly indicated otherwise; and on Congress’s passage, subsequent to *Cannon*, of the Civil Rights Remedies Equalization Amendment of 1986 (42 U.S.C. § 2000d-7), discussed later in this subsection) and the Civil Rights Restoration Act of 1987 (see subsection 13.5.7.4 above), which the Court regarded as implicit congressional acknowledgments that private remedies, including money damages, are available under Title IX. Although confessing that the multiple opinions in *Guardians Association* had made it difficult to determine the Court’s viewpoint on damage remedies, the Court in *Gwinnett* confirmed that “a clear majority [in *Guardians Association*] expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court’s power to award appropriate relief in a cognizable cause of action.” (See generally E. Vargyas, “*Franklin v. Gwinnett County Public Schools* and Its Impact on Title IX Enforcement,” 19 *J. Coll. & Univ. Law* 373 (1993).)

The *Franklin* case, permitting compensatory damages under Title IX, also serves to reinforce the availability of such damages under Title VI—as the Court indicated by its reliance on the prior *Guardians Ass’n.* case. The *Franklin* reasoning apparently applied to Section 504 as well as the Court confirmed in *Barnes v. Gorman*, 536 U.S. 181 (2002). The *Franklin* analysis does not extend to the Age Discrimination Act, however, since that statute’s express authorization for private causes of action is limited to suits “to enjoin a violation of this Act” (42 U.S.C. § 6104(e)), thus indicating that only injunctive relief (and not money damages) is available.

Nine years after *Franklin*, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court reaffirmed (consistent with *Guardians* and *Franklin*) that private causes of action for money damages are available to enforce Title VI. At the same time, however, the Court imposed a major new limitation on private causes of action by rejecting the particular cause of action asserted in that case. The plaintiffs had based their claim on a Title VI “disparate impact” regulation (34 C.F.R. § 100.3(b)(2)) that did not require proof of discriminatory intent (see subsection 13.5.7.2 above). Section 601 of Title VI prohibits only intentional sex discrimination, the

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<sup>67</sup>Two later U.S. Supreme Court cases provided further clarification on the Title IX private cause of action for sexual harassment authorized by the *Franklin* case. These two cases—*Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)—are discussed fully in Sections 9.3.4 and 8.1.5.

Court asserted, and Section 602, which authorizes federal agencies to promulgate regulations implementing Section 601, did not itself create any new rights. Regulations issued under Section 602, therefore, could not be used as a basis for private causes of action for unintentional, or “disparate impact,” discrimination, since such discrimination was beyond the scope of Section 601. (The Court split severely on this point, with four dissenting Justices adamantly asserting the contrary view.) While the majority’s ruling in *Sandoval* substantially restricts the availability of private causes of action, the majority did not go so far as to rule that Title VI regulations can never be enforced by a private cause of action. Specifically, the majority’s ruling is that a regulation may be enforced by a private cause of action only if it prohibits *intentional* sex discrimination that is within the general prohibition of Section 601. This ruling would presumably apply to Title IX as well; but its applicability to Section 504 may be problematic because it is not clear that that statute prohibits only intentional discrimination (see *Alexander v. Choate* in subsection 13.5.7.2 above).

Under *Franklin*, it was unclear whether damages awards under Title IX were limited to compensatory damages or could also include *punitive* damages. The law was unclear on this point for Title VI and Section 504 as well. But the Court later resolved the issue in *Barnes v. Gorman*, 536 U.S. 181 (2002). In this Section 504 case, the Court reasoned that Section 504 remedies “are coextensive with the remedies available in a private cause of action brought under Title VI” (see 29 U.S.C. § 794a(a)(2)); that under Title VI, the federal government’s relationship with fund recipients is analogous to a contractual relationship (see Section 13.1.1 of this book); that “punitive damages, unlike compensatory damages and injunctions, are generally not available for breach of contract”; that punitive damages are therefore not available under Title VI; and that “it follows that they may not be awarded in suits brought under . . . § 504” (536 U.S. at 185–89). The same reasoning would apply to Title IX, the other spending statute permitting compensatory damages, since it is also patterned after Title VI.

An additional complexity may arise when a private cause of action for money damages is brought against a state college or university. Such institutions are often considered arms of the state and, as such, may claim sovereign immunity from private suits alleging violations of federal law (see Section 13.1.6). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the U.S. Supreme Court highlighted this point by holding that, in enacting Section 504, Congress did not abrogate the states’ Eleventh Amendment sovereign immunity. Subsequently, however, Congress enacted the Civil Rights Remedies Equalization Amendment of 1986 (100 Stat. 1845, 42 U.S.C. § 2000d-7). This statute specifically declares that states are not immune under the Eleventh Amendment from federal court suits alleging violations of Section 504, Title IX, Title VI, the Age Discrimination Act, or any other federal statute prohibiting discrimination by recipients of federal financial assistance.

Nevertheless, in the wake of the U.S. Supreme Court’s decision in the *Seminole Tribe* case (see Section 13.1.6), sovereign immunity issues have frequently arisen in money damages suits brought against state colleges and universities under these statutes. Before *Seminole Tribe*, it was generally accepted that the



Civil Rights Remedies Equalization Amendment constituted an abrogation of state sovereign immunity. But after *Seminole Tribe* and related Supreme Court cases, state institutions have argued that Congress has no power to abrogate state immunity under the nondiscrimination statutes. Alternatively, state institutions have argued that Congress has no power to require that states waive their immunity as a condition to participating in a federal funding program or that, even if Congress has this power, the Equalization Amendment does not establish such a waiver. Most cases thus far have involved Title IX or Title VI, and the results suggest that these arguments are not likely to succeed under either of these statutes.

In *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997), for example, a student at the University of Central Arkansas filed a Title IX sexual harassment claim. Relying on *Seminole Tribe*, the university contended that Congress had passed Title IX under its spending power rather than its enforcement power under Section 5 of the Fourteenth Amendment; and that Congress had no authority under the spending clause to abrogate the university's sovereign immunity. The court disagreed, holding that Title IX was within the scope of Congress's Fourteenth Amendment enforcement power, since the Fourteenth Amendment's equal protection clause has often been used to proscribe gender discrimination—as, for example, the U.S. Supreme Court did in the Virginia Military Institute (VMI) case, *United States v. Commonwealth of Virginia* (see Section 8.2.4.2). The court in *Crawford* was not concerned with whether Congress “had the specific intent to legislate pursuant to” Section 5 of the Fourteenth Amendment, but only with whether Congress “could have enacted Title IX pursuant to” Section 5. Therefore, since Title IX did fit within Section 5, under which Congress has power to abrogate, and since the Equalization Amendment clearly indicates a congressional intent to abrogate, the court rejected the university's immunity defense. (*Crawford* was approved and followed by another federal circuit in *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), and 200 F.3d 499 (7th Cir. 1999).)

The reasoning and results in Title VI cases thus far have been similar to the Title IX cases. In *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998), for instance, the appellate court determined that Title VI paralleled the Fourteenth Amendment's equal protection clause, prohibiting “precisely that which the Constitution prohibits in virtually all possible applications”; and that the Equalization Amendment, which abrogated state immunity under Title VI, was also within the scope of Congress's power under Section 5 of the Fourteenth Amendment (158 F.3d at 215–17).<sup>68</sup> And in *Fuller v. Rayburn*, 161 F.3d 516 (8th Cir. 1998), another appellate court concluded that the university could not assert a sovereign immunity defense against a student's Title VI claim because Congress, by enacting the Equalization Amendment, had validly abrogated state immunity under Title VI.

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<sup>68</sup>*Lesage* was reversed in part, on other grounds, in *Texas v. Lesage*, 528 U.S. 18 (1999) (see Section 8.2.5 of this book).

Even if a court were to determine that Congress had *not* validly abrogated state immunity under Title IX or Title VI, it is likely that these suits could proceed on an alternative basis. In *Doe v. University of Illinois* (above), the court identified this alternative: “that the University affirmatively waived its Eleventh Amendment immunity by choosing to accept federal funds under Title IX” (138 F.3d at 660). The *Doe* court did not rule on this waiver argument (a spending power argument) because it had already determined that Congress had validly abrogated immunity under its Fourteenth Amendment, Section 5 power. But the U.S. Supreme Court has been receptive to this waiver argument (see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238–40, 246–47 (1985), and *Alden v. Maine*, 527 U.S.706, 755 (1999)), and some lower courts have also accepted it. In *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), for example, a female student who had been expelled filed a Title IX suit against the university, and the university asserted sovereign immunity. Using a spending power analysis, the court concluded that the Equalization Amendment (above) constituted “a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity”; and that “when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state’s voluntary and knowing acceptance of it” (186 F.3d at 554–55). The court therefore ruled that the university had “waived its Eleventh Amendment immunity” by accepting federal funds that were unambiguously conditioned on the recipient’s waiver of its immunity. (See also *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000).)

The waiver argument, as a spending power argument, has also been held to apply to Section 504 (see *Garrett v. University of Alabama*, discussed in Section 13.1.6) and would apparently apply to Title VI and the Age Discrimination Act as well, since all these statutes fit within Congress’s spending power, and the Equalization Amendment applies to them all. But the applicability of the abrogation argument (the Fourteenth Amendment, Section 5 argument) to Section 504 and ADA cases is more problematic. Race discrimination claims and gender discrimination claims are clearly subject to heightened scrutiny under the Fourteenth Amendment’s equal protection clause. They therefore clearly fall within the scope of Congress’s Section 5 power to enforce the Fourteenth Amendment, which Congress may use to abrogate state immunity. Disability discrimination and age discrimination, in contrast, do not usually receive heightened scrutiny under the equal protection clause and are therefore much harder to fit within the scope of Congress’s enforcement power under the Fourteenth Amendment (see Section 13.1.4 of this book). Thus, if state colleges and universities are subjected to private causes of action under Section 504 and the ADA, it will apparently be waiver arguments, not abrogation arguments, that will achieve this result.

The final issue regarding private causes of action concerns attorney’s fees (see generally Section 2.2.4.4). When a plaintiff successfully invokes one of the civil rights statutes against an institution, the institution may be liable for the plaintiff’s attorney’s fees. Under the Civil Rights Attorney’s Fees Awards Act

of 1976 (42 U.S.C. § 1988), courts have discretion to award “a reasonable attorney’s fee” to “the prevailing party” in actions under Title IX, Title VI, and several other civil rights statutes.<sup>69</sup> Although this Act does not apply to Section 504 suits or Age Discrimination Act suits, the omission is inconsequential, because both Section 504 and the ADA have their own comparable provisions authorizing the award of attorney’s fees (29 U.S.C. § 794a(b); 42 U.S.C. § 6104(e)(1)).

## **Sec. 13.6. Dealing with the Federal Government**

**13.6.1. Handling federal rule making and regulations.** Administrative agencies write regulations both to implement legislation and to formalize their own housekeeping functions. To prepare such regulations, agencies typically engage in a process of rule making, which includes an opportunity for the public to comment on regulatory proposals. Information on particular agencies’ rule-making activities is published in the *Federal Register*. Final regulations (along with summaries of public comment on proposed drafts) are also published in the *Federal Register*, and these regulations are then codified in the *Code of Federal Regulations*.

Postsecondary administrators have long complained that the multitude of federal regulations applying to the programs and practices of postsecondary institutions creates financial and administrative burdens for their institutions. These burdens can be decreased as postsecondary administrators and legal counsel take more active roles in the process by which the federal government makes and enforces rules. The following suggestions outline a strategy for active involvement that an institution may undertake by itself, in conjunction with other similarly situated institutions, or through educational associations (see Section 14.1) to which it belongs. (See generally C. Saunders, “Regulating the Regulators,” *Chron. Higher Educ.*, March 22, 1976, A32, which includes suggestions similar to some of those below.)

1. Appoint someone to be responsible for monitoring federal agency Web sites, the *Federal Register*, and other publications for announcements and information on regulatory proposals and regulations that will affect postsecondary education. Each agency periodically prepares an agenda of all regulations it expects to propose, promulgate, or review in the near future, and publishes this agenda in the *Federal Register*. The *Federal Register* also publishes “Notice(s) of Intent” to publish rules (NOIs) (sometimes called “Advance Notice(s) of Proposed Rulemaking” (ANPRs)) and “Notice(s) of Proposed Rulemaking” (NPRMs), the latter of which are drafts of proposed regulations along with invitations for comments from interested parties. Notices of the establishment of a *committee* to negotiate rule making on a subject or proposed rule are also

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<sup>69</sup>The cases are collected in Ralph V. Seep, Annot., “What Persons or Entities May Be Liable to Pay Attorney’s Fees Awarded Under Civil Rights Attorney’s Fees Awards Act of 1976 (42 U.S.C.S. § 1988),” 106 A.L.R. Fed. 636; Francis M. Dougherty, Annot., “Propriety of Amount of Attorneys’ Fees Awarded to Prevailing Parties Under Civil Rights Attorney’s Fees Award Act of 1976 (42 U.S.C.A. § 1988),” 118 A.L.R. Fed. 1.

published in the *Federal Register*. If further information on a particular rule-making process or a particular regulatory proposal would be useful, have institutional personnel ask the agency for the pertinent information. Some agencies may have policies that make draft regulations or summaries available for review before the proposed form is published.

2. File comments and deliver testimony in response to NOIs and NPRMs when the rules would have a likely impact on institutional operations. Support these comments with specific explanations and data showing how the proposed regulations would have a negative impact on the institution. Have legal counsel review the proposed rules for legal and interpretive problems, and include legal questions or objections with your comments when appropriate. Consider filing comments in conjunction with other institutions that would be similarly affected by the proposed regulations. In addition, when negotiated rule making is provided, participate in the negotiation process if your institution is eligible to do so.

3. Keep federal agencies informed of your views on and experiences with particular federal regulations. Compile data concerning the regulations' impact on your institution and present these data to the responsible agency. Continue to communicate complaints and difficulties with final regulations to the responsible agency, even if the regulations were promulgated months or years ago. In addition, determine whether any federal advisory committee has been appointed for the agency or the issues that are of concern to your institution. (The Federal Advisory Committee Act, 5 U.S.C. Appx. § 10, regulates the formation and operation of such committees.) If so, also keep the committee informed of your views and experience regarding particular regulations.

4. When the institution desires guidance concerning ambiguities or gaps in particular regulations, consider submitting questions to the administering agency. Make the questions specific and, if the institution has a particular viewpoint on how the ambiguity or gap should be resolved, forcefully argue that view. Legal counsel should be involved in this process. Once questions are submitted, press the agency for answers.

5. Be concerned not only with the substance of regulations but also with the adequacy of the rule-making and rule-enforcing procedures. Be prepared to object whenever institutions are given insufficient notice of an agency's plans to make rules, too few opportunities to participate in rule making, or inadequate opportunities to criticize or receive guidance on already implemented regulations. (For example, see *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997), which provides an example of a successful challenge to an agency's interpretation of a statute that was effectuated by sending two interpretive letters rather than by promulgating a regulation.)

6. Develop an effective process for institutional self-regulation. With other institutions, develop criteria and data to use in determining the circumstances in which self-regulation is more effective than government regulation (see A. Blumrosen, "Six Conditions for Meaningful Self-Regulation," 69 *A.B.A. J.* 1264 (1983)). Use a record of institutional success at self-regulation, combined with developed rationales for self-regulation, to argue in selected situations that government regulation is unnecessary.

7. When an agency passes a particular regulation that your institution (and presumably others) believes will have an ill-advised impact on higher education interests, consider obtaining a review of the regulation's legality. Section 13.4.6 of this book examines legal defects that may exist and legal challenges that may be made. One of the most important considerations is whether the regulation is "*ultra vires*"—that is, whether, in promulgating the regulation, the agency has exceeded the scope of authority Congress has delegated to it. Such issues may be the basis for a court challenge of agency regulations. In *Bowen v. American Hospital Ass'n.*, 476 U.S. 610 (1986), for example, the U.S. Supreme Court invalidated Department of Health and Human Services regulations on the protection of disabled infants because they were beyond the agency's scope of authority under Section 504 of the Rehabilitation Act. *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997), provides another instructive example of a successful challenge to a federal regulation (a Department of Education regulation implementing federal loan programs) on grounds that it is *ultra vires*. Such legal issues may also be raised during the rule-making process itself, to bolster policy reasons for opposing particular regulations. (For a discussion of various strategies for contesting the application of a federal agency's regulation, see subsection 13.4.6).

Several pieces of legislation enacted since the early 1980s provide assistance for postsecondary institutions that do involve themselves in the federal regulatory process. One statute, the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), added Chapter VI to the federal Administrative Procedure Act. Another statute, the Negotiated Rulemaking Act of 1990 (5 U.S.C. § 561 *et seq.*), added subchapter III to the Administrative Procedure Act. A third statute, the Equal Access to Justice Act (28 U.S.C. § 2412), amended Chapter V of the Administrative Procedure Act.

The Regulatory Flexibility Act benefits three types of "small entities," each of which is defined in Section 601: the "small business," the "small organization," and the "small governmental jurisdiction." The Act's purpose is "to establish as a principle of regulatory issuance that [federal administrative] agencies shall endeavor . . . to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation" (96 Stat. 1164 § 2(b)). To implement this principle, the Act provides that (1) in October and April of every year, agencies must publish a "regulatory flexibility agenda," which describes and explains any forthcoming regulations that are "likely to have a significant economic impact on a substantial number of small entities" (5 U.S.C. § 602); (2) agencies proposing new regulations must provide, for public comment, an "initial regulatory flexibility analysis" containing a description of "the impact of the proposed rule on small entities" and a description of "alternatives to the proposed rule" that would lessen its economic impact on small entities (§ 603); (3) agencies promulgating final regulations must issue a "final regulatory flexibility analysis" containing a summary of comments on the initial analysis and, where regulatory alternatives were rejected, an explanation of why they were rejected (§ 604); (4) for any

regulation “which will have a significant economic impact on a substantial number of small entities,” agencies must “assure that small entities have been given an opportunity to participate in the rulemaking” (§ 609); and (5) agencies must periodically review and, where appropriate, revise their regulations with an eye to reducing their economic impact on small entities (§ 610).

The key issue for postsecondary institutions under the Regulatory Flexibility Act is one of definition: To what extent will postsecondary institutions be considered to be within the definition for one of the three groups of “small entities” protected by the Act? The first definition, for the “small business” (§ 601(3)), is unlikely to apply, except to some proprietary institutions. The second definition, for the “small organization” (§ 601(4)), will apply to many, but not necessarily all, private nonprofit institutions. And the third definition, for the “small governmental jurisdiction” (§ 601(5)), will apparently apply to some, but relatively few, public institutions—primarily community colleges. Thus, not every postsecondary institution will be within the Act’s protected classes.<sup>70</sup>

The second statute, the Negotiated Rulemaking Act of 1990 (104 Stat. 4969 (1990), codified at 5 U.S.C. § 561 *et seq.*), was enacted to encourage agencies to use negotiations among interested parties as part of their rule-making process. Through an agency-established committee (5 U.S.C. § 565), agencies may informally negotiate a proposed rule that accommodates the varying interests of groups participating in the process and represents a consensus on the subject for which the committee was established. The rationale is that greater involvement and face-to-face discussion of opposing viewpoints will yield a proposed rule that may be formally adopted and enforced more quickly than would occur under more formal rule-making procedures (5 U.S.C. § 561 note).

The third statute, the Equal Access to Justice Act, was originally promulgated in 1980 (Pub. L. No. 96-481, 94 Stat. 2321 (1980)), and then was amended and permanently renewed in 1985 (Pub. L. No. 99-80, 99 Stat. 183 (1985)). (See Comment, “Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act—Questions Remaining, Questions Resolved,” 14 *Fla. St. L. Rev.* 925 (1987).) By authorizing courts to award attorney’s fees and other expenses to certain parties that prevail in a civil action brought against or by a federal administrative agency, this Act assists institutions that must litigate with the federal government over procedural defects in rule making, substantive defects in regulations that were not resolved during the rule-making process, or interpretive issues regarding the application of regulations. If an institution prevails in such litigation, it may receive attorney’s fees unless the agency shows that its position in the suit was “substantially justified” (28 U.S.C. § 2412(d)(1)(A)). Like the Regulatory Flexibility Act, this Act’s application to postsecondary education is limited by its definitions: apparently, to be a “party” eligible for attorney’s fees, a postsecondary institution must have no more than five hundred employees and, unless it is a 501(c)(3) organization (see this book, Section 13.3.1), must have a net worth of not more than \$7 million (28 U.S.C.

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<sup>70</sup>Institutions falling outside the definitions in the Regulatory Flexibility Act, and covered institutions seeking additional leverage in the administrative process, will be aided by the rule-making protections in Executive Order 12866, discussed later in this Section.

§ 2412(d)(2)(B)).<sup>71</sup> Moreover, state colleges and universities do not appear to be within the definition of “party,” which includes a “unit of local government” but makes no reference to state-level agencies and entities. Individual agencies must publish their own regulations implementing the Act; the Department of Education’s regulations, for example, are in 34 C.F.R. Part 21.

Another development that helps postsecondary institutions cope with the federal regulatory process is Executive Order 12866, issued by President Clinton on September 30, 1993 (58 Fed. Reg. 51725). The Executive Order sets out twelve principles of regulation for federal administrative agencies, including the requirement that each agency “shall identify and assess available alternatives to direct regulation” (§ 1(b)(3)); “shall assess both the costs and the benefits of the intended regulation” (§ 1(b)(6)); and “shall seek views of appropriate state, local, and tribal officials before imposing regulatory requirements” on those entities (§ 1(b)(9)). The order also establishes a number of procedural requirements—for example, requiring each agency periodically to “prepare an agenda of all regulations under development or review” (§ 4(b) and (c)), periodically to “review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency’s regulatory program more effective [and] less burdensome” (§ 5(a)), and to “provide the public with meaningful participation in the regulatory process” and “afford the public a meaningful opportunity to comment” on any proposed regulation (§ 6(a)(1)). In addition, the order addresses various structural matters. For example, it assigns to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (§ 2(b)) various responsibilities for monitoring the regulatory processes of each agency (see, for example, § 4(e)), and it requires that each agency appoint a regulatory policy officer “to foster the development of effective, innovative, and least burdensome regulations and to further the principles” in Section 1(b) of the order (§ 6(a)(2)).

The Administrative Dispute Resolution Act of 1996 (Pub. L. No. 104-320, 110 Stat. 3870), amending the Administrative Dispute Resolution Act of 1990 (Pub. L. No. 101-552, 104 Stat. 2736), authorizes the use of alternative methods of dispute resolution to resolve conflicts with federal agencies that arise under an “administrative program.” Under the Act, which is codified at 5 U.S.C. §§ 571–573, an “administrative program” is defined as “a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation” (5 U.S.C. § 571(2)). The alternative dispute resolution methods encouraged by the Act are “conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds” (5 U.S.C. § 571(3)). The Act facilitates the use of such alternative dispute resolution techniques and provides for their availability when the parties agree to their use; they are voluntary and are intended to supplement rather than replace other agency dispute resolution techniques (5 U.S.C. §§ 572(a) & (c)).

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<sup>71</sup>Cases are collected in Ralph V. Seep, Annot., “Who Is a Party Entitled to Recover Attorney’s Fees Under Equal Access to Justice Act (28 U.S.C.S. § 2412(d)),” 107 A.L.R. Fed. 827.

**13.6.2. Obtaining information.** Information will often be an indispensable key to a postsecondary institution's ability to deal effectively with the federal government, in rule-making processes or otherwise. Critical information sometimes will be within the control of the institution—for example, information about its own operations and the effect of federal programs on these operations. At other times, critical information will be under the government's control—for example, data collected by the government itself or information on competing policy considerations being weighed internally by an agency as it formulates regulatory proposals. When the latter type of information is needed, it may sometimes be obtained during the course of a rule-making proceeding (see Section 13.6.1 above). In addition, the following legislation may help institutional administrators and legal counsel: the Freedom of Information Act (FOIA) Amendments of 1974; the Privacy Act of 1974; the Government in the Sunshine Act of 1976; and the Government Printing Office Electronic Information Access Enhancement Act of 1993 (Pub. L. No. 103-40, 107 Stat. 112 (1993)), an Act facilitating electronic access to government data. Executive Orders 12866 and 12356 and successor government orders may also be of help.

The Freedom of Information Act Amendments (5 U.S.C. § 552) afford the public access to information from federal government files that is not specifically exempted from disclosure by the legislation.<sup>72</sup> Nine categories of information are exempted from disclosure under Section 552(b), the most relevant to postsecondary institutions being national security information, federal agencies' internal personnel rules and practices, interagency or intra-agency memoranda or letters that would not be available except in litigation, and investigatory files compiled for law enforcement purposes.

The FOIA is useful when an institution believes that the government holds information that would be helpful in a certain situation but informal requests have not yielded the necessary materials. By making an FOIA request, an institution can obtain agency information that may help the institution understand agency policy initiatives; or document a claim, process a grievance, or prepare a lawsuit against the government or some third party; or determine what information the government has that it could use against the institution—for example, in a threatened fund termination proceeding. Specific procedures to follow in requesting such information are set out in the statute and in each agency's own policies on FOIA requests. Persons or institutions whose requests are denied by the agency may file a suit against the agency in a U.S. district court. The burden of proof is on the agency to support its reasons for denial. Guidelines for making a Freedom of Information Act request to the U.S. Education Department are on its Web site, available at <http://www.ed.gov/policy/gen/leg/foia/foiatoc.html>.

The Privacy Act (codified in part at 5 U.S.C. § 552a) is discussed in Section 9.7.3 of this book with regard to student records. The point to be made here

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<sup>72</sup>For analysis and discussion of when information may be considered to be "agency records" accessible under the Freedom of Information Act, see *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); and *Forsham v. Harris*, 445 U.S. 169 (1980).



is that someone who requests certain information under the FOIA may find an obstacle in the Privacy Act. The FOIA itself exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (5 U.S.C. § 552(b)(6)). The Privacy Act provides an even broader protection for information whose release would infringe privacy interests. While the Act thus may foil someone who requests information, it may also protect a postsecondary institution and its employees and students when the federal government has information concerning them in its files. (For a discussion of the implications of technological advances on the FOIA and Privacy Acts, see Julianne M. Sullivan, Comment, “Will the Privacy Act of 1974 Still Hold Up in 2004?: How Advancing Technology Has Created a Need for Change in the ‘System of Records’ Analysis,” 39 *Cal. W. L. Rev.* 295 (2003).)

Individual agencies each publish their own regulations implementing the Privacy Act. The Department of Education’s regulations are published in 34 C.F.R. § 5b.1 *et seq.*

The Government in the Sunshine Act (5 U.S.C. § 552b) assures the public that “meetings of multimember federal agencies shall be open with the exception of discussions of several narrowly defined areas” (H.R. Rep. No. 880, 94th Cong., 2d Sess. (1976), at 2, reprinted in 3 *U.S. Code Cong. & Admin. News* 2184 (1976)). Institutions can individually or collectively make use of this Act by sending a representative to observe and report on agency decision making that is expected to have a substantial impact on their operations.

Executive Order 12866 (also discussed in Section 13.6.1 above) requires agencies to do various cost-benefit assessments of proposed regulations and to make this information available to the public after the regulations are published (§ 6(1)(3)(E)(i)). The order also provides that OIRA (see Section 13.6.1 above) will “maintain a publicly available log” containing information about the status of regulatory actions and the oral and written communications received from outsiders regarding regulatory matters (§ 6(b)(4)(C)). And Executive Order 12958 (60 Fed. Reg. 19825, April 17, 1995) specifies the procedures and the schedule for classifying and declassifying government documents related to national security.

## Selected Annotated Bibliography

### *General*

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### **Sec. 13.1 (Federal Constitutional Powers over Education)**

Hartley, Roger. "Enforcing Federal Civil Rights Against Public Entities After *Garrett*," 28 *J. Coll. & Univ. Law* 41 (2001). Author evaluates the U.S. Supreme Court's current posture with respect to abrogation of state sovereign immunity through Section 5 of the Fourteenth Amendment, a posture the author describes as a "federalism revival." After a basic overview of state sovereign immunity, the Eleventh Amendment, and the abrogation doctrine, the author explores the *Garrett* case and its implications for redressing disability-based discrimination. Author also includes discussion of whether Congress can "purchase" a "waiver" of state sovereign immunity as a condition of federal funding, focusing on Section 504 of the Rehabilitation Act.

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Merico-Stephens, Ana Maria. "*United States v. Morrison* and the Emperor's New Clothes," 27 *J. Coll. & Univ. Law* 735(2001). Three-part article. Part I provides a brief history of the Supreme Court's treatment of the commerce clause up to *United States v. Lopez*. Part II examines the Court's refusal in *U.S. v. Morrison* to uphold the constitutionality of the Violence Against Women Act under either the commerce clause or, alternatively, Section 5 of the Fourteenth Amendment. Part III considers the ramifications of the Court's rejection of the government's arguments in *Morrison* and contemplates the impact that the "new federalism" now being developed by the Supreme Court may have on congressional power in the future.

### **Sec. 13.2 (Federal Regulation of Postsecondary Education)**

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instances in which they have allowed ethical lapses; proposes reforms for institutional review boards and researchers.

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- Elias, Stephen. *Patent, Copyright & Trademark* (7th ed., Nolo, 2004). Provides definitions of patent, copyright, trademark, and trade secret law. Discusses recent developments in intellectual property law, particularly that related to the Internet.

- Elias, Stephen, & Goldoftas, Lisa. *Patent, Copyright and Trademark: A Desk Reference to Intellectual Property Law* (3d ed., Nolo, 1999). Includes an overview of patent, copyright, trademark, and trade secret law. Explains the scope of each area of the law, defines terms, and provides examples. Also includes sample nondisclosure agreements.
- Flygare, Thomas J. *What to Do When the Department of Labor Comes to Campus: Wage and Hour Law in Higher Education* (National Association of College and University Attorneys, 1999). Provides guidelines for colleges in responding to Department of Labor investigations of alleged pay infractions. Includes a case study that illustrates basic FLSA principles, examines the exemptions from overtime requirements, discusses how to calculate work time and overtime compensation.
- Gasaway, Laura N. "Impasse: Distance Learning and Copyright Law," 62 *Ohio St. L.J.* 783 (2001). Discusses the use of copyrighted material for instructional purposes in a distance learning format, the lawfulness of distributing copyrighted material to students enrolled in distance education courses, and providing library services to individuals involved in distance education.
- Gindin, Susan E. "Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet," 34 *San Diego L. Rev.* 1153 (1997). Discusses the various ways in which personal privacy may be invaded electronically, the various ways users and systems operators can protect against privacy invasions, and the legal rights of individuals whose privacy has been invaded. Includes analysis of the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and other federal (and state) statutes protecting privacy interests.
- Goldberg, Daniel. "Research Fraud: A Sui Generis Problem Demands a Sui Generis Solution (Plus a Little Due Process)," 20 *T.M. Cooley L. Rev.* 27 (2003). Criticizes the effectiveness of the False Claims Act to remedy fraud; also criticizes the federal Office of Research Integrity. Provides suggestions for reducing research fraud.
- Hajian, Tamar, Sizer, Judith R., & Ambash, Joseph W. *Record Keeping and Reporting Requirements for Independent and Public Colleges and Universities* (National Association of College and University Attorneys, 1998). Summarizes relevant federal laws governing record keeping, reporting requirements, and retention of records for both public and private colleges. Covers student and employee records, student financial aid, grants and sponsored research, law enforcement, licensure and accreditation, and other miscellaneous records. Includes diskette for downloading materials, as well as "hotlinks" to URL citations for laws and regulations.
- Harper, Georgia K. *Copyright Issues in Higher Education, 2005 Edition* (National Association of College and University Attorneys, 2005). Describes the basic concepts of copyright, including what are and are not protected works, what constitutes fair use, the application of the law to academia, institutional liability for copyright infringement by employees and students, and the numerous issues relating to authorship and ownership. Includes URLs for more than fifty additional sites, all relating to some aspect of copyright.
- Harper, Georgia. "Developing a Comprehensive Copyright Policy to Facilitate Online Learning," 27 *J. Coll. & Univ. Law* 5 (2000). Reviews the special copyright issues related to online learning, and discusses the need for a copyright policy that recognizes these special issues. Reviews the concept of fair use and its restrictions in the context of online learning. Provides an appendix with links to helpful Internet resources.

- Harrington, Peter J. "Faculty Conflicts of Interest in an Age of Academic Entrepreneurialism: An Analysis of the Problem, the Law and Selected University Policies," 27 *J. Coll. & Univ. Law* 775 (2001). Discusses conflicts of interest in financial, professional, familial, and other areas. Focuses primarily on conflicts related to industry-sponsored research and faculty consulting.
- Hovenkamp, Herbert. *Federal Antitrust Policy: The Law of Competition and Its Practice* (West, 1999). Reviews all aspects of federal antitrust law; discusses relevant litigation and policy issues.
- Kaufman, Hattie E. *Access to Institutions of Higher Education for Students with Disabilities* (National Association of College and University Attorneys, 1998). Discusses the impact of disability discrimination laws and regulations on admissions, accommodations in academic programs, auxiliary aids, financial aid, housing, physical accessibility, and transportation systems. Provides checklists of actions for administrators to take to ensure compliance and avoid liability.
- Kelch, Thomas G. "Animal Experimentation and the First Amendment," 22 *W. New Eng. L. Rev.* 467 (2001). An opponent of the use of animals in scientific research argues that the First Amendment provides no special protection for scientific research, and argues for restrictions on animal experimentation.
- Kirby, Wendy T. "Federal Antitrust Issues Affecting Institutions of Higher Education: An Overview," 11 *J. Coll. & Univ. Law* 345 (1984). A review of general antitrust law principles that apply to colleges and universities. Analyzes the potential antitrust liability of undergraduate institutions in the areas of commercial activities, athletics, accreditation, and joint ventures with private industry; and lists the "exemptions" or "immunities" that may be available to protect institutions threatened with antitrust liability. Includes a bibliography of secondary sources on antitrust law's application to higher education.
- Lape, Laura G. "Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies," 37 *Villanova L. Rev.* 223 (1992). Discusses attempts by universities to control the copyrightable works of professors. Analyzes cases about works made for hire, discusses the effectiveness of university copyright policies, and examines copyright policies at seventy research universities. Includes recommendations about how copyright ownership questions between professors and their institutions should be resolved.
- Lazarus, Richard J. "The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States," 20 *Va. Envtl. L.J.* 75 (2001). Reviews the historical development of environmental law and policy, discusses current environmental policy, and predicts the future development of environmental law. Discusses several areas of continuing controversy, as well as the impact of international trade and development on U.S. environmental law and policy.
- Levine, Robert J. *Ethics and Regulation of Clinical Research* (2d ed., Yale University Press, 1986). Focuses on the ethics of research for administrators, members of institutional review boards, and researchers themselves. Discusses federal regulations, ethical analyses, and specific research projects that use humans as research subjects.
- Loundy, David J. "A Primer on Trademark Law and Internet Addresses," 15 *J. Marshall J. Computer & Info. L.* 465 (1997). Examines trademark law as applied to a variety

- of Internet addressing issues, including domain names and e-mail addresses. Analyzes several recent court opinions relevant to this issue.
- McCarthy, J. Thomas, Schechter, Roger E., & Franklyn, David J. *McCarthy's Desk Encyclopedia of Intellectual Property* (3d ed., Bureau of National Affairs, 2004). A reference guide for lawyers and administrators who work regularly with intellectual property issues. Defines terms from patent, trademark, copyright, trade secret, entertainment, and computer law. Entries are annotated with cases and statutes, regulations, treaties, and bibliographical citations. Includes all recent federal copyright amendments and new legislation.
- McSherry, Corynne. *Who Owns Academic Work?* (Harvard University Press, 2001). Reviews a range of legal issues faced by institutions of higher education regarding the ownership of intellectual property produced by employees and students. Copyright and patent issues are discussed, as well as the role of the Internet in ownership disputes.
- Paradis, Laurence. "Developments in Disability Rights: Title II of the Americans With Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All," 14 *Stan. L. & Pol'y. Rev.* 389 (2003). Examines the effectiveness of Section 504 and the ADA with respect to discrimination against individuals with disabilities who participate in government-funded programs. Reviews judicial interpretation of these laws' requirements, particularly with respect to access to programs, the definitions of "fundamental alteration," "undue burden," and qualification standards for program participation. Also discusses sovereign immunity challenges to the application of these laws to public organizations.
- Patry, William F. *Copyright Law and Practice* (2d ed., Bureau of National Affairs, 1994, with 2000 cumulative supplement). A standard reference on copyright law. Thoroughly treats provisions of domestic copyright law, analyzing both the 1909 and the 1976 Copyright Acts. Includes appendices containing texts of the 1909 and 1976 Acts, Copyright Office regulations, and leading international conventions on copyrights.
- Richmond, Douglas R. "Antitrust and Higher Education: An Overview," 61 *Mo. L. Rev.* 417 (1993). A review of antitrust theory, with special emphasis on the price-fixing charges against several Ivy League schools.
- Rothstein, Laura F. *Disabilities and the Law* (2d. ed., Shepard's/McGraw-Hill, 1997, with annual supplements). A reference guide designed for lawyers, educators, and medical professionals. Includes chapters on the Americans With Disabilities Act, the Rehabilitation Act, and federal and state laws related to disability discrimination, among others. The chapter on higher education discusses admissions, programs and services (including academic modifications and auxiliary services), athletics, health insurance, physical facilities, confidentiality requirements, learning-disabled students, and mentally impaired students.
- Rothstein, Laura. "Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading," 63 *Maryland L. Rev.* 122 (2004). Provides an overview of court decisions and agency opinions, and reviews relevant Supreme Court decisions, assessing their impact on higher education policy. Predicts the direction of future national policy related to disability discrimination in higher education.
- Sermersheim, Michael D. *Environmental Law: Selected Issues for Higher Education Managers and Counsel* (National Association of College and University Attorneys, 2001).

Discusses selected environmental laws and regulations, provides suggested compliance standards used by institutions, as well as sample institutional policies. Includes appendices and lists of references.

- Shea, Lance, Robinson, Frederick, & Parkin, Lara. *Managing Financial Conflicts of Interest in Human Subjects Research* (National Association of College and University Attorneys, 2004). Discusses the range of financial interests that may pose conflicts for academic researchers and/or their sponsors, reviews federal regulations and guidance related to these interests, and provides suggestions for managing conflicts of interests.
- Skitol, Robert A. "The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century," 9 *Cornell J.L. & Pub. Pol'y.* 239 (1999). Provides commentary on the evolution of antitrust policy; argues that recent changes have improved enforcement, but that many inconsistencies and unanswered questions remain.
- Stim, Richard. *Getting Permission: How to License and Clear Copyrighted Materials Online and Off* (2d ed., Nolo, 2004). Discusses fair use, what is meant by the "public domain," and other matters of significance for faculty and other non-attorneys. Includes agreement forms in paper and CD-ROM format.
- Symposium, "The Future of Medicare, Post Great Society and Post Plus-Choice: Legal and Policy Issues," 60 *Wash. & Lee L. Rev.* 1137 (2003). Special issue devoted to Medicare, including Jonathan Oberlander, "The Politics of Medicare Reform"; Marilyn Moon, "Modernizing Medicare's Benefit Structure"; Mark V. Pauly, "What if Technology Never Stops Improving? Medicare's Future Under Continuous Cost Increases"; Thomas H. Stanton, "The Administration of Medicare: A Neglected Issue"; Robert A. Berenson, "Paying for Quality and Doing It Right"; Eleanor D. Kinney, "Medicare Coverage Decision-Making and Appeal Procedures: Can Process Meet the Challenge of New Medical Technology?"
- Symposium, "Legal Regulation of the Internet," 28 *Conn. L. Rev.* 953 (1996). Provides various insights and analyses on the development and regulation of online technology. Contains six articles: M. Ethan Katsh, "Dispute Resolution in Cyberspace"; Julie Cohen, "A Right to Read Anonymously: A Closer Look at 'Copyright Management'"; Mark Lemley, "Antitrust and the Internet Standardization Problem"; Dan Burk, "Federalism in Cyberspace"; Bruce Stanford & Michael Lorenger, "Teaching an Old Dog New Tricks: The First Amendment in an Online World"; and Robert Charles & Jacob Zamansky, "Liability for Online Libel after *Stratton Oakmont v. Prodigy Services, Co.*"
- Tribbensee, Nancy. "Privacy and Security in Higher Education Computing Environments After the USA PATRIOT Act," 30 *J. Coll. & Univ. Law* 337 (2004). Examines the implications of the USA PATRIOT Act for the privacy and security of information stored on campus computer systems. Discusses changes to electronic surveillance law and the implications of the USA PATRIOT Act for constitutional interests. Provides suggestions for improving the security of campus computer systems.
- Wallach, Paul G., Davidson, Jeffery J., Atlas, Mark, & Meade, Kenneth R. *Environmental Requirements for Colleges and Universities* (American Council on Education, 1989). Summarizes eleven areas of federal environmental law, including RCRA, CERCLA, the Clean Water Act, the Hazard Communication Standard, the Toxic Substances Control Act, asbestos issues, underground storage tanks, the Clean Air Act, and the Safe Drinking Water Act.



Yale-Loehr, Stephen (ed.). *Understanding the Immigration Act of 1990* (Federal Publications, 1991). A descriptive and analytical review of the 1990 legislation and its comprehensive overhaul of U.S. immigration law. Each of the thirteen chapters is aimed at a major aspect of the new law. Chapters 3 (employment-based immigrants), 5 (F-1 nonimmigrants), and 6 (H-1B nonimmigrants) will be particularly helpful to higher education institutions. Also includes the full text of the 1990 Act.

See Selected Annotated Bibliographies for Chapter Four, Section 4.6, for references on federal regulation of employment generally, and Chapter Five, Section 5.2, for references on federal regulation of employment discrimination.

### ***Sec. 13.3 (Federal Taxation of Postsecondary Education)***

Ashford, Deborah, & Frank, Robert. *Lobbying and the Law: A Guide to Federal Tax Law Limitations on Legislative and Political Activities by Nonprofit Organizations* (2d ed., Hogan & Hartson/Frank & Company, 1990). Covers participation in political campaigns, direct and grass-roots lobbying, mass media communications, and activities excluded from the definition of lobbying. An appendix includes an overview of the lobbying laws of every state.

Bittker, Boris, & Rahdert, George K. "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L.J.* 299 (1976). An overview of issues regarding the federal tax status of nonprofit entities. Discusses the unrelated business income tax, the taxation of capital gains and investment income of private foundations, and the tax status of organizations that engage in political activity. Also contains sections on the exemption of educational institutions and on appropriate methods by which to measure the income of nonprofit entities.

Colombo, John D. "Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)," 35 *Ariz. L. Rev.* 841 (1993). Examines federal and state exemptions for private educational institutions. Discusses the rationales presented to justify tax exemption for charitable institutions in general, including the donative theory that would limit exemption to those entities receiving a certain percentage of revenues from donations. Also discusses both the expansive definition of "education" and the manner in which the IRS and state taxing authorities circumscribe this definition. Includes five tables, setting out the total charitable donations received by various types of postsecondary institutions.

Harding, Bertrand M., Jr. "Federal Tax Issues Raised by International Study Abroad Programs," 27 *J. Coll. & Univ. Law* 207 (2000). Examines the domestic and foreign tax implications of study abroad programs administered by American colleges and universities. Author suggests how programs can be structured to minimize adverse tax consequences and provides an overview of the personal income tax consequences for employees who participate in a study abroad program outside of the United States, including implications for American employees who elect to file for a "foreign earned income exclusion."

Harding, Bertrand M., Jr. *The Tax Law of Colleges and Universities* (Wiley, 1997). Provides a comprehensive examination of the tax problems and issues faced by colleges and universities. Topics covered include unrelated business income, employment taxes, IRS audits, and other related topics. Outlines tax planning and compliance aspects of managing the institution's business.

- Harding, Bertrand, Jr., & Peterson, Norm. *U.S. Taxation of International Students and Scholars: A Manual for Advisers and Administrators* (rev. ed., National Association for Foreign Student Affairs, 1993). Practical advice on the taxability of scholarships, fellowships, living allowances, and travel grants for foreign students and scholars, as well as the withholding and reporting requirements imposed on their institutions.
- Hopkins, Bruce. *The Law of Tax-Exempt Organizations* (7th ed., Wiley, 1998, and periodic supp.). A reference volume, for managers and administrators as well as counsel, that examines the pertinent federal law affecting the different types of nonprofit organizations, including colleges and universities. Emphasis is on how to obtain and maintain tax-exempt status. Contains citations to Internal Revenue Code provisions, Treasury Department revenue rulings, and court decisions.
- Hopkins, Bruce. *The Nonprofit Counsel* (Wiley). A monthly newsletter that analyzes current developments in Congress, the Treasury Department, the IRS, and the courts regarding taxation of nonprofit organizations and related issues. See also entry in Selected Annotated Bibliography for Section 12.3.
- Jones, Darryll K. "Tax Exemption Issues Facing Academic Health Centers in the Managed Care Environment," 24 *J. Coll. & Univ. Law* 261 (1997). Discusses and analyzes the tax statutes, regulations, IRS interpretations, and case law "applicable to operating strategies employed by academic health centers adapting to the managed care environment." Operating strategies discussed include "primary care physician recruitment, primary care practice acquisitions, joint operating agreements, joint ventures and tax-exempt health maintenance organizations."
- Kaplan, Richard L. "Intercollegiate Athletics and the Unrelated Business Income Tax," 80 *Columbia L. Rev.* 1430 (1980). Reviews the unrelated business income tax as it affects the postsecondary institution's athletic program. Author argues that many schools' intercollegiate athletic programs have taken on the appearance of business activities unrelated to the institution's educational mission, and thus may be liable to taxation. Article also includes broader discussion of the unrelated business income tax in the higher education context.
- Kelly, Marci. "Financing Higher Education: Federal Income-Tax Consequences," 17 *J. Coll. & Univ. Law* 307 (1991). Discusses federal tax law as it applies to the financing of education through scholarships, prizes, loans, and student employment. Provides guidance for administrators in counseling students, structuring new financial aid programs, and administering existing programs.
- National Association of College and University Business Officers. *A Guide to Federal Tax Issues for Colleges and Universities* (NACUBO, 1999). In thirteen chapters, discusses numerous tax topics, from basic to highly complex, including UBIT, public access to the institution's tax forms, and preparing for IRS audits. Updated monthly and quarterly.
- Roady, Celia & others (eds.). *A Guide to Federal Tax Issues for Colleges and Universities* (National Association of College and University Business Officers). A looseleaf binder updated quarterly and written by various tax experts specifically for college and university "business officers, auditors, and attorneys." Provides analysis and guidance on a wide range of tax subjects. Includes "checklists, flow charts, and forms." A monthly newsletter (by Bertrand Harding) is also available.
- Symposium, "Federal Taxation and Charitable Organizations," 39 *Law & Contemp. Probs.* 1-262 (1975). A sophisticated collection of articles on federal tax policy and law concerning charitable organizations. Includes J. H. Levi on "Financing

Education and the Effects of the Tax Law,” which discusses the impact of the Internal Revenue Code’s charitable deduction provisions on postsecondary institutions; and J. F. Kirkwood & D. S. Mundel on “The Role of Tax Policy in Federal Support for Higher Education,” which examines federal tax policy regarding higher education and compares tax programs with spending and regulatory programs.

Vance, Deborah. *U.S. Federal Income Tax Guide for International Students and Scholars* (rev. ed., National Association for Foreign Student Affairs, 1994). Provides a layperson’s guide to U.S. taxation and filing requirements for foreign students and scholars.

### **Sec. 13.4 (Federal Aid-to-Education Programs)**

Advisory Commission on Intergovernmental Relations. *The Evolution of a Problematic Partnership: The Feds and Higher Education* (Advisory Commission on Intergovernmental Relations, 1981). Examines the history and growth of the federal government’s involvement in higher education. Chapters include “The Scope of Federal Involvement in Higher Education,” “The Evolution of a Federal Role: 1787–1958,” “Beginnings of a New Federal Role in Higher Education: The National Defense Education Act,” “A Direct Federal Role Established: The Higher Education Acts of 1963 and 1965,” “Equal Opportunity Preminent: The 1972 Higher Education Amendments,” and “A Growing Regulatory Presence.” Contains various figures, graphs, and tables charting major developments in the relationship between the federal government and higher education.

Arriola, Elvia. “Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights,” 24 *St. Louis U. Pub. L. Rev.* 149 (2005). Describes the litigation challenging the Solomon Amendment; provides historical context for the clash between First Amendment concerns and military priorities; and discusses the role of the First Amendment in the debate over gay marriage and its relationship to the tension between academic freedom and military priorities.

Lacovara, Philip. “How Far Can the Federal Camel Slip Under the Academic Tent?” 4 *J. Coll. & Univ. Law* 233 (1977). A constitutional analysis, in the postsecondary education context, of the federal government’s spending power and potential First Amendment and due process limitations on that power. Outdated in its case law, but a good source for the foundational principles.

Olivas, Michael. *The Tribally Controlled Community College Assistance Act of 1978: The Failure of Federal Indian Higher Education Policy*, IHELG Monograph 82-1 (Institute for Higher Education Law and Governance, University of Houston, 1982). An analysis of the Act’s design flaws, the bureaucratic delays in its implementation, and the impoverished condition of the tribal colleges that are the Act’s intended beneficiaries. Includes recommendations for improving the Act and its administration. Another version of this paper is published in 9 *Am. Indian L. Rev.* 219 (1981).

O’Neil, Robert M. “Artists, Grants and Rights: The NEA Controversy Revisited,” 9 *N.Y.L. Sch. J. Hum. Rts.* 85 (1991). Considers the viability of constitutional challenges to restrictions on the use of grant funds administered by the National Endowment for the Arts (NEA). Reviews the First Amendment’s applicability to NEA grants, discusses the Helms amendment and congressional changes that followed, and analyzes recent cases challenging NEA grant restrictions on First Amendment grounds.

- O'Neil, Robert M. "God and Government at Yale: The Limits of Federal Regulation of Higher Education," 44 *U. Cincinnati L. Rev.* 525 (1975). An analysis of constitutional and nonconstitutional issues regarding the extent of federal authority to regulate higher education. Outdated in its case law, but another good source for the foundational principles.
- Palmer, Carolyn, & Gehring, Donald (eds.). *A Handbook for Complying with the Program and Review Requirements of the 1989 Amendments to the Drug-Free Schools and Communities Act* (College Administration Publications, 1992). A how-to manual for college administrators who are setting up or reviewing on-campus drug and alcohol programs in accordance with federal law. The handbook also provides a guide, supplemented by a comprehensive appendix, to federal and private funding sources, research and studies on the subject, organizations concerned with drug-free education, and model standards and guidelines.
- Wallick, Robert D., & Chamblee, Daryl A. "Bridling the Trojan Horse: Rights and Remedies of Colleges and Universities Under Federal Grant-Type Assistance Programs," 4 *J. Coll. & Univ. Law* 241 (1977). Discusses legal and policy aspects of federal assistance to postsecondary institutions. Suggests steps that legal counsel might take to protect the interests of institutions in grant programs.
- Whitehead, Kenneth D. *Catholic Colleges and Federal Funding* (Ignatius Press, 1988). Examines the question whether religiously affiliated colleges and universities must safeguard "academic freedom" and have "institutional autonomy" in order to be eligible for federal aid. Discusses eligibility requirements (such as accreditation), accrediting agencies' policies, the current understanding of academic freedom and the role of the AAUP, and parallel issues regarding state (rather than federal) aid for religiously affiliated institutions. Written by the then deputy assistant secretary for higher education programs in the U.S. Department of Education.
- See the Constance Cook and the Michael Parsons entries in bibliography for Chapter 14, Section 14.1.

### ***Sec. 13.5 (Civil Rights Compliance)***

- Baxter, Felix V. "The Affirmative Duty to Desegregate Institutions of Higher Education—Defining the Role of the Traditionally Black College," 11 *J. Law & Educ.* 1 (1982). Provides "an analytical framework to assess, in a consistent fashion, the role which [black] institutions should play in a unitary system." Reviews various legal strategies to deflect the "very real threat to black efforts to desegregate state systems of higher education."
- Bell, Derrick A., Jr. "Black Colleges and the Desegregation Dilemma," 28 *Emory L.J.* 949 (1979). Reviews the development of desegregation law and its impact on black colleges. Author argues that black colleges continue to provide a special service to black Americans and that litigation and legislation should be tailored to accommodate and promote this service.
- Brown-Scott, Wendy. "Race Consciousness in Higher Education: Does 'Sound Educational Policy' Support the Continued Existence of Historically Black Colleges?" 43 *Emory L.J.* 1 (1994). Discusses the pedagogic and cultural significance of historically black institutions (HBIs), traces why HBIs developed, and explains their still important role in the United States. Argues that requiring racial balance or race-neutral remedies does not constitute "sound educational policy" under the *Fordice*

- standard, and that racial identifiability is not per se harmful for colleges or their students.
- Fossey, Richard (ed.). *Race, the Courts, and Equal Education: The Limits of the Law* (AMS Press, 1998). Contains chapters on desegregation litigation both K–12 and higher education. Includes discussion of the post-*Fordice* legal environment, race-based financial aid, and a consideration of affirmative action.
- Neiger, Jan Alan. “Actual Knowledge Under *Gebser v. Lago Vista*: Evidence of the Court’s Deliberate Indifference or an Appropriate Response for Finding Institutional Liability?” 26 *J. Coll. & Univ. Law* 1 (1999). Provides a comprehensive review and analysis of Title IX’s application to sexual harassment, with a particular focus on the *Gebser* case. Traces Title IX developments from their origin in Title VII law, to the *Franklin* case, to the conflicts among the lower federal courts, to OCR’s “Sexual Harassment Guidance,” to *Gebser*, and finally to the lower federal courts’ initial attempts to apply the *Gebser* liability standards. Author is generally supportive of the majority’s opinion in *Gebser*.
- O’Brien, Molly. “Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia,” 8 *Wm. & Mary Bill Rts. J.* 1 (1999). Reviews the history of racial segregation and desegregation in Georgia’s system of public higher education, including the establishment of dual systems of higher education, litigation by both black and white plaintiffs to change funding and enrollment patterns in Georgia public colleges and universities, and argues that the “affirmative duty” concept articulated in *Fordice* is inadequate to foster desegregation and imperils traditionally black colleges and universities.
- Preer, Jean. “Lawyers v. Educators: Changing Perceptions of Desegregation in Public Higher Education,” 1 *N.C. Central L.J.* 74 (1979), reprinted in 53 *J. Higher Educ.* 119 (1982). Examines the tension between lawyers’ and educators’ perceptions of desegregation in public universities and colleges. Discusses three historical examples: the Morrill Act of 1890, “the reactions of civil rights lawyers and educators to the regional educational compact of the 1940s,” and the “legal and educational paradoxes” of *Adams v. Richardson* (see Sections 13.5.2 & 13.5.8 of this book). Author concludes that “both lawyers and educators need to expand their vision.” An extended version of these themes appears in Jean Preer, *Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education* (Greenwood, 1982), especially rich in historical materials.
- Rothstein, Laura. “Reflections on Disability Discrimination Policy—25 Years,” 22 *U. Ark. L. Rev.* 147 (2000). Traces the development of disability policy over the last quarter of the twentieth century, analyzing the roles of the courts, the enforcement agencies, and Congress. Responds to claims that disability policy limits the efficient function of the workplace or the educational arena.
- Rutherford, Lisa, & Jewett, Cynthia. *What to Do When the U.S. Office of Civil Rights Comes to Campus* (National Association of College and University Attorneys, 2005). Describes the enforcement process of the Office of Civil Rights, from the filing of a complaint through the investigation and resolution of the complaint. Provides advice on how administrators and counsel should respond to a complaint, how to prepare for an investigation, OCR’s authority to review documents and interview witnesses, and issues to consider in reaching a resolution of the complaint.
- Shuck, Peter H. “The Graying of Civil Rights Law: The Age Discrimination Act of 1975,” 89 *Yale L.J.* 27 (1979). A theoretical study of the Age Discrimination Act.

Article is divided into four parts: “The ADA and the Analogy to Title VI”; “The Political Context and Legislative History of the ADA”; “Interpreting the ADA: Reading Shadows on Walls” (which presents a detailed explication of the statute’s ambiguities and built-in exceptions); and “The Process, Substance, and Form of Age Discrimination Policy.” Author is critical of the ADA and furnishes a trenchant analysis of its inherent difficulties.

Sum, Paul E., Light, Steven Andrew, & King, Ronald F. “Race, Reform, and Desegregation in Mississippi Higher Education: Historically Black Institutions after *United States v. Fordice*,” 29 *Law & Soc. Inquiry* 403 (2004). Beginning with the requirements of *Fordice*, the authors discuss the difficulties that states have in implementing desegregation. Criticizes the precept that the “success” of desegregation rests on increasing the proportions of white students in historically black institutions, given their findings concerning the resistance of white students to attend historically black institutions.

Tollett, Kenneth S., Sr. “The Fate of Minority-Based Institutions After *Fordice*: An Essay,” 13 *Rev. Litig.* 447 (1994). Discusses seven significant functions of historically black colleges and argues that their continued existence is consistent with Supreme Court rulings.

Ware, Leland. “The Most Visible Vestige: Black Colleges After *Fordice*,” 35 *B.C. L. Rev.* 633 (1994). Examines whether there is a continuing justification for publicly funded black colleges, and whether the operation of these colleges as racially distinct institutions can be justified in light of the principles of *Fordice* and *Brown v. Board of Education*.

Wegner, Judith W. “The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973,” 69 *Cornell L. Rev.* 401 (1984). Author compares Section 504 to other antidiscrimination measures and “discusses the extent to which traditional antidiscrimination principles . . . must be reshaped” to protect people with disabilities from discriminatory practices. Also discusses coverage and enforcement issues and analyzes the elements of the plaintiff’s *prima facie* case and the defendant’s defenses in situations where a disabled individual challenges an exclusion from participation in a program, the denial of benefits of a program, or unequal treatment within a program. Includes a section analyzing the U.S. Supreme Court’s decision in *Southeastern Community College v. Davis*.

Williams, John B., IV (ed.). *Desegregating America’s Colleges and Universities: Title VI Regulation of Higher Education* (Teachers College Press, 1987). Offers a range of policy proposals aimed at increasing the proportion of blacks among college students and faculty. Authors—including Barbara Newell, Larry Leslie, James Blackwood, Charles Willie, and Edgar Epps—discuss trends in black enrollment and degree attainment at the undergraduate and graduate levels, financial inequities in previously segregated systems of public postsecondary education, achievement of black and white students in predominantly white and predominantly black institutions, and the future of Title VI enforcement. The book is intended for administrators, faculty, policy makers, and researchers.

Williams, John B. *Race Discrimination in Public Higher Education: Interpreting Federal Civil Rights Enforcement, 1964–1996* (Praeger, 1997). Traces the history of resistance to desegregation by public systems of higher education in the South. Examines the history of desegregation litigation in Georgia, Louisiana, Alabama, and

Mississippi, including an analysis of the implementation of the U.S. Supreme Court's *Fordice* ruling.

Wilson, Reginald (ed.). *Race and Equity in Higher Education* (American Council on Education, 1983). Contains five essays produced by the American Council on Education-Aspen Institute Seminar on the Desegregation of Higher Education. Essays (by J. Egerton, J. E. Blackwell, J. L. Prestage, P. R. Dimond, and A. L. Berrian) examine the history and politics of higher education desegregation, provide data on demographic changes in recent decades, analyze constitutional standards and remedies, evaluate desegregation plans of states involved in *Adams v. Richardson* litigation (see Sections 13.5.2 & 13.5.8), and propose new policies and agendas.

### ***Sec. 13.6 (Dealing with the Federal Government)***

Administrative Conference of the United States. *Federal Administrative Procedure Sourcebook: Statutes and Related Materials* (2d ed., Office of the Chairman, Administrative Conference, 1992). A handy guide that collects together materials on the Administrative Procedure Act, Equal Access to Justice Act, Federal Advisory Committee Act, Freedom of Information Act, Negotiated Rulemaking Act, Privacy Act, Regulatory Flexibility Act, and other legislation regarding the administrative process. Includes texts of the Acts, legislative histories, an overview of each Act, agency regulations and Executive Orders, citations and bibliographies, and materials on judicial review of federal agency decisions.

Brademus, John. *The Politics of Education* (University of Oklahoma Press, 1987). Discusses the federal role in education, the legislative process with reference to education, contemporary themes and concerns regarding education policy, and the relationship between education and democracy. Written "from a highly personal perspective" by a former congressman who became president of a large private university after leaving Congress.

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Hajian, Tamara, Sizer, Judith R., & Ambash, Joseph W. *Record Keeping and Reporting Requirements for Independent and Public Colleges and Universities* (National Association of College and University Attorneys, 1998). Summarizes relevant federal laws governing record keeping, reporting requirements, and retention of records, including student and employee records, student financial aid, grants and sponsored research, law enforcement, licensure and accreditation, and other records required by the federal government. Available in hard copy or electronic form.

Lisman, Natasha. "Freedom of Scientific Research: A Frontier Issue in First Amendment Law," 35 *Boston Bar J.* 4 (November–December 1991). Author argues "that the development of scientific knowledge is among the vital interests protected by the First Amendment, and that the very nature of the process by which science

creates and advances scientific knowledge dictates that the First Amendment protections apply not only to the scientific expression but also to scientific experimentation.”

- Mintz, Benjamin, & Miller, Nancy. *A Guide to Federal Agency Rulemaking* (2d ed., Office of the Chairman, Administrative Conference of the United States, 1991). Provides comprehensive explanation and analysis of federal agency rule-making processes, including judicial review of rule making. Includes discussion of the Administrative Flexibility Act, the Negotiated Rulemaking Act of 1990, and the Paperwork Reduction Act.
- Steadman, John M., Schwartz, David, & Jacoby, Sidney B. *Litigation with the Federal Government* (3d ed. by Urban Lester & Michael Noone, American Law Institute/American Bar Association, 1994). An overview and analysis of how to sue the federal government and handle the problems encountered in such suits. Includes extensive discussion of the Federal Tort Claims Act, the Tucker Act (for certain claims based on a federal statute or regulation or on an express or implied contract), the Contract Disputes Act of 1978, and the Equal Access to Justice Act. Also discusses the process of settling cases against the federal government and the remnants of the sovereign immunity doctrine that still pose some barriers to suing the federal government.
- Youngers, Jane, & Norris, Julie T. *Managing Federal Grants* (National Council of University Research Administrators and National Association of College and University Business Officers, n.d., includes monthly newsletters and quarterly updates). A thorough reference guide that covers all steps in the grant process from pre-solicitation, application, and agency review through administering the grant, intellectual property issues, and closing out the grant. Available by subscription.
- See the Lacovara, O’Neil (“God and Government”), and Wallick & Chamblee entries in Bibliography for Section 13.4.



PART SIX

THE COLLEGE AND  
EXTERNAL PRIVATE  
ENTITIES



# 14

## The College and the Education Associations

### *Sec. 14.1. Overview of the Education Associations*

The myriad of associations related, either wholly or in part, to postsecondary education exemplifies the diversity of missions, structure, and program mix of American colleges and universities. From the American Council on Education (ACE), which monitors and informs college presidents about a variety of issues affecting colleges and universities generally, to the League for Innovation in the Community Colleges, a small group that promotes new technology in community colleges, these associations perform numerous functions on behalf of all, some, or a few specialized institutions. The Web site of the U.S. Department of Education (ED) contains a searchable “Education Resources Information Directory” listing nearly three thousand organizations, related to either K–12 or postsecondary education, that is updated at least annually (available at <http://wdcrobcolp01.ed.gov/Programs/EROD/>). Although many of the associations are located in Washington, D.C., others are located in various cities throughout the United States. Education associations exist at the state level as well, particularly those whose members are institutions or boards of trustees.

Several education associations have institutions as members, and focus on monitoring and lobbying for (or against) federal legislation and regulatory changes that affect postsecondary education. Those institutional-membership organizations are the American Council on Education (<http://www.acenet.org>), the American Association of Community Colleges (<http://www.aacc.nche.edu>), the American Association of State Colleges and Universities (<http://www.aascu.org>), the Association of American Universities (<http://www.aau.edu>), the National Association of State Universities and Land-Grant Colleges

(<http://www.nasulgc.org>), and the National Association of Independent Colleges and Universities (<http://www.naicu.edu>).

Other education associations, such as the American Association of University Professors (AAUP) (<http://www.aaup.org>) and the National Association of Student Personnel Administrators (NASPA) (<http://www.naspa.org>), have individuals as members, and focus, at least in part, on the professional development of their members and the advancement of the profession. The “National Academies,” consisting of the National Academy of Sciences (<http://www.nas.edu>), the National Research Council (<http://www.nationalacademies.org/nrc>), the National Academy of Engineering (<http://www.nae.edu>), and the Institute of Medicine (<http://www.iom.edu>), are private, nonprofit institutions that “provide science, technology and health policy advice under a congressional charter,” according to their Web site. Membership in the National Academies is by election by current members. The American Council of Learned Societies (<http://www.acls.org>) provides funding for research in the humanities and social sciences, and the American Association for the Advancement of Science advances the interests of science and publishes a journal, books, newsletters, and reports.

Regardless of whether their members are institutions or individuals, most of these organizations fulfill multiple purposes. Many, particularly those located in the nation’s capital, engage in lobbying activities, attempting to influence congressional action or the regulatory activities of executive branch agencies. Their representatives may advise congressional staff in drafting legislation and ascertaining its impact on postsecondary education; they may also appear before congressional committees or assist congressional staff in inviting others to appear. They may attend agency meetings and hearings on draft regulations, to make drafting suggestions and to explain the implications of these regulations for postsecondary education. The state-level equivalents of the education associations perform similar activities with regard to state legislation and regulations. (For a discussion of the lobbying activities and influence of the education associations, see Chapters Five and Six of the Cook entry in the Selected Annotated Bibliography for this Section.) Many associations develop statements of policy on good professional practice and other matters for their constituencies. The statements promulgated by the American Association of University Professors, for instance, have had a substantial impact on the status of faculty on many campuses and on the judicial interpretation of “national custom and usage” in faculty employment relations (see Section 14.5).

Education and training, and information sharing, are significant activities of the education associations as well. Most have annual conferences, and many produce publications to inform and update their constituencies. Many serve an important monitoring function for their members, particularly with regard to new legislative, administrative, and judicial developments. In addition, most agencies have Web sites on which they post recent developments in the law and regulatory activities, standards of good practice, publications, and other important materials.

Many associations have special interests or expertise regarding the legal issues in this book, and are excellent sources of legal information and law-related conferences and workshops. The American Council on Education, for example, prepares important analyses and alerts on current legal issues, especially those concerning congressional legislation and legislative proposals. The National Association of Student Personnel Administrators prepares a monthly “Legal Issues Update” that is sent electronically to NASPA members. The Association for Student Judicial Affairs (<http://asja.tamu.edu>) has an annual national conference, regional gatherings, and a summer institute at which legal issues of interest to personnel responsible for campus judicial affairs are discussed. And the National Association of College and University Attorneys (NACUA) (<http://www.nacua.org>) provides a comprehensive array of services for member institutions and the attorneys who represent them, as well as for other “associate” members.

Some of the associations also act as *amici curiae*, or “friends of the court,” in litigation affecting the interests of their members. When ongoing litigation affects the interests of postsecondary education generally, or a large group of institutions, many of the education organizations often will band together to submit an *amicus* brief, particularly if the case is before the U.S. Supreme Court. The associations have, on occasion, also provided expert witnesses to explain academic custom and practice, or to interpret the academic community’s “general understanding” of important concepts such as tenure and academic freedom.

In addition, some associations perform the critical function of accrediting institutions or particular academic programs within institutions. The U.S. Department of Education relies on these private, nonprofit accrediting actions as a basis for certifying an institution’s eligibility to participate in federal aid programs (see Section 14.3.3). The accrediting associations also play a significant role in the higher education community’s self-regulation.

In their roles as monitors, quasi-regulators, or accreditors of higher education institutions, the education associations may make decisions that precipitate litigation against them by a college or university. For example, on many occasions a college or university has sued the National Collegiate Athletic Association (NCAA, <http://www.ncaa.org>) over its regulation of college athletics (see Section 14.4). Institutions have also sued accrediting associations to challenge a withdrawal, threatened withdrawal, or denial of accreditation (see Section 14.3.2).

The Council for the Advancement of Standards (CAS), founded in 1979, is a consortium of thirty-one higher education organizations. CAS was created to establish, disseminate, and advocate professional standards and guidelines for higher education programs and services. Member organizations are listed on CAS’s homepage (available at <http://www.cas.edu>). The organization has developed standards and guidelines for professional practice in student affairs as well as other institutional functions; these standards and guidelines are useful for institutional self-assessment and accountability purposes.

The education associations are a source of information, assistance, and practical advice for colleges and universities, and for members of the academic community, particularly with regard to federal regulation and with regard to professional and ethical practices. They provide services and expertise that few institutions have the resources to provide for themselves, and a network of colleagues with similar interests and concerns.<sup>1</sup>

### ***Sec. 14.2. Applicable Legal Principles***

The various education associations described in Section 14.1 are private rather than governmental entities. Being private, they are not created by and do not owe their existence directly to state and federal constitutions and authorizing legislation, as do federal, state, and local government agencies. Rather, they are created by the actions of private individuals or groups, and their legal status is shaped by state corporation law and the common law of “voluntary associations.” These associations thus have whatever powers are set forth in their articles of incorporation or association and in the accompanying bylaws and rules. These powers are exercised through organizational structures and enforced through private sanctions, which are specified in the articles, bylaws, and rules. Some education associations are membership organizations that exercise power through their members (either institutions or individuals), or that extend particular prerogatives to and impose particular responsibilities on members. In such situations the articles, bylaws, and rules will also establish the qualifications for obtaining and maintaining membership.

Education associations may also develop various kinds of working relationships with one another. In such cases, memoranda of understanding, consortium agreements, and other such documents may also become part of the basic governing law for the signatory associations. These documents will often have the legal status of contracts and will therefore be interpreted and enforced, as necessary, according to the common law of contract.

State and federal law restricts the powers of private associations in a number of important ways. State corporation law may restrict the structures and procedures through which an association may operate. The common law of

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<sup>1</sup>A partial listing of education associations and their Web sites, in addition to those mentioned in the text of this section, include American Association of Collegiate Registrars and Admissions Officers, <http://www.aacrao.org>; American College Counseling Association, <http://www.collegecounseling.org>; American College Personnel Association, <http://www.acpa.nche.edu>; Association of American Colleges and Universities, <http://www.aacu-edu.org>; Association of American Medical Colleges, <http://www.aamc.org>; Association of Catholic Colleges and Universities, <http://www.accunet.org>; Association of College and University Housing Officers—International, <http://www.acuho.ohio-state.edu>; Association of Community College Trustees, <http://www.acct.org>; University Risk Management and Insurance Association, <http://www.urmia.org>; Association of Governing Boards of Universities and Colleges, <http://www.agb.org>; Association of Jesuit Colleges and Universities, <http://www.ajcunet.edu>; College and University Professional Association for Human Resources, <http://www.cupahr.org>; Council for Opportunity in Education, <http://www.trioprograms.org>.

voluntary associations may superimpose upon the association's own standards and procedures a general obligation to act reasonably and fairly, especially toward its members, and may also require that the association follow its own rules; judicial review may be available to persons or organizations harmed by an association's failure to do so (see Sections 14.3.2.2 & 14.4.5 below).<sup>2</sup> Federal and state antitrust law may restrict associational activities that have anticompetitive or monopolistic effects (see Sections 14.3.2.4 & 14.4.4 below). Other statutes may occasionally impose special requirements on certain associations (see, for example, Sections 14.3.3 & 14.4.6 below). In the past, state and federal constitutional provisions protecting individual rights have also been applied to limit the authority of some private associations; under current trends, however, these provisions will seldom apply to private education associations like those that are the focus of this chapter (see Sections 14.3.2.3 & 14.4.2 below; and compare Section 1.5.2).

Many of the suits against education associations have been brought by institutions or individuals who were rejected or terminated as members or who were sanctioned by an association. These cases have been a testing ground for the development of legal restrictions on the powers of private associations. Such suits are usually brought by institutions seeking to assert their rights as members or prospective members of the association (see, for example, the cases in Section 14.3.2). But suits are also occasionally brought *against* an institution when it sponsors a chapter of, or is otherwise affiliated with, an education association in which a student, faculty member, or staff member seeks to attain or maintain membership.

In *Blatt v. University of Southern California*, 85 Cal. Rptr. 601 (Cal. Ct. App. 1970), for instance, the plaintiff was a law student who was rejected for membership in his school's chapter of the Order of the Coif, a national legal honorary society. The student challenged his rejection on grounds that he had fulfilled all the prerequisites for membership in the society. He also asserted that the denial of membership would affect his financial and professional status—that is, his ability to obtain a higher-paying job and to attain the respect and prestige that membership affords. Holding that denial of membership in such an organization is not subject to judicial review unless the denial actually prevents the individual from attaining employment in a particular occupation or from practicing a specialty, the court rejected the plaintiff's request for an order compelling his admission:

Membership in the Order does not give a member the right to practice the profession of law. It does not signify qualification for any specialized field of practice. It has no direct bearing on the number or type of clients that the attorney-member might have or on the income he will make in his professional practice. It does not affect his basic right to earn a living. We hold that in the

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<sup>2</sup>For an extended analysis of common law principles and judicial review in an analogous area of concern, see William Kaplin, "Professional Power and Judicial Review: The Health Professions," 44 *Geo. Wash. L. Rev.* 710, 716–50 (1976).

absence of allegations of sufficient facts of arbitrary or discriminatory action, membership in the Order is an honor best determined by those in the academic field without judicial interference. Plaintiff's allegations of arbitrary or discriminatory action on the part of the election committee are insufficient to state a cause of action. No justiciable issue has been presented [85 Cal. Rptr. at 606].

The court also determined that, under the society's rules, the fulfillment of membership prerequisites does not entitle an individual to membership but only to a consideration of his or her application. According to the court, "The complaint alleges that [the plaintiff's] name was on the eligible list and did receive consideration by the election committee under the general standards set forth in the Order's constitution. This is all that the individual defendants promised. The facts pleaded do not support the alleged conclusion that there was a breach of contract."

Occasionally, an educational association may itself seek to bring suit. The suit could be against a member or chapter of the association, or against another association with which it has a contractual relationship. But more likely, and increasingly, associations as plaintiffs seek to sue an agency of government. An accrediting association whose federal recognition has been suspended or terminated, for example, may sue the U.S. Secretary of Education (see Section 14.3.3). In some situations, an association may sue a government agency on behalf of its members who are regulated or funded (or whose institutions are regulated or funded) by the agency. The association's "standing to sue" will be an issue in some of these cases. In *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), for instance, the court held that the plaintiff associations did not have standing to challenge the department's implementation of its Title IX Policy Interpretation on intercollegiate athletes (see Section 10.4.6 of this book) on behalf of coaches, athletes, and alumni whose institutions had eliminated their men's varsity wrestling teams.

### ***Sec. 14.3. The College and the Accrediting Agencies***

***14.3.1. Overview of accrediting agencies.*** Among the associations with which postsecondary administrators must deal, the ones most concerned with the educational missions of institutions and programs are the educational accrediting agencies. Educational accreditation, conducted by private associations rather than by a ministry of education or other government agency, is a development unique to the United States. As the system has evolved, the private accrediting agencies have assumed an important role in the development and maintenance of standards for postsecondary education and have gained considerable influence over individual institutions and programs seeking to obtain or preserve the accreditation that only these agencies may bestow.



There are two types of accreditation: institutional (or “regional”) accreditation and program (or “specialized”) accreditation. Institutional accreditation applies to the entire institution and all its programs, departments, and schools; program accreditation applies to a particular school, department, or program within the institution, such as a school of medicine or law, a department of chemistry, or a program in medical technology. Program accreditation may also apply to an entire institution if it is a free-standing, specialized institution, such as a business school or technical school, whose curriculum is all in the same program area.

Institutional accreditation is granted by six regional agencies—membership associations composed of the accredited institutions in each region. Since each regional agency covers a separate, defined part of the country, each institution is subject to the jurisdiction of only one such agency. Program accreditation is granted by a multitude of proliferating “specialized” (or “professional” or “occupational”) accrediting agencies, which may or may not be membership associations and are often sponsored by the particular profession or occupation whose educational programs are being accredited. The jurisdiction of these specialized agencies is nationwide.

From 1975 until 1993, a private organization, the Council on Postsecondary Accreditation (COPA), operated a nongovernmental recognition process for both regional and specialized agencies and served as their representative at the national level. The organization disbanded effective December 31, 1993. A successor organization to COPA, the Council for Higher Education Accreditation (CHEA), began operations in 1996 through the initiative of a group of college presidents. See generally Harland Bloland (ed.), *Creating the Council for Higher Education Accreditation* (Greenwood, 2001). CHEA oversees both institutional (regional) and program (specialized) accreditation. (Its purposes and structure, and the challenges it faces, are reviewed in Beth McMurtrie, “Assessing the Group That Assesses Accreditation,” *Chron. Higher Educ.*, November 12, 1999, A41.)

Being private, accrediting agencies owe their existence and legal status to state corporation law and to the common law of “voluntary” (or private) associations (see Section 14.2). Their powers are enforced through private sanctions embodied in their articles, bylaws, and rules, the primary sanctions being the withdrawal and denial of accreditation. The force of these private sanctions is greatly enhanced, however, by the extensive public and private reliance on accrediting agencies’ decisions.

The federal government relies in part on these agencies to identify the institutions and programs eligible for a wide range of aid-to-education programs, particularly those administered by the U.S. Department of Education (see Section 14.3.3). The states demonstrate their reliance on the agencies’ assessments when they exempt accredited institutions or programs from various licensing or other regulatory requirements (see Section 12.3). Some states also use accreditation to determine students’ or institutions’ eligibility under their own state funding programs (see, for example, Fla. Stat. Ann. §§ 240.4022 & 240.605); and

the state approving agencies operating under contract with the Department of Veterans Affairs depend on accreditation in approving courses for veterans' programs (38 U.S.C. § 3675(a)(2)). State professional and occupational licensing boards rely on the accrediting agencies by making graduation from an accredited school or program a prerequisite to obtaining a license to practice in the state (see, for example, Cal. Bus. & Prof. Code § 1260). Some states also rely on an institution's accredited status in granting tax exemptions (see, for example, Idaho Code § 63-3029A and Ind. Code § 6-3-3-5(d)).

Private professional societies may use professional accreditation in determining who is eligible for membership. Students, parents, and guidance counselors may employ accreditation as one criterion in choosing a school. And postsecondary institutions themselves often rely on accreditation in determining the acceptability of transfer credits, and in determining what academic credentials will qualify persons to apply for particular academic positions. In *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631 (5th Cir. 1985), for example, the court upheld the defendant's requirement that applicants for certain faculty librarian positions must hold a master's degree from a program accredited by the American Library Association.

Because of this extensive public and private reliance on accrediting agencies, postsecondary administrators usually consider it necessary to maintain both institutional and program accreditation even if they disagree with an association's standards or evaluation procedures. Consequently, administrators and counsel must be prepared to maintain working relationships with a multitude of agencies and should understand the legal limits on the agencies' powers, the legal or professional leverage an institution might apply if an agency threatens denial or withdrawal of accreditation, and the legal and practical consequences to the institution and its students if the institution or one of its programs loses (or voluntarily relinquishes) its accreditation. These matters are discussed in subsection 14.3.4 below.

Despite the clear importance of accreditation and the long-term continuing existence of accrediting agencies, the role of accrediting agencies over the years has sometimes been controversial and often been misunderstood. There has been frequent, sometimes intense debate about accreditation among college presidents, federal and state evaluation officials, Congress, accreditation agency officials, and officials of other higher education associations. Much of this debate since the early 1990s has concerned accrediting agencies' relationships with the federal government—especially the agencies' role in monitoring institutional integrity regarding federal student aid programs (see below and see also subsection 14.3.3).

In the Higher Education Amendments of 1992, Congress added a new Part H to Title IV of the Higher Education Act (Pub. L. No. 102-325, § 499, 106 Stat. at 634). This new part, for the first time, established statutory criteria that the Secretary of Education must follow in reviewing and "recognizing" accrediting agencies whose decisions the Secretary uses in certifying institutions' eligibility to participate in the Title IV student aid programs. Specifically,

these criteria required that recognized agencies, when reviewing an institution's accreditation, were to consider its default rates for Title IV student loan programs, and were also to assist state agencies in reviewing institutions that have the potential for misusing Title IV funds (106 Stat. 640). In the Higher Education Amendments of 1998, however, Congress eased the criteria concerning agencies' Title IV compliance responsibilities and largely relinquished the 1992 Amendments' new cooperative role between the states and the accrediting agencies regarding institutional misuse of student aid funds—a role that had been codified in 20 U.S.C. § 1099a-3. Congress omitted Section 1099a-3 from Title IV, Part H (“Program Integrity”) (see Pub. L. No. 105-244, § 491, 112 Stat. 1581, 1758–1759 (October 7, 1998)). This change from 1992 to 1998 resulted from an intense controversy regarding Section 1099a-3 and the U.S. Department of Education's proposed implementing regulations for that section. The controversy centered on the 1992 legislation's requirement (since repealed) that each state have a State Postsecondary Review Entity (SPRE), which was to contract with accrediting agencies in reviewing institutions' courses and programs. (See generally Constance Cook, *Lobbying for Higher Education: How Colleges and Universities Influence Federal Policy* (Johns Hopkins University Press, 1998), 44–51, 173–75.)

Debate in modern times has also sometimes focused on particular, existing or proposed, functions of accrediting agencies—for example, monitoring academic abuses on the part of student athletes; overseeing programs that accredited institutions sponsor in foreign countries or on branch campuses in the United States; and monitoring nondiscrimination and academic freedom in religiously affiliated institutions and other institutions. The need for, and the composition and functions of, private umbrella groups to oversee the accreditation systems (such as the former Council on Postsecondary Accreditation) has also periodically been debated. Other issues continuing into the twenty-first century include the accreditation of new “virtual” or “online” institutions (see, for example, Florence Olsen, “‘Virtual’ Institutions Challenge Accreditors to Devise New Ways of Measuring Quality,” *Chron. Higher Educ.*, August 6, 1999, A29); the evaluation of distance education courses and other technological teaching innovations within established institutions (see, for example, Judith Eaton, *Distance Learning: Academic and Political Challenges for Higher Education Accreditation* (Monograph no. 1, Council for Higher Education Accreditation, 2001)); accreditation standards concerning use of part-time faculty members (see, for example, Courtney Leatherman, “Do Accreditors Look the Other Way When Colleges Rely on Part-Timers?” *Chron. Higher Educ.*, November 7, 1997, A12); the accreditation of teacher education programs, a new version of a traditional issue (see, for example, Julianne Basinger, “Fight Intensifies over Accreditation of Teacher-Education Programs,” *Chron. Higher Educ.*, October 9, 1998, A12); the accreditation of medical residency training programs, especially with respect to duty hour rules for residents (see, for example, Richard Minicucci & John Bolton, “Accreditation of Medical Residency Training Programs in the Aftermath of the New Duty Hour Rules” (2004), a conference outline presented at the annual national

conference of the National Association of College and University Attorneys); and accrediting standards to promote racial, ethnic, and cultural diversity at accredited institutions (see, for example, Katherine Mangan, “Law Schools May Get Diversity Rule,” *Chron. Higher Educ.*, February 24, 2006, at A37).

Moreover, in the first years of the new century, issues concerning the U.S. Secretary of Education’s criteria for recognizing accrediting agencies (see subsection 14.3.3 below) heated up again, as they had in the early 1990s. A major focus of this debate has been on whether Congress or the Secretary should do more to require that accrediting agencies use specific, concrete measures of the quality of student learning, in particular “output” rather than “input” measures. (See Jon Wergin, “Taking Responsibility for Student Learning: The Role of Accreditation,” *Change*, January/February 2005, 30–33; James Ratcliff, Edward Lubinescu, & Maureen Gaffney (eds.), *How Accreditation Influences Assessment*, New Directions for Higher Education no. 113 (Jossey-Bass, 2001).)

### 14.3.2. Accreditation and the courts

**14.3.2.1. Formative developments.** The first reported case involving the powers of accrediting agencies arose in 1938, after the North Central Association of Colleges and Secondary Schools had threatened to withdraw the accreditation of North Dakota’s State Agricultural College. The state’s governor sought an injunction against North Central. Using traditional legal analysis, the court denied the governor’s request, reasoning that “[i]n the absence of fraud, collusion, arbitrariness, or breach of contract, . . . the decisions of such voluntary associations must be accepted in litigation before the court as conclusive” (*North Dakota v. North Central Ass’n. of Colleges and Secondary Schools*, 23 F. Supp. 694 (E.D. Ill.), *affirmed*, 99 F.2d 697 (7th Cir. 1938)).<sup>3</sup>

Another case did not arise until 1967, when Parsons College sued the North Central Association. The association had placed the college on probation in 1963 and removed it in 1965 with the stipulation that the college’s accreditation status be reviewed within three years. In 1967, the association conducted a two-day site visit of the college, after which the visiting team issued a report noting that some improvements “had not been realized” and that “other deficiencies persisted.” After a meeting at which the college made statements and answered questions, the executive board recommended that Parsons be dropped from membership,

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<sup>3</sup>Like the *North Central* case, most of the other cases in Section 14.3.2 involve litigation between institutions and accrediting agencies. Litigation concerning accreditation can also arise between institutions and their students, however, if the students consider themselves harmed by institutional actions or inactions that prompt a denial or withdrawal of accreditation. See *Behrend v. State*, 379 N.E.2d 617 (Ohio 1977); and compare *Lidecker v. Kendall College*, 550 N.E.2d 1121 (Ill. Ct. App. 1st Dist. 1990)). Cases may also be brought by students who consider themselves harmed by an institution’s alleged misrepresentation of its accreditation status. See *Craig v. Forest Institute of Professional Psychology*, 713 So.2d 967 (Ala. 1997); *Malone v. Academy of Court Reporting*, 582 N.E.2d 54 (Ohio App. 10th Dist. 1990); and compare *Lidecker v. Kendall College* (above), and *Galdikas v. Fagan*, 342 F.3d 684 (7th Cir. 2003).

and the association's full membership voted to accept this recommendation. The college then appealed to the board of directors, which sustained the association's decision on the basis that the college was not "providing an adequate educational program for its students, especially those of limited ability."

When the college sought to enjoin the association from implementing its disaccreditation decision, the federal district court denied its request (*Parsons College v. North Central Ass'n. of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967)). Reflecting traditional judicial reluctance to examine the internal affairs of private associations, the court determined that the association was not bound by the federal Constitution's due process requirements, that the association had followed its own rules in withdrawing the college's accreditation, and that it had not acted arbitrarily or violated "rudimentary due process."

Shortly after *Parsons College*, another federal court tangled with accreditation issues in the *Marjorie Webster Junior College* case. The college, a proprietary (for-profit) institution, had applied to the Middle States Association for accreditation, and the association had refused to consider the application because the college was not a nonprofit organization. After a lengthy trial, the lower court held that the nonprofit criterion was invalid under the federal antitrust laws, the "developing common law regarding exclusion from membership in private associations," and the federal Constitution's due process clause (*Marjorie Webster Junior College v. Middle States Ass'n. of Colleges and Secondary Schools*, 302 F. Supp. 459 (D.D.C. 1969)). The lower court ordered the association to consider the college's application and to accredit the college "if it shall otherwise qualify" for accreditation under Middle States' standards. The appellate court reversed, finding that in the circumstances of the case the association's reason for refusing to consider the application (the proprietary character of the college) was valid (432 F.2d 650 (D.C. Cir. 1970)).

A later case, the *Marlboro Corporation* case, concerned the Emery School, a private proprietary business school operated by the Marlboro Corporation. The litigation arose from the school's efforts to have its accreditation renewed by the Accrediting Commission of the Association of Independent Colleges and Schools. During the reapplication process, an inspection team visited the school and filed a substantially negative evaluation, to which the school responded in writing. The commission ordered a temporary extension of the school's accreditation and requested the school to submit evidence of compliance with association criteria in twelve specified areas of weakness. Rather than complying, the school submitted a progress report that admitted its deficiencies and indicated its plans to correct them. Refusing to accept a letter of intent as evidence of the correction of deficiencies, the commission denied accreditation. When the school appealed, the commission held a short hearing at which the school presented its case and responded to questions, after which the commission reaffirmed its refusal to renew Emery's accreditation.

The lower court denied the school's request for an injunction requiring the association to grant accreditation, and the appellate court affirmed (*Marlboro Corp. v. Ass'n. of Independent Colleges and Schools*, 556 F.2d 78 (1st Cir. 1977)). The school contended that the association had violated its rights to due process under the Constitution and under common law principles and that the denial of accreditation deprived it of rights protected by the recognition criteria of the U.S. Commissioner (now Secretary) of Education (see subsection 14.3.3 below). The appellate court held that none of the school's procedural rights had been violated; that the commission's decision was not "arbitrary and capricious," because "the irregularities in Emery's financial statement alone . . . justified the commission's decision"; and that the Commissioner of Education's criteria were not violated by the association's internal appeal procedure.<sup>4</sup> (The *Marlboro* court's suggestion that the Secretary's recognition criteria are enforceable in court in such a lawsuit has not been followed by later courts; see subsection 4.3.3 below.)

The *Parsons College*, *Marjorie Webster*, and *Marlboro Corporation* cases form the foundation for the contemporary law on judicial review of accrediting decisions. Together, the cases make clear that the courts will impose some constraints on accrediting agencies in their dealings with postsecondary institutions. Though the accrediting agencies ultimately won all three cases, each court opinion suggests some limits on the authority to deny or withdraw accreditation. It is equally clear, however, that the courts still view accrediting agencies with a restrained eye and do not subject them to the full panoply of controls that state and federal governments impose on their own agencies. Though the law on accreditation is not sufficiently developed or unitary to permit a precise description of all the rights postsecondary institutions have in dealing with accrediting agencies,<sup>5</sup> the foundational cases, supplemented by later developments, do provide valuable guidance, as discussed below and in subsection 14.3.2.2.

Another important, and more recent, guideline on accreditation litigation has come from Congress. In the Higher Education Amendments of 1992 (see Section 14.3.3), Congress provided that, in order for the Secretary of Education to recognize its accreditation, an institution must agree to submit any accreditation disputes with accrediting agencies to arbitration before filing suit in court (20 U.S.C. § 1099b(e)); and that any such suits "involving the denial, withdrawal, or termination of accreditation" must be filed in the appropriate federal district court (20 U.S.C. § 1099b(f)). In *Chicago School of Automatic Transmissions v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447

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<sup>4</sup>The procedures and standards of this same accrediting commission were also at issue in *Rockland Institute v. Ass'n. of Independent Colleges and Schools*, 412 F. Supp. 1015 (C.D. Cal. 1976). In relying on both *Parsons College* and *Marjorie Webster* to reject Rockland's challenge to its disaccreditation, the court ruled that the accrediting commission followed its own rules, that the rules provided sufficient procedural due process, and that the commission's evaluative standards were neither vague nor unreasonable.

<sup>5</sup>For further description of such rights in a related area of the law, which can be used to predict available rights in accreditation, see Kaplin, "Professional Power and Judicial Review: The Health Professions," in footnote 2 above in this Chapter.

(7th Cir. 1994), the appellate court relied on these statutory provisions in rejecting the school's claim against the accrediting agency. The court's analysis serves to give added importance to federal law in the review of accrediting agency decisions, and to diminish the importance of state law in some cases.

The *Chicago School* case commenced after the defendant accrediting agency refused to renew the plaintiff's accreditation because the school had failed to provide prompt refunds of tuition money to withdrawing students. The school claimed that the agency's action violated the agency's own rules and therefore constituted a breach of contract under Illinois state law. The agency argued, to the contrary, that the case should be reviewed under principles of federal administrative law and the federal Administrative Procedure Act. The court agreed with the agency's perspective on the case:

Accreditation serves a federal function, and two years ago (shortly after the commencement of this action under the diversity jurisdiction), Congress provided for exclusive federal jurisdiction of any suit by a school or college protesting the denial or withdrawal of accreditation by [a recognized accrediting agency]. Congress did not specify a source of law for these suits, but it is hard to see how state law could govern when federal jurisdiction is *exclusive*. . . . [I]t is all but impossible to see how federal courts could apply state law to the actions of accrediting agencies when state courts have been silenced by the provision for exclusive jurisdiction. If a grant of federal jurisdiction sometimes justifies creation of federal common law, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) . . . , a grant of exclusive federal jurisdiction necessarily implies the application of federal law [44 F.3d at 449].

Similarly, the court asserted that the federal courts, when shaping a federal law of accreditation, should not derive its principles from the contract law or other common law of the states:

[A]ccrediting bodies are not engaged in commercial transactions for which state-law contract principles are natural matches. The "contract" the School wants to enforce is not a bargained-for exchange but a set of rules developed by an entity with many of the attributes of an administrative agency. [Moreover,] [a]lthough the law of every state contains a set of rules for the conduct of voluntary associations, distinct from the law of contracts, this too is not quite the right match; the School did not apply to "join" the Alliance. It wanted a key that would unlock the Federal Treasury. An accrediting agency is a proxy for the federal department whose spigot it opens and closes [44 F.3d at 449].

Following this reasoning, the court concluded "that principles of federal administrative law supply the right perspective for review of accrediting agencies' decisions. Section 1099b(f) cements the case for the application of federal law."

Using rudimentary administrative law principles, the court then determined that the defendant agency had not violated its own procedural rules in refusing to renew the plaintiff school's accreditation. Alternatively, in response to one of the school's arguments, the court also noted that if the defendant had departed from

one of its rules, “it was a harmless departure” that would not “lead to the whoping damages the School requests. . . .”

The court’s decision in *Chicago School* should not affect federal antitrust law claims (see subsection 14.3.2.4 below), federal constitutional law claims involving “state action” (see subsection 14.3.2.3), or federal bankruptcy law claims (see subsection 14.3.2.6). Moreover, the court’s opinion, like the federal statute upon which it relies (20 U.S.C. § 1099b(f)), applies only to disputes concerning the denial, withdrawal, or termination of accreditation. Thus, state law should continue to govern defamation claims such as those in *Avins v. White* (see subsection 14.3.2.5) and other tort claims such as those in *Keams v. Tempe Technical Institute* (see subsection 14.3.2.5). There are also some other state common law claims that are beyond the purview of the *Chicago School* case and 20 U.S.C. Section 1099b(f), as discussed in subsection 14.3.2.2 below.

**14.3.2.2. State common law and “federal common law.”**<sup>6</sup> At the very least, it is clear under state common law that courts will require an accrediting agency to follow its own rules in withdrawing accreditation (as in *Parsons College*) or refusing to renew accreditation (as in *Marlboro Corporation*). In *Parsons*, the court decided that the “law applicable to determine the propriety of the expulsion of a member from a private association is the law which he agreed to when he voluntarily chose to join the association, that is, the rules of the association itself.” The court then found that the college had neither charged nor proved that the association had violated these rules. It is less clear whether courts will require an agency to follow its own rules in considering an initial application for accreditation. There is no accreditation case on this point, and some judicial pronouncements in related areas suggest that the right to be judged by the rules accrues only after the applicant has been admitted to membership or otherwise approved by the association. The better view, however, is that an applicant can also require that the agency follow its own rules.

Beyond requiring that accrediting agencies follow their own rules, the courts may also hold agencies to a variously stated standard of fairness in their dealings with members and applicants. The old *North Central Association* case, for example, highlights “fraud” and “collusion” as circumstances that would invalidate agency actions. The *North Central* case and the *Parsons* case both highlight “arbitrariness,” and *Parsons* also emphasizes the failure to provide “rudimentary due process.” The *Marjorie Webster* case speaks of reasonableness, evenhandedness, and consistency with “public policy” as standards; the appellate court agreed with the lower court that, under a developing exception to the general rule of judicial nonintervention in private associations’ affairs, an association possessing virtual monopolistic control in an area of public concern

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<sup>6</sup>The role of the state common law principles set out in this Section, as they apply to judicial review of decisions to deny or withdraw accreditation, must now be considered in light of the *Chicago School of Automatic Transmissions* case discussed in subsection 14.3.2.1 above. Even though that case, and others following it, indicate that “federal common law” now controls challenges to denials, withdrawals, and terminations of accreditation, the federal common law principles that courts have articulated appear to parallel the state common law principles developed in this subsection.



must exercise its power reasonably, “with an even hand, and not in conflict with the public policy of the jurisdiction.”

The primary “fairness” requirement seems to be that the agency must provide institutions with procedural due process before denying, withdrawing, or refusing to renew their accreditation. The institution appears to have a right to receive notice that its accreditation is being questioned, to know why, and to be heard on the question. *Parsons College* provides useful analysis of the extent of these protections.

In *Parsons*, the college argued that the association’s action should be invalidated, even though consistent with its own rules, if the action was “contrary to rudimentary due process or grounded in arbitrariness.” Without admitting that such a legal standard applied to accrediting agencies, the court did analyze the association’s action under this common law standard. The court defined rudimentary due process to include (1) an adequate opportunity to be heard, (2) a notice of the proceedings, (3) a notice of the specific charges, (4) sufficiently definite standards of evaluation, and (5) substantively adequate reasons for the decision. After reviewing the entire process by which the association reached its disaccreditation decision, the court concluded that “the college has failed to establish a violation of the commands of any of the several rules.” The court found that the college had been afforded the opportunity to speak and be heard at almost every stage of the proceedings and that the opportunity afforded was adequate for the type of proceeding involved:

The nature of the hearing, if required by rudimentary due process, may properly be adjusted to the nature of the issue to be decided. In this case, the issue was not innocence but excellence. Procedures appropriate to decide whether a specific act of plain misconduct was committed are not suited to an expert evaluation of educational quality. . . .

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Here, no trial-type hearing, with confrontation, cross-examination, and assistance of counsel, would have been suited to the resolution of the issues to be decided. The question was not principally a matter of historical fact, but rather of the application of a standard of quality in a field of recognized expertise [271 F. Supp. at 72–73].

The court further found that the college had ample notice of the proceedings because “after a long history of questionable status, the visit of the examining team was adequate notice without more.” The requirement of specific charges was satisfied by the examining team’s report given to the college. The court found that this report, “supplemented by the evidence produced by the college itself, contained all the information on which all subsequent decisions were made. No fuller disclosure could have been made.” Finally, the court found that the evaluative standards of the association were sufficiently definite to inform the school of what was expected of it. Disagreeing with the college’s

claim that the standards were “so vague as to be unintelligible to men of ordinary intelligence,” the court reasoned as follows:

The standards of accreditation are not guides for the layman but for professionals in the field of education. Definiteness may prove, in another view, to be arbitrariness. The Association was entitled to make a conscious choice in favor of flexible standards to accommodate variation in purpose and character among its constituent institutions, and to avoid forcing all into a rigid and uniform mold [271 F. Supp. at 73].

In contrast to the procedural aspects of accrediting activities, an agency’s substantive decisions and standards will receive very limited review. Courts are familiar with problems of procedural fairness, and are well equipped to resolve them, but they do not have experience and expertise in evaluating educational quality. The *Parsons* court used this distinction in determining that the accrediting agency had not violated the last of the five due process rules set out above:

In this field, the courts are traditionally even more hesitant to intervene. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion. Evaluation by the peers of the college, enabled by experience to make comparative judgments, will best serve the paramount interest in the highest practicable standards in higher education. The price for such benefits is inevitably some injury to those who do not meet the measure, and some risk of conservatism produced by appraisals against a standard of what has already proven valuable in education [271 F. Supp. at 74].

The appellate court in *Marjorie Webster* also relied on the distinction between procedural and substantive decisions. To this court, the scope of judicial review depends on the amount of “deference” that courts should accord accrediting agencies, and this deference varies “both with the subject matter at issue and with the degree of harm resulting from the association’s action.” Since the issue in *Marjorie Webster* concerned the accrediting agency’s “substantive standards” rather than “the fairness of the procedures by which the challenged determination was reached,” the court accorded “substantial deference” to the agency and its judgments “regarding the ends that it serves and the means most appropriate to those ends.” The court then considered the agency’s nonprofit criterion, which was based on the assumption that the profit motive is inconsistent with educational quality. The lower court had determined that this assumption “is not supported by the evidence and is unwarranted.” But the appellate court, in light of the substantial deference it accorded the agency’s substantive judgments, held that it had not “been shown to be unreasonable for [the association] to conclude that the desire for personal profit might influence educational goals in subtle ways difficult to detect but destructive, in the long run, of that atmosphere of academic inquiry which . . . [the association’s] standards for accreditation seek to foster.”

The more recent case of *Wilfred Academy et al. v. Southern Ass’n. of Colleges and Schools*, 738 F. Supp. 200 (S.D. Tex. 1990), *reversed and vacated*, 957 F.2d 210 (5th Cir. 1992), illustrates the complexities that may arise when state common law concepts of fairness, developed in the above cases, are applied to accrediting agency decisions. Six cosmetology schools challenged the decision of the Southern Association of Colleges and Schools (SACS), a regional accrediting agency, and COEI (Commission on Occupation Education Institutions), an independent branch of SACS, to withdraw their accreditation. The district court held that, although it would give “great deference to the expertise of the accrediting agency,” such agencies nevertheless have an implied “duty of good faith and fair dealing” that arises from the “special relationship of trust and confidence” between an agency and its member schools. This special relationship “results from the tremendous disparity of bargaining power in favor of the accrediting agency and from the fact that loss of accreditation can deprive a school of the opportunity to participate in governmental programs, such as federal financial aid.” The duty of good faith and fair dealing is breached whenever an accrediting agency violates fundamental “fairness,” which in turn requires that accrediting decisions be “reasonable,” not “arbitrary,” and “supported by substantial evidence.” Applying these standards, the district court determined that, in processing their charges against the plaintiff schools, the defendants had violated fundamental fairness in various ways. In addition, the district court determined that the defendants failed to present “substantial evidence” that the plaintiffs had violated any of the defendants’ accreditation standards. The court enjoined the defendants from implementing their decision to withdraw the plaintiffs’ accreditation.

On appeal, the Fifth Circuit determined that the district court’s fact findings “wholly disregard the deference due to the association’s accrediting decisions” and that “[s]ubstantial evidence supports COEI’s decision to withdraw accreditation. . . .” Considering the judicial role in cases like this, and focusing primarily on judicial review of an agency’s *substantive* judgments, the appellate court commented:

Federal courts have consistently limited their review of decisions of accrediting associations to whether the decisions were “arbitrary and unreasonable” and whether they were supported by “substantial evidence.” See, e.g., *Medical Institute of Minnesota v. National Ass’n. of Trade and Technical Sch.*, 817 F.2d 1310, 1314 (8th Cir. 1987); *Rockland Inst. v. Association of Indep. Colleges and Sch.*, 412 F. Supp. 1015, 1016 (C.D. Cal. 1976). . . .

In reviewing an accrediting association’s decision to withdraw a member’s accreditation, the courts have accorded the association’s determination great deference. *Medical Inst. of Minnesota*, 817 F.2d at 1314; *Marjorie Webster Junior College, Inc. v. Middle States Ass’n. of Colleges and Secondary Sch.*, 432 F.2d 650, 657 (D.C. Cir. 1970). Courts give accrediting associations such deference because of the professional judgment these associations must necessarily employ in making accreditation decisions. In considering the substance of accrediting agencies’ rules, courts have recognized that “[t]he standards of accreditation are not guides for the layman but for professionals in the field of education.” *Parsons*

*College v. North Cent. Ass'n. of Colleges and Secondary Sch.*, 271 F. Supp. 65, 73 (N.D. Ill. 1967). Consequently, courts are not free to conduct a *de novo* review or to substitute their judgment for the professional judgment of the educators involved in the accreditation process. *Medical Inst. of Minnesota*, 817 F.2d at 1315; *Rockland Inst.*, 412 F. Supp. at 1019). Instead, courts focus primarily on whether the accrediting body's internal rules provide a fair and impartial procedure and whether it has followed its rules in reaching its decision [957 F.2d at 214].

Congress's limitation of judicial review in the 1992 HEA Amendments (see 20 U.S.C. § 1099b(f)), as construed in the *Chicago School* case (see subsection 14.3.2.1), has had an important impact on the use of state common law in subsequent accreditation cases. It has not always precluded state common law cases from getting to court, however, nor has it always prevented arguments supported by state common law from being aired in court. State common law, for example, apparently still continues to apply to accreditation issues that do not arise in the context of a challenge to a "denial, withdrawal, or termination of accreditation," as prescribed by Section 1099b(f). In *Auburn University v. The Southern Ass'n. of Colleges and Schools*, 2002 WL 32375008 (N.D. Ga. 2002)), Auburn, a member institution of the accrediting association, challenged certain aspects of a process that the association was using to investigate some "accreditation-related" circumstances regarding Auburn. The court determined that "Auburn is not challenging the 'denial, withdrawal, or termination of accreditation' [20 U.S.C. § 1099b(f)]" but rather "is challenging the manner in which the accrediting agency is conducting an investigation into matters of accreditation" (*Auburn University*, pp. 15–16). Section 1099b(f) and the federal common law principles courts have read into it therefore did not apply to Auburn's claim, and the court instead applied state "common law of due process," citing cases such as *Parsons College*, *Marlboro Corporation*, and *Medical Institute of Minnesota* (*Auburn University*, pp. 6–7). And in *Foundation for Interior Design Education Research v. Savannah College of Art and Design*, 39 F. Supp. 2d 889 (W.D. Mich. 1998), *affirmed*, 244 F.3d 521 (6th Cir. 2001), the Foundation, an accrediting agency that had denied accreditation to the college, "was not at any relevant time [recognized] by the Secretary of Education" (244 F.3d at 528). The district and appellate courts therefore found Section 1099b(f) to be inapplicable and held that state law controls, citing much the same case law as did the court in the *Auburn University* case.

Moreover, and perhaps most important, when the federal law perspective of the court in *Chicago School of Automatic Transmissions* does apply, in most cases it should not substantially alter the reasoning or result in accreditation cases. It is true that the *Chicago School* case has been followed in later cases, and that the federal administrative law principles referenced in that case have become a kind of "federal common law" or federal "common law of due process" applicable to judicial review of accreditation decisions. (See, for example, *Thomas M. Cooley Law School v. American Bar Association*, 376 F. Supp. 2d 758 (W.D. Mich. 2005); *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2d 1129 (C.D. Cal. 2004).) But the

courts' reasoning in the later cases, as in *Chicago School*, strongly suggests that the developing federal common law principles of judicial review are very similar to the state common law principles that were developed in the earlier cases beginning with *Parsons College*. It is likely, therefore, that counsel and courts, for the foreseeable future, will continue to consult and to cite state common law cases and judicial review principles when litigating and deciding federal common law cases covered by the grant of jurisdiction in Section 1099b(f). It should follow, then, at least for the foreseeable future, that the reasoning used and results reached in the federal common law cases will be similar to those in the state common law cases.

The court in *Chicago School*, however, did note one potentially significant major difference between federal common law and state common law:

If this were a contract dispute, we would have to make an independent judgment about the meaning of . . . the [accrediting agency's rules and] internal operating procedures. In administrative law, however, the first question is how the agency understands its own rules—for an agency possessed of the ability to adopt and amend rules also may interpret them, even if the interpretation chosen is not the one that most impresses an outside observer [44 F.3d at 450].

But this difference may not be nearly as substantial as the court suggests, since there is already ample precedent in the state common law cases for courts deferring to accrediting agencies' interpretive judgments about their own rules, as the cases above indicate (see, for example the *Foundation for Interior Design* case, above, 244 F.3d at 527–28).

**14.3.2.3. The U.S. Constitution.** A number of cases have considered whether accrediting agency decisions are “state action” subject to the federal Constitution (see Section 1.5.2). The court in *Parsons College* rejected the college's claim that the association must comply with the due process requirements of the federal Constitution, reasoning that “the Association stands on the same footing as any private corporation” and is not subject to “the constitutional limits applicable to government” (see Section 1.5.2). The lower court in the *Marlboro Corporation* case (416 F. Supp. 958, 959 (D. Mass. 1976)) also rejected the state action argument. On the other hand, the lower court in *Marjorie Webster* accepted the state action argument; and the appellate courts in *Marjorie Webster* and in *Marlboro Corporation* assumed, without deciding, that the accrediting agency was engaged in state action.

The appeals court in *Marjorie Webster*, in holding that the association's non-profit criterion was not unreasonable and therefore was valid, in fact engaged in a constitutional due process analysis. The lower court had found that the association's accreditation activities were “quasi-governmental” and thus could be considered “state action” subject to federal constitutional restraints. The appeals court then “assume[d] without deciding” that state action did exist. Thus, unlike the court in *Parsons College*, which specifically rejected the state action argument, the lower court in *Marjorie Webster* accepted the argument, and the appellate court left the question unanswered.

The appellate court in *Marlboro Corporation* considered whether the accrediting commission's procedures should be scrutinized under common law due process standards or under the more exacting standards of the U.S. Constitution's due process clause. The lower court had held that the Constitution did not apply because the commission's action was not "state action." The court of appeals, however, found it unnecessary to decide this "close question," since, "even assuming that constitutional due process applies," none of the Emery School's procedural rights had been violated. To reach this conclusion, the appellate court did review the commission's procedures under the constitutional standard, stating that under either "constitutional or common law standards . . . procedural fairness is a flexible concept" to be considered case by case. The court held that "due process did not . . . require a full-blown adversary hearing in this context." It noted that the commission's inquiry concerned a routine reapplication for accreditation and was "broadly evaluative" rather than an accusatory inquiry with specific charges. "Emery was given ample opportunity to present its position by written submission and to argue it orally," and more formalized proceedings would have imposed too heavy a burden on the commission.

The court then considered Emery's claim that the decision to deny accreditation was tainted by bias because the chairman of the accrediting commission was the president of a school in direct competition with Emery. While it emphasized that a "decision by an impartial tribunal is an element of due process under any standard," the court found that the chairman took no part in the discussion or vote on Emery's application and in fact did not chair, or participate in, the December hearing. Recognizing the "local realities"—the prolonged evaluation process, the large number of people participating in the decision at various levels, and the commission's general practice of allowing interested commissioners to remain present without participating—the court viewed the question as "troublesome" but concluded that "Emery has [not] shown sufficient actual or apparent impropriety."

In more recent cases, the weight of authority has shifted against state action findings. In *Medical Institute of Minnesota v. National Ass'n. of Trade and Technical Schools*, 817 F.2d 1310 (8th Cir. 1987), for example, the court rejected the school's claim that the accrediting agency's decision denying reaccreditation was state (or federal) action subject to federal constitutional constraints. The school's argument relied heavily on the rationale of the district court in the *Marjorie Webster* case, but the *Medical Institute* court determined that this rationale has been undermined by two cases decided by the U.S. Supreme Court in 1982: *Rendell-Baker v. Kohn* and *Blum v. Yaretsky* (see Section 1.5.2). In *St. Agnes Hospital v. Riddick*, 668 F. Supp. 478 (D. Md. 1987), and 748 F. Supp. 319 (D. Md. 1990), however, a federal district court distinguished the *Medical Institute* case and held that the Accreditation Council for Graduate Medical Education (ACGME) (of which defendant Riddick was chairman) had engaged in state action when it withdrew accreditation from the plaintiff's residency program in obstetrics and gynecology. The court relied on state regulations requiring that applicants for medical licensure must have at least one year of postgraduate

clinical training in a program that meets “standards equivalent to those established by” ACGME. Under this regulatory scheme, according to the court, the state had delegated its authority to ACGME, and there was a direct “nexus” (see Section 1.5.2) between this delegation and the accreditation action challenged by the plaintiff.

In a similar case against ACGME, a different federal district court reached the same result, but the appellate court reversed (*McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519 (3d Cir. 1994)). Relying on the Supreme Court’s decisions in *Rendell-Baker* and *Blum* and its later decision in *NCAA v. Tarkanian* (see Section 14.4.2), and following the *Medical Institute* case, the appellate court concluded that ACGME had not engaged in state action when it withdrew accreditation from the plaintiff’s general surgery residency program. According to the two-judge majority:

The district court concluded that the Board delegated its duties to the ACGME, thereby rendering the ACGME’s actions fairly attributable to the state. We cannot agree. . . . [U]nder the [Pennsylvania Medical Practice] Act the state Board remains ultimately responsible for approving medical training facilities in Pennsylvania. Cf. *Tarkanian*, 488 U.S. at 195–98. . . . Merely because the state Board deems its obligation met by following the ACGME’s accreditation decisions does not imbue the ACGME with the authority of the state nor does it shift the responsibility from the state Board to the ACGME. The Board remains the state actor. . . .

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The district court also found the connection between the state Board and the ACGME sufficient to turn the latter into a state actor. We must disagree. Sometimes, a state and an ostensibly private entity are so interdependent that state action will be found from their symbiotic relationship alone. . . . The ACGME’s relationship to the state is clearly distinguishable. The ACGME is self-governed and financed, and its standards are independently set; the state Board simply recognizes and relies upon its expertise.

Alternatively, a connection between the state and a specific decision of a private entity may render that decision chargeable to the state. . . . Under this approach, however, state action will be found only “when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private decision] must in law be deemed that of the State[;] mere approval of or acquiescence in” the decision is not enough. *Blum*, 457 U.S. at 1004. . . . The required state coercion or encouragement of the ACGME’s actions is not present here.

. . . The Board . . . does not control or regulate the ACGME’s standard-setting or decision-making processes. Although it recognizes them, state law does not dictate or influence those actions. Rather, the ACGME’s decisions are “judgments made by private parties according to . . . standards that are not established by the State.” *Blum*, 457 U.S. at 1008 [24 F.3d at 524–25].

A third judge disagreed with the majority’s reasoning but concurred in the result because, in his view, ACGME had provided the plaintiff all the due

process that the federal Constitution would require. In a separate opinion—whose analysis may be more sound than the majority’s—this judge distinguished the *Medical Institute* case and relied on *Riddick* in concluding that ACGME’s action was state action (24 F.3d at 526–29; Becker, J., concurring).

In more recent cases, courts have continued to reject state action arguments. In a 2004 case, for example, *Western State University of Southern California v. American Bar Association* (discussed in subsection 14.3.2.2 above), the court relied on the *Medical Institute* case and the *McKeesport* case (above), as well as a footnote on state action in the *Chicago School* case (see subsection 14.3.2.1 above, and see particularly 44 F.3d at 449, n.1). And in *Thomas M. Cooley Law School v. American Bar Association*, 376 F. Supp. 2d 758 (W.D. Mich. 2005), a court again relied on these same cases to reject the law school’s state action argument.

Although Supreme Court cases such as *Rendell-Baker* have narrowed the state action concept, while *NCAA v. Tarkanian* (Section 14.4.2 below) has limited its application to membership associations, and although a trend against state action findings continues in the lower courts, there still appears to be grounds for judicial state action determinations in some accreditation cases. The most likely situation still appears to be that where a government agency has delegated authority to an accrediting agency, as perceived by the *Riddick* court and the dissenting judge in *McKeesport Hospital*. Similarly, it is possible that, for accrediting agencies recognized by the U.S. Secretary of Education, the more formalized relationship between accrediting agencies and the Secretary created by the 1992 and 1998 reauthorizations of the Higher Education Act, and the agencies’ responsibilities in helping the Secretary to assure institutional compliance with the requirements of the federal student aid programs (see subsections 14.3.1 above and 14.3.3 below) could in some cases provide a basis for a state action finding. The U.S. Supreme Court’s decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), using an “entwinement” theory to hold that the association there was engaged in state action, might be used in some cases to support such a state action argument. (For a discussion of these points, see *Auburn University v. The Southern Ass’n. of Colleges and Schools*, 2002 WL 32375008 (N.D. Ga. 2002), pp. 7–9.)

**14.3.2.4. Antitrust law.** Federal or state antitrust law may sometimes also protect postsecondary institutions from certain accrediting actions that interfere with an institution’s ability to compete with other institutions.

In responding to the plaintiff’s antitrust claims in *Marjorie Webster* (subsections 14.3.2.2 & 14.3.2.3 above), the appellate court held that the “proscriptions of the Sherman Act were ‘tailored . . . for the business world’ [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 141 (1961)], not for the noncommercial aspects of the liberal arts and the learned professions.” The court also noted that, since the “process of accreditation is an activity distinct from the sphere of commerce,” going “rather to the heart of the concept of education,” an accreditation decision would violate the Act only if undertaken with “an intent or purpose to affect the commercial aspects of the profession.” Since no such “commercial motive” had been shown, the association’s action did not constitute a combination or conspiracy in restraint of the college’s trade.



Subsequently, the antitrust approach was broadened and strengthened by the U.S. Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the first case in which the Court clearly approved the applicability of federal antitrust law (see Section 13.2.8 of this book) to professional associations. The application of these laws to accreditation was further strengthened by two Supreme Court cases following *Goldfarb*. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Court reaffirmed its *Goldfarb* determination that the standard-setting activities of nonprofit professional associations are subject to scrutiny under antitrust laws. The Court then invalidated the society's ethical canon prohibiting members of the society from submitting competitive bids for engineering services. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court again subjected a nonprofit professional association to antitrust liability arising from its standard-setting activities. Going beyond *Goldfarb* and *National Society of Professional Engineers*, the Court held that a professional organization can be liable for the anticompetitive acts of its members and other agents, including unpaid volunteers, if the agents had "apparent authority" to act (see Section 3.2). The characteristics of the American Society of Mechanical Engineers (ASME) that subjected it to antitrust liability are similar to those that could be attributed to accrediting agencies:

ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable under the antitrust laws. Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering. Since the antitrust violation in this case could not have occurred without ASME's codes and ASME's method of administering them, it is not unfitting that ASME will be liable for the damages arising from that violation (see W. Prosser, *Law of Torts* 459 (4th ed. 1971); W. Seavey, *Law of Agency* § 83 (1964)). Furthermore . . . ASME is in the best position to take precautions that will prevent future antitrust violations. Thus, the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for Hydrolevel's antitrust injuries [456 U.S. at 576].

(See Charles Chambers, "Implications of the *Hydrolevel* Decision for Postsecondary Accrediting Associations," 7 *Accreditation*, no. 2 (Council on Postsecondary Accreditation, Summer 1982)).

As these decisions clearly indicate, federal antitrust law can be a meaningful source of rights for postsecondary institutions, as well as their students and faculty, if they are harmed by accrediting activities that can be characterized as anticompetitive. Such rights may be asserted not only against decisions to deny, terminate, or condition an institution's accreditation, as in *Marjorie Webster*, but also against other activities undertaken by accrediting agencies or their agents in the process of fashioning and applying standards.

However, although antitrust laws clearly *apply* to such activities, that does not mean that such activities, or any substantial portion of them, will *violate* antitrust laws. In *Zavaletta v. American Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989), for example, students at an unaccredited law school sued the American Bar Association (ABA), claiming that its accrediting activities constituted an unreasonable restraint of trade under the Sherman Antitrust Act. The court did not dispute that the Act applied to the ABA's accrediting activities, but it nevertheless held that these "activities impose no restraint on trade, unreasonable or otherwise." Rather, according to the court, "the ABA merely expresses its educated opinion . . . about the quality of the school's program"—an expression protected by the First Amendment. Although the ABA communicates these opinions to state courts that control bar admissions, the resulting restraint on an unaccredited law school is caused by the independent actions of state courts in determining who may sit for the bar exam, not by the ABA's accreditation activities as such.

In *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026 (3d Cir. 1997), another court considered the applicability of antitrust law to accreditation, again in the context of legal education. The Massachusetts School of Law (MSL) alleged that the American Bar Association had conspired to monopolize legal education, law school accreditation, and the licensing of lawyers, in violation of the Sherman Act.<sup>7</sup> Specifically, MSL alleged that the ABA established and enforced anticompetitive criteria in making accreditation decisions, that application of these criteria to MSL resulted in the denial of its application for provisional accreditation, and that this denial put MSL "at a competitive disadvantage in recruiting students because graduates of unaccredited schools cannot take the bar examination in most states," which in turn caused the school "to suffer a 'loss of prestige' and direct economic damage in the form of declining enrollments and tuition revenue." Regarding the ABA's accreditation criteria, MSL alleged they created an anticompetitive effect by:

- [1] fixing the price of faculty salaries; [2] requiring reduced teaching hours and non-teaching duties; [3] requiring paid sabbaticals; [4] forcing the hiring of more professors in order to lower student/faculty ratios; [5] limiting the use of adjunct professors; [6] prohibiting the use of required or for-credit bar review courses; [7] forcing schools to limit the number of hours the students could work; [8] prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools

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<sup>7</sup>Some of the same issues raised in this litigation were also investigated by the Antitrust Division of the U.S. Department of Justice (DOJ). The Massachusetts School of Law filed its suit against the ABA in federal district court in 1993. This school and several other law schools also complained to DOJ. In 1994, DOJ began an investigation of the ABA's accreditation practices that led, in 1995, to the filing of a Sherman Act lawsuit against the ABA and a settlement of the case by the parties by way of a "Final Judgment without trial or adjudication" (*United States of America v. American Bar Association*, 934 F. Supp. 435 (D.D.C. 1996)). In the Final Judgment, the ABA agreed to change various accrediting practices, which DOJ alleged to have anticompetitive effects, but the Judgment specifically provided that it was not "evidence or admission by any party with respect to any issue of fact or law."

in graduate programs; [9] requiring more expensive and elaborate physical and library facilities; and [10] requiring schools to use the LSAT [Law School Admissions Test] [107 F.3d at 1031–32].

The appellate court held federal antitrust laws to be generally applicable to accrediting activities, but it did not find the ABA's enforcement of accreditation standards to be in violation of the antitrust laws. The court thus affirmed the trial court's grant of summary judgment to the ABA. In rejecting MSL's assertion that it suffered a competitive disadvantage in recruitment because graduates of MSL were prohibited from taking the bar examination in most states, the appellate court relied on the U.S. Supreme Court's decision in *Parker v. Brown* (see Section 13.2.8) to shield the ABA from liability. "[E]very state retains final authority to set all the bar admission rules," said the court, and since the alleged injury is the result of state action, it falls within *Parker's* state immunity doctrine. "Without state action, the ABA's accreditation decisions would not affect state bar admissions requirements" (107 F.3d at 1036). Since the state determines that graduation from an ABA-accredited school is required to sit for the state bar examination, the ABA merely "assist[s] [the states] in their decision-making processes" and cannot be held liable for any competitive disadvantage MSL may suffer in recruiting students.

The court then addressed the "stigmatic effect [MSL has allegedly suffered] in the marketplace [as the result] of the denial of accreditation." MSL claimed that "the ABA has conducted a campaign to convey the idea that . . . [it] is the most, or only, competent organization to judge law schools." Relying on the *Noerr* case (above), the court held that the ABA's annual communication of its accreditation decisions to states was sufficient "petitioning activity" to grant the ABA immunity from any stigmatic effect its accreditation decision may have had on MSL. Any stigmatic injury suffered by MSL was merely incidental to the competitive disadvantage it suffered as a result of individual state requirements that individuals graduate from an ABA-accredited school prior to sitting for the bar examination.<sup>8</sup>

In a later case, *Foundation for Interior Design Education Research v. Savannah College of Art and Design*, 244 F.3d 521 (6th Cir. 2001), another U.S. Court of Appeals also applied federal antitrust law to accreditation but dismissed the college's antitrust claims. Affirming the district court's decision, the court of appeals ruled that the college "did not allege that the [accrediting agency] has market power in the relevant market . . . [and] did not allege that it has suffered an antitrust injury" (244 F.3d at 529–32).

**14.3.2.5. Defamation law and other tort theories.** The first application of defamation law (see Section 3.3.4) to accrediting agencies and officials occurred

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<sup>8</sup>In a subsequent action, *Massachusetts School of Law at Andover v. American Bar Association, et al.*, 142 F.3d 26 (1st Cir. 1998), the plaintiff law school filed numerous additional claims against the ABA, the Association of American Law Schools (AALS), and various other defendants, alleging unfair competition, fraud and deceit, tortious misrepresentations, and breach of contract. The court of appeals, following the district court, dismissed all the claims on procedural and jurisdictional grounds or for failure to state a cognizable cause of action.

in *Avins v. White*, 627 F.2d 637 (3d Cir. 1980). The plaintiff was a school official who alleged that he had been defamed by an accrediting official in the course of a site inspection. The case arose from the efforts of the Delaware Law School (DLS) to gain provisional American Bar Association accreditation. After a series of accreditation inspections of DLS, the then dean of DLS (Avins) sued the ABA consultant (White) who had participated in two of the inspections. The dean alleged three counts of defamation. The first two counts were based on statements in the reports of the inspection team; the third was based on remarks that the consultant had made to the dean at a luncheon meeting while they were in the presence of a third party (a Judge DiBona). The dean prevailed at a trial in federal district court, and the jury awarded him \$50,000 in compensatory damages.

On appeal, the U.S. Court of Appeals for the Third Circuit considered each of the three defamation counts separately. Regarding the first two counts, the court held that the statements in the inspection team's reports could not be considered to have defamed the dean. The statements in the first report, according to the court, were not based on fact but were expressions of "pure opinion." Such expressions cannot be defamatory, because "ideas themselves," unlike their underlying facts, "cannot be false." The statements in the second report, according to the court, referred to the school rather than to the dean personally and therefore could not have defamed him. Thus, instead of submitting the first two counts to the jury, the district judge should have ruled the statements non-defamatory as a matter of law. The appellate court therefore reversed the district court's judgment on the first two counts.

The third count presented different problems. The appellate court ruled that the luncheon remarks cited in this count "may have been potentially defamatory." The consultant argued, however, that because of his role in the accreditation process, he possessed a "qualified privilege" to make the luncheon remarks, which addressed matters regarding the accreditation inspection. Neither the appellate court nor the dean disputed that the consultant could possess such a qualified privilege. The issue, rather, was whether the consultant had abused the privilege by making his remarks in the presence of the third party (Judge DiBona), who was not an official of the law school. The appellate court held that this issue was one for the jury, that the district judge had properly instructed the jury on when it could consider the qualified privilege to be abused, and that "the jury quite properly could have rejected the defense." The appellate court could not determine whether the jury had actually found the luncheon remarks to be defamatory, however, since the district judge had submitted all three defamation counts to the jury as a package; it was "therefore impossible to determine if the jury had based its verdict on all three allegedly defamatory statements or whether the verdict was based on only one or two of the incidents." Because of this technical complexity, the appellate court also reversed the district court's judgment on the third count and remanded the case to the district court for a new trial on that count only.

One critical issue then remained: the "standard of proof" the dean had to meet in order to sustain a defamation claim against the consultant. Although

the issue applied to all three counts, the appellate court needed to address it only with respect to the third count, which it was remanding for a new trial. The consultant argued that the dean was a “public figure” for purposes of this lawsuit and therefore had to meet a higher standard of proof than that required for ordinary defamation plaintiffs.<sup>9</sup> The district court had rejected this argument. The appellate court overruled the district court, determining that the dean was a public figure within the meaning of the applicable Supreme Court precedents:

The [U.S. Supreme] Court in *Gertz [v. Robert Welch, Inc.]*, 418 U.S. 323 (1974)] gave a description of who may be a public figure:

For the most part, those who attain [public-figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

The *Gertz* test envisions basically two types of public figures: (1) those who are public figures for all purposes; and (2) those who are public figures only in the context of a particular public controversy. . . .

We have no difficulty in concluding that Avins is not a public figure for all purposes under the first part of the *Gertz* test. Although Avins was apparently well known in legal academic circles, we do not believe he possessed the fame and notoriety in the public eye necessary to make him a public figure for all purposes. This leaves the question whether Avins is a public figure in the limited context of the DLS accreditation struggle. We must accordingly consider whether (1) the DLS accreditation struggle was a public controversy and (2) if so, whether Avins voluntarily injected himself into that controversy.

Although DLS was formed and operated as a purely private law school, its success or failure was of importance to the Delaware State Bar as well as to any individual interested in attending an accredited law school in Delaware. It is the only law school in the State of Delaware. Accreditation of DLS would create a new source of attorneys who could qualify to take the Delaware Bar examinations and be admitted to practice in the state. Furthermore, a majority of DLS students were from out of state. Thus, DLS accreditation would also affect the interests of students from a variety of locales and admission to state bars outside of Delaware.

Further, there is evidence in the record that mass meetings were held and that individuals from other states concerned about DLS visited the school. The local news media, as well as the Delaware Bar Association publicized the events

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<sup>9</sup>In a series of cases beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), the U.S. Supreme Court has formulated a “public-figure” doctrine in order to ensure that certain speakers’ free speech rights would not be unduly chilled by the fear of defamation suits. To prevail on a defamation claim, a public figure must prove “actual malice” on the part of the defendant—that is, that the defendant had made the statement with a knowledge of its falsity or with a reckless disregard for the truth. (See the discussion of defamation in subsections 3.3.4 and 4.7.2.3.)

surrounding DLS's formation and struggle for accreditation. . . . We therefore hold that DLS's accreditation was a legitimate public controversy within the meaning of *Gertz*.

. . . We have no difficulty in concluding that Avins voluntarily injected himself into the controversy surrounding DLS's accreditation. As creator, chief architect, and the first dean of DLS, Avins spearheaded its drive toward accreditation. Indeed, the first major hurdle which Avins had to surmount in behalf of DLS was accreditation. The record reveals that from the outset Avins, as dean, was actively involved in every facet of the accreditation struggle. He, in fact, invited the first three accreditation teams to inspect DLS and he personally presented DLS's case before the Council and Accreditation Committee. . . . It was Avins who as dean of DLS officially requested, invited, and affirmatively invoked the accreditation process of the American Bar Association. We therefore conclude that Avins played an affirmative and aggressive role in the accreditation process and that he was a public figure for that limited purpose [627 F.2d at 646-48].

The court justified this extension of the public figure doctrine to the accreditation context by relying on the nature of the accreditation process itself:

We believe the importance of the accreditation process underscores the need for extension of the *New York Times [v. Sullivan]* privilege to a private individual criticizing a public figure in the course of commenting on matters germane to accreditation. An accreditation evaluation by its nature is critical; the applicant school invites critical comments in seeking accreditation. In order to succeed, individuals involved in the accreditation process need to be assured that they may frankly and openly discuss accreditation matters. White, in criticizing Avins at the luncheon, was expressing a candid view of Avins' conduct during the accreditation process. To require an individual like White to insure the accuracy of his comments on accreditation matters would undoubtedly lead to self-censorship, which will jeopardize the efficacy and integrity of the accreditation process itself. Since the public is vitally affected by accreditation of educational institutions, we believe that self-censorship in the accreditation process would detrimentally affect an area of significant social importance [627 F.2d at 648-49].

*Avins v. White* thus provides additional insight into how courts view the accreditation process. The case affirms the societal importance of the process and underscores the need for courts to provide enough legal running room for accreditation to accomplish its societal purposes. More specifically, the case illustrates the steps administrators and counsel should take and the issues they will encounter in analyzing defamation claims in the accreditation context. The plaintiff's initial victory at trial suggests that defamation law can be a very real source of legal protection for institutions and their officials, and of legal liability for accrediting agencies and their officials. But the appellate court's reversal provides a mellowing effect: defamation law will not be applied so strictly that it discourages the candid criticism necessary to accreditation's success; and, when the institutional official allegedly defamed is a "public figure," defamation

law will provide a remedy against accrediting agencies only in cases of malicious misconduct.

In another type of tort case, *Keams v. Tempe Technical Institute*, 39 F.3d 222 (9th Cir. 1994), the appellate court considered a negligence claim against an accrediting agency and addressed a new issue concerning the judicial role in accreditation cases: whether the Higher Education Act preempts state tort claims by students against accrediting agencies. (Only the accrediting associations were defendants for purposes of this appeal.) The trial court had ruled that the Higher Education Act did preempt such claims against the agencies, and also ruled that the Act did not provide for a private right of action by students against accrediting agencies. The appellate court reversed, finding no evidence in the Higher Education Act of a congressional intent to preempt state tort claims. Indeed, said the court, since it is difficult for the U.S. Secretary of Education to police the accreditors, and since the accrediting agencies and the schools they accredit had a commonality of interests, the students' "interest in honest and effective accreditation may be more effectively vindicated by private tort suits in state court" (39 F.3d at 227). The students could therefore proceed with their negligence action against the accrediting agencies.

The *Keams* case thus adds additional tort claims, beyond defamation, to the list of common law claims that may be asserted against accrediting agencies, thereby expanding the bases upon which courts may review accrediting agency decisions. In a later proceeding, however, the trial judge dismissed the students' negligence claims on the merits, ruling that state law had not recognized a duty of care that would create liability under the facts alleged by the students, and the appellate court affirmed (*Keams v. Tempe Technical Institute*, 110 F.3d 44 (9th Cir. 1997)).

**14.3.2.6. Bankruptcy law.** On occasion, an accredited institution may file for bankruptcy. Such an action does not protect the institution from an accrediting agency that is seeking to withdraw the institution's accreditation. The federal Bankruptcy Code (see Section 8.3.8.1 of this book), as amended by the Omnibus Reconciliation Act of 1990 (104 Stat. 1388), makes clear that the "accreditation status . . . of the debtor as an educational institution" is not considered to be property subject to the bankruptcy laws (11 U.S.C. § 541(b)(3)); and that the automatic stay provision, which prohibits others from obtaining possession or control of the debtor's property, does not apply to "any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution" (11 U.S.C. § 362(b)(14)).

These Bankruptcy Code amendments adopt and give nationwide application to the holding in *In re Nasson College*, 80 Bankr. Rptr. 600 (D. Maine 1988), in which a college in bankruptcy sought an injunction ordering the New England Association of Schools and Colleges to restore its accreditation. The college had filed for bankruptcy and then ceased to offer educational programs, after which the accrediting agency had terminated the college's accreditation. The college argued that its accreditation was property included in the bankruptcy estate and that the agency's action therefore violated the Bankruptcy Code's automatic stay provision (11 U.S.C. § 362(a)(3)). The court rejected the college's argument,

ruling that accreditation is not property but “[a] status . . . held in the nature of a trust for the [accrediting agency] and the public” (80 Bankr. Rptr. at 604).<sup>10</sup> (For another similar case, see *In re Draughon Training Institute*, 119 Bankr. Rptr. 927 (W.D. La. 1990).)

Given the thrust of the Bankruptcy Code amendments and the *In re Nasson College* case, it is apparently also clear that a debtor institution cannot protect its accreditation by resort to the “executory contract” provision of the Bankruptcy Code (11 U.S.C. § 365), which allows debtors to continue performance under certain of its contracts. In the case of *In re Statewide Oilfield Construction, Inc., d/b/a Golden State School*, 134 Bankr. Rptr. 399 (E.D. Cal. 1991), the bankruptcy court held that the bankruptcy amendments quoted above preclude a debtor from claiming that its accredited status constitutes an executory contract with the accrediting agency and an asset protected by 11 U.S.C. § 365. (See M. Pelesh, “Accreditation and Bankruptcy: The Death of Executory Contract,” 71 *West’s Educ. Law Rptr.* 975 (March 12, 1992).) The *Golden State* litigation apparently closes the last possible door through which an accredited institution might have used bankruptcy laws as a shield to protect its accreditation during difficult financial times.

**14.3.3. Accreditation and the U.S. Department of Education.** The Department of Education (ED) plays an important and sometimes controversial role in the accrediting process. The federal aid-to-education statutes generally specify accreditation or “preaccreditation” by “a nationally recognized accrediting agency or association” as a prerequisite to eligibility for the institution and its students (see 20 U.S.C. § 1001(a)(5); 42 U.S.C. § 296(6)). These provisions authorize the Secretary of Education to “publish a list of nationally recognized accrediting agencies or associations that the Secretary determines . . . to be reliable authority as to the quality of education or training offered” (20 U.S.C. § 1001(c)). A National Advisory Committee on Institutional Quality and Integrity, established by statute, assists the Secretary with this responsibility (20 U.S.C. § 1011(c)). (The Committee was scheduled to go out of existence on September 30, 2004; its future apparently depends on the bills to reauthorize the Higher Education Act that were still pending in Congress as this book went to press.) Most postsecondary institutions and programs attain eligibility for federal funds by obtaining accreditation or preaccreditation from one of the agencies recognized by the Secretary.

For many years after passage of the Higher Education Act, the Secretary of Health, Education and Welfare (HEW), and then the Secretary of Education, promulgated and published criteria for determining whether to recognize particular accrediting agencies. It was not until 1992, with passage of the 1992

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<sup>10</sup>The college also argued that the termination of accreditation violated Section 525(a) of the Bankruptcy Code, which prohibits “governmental unit(s)” from discriminating against debtors in bankruptcy. The court rejected this argument as well, holding that the defendant was not a “governmental unit” for purposes of Section 525(a) and that the termination occurred because the college had ceased offering programs, not because it had become a debtor in bankruptcy.



Amendments to the HEA, that Congress involved itself in the establishment of recognition criteria and procedures to be used by the Secretary (see subsection 14.3.1 above). These amendments established a list of requirements that accrediting agencies must comply with in order to be recognized and that the Secretary must include in the criteria for recognition.

In the Higher Education Amendments of 1998, Congress again addressed the statutory standards and procedures that the Secretary of Education must follow in recognizing accrediting agencies. These newer amendments (Pub. L. No. 105-244, Title IV, § 492, 112 Stat. 1622 at 1759–61, codified at 20 U.S.C. § 1099b), made several changes in the criteria that the Secretary must use. As amended in 1998, Section 1099b now specifies, for example, that the Secretary must have criteria that: require accrediting agencies to promulgate and enforce standards that assess institutions' compliance with their program responsibilities under the federal student aid programs (20 U.S.C. § 1099b(a)(5)(J)); require agencies to promulgate and enforce standards regarding nine other listed areas of institutional operations (20 U.S.C. § 1099b(a)(5)); require accrediting agencies to evaluate the quality of institutions' "distance education courses or programs" (20 U.S.C. § 1099b(a)(4)); assure that agencies follow "due process" procedures "throughout the accrediting process" (20 U.S.C. § 1099b(a)(6)); require most accrediting agencies to be "separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization" (20 U.S.C. § 1099b(a)(3)(A)); and require agencies to make various types of information available to the Secretary, to state licensing agencies, or to the public (20 U.S.C. § 1099b(a)(7), (a)(8), (c)(5), & (c)(6)).<sup>11</sup> (Most such matters had already been addressed in recognition criteria that the Secretary had adopted administratively prior to passage of the 1992 legislation.)

In 1999, using a negotiated rule-making process, the Secretary proposed regulations to implement the 1998 Amendments and to otherwise revise and reorder the department's recognition process (64 Fed. Reg. 34466–85 (June 25, 1999)). Several months later, the Secretary published the final version of these regulations (64 Fed. Reg. 56612–26 (October 20, 1999)). The new regulations, like the previous ones, are codified at 34 C.F.R. Part 602. Extensive and important departmental commentary on these regulations is included with both the proposed regulations and the final regulations.

Although accreditation or preaccreditation by a recognized agency is the predominant means for obtaining eligibility to participate in federal aid programs, alternative means for attaining eligibility under certain programs are sometimes provided. Approval by a state agency recognized by the Secretary, for example, is an alternative available under student financial aid programs for nursing

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<sup>11</sup>Most of these matters, and others discussed in the rest of this subsection, could become involved in the congressional debates over the reauthorization of the Higher Education Act; and some of these matters could be affected by passage of the reauthorization act that was pending in Congress as this book went to press. Amendments to the due process requirements, for example, have been proposed (see H.R. 4795, 109th Cong., 2d Sess., introduced February 16, 2006).

education (42 U.S.C. § 296(6)); and state approval alternatives also exist for veterans' educational benefit programs (38 U.S.C. § 3452).

The Secretary of Education periodically publishes in the *Federal Register* a list of nationally recognized accrediting agencies and associations; the Secretary also publishes a list of recognized state agencies that approve public vocational education programs (34 C.F.R. Part 603) and a list of recognized state agencies for approval of nursing education (see 42 U.S.C. § 296(6)). The Secretary's criteria and procedures for recognition of accrediting agencies are also published in the *Federal Register* and codified in the *Code of Federal Regulations* (34 C.F.R. Parts 602 & 603). Periodically, the Secretary also publishes a pamphlet containing a current list of recognized agencies, the criteria and procedures for listing, and background information on accreditation.<sup>12</sup> The listing process and other aspects of institutional eligibility for federal aid are administered within the Department of Education by the Accrediting Agency Evaluation Branch, part of the Higher Education Management Services Directorate of the Office of Postsecondary Education.

To be included in the list of nationally recognized agencies, an agency must apply to the Secretary for recognition and must meet the Secretary's criteria for recognition. Agencies are reevaluated and their listings renewed or terminated at least once every five years (34 C.F.R. §§ 602.35(b)(1)(ii) & 602.36(c)). The criteria for recognition, as authorized by 20 U.S.C. § 1099b (see above), concern such matters as the agency's organization and membership, its administrative and fiscal capacities, its experience and its national acceptance by pertinent constituencies, its standards for reviewing institutional programs and functions, the procedures it follows in making accreditation decisions, and other operating processes (34 C.F.R. §§ 602.13–602.26). The criteria for recognition also cover matters concerning the agency's role in ensuring institutional compliance with the requirements of the federal student aid programs authorized by Title IV of the Higher Education Act (34 C.F.R. §§ 602.1, 602.10, 602.22(c), 602.24, & 602.27(e)–(f); see also 20 U.S.C. § 1099b(a)(5)(J)).

Although the statutory provisions and regulations discussed in this subsection give the Secretary of Education substantial influence over the accrediting process, the Secretary has no direct authority to regulate unwilling accrediting agencies. Agencies must apply for recognition before coming under the Secretary's jurisdiction. Moreover, recognition only gives the Secretary authority to ensure the agency's continued compliance with the criteria; it does not give him or her authority to overrule the agency's accrediting decisions on particular institutions or programs. (See, however, 34 C.F.R. § 602.28, setting out limits on a recognized agency's authority to accredit or preaccredit institutions and programs; and 34 C.F.R. § 602.31(b)(2), (3), on the Secretary's review of complaints against an agency during consideration of an application for recognition.)

Postsecondary administrators responsible for academic programs will find it beneficial to understand the relationship between the agencies and the

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<sup>12</sup>U.S. Department of Education, "Accreditation in the United States," available at <http://www.ed.gov/admins/finaid/accred./accreditation.html>.

Department of Education. The requirements in the Secretary's criteria for recognition affect institutions in two ways: they are the source of additional standards that the agencies impose on institutions through the accreditation process, and they are a source of procedural and other protections that redound to the benefit of institutions and programs when an agency is investigating them or considering a denial or termination of accreditation. The criteria require, for example, that an accrediting agency follows specified processes in its accrediting activities (34 C.F.R. § 602.18); that an agency has "clear and effective controls" against conflicts of interest on the part of its evaluators and decision makers (34 C.F.R. §§ 602.14(b) & 602.15(a)(6)); that an agency applies its standards consistently and without bias (34 C.F.R. § 602.18(a), (b)); that an agency's policy and decision-making bodies include public representatives (34 C.F.R. §§ 602.14(b)(2) & 602.15(a)(5)); that an agency reviews and follows up on any complaint filed against it (34 C.F.R. § 602.23(c)(3)); and that all of an agency's procedures "satisfy due process requirements" (34 C.F.R. § 602.25). Because recognition is vitally important to an accrediting agency's influence and credibility in the postsecondary world, agencies will be disinclined to jeopardize their recognition by violating the Secretary's criteria in their dealings with institutions. Institutional administrators therefore have considerable leverage to insist that accrediting agencies comply with these criteria.

Although an institution may complain to the Secretary about an agency's violation of the recognition criteria (see 34 C.F.R. § 602.31(b)(2), (3)), it is unlikely that the Secretary's criteria are enforceable in the court through suits by individual institutions against accrediting agencies. The prevailing judicial view is that government regulations are to be enforced by the government agency that promulgated them, unless a contrary intention appears from the regulations and the statute that authorized the regulations (see generally the "private cause of action" cases in Sections 13.4.6 and 13.5.9). Since there is no indication that the Secretary's criteria are to be privately enforceable, the courts would likely leave problems concerning compliance with these criteria to the Secretary. Similarly, it is unlikely that 20 U.S.C. Section 1099b(f), passed in 1992 (see subsections 14.3.2.1 & 14.3.2.2 above), serves to create a private cause of action to enforce the statutory requirements that Section 1099b applies to accrediting agencies. In *Thomas M. Cooley Law School v. American Bar Association*, 376 F. Supp. 2d 758 (W.D. Mich. 2005), for example, the court rejected the law school's claim that the defendant had violated several of the requirements in Section 1099b, concluding that "there is no case law support for the proposition that [Section 1099b(f)] expressly or impliedly creates a private right of action in favor of an institution of higher education against an accrediting agency." The developing case law on this point is not definitive, however. In the *Auburn University* case (subsection 14.3.2.2 above), for instance, the court suggested in *dicta* that Section 1099b(f) "is susceptible of an interpretation" that would allow a private cause of action to enforce the requirements in the rest of Section 1099b (2002 WL 3237500 at p. 16); and in *Western State University of Southern California v. American Bar Ass'n.*, 301 F. Supp. 2d 1129 (C.D. Cal. 2004),

the court suggested in *dicta* that, if Section 1099b(f) did not create a private right of action, this provision “might be superfluous.”

Even if the recognition criteria are not privately enforceable, however, that does not mean they would be irrelevant in any suit by an institution against an accrediting agency. Since the judicial standards applying to accrediting agencies are not fully developed (see subsection 14.3.2.2 above), courts may look to the Secretary’s criteria, especially in federal common law cases (subsection 14.3.2.2), as evidence of accepted practice in accreditation or as a model to consult in formulating a remedy for an agency’s violation of legal standards.

When the Secretary applies the criteria to grant or deny recognition to a particular agency (see 34 C.F.R. §§ 602.34–602.45), a different question about the role of courts arises: On what grounds, and at whose request, may a court review the Secretary’s recognition decisions? The case of *Sherman College of Straight Chiropractic v. U.S. Commissioner of Education*, 493 F. Supp. 976 (D.D.C. 1980), is illustrative. The plaintiffs were two chiropractic schools that were not accredited by the Council on Chiropractic Education (CCE), the recognized professional accrediting agency for chiropractic schools. The plaintiffs espoused a chiropractic philosophy divergent from that represented by CCE and the schools it had accredited: the plaintiffs adhered to a limited view regarding diagnosis, called the “straight doctrine,” whereas CCE took a broader view of diagnosis as an essential part of chiropractic practice. When the Commissioner (who would now be the Secretary) renewed CCE’s status as a nationally recognized accrediting agency, the plaintiffs challenged his action in court.

Using federal administrative law principles, the court determined that the Commissioner’s renewal of CCE’s recognition was a final agency action subject to judicial review. The court also determined that the plaintiffs, as parties aggrieved by the Commissioner’s action, had standing to challenge it. On the merits, however, the court rejected the plaintiffs’ claim that the Commissioner’s decision was arbitrary and capricious, or an abuse of discretion. The court provided various reasons having to do with the nature and scope of the Commissioner’s (now Secretary’s) recognition authority and with the nature of accreditation, concluding that “the commissioner acted correctly in deciding the only issue [he] could legitimately determine: that CCE is a ‘reliable authority’ under the statute” (493 F. Supp. at 981).

The *Sherman College* case thus indicates that the Secretary of Education’s decisions to grant or refuse recognition to petitioning accrediting agencies, or to renew or not renew such recognition, are reviewable in the federal courts. The Secretary has similarly concluded that accrediting agencies may sue in court to challenge decisions “to limit, suspend, or terminate” recognition (34 C.F.R. § 602.45). It is possible that the Secretary’s recognition decisions may also be challenged by individual institutions, and by students and faculty members, if they suffer some concrete injury attributable to the decision. The availability of judicial review, however, does not mean that courts are likely to overturn the Secretary’s decisions. As the *Sherman College* case illustrates, courts will accord the Secretary considerable latitude in applying the recognition criteria and will not expect the Secretary to take sides in disputes over educational philosophies,

professional doctrine, or other matters outside the scope of the recognition criteria.

**14.3.4. Dealing with accrediting agencies.** As a general proposition, institutional officials and counsel should not regard accrediting agencies as adversaries. Accreditation usually depends on mutual assistance and cooperation, and the dynamic between institution and agency can be very constructive. Institutions and programs that are willing to cooperate and expend the necessary effort usually can obtain and keep accreditation without serious threat of loss. But serious differences can and do arise, particularly with institutions that are innovating with curricula, the use of resources, or delivery systems. Such institutions may not fit neatly into accrediting standards or may otherwise be difficult for accrediting agencies to evaluate. Similarly, institutions that establish branch campuses, operate in more than one state (see Section 12.4), offer programs in foreign countries, contract for the delivery of educational services with nonaccredited outside organizations, or sponsor off-campus or “external” degree programs may pose particular problems for accrediting agencies.<sup>13</sup> So may institutions that are organized as proprietary entities, as illustrated by the *Marjorie Webster* case (Section 14.3.2.1; and see generally Kevin Kinser, *A Profile of Regionally-Accredited For-Profit Institutions of Higher Education* (University of Houston Law Center, IHELG Monograph 04-08, (2004)), or institutions in financial crisis, as illustrated by the cases in Section 14.3.2.6. Controversies may also arise, as they prominently did in the early 1990s, over accrediting standards regarding the cultural diversity of faculty and students. When these or other circumstances involve the institution in accreditation problems, they can be critical matters because of accreditation’s importance to the institution. Administrators should then be prepared to deal, perhaps in an adversarial way at times, with the resulting conflicts between the institution and the agency. (For other more general suggestions, see Section 14.6 below.)

Whether a postsecondary institution is dealing with an accrediting agency in a cooperative or an adversarial manner, administrators should have complete information from the agency about its organization and operation. According to the Secretary of Education’s criteria (subsection 14.3.3), an accrediting agency recognized by the Department of Education must provide, in clear written form, its standards and procedures for granting, suspending, and terminating accreditation and preaccreditation, as well as various types of other information covering its operations and its personnel. The accrediting agency must also provide written notice of its accrediting decisions regarding particular institutions or programs and, for negative decisions, must provide a brief statement of reasons (34 C.F.R. § 602.26). In addition, the agency must provide notice of any proposed changes in its standards to its “relevant constituencies” and to “other parties who have made their interest known”; must provide opportunity to comment

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<sup>13</sup>See generally E. Kuhns & S. V. Martorana, *Toward Academic Quality Off-Campus: Monitoring Requirements of Institutional Accrediting Bodies and the States for Off-Campus, Military Base, and Study Abroad Programs* (Council on Postsecondary Accreditation, 1984).

on any such proposed changes; and must “take into account” all comments that are submitted in a timely fashion (34 C.F.R. § 602.21(c)). Most important for an administrator is the information on the agency’s evaluative standards and its procedures for making accrediting decisions. A full understanding of the standards and procedures can be critical to representing the institution or program effectively before the agency or in court. Administrators should insist on receiving all this information (see 34 C.F.R. § 602.23) and should also insist, as the court cases discussed in Section 14.3.2.2 make clear, that the agency consistently follows its own rules in dealing with the institution.

If an institution’s dispute with an accrediting agency does become sufficiently adversarial to result in litigation, institutional counsel and administrators can find substantial guidance on the applicable law in subsection 14.3.2 above. It will also be important to understand the effect of 20 U.S.C. Section 1099b(f) on the jurisdiction of courts to hear accreditation cases; this matter is discussed in subsections 14.3.2.1 and 14.3.2.2 above. In addition, questions may arise concerning whether an institution may litigate, in court, claims that an accrediting agency has violated the Secretary of Education’s criteria for recognition in its dealings with the institution. This matter is discussed in subsection 14.3.3 above.

## ***Sec. 14.4. Athletic Associations and Conferences***

**14.4.1. Overview.** Various associations and conferences have a hand in regulating intercollegiate athletics. Most institutions with intercollegiate programs are members of both a national association (for example, the National Collegiate Athletic Association (NCAA)) and a conference (for example, the Atlantic Coast Conference (ACC)).

The NCAA (<http://www.ncaa.org>) is the largest and most influential of the athletic associations. It is an unincorporated association with a membership of more than one thousand public and private colleges and universities that are divided into three divisions. The association has a constitution that sets forth its fundamental law, and it has enacted extensive bylaws that govern its operations. (The constitution and bylaws, and the NCAA manuals (see below), are available on the NCAA’s Web site under “legislation and governance.”) To preserve the amateur nature of college athletics and the fairness of competition, the NCAA includes in its bylaws complex rules regarding recruiting, academic eligibility, other eligibility requirements, and the like. There are different rules for each of the three divisions, compiled into an *NCAA Manual* for each division, which is updated periodically. Regarding eligibility, for instance, the *NCAA Manual* for Division I has requirements on minimum grade point average (GPA) and Scholastic Aptitude Test (SAT) or American College Testing (ACT) scores for incoming freshman student athletes; requirements regarding satisfactory academic progress for student athletes; restrictions on transfers from one school to another; rules on “redshirting” and longevity as a player; limitations on financial aid, compensation, and employment; and limitations regarding professional contracts and players’ agents (see generally G. Wong, *Essentials of Amateur Sports*

*Law* (2d ed., Praeger, 1994), 239–84). To enforce its rules, the NCAA has an enforcement program that includes compliance audits, self-reporting, investigations, and official inquiries, culminating in a range of penalties that the NCAA can impose against its member institutions but not directly against the institutions' employees. The various conferences affiliated with the NCAA may also have their own rules and enforcement processes, so long as they meet the minimum requirements of the NCAA.

Legal issues often arise as a result of the rule-making and enforcement activities of the various athletic associations and conferences. Individual institutions have become involved in such legal issues in two ways. First, coaches and student athletes penalized for violating conference or association rules have sued their institutions as well as the conference or association to contest the enforcement of these rules. Second, institutions themselves have sued conferences or associations over their rules, policies, or decisions. The majority of such disputes have involved the NCAA, since it is the primary regulator of intercollegiate athletics in the United States. The resulting litigation frequently presents a difficult threshold problem of determining what legal principles should apply to resolution of the dispute.

As the developments in the subsections below demonstrate, institutions of higher education do have legal weapons to use in disputes with the NCAA and other athletic associations or conferences. State common law clearly applies to such disputes (subsection 14.4.5). Antitrust law also has some applicability (subsection 14.4.4), as does federal civil rights law (subsection 14.4.6).

Federal constitutional rights may still have some application in a narrow range of cases (subsection 14.4.2). And some role may still be found for state regulatory statutes more narrowly crafted than those discussed in subsection 14.4.3. Administrators and counsel should be aware, however, that these weapons are two-edged: student athletes may also use them against the institution when the institution and the athletic association are jointly engaged in enforcing athletic rules against the student.

**14.4.2. Federal constitutional constraints.** In a series of cases, courts have considered whether the NCAA, as an institutional membership association for both public and private colleges and universities, is engaged in “state action” (see Section 1.5.2) and thus is subject to the constraints of the U.S. Constitution, such as due process and equal protection. In an early leading case, *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975), for example, several basketball players at Centenary College, later joined by the college, challenged the constitutionality of an NCAA academic requirement then known as the “1.600 rule.” Using first the “government contacts” theory and then the “public function” theory (both are explained in Section 1.5.2), the court held that the NCAA was engaged in state action. It then proceeded to examine the NCAA’s rule under constitutional due process and equal protection principles, holding the rule valid in both respects.

Subsequent to the decision in *Parish* and other similar decisions in NCAA cases, the U.S. Supreme Court issued several opinions that narrowed the

circumstances under which courts will find state action (see especially *Rendell-Baker v. Kohn*, discussed in Section 1.5.2). In *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984), the court relied on these Supreme Court opinions to reach a result contrary to the *Parish* line of cases. The plaintiff was a varsity tennis player at Duke University (a private institution) whom the NCAA had declared ineligible for further competition because he had participated in amateur competition for several years before enrolling at Duke. He claimed that the bylaw under which the NCAA had acted was invalid under the due process and equal protection clauses. Determining that the NCAA's promulgation and enforcement of the bylaw did not fit within either the government contacts or the public function theory, the court held that the NCAA was not engaged in state action and therefore was not subject to constitutional constraints.

In 1988, the U.S. Supreme Court came down on the *Arlosoroff* side of the debate in a 5-to-4 split decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The NCAA had opened an official inquiry in 1976 into the basketball program at the University of Nevada, Las Vegas (UNLV). UNLV conducted its own investigation into the NCAA's allegations and reported its findings to the NCAA's Committee on Infractions. After a hearing, the committee found that UNLV had committed thirty-eight infractions, ten of which directly involved its highly successful, towel-chewing basketball coach, Jerry Tarkanian, including a finding that he had failed to cooperate fully with the NCAA investigation. As a result, the NCAA placed UNLV's basketball team on a two-year probation and ordered UNLV to show cause why further penalties should not be imposed "unless UNLV severed all ties during the probation between its intercollegiate program and Tarkanian." Reluctantly, after holding a hearing, UNLV suspended Tarkanian in 1977. Tarkanian then sued both the university and the NCAA, alleging that they had deprived him of his property interest in the position of basketball coach without first affording him procedural due process protections. The trial court agreed and granted the coach injunctive relief and attorney's fees. The Nevada Supreme Court upheld the trial court's ruling, agreeing that Tarkanian's constitutional due process rights had been violated. This court regarded the NCAA's regulatory activities as state action because "many NCAA member institutions were either public or government supported" and because the NCAA had participated in the dismissal of a public employee, traditionally a function reserved to the state (*Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987)).

The U.S. Supreme Court, analyzing the NCAA's role and its relationship with UNLV and the state, disagreed with the Nevada courts and held that the NCAA was not a state actor. The Court noted that UNLV, clearly a state actor, had actually suspended Tarkanian, and that the issue therefore was "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action." Defining "state action" as action engaged in by those "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it" (488 U.S. at 191; quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)), the Court concluded that "the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is



independent of any particular State.” It further noted that the majority of the NCAA’s membership consisted of private institutions (488 U.S. at 193, n.13).

The Court also rejected arguments that the NCAA was a state actor because UNLV had delegated its state power to the NCAA. While such a delegation of power could serve to transform a private party into a state actor, no such delegation had occurred. Tarkanian was suspended by UNLV, not by the NCAA; the NCAA could only enforce sanctions against the institution as a whole, not against specific employees. Moreover, UNLV could have taken other paths of action, albeit unpleasant ones, in lieu of suspending the coach: it could have withdrawn from the NCAA or accepted additional sanctions while still remaining a member. Further, although UNLV, as a representative of the State of Nevada, did contribute to the development of NCAA policy, in reality it was the full membership of the organization that promulgated the rules leading to Tarkanian’s suspension, not the State of Nevada.

The Court also found that UNLV had not delegated state investigatory authority to the NCAA. Moreover, UNLV had not formed a partnership with the NCAA simply because it decided to adhere to the NCAA’s recommendation regarding Tarkanian. The interests of UNLV and the NCAA were in fact hostile to one another:

During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA’s recruitment standards [488 U.S. at 196].

Disagreeing with the U.S. Supreme Court majority, the four dissenting Justices argued that UNLV and the NCAA had acted jointly in disciplining Tarkanian; that the NCAA, which had no subpoena power and no direct power to sanction Tarkanian, could have acted only through the state; and that the NCAA was therefore engaged in state action.

The *Tarkanian* case does not foreclose all possibilities for finding that an athletic association or conference is engaged in state action. As the Supreme Court itself recognized, state action may be present “if the membership consist[s] entirely of institutions located within the same State, many of them public institutions created by [that State]” (488 U.S. at 193, n.13). Even if the member institutions were not all located in the same state, state action might exist if the conference were composed entirely of state institutions. For example, in *Stanley v. Big Eight Conference*, 463 F. Supp. 920 (D. Mo. 1978), a case preceding *Tarkanian*, the court applied the Fourteenth Amendment’s due process clause to the defendant conference because all its members were state universities. Even if a conference or association were like the NCAA, with both public and private members located in different states, courts might distinguish *Tarkanian* and find state action in a particular case where there was clear evidence that the conference or association and a state institution member had genuinely

mutual interests and were acting jointly to take adverse action against a particular student or coach. Finally, even if there were no basis for finding that a particular conference is engaged in state action, courts would still be able to find an individual *state institution* to be engaged in state action (see Section 1.5.2) when it directed the enforcement of conference or association rules, and suit could therefore be brought against the institution rather than the conference or association. In *Spath v. NCAA*, 728 F.2d 25 (1st Cir. 1984), for example, the court held that the University of Lowell, also a defendant, was a state actor even if the NCAA was not and therefore proceeded to the merits of the plaintiff's equal protection and due process claims. (See also *Barbay v. NCAA and Louisiana State University*, 1987 WL 5619 (E.D. La. 1987).)

Moreover, even if federal state action arguments will not work and the federal Constitution therefore does not apply, athletic associations and conferences may occasionally be suable under state constitutions for violations of state constitutional rights (see generally Section 1.4.2.1). In *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (Section 10.4.8 of this book), for example, the California Supreme Court held that the right to privacy guarantee of the California constitution could be applied to the NCAA even though it is a private organization.

**14.4.3. State statutes regulating athletic associations' enforcement activities.** Partially in response to the *Tarkanian* litigation and NCAA investigations in other states, and to protect in-state institutions as well as their athletic personnel and student athletes, a number of states passed or considered "due process" statutes (see Fla. Stat. §§ 240.5339–240.5349 (1991); 110 ILCS § 25/1 *et seq.* (1991); Nev. Rev. Stat. § 398.155 *et seq.* (1991)). Such statutes require athletic associations to extend certain due process protections to those accused in any enforcement proceeding. The Nevada statute, for example, requires that the accused be given the opportunity to confront all witnesses, that an impartial entity be empaneled to adjudicate the proceeding, and that all proceedings be made public. These statutes may be enforced through injunctions issued by the state's courts or by damage suits against the association by institutions harmed by association action (see, for example, Nev. Rev. Stat. § 398.245). (See generally Comment, "Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings," 20 *Fla. St. L. Rev.* 871, 889–900 (1993).) Some of these statutes have been repealed or invalidated by the courts (see, for example, the *Miller* case below). In such circumstances, however, a statute providing for suits by institutions against athletic associations may still remain (see, for example, Fla. Stat. § 468.4562; Nev. Rev. Stat. § 398.490).

In *NCAA v. Miller, Governor, State of Nevada*, 795 F. Supp. 1476 (D. Nev. 1992), *affirmed*, 10 F.3d 633 (9th Cir. 1993), the NCAA challenged the Nevada statute cited above. The lower court held the statute unconstitutional as both an invalid restraint on interstate commerce and an invalid interference with the NCAA's contract with its members. First, the court found that the NCAA and its member institutions are heavily involved in interstate commerce through their athletic programs, and that the statute restrained that

commerce by curtailing the NCAA's capacity to establish uniform rules for all of its members throughout the United States, thus violating the federal Constitution's commerce clause (Article I, Section 8, Clause 3). Second, the court agreed that Nevada's statute "substantially impair[ed] existing contractual relations between itself and the Nevada member institutions[,] in violation of the Contracts Clause of Article I, Section 10 of the United States Constitution." Since the Nevada law would give Nevada schools an unfair advantage over other schools, it would undermine the basic purpose of the NCAA's agreement with its members and destroy the NCAA's goal of administering a uniform system for all its members.

In affirming, the appellate court focused only on the commerce clause problem. (See generally Section 12.4 of this book regarding the commerce clause.) The court held that the statute directly regulated interstate commerce:

It is clear that the Statute is directed at interstate commerce and only interstate commerce. By its terms, it regulates only interstate organizations, *i.e.*, national collegiate athletic associations which have member institutions in 40 or more states. Nev. Rev. Stat. 398.055. Moreover, courts have consistently held that the NCAA, which seems to be the only organization regulated by the Statute, is engaged in interstate commerce in numerous ways. It markets interstate intercollegiate athletic competition, . . . [it] schedules events that call for transportation of teams across state lines and it governs nationwide amateur athlete recruiting and controls bids for lucrative national and regional television broadcasting of college athletics [10 F.3d at 638].

According to the court, the statute would "have a profound effect" on the NCAA's interstate activities. Since the NCAA must apply its enforcement procedures "even-handedly and uniformly on a national basis" in order to maintain integrity in accomplishing its goals, it would have to apply Nevada's procedures in every other state as well. Thus, "the practical effect of [Nevada's] regulation is to control conduct beyond the boundaries of the State." Moreover, since other states had enacted or might enact procedural statutes that differed from Nevada's, the NCAA would be subjected to the potentially conflicting requirements of various states. In both respects, the Nevada statute created an unconstitutional restraint on interstate commerce.

The *Miller* case was relied on in *NCAA v. Roberts*, 1994 WL 750585 (N.D. Fla. 1994), a case in which the court used the commerce clause to invalidate the Florida statute cited above.

The *Miller* and *Roberts* cases, however, should not be interpreted as casting doubt on all state statutes that regulate athletic associations and conferences. Not all statutes will have a substantial adverse effect on the association's activities in *other* states, and thus not all state statutes will work to restrain interstate commerce or to impair an association's contractual relations with its members. Various other types of regulatory statutes, and even some types of due process statutes, could be distinguishable from *Miller* in this respect. With such statutes, however, other legal issues may arise. In *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988), for instance, the court refused to apply the Texas Open

Records Act to the NCAA and the Southwest Athletic Conference, because they could not be considered governmental bodies subject to the Act.

**14.4.4. Antitrust laws.** Federal and state antitrust laws will apply to athletic associations and conferences in some circumstances. Such laws may be used to challenge the membership rules of the associations and conferences, their eligibility rules for student athletes, and other joint or concerted activities of the members that allegedly have anticompetitive or monopolistic effects. (See generally Section 13.2.8 of this book.) Most cases thus far have been brought against the NCAA, either by a member institution or by a student athlete. Member institutions could also become defendants in such lawsuits, however, since they are the parties that would be engaging in the joint or concerted activity under auspices of the conference or association.

The leading case, *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), concerned an NCAA plan for regulating the televising of college football games by its member institutions. The U.S. Supreme Court held that the NCAA's enforcement of the plan violated Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) and was therefore invalid. In its salient features, the challenged television plan was mandatory for all NCAA members; it limited the total number of games a member institution could have televised; it fixed prices at which each institution could sell the broadcast rights to its games; and it prohibited member institutions from selling the broadcast rights to their games unless those games were included in the NCAA's television package agreed upon with the networks. The plan was challenged by schools desiring to negotiate their own television contracts free from the set prices and output limitations imposed on them by the NCAA plan.

Although acknowledging from the outset that the NCAA plan was “perhaps the paradigm of an unreasonable restraint of trade,” the Court held that it was not a per se violation of the Sherman Act. The Court reasoned that in the “industry” of college football such “restraints on competition are essential if the product is to be available at all” (468 U.S. at 99). In order to ensure the integrity of intercollegiate athletic competition, participating schools must act jointly through the NCAA. Through its regulatory activities in this field, the NCAA enables institutions to preserve “the character of college football” and thus “enables a product to be marketed which might otherwise be unavailable” (468 U.S. at 102). The Court thus found that, by maintaining the existence of college football in its traditional form, as opposed to allowing it to die out or become professionalized, the NCAA's actions as a whole “widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive” (468 U.S. at 102).

Having rejected a rule of per se invalidity, the Court then analyzed the case under the “rule of reason,” considering both the plan's anticompetitive impact and its procompetitive impact. In a lengthy discussion, the Court found that the NCAA television plan restricted individual institutions from negotiating their own television contracts and had a significant adverse impact on member institutions' ability to compete openly in the sports broadcasting market. The Court

also found that the NCAA wields market power in this market. The Court then turned to the NCAA's alleged justifications for the plan, to determine whether they should take precedence over the plan's anticompetitive impact.

The NCAA argued that, if individual institutions were permitted to negotiate their own television contracts, the market could become saturated, and the prices that networks would pay for college football games would decrease as a result. The Court disagreed with this premise, noting that the NCAA's television plan was not "necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors" (468 U.S. at 115). The NCAA also argued that, if there was too much college football on television, fewer people would attend live games, thereby decreasing ticket sales, and its television plan was therefore needed to protect gate attendance. The Court rejected this argument as well, because such protection—through collective action—of what was presumed to be an inferior product was itself "inconsistent with the basic policy of the Sherman [Antitrust] Act" (468 U.S. at 116).

Under the rule of reason, therefore, the Court held that the NCAA's enforcement of its television plan was a clear restraint of trade in violation of Section 1 of the Sherman Act.<sup>14</sup> (See B. Gregory & J. C. Busey, "Alternative Broadcasting Arrangements After NCAA," 61 *Indiana L.J.* 65 (1985).)

A later case involving a different type of competitive effects problem, *Law v. National Collegiate Athletic Association*, 902 F. Supp. 1394 (D. Kan. 1995), affirmed, 134 F.3d 1010 (10th Cir. 1998), provides another dramatic example of antitrust law's application to athletic associations and conferences. Using Section 1 of the Sherman Act, the district court and then the court of appeals invalidated the NCAA's "REC Rule" that established a category of "restricted earnings coaches" (RECs) for Division I men's sports (except football) and capped these coaches' salaries at \$16,000 per year. The courts' decisions paved the way for a jury award of money damages to a plaintiff class of 2,000–3,000 coaches and, ultimately, a \$54.5 million settlement in the case that was paid in part by the NCAA directly and in part by individual Division I schools. (See Welch Suggs, "NCAA Approves Plan to Finance Settlement with Coaches," *Chron. Higher Educ.*, April 30, 1999.)

The district and appellate courts in *Law* used rule-of-reason analysis similar to that used in many of the cases above, in particular the *University of Oklahoma* case in the U.S. Supreme Court. Affirming the district court's determination that no dispute of material fact existed between the parties, the appellate court first explained that the coaches had to demonstrate that, by imposing the

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<sup>14</sup>Subsequent to the *University of Oklahoma* decision, the Federal Trade Commission (FTC) challenged the television broadcasting arrangements of the College Football Association, whose members had been plaintiffs in the *University of Oklahoma* case. An FTC administrative law judge dismissed the FTC's antitrust case on jurisdictional grounds (*In re College Football Ass'n. and Capital Cities/ABC, Inc.*, Docket No. 9242 (July 29, 1991)). See generally Section 13.2.9.

REC salary cap, “the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.” The NCAA did not contest the first point in this analysis, since it was evident “that the REC rule resulted from an agreement among its members.” Turning to the second part of the analysis, the court noted that the salary cap constituted the type of horizontal price fixing that would ordinarily be struck down as invalid per se under the Sherman Act. Because some horizontal agreements among member schools are necessary in order for competitive collegiate basketball to exist, however, the court used the more flexible rule of reason to determine the salary cap’s legality.

The court’s rule-of-reason analysis consisted of two main steps. The first step “requires a determination of whether the challenged restraint has a substantially adverse effect on competition” (anticompetitive effect). The second step requires “an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justify the otherwise anticompetitive impacts” (procompetitive effect). For the first step, plaintiffs may show anticompetitive effects either indirectly by showing “that the defendant possessed the requisite market power within a defined market” or directly “by showing actual anticompetitive effects, such as control over output or price.” Since the coaches were able to demonstrate that the NCAA exerted direct control over the salaries of assistant coaches, the court did not need to examine the NCAA’s market power or the proper delineation of the relevant market controlled by the NCAA. (This type of analysis is referred to as “quick look rule of reason.”)

For the second step of the rule-of-reason analysis, the NCAA offered several “procompetitive justifications.” The NCAA argued that the salary cap would help retain positions for younger, less experienced coaches so that they might gain experience at the collegiate level. It also argued that the salary cap would help level the playing field between teams, so that no team would have the benefit of a greater number of experienced coaches than another team. The court rejected those arguments on two grounds. First, the court noted that, although there may be social value in protecting positions for young coaches, such a result may not be considered unless it has a positive impact on competition. Second, the court explained that the NCAA did not present evidence that the salary caps would actually help level the playing field among teams. The NCAA also argued that, without the salary cap, certain teams would always emerge as the winners and, consequently, NCAA competition could disappear altogether. Again, the court rejected the argument, citing the NCAA’s lack of evidence to support it.

Without any demonstrated procompetitive effects to justify the salary cap, the appellate court upheld the district court’s grant of summary judgment for the plaintiffs.

Various other antitrust cases involve athletic eligibility rules. In *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988), for example, the court considered the legality of NCAA rules restricting compensation for student athletes. The court used rule-of-reason analysis as articulated in the *University of Oklahoma* case but held that the eligibility rules, unlike the TV rules in *University of Oklahoma*,

did not violate the rule of reason. In the *McCormack* case, alumni, football players, and cheerleaders of Southern Methodist University (SMU) sued the NCAA after it had suspended and imposed sanctions on the school's football program for violating the restrictions on student-athlete compensation. Assuming without deciding that the football players had standing to sue, the court upheld the dismissal of the plaintiffs' antitrust claim. It found that, under the rule of reason, the NCAA's eligibility rules were a reasonable means of promoting the amateurism of college football. Unlike the regulations regarding the television plan in the *University of Oklahoma* case, the court found that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and intercollegiate athletics" (845 F.2d at 1344).

Other important cases have also upheld NCAA eligibility requirements against antitrust challenges, employing a variety of reasoning. In two similar cases, football players with one year of intercollegiate eligibility remaining entered themselves in the professional football draft and used the services of an agent. Neither of the players was drafted, and each then attempted to rejoin his college—despite NCAA “no-draft” rules, which at that time prohibited players who had entered the draft or obtained an agent from returning to play. When the NCAA refused to let them play, each player sued the NCAA and their schools, challenging the no-draft rule as well as the no-agent rule under the Sherman Act.

In one of these two cases, *Banks v. NCAA*, 746 F. Supp. 850 (N.D. Ind. 1990), *affirmed*, 977 F.2d 1081 (7th Cir. 1992), the player (Banks) filed suit under Section 1 of the Sherman Act (15 U.S.C. § 1). Although acknowledging that the rule of reason was the appropriate standard for the case, the district court nevertheless rejected Banks's request for injunctive relief, because he had alleged no anticompetitive effect of the NCAA's rules even though there was clear evidence of a procompetitive effect of upholding the amateur nature of college football. The appellate court affirmed:

Banks' allegation that the no-draft rule restrains trade is absurd. None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education. . . . [T]he regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students [977 F.2d at 1089–90; footnotes and citations omitted].

In the second of these two cases, *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990), the student football player filed suit under Section 2 of the Sherman Act (15 U.S.C. § 2) and sought an injunction against the NCAA and Vanderbilt University to reinstate his eligibility to play football. Unlike the court in *Banks*, the *Gaines* court accepted the NCAA's argument that its eligibility rules “are not subject to antitrust analysis because they are not designed to generate profits in

a commercial activity but to preserve amateurism by assuring that the recruitment of student athletes does not become a commercial activity.” The court distinguished the *University of Oklahoma* case by stressing that the rules involved there had commercial objectives (generation of broadcasting profits), whereas the no-draft and no-agent rules did not. The court also held that, even if the antitrust laws did apply to the NCAA’s rules, these rules did not violate Section 2 of the Sherman Act, because the NCAA’s no-agent and no-draft rules were justified by legitimate business reasons. (See generally Note, “An End Run Around the Sherman Act? *Banks v. NCAA* and *Gaines v. NCAA*,” 19 *J. Coll. & Univ. Law* 295 (1993).)

In *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996), football players at the University of Washington challenged a Pac-10 decision placing the football team on probation and levying sanctions against it for recruiting violations. As in the *Banks* case, the challenge was based on Section 1 of the Sherman Act, and the argument was that the conference’s sanctions constituted an unreasonable restraint of trade. The court, employing the “rule-of-reason” analysis, rejected the plaintiffs’ argument. The conference had submitted evidence “showing that there are significant pro-competitive effects of punishing football programs that violate the Pac-10s amateurism rules,” and the plaintiffs had not produced any evidence that “the Pac-10s pro-competitive objectives could be achieved in a substantially less restrictive manner.”

In *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (also discussed in subsection 14.4.6.1 below), Renee Smith, a volleyball player for two years at her undergraduate institution, challenged the NCAA’s “Postbaccalaureate Bylaw” that prevented her from playing intercollegiate volleyball at either of her two postgraduate institutions. As in the *Hairston* case and the *Banks* case (above), the challenge was based on Section 1 of the Sherman Act.

Smith alleged that the NCAA’s enforcement of the Postbaccalaureate Bylaw violated Section 1 “because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect.” The NCAA argued (as in the *Gaines* case, above) that the Sherman Act applies only to a defendant’s commercial or business activities, and that enforcement of the bylaw was not such an activity. The court thus focused on the NCAA’s activities—rather than on the plaintiff’s injuries—and posed the question “whether antitrust laws apply only to the alleged infringer’s commercial activities.” The court answered in the affirmative:

[T]he eligibility rules are not related to the NCAA’s commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court’s recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in “business and commercial transactions,” *Apex [Hosiery Co. v. Leader]*, 310 U.S. at 493, 60 S. Ct. at 992 [(1940)], and therefore has only limited applicability to organizations which have principally noncommercial objectives . . . , we find that the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements [139 F.3d at 185–86].



In addition, the court asserted that “even if the NCAA’s actions in establishing eligibility requirements were subject to the Sherman Act,” it would still dismiss the plaintiff’s claim:

The NCAA’s eligibility requirements are not “plainly anticompetitive,” *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), and therefore are not per se unreasonable, see *National Collegiate Athletic Ass’n. v. Board of Regents*, 468 U.S. at 101. . . . ; McCormack, 845 F.2d at 1343-44. . . . Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason [139 F.3d at 186].

Agreeing with the *McCormack*, *Banks*, and *Gaines* cases, which upheld NCAA eligibility rules under the rule of reason, the court held that “the bylaw at issue here is a reasonable restraint which furthers the NCAA’s goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. . . .”

In a similar case, *Tanaka v. University of Southern California*, 252 F. 3d 1059 (9th Cir. 2001), in which the Pac-10 and the NCAA were also defendants, the court rejected an antitrust challenge to a rule governing intraconference transfers. The court declined to rule on whether the intraconference transfer rule “involve[s] commercial activity” and, if not, whether it is “immune from Sherman Act scrutiny.” Then, citing the *University of Oklahoma* and the *Hairston* cases (above), the court determined that, if the Sherman Act did apply, rule-of-reason analysis would apply and the plaintiff would lose because she had “failed to identify an appropriately defined product market” or to “allege that the transfer rule has had significant anticompetitive effects within a relevant market.” In addition, the court ruled that the plaintiff’s case failed because she had alleged “nothing more than a personal injury to herself, not an injury to a definable market;” and explained that “[i]t is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort” (252 F.3d at 1064, quoting *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812–13 (9th Cir. 1988)).

These antitrust cases, beginning with *University of Oklahoma*, clearly establish that the NCAA and other athletic associations and conferences are subject to antitrust laws, at least when their actions have some commercial purpose or impact. But their rules, even when they have anticompetitive effects, will generally not be considered per se violations of the Sherman Antitrust Act. They may be upheld under Section 1 if they are reasonable and their procompetitive impact offsets their anticompetitive impact, and they can be upheld under Section 2 if they have legitimate business justifications.

**14.4.5. Common law principles.** Even if the courts refrain from applying the Constitution to most activities of athletic associations and conferences, and even if state statutes and antitrust laws have only a narrow range of applications, associations and conferences are still limited in an important way by another relevant body of legal principles: the common law of “voluntary private

associations.”<sup>15</sup> Primarily, these principles would require the NCAA and other conferences and associations to adhere to their own rules and procedures, fairly and in good faith, in their relations with their member institutions. *California State University, Hayward v. NCAA*, 121 Cal. Rptr. 85 (Cal. Ct. App. 1975), for instance, arose after the NCAA had declared the university’s athletic teams indefinitely ineligible for postseason play. The university argued that the NCAA’s decision was contrary to the NCAA’s own constitution and bylaws. The appellate court affirmed the trial court’s issuance of a preliminary injunction against the NCAA, holding the following principle applicable to the NCAA:

Courts will intervene in the internal affairs of associations where the action by the association is in violation of its own bylaws or constitution. “It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance its adopted laws or rules. But if the decision of the [association] is contrary to its laws or rules, [or] it is not authorized by the by-laws of the association, a court may review the ruling of the [association] and direct the reinstatement of the member” [quoting another case] [121 Cal. Rptr. at 88, 89].

The case then went back to the lower court for a trial on the merits. The lower court again held in favor of the university and made its injunction against the NCAA permanent. In a second appeal, under the name *Trustees of State Colleges and Universities v. NCAA*, 147 Cal. Rptr. 187 (Cal. Ct. App. 1978), the state appellate court again affirmed the lower court, holding that the NCAA had not complied with its constitution and bylaws in imposing a penalty on the institution. The appellate court also held that, even if the institution had violated NCAA rules, under the facts of the case the NCAA was estopped from imposing a penalty on the institution. (The *Hayward* case is extensively discussed in J. D. Dickerson & M. Chapman, “Contract Law, Due Process, and the NCAA,” 5 *J. Coll. & Univ. Law* 197 (1978–79).)

*Hairston v. Pac-10 Conference*, a case also discussed in subsection 14.4.4 above, adds another issue to the state common law analysis. The plaintiff football players argued that the Pac-10’s sanctions violated the conference’s constitution, bylaws, and articles. In order to make such an argument, the plaintiffs had to show not only that the Pac-10’s documents created a contract between the conference and its member institutions, but also that “the players were third-party beneficiaries of this contract.” The federal appellate court did not challenge the first premise, but it did reject the second premise because the plaintiffs “have not demonstrated that the parties [the university and the conference] intended to create direct legal obligations between themselves and the students.” The case is therefore distinguishable from, and an interesting contrast to,

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<sup>15</sup>This same body of common law also applies to private accrediting associations, as discussed in Section 14.3.2.1 & .2. Regarding the application of voluntary private association law to the NCAA, see Note, “Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association,” 24 *Stan. L. Rev.* 903, 909–16 (1972).

the case of *California State University, Hayward v. NCAA* (above), which was a suit brought by the institution itself rather than by its student-athletes and, therefore, required no third-party beneficiary arguments.

The case of *Phillip v. Fairfield University & The National Collegiate Athletic Association*, 118 F.3d 131 (2d Cir. 1997), also involved a third-party beneficiary issue. The plaintiff, Phillip, a freshman at Fairfield University, had been declared academically ineligible to play basketball by the NCAA. Phillip and Fairfield sought a waiver of the academic requirements, but the NCAA denied a waiver. Phillip claimed in court that the NCAA had previously granted waivers in similar cases and that its refusal to do so here was a breach of a contractual duty of good faith and fair dealing. The district court agreed and granted Phillip a preliminary injunction, but the appellate court reversed. According to that court, the district court had not demonstrated that the NCAA owed any such contractual duty to Phillip, either as a party to or third-party beneficiary of a contract with the NCAA. Moreover, even if the NCAA did owe Phillip a duty of good faith, the duty would be breached (under Connecticut law) only if the plaintiff can show that the defendant acted with a “dishonest purpose” or “sinister motive.” A showing of “arbitrary enforcement of one’s own rules,” standing alone, which the district court had accepted, is not sufficient. The appellate court therefore remanded the case to the district court for further proceedings.

#### **14.4.6. Federal civil rights statutes**

**14.4.6.1. The civil rights spending statutes.** In *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999), a student athlete argued that the NCAA had violated the federal Title IX statute (see Section 13.5.3 of this book) when it refused to waive its postbaccalaureate bylaw that precluded her from further participation in intercollegiate volleyball. In particular, the plaintiff contended that the NCAA granted more waivers from the bylaw to men than to women and that the refusal in her case therefore excluded her from intercollegiate competition based upon her sex.

The threshold issue was whether the NCAA was subject to Title IX because it was a “recipient” of federal funds within the meaning of the Title IX statute (see Section 13.5.7.3 of this book). The plaintiff alleged that the NCAA’s member institutions receive federal funds, that the NCAA receives dues payments from these member institutions, and that the NCAA is therefore an indirect recipient of federal funding. In considering these allegations, the appellate court (*Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), also discussed in subsection 14.4.4 above) had analogized to *Grove City College v. Bell*, 465 U.S. 555 (1984) (Section 13.5.7.3 of this book), which held that the college was a “recipient” of federal funds under Title IX even though it received the funds indirectly from students who had received federal financial aid awards. Given the holding in *Grove City*, and “given the breadth of the language of the Title IX regulation defining recipient” (34 C.F.R. § 106.2(h)), said the appellate court, the plaintiff’s allegations “if proven, would subject the NCAA to the requirements of Title IX.”

On further appeal, the U.S. Supreme Court reversed the appellate court’s decision, holding that the NCAA is not subject to the provisions of Title IX merely

because it receives federal funds indirectly through its member institutions in the form of membership dues. Distinguishing its earlier decision in *Grove City*, the Court noted that no part of the federal funds granted to NCAA member institutions were specifically earmarked for payment of NCAA dues. Furthermore, the Court relied on its decision in *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), in which it rejected the argument that a party benefiting from federal funds, even though it is not a recipient as such, must comply with statutes governing federal fund recipients. Since the NCAA was not the recipient of the federal funds—being a beneficiary rather than a recipient—it was not governed by Title IX. Similarly, the Court addressed the applicability to the NCAA of the U.S. Department of Education regulation defining a “recipient” for purposes of Title IX. The Court determined that, read in its entirety, the language limits “recipients” to entities “to whom Federal financial assistance is extended directly or through another recipient,” and that this language did not cover mere beneficiaries. Thus, “entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not” (525 U.S. at 468).

Although the Court thus rejected the plaintiff’s arguments for applying Title IX, the final segment of the Court’s opinion described other theories under which the NCAA could possibly be classified as a federal funds recipient and consequently subjected to Title IX. The majority noted both the theory that the NCAA receives direct federal funding for its National Youth Sports Program (NYSP), and the theory that “when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX, regardless of whether it is itself a recipient.” Since these issues were not properly raised by the appeal, the Court did not rule on the viability of these alternative theories.

In *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999) (*Cureton I*), reversing 37 F. Supp. 2d 687 (E.D. Pa. 1999), the court wrestled with the issues left open by the U.S. Supreme Court’s decision in *Smith*. While *Cureton* arose under Title VI (see Section 13.5.2 of this book) rather than Title IX as in *Smith*, it is apparent from the Court’s opinion in *Smith* that analysis the NCAA’s status under the civil rights spending statutes will be comparable under all four statutes. In *Cureton*, therefore, and presumably in other cases under any of the statutes, the two conceptual issues that frame the analysis are the same as in *Smith*: (1) whether the NCAA is a “program or activity,” and (2) whether the NCAA is “receiving Federal financial assistance.”

*Cureton* concerned a challenge by two African American athletes to the NCAA’s Proposition 16, setting academic requirements for initial eligibility for intercollegiate Division I competition. The plaintiffs argued that the SAT score portion of Proposition 16 had a “disparate impact” on African American student athletes and therefore violated the Title VI regulations. (See Section 13.5.7.2 regarding disparate impact and Title VI.) The NCAA’s first defense to the suit was that it is not subject to Title VI. The district court held that the NCAA was

subject to Title VI and that the plaintiffs had established their disparate impact claim. Regarding the first point, the district court adopted two theories to support its application of Title VI to the NCAA: that the NCAA was an “indirect recipient” of federal funds because (1) it effectively controlled funds the government had granted to the National Youth Sport Program, an affiliate organization of the NCAA; and (2) it had “controlling authority” over its member schools, which were direct recipients of federal funds.

By a 2-to-1 vote, the court of appeals reversed the district court, disagreeing with both of its coverage theories. Regarding the first theory, the appellate court determined that, even if the NCAA did “receive” the NYSP grant funds, Title VI would apply only to discrimination in the specific *program or activity* that received the funds. That program or activity was the NYSP, which was not the focus of the plaintiffs’ complaint. “It therefore inexorably follows,” said the court, “that, to the extent this action is predicated on the NCAA’s receiving Federal financial assistance by reason of grants to the [NYSP], it must fail as the Fund’s programs and activities are not at issue in this case” (198 F.3d at 115). Regarding the second coverage theory, the court of appeals majority flatly rejected it, prompting a lengthy dissent from the panel’s third member. The majority noted that, under the Supreme Court’s decision in *NCAA v. Smith* (above), “the controlling authority argument can be sustained, if at all, only on some basis beyond the NCAA’s mere receipt of dues”; and the plaintiffs had not demonstrated any other basis:

[T]he ultimate decision as to which freshmen an institution will permit to participate in varsity intercollegiate athletics and which applicants will be awarded athletic scholarships belongs to the member schools. The fact that the institutions make these decisions cognizant of NCAA sanctions does not mean that the NCAA controls them, because they have the option, albeit unpalatable, of risking sanctions, or voluntarily withdrawing from the NCAA. . . . We emphasize that the NCAA members have not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against students [198 F.3d at 117–18].

In another case decided before *Smith* or *Cureton*, the court considered the applicability of Section 504 (Section 13.5.4 of this book) to the NCAA. In *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998), a student who had taken special education classes as a result of a learning disability was recruited to play football by several colleges and universities. Because the NCAA would not certify his special education classes as “core courses,” Bowers was unable to satisfy the NCAA’s academic eligibility requirements. He brought suit under Section 504, as well as the federal Americans With Disabilities Act (ADA) and a New Jersey state nondiscrimination law. (The ADA aspects of *Bowers* are discussed below in subsection 14.4.6.2 below.) The *Bowers* court focused on the NCAA’s National Youth Sports Program Fund (as had the district court in *Cureton*) and acknowledged that it was, in fact, a direct recipient of federal funds. Although the NCAA attempted to disassociate itself from the fund, the court held that the

relationship between the NCAA and the fund was to be determined at trial. The court therefore denied the NCAA's motion for summary judgment on the Section 504 claim. The court's opinion does not directly address the "program or activity" issue later raised with respect to the NYSP by the *Cureton* appellate court.

Additional issues arose in the wake of the Third Circuit's decision in *Cureton I* (above). In further proceedings in that case, and in another related case, the same court considered what type of discrimination claims may be brought against the NCAA if it is subjected to the civil rights spending statutes. After being reversed by the Third Circuit, the district court in *Cureton I* entered summary judgment for the NCAA. The plaintiffs then moved to amend the summary judgment order and amend their complaint to allege a claim of intentional discrimination. When the district court denied the motion, they appealed again to the Third Circuit. In *Cureton v. NCAA (Cureton II)*, 252 F.3d 267 (3d Cir. 2001), the appellate court affirmed the district court's denial of the plaintiff's motion, holding that the district court had not abused its discretion. The appellate court also noted that in *Alexander v. Sandoval*, 532 U.S. 275 (2001) (see Section 13.5.7.2 of this book), decided just before *Cureton II*, the U.S. Supreme Court had ruled that plaintiffs could not bring disparate impact (unintentional discrimination) claims under Title VI.

Two months after the appellate court's decision in *Cureton II*, the district court judge who had decided *Cureton I* and *Cureton II* dismissed another case, similar to the *Cureton* case, except that the African American student athletes claimed that the NCAA had engaged in *intentional* race discrimination through its adoption and implementation of Proposition 16 (*Pryor v. NCAA*, 153 F. Supp. 2d 710 (E.D. Pa. 2001)). On appeal (288 F.3d 548 (3d Cir. 2002)), the Third Circuit reversed the district court's decision, holding that the students had stated a valid claim of *intentional* race discrimination under Title VI and Section 1981 (42 U.S.C. § 1981; see Sections 5.2.4 & 8.2.4.1 of this book).

The alleged disparate impact of Proposition 16 on minority athletes, combined with allegations of the NCAA's purposeful consideration of race, provided the basis for the plaintiff's claim of intentional discrimination. Relying on the U.S. Supreme Court's decision in the *Feeney* case (see Section 5.2.7), the plaintiffs claimed that the "NCAA adopted Proposition 16 'because of' its alleged adverse impact on African American athletes." The NCAA countered that their data forecast an increase in graduation rates among student athletes, particularly African American student athletes, if Proposition 16 was implemented; and that this benefit to student athletes should justify the consideration of race in creating and implementing the athletic eligibility requirements. The Third Circuit sided with the plaintiffs. (At the same time it confirmed, as had the panel in *Cureton II*, that the Supreme Court's decision in *Sandoval* precluded the plaintiffs from bringing a disparate impact claim under the Title VI statute or regulations.) The appellate court in *Pryor* then determined that, on remand, if the plaintiffs could prove that the NCAA had intentionally discriminated against African American student athletes, the NCAA would then need to prove that its actions survived the strict scrutiny standard of review. "Laudable" or "beneficial"

goals standing alone, the court warned, would not be an adequate defense to an intentional discrimination claim. “[C]onsiderations of race, well-intentioned or not, can still subject a decision-maker to liability for purposeful discrimination” under Title VI and Section 1981 (288 F.3d at 560–61).

**14.4.6.2. The Americans with Disabilities Act.** In addition to the decisions on the civil rights spending statutes, various courts have examined whether the NCAA is subject to the requirements of Title III of the Americans With Disabilities Act (ADA) (Section 13.2.11 of this book). The primary issue is whether the NCAA “operates a place of public accommodation” within the meaning of Title III (42 U.S.C. § 12182(a)).

A line of federal district court decisions suggests an affirmative answer to this question. In *Ganden v. NCAA*, 1996 WL 680000 (N.D. Ill. 1996), for example, the plaintiff Ganden was a swimmer who was denied NCAA academic eligibility to compete for Michigan State University (MSU) on its swim team. He had been diagnosed in the second grade with a learning disability that affected his reading and writing. During his high school years, he followed a specially developed curriculum addressing his educational weaknesses. Ganden filed suit against the NCAA, alleging that its denial of eligibility was disability discrimination violating Title III of the ADA. He sought a preliminary injunction permitting him to compete with the MSU swim team during his freshman year. In order to state a viable Title III claim, a plaintiff such as Ganden must allege as a threshold matter that the defendant falls within the statute’s “public accommodation” category. The court considered two approaches for determining whether the NCAA did so. First, if the NCAA is itself a “place of public accommodation,” it is subject to the provisions of Title III. Alternatively, if the NCAA “operates” a place of public accommodation, it is subject to Title III.

To reach a membership organization such as the NCAA under the first theory, said the *Ganden* court, the organization must meet the two requirements set out in *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1270 (7th Cir. 1993): “(1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility.” Using this analysis, the court found that the NCAA does have such a connection to the athletic facilities of its member institutions: “It is evident that the NCAA . . . has a connection to a number of public accommodations; the athletic facilities of its member institutions. . . . NCAA events occur in stadiums or arenas, open to the public, with a significant number of competitors, support staff and fans” (1996 WL at 10). Moreover, said the court, the NCAA exercises control over its members’ athletic facilities and students’ access to these facilities. Therefore, Ganden could likely demonstrate that NCAA membership functions as a predicate to use of the facility.

Regarding the second theory, the court found that Ganden could also likely show that the NCAA “operates” a place of public accommodation because “the member institutions may have delegated to the NCAA a more significant degree of control over the management of the competitions and use of its facilities.” There was thus a reasonable likelihood that the NCAA operates the MSU swimming facilities for the purposes of Title III. The court emphasized that it was

irrelevant whether MSU actually owned and also “operated” the facilities at issue; even if this were true, “the NCAA may also ‘operate’ those facilities for purposes of Title III.”

Three additional cases provide further insight into the NCAA’s status as a place of public accommodation. A federal district court in Missouri addressed the issue in *Tatum v. National Collegiate Athletic Association*, 992 F. Supp. 1114 (E.D. Mo. 1998), a case brought by a freshman basketball player at Saint Louis University. Largely adopting the analysis of the *Ganden* court, the court in *Tatum* gave additional detail to the argument that the NCAA operates a place of public accommodation. Citing several NCAA bylaws that demonstrate its control over facilities of member institutions, the court determined that these bylaws:

permit member institutions to reserve athletic training facilities for student-athletes only; direct under what guidelines a student-athlete may voluntarily choose to use the athletic training facilities; regulate the number of days a student-athlete may practice in the athletic training facilities; control what equipment may be used while the student-athlete uses the athletic training facilities; control the type of “conditioning activities” the student athlete may use; control the conditions surrounding when a student-athlete may seek advice or instruction from a coach; and regulate under what conditions individuals not enrolled in the school may use the athletic training facilities. . . . [Also], the NCAA exerts significant control over the operation of stadiums and auditoriums including: regulating ticket prices; controlling the types of beverages and goods that vendors may sell; regulating profits which may be earned from concession sales; controlling which press members may broadcast from the stadiums; and controlling which institutions are allowed to play in the stadiums [citation omitted]. Additionally, with regard to championship events and tournaments, plaintiff has shown that the NCAA actually leases athletic facilities [992 F. Supp. at 1120].

Embracing similar reasoning, another federal district court in New Jersey rejected the NCAA’s motion for summary judgment in *Bowers v. National Collegiate Athletic Association*, 9 F. Supp. 2d 460 (D.N.J. 1998). Much like the *Ganden* and *Tatum* cases, *Bowers* involved a student who, as a result of a learning disability, had received special education throughout his primary and secondary education. He played football during high school and was recruited by numerous colleges and universities. Due to the NCAA’s refusal to recognize his special education classes as “core courses,” Bowers was unable to satisfy the NCAA’s academic eligibility requirements.

Unlike the *Ganden* and *Tatum* courts, however, the *Bowers* court found that the NCAA is not itself a place of public accommodation. Citing an earlier decision, the court held “that a public accommodation within the meaning of 42 U.S.C. § 12181(7) is a physical place” (citing *Ford v. Schering-Plough*, 1998 WL 258386 (3d Cir. 1998)). As a result of *Schering-Plough*, the court explained, the *Welsh* test as used in *Ganden* and *Tatum* “has now been repudiated in this Circuit.” Since the NCAA is not itself a physical place, it could not be deemed a place of public accommodation.



Although the NCAA was not itself a place of public accommodation, the *Bowers* court determined that mere operation of a place of public accommodation was sufficient to bring the NCAA within the scope of Title III. Then, investigating Bowers's allegations in his complaint, the court concluded that they "adequately allege that the NCAA at least operates the place or places of public accommodation of which Bowers was allegedly denied enjoyment," and that the NCAA operated these public accommodations "in such a way that the NCAA manages, regulates, or controls discriminatory conditions of that place or places . . . (9 F. Supp. 2d at 487).

In a later case, *Matthews v. National Collegiate Athletic Association*, 179 F. Supp. 2d 1209 (E.D. Wash. 2001), another federal district court looked favorably upon the ADA Title III claim of a learning-disabled student athlete. The plaintiff had been denied a waiver of the NCAA's "75/25 Rule," which requires athletes to earn at least 75 percent of their required academic credits in the regular school year, and not the summer. The court discussed and agreed with much of the reasoning in *Ganden*, *Tatum*, and *Bowers*, and concluded that the NCAA was subject to ADA Title III because it operated places of public accommodation. The court in *Matthews*, like the courts in *Tatum* and *Bowers*, focused particularly on the NCAA's control over access to athletic facilities; but unlike the earlier courts, it emphasized that both access for spectators and access for the athletes were pertinent: "the ADA applies not only to entities governing spectators' access to a sports facility but also to those entities governing athletes' access to the competition itself." For this proposition, the court cited the U.S. Supreme Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), holding that the PGA Tour is a place of public accommodation that must make reasonable accommodations for disabled golfers in PGA tournaments.

In each of these cases—*Ganden*, *Tatum*, *Bowers*, and *Matthews*—the courts were able to develop bases for bringing the NCAA under the requirements of Title III of the ADA. Emphasizing the NCAA's control of member institutions and their athletic programs and facilities through NCAA regulations, the courts each found sufficient allegations or evidence of control to support the classification of the NCAA as an operator of a place of public accommodation under the ADA.

In addition to the courts' discussions respecting the NCAA's fit within the public accommodations category, *Ganden*, *Tatum*, *Bowers*, and *Matthews* provide useful analysis of the alleged discriminatory character of NCAA academic eligibility requirements as applied to learning disabled athletes. In *Ganden*, for instance, the plaintiff alleged that "(1) the NCAA relied upon an eligibility criterion that 'screened' him out on the basis of his disability as prohibited under section 12182 (b)(2)(A)(i) [of the ADA;] and (2) the NCAA refused to make reasonable modifications to its eligibility requirements that discriminated against him on the basis of his disability as required under section 12182 (b)(2)(A)(ii)." In order to meet the NCAA's academic eligibility requirements for Division I schools, students must take "at least thirteen high school 'core courses'" and attain a GPA in those courses as determined by the student's performance on a standardized test; "the higher the test score, the lower the required GPA."

Because Ganden suffered from a learning disability, he took several remedial courses, which were not certifiable as “core courses” under the NCAA’s requirements. Thus, Ganden argued that the “core course” requirement screened him out on the basis of his disability. The court was receptive to his argument that he had been discriminatorily screened out: “Because the NCAA’s definition of ‘core course’ explicitly excludes special education, compensatory and remedial courses, this definition provides at least a prima facie case of disparate impact on learning disabled students.”

The court in *Ganden* then addressed the requirement that a covered entity must make reasonable modifications to its policies that deny full access to disabled individuals, unless it can demonstrate that those modifications would “fundamentally alter” the entity’s mission. Ganden suggested several modifications that he believed would not work such a fundamental alteration, including (1) a modification of the NCAA’s “core course” requirement so that it would include two additional courses taken by Ganden; (2) a modified GPA requirement that took account of Ganden’s improving academic record and other indications of his ability to succeed in college; and (3) a more open process for obtaining waivers of NCAA rules that would allow students and counselors direct participation in the process. The NCAA argued that it had already provided adequate modifications to Ganden, including a variation of its “core course” requirement and a lengthy discussion of a potential waiver. In considering these arguments, the court assessed the “purpose” and “reasonableness” of the NCAA academic eligibility requirements and waiver process and the effect that Ganden’s proposed modifications would have on the NCAA’s pursuit of its objectives. In this context, the modifications that the NCAA had already provided to Ganden were sufficient, in the court’s view, to preclude Ganden’s motion for preliminary injunction.

Similarly, in *Matthews* (above), the court indicated that a waiver of the 75/25 Rule would be a reasonable accommodation for that particular student athlete. The court drew its guidelines for this inquiry in part from *Bowers* and *Ganden* (along with a later case, *Cole v. National Collegiate Athletic Association*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000)), and in part from the subsequent U.S. Supreme Court decision in *PGA Tour, Inc. v. Martin* (above).

In contrast to *Ganden* and *Matthews*, the *Bowers* court did not suggest that the NCAA had provided sufficient modifications to its eligibility requirements. Specifically, the court questioned the sufficiency of the NCAA waiver process because of its timing (9 F. Supp. 2d at 476–77, 490). Generally, the waiver process could only be initiated after a student had graduated from high school—a time long after college recruiting has concluded, and a time when the student no longer has any means to correct insufficiencies in his or her academic record. Also, the waiver procedure may be completed so late that, even if the student is granted a waiver, he or she may have missed the opportunity to compete in the fall athletic season.

In response to complaints such as those that led to the litigation between student athletes and the NCAA, the U.S. Department of Justice (DOJ) initiated an investigation of the NCAA’s academic eligibility requirements. The investigation

resulted in a complaint filed by the DOJ against the NCAA in the U.S. District Court for the District of Columbia, and an agreement between DOJ and the NCAA was embodied in a consent decree issued by that court in May 1998. (The complaint and the consent decree may be found at <http://www.usdoj.gov/crt/ada/ncaacomp.htm>.) Although the consent decree does not itself settle other pending litigation against the NCAA or preclude later litigation on similar issues, it does provide a basis for resolving or preventing problems such as those raised in *Ganden*, *Tatum*, *Bowers*, and *Matthews*. Under the decree, for instance, the NCAA was to certify as “core courses” classes designed for students with learning disabilities when these classes “are substantially comparable, quantitatively and qualitatively, to similar core course offerings in that academic discipline.” The NCAA also was to adopt specific practices for granting initial eligibility waivers to learning disabled students. Although the decree provides that “the NCAA voluntarily agrees that any further legislative action by the NCAA will comply with Title III of the ADA,” the parties also acknowledged that “the NCAA does not waive its position that it is not a place of public accommodation and therefore Title III of the ADA does not apply to it, nor does the NCAA admit liability under the ADA.” The decree remained in effect until May 1, 2003.

### ***Sec. 14.5. The American Association of University Professors***

The American Association of University Professors (AAUP) is an organization of college and university faculty, librarians with faculty status, and graduate students. Administrators may be associate members but may not vote on AAUP policies. Since its inception in 1915, the AAUP has focused on developing “standards for sound academic practice” and affording faculty the protections of these standards. The organization was formed by a group of faculty, headed by John Dewey, in reaction to criticisms of the university from external and internal sources.<sup>16</sup> Early members were concerned about protecting academic freedom, developing a code of ethics, and creating agreed-upon standards for promotion through the faculty ranks. They also had a strong interest in strengthening and ensuring the faculty’s role in institutional governance. Committees were established, most of which still exist today, on academic freedom and tenure (Committee A), appointment and promotion (Committee B), recruitment of faculty (Committee C), and a variety of other issues of concern to faculty, such as pensions and salaries.

The AAUP has led the movement to develop principles and standards that regulate faculty employment relationships. By the end of its founding year, 1915, the association issued a seminal declaration on academic freedom. In 1934, the AAUP and the Association of American Colleges (whose members were primarily liberal arts colleges) began developing what culminated in the “1940 Statement of Principles on Academic Freedom and Tenure,” which more than 150 educational organizations have endorsed. Among the many other policy statements and

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<sup>16</sup>This discussion relies on W. P. Metzger’s “Origins of the Association,” 51 *AAUP Bulletin* 229 (1965).

committee reports developed since the 1940 Statement are statements on procedural standards for the dismissal of faculty; recommended institutional regulations on academic freedom and tenure (including the standards for terminating faculty appointments on the grounds of financial exigency); and statements on discrimination, academic governance, and collective bargaining.

Committees deliberate about issues of significance to the academic community (such as the disclosure of confidential peer evaluations to candidates for promotion and tenure). The draft report circulates and then is presented to the membership for its comments. Administrators and other national organizations frequently provide comments as well. A revised version of the policy is then published and may be adopted by the association's governing body. Thus, by the time the policies and standards are published in final form, the academic community has been heavily involved in developing and refining them. The major policies, standards, and reports are collected in *AAUP Policy Documents and Reports* (9th ed., 2001), which is known as the "Redbook." According to two scholars long involved in the work of the AAUP:

The policy documents of the American Association of University Professors may be used in any of three ways. First, they offer guidance to all components of the academic community either for the development of institutional policy or for the resolution of concrete issues as they arise. Second, some documents, like the *Recommended Institutional Regulations on Academic Freedom and Tenure* (RIR), are fashioned in a form that is explicitly adaptable as official institutional policy, and they formalize particular advice the AAUP staff gives in recurring situations. . . . [Third,] parties to lawsuits—both administrators and faculty—have begun to invoke AAUP standards to buttress their cases, either because these standards express academic custom generally or because they serve as an aid to the interpretation of institutional regulations or policies that derive from AAUP sources [R. S. Brown, Jr., & M. W. Finkin, "The Usefulness of AAUP Policy Statements," 59 *Educ. Record* 30 (1978)].

Many colleges and universities have incorporated the 1940 Statement into their policies and procedures, or into their collective bargaining agreements with faculty unions. Some institutions have incorporated other policy statements as well. If a college has explicitly incorporated an AAUP policy statement as institutional policy, the provisions of that statement are contractually binding on the institution (see Section 7.1.3 of this book). Even if the college has not formally incorporated the policy statement, it may have acted in conformance with its provisions over a long period of years; in such instances the policy statement may be regarded as binding under a theory of implied contract (see Section 6.2.2). Finally, in some cases (for instance, *Greene v. Howard University*, discussed in Section 6.2.3), courts have looked to AAUP policy statements as authoritative sources of academic custom and usage (see Section 1.4.3.3). Examples of the use of AAUP standards in litigation involving faculty status may be found in Sections 6.6.2 and 6.8.2. Thus, in various ways faculty members, institutions, and courts use AAUP

standards and policies as guides to interpreting college policies, regulations, and faculty handbooks:

The absence of detailed individual contracts, which are not common in the academic world, makes such documents the chief source of guidance toward the rights and duties of all parties. When regulations use terms customary in the academic world like “tenure,” it is helpful to look to the academic community’s understanding about what the term means, which to a large extent is found in the 1940 *Statement* and the commentary upon it [Introduction to *AAUP Policy Documents and Reports*, at xii].

Although its concerns are myriad, the AAUP historically has been most active in the area of the protection of faculty members’ academic freedom and tenure rights (see Section 7.1.3 of this book). In fact, the AAUP’s first investigation of academic freedom violations occurred in 1915, the year of its founding, when seventeen members of the University of Utah faculty resigned, protesting the discharge of several faculty members. As word of the new organization’s existence spread, faculty at other institutions sought the AAUP’s assistance, and thirteen cases of allegedly unjust dismissals were referred to the organization in the first year of its existence.<sup>17</sup> The organization reviews approximately two thousand inquiries each year on specific problems related to AAUP standards (J. Kurland, “Implementing AAUP Standards,” 66 *Academe*, 1980, 414).

Approximately half of these inquiries are resolved with a single response; the other half involve a formal complaint by a faculty member against one or more administrators or against faculty colleagues. In these cases, the AAUP staff provide assistance in settling the dispute, and in some instances a group of AAUP members may investigate the complaint by visiting the institution and talking with the parties involved. Reports of the investigation of certain cases are published periodically in the AAUP’s journal, *Academe*. If the membership believes that alleged violations of its principles of academic freedom or governance are sufficiently egregious and the institution is apparently not amenable to resolving these violations to the satisfaction of the membership, the membership may vote to sanction the institution’s administration. As of late 2005, forty-five colleges and universities were on the list of censured administrations, including two that have been on the list since the 1960s and six that have been on the list since the 1970s. (For a history of the “censure list” and its use to protect academic freedom, see Jonathan Knight, “The AAUP’s Censure List,” 89 *Academe*, January–February 2003, 44.)

An area of AAUP activity that has created some controversy both outside and within the organization is its role in faculty collective bargaining. Discussions concerning a possible role for the AAUP in this regard began in the mid-1960s,

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<sup>17</sup>For an account of the investigation of the University of Utah incidents and related historical information, see W. P. Metzger, “The First Investigation,” 47 *AAUP Bulletin* 206 (1961).

when faculty at several large public colleges and universities began to organize into unions. Between that time and 1971, vigorous debates over the propriety of the association's serving as a bargaining agent occurred, and in 1971 the association's council adopted the following position:

The Association will pursue collective bargaining as a major additional way of realizing the Association's goals in higher education, and will allocate such resources and staff as are necessary for the vigorous selective development of this activity beyond present levels ["Council Position on Collective Bargaining," 58 *AAUP Bulletin* 46 (1972)].

Local AAUP chapters thus joined local chapters of the National Education Association and the American Federation of Teachers in competing to represent the collective interests of faculty at various colleges and universities. The national association provides advice, assistance with contract negotiation if necessary, and other assistance to the local chapters, which act as the "union" for collective bargaining purposes. (For discussion of the activities of these three associations in the early days of faculty bargaining, see J. W. Garbarino, *Faculty Bargaining: Change and Conflict* (McGraw-Hill, 1975).)

A final area of AAUP activity is in the monitoring of legislation and litigation involving faculty status and academic freedom issues. The AAUP has provided *amicus* briefs in many significant cases, including *University of Pennsylvania v. EEOC* (discussed in Section 7.7.2); *Regents of the University of Michigan v. Ewing* (discussed in Section 9.3.2); *Board of Regents v. Roth* and *Perry v. Sindermann* (discussed in Section 6.7.2.1); and cases in Section 7.1.4. Although the association has a small Washington-based professional staff, much of its work depends on the talent and energy of its volunteer members, whose efforts have provided the academic community with significant guidance on standards and norms.

### ***Sec. 14.6. Dealing with the Education Associations***

Since educational associations can provide many benefits for institutions and their officers and personnel (see Section 14.1 above), postsecondary administrators should be knowledgeable about the various associations and their roles within academia. Armed with this knowledge, administrators should be able to make appropriate decisions about the institution's associational memberships and support of association goals, and about the institution's means for helping its personnel join and participate in associations that support their own job functions. In addition, administrators should have particular familiarity with those associations whose work most closely parallels their own, and should reserve time for their own participation in these associations.

Administrators who need specific information about a particular association's organization and operation may find it in the association's bylaws, rules, standards, and official statements, as well as in charters or articles of incorporation or association. Associations may make such documents

available on their Web sites (see Section 14.1 above and footnote 1 in that section), or otherwise upon request, at least for members. Administrators can insist that, in its dealings with the institution, the association scrupulously follow the policies set out in these sources. The institution may have a legally enforceable claim against the association if it fails to do so, at least if the association is a membership association and the institution is a member. (See Sections 14.2, 14.3.2.2, & 14.4.5 above.)

If an institution's relationship with an association should become potentially adverse, institutional administrators should be sure that they have copies of the association's evaluative standards or criteria, the procedures that it follows in making adverse decisions about an institution, and the procedures that institutions can follow in appealing adverse decisions. A full understanding of the standards and procedures can be critical to effective representation of the institution before the association. In particular, administrators should take advantage of all dispute resolution mechanisms and all procedural rights, such as notice and hearing, that association rules provide in situations where institutional interests are in jeopardy. If associational rules are unclear or do not provide sufficient procedural safeguards, administrators will want to seek clarifications or additional safeguards from the association. Good communications between institutional administrators and counsel will be important, so that sensitive decisions can be made about whether or when the institution should assume an adversarial posture with the association, and whether or when counsel should become the institution's spokesperson with the association.

If the institution is subjected to an adverse association decision that appears to violate the association's own rules or the legal requirements developed in court cases, the first recourse usually is to exhaust all the association's internal appeals processes. Simultaneously, institutional administrators and counsel may want to negotiate with the association about ways that the institution can alleviate the association's concerns or comply with its rulings without undue burden on the institution. If negotiations and internal appeals fail to achieve a resolution satisfactory to the institution, outside recourse to the courts may be possible (see generally Section 2.2.6). But court actions should be a last resort, pursued only in exceptional circumstances and only when reasonable prospects for resolution within the association have ended.

Thus, the process for resolving disputes with education associations parallels the process for most other legal issues in this book. Courts may have a presence, but in the end it is usually in the best interests of academia for institutions and private educational associations to develop the capacity for constructive internal resolution of disputes. As long as affected parties have meaningful access to the internal process, and the process works fairly, courts and government agencies should allow it ample breathing space to permit educational expertise to operate. It should be a central goal of post-secondary institutions and educational associations to facilitate such constructive accommodations in the interests of all participants in the postsecondary community.

## Selected Annotated Bibliography

### **Sec. 14.1 (Overview of the Education Associations)**

Boland, Harland. *Associations in Action: The Washington, D.C. Higher Education Community*, ASHE-ERIC Higher Education Report no. 2 (Association for the Study of Higher Education, 1985). Reviews the historical and political development of the associations that represent various higher education constituencies. Focuses on the activities and developing sophistication of the associations between 1960 and the mid-1980s.

Cook, Constance Ewing. *Lobbying for Higher Education: How Colleges and Universities Influence Federal Policy* (Vanderbilt University Press, 1998). Presents a history of lobbying by higher education associations, discusses differences in priorities and strategies in lobbying among institutions, describes the various lobbying techniques, and provides guidance for college presidents. Examines the effect of the proliferation of higher education associations on lobbying, and summarizes the benefits and limitations of lobbying by associations. Portions of the book are based on a survey of college and university presidents.

Hawkins, Hugh. *Banding Together: The Rise of National Associations in American Higher Education, 1887–1950* (Johns Hopkins University Press, 1992). Traces the history of four national higher education associations: the Association of American Colleges, the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges. Discusses their transformation from organizations of scholar-administrators to lobbyists and shapers of post-World War II American higher education.

Parsons, Michael. *Power and Politics: Federal Higher Education Policymaking in the 1990s* (State University of New York Press, 1997). Reviews the events leading to the 1992 reauthorization of the Higher Education Act. Discusses direct loans, national service, and the effect of the Republican majority in Congress on federal student aid policy.

*Washington Information Directory* (Congressional Quarterly, published biannually). A section on “Education and Culture” lists relevant associations located in the metropolitan Washington, D.C., area.

### **Sec. 14.2 (Applicable Legal Principles)**

Developments in the Law, “Judicial Control of Actions of Private Associations,” 76 *Harvard L. Rev.* 983 (1963). A classical and comprehensive treatment of the legal status of private voluntary associations, with extensive citation of American case law to 1963 and its British predecessors.

See Oleck entry in Selected Annotated Bibliography for Section 12.3.

### **Sec. 14.3 (The College and the Accrediting Agencies)**

Finkin, Matthew. “Federal Reliance and Voluntary Accreditation: The Power to Recognize as the Power to Regulate,” 2 *J. Law & Educ.* 339 (1973). An overview of the accreditation process and the role of the federal government in that process. Emphasizes the evolution—through the various federal aid-to-education statutes—of the relationship between private accrediting agencies and the U.S. Office of



- Education, and the legal basis for the Office (now Department) of Education's recognition function. Author later published a sequel to this article (*Federal Reliance on Educational Accreditation: The Scope of Administrative Discretion* (Council on Postsecondary Accreditation (1978))). Article and sequel are primarily of historical interest, given later legal developments such as the 1992 and 1998 Amendments to the Higher Education Act.
- Finkin, Matthew W. "The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education," *57 Law & Contemp. Probs.* 89 (1994). Reviews the origins and the structure of higher education accreditation. Critiques the connection between accrediting agencies and the federal government, the legislation creating this connection, and the ongoing controversy regarding this connection. The author expresses concern regarding the further development of the relationship between accrediting agencies and the federal government as it impacts on higher education institutions.
- Fisk, Robert S., & Duryea, E. D. *Academic Collective Bargaining and Regional Accreditation* (Council on Postsecondary Accreditation, 1977). A COPA Occasional Paper. Analyzes the potential impact of collective bargaining on regional accreditation and on the relationship between the institution and the agency that accredits it. Provides helpful perspective for administrators who must deal with accrediting agencies in circumstances where their faculty is unionized.
- Heilbron, Louis H. *Confidentiality and Accreditation* (Council on Postsecondary Accreditation, 1976). Another COPA Occasional Paper. Examines various issues concerning the confidentiality of an accrediting agency's records and other agency information regarding individual institutions. Discusses the kinds of information the accrediting agency may collect, the institution's right to obtain such information, and the accrediting agency's right to maintain the confidentiality of such information by denying claims of federal or state agencies, courts, or other third parties seeking the disclosure.
- Kaplin, William A. "Judicial Review of Accreditation: The *Parsons College* Case," *40 J. Higher Educ.* 543 (1969). Analyzes the *Parsons College* case and evaluates its impact on accreditation and the courts.
- Kaplin, William A. "The *Marjorie Webster* Decisions on Accreditation," *52 Educ. Record* 219 (1971). Analyzes the antitrust law, common law, and constitutional law aspects of the *Marjorie Webster* case and evaluates its impact on accreditation.
- Kaplin, William A. *Respective Roles of Federal Government, State Governments, and Private Accrediting Agencies in the Governance of Postsecondary Education* (Council on Postsecondary Accreditation, 1975). Another COPA Occasional Paper. Examines the current and potential future roles of federal and state governments and the accrediting agencies, particularly with regard to determining eligibility for federal funding under U.S. Office (now Department) of Education programs. Useful background for understanding the Higher Education Amendments of 1992 and 1998 as they affect accreditation.
- Martin, Jeffrey C. "Recent Developments Concerning Accrediting Agencies in Postsecondary Education," *57 Law & Contemp. Probs.* 121 (1994). Reviews recent controversies regarding accreditation, including the use of accrediting standards to impose racial and gender diversity requirements on institutions, the accreditation of proprietary schools, and the federal government's role in recognizing accrediting agencies.

*Project on Nontraditional Education Final Reports* (Council on Postsecondary Accreditation, 1978). Product of a project sponsored by COPA and funded by the W. K. Kellogg Foundation. Discusses problems encountered in accrediting innovative or nontraditional programs and institutions. The four-volume set includes a summary report by project director Grover Andrews (Vol. 1) and nine individual reports (Vols. 2–4), including the following: J. Harris, “Institutional Accreditation and Nontraditional Undergraduate Educational Institutions and Programs” (Rpt. No. 3); P. Dressel, “Problems and Principles in the Recognition or Accreditation of Graduate Education” (Rpt. No. 4); and J. Harris, “Critical Characteristics of an Accreditable Institution, Basic Purposes of Accreditation, and Nontraditional Forms of Most Concern” (Rpt. No. 5).

Selden, William K., & Porter, Harry V. *Accreditation: Its Purposes and Uses* (Council on Postsecondary Accreditation, 1977). Another COPA Occasional Paper. Explains the historical derivation of private accreditation, the purposes and uses of accreditation, and pressures on the accreditation system.

Symposium, “Accreditation,” 50 *J. Higher Educ.*, issue 2 (March–April 1979). Provides various perspectives on the accreditation system, its prospects, and its problems. Contains eleven articles, including Margaret Conway, “The Commissioner’s Authority to List Accrediting Agencies and Associations: Necessary for an Eligibility Issue”; J. Hall, “Regional Accreditation and Nontraditional Colleges: A President’s Point of View”; Jerry Miller & L. Boswell, “Accreditation, Assessment, and the Credentialing of Educational Accomplishment”; John Profit, “The Federal Connection for Accreditation”; W. Trout, “Regional Accreditation, Evaluative Criteria and Quality Assurance”; and Kenneth E. Young, “New Pressures on Accreditation.” Symposium is now primarily of historical interest.

Taylor, C. William, & Hylden, Thomas. “Judicial Review of Accrediting Agency Actions: *Marlboro Corporation d/b/a The Emery School v. The Association of Independent Colleges and Schools*,” 4 *J. Coll. & Univ. Law* 199 (1978). Analyzes the *Emery School* case in the context of the developing law of educational accreditation. Discusses the scope of judicial review and the legal standards courts will apply in accreditation cases.

Young, Kenneth E., Chambers, Charles M., Kells, H. R., & Associates. *Understanding Accreditation: Contemporary Perspectives on Issues and Practices in Evaluating Educational Quality* (Jossey-Bass, 1983). A sourcebook on the history, purposes, problems, and prospects of postsecondary accreditation. Includes eighteen chapters by fourteen different authors, a substantial prologue and epilogue tying the chapters together, an appendix with various COPA documents, a glossary of terms, and an extensive bibliography.

### ***Sec. 14.4 (Athletic Associations and Conferences)***

Connell, Mary Ann, Harris, Robin Green, & Ledbetter, Beverly E. *What to Do When the NCAA Comes Calling* (National Association of College and University Attorneys, 2005). Monograph discussing the components of an NCAA investigation, the types of violations that the NCAA may investigate, the types of documents the NCAA will use, the expectations it will have for the institution’s response, and the institution’s appeal rights. Also answers frequently asked questions and provides a checklist for the investigation process.

- Heller, Greg. "Preparing for the Storm: The Representation of a University Accused of Violating the NCAA Regulations," 7 *Marquette Sports L.J.* 295 (1996). Reviews the various steps in the NCAA's enforcement process and provides practical guidance on the attorney's role in defending a university subjected to this process. Includes recent examples of NCAA enforcement actions and a hypothetical enforcement problem with suggestions for handling it. Author's research included interviews with university athletic administrators, NCAA staff, and sports law attorneys.
- Meyers, D. Kent, & Horowitz, Ira. "Private Enforcement of the Antitrust Laws Works Occasionally: *Board of Regents of the University of Oklahoma v. NCAA*, A Case in Point," 48 *Okl. L. Rev.* 669 (1995). A retrospective on the *University of Oklahoma* case prepared a decade after the U.S. Supreme Court's decision by an attorney for the plaintiffs and one of the expert witnesses in the case. Reviews the issues in the litigation and explains the impact of the decision on "the universities, the television networks, the advertisers, and the viewing public."
- Symposium, "NCAA Institutional Controls and Mechanisms and the Student-Athlete," 1995 *Wis. L. Rev.* 545 (1995). Examines individual institutions' mechanisms for governing intercollegiate athletics, and considers measures to increase the efficiency and fairness of institutional control of student athletes. Includes the following articles: Peter C. Carstensen & Paul Olszowka, "Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation"; Timothy Davis, "A Model of Institutional Governance for Intercollegiate Athletics"; B. Glenn George, "Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics"; and David A. Skeel, Jr., "Some Corporate and Securities Perspectives on Student-Athletes and the NCAA."
- Weistart, John C. "Antitrust Issues in the Regulation of College Sports," 5 *J. Coll. & Univ. Law* 77 (1979). A systematic treatment of antitrust law's particular applications to intercollegiate athletics. Reviews issues facing the NCAA regional conferences and particular schools.
- Weistart, John C. "Legal Accountability and the NCAA," 10 *J. Coll. & Univ. Law* 167 (1983-84). An essay exploring the unique status and role of the NCAA in intercollegiate athletics. Reviews structural deficiencies, such as the NCAA's alleged failure to accommodate the interests of student athletes in its governance structure; and suggests that the NCAA should be considered to have a fiduciary relationship to its member institutions. Also examines the role of judicial supervision of NCAA activities and its effect on the NCAA's regulatory objectives.
- Young, Sherry. "The NCAA Enforcement Program and Due Process: The Case for Internal Reform," 43 *Syracuse L. Rev.* 747 (1992). Outlines complaints about NCAA rules enforcement, traces case law challenging NCAA procedures, explains and critiques the current enforcement program, and calls for further amendment of the NCAA's enforcement procedures.
- See Wong entry in Selected Annotated Bibliography for Chapter 10, Section 10.4.

### ***Sec. 14.5 (The American Association of University Professors)***

- American Association of University Professors. "Council Position on Collective Bargaining," 58 *AAUP Bulletin* 46 (1972). A report by the association's Collective Bargaining Council. Describes the rationale for the association's decision to act as a collective bargaining representative for college faculty, the issues addressed by the

council in reaching this decision, and the supporting and dissenting opinions of AAUP leaders.

American Association of University Professors. "Seventy-Five Years: A Retrospective on the Occasion of the Seventy-Fifth Annual Meeting," 75 *Academe* 4 (1989). Special issue devoted to the history of the AAUP. Includes articles and reproductions of documents about the association's history and the development of its policies on academic freedom and tenure, as well as on collective bargaining and governance. Also examines the AAUP's work on the status of women, the economic status of the profession, the McCarthy era, and the association's activity in filing *amicus* briefs in cases of significance to higher education.

Hutcheson, Philo A. *A Professional Professoriate: Unionization, Bureaucratization, and the AAUP* (Vanderbilt University Press, 2000). Traces the history of the American Association of University Professors with particular emphasis on the expansion of higher education post-World War II, and describes how it changed in response to the increasing complexity of higher education governance.

Metzger, Walter P. "Origins of the Association: An Anniversary Address," 51 *AAUP Bulletin* 229 (1965). Discusses the context for and development of the AAUP and describes early efforts of the association in the areas of academic freedom, tenure, institutional governance, and other issues of concern to faculty and administrators.

See *AAUP Policy Documents and Reports* ("Redbook") and Furniss entries in Selected Annotated Bibliography for Chapter 6, Section 6.1.

# 15

## The College and the Business/ Industrial Community

### ***Sec. 15.1. The Contract Context for College Business Transactions***

**15.1.1. Overview.** Entry into the world of business and industry exposes higher education institutions to a substantial dose of commercial law. Since most commercial arrangements are embodied in contracts that define the core rights and responsibilities of the contracting parties, contract law is the foundation on which the institution's business relationships are built. This Section discusses the basics of contract law as they apply to relationships between the institution and the business world. While the discussion is addressed primarily to nonlawyers, it includes numerous illustrations, citations, and reminders that should be of use to counsel; it also provides a common ground upon which counsel can join with administrators to engage in business planning. Other Sections of this chapter discuss additional applications of contract law, designed as much for counsel as for administrators, as well as applications of other bodies of law (for example, tort law, real estate law, intellectual property law, and tax law) that are particularly important to institutions' activities in the world of business and industry.

**15.1.2. Types of contracts and contract terms.** A contract is a promise, or a performance or forbearance, given in exchange for some type of compensation. The three basic elements of a contract are the offer; the acceptance; and the compensation, legally referred to as "consideration." A contract may involve goods, services, real estate, or any combination thereof. A contract may be either written or oral. Virtually all states have a "statute of frauds," however, providing that certain types of contracts (for example, contracts for the sale of real property) must

be in writing in order to be enforceable. A written contract may be either a standard form contract or an instrument specifically designed to meet individual circumstances. While contracts typically are viewed as an exchange (for example, money for goods), they also can take the form of cooperative arrangements such as affiliation agreements or joint venture agreements.

The types of clauses contained in a contract depend on the purposes of the contract, the interests of the parties, and the scope and complexity of the transaction. Most commercial contracts include clauses specifying the scope and duration of the contract; price, payment, or profit-sharing arrangements; delivery, installation, or implementation requirements; and definitions of contract terms. Most commercial contracts also include general clauses containing representations of authority to contract and to perform; warranties of products or performance; limitations on liability (indemnification or hold-harmless clauses); provisions for termination, renewal, or amendment; definitions of breach or default; remedies for breach; dispute resolution techniques (for example, arbitration); and a “choice of law,” that is, a selection of a body of state law that will govern the transaction. Some contracts also may include special clauses containing representations that a party has complied with applicable law; has clear title to certain property; holds necessary licenses, bonds, or insurance coverages; or has certain copyright or patent rights. Overall, the parties can include any provisions they agree on that are not prohibited by state or federal law. They are, by a process of “private ordering,” creating the private law that will govern their relationship.

Prior to 1954 state common law (see Section 1.4.2.4) governed all contracts. From 1954 to 1967, every state except Louisiana adopted some form of the Uniform Commercial Code (U.C.C.). The U.C.C. now governs contracts for the sale of goods, except for certain issues (for example, defenses) that the U.C.C. does not address. These issues are still governed by the common law (see U.C.C. § 1-103), as are domestic contracts that do not involve the sale of goods. For international transactions between parties in the United States and parties in certain other countries, the United Nations Convention on Contracts for the International Sale of Goods (15 U.S.C.A. Appendix (West Supp. 1993)) will govern the contract if the contract does not otherwise specify the applicable law.

For the most part, the U.C.C. is consistent with the common law of contract. Departures from the common law are contained primarily in Article 2, dealing with the sale of goods, and in Article 9, dealing with the assignment of contract rights. (See generally J. D. Calamari & J. M. Perillo, *The Law of Contracts* (3d ed., West, 1987).) When the U.C.C. does depart from the common law, the effect is that the rules applicable to the sale of goods will differ from those for the sale of labor, services, or land. Thus, it is important to know whether a particular contract is for the sale of goods, and thus subject to the U.C.C., or for the sale of services, labor, or land, and subject to the common law (see Section 15.2.2).

The starting point for making this distinction is the U.C.C.’s definition of “goods”—that is, “all things (including specifically manufactured goods) which are movable at the time of identification to the contract for sale” (U.C.C. § 2-105). This definition will sometimes be difficult to apply. In *Advent Systems*

*Ltd. v. Unysis Corp.*, 925 F.2d 670 (3d Cir. 1991), for instance, a computer software producer sued a computer manufacturer for breach of contract. The plaintiff argued that the U.C.C. should not control the case because “the ‘software’ referred to in the agreement as a ‘product’ was not a ‘good’ but intellectual property outside the ambit of the [U.C.C.]” The court rejected the argument:

[A] computer program may be copyrightable as intellectual property [but this] does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, movable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as “goods” because the code definition includes “specifically manufactured goods.”

**15.1.3. Elements of the contract.** An “offer” is the offeror’s expression of a present intent to be bound to particular terms, subject to the offeree’s acceptance of those terms in an appropriate manner. The offer sets out the basic terms of the contract, although the terms are subject to negotiation and those ultimately agreed on need not have been expressed in the initial offer. The scope of the offer is determined by an objective standard that focuses on what the offeree should reasonably have understood from the offeror’s communication rather than on the subjective meaning the offeror or offeree may have attached to the communication. In *Board of Governors of Wayne State University v. Building Systems Housing Corp.*, 233 N.W.2d 195 (Mich. Ct. App. 1975), for example, university officers believed that they had accepted the defendant’s bid (offer) and thus formed a contract. According to the court, however, the university had made a conditional acceptance that functioned as a counteroffer. The conditional nature of the acceptance was evidenced by the university’s statement (in a letter) that formal documents would be drawn after the Department of Housing and Urban Development (HUD) had approved the contract award and financing bonds had been sold. The court reasoned that this statement interjected additional terms that transformed the university’s attempted acceptance into a counteroffer, since the defendant’s bid did not contain any “promise to abide by the conditions of HUD approval and the sale of financing bonds.”

In general, an offer remains open for the time specified in the offer, and that time begins to run when the offer is received. An acceptance after the time specified becomes a new offer. If no time is specified, the offer will lapse in a reasonable time. In the case of option contracts not governed by the U.C.C., legally sufficient consideration usually must be given in exchange for any promise to keep an offer open for a certain period of time. See *Board of Control of Eastern Michigan University v. Burgess*, 206 N.W.2d 256 (Mich. Ct. App. 1973) (court refused to enforce an option contract, although agreement stated that consideration had been received, where one party had, in fact, received no such consideration). Under U.C.C. § 2-205, however, consideration is not needed if a “merchant” offers to buy or sell goods and “gives assurance” that the offer is “open for a specified period.” In *City University of New York v. Finalco, Inc.*, 514 N.Y.S.2d 244 (N.Y. App. Div. 1987), Finalco had stated in a bid to City University for a used IBM computer that

“this offer is valid through the close of business, December 18, 1978.” The court held that the offer was irrevocable, even with no consideration, and that Finalco was thus obligated to purchase the computer when the university accepted its bid on December 18.

The offeror may specify the manner by which the offer is to be accepted. The parties are bound when the offeree has appropriately communicated its return promise to the offeror or begun performances in the manner specified. In *Finalco*, for instance, the parties became bound when the university sent the letter to Finalco accepting its bid. The parties were bound at this point, despite their “manifested . . . intention to adopt a formal written agreement,” because the letter and Finalco’s bid included sufficient evidence of mutual assent between the parties “prior to the execution of the writing.”

To be effective, an acceptance must be unequivocal, and under common law its terms must match the terms of the offer. As in the *Building Systems Housing* case, above, a proposed acceptance that conditions the offeree’s consent to terms not in the original offer is a counteroffer; the original offeror then has the power to form the contract by accepting the counteroffer. Under the U.C.C., however, an acceptance may be effective despite some differences between its terms and those specified in the offer (U.C.C. § 2-207).

Generally, consideration is the price to be paid or the benefit to be extended by one party for the other party’s promise. Consideration transforms the arrangement into a type of bargained exchange. *St. Norbert College Foundation v. McCormick*, 260 N.W.2d 776 (Wis. 1978), illustrates the application of this concept. McCormick had initially approached the college, indicating that he wished to make two gifts for its benefit. To maximize his own tax advantages, McCormick proposed to make two stock transfers to, and to enter two buy-sell agreements with, the college. In the second of these agreements, McCormick agreed to transfer to the college seven thousand shares of Procter & Gamble stock, worth approximately \$500,000, in return for an annual annuity of \$5,000 for life. McCormick thereafter revoked this agreement, contending that it was not enforceable because it lacked adequate consideration. The court disagreed:

[T]he presence of consideration is clear from the document. Defendant agreed to sell the stock. Plaintiff agreed to pay the stipulated price—\$5,000 per year for life to the defendant. It is not the amount of consideration that determines the validity of a contract. . . . “[I]nadequacy of consideration alone is not a fatal defect” [260 N.W.2d at 780, quoting *Rust v. Fitzhugh*, 112 N.W. 508, 511 (Wis. 1907)].

Related to consideration, and a kind of modern alternative to it, is the doctrine of promissory estoppel. Under this doctrine, if (1) a promise or assurance is made that could reasonably be expected to induce some particular action by the person to whom the promise is addressed, (2) the person does take action in reliance on the promise or assurance, and (3) an injustice would otherwise occur, the courts will enforce the promise as a contract even though there was no consideration for it (see *Restatement (Second) of Contracts* § 90 (1979); see also § 87(2), recognizing judicial enforcement of some



offers even without a promise). The trend is toward a low threshold for finding a promise and an emphasis on the “reliance interest” of the person addressed. In *Howard University v. Good Food Services, Inc.*, 608 A.2d 116 (D.C. 1992), for example, the university had contracted with an outside service, Good Food Services (GFS) to provide meals campuswide. Although it was not required to do so by the contract, GFS listed the university as an additional insured on its insurance certificates each year for a four-year period, pursuant to the university’s annual requests that it do so. Two years after GFS terminated this practice without notifying the university, a GFS employee was injured in a university kitchen and brought suit against the university. Among other defenses, the university asserted promissory estoppel against GFS for failing to maintain the university as an insured, a practice that the university claimed to have relied on to its detriment. In analyzing the university’s defense, the court stated: “[T]o make out a claim of promissory estoppel, the following questions must be answered in the affirmative: First, was there a promise? Second, should the promisor have expected the promisee to rely on the promise? [Finally], did the promisee so rely to [its] detriment?” Although the court recognized that the university had grounds to assert promissory estoppel under this test, it nevertheless rejected the university’s defense for procedural reasons.

**15.1.4. Breach of contract and remedies for breach.** Either party may breach a contract by failing to perform as it has promised. In case of breach, and in the absence of a viable defense, a court may award damages as well as other remedies.

If the promise to perform is a conditional one, there can be no breach until all the conditions have been fulfilled or excused. In *Pioneer Roofing Co. v. Mardian Construction Co.*, 733 P.2d 652 (Ariz. Ct. App. 1986), the court considered a defendant’s claim that contract conditions had been excused because of an emergency and because of a waiver by the other party. The case concerned the obligation of the Arizona Board of Regents to pay for unanticipated extra work performed and materials purchased by a subcontractor for a sports facility on the Northern Arizona University campus. According to the contract, no additional work that would increase the “Contract Sum” could be undertaken, except in an emergency, until the general contractor informed the architect about the additional work. The contract also required that the architect provide authorization “in advance and in writing” to the contractor before the extra work was initiated. Both conditions had to be met before the university would be obligated to pay claims for extra work. In defending itself against a claim for payment, the board of regents contended that neither condition had been met. The court rejected the board’s defense. It held that the first condition did not apply, since the extra work, the reroofing of the structure, “was in response to an emergency that endangered the property”; and that the second condition had been waived by the architect’s representative, who gave go-ahead instructions at a meeting where the emergency was discussed. (See also *Bellevue College v. Greater Omaha Realty Co.*, 348 N.W.2d 837 (Neb. 1984), where the plaintiff

college successfully enforced a contract—despite an unfulfilled condition—because the failure to fulfill the condition was solely the fault of the defendant.)

Lack of performance also will not constitute a breach if there has been a rescission or release of the contract. When neither party has performed its promises, the parties may agree mutually to rescind their contract as long as no third party's rights are affected. If only one of the parties has performed its promise, a mutual rescission must be accompanied by some consideration (see Section 15.1.3) given by the nonperforming party to the party that has performed. Similarly, if one party releases the other from its contractual obligation to perform, some consideration from the nonperforming party may be required if the release is to be valid. The U.C.C. permits written release of an obligation without consideration, however, as do state statutes in some states.

Occasionally, a court may also rescind a contract for good cause. In *Boise Junior College District v. Mattefs Construction Co.*, 450 P.2d 604 (Idaho 1969), for instance, the court determined that a construction contractor was “entitled to the equitable relief of rescission” because it had made a “material” mistake in failing to include the glass subcontractor's bid when compiling subcontractors' bids in order to calculate its own bid. The court indicated that, among pertinent considerations, “enforcement of a contract pursuant to the terms of the erroneous bid would be unconscionable; the mistake did not result from [the contractor's] violation of a positive legal duty or from culpable negligence; the [other] party . . . will not be prejudiced except by the loss of his bargain; and prompt notice of the error [was] given.”

If a condition to performance has occurred or has been excused, *and* if the promise still has not been fulfilled or otherwise discharged, then a breach exists, for which a court will award damages, and perhaps other remedies as well, as discussed below.

Because contracts are made in a bargained exchange, in which the parties presumably contemplate their resultant duties and liabilities, judicial remedies for breach of contract are limited to those that fulfill the reasonable expectations of the parties. American courts prefer money damages over “specific performance” (that is, an order to the breaching party to perform). Money damages may be “nominal” or “compensatory.” Compensatory damages may be computed in one of three ways. “Expectation” damages are calculated to place the nonbreaching party as nearly as possible in the position it would have been in had the breaching party performed; “reliance” damages are calculated to return the nonbreaching party to its original position, as if it had never entered the contract; and “restitution” damages are calculated to return or restore to the nonbreaching party the dollar value of any benefit it had conferred on the breaching party. (See generally Calamari & Perillo, *The Law of Contracts* (cited in Section 15.1.1), Chaps. 14–16.) The nonbreaching party may choose which type of calculation to use and has the burden of proving the existence of damages and calculating their amount with reasonable certainty. The nonbreaching party must also “mitigate” its damages and may not recover for loss that could have been avoided or mitigated with reasonable effort. The nonbreaching party also may not recover damages that were not foreseeable to the breaching party.

In order to avoid complicated court proceedings on proof of damages, the parties may insert a “liquidated damages” clause into the contract at formation. Liquidated damages represent an agreed-upon estimate of the actual damages that would likely be incurred in case of breach. The U.C.C., for instance, permits the enforcement of liquidated damages clauses when “the amount is reasonable in the light of anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy” (§ 2-718(1)).

**15.1.5. Arbitration.** Arbitration is a process by which contracting parties may resolve a dispute by asking a neutral third party to examine the claims and render a decision. The parties can agree in advance to have contract disputes resolved through arbitration by including an arbitration clause in the contract at formation. Without such a clause, the parties can still agree to arbitrate a particular dispute after it has arisen. In either case, the parties may specify whether the decision is binding on the parties or only advisory.

In comparison to protracted court litigation, arbitration (like mediation) offers a much quicker resolution at a much lower cost (see generally Section 2.3). Arbitration is an informal process that decreases the adversarial character of the dispute and increases the likelihood of a mutually beneficial outcome. The arbitrator is not bound by judicial precedents or rules of law and is thus free to resolve the dispute in an equitable manner. In addition, since the parties choose the arbitrator, they can ensure that he or she is familiar with the business context and proficient in the issues to be resolved.

Most states as well as the federal government have statutes that promote the use and enforceability of arbitration agreements.<sup>1</sup> The federal statute, the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.*), applies to written arbitration agreements involving interstate commerce or maritime transactions and provides that such agreements are “valid, irrevocable, and enforceable.” Federal and state courts, upon the request of a party, must stay any litigation on a covered transaction that is also the subject of pending arbitration. The federal district courts also are empowered to compel arbitration when a party fails, neglects, or refuses to submit a dispute to arbitration. The FAA also limits judicial review of arbitrators’ decisions. Either party may petition a court to confirm an arbitrator’s decision, and the court must confirm the decision unless there are demonstrated grounds for vacating or modifying it. A decision may be vacated only if it was influenced by fraud, corruption, or misconduct, and it may be modified only if it goes beyond the scope of the issues presented by the parties or contains a material miscalculation.

In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), the U.S. Supreme Court considered the relationship

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<sup>1</sup>Most of the state statutes are based on the Uniform Arbitration Act (7 U.L.A. (Uniform Laws Annotated) 1 (Supp. 1991)). A number of states now also have statutes governing international arbitrations; see G. Walker, “Trends in State Legislation Governing International Arbitrations,” 17 *N.C. J. Int’l. L. & Com. Reg.* 419 (1992).

between the Federal Arbitration Act (FAA) and state law. Volt and Stanford had entered into a construction contract. The contract included an arbitration clause as well as a “choice-of-law” clause providing that the contract would be governed by California law. When a dispute arose over compensation for additional work done by Volt, Volt demanded arbitration while Stanford filed a breach of contract suit in California Superior Court against Volt and also sought indemnity from two other contractors not subject to the arbitration agreement.

Under the FAA, the court would have been required to compel enforcement of the private arbitration contract clause and to stay the litigation until the arbitration process was complete. However, a California statute—the California Arbitration Act—allows “a court to stay arbitration pending the resolution of related litigation,” and Stanford invoked this statute because its suit included the indemnity claims against two other contractors. The Supreme Court held that the FAA does not preempt the California statute (see generally Section 13.1.1 of this book), and that, under the contract’s choice-of-law clause, the California law should apply: “[T]he federal policy [under the Federal Arbitration Act] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. . . . Where, as here, the parties have agreed to abide by state arbitration rules, enforcing those rules according to the terms of the agreement is fully consistent with the FAA’s goals, even if the result is that arbitration is stayed when the Act would otherwise permit it to go forward.”

*University of Alaska v. Modern Construction, Inc.*, 522 P.2d 1132 (Alaska 1974), provides another perspective on arbitration. The university contracted with Modern to build a Campus Activity Center. The contract provided that “[a]ll claims, disputes and other matters in question arising out of, or relating to, the Contract or the breach thereof” would be submitted to arbitration. The contract also contained elaborate procedures for approval of design changes and accompanying adjustments in the contract price (called “Change Orders”). After completing the project, Modern presented the university with a bill for “impact charges” attributable to several change orders. When the university refused to pay, Modern demanded arbitration. The university cooperated but recorded an objection that Modern’s claims were beyond the scope of the contract and thus not arbitrable under the arbitration clause. The panel of arbitrators awarded Modern approximately 40 percent of its claim. Modern then asked the court to confirm the arbitration award, and the university simultaneously asked the court to vacate it. The court stated that, although the contract was ambiguous about whether the dispute was arbitrable, it would “allow ambiguous contract terms to be constructed in favor of arbitrability where such construction is not obviously contrary to the parties’ intent, especially where, as here, the party contesting arbitrability drafted the contract.” Thus, since “the arbitrators’ decision on the arbitrability of Modern’s claims for ‘impact damages’ due to delays was not based on an unreasonable interpretation of the contract,” the Supreme Court of Alaska confirmed the arbitration award.

## **Sec. 15.2. The College as Purchaser**

**15.2.1. Purchase of goods.** One of the most common commercial transactions of colleges and universities is the purchase of “goods”—that is, personal property generally categorizable as equipment, materials, or supplies. Computer equipment and software, for instance, would constitute goods whose acquisition commonly involves institutions in complex commercial transactions (see generally M. Bandman, “Balancing the Risks in Computer Contracts,” 92 *Com. L.J.* 384 (1987)). Purchases of goods are effectuated by means of contracts providing for the transfer of title to (or a lease interest in) the goods from seller to purchaser in return for a monetary payment or other consideration. When payment is made over time, the parties may also execute and file documents giving the seller a security interest in the goods. Contracts for the sale of goods are typically governed by state contract and commercial law, in particular Article 2 (sales) and Article 9 (security interests) of the Uniform Commercial Code (U.C.C.) (see Section 15.1.2 of this book).

For public institutions, the state’s procurement law, embodied in statutory provisions and administrative regulations, usually will establish further requirements regarding purchasing, or a state higher education system may adopt procurement regulations of its own.<sup>2</sup> For example, public institutions may be required to purchase certain products or services from a “procurement list” (see, for example, Ohio Rev. Code Ann. § 4115.34) or to use competitive bidding for certain purchases (see, for example, Tex. Rev. Civ. Stat. Ann. art. 601b). Public institutions may also be subject to a variety of special provisions, in procurement laws or otherwise, that require or authorize “purchase preferences” for particular products or sellers that would benefit the state’s own residents.<sup>3</sup> Some states, for instance, accord purchase preferences to recycled paper products (for example, Cal. Pub. Cont. Code § 10860; Neb. Rev. Stat. § 81-15). Other states accord purchase preferences to designated small businesses (for example, Md. Code Ann., State Fin. & Proc. § 14-207(c); Minn. Stat. Ann. § 137.35). Iowa has a statute that requires state governing bodies (including state universities) to purchase coal “mined or produced within the state by producers who are, at the time such coal is purchased or produced, complying with all the workers’ compensation and mining laws of the state” (Iowa Code Ann. § 73.6); and California has a statute that requires community colleges to give food purchase preferences to produce that is grown, or food that is processed, in the United States (Cal. Pub. Cont. Code § 3410).

In addition, some states have conflict of interest statutes that would apply to purchase transactions involving state higher education institutions and their

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<sup>2</sup>Constitutionally based public institutions (Section 12.2.2) may be exempt from some or all state procurement statutes and may have authority to promulgate their own procurement rules and policies.

<sup>3</sup>The cases and authorities are collected in Gavin L. Phillips, Annot., “Validity, Construction, and Effect of State and Local Laws Requiring Governmental Units to Give ‘Purchase Preference’ to Goods Manufactured or Services Rendered in the State,” 84 A.L.R.4th 419.

suppliers (for example, La. Rev. Stat. Ann. §§ 42.1111C(2)(d), 1112B(2) & (3), and 1113(B)). In *In Re Beychok*, 495 So. 2d 1278 (La. 1986), the Supreme Court of Louisiana interpreted these statutes to prohibit Louisiana State University from entering purchase contracts with members of its governing board or their firms. The court held that Beychok, a member of the university's governing board and the chief executive officer and majority stockholder of a baking company, had violated the statutes when his firm entered into a supply contract with the university. Beychok defended on the grounds that the university had awarded the contract through the use of sealed competitive bids. The court rejected the defense, however, because the statutes "protect against both actual and perceived conflicts of interest" and thus "do not require that there be actual corruption on the part of the public servant or actual loss by the state."

There is also some federal law that applies to institutional transactions for the sale of goods—in particular, federal antitrust law (see Section 13.2.8). The Robinson-Patman Act (15 U.S.C. § 13 *et seq.*), for instance, prohibits sellers from engaging in certain types of discriminatory pricing practices and prohibits purchasers from knowingly inducing or receiving discriminatory prices arising from such prohibited pricing practices. In *Jefferson County Pharmaceutical Ass'n., Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983), the U.S. Supreme Court considered the Act's applicability to purchases by public higher education institutions. The case concerned purchases of pharmaceutical products by two pharmacies at the University of Alabama Medical Center. The plaintiff claimed that Abbott Laboratories and the university had violated the Act by entering transactions in which the pharmacies purchased products at lower prices than those charged to the plaintiff's member pharmacies. The university defended on the ground that the Act did not apply to purchases by state governmental entities. Because the university pharmacies had purchased the products at issue for *resale* in competition with private enterprises, the Court did not address the Act's application to state purchases "for use in traditional governmental functions"; the sole issue was whether the Act applied to purchases for resale. The Court answered this question affirmatively, since it could find no evidence that Congress intended to accord states the means to compete unfairly with commercial businesses by exempting them from the Act.

When the question concerns an institution's purchases for its own use, the Robinson-Patman Act expressly provides some protection for both public and private institutions. Section 13c (15 U.S.C. § 13c) exempts colleges, universities, and other listed entities from the Act with respect to "purchases of their supplies for their own use."<sup>4</sup> The exemption also extends to the sellers who enter into such transactions with colleges and universities. In *Logan Lanes v. Brunswick Corp.*, 378 F.2d 212 (9th Cir. 1967), the court broadly construed the scope of this exemption. At issue was the defendant's sale of bowling alleys and related equipment to a state board for use in the state university's student

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<sup>4</sup>The cases are collected in J. M. Purver, Annot., "Construction and Application of Provision in Robinson-Patman Act (15 U.S.C. § 13c) Exempting Nonprofit Institutions from Price Discrimination Provisions of the Act," 3 A.L.R. Fed 996.

union. The alleys were used for a fee by the general public, as well as the university community, and were operated in competition with the plaintiff. The plaintiff challenged the sale, complaining that the defendant had charged it a higher price for alleys and equipment than the price it charged to the state board. The court held that the transaction fell within the Section 13c exemption. The alleys and equipment were “supplies,” within the meaning of Section 13c, because that term includes “anything needed to meet the institution’s needs,” including nonconsumable items that constitute capital expenditures. The alleys and equipment were also for the university’s “own use” within the meaning of Section 13c, even though they were also used by the public, since “the primary purpose of the purchases . . . was to fulfill the needs of the university in providing bowling facilities for its students, faculty and staff.”

To avoid legal challenges and liability arising from purchasing activities, and to meet the institution’s ongoing needs for goods, institutional purchasing officers and legal counsel will need to be thoroughly familiar with Article 2 of the U.C.C. and to identify all other state and federal laws potentially applicable to particular transactions. Careful negotiation and drafting of contract terms is necessary, as is effective assertion of legal rights should the seller perform inadequately. Among the most important protections for institutions are those available from warranties, which may be invoked to enforce the purchaser’s interest in the quality and suitability of goods.

In most states Article 2 of the U.C.C. is the source of warranty law regarding the sale of goods. When a sales transaction involves both goods and services (for example, the purchase of carpet that the seller installs), U.C.C. warranty law will apply to the service as well as the goods provided by a particular supplier if the service is only incidental to the sale of the goods (see Section 15.2.2 of this book). Warranties may be either “express” or “implied.” Section 2-313 of the U.C.C. governs express warranties. If a seller makes representations about product quality or performance by asserting facts, making promises, or providing a description, sample, or model of the goods, the goods must comply with these representations. In *Brooklyn Law School v. Raybon, Inc.*, 540 N.Y.S.2d 404 (N.Y. Sup. Ct. 1989), *reversed on other grounds*, 572 N.Y.S.2d 312 (N.Y. App. Div. 1991), for example, the school sued Raybon and twenty-six other defendants who had sold it asbestos products and installed them in the school facilities. The school alleged that the defendants made representations about the safety and fitness of the asbestos materials in advertisements directed at the general public, and that the school relied on these representations in purchasing the asbestos products. The trial court held that these allegations stated an express warranty claim, and it denied the defendant’s motion to dismiss this claim. *In dictum*, the court suggested that any defendants whose primary function was to install the asbestos materials might not be subject to the express warranty claim, because the installation was a service incidental to the sale; but the court did not decide this potential issue, since none of the defendants had alleged that they primarily provided a service.

Implied warranties are governed by Sections 2-314 and 2-315 of the U.C.C. Section 2-314 recognizes an implied warranty that goods are “merchantable”—that

is, suitable for the ordinary purpose for which such goods are used—if the seller is a “merchant” who deals in goods of that kind. Section 2-315 recognizes an implied warranty of “fitness for a particular purpose” when the seller knows the purchaser’s purpose for wanting the goods and the purchaser relies on the seller’s expertise to provide goods suitable for the purpose. *Western Waterproofing Co., Inc. v. Lindenwood Colleges*, 662 S.W.2d 288 (Mo. Ct. App. 1983), concerned an alleged breach of implied warranty. Lindenwood had contracted with Western Waterproofing Company (WWC) to install a soccer/football field in the college stadium. The field was used by Lindenwood’s soccer team and was also leased to the St. Louis Cardinals football team for training camp. When the Cardinals used the field, parts of it “were torn up and holes and divots developed.” In later use similar damage occurred, and pools of standing water formed on the field. Lindenwood claimed that WWC had “breached an implied warranty that the field was fit for its intended use.” WWC argued that Lindenwood’s implied warranty claim was barred, because Lindenwood was contributorily negligent for misusing the field by overwatering. The court rejected WWC’s argument, holding that contributory negligence can be a defense to an implied warranty claim only if the purchaser’s misuse is the “proximate cause of the alleged breach” of warranty. Thus, the court confirmed an arbitration award in Lindenwood’s favor because the “principal cause of the field’s deficiencies were in the design of the field itself and not Lindenwood’s misuse of the field.”

Sellers may disclaim (and thus avoid) warranties by inserting disclaimers into sales contracts. Purchasers may also disclaim (and thus lose) warranty protection in some circumstances by their own inaction. (Section 2-316(1) of the U.C.C. governs the disclaimer of express warranties; Section 2-316(2) governs the disclaimer of implied warranties.) When a warranty has not been disclaimed, there are nevertheless several defenses a seller may assert against a breach of warranty claim, including the complex “lack of privity” defense. To take full advantage of warranty law, administrators and purchasing officers will want to seek the assistance of counsel in dealing with these matters.

In addition to warranty and other breach of contract claims, institutions may also sometimes protect themselves by asserting claims for tortious performance of contract obligations. In *Board of Regents of the University of Washington v. Frederick & Nelson*, 579 P.2d 346 (Wash. 1978), for example, the university purchased furniture for a laboratory from Frederick & Nelson (F&N), the supplier. When the furniture did not meet the contract specifications, the manufacturer agreed to refinish the furniture on the university’s premises. The university subsequently sustained fire damage at the site, apparently as a result of spontaneous combustion of oily rags that the manufacturer had left on the premises. The court held that, since F&N had allowed the manufacturer to perform F&N’s contractual duty to bring the furniture up to specifications, F&N was liable to the university for the manufacturer’s negligent performance of these duties, which resulted in the fire. See also *University Systems of New Hampshire v. United States Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991) (asbestos case presenting numerous tort claims).

In *Regents of the University of Minnesota v. Chief Industries, Inc.*, 106 F.3d 1409 (8th Cir. 1997), a products liability case, the court addressed the issue of



the money damages a university may seek in court when it has suffered economic loss due to a defect in goods it has purchased. The university had decided to purchase a new grain dryer for its agricultural research facilities. Before purchasing the equipment, the manager of the research facility consulted with an expert in the university's Department of Agricultural Engineering, Dr. Harold Cloud, who was regarded as "the expert, probably, in the United States on drying." Cloud was actively involved in assisting with the specifications for the new dryer. Several years after the purchase, a defect in a solenoid valve in the dryer caused it to overheat and start a fire that spread to another nearby building. The university then brought a products liability claim and other tort claims against Chief Industries, Inc., the manufacturer of the dryer, and Parker-Hannafin, Inc., the manufacturer of the solenoid component, seeking damages for its economic losses resulting from the fire. The district court granted summary judgment to the defendants, holding that the university was a "merchant in goods of the kind" and could not recover in tort for economic losses.

On appeal, the Eighth Circuit looked to Minnesota's version of the Uniform Commercial Code to determine whether the university's tort action was viable. The statute provides, in part, that "economic loss that arises from a sale of goods between parties *who are each merchants in goods of the kind* is not recoverable in tort" (Minn. Stat. § 604.10; emphasis added). The legislation further provides (adapted from UCC § 2-104) that:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. [Minn. Stat. § 336.2-104(1), adapted from UCC § 2-104].

The court determined that, under this statute, the university itself was a "merchant in goods of the kind" because it was able to rely on its agricultural engineering expert, who specialized in drying. The court held that the university did not actually have to be a "dealer" of grain dryers to fit the statutory definition of a "merchant." It could be classified as a merchant simply because it had and could use its expert's knowledge of the goods to assist it in the transaction. Accordingly, the university was barred from bringing a tort action by § 604.10 and § 336.2-104(1), which limit merchants to contract remedies—remedies much narrower than tort remedies—for recovery of economic loss.

The opinion of the court garnered a strong dissent. The dissenting judge questioned both the way in which the majority had interpreted the statute and the way in which it had characterized Cloud's expertise.

**15.2.2. Purchase of services.** Institutions commonly contract for the purchase of services as well as goods. Sometimes the same contract will cover both services and goods, as when the seller of equipment agrees to install, provide maintenance for, or train personnel in the use of the equipment. At other times the institution will contract with one party to purchase goods and contract with

other parties for services related to the goods. The acquisition and operation of computer systems, for example, will customarily involve purchases of both goods (hardware and software) and services (installation of hardware, implementation of systems, periodic maintenance, and so forth).

Services may also be unrelated to and purchased independently of goods. Examples include accounting services, legal services, services of consultants, payroll services, and custodial services. Such services are often performed by corporations or individuals that have the legal status of “independent contractors” rather than by being performed by employees. Generally the activities of an independent contractor are not subject to the same level of control by the employer as are the activities of an employee; therefore, the independent contractor generally has more discretion regarding methods and equipment for the job, and may also work for many different employers during the same day or week. An independent contractor may or may not be an agent of the institution (see Section 4.2.1) in performing particular contractual duties. Since an institution could be liable in contract, and occasionally in tort, for the acts of a contractor acting as its agent, close attention must be given to contractual provisions that characterize the contractor’s status and authority to act for the institution (see Section 3.4), and that allocate the risk of loss from any unlawful acts of the contractor (see Section 2.5.3).

The use of outside independent contractors to provide services for the institution or for members of the campus community—often called “outsourcing” or “contracting out”—has become increasingly popular and widespread. This is particularly true with services for students. Food services is one common example, as illustrated by the *ABL Management, Inc.*, case discussed below in this subsection. Student housing is another example. (See generally Martin Van Der Werf, “Colleges Turn to Private Companies to Build and Run Student Housing,” *Chron. Higher Educ.*, June 11, 1999, A37.) Not only are housing management responsibilities being outsourced, but also responsibilities for building and financing of student housing. The arrangements raise various potential issues of law and policy. There may be issues, for instance, of whether the institution has authority to enter such an arrangement (compare the janitorial services cases below); whether to use a captive or affiliated organization (see Section 3.6) as part of the arrangements; whether the construction process will be subject to state competitive bidding laws imposed upon public institutions (see subsection 15.2.4 below); and whether and how the institution can insulate itself from liability for student injuries and other harms occurring in the housing complex (see generally Sections 3.3.2.1 & 8.6.2).

Another example is outsourcing the management of college bookstores. These arrangements raise some of the same issues as student housing outsourcing, as well as issues concerning the responsiveness of outside entrepreneurs to the needs of students and faculty members. (See John Pulley, “Whose Bookstore Is It, Anyway?” *Chron. Higher Educ.*, February 4, 2000, A41.) Yet another example is outsourcing of janitorial services and building management services. Some of the issues concerning such arrangements are discussed in the cases below on janitorial services.

The purchase of services, like the purchase of goods, is effectuated by contractual agreements governed by the contract law of the state. Unlike the purchase of goods, however, the purchase of services as such is not subject to Article 2 of the U.C.C. Even when the same transaction involves both goods and services—for example, a contract for the acquisition of a computer system—the U.C.C. will not apply to the service unless the goods are the dominant component of the transaction and the services are merely incidental to their sale. (See, for example, *Ames Contracting Co., Inc. v. City University of New York*, 466 N.Y.S.2d 182, 184–85 (N.Y. Ct. Cl. 1983), *reversed on other grounds*, 485 N.Y.S.2d 259 (N.Y. App. Div. 1985).) Since Article 2 of the U.C.C. usually will not apply to the purchase of services, U.C.C. warranties (Section 15.2.1) usually will not protect the institution if the purchased services are unsatisfactory. Instead, the institution’s legal recourse is a breach of contract claim (Section 15.1.4), supplemented by a tortious performance claim (Section 15.2.1) and, when professional services are involved, a malpractice law claim.

For public institutions, state procurement law, purchase preference regulations, and conflict of interest regulations (see subsection 15.2.1 above) may apply to the purchase of services as well as goods. Moreover, “prevailing wage” statutes may sometimes apply to the purchase of contractors’ services. Such statutes require contractors working on certain public works projects (including those at state universities and colleges) to pay laborers the “prevailing wage” in the locality. Applicability of the statute typically depends on two factors: first, whether the project is considered a “public work”; second, whether the particular type of work to be performed falls into one of the statutorily defined categories (for example, construction, demolition, repair, alteration) for which the prevailing wage must be paid.<sup>5</sup> In *Sarkisian Bros., Inc. v. Hartnett*, 568 N.Y.S.2d 190 (N.Y. App. Div. 1991), the state commissioner of labor found that a contractor renovating a state university classroom building into a hotel/conference center had violated the state’s prevailing wage statute. The contractor appealed the commissioner’s determination, arguing that the renovation was not a public work but, rather, a “private venture for profit.” The court disagreed and upheld the commissioner’s decision. To support its conclusion, the court cited a number of factors—including the reservation of 75 percent of the facility’s space for the use of the state university system and its affiliates—that “tend to demonstrate the public use, public access, public ownership and public enjoyment characteristics of the project and [to] support [the commissioner’s] determination, which is neither irrational nor unreasonable.”

Another pertinent type of state law that can become involved in disputes about services, and that public institutions may seek to use as an alternative to purchasing services, is a property leasing law. The case of *ABL Management, Inc. v. Board of Supervisors of Southern University and Agricultural & Mechanical College*, 773 So. 2d 131 (La. 2000), illustrates such a law’s application to

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<sup>5</sup>The cases and statutes are collected in Annot., “What Projects Involve Work Subject to State Statutes Requiring Payment of Prevailing Wages on Public Works Projects,” 10 A.L.R.5th 337.

outsourcing food services and also illustrates a potential conflict between leasing laws and state procurement laws.

The Louisiana Procurement Code (La. Rev. Stat. Ann. §§ 39:1551–1755), which was at issue in the *ABL Management* case, requires public entities (including state universities) to follow requirements for selecting the lowest bidder when “buying, purchasing, renting, leasing, or otherwise obtaining any supplies, services, or major repairs” (La. Rev. Stat. Ann. § 39:1556). The Louisiana law on “Leases of College and University Properties” (La. Rev. Stat. Ann. § 17:3361), in contrast, authorizes state universities to “grant leases” of their property under terms obligating the private lessee “to construct improvements on the leased premises which will further the educational, scientific, research, or public services functions” of the university (La. Rev. Stat. Ann. § 17:3361 (A)(5)).

In 1987, under the latter statute, Southern University and Agricultural & Mechanical College (Southern) leased space in which to operate dining services for its Baton Rouge campus to Aramark, Inc. ABL Management, Inc., and D’Wiley’s Services, Inc. (ABL), which had sought but did not receive the lease, filed a protest with the state’s Division of Administrative Law, asserting that Southern’s award of the lease violated the “lowest bidder” requirement of the Procurement Code. ABL argued that “the acquisition of food services was a procurement subject to” the Procurement Code. In response, Southern argued that “the lease did not constitute a procurement and that its award . . . was made pursuant to [the Leases law].” A lower state court recognized Southern’s authority to award the lease under the Leases law but “held that the food services portion of the proposal could only be awarded in conformity with the Louisiana Procurement Code” (*ABL v. Board*, 752 So. 2d 384, 388 (La. App. 2000)).

The Supreme Court of Louisiana reversed, emphasizing that procurement subject to the Procurement Code “involves an *expenditure* of state funds,” and that Southern, “[i]nstead of expending funds for this service, [had] contracted to receive lease payments and benefit from capital improvements that the lessee would provide.” Under the Leases law, the court explained, a “private entity that leases a public college or university facility [must] provide a service that furthers at least one of the essential functions of the institution of higher learning” and must also “provide capital improvements” to the facility “without the involvement of funds from the public fisc.” The court rejected ABL’s argument that student payments to Southern for meal plans were converted into public funds when collected by Southern for remittance to the lessee under the lease. Southern merely collected the payments on behalf of the lessee, as the parties had “*agreed in the lease*” (emphasis in original), and “[s]uch a legal relationship does not convert student money to public funds.” The court also rejected the proposition that the lease was partially subject to the Procurement Code and partially subject to the Leases law, since it could lead to the “absurd” possibility that the lessee would be unable to use the leased property due to the Procurement Code’s requirement that the “service” component of the food contract be mechanically awarded to another, lower-bidding, entity.

In addition, other state laws may limit the authority of public institutions to purchase certain services from outsiders—services such as accounting or payroll services, legal services, consulting services, food services, janitorial or grounds-keeping work, and other building management services. State civil service laws, for instance, may expressly or implicitly require state agencies to use only civil service employees to perform such work, unless certain special circumstances exist (see, for example, Minn. Stat. § 16B.17 (1992); Cal. Govt. Code § 19130). Delegations of authority in the state constitution or state statutes may also impose such limits on state universities or colleges (see Cal. Const. art. IX, § 6; *California School Employees Ass’n. v. Sunnyvale Elementary School District of Santa Clara County*, 111 Cal. Rptr. 433 (Cal. Ct. App. 1973); and Cal. Govt. Code § 19130). Other state statutes or regulations, dealing specifically with contracts for special services, may also apply to and limit state educational institutions’ authority to outsource or “contract out” for services (see, for example, Cal. Gov. Code § 53060).

A series of cases concerning contracts for janitorial services illustrate how such “contracting out” limits may affect public higher education institutions. In the first of these cases, *State ex rel. Sigall v. Aetna Cleaning Contractors of Cleveland, Inc.*, 345 N.E.2d 61 (Ohio 1976), the Ohio Supreme Court held that Kent State University could lawfully contract with an independent contractor to perform janitorial services that could also be performed by state civil service employees. The university had been unable to maintain a full complement of janitorial workers, despite regular recruiting from a state employment office, and had therefore contracted out for such services—admittedly at lower cost than the wages that civil service employees would have received for the same work. In the taxpayer’s suit challenging this contract, the plaintiff alleged that Ohio’s constitution and related state statutes required the school to use only civil service employees for such work. Determining that “no statutory provision exists which prohibits the contracting out of the custodial services at issue herein,” and that the contracting out would not undermine the state’s civil service system, the Ohio Supreme Court rejected the challenge:

In the absence of proof of an intent to thwart the purposes of the civil service system, the board of trustees of a state university may lawfully contract to have an independent contractor perform services which might also be performed by civil service employees [345 N.E.2d at 65].

In contrast, the court in *Washington Federation of State Employees, AFL-CIO Council 28 v. Spokane Community College*, 585 P.2d 474 (Wash. 1978), held that the college had violated the policy underlying the civil service system—that hiring be based on merit rather than politics—by contracting out for janitorial services. Although the contract would clearly have saved the college money, and although a separate statute permitted the state purchasing director to “purchase all materials, supplies, services, and equipment needed for the support, maintenance, and use of” the college (Wash. Rev. Code § 43.19.190), the Supreme Court of Washington voided the contract because “the College has no authority

to enter into a contract for new services of a type which have regularly and historically been provided, and could continue to be provided, by civil service staff employees.” Three judges strongly dissented, arguing that the majority had intruded upon the prerogative of the legislature in ruling that all state work had to be performed by state employees, even though no statute said so and one statute apparently stated the contrary (§ 43.19.190 above).

Similarly, in *Local 4501 Communications Workers of America v. Ohio State University*, 466 N.E.2d 912 (Ohio 1984), the Ohio Supreme Court (also over a vigorous dissent) held that the university could not contract out for janitorial services during a hiring freeze, while permitting the slow attrition of civil service workers. As in the Washington case, there was no state statute forbidding such a contract, but the court reasoned that the university was circumventing the civil service system; the contracts were thus void. In reaching this result, the court applied the rule from its earlier *Sigall* case, above, but determined that there was sufficient evidence that the university was attempting to thwart the civil service system.

Two years later, however, in *Local 4501 Communications Workers of America v. Ohio State University*, 494 N.E.2d 1082 (Ohio 1986), the same court severely limited its 1984 decision. Noting that the Ohio legislature had in the interim passed a statute permitting public employees to bargain collectively, the court held that civil service employees now had sufficient “protection” through the bargaining table and did not need the additional civil service protection provided by the court’s 1984 decision. That decision was thus left to apply only in rare situations where a state agency had attempted to thwart the civil service system but the affected employees had no statutory right to bargain collectively.

As these cases illustrate, the authority of public institutions to outsource services will depend on a variety of factors: the existence of state laws that expressly permit or prohibit particular types of service contracts, the implications that courts may draw from the civil service laws, the impact that a particular contract would have on civil service employment, the presence or absence of collective bargaining in the employment field that would be affected by the service contract, and the provisions of collective bargaining contracts that the institution has entered with its employees. The weight to be given such factors, and the content of applicable statutes and regulations, will, of course, vary from state to state.

One of the newer purchasing contexts, of particular importance, is the purchase of instructional services. A 1997 case, *Linkage Corp. v. Trustees of Boston University*, 679 N.E.2d 191 (Mass. 1997), provides an outstanding example of problems that can arise in this context. The case also illustrates how state statutes, rather than or in addition to state common law of contract or tort, may apply to such purchase arrangements. As explained by the Supreme Judicial Court of Massachusetts, the dispute in the case arose “out of an agreement between Linkage Corporation (Linkage) and Boston University that called for Linkage to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University.” Under this agreement, “Linkage initiated a variety of training programs, conferences,

seminars, and other offerings for the corporate market. Boston University also transferred some university courses to [the Satellite Education Center] which Linkage then managed for the university.” “Linkage claims that the agreement was renewed by Boston University and then unlawfully terminated; Boston University claims that the agreement was lawfully terminated and never renewed.” The court agreed with Linkage and, thus, held the university liable for breaching the renewed contract. The court also agreed that the university’s conduct constituted a violation of a Massachusetts unfair practices statute, Mass. Gen. Laws Ann. Ch. 93A. The applicability of this statute was of great importance in the litigation because the statute authorized the court to double the amount of the damages awarded by the jury and, in addition, to award the successful plaintiff attorney’s fees and court costs.

The state statute at issue creates new rights, beyond those afforded by the Massachusetts common law of contract and tort. The trial judge found, and the appellate court affirmed, “that Boston University’s actions constituted unfair or deceptive practices, and that they constituted willful and knowing violations of the statute.” In particular, according to the court, “[t]he University, and its principals, repudiated binding agreements and usurped Linkage’s business and work force in order to promote a purely self-serving agenda. The result was to end Linkage’s vitality as a going concern, at least until it might be able to reconstitute itself with its main mission still intact.”

Before holding the university liable under Chapter 93A, the court addressed two important threshold issues: first, whether the interaction between the parties was “commercial” in character; and second, whether the parties to the dispute were both engaged in “trade or commerce” and, therefore, acting in a “business context.” Regarding the first issue, the problem was whether the interaction between the parties was an “intra-enterprise” dispute—such as a dispute between employer and employee or between partners in a partnership—which would not be considered a “genuine commercial transaction” for purposes of the statute. The court held that the transaction was commercial rather than intra-enterprise: “The arrangement between Linkage and Boston University was an arm’s-length transaction between two corporations under which Linkage provided services to Boston University and received compensation. Both the base and renewal agreements state that Linkage is ‘an independent contractor . . . not an agent or employee of the university,’ indicating that, from the very beginning of their relationship, the parties did not intend to be treated as partners or participants in a joint venture.”

Regarding the second issue, the problem was whether Boston University, a non-profit corporation, was engaged in trade or commerce when it operated the Satellite Education Center. The court emphasized that an entity’s nonprofit or charitable status is not itself dispositive of this question and that “a corporation need not be profit-making in order to profit from an activity.” The court also emphasized that fees were charged for the services offered at the Satellite Education Center; that the university was “motivated by a strong desire to benefit as much as possible from its arrangement with Linkage as a means of dealing with the debt service and costs of the [Satellite Education Center]; and that the University sought to ‘expand

its reach . . . to the corporate market [that] provided a . . . lucrative earnings potential. . . .” The court thus concluded, as to the second issue:

In most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission. But when, as in the case here, an institution’s business motivations, in combination with the nature of the transaction and the activities of the parties, establish a “business context” . . . G.L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play [679 N.E.2d at 209].

Thus, having determined that the unfair practices statute applied to the transaction between Boston University and Linkage, and that Boston University had violated the statute, the court doubled Linkage’s damage award (from \$2,411,852 to \$4,823,704) and awarded attorney’s fees and costs to Linkage in the amount of \$899,382.

**15.2.3. *Purchase of real estate.*** While goods are personal property, land and buildings are real property. The U.C.C. is inapplicable to sales of real property; state real property law governs the bulk of the transaction. An institution’s real property transactions may include the purchase of title to land and buildings, leasehold interests in land and buildings, and options to purchase or lease land or buildings, as well as easements, rights-of-way, and other interests in land. The title to property transfers only in the first of these types of transactions, and then only at settlement.

Real estate transactions are substantially different from transactions for the purchase of goods or services. The legal documents evidencing the transactions differ, as does the governing law. When an institution purchases land or buildings, for instance, there will be a sales contract with its own special provisions; financing agreements, typically including one or more mortgages or deed-of-trust instruments creating the lender’s security interest in the property; and the deed that transfers title to the property. In conjunction with the transaction, the institution may also need to consider local zoning law and the property’s zoning classification (see Section 11.2 of this book), as well as the real property tax status of the property under the institution’s planned use(s) (see Sections 11.3 & 12.1). For public institutions, there may be various other state law requirements and authority issues to consider. (See generally Carol Zeiner, “Monetary and Regulatory Hobbling: The Acquisition of Real Property by Public Institutions of Higher Education in Florida,” 12 *U. Miami Bus. L. Rev.* 105 (2004).) Moreover, because real estate purchases can be part of a larger entrepreneurial or academic endeavor, partnership or joint venture agreements may also be involved, as may other subsidiary real estate transactions, such as purchase options, leases, or lease-backs.

#### **15.2.4. *The special case of design and construction contracts***

**15.2.4.1. *General principles.*** One of the most complex purchasing situations an institution may encounter is that concerning design and construction



contracts. Since there are usually more parties involved and more money at stake in these contracts than in other purchase contracts, both counsel and high-level administrators should be directly involved and keenly aware of the difficulties that may arise. (See generally R. Rubin & L. Banick, “The Ten Commandments of Design and Construction Contracts,” a paper presented at the 32d Annual Conference of the National Association of College and University Attorneys, 1992, and on file with the Association.)

Before an institution can develop the specifics of the contracts for a major construction project, it must first implement a financing plan. Then, as owner of the future building, the institution will typically contract with an architect or engineer, or both, to design and oversee the plans for construction. Next the institution will solicit bids from general contractors, select a contractor, and negotiate a construction contract. The general contractor will then hire subcontractors to do masonry work, electrical work, painting, plumbing, and so forth. Numerous suppliers will also be involved, as will insurance companies, bonding companies, and sometimes outside funding sources. Thus, in a standard design and construction arrangement, there are numerous parties that could be liable to the institution and to which the institution could be liable should difficulties arise.

The institution must determine what types of contracts it will seek to negotiate with the architect and general contractor. Construction contracts usually are fixed price contracts resulting from competitive bidding. In such a contract, the entire project is planned from start to finish before any work is done. A price for the project is fixed, and the contractor begins work for that amount (with a possibility of adjustments for unexpected costs incurred during the work, if the contract so provides). A variation of this type of contract is the cost-plus contract, under which the contractor’s profit margin is based on a set percentage of overall costs. This type of contract typically contains clauses under which the overall cost may exceed the base bid, taking into account labor and materials costs actually incurred during construction, but may not exceed a specified “guaranteed maximum cost.” Yet another type of contract is the “fast-track design” contract, which an institution may use if the project must begin quickly. In such a contract, actual construction starts almost immediately, and details of cost and design are left to be resolved as the project develops—affording the obvious advantage of speed but also the obvious disadvantage of unresolved design issues and an incomplete, potentially escalating, budget for the project.

Various standard form contracts exist for both architectural and construction services. The American Institute of Architects and the National Construction Law Center, among others, offer standardized form contracts for various types of projects, especially private sector projects. Some form contracts tend to favor the architect or contractor, and others the institution, so the institution should be careful in its selection. Moreover, the institution should consider adding terms or deleting particular clauses to make the contract fit the institution’s particular purposes and concerns. In negotiating the contract, the institution should also anticipate and cover such problem areas as construction delays, compensation schemes, unsatisfactory work, insurance coverage, employment discrimination, and changes in

design or materials. In addition, the contract should specify who may speak for and bind each of the parties and what dispute resolution mechanisms will be used.

Although construction contracts may be more enmeshed in statutory law than other contracts are (see subsection 15.2.4.2 below), the general contract principles discussed in Section 15.1 still apply. As indicated there, however, and as the court explained in *Ames Contracting Co., Inc. v. City University of New York* (cited in subsection 15.2.2 above): “Construction contracts are service contracts providing a combination of labor, skill and materials and are generally exempted from the operation of the Uniform Commercial Code.” Making the same point in reference to a subcontractor, the court in *Manor Junior College v. Kaller’s Inc.*, 507 A.2d 1245 (Pa. Super. Ct. 1986), noted that, “since . . . [the subcontractor] was hired by [the general contractor] to perform a service, specifically, to provide most of the labor for the installation of a roof, we must reject the assertion of appellant that the U.C.C. is applicable.”

*Kingery Construction Co. v. Board of Regents of the University of Nebraska*, 203 N.W.2d 150 (Neb. 1973), illustrates how general contract principles apply to construction contracts. A general contractor brought an action for declaratory judgment to determine whether, under a contract with the University of Nebraska, it was required to paint exposed pipes in the building under construction. The general contractor’s interpretation of the contract was that the mechanical contractor was solely responsible for completing the pipe painting. It did not, however, seek relief from the mechanical contractor; it sought only a declaration from the court that it was not under a contractual duty to the university to do the painting. Relying on basic principles of contract interpretation, the court held that, although “[q]uite possibly the contract, in part, duplicated requirements for painting as pertains to [the general contractor] and the mechanical contractor,” the general contractor remained liable to the university to complete the disputed painting. (The court made no comment on possible liability of the mechanical contractor to the general contractor.)

**15.2.4.2. Construction contracts in public institutions.** Unlike private institutions, public colleges and universities may be statutorily required to use a competitive bidding process in deciding which general contractor to select. Competitive bidding statutes come in many forms. California and New York have statutes pertaining specifically to state universities and construction contracts (Cal. Pub. Cont. Code § 10503; N.Y. Educ. Law § 376). Both statutes require institutions to engage in public bidding before awarding any major construction contract. Other states have more general statutes that apply to any building project the state undertakes (for example, S.H.A. 20 ILCS 3110/0.01 *et seq.* (1994); Tex. Rev. Civ. Stat. Ann. art. 601b). State statutes may also require that contractors or architects for public construction projects meet certain licensing requirements (for example, Fla. Stat. Ann. §§ 481.223 (architects) and 489.113 (contractors)), or may include other particular requirements concerning architectural services (for example, W. Va. Code §§ 5G-1-1 to -4).

Competitive bidding carries its own special baggage. An institution is required to accept the “lowest *responsible* bidder” to do the project. This phrase accords the institution some discretion to look behind the bid and assure itself that the lowest bidder is trustworthy and competent to do the work. Thus, an institution may reject the lowest bidder if that contractor is deemed to be nonresponsible, or it may reject all the bids if no responsible bid is received. Nevertheless, numerous complexities may arise in determining which bidder is the “lowest” bidder, as illustrated by *SE/Z Construction, L.L.C. v. Idaho State University*, 89 P.3d 848 (Idaho 2004). This case arose under Idaho Code § 67-5711C, requiring that “[a]ll construction contracts for public works shall be awarded to the lowest responsible and responsive bidder after receipt of competitive sealed bidding . . .” and Idaho Code § 67-2309, requiring that “all plans and specifications for said contracts or materials shall state . . . the number, size, kind and quality of materials and services required for such contract. . . .” The university solicited bids for renovation of its physical sciences building, and the bids were to include a base price; five alternate prices; and the prices for each of two different packages of audiovisual (AV) systems to be installed in some of the classrooms in the renovated building. Based on the submitted bids, the university awarded the contract to a contractor whose base bid plus alternates was the second-lowest bid received but whose bid prices for the AV packages were the lowest. The bidder with the lowest base and alternate bid price (but not the lowest AV package prices) sued the university, arguing that it was the lowest bidder. Sorting out this complex mix of bid components, and closely examining the provisions of the university’s published bid request, the Supreme Court of Idaho determined that the university had not violated the competitive bidding statute and rejected the plaintiff’s challenge.

Institutions are also subject to requirements on advertising for bids that can create difficulties in the competitive bidding process. In *Gibbs Construction Co., Inc. v. Board of Supervisors of Louisiana State University*, 447 So. 2d 90 (La. 1984), for instance, a general contractor sued the university after being denied a contract even though it was the lowest bidder. The contractor had not appeared at the pre-bid conference and thus was technically ineligible to submit a bid. The court upheld the lower court’s dismissal of the suit because the contractor had not conformed to the advertised specifications that all eligible bidders were required to attend the pre-bid conference.

There may also be issues concerning the type of contracts to which the competitive bidding statutes apply. In *McMaster Construction, Inc. v. Board of Regents of Oklahoma Colleges*, 934 P.2d 335 (Okla. 1997), for example, unsuccessful bidders sought to use Oklahoma’s Competitive Bidding Act (Okla. Stat. Title 61 §§ 101–133), to void construction management contracts awarded by the University of Central Oklahoma for the oversight of capital improvements projects on the university campus. The Supreme Court of Oklahoma rejected the plaintiffs’ argument that the regents had failed to comply with the Competitive Bidding Act, holding that the construction management contracts were not subject to the Act because they covered personal services requiring professional judgment and did not involve actual construction or supplying materials. The

court also rejected the plaintiffs' arguments that the contracts did not comply with the Public Building Construction and Planning Act or with the State Consultants Act; the former Act expressly excluded the regents from coverage and the latter Act covered only architectural, engineering, and surveying services—categories into which the construction services contracts “did not fall.”

Another type of issue concerning the applicability of a competitive bidding statute arose in *Associated Subcontractors of Massachusetts, Inc. v. University of Massachusetts Bldg. Authority*, 810 N.E.2d 1214 (Mass. 2004). The university's project was the construction of a dormitory complex. By statute, so long as more than 50 percent of the funds to be expended for the project are from “nongovernmental sources,” the University of Massachusetts Building Authority could, with the approval of the Governor, proceed without complying with the state competitive bidding statute (Mass. Gen. Laws Ann. Ch. 75 App. § 1–18). After the building authority demonstrated that at least half of the funds used for the project would be from student fees, “the Governor approved the authority's request, agreeing that the student room and board fees used to fund the construction were ‘funds from nongovernmental sources.’ . . .” When a state association of subcontractors challenged this interpretation of the key statutory phrase and sued the university and its building authority, the court had to determine, as a matter of first impression, whether the student room and board fees used to repay principal and interest on construction financing bonds were “funds from nongovernmental sources.” The court considered the legislative history of the statutory amendment that allowed the university building authority to bypass the competitive bidding process, and also considered other state statutory provisions regarding public funds, and other statutory provisions containing the same terminology as that in the challenged provision. The court emphasized that the student fees were not “raised by State, local, or Federal taxation” and were not part of any “governmental appropriation . . . made for the [construction] project.” Moreover, the fees “originate with private individuals who desire to reside in university housing” and are paid by the university “directly to the bond trustee.” The fees therefore were funds from “nongovernmental sources” whose use exempted the university building authority from the requirements of the competitive bidding statute.

In an interesting development after the case, however, the Massachusetts legislature amended the statute to overrule the result in the case:

[T]he term “nongovernmental sources” shall be limited to private donations, gifts, contracts, or grants, including commercial ventures and intellectual property contracts, or grants or contracts from the federal government or the administrative overhead associated with such grants and contracts; but the term shall not mean revenue derived from fees, tuition or charges of any kind paid by students, faculty, or staff [Mass. Gen. Laws Ann. Ch. 75 App. § 1–18 (2004)].

In addition to competitive bidding and licensing statutes, public institutions in some states must also be concerned with minority set-aside statutes. Such statutes “set aside” a certain percentage of state construction work for minority contracting firms. In *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469

(1989), the U.S. Supreme Court indicated that such programs may be constitutional but only if they meet a strict scrutiny standard of review (see Section 5.4). Thus, if the state or a state university seeks to remedy past discrimination through a set-aside program, it will have a heavy burden of justification; a mere general assertion of past discrimination, without specific statistics identifying past discrimination in particular fields and a demonstration of how the set-aside ameliorates that discrimination, is not likely to suffice. Assuming that the statute is valid, the requirements it imposes on the institution will depend on the particular statutory provisions, which vary from state to state. In *Croson*, for example, the set-aside program required that 30 percent of the dollar amount of any contract be subcontracted to minority businesses. Other programs may only establish statewide goals or vest discretion in the institution or statewide system to set its own goals or take other actions favoring minority businesses. In California, for example, the Regents of the University of California may consider whether a “substantially equal” bid is received from a “disadvantaged business enterprise” (Cal. Pub. Cont. Code § 10501); if so, the regents might favor that business over another business that submitted a lower bid. Moreover, under Cal. Pub. Cont. Code § 10500.5(a), the regents are encouraged to adopt measures such as set-aside “targets for utilization of small businesses, particularly disadvantaged business enterprises.” The various state statutes include their own definitions of “minority” and may also encompass female-owned businesses (see 30 Ill. Comp. Stat. 575/1 *et seq.*).

An Ohio minority set-aside statute was at issue in *F. Buddie Contracting, Limited v. Cuyahoga Community College District*, 31 F. Supp. 2d 584 (N.D. Ohio 1998). The statute, Ohio Rev. Code § 123.151, requires that 5 percent of contracts on a project be set aside for minority bidders. A second statute, Ohio Rev. Code § 3354.161, applies these requirements specifically to contracts of Ohio community college districts. The community college district had implemented a minority set-aside policy in compliance with the state statute. The federal district court held, however, that the district was also obligated to ensure that its implementation of the policy was “narrowly tailored to advance a compelling government interest”—the constitutional standard used in *Adarand*. The district’s failure to meet this requirement violated the equal protection clause of the Fourteenth Amendment. (This case is discussed further in Section 4.7.4 with respect to qualified immunity.)

**15.2.4.3. Liability problems.** Because of the number of parties involved and the complexities of the contract itself, numerous liability problems can arise with design and construction contracts. The following cases illustrate types of liabilities that may arise, for the institution as well as for other parties, and the ways in which courts may resolve liability issues.

The first case, *Dugan & Meyers Construction Co., Inc. v. State of Ohio Dept. of Administrative Services*, 2003 WL 21640882 (Ohio Ct. Cl. 2003), *affirmed*, 2003 WL 22890599 (Ohio Ct. Cl. 2003), *reversed in part and affirmed in part*, 834 N.E.2d 1 (Ohio Ct. App. 2005), illustrates the complexities, and the clashes among numerous parties, that can arise in construction project litigation, and

serves as a valuable cautionary tale for institutions. The case concerned the construction of three buildings for the Fisher College of Business on the campus of the Ohio State University (OSU). After a competitive bidding phase, Dugan & Meyers (D&M) was selected for general trades work and for lead contractor services, and four other companies were selected for additional portions of the work: a heating, ventilation, and air conditioning (HVAC) contractor; an electrical contractor; a plumbing contractor; and a site work company. All parties had agreed to a "baseline schedule" for the work's completion, which stressed the university's need to utilize the completed structures by the start of the fall 1999 academic quarter. The first major disruption of this schedule was a four-week extension, agreed to by the parties, resulting from some difficulty in procuring structural steel for the project. As time passed, the project fell further behind schedule. In July 1999, the university relieved D&M of its responsibilities as lead contractor, employed the construction manager for the project to take over D&M's obligations, and informed D&M that it would be backcharged for the cost of employing the construction manager in its stead. The university further assessed liquidated damages against each of the other contractors for their alleged failures to facilitate the timely completion of the project.

D&M and other contractors sued the university and the state agency responsible for administering the contract. After a lengthy trial that produced voluminous testimony and evidence (seventeen days, more than six thousand pages of testimony, and several thousand pages of exhibits), the court of claims referee found that the principal cause of the delays in construction was "an excessive number of errors, omissions and conflicts in the design documents furnished to bidders by the state and incorporated into the plaintiffs' contracts," which in turn prevented the plaintiffs from "perform[ing] the required activities with the efficiency and productivity reasonably contemplated in the plaintiffs' bids and in the approved baseline schedule" (2003 WL 21640882, at p. 6).

The referee also found that OSU breached its contract with D&M by removing D&M as lead contractor and backcharging D&M for the services of its replacement, and that D&M was entitled to reversal of the charge. The referee recommended that D&M recover over \$2.7 million in damages. (In addition, the referee found that the university had breached its contract with the HVAC contractor, and the electrical and plumbing contractors, entitling them to cancellation of the liquidated damages the university had assessed against them.)

On appeal, the reviewing judge on the court of claims adopted much of the referee's report, finding that "[the university's] failure to provide complete, accurate and buildable plans and specifications was a breach of contract, thereby entitling plaintiffs to damages proven by a preponderance of the evidence." Both parties then appealed to the state court of appeals, which affirmed the court of claims' ruling on reversing the "back-charge" but reversed the court of claims' other rulings, on a variety of grounds, and reduced D&M's damage award to \$264,000. The Ohio Supreme Court had granted D&M's request for an appeal as this book went to press (840 N.E.2d 202 (2005) (table)).

In *Broadway Maintenance Corp. v. Rutgers, The State University*, 447 A.2d 906 (N.J. 1982), another suit by contractors, the institution prevailed. The contractors requested damages for harm they suffered from delays caused when one subcontractor's work interfered with the timely completion of another's. They claimed that the university was liable because it had failed to "synthesize" the work adequately. The court held that, because the university had entrusted overall responsibility for supervision of the work to a general contractor, the university was not liable to the subcontractors for damages caused by the delays. Since the university had contracted with a general contractor to supervise the work, liability for failure to "synthesize" the work rested entirely on that general contractor. The court noted, however, that "if no one were designated to carry on the overall supervision, the reasonable implication would be that the owner [the university] would perform those duties." The court also noted that subcontractors "may have valid causes of action against each other for damages due to unjustifiable delay."

Similarly, in *John Grace & Co. v. State University Construction Fund*, 472 N.Y.S.2d 757 (N.Y. App. Div. 1984), *affirmed as modified*, 475 N.E.2d 105 (N.Y. 1985), a university construction fund escaped liability to a general contractor because it had fully entrusted the execution of the details of the construction contract to an engineer. The general contractor brought suit against the construction fund for the cost of repairs to a hot water distribution system the general contractor had installed. The contractor installed the system properly to the best of its knowledge, but the engineer hired by the construction fund had allowed improper components to be used in the installation, necessitating the repairs by the general contractor. As in *Broadway*, the court held that the construction fund had hired a third party (the engineer) to be responsible for the overall completion of the contract, and it was that third party, not the university or fund, that was liable to the general contractor for the cost of the repairs.

The university ended up a loser, however, in *Davidson and Jones, Inc. v. North Carolina Department of Administration*, 337 S.E.2d 463 (N.C. 1985), another suit brought by a general contractor. The contractor had encountered unexpected amounts of rock to excavate. The contract clearly stated that the university would pay \$55 per cubic yard for any rock excavation in excess of 800 cubic yards. When there turned out to be a 400 percent overrun on excavation, causing a six-month delay, the contractor sued the university, demanding that it pay the agreed-upon \$55 per cubic yard plus the additional costs the contractor incurred (such as the cost of keeping personnel at the job site) as a direct result of the delay. The state supreme court held that the university was liable for the additional, duration-related, costs, noting that "[t]he trial court found . . . that [duration-related costs] were customarily budgeted as a function of a project's expected duration and were included as such in a contractor's base bid [and] that it was not customary . . . to make any allowance for such costs in setting unit prices." Thus, because the contract did not provide protection

against these costs, and the contractor had no reasonable way of predicting a 400 percent excavation overrun, the court ordered the university to pay the contractor not only the \$55 per cubic yard for the overruns but also more than \$110,000 for other on-site expenses associated with the extra time spent on the project.

In *United States Fidelity & Guaranty Co. v. Jacksonville State University*, 357 So. 2d 952 (Ala. 1978), it was the university that brought suit, claiming that a general contractor was liable for a subcontractor's breach of contract. The court used standard contract principles in agreeing that the general contractor was liable to the university for the poor workmanship of the subcontractor, even though the architect for the project had specified which subcontractor to use. Although the contract contained conflicting terms regarding the general contractor's responsibility for the work of the subcontractors, the court accepted as controlling a clause stating that the general contractor would be responsible for all project work of the subcontractors. The contract also clearly stated that the subcontractors had no contractual relationship with the university and thus could not be directly liable to it for breach of contract. (Subcontractors would have a contractual relationship with the general contractor, however, who if sued might have the option of impleading the subcontractors, since they would ultimately be liable to the general contractor for their poor workmanship.)

These are but a few examples of the many types of liability issues that may arise from institutional construction contracts. Counsel will need to be heavily involved in the resolution of these problems if they arise, as well as in preventing such problems through careful contract drafting and construction planning.

### ***Sec. 15.3. The College as Seller/Competitor***

#### ***15.3.1. Auxiliary enterprises***

**15.3.1.1. Overview.** With increasing frequency and vigor, postsecondary institutions have expanded the scope of "auxiliary" enterprises or operations that involve the institution in the sale of goods, services, or leasehold (rental) interests in real estate.<sup>6</sup> In some situations such sales may be restricted to the members of the campus community (students, faculty, staff); in other situations sales may also be made incidentally to the general public; and in yet other situations the general public or a particular noncampus clientele may be the primary sales target.

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<sup>6</sup>The phrases "auxiliary enterprises," "auxiliary operations," and "auxiliary activities," as used throughout Section 15.3, refer to a broad range of functions that are claimed to be "auxiliary" to the education and research that are the central mission of a higher education institution. To fall within this Section, such functions must place the institution or one of its subsidiary or affiliated organizations (Section 3.6) in the position of seller and must be (or have the potential to be) income producing. These phrases, however, do not include investment activities generating dividends, interest, annuity income, or capital gains.



Examples include child care services provided for a fee at campus child care centers; barbering and hairstyling services; travel services; computing services; graphics, printing, and copying services; credit card services; conference management services; and interactive computer conferencing services and related communication services. Other examples concern the sale of goods: the sale of personal computers and software to students; the sale of merchandise by campus bookstores and convenience stores; the sale of refreshments at concession stands during athletic events; the sale of advertising space in university sports stadiums and arenas or in university publications; the sale of hearing aids at campus speech and hearing clinics; the sale of books by university presses; and the sale of prescription drugs and health care supplies at university medical centers. Programs and events that generate fees provide other examples, such as summer sports camps on the campus; training programs for business and industry; entertainment and athletic events open to the general public for an admission charge; and hotel or dining facilities open to university guests or the general public. Leasing activities provide yet other examples, such as rental of dormitory rooms to travelers or outside groups; rental of campus auditoriums, conference facilities, athletic facilities, and radio or television stations; and leasing of campus space to private businesses that operate on campus.

In addition, institutions may sell “rights” to other sellers, who then can market particular products or services on campus—for example, a sale of rights to a soft drink company to market its soft drinks on campus. Similarly, institutions may sell other “rights” for a profit, such as broadcast rights for intercollegiate athletic contests or rights to use the institution’s trademarks. Institutions, moreover, may enter corporate sponsorship or corporate partnership arrangements with commercial entities that reap financial benefits for the institution. (The sale (or licensing) of intellectual property rights may also occur in connection with research and development; see Section 15.4.3 below.)

Institutions may engage in such activities for a variety of reasons. The goal may be to provide clinical training opportunities for students (for example, speech and hearing clinics or hotel administration schools); to make campus life more convenient and self-contained, thus enhancing the quality of life (banks, fast-food restaurants, travel services, barber shops and hairstyling salons, convenience stores); to increase institutional visibility and good will with professional and corporate organizations, or with the general public (training programs, conference management services, rental of campus facilities); or to make productive use of underutilized space, especially in the summer (summer sports camps, rental of dormitory rooms and conference facilities). In addition to or in lieu of these goals, however, institutions may operate some auxiliary enterprises in response to budgetary pressures or initiatives that necessitate the generation of new revenues or prompt particular institutional units to be self-supporting.

When the growth in auxiliary enterprises and related entrepreneurial activities is considered alongside the ever-expanding purchasing activities and vendor

relationships of institutions, and the increased reliance on outsourcing (see Section 15.2.2 above), a trend toward “commercialization” of college and university operations begins to emerge. Such a trend is further evidenced in the partnerships with industry that institutions increasingly form with respect to scientific research and development (see Section 15.4 below). These developments may affect institutions, their campus communities, and local communities in many ways, some good and some not, and may also raise critical questions about academic values and institutional mission. (See, for example, Jennifer Croissant, “Can This Campus Be Bought?” *Academe*, September–October 2001, 44–48.)

When auxiliary operations are for educational purposes and involve goods, services, or facilities not generally available from local businesses, “commercialization” is generally not evident, and few controversies arise. Those that do arise usually involve tort and contract liability issues fitting within the scope of Sections 3.3 and 3.4 of this book, or issues concerning government licenses and inspections (for example, for a campus food service). But when auxiliary operations extend beyond educational purposes or put the institution in a competitive position, numerous new issues may arise. Critics may charge that the institution’s activities are drawing customers away from local businesses; that the competition is unfair because of the institution’s tax-exempt status, funding sources, and other advantages; that the institution’s activities are inconsistent with its academic mission and are diverting institutional resources from academic to commercial concerns; or that the institution’s activities expose it to substantial new risks that could result in monetary loss or loss of prestige from commercial contract and bill collection disputes (see generally Section 15.1) and tort liability claims.

The case of *Heirs and Wrongful Death Beneficiaries of Branning v. Hinds Community College District*, 743 So. 2d 311 (Miss. 1999), illustrates how auxiliary activities can subject an institution to tort liability claims and how a college’s structuring of its auxiliary operations can limit its liability for the negligent acts of third parties. In this case, the crash of a private plane had resulted in the deaths of Branning, a passenger in the plane, and Tomlinson, the pilot, and injuries to two other passengers. The defendant, Hinds Community College District (HCCD), acting under a long-term lease from Hinds County (a legal entity separate from the college), served as the airport authority for the airport where the plane had taken off. In fulfilling its responsibilities under the lease, HCCD had contracted with Tomlinson Avionics, Inc., to be its airport manager. Michael Tomlinson, an employee of Tomlinson Avionics, was in charge of implementing the corporation’s responsibilities as airport manager, and was also the pilot of the plane that had crashed shortly after takeoff. Tomlinson had met Branning and the other passengers at a bar and had invited them for a ride in his private plane that he kept at the airport. After the crash, Tomlinson was found to have an alcohol content in his blood that was beyond legal limits.

The plaintiffs, representing the deceased passenger, Branning, argued that HCCD had a duty to exercise reasonable care to protect her from the harms she

had suffered at the hands of HCCD's own airport manager. The Supreme Court of Mississippi asserted that "[t]o determine whether Hinds [HCCD] owed a duty to take due care to the plaintiffs, the relationship between Hinds and Tomlinson must first be established. . . . The main concern in this case is whether this was an employer/employee relationship or an independent contract." The difference between the two, the court explained, is that, while an employer may be vicariously liable for the acts of its employees, it may not be held vicariously liable for the torts of an independent contractor that it engages "or for the torts of the independent contractor's employees in the performance of the contract." (See generally Sections 2.1.3 & 4.2.1 of this book.) To determine the relationship between HCCD and Tomlinson, the court analyzed the terms of the two contracts between HCCD and Tomlinson Avionics, as well as the conduct of the parties under these contracts, concluding that "the relationship between the two parties is that of independent contractor." HCCD therefore owed no duty of care to the plaintiffs and could not be vicariously liable for the torts of Tomlinson Avionics or of Michael Tomlinson.

In addition to contract and tort liability issues, as in the *Branning* case, commercially oriented or noneducational auxiliary activities may also raise problems in the areas of public relations, government relations (especially for public institutions, and especially with state legislatures), budgets and resources, and insurance and other risk management practices (see Section 2.5). Other types of legal issues may also arise, as discussed in subsections 15.3.1.2 and 15.3.2 through 15.3.4 below.

In some situations, moreover, an institution's activities as a seller will become intertwined with its activities as a purchaser. An institution may outsource the selling of certain products or services on campus to an outside third party, for example, in which case the institution will have "purchased" the services of the third party in order to effectuate sales. The case of *ABL Management, Inc. v. Board of Supervisors of Southern University and Agricultural & Mechanical College*, 773 So. 2d 131 (La. 2000), discussed in Section 15.2.2, is an interesting example of how selling and purchasing may become entwined. When this does occur, the institution may be subject not only to legal requirements pertaining to selling, set out in this Section, but also to some legal requirements regarding purchasing, such as those set out in Section 15.2.

### **15.3.1.2. Institutional authority to operate auxiliary enterprises**

**15.3.1.2.1. PUBLIC INSTITUTIONS.** The scope of an institution's authority to operate particular auxiliary enterprises may be questioned whether or not the institution's activity puts it in competition with local businesses. As a practical matter, however, competitive activities of public institutions are much more likely to be controversial and to be challenged on authority grounds than are those of private institutions.

For public institutions, the basic question is whether the constitutional and statutory provisions delegating authority to the institution (see generally Section 12.2 of this book), and the appropriations acts authorizing expenditures of public funds, are broad enough to encompass the auxiliary operation at issue. Challenges may be made by business competitors, by state taxpayers, or by the

state Attorney General. Challenges may focus on the conduct of a particular activity or the operation of a particular facility, on the construction of a particular facility, or on the financing arrangements (bond issues and otherwise) for construction or operation of a particular facility or activity.

Several important early cases in the period of the 1920s to the 1940s illustrate the problem and lay the foundation for the more modern cases. One of the earliest (and by today's standards, easiest) cases was *Long v. Board of Trustees*, 157 N.E. 395 (Ohio Ct. App. 1926)—a challenge to bookstore sales to students and faculty at Ohio State University. Noting that the sales were “practically upon a cost basis,” the court upheld this activity because it was “reasonably incidental” to the operation of the university.

In another early case, *Batcheller v. Commonwealth ex rel. Rector and Visitors of University of Virginia*, 10 S.E.2d 529 (Va. 1940), the issue was whether the university had authority to build and operate a commercial airport. The university offered a course in aeronautical engineering but, without an airport, had been unable to provide its students flight instruction or the ability to take advantage of flight instructors and related benefits that the Civil Aeronautics Authority offered at little or no cost. On the university's application, the State Corporation Commission issued the university a permit to construct, maintain, and operate an airport for civil aircraft involved in commercial aviation. The plaintiffs, adjoining landowners, sought judicial review of the commission's decision, claiming that the commission had no authority to grant the permit because the university had no authority to operate such an airport. The court recognized that the university “has not only the powers expressly conferred upon it, but also the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.” Quoting the commission, the court reasoned that:

[t]he University in making application for the permit in question was not asking for the right to engage in commercial aviation, but only for the right to operate and conduct an airport for the landing and departure of *civil aircraft engaged in commercial aviation*, upon which there could be given instruction in student flying so necessary and essential to its course in aeronautics. . . . [T]he University will be authorized by the permit to own and operate an airport upon which aircraft engaged in commercial aviation may land or take off, but this would not involve it in a purely commercial or industrial enterprise, but, as has been shown, in an enterprise necessary to and incidental to the full and complete instruction in the course in aeronautics which it has established [10 S.E.2d at 535 (emphasis in original)].

The airport thus fell into the category of “necessary but incidental enterprises,” the operation of which was within the university's legal authority.

In *Turkovich v. Board of Trustees of the University of Illinois*, 143 N.E.2d 229 (Ill. 1957), taxpayers sought to enjoin the university from using state funds to construct, equip, and operate a television station. The plaintiffs claimed that: (1) the university had no legal authority to operate a television station; and

(2) there was no valid appropriation of funds for the purpose of building and maintaining a television station, either because the appropriation acts the university relied on were too general to encompass the challenged expenditures or because these acts violated the Illinois constitution's "itemization requirements" governing the legislative appropriation of state funds.

The university had obtained a permit from the Federal Communications Commission (FCC) to construct and operate a noncommercial television station. The station was to be used to train and instruct students in the communications and broadcasting field, to facilitate the dissemination of research on a campus-wide basis, to experiment in the planning and technique of television programming, and to educate the public. (It was not clear from the court's opinion whether the television station would operate in competition with local commercial stations.) Concerning the authority issue, the court determined that, under the statute creating the university, the board of trustees had "authority to do everything necessary in the management, operating and administration of the University, including any necessary or incidental powers in the furtherance of the corporate purposes." Since the challenged activity encompassed "research and experimentation," it was "well within the powers of the University without any additional statutory enactment upon the subject." Regarding the appropriation issues, the court held that "[t]he impracticability of detailing funds for the many activities and functions of the University in the Appropriation Act is readily apparent," and the legislature "cannot be expected to allocate funds to each of the myriad activities of the University and thereby practically substitute itself for the Board of Trustees in the management thereof." The court thus concluded that the board of trustees' expenditures for the television station were consistent with the relevant state appropriation acts and the constitutional mandates concerning appropriation of state monies.

The last of the leading early cases is *Villyard v. Regents of University System of Georgia*, 50 S.E.2d 313 (Ga. 1948). The issue was whether the regents had the authority to operate a laundry and dry cleaning business at one of the system's colleges, the Georgia State College for Women. The customers of the business were the college's students; faculty members, executive officers, staff, and their families; and, apparently, former employees and their families as well. The charges for the laundry and dry cleaning services were lower than those of local commercial dry cleaning and laundry businesses. The plaintiffs, operators of such businesses, sought to enjoin and restrict the college's enterprise. They claimed it was unfair for the college "to use rent-free public property in the operation of said enterprise in competition with the private enterprises of petitioners" and that such activities represented a "capricious exercise of . . . power that thwarts the purpose of the legislature in establishing the University System. . . ." The court recognized that the regent's powers and duties under the Georgia Code "are untrammelled except by such restraints of law as are directly expressed, or necessarily implied. 'Under the powers granted, it becomes necessary . . . to look for limitations, rather than for authority to do specific acts.' *State v. Regents of the Univ. System of Georgia*, 210, 227, 175 S.E.2d 567, 576." Then, suggesting that the college's business was "reasonably related to the

education, welfare, and health” of the student body, the court held that the business did not transgress any state constitutional or statutory limitations on the regents’ authority. Further, “if the operation of the laundry and dry-cleaning service, at a price less than the commercial rate for the benefit of those connected with the school, is lawful, it matters not that such enterprise is competitive with the plaintiffs’ business.” In so deciding, the court apparently applied an expansive understanding of the college’s educational purposes so as to encompass not only services to students, but also services to faculty, staff, and others with connections to the college. The court did not specify the particular educational benefit that the students gained from the college’s provision of services to this expansive group of customers.

The first of the leading modern cases is *Iowa Hotel Association v. State Board of Regents*, 114 N.W.2d 539 (Iowa 1962). The State University of Iowa had planned an addition to its Memorial Union that would include guest rooms, food service facilities for guests, and banquet and conference rooms. The legislature had passed a statute authorizing the addition. The plaintiff hotel association, however, challenged the constitutionality of this statute and the university’s financing and construction plans pursuant to the statute. The court rejected the challenge and upheld the university’s authority to finance and construct the addition because it was “incident[al] to the main purpose and complete program of the university.” In reaching this conclusion, the court noted that university representatives and organizations commonly invite individuals and groups to the campus; that “[f]ood, housing and entertainment are necessary incidents” of such visits; and that “the percentage of those who use [these services] without invitation is small.” Although operation of the addition’s facilities could put the university in competition with private enterprise, the university did not encourage sales to the general public and any resulting competition would be merely incidental. (In a later case, *Brack v. Mossman*, 170 N.W.2d 416 (Iowa 1969), the same court relied on its *Iowa Hotel Association* decision to uphold the University of Iowa’s authority to construct a multilevel parking garage on campus that would be used by campus visitors as well as students, faculty, and staff.)

The case of *Churchill v. Board of Trustees of University of Alabama in Birmingham*, 409 So. 2d 1382 (Ala. 1982), involved a quite different issue: whether the university’s speech and hearing clinic had authority to sell hearing aids to its patients. The plaintiffs were private hearing aid dealers and a hearing aid dealers association. They argued that the sale of hearing aids was a commercial rather than educational activity and that neither the university nor other state agencies had authority to engage in commercial activities in competition with the private business sector. This argument rested on Section 35 of the Alabama constitution, which states that “the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.”

The plaintiffs contended that the university’s activity was a profit-making commercial venture that injures private enterprise. The university contended,

however, that the sale of hearing aids in its own school clinics allowed students to reap the educational benefits of providing follow-up care to patients and receiving feedback from them—opportunities that would not arise if the clinics had to refer patients to private hearing aid dealers. Reviewing the trial record, including expert testimony presented by both parties, the Alabama Supreme Court sided with the university:

We believe the evidence before us . . . amply supports the conclusion that the dispensing of hearing aids, although in the broadest sense it is in competition with private enterprise, is a function which is reasonably related to and promotive of the educational, research, and service mission of a modern university [409 So. 2d at 1389].

The court agreed that “[t]he prohibition of Section 35 is not to be taken lightly” and that “each challenged activity [must] undergo careful scrutiny on a case by case basis to avoid the constitutional ‘usurpation and oppression’ admonition.” Applied to this case, the court said, Section 35 would prohibit the university from engaging in the sale of hearing aids “solely for the purpose of raising revenues.” On the other hand, under state statutes, the university had clear authority to establish curriculum and provide education—activities that would not violate Section 35. Thus, the question was whether “the commercial aspect, rather than the instructional aspect, was the principal factor in the sale of the hearing aids”—a question the court answered in the negative.

*Jansen v. Atiyeh*, 743 P.2d 765 (Ore. 1987), involved the authority of the Oregon State Board of Higher Education, acting through Southern Oregon State College, to provide housing, food, and transportation services to groups of non-students attending the annual Oregon Shakespearean Festival. The plaintiffs were motel and hotel operators, taxi drivers, and caterers in the Ashland, Oregon, area. The festival, hosted by Ashland and operated by a nonprofit corporation unaffiliated with the college or the state board, offered a series of events running from spring through fall.

The college had devised and implemented a plan to increase revenues by opening college dormitory facilities to outside groups of more than fifteen persons who gathered to pursue an educational objective. Certain groups attending the festival met this qualification and were provided housing and related services for a fee. To accommodate these groups, the college had to renovate some of its residence halls. The renovations were funded with the proceeds of revenue bonds issued pursuant to Article XI-F(1) of the Oregon constitution and Section 351.160(1) of the Oregon statutes. Article XI-F(1) authorized the board to issue revenue bonds “to finance the cost of buildings and other projects *for higher education*, and to construct, improve, repair, equip and furnish buildings and other structures for such purpose, and to purchase or improve sites therefor” (emphasis added). Section 351.160(1), which implements Article XI-F(1), authorized the board to use revenue bonds to “undertake the construction of any building or structure *for higher education* . . . and enter into contracts for the erection, improvement, repair,

equipping and furnishing of buildings and structures for dormitories, housing, boarding, off-street motor vehicle parking facilities and other *purposes for higher education . . .*” (first emphasis added). The plaintiffs argued that the college’s actions were inconsistent with these provisions because the use of the dormitories to house nonstudents did not satisfy the requirement that the constructed or improved buildings be used “for higher education.”

The court recognized that “the crucial issue in this case is whether [the college’s] policy of allowing the groups to use the facilities is within the definition of ‘higher education.’” This term was not defined in the statute. But in light of the board’s broad authority (under other statutory provisions) to supervise instruction and educational activities and to manage campus properties, the court concluded that “the legislature has delegated to the Board the authority to interpret the term.” The issue then became whether the board’s interpretation “was within its discretion” and consistent “with the constitutional [and] statutory provisions.” Concluding that it was, the court thereby rejected the plaintiffs’ challenge:

[T]he statutory scheme relating to higher education contemplates that the system may offer more than traditional formal degree programs. The Board may maintain “cultural development services,” ORS 351.070(2)(c), as well as offer “extension” activities, ORS 351.070(2)(a), in its instructions. [The college] has decided that only groups having an educational mission may use its facilities. That use is within those contemplated by the legislative scheme [743 P.2d at 769].

Taken together, the early and modern cases illustrate the variety of approaches that courts may use in analyzing the authority of a public institution to engage in arguably commercial activities or to compete with private business enterprises. Common threads, however, run through these challenges and approaches. In general, courts would consider the particular functions and objectives of the enterprise; the relation of these functions and objectives to the institution’s educational purposes (presumably including the creation of a wholesome and convenient residential life environment for students); the particular wording of the statutes or constitutional provisions delegating authority to the institution or limiting its powers; and judicial precedent in that state indicating how to construe the scope of delegated powers.<sup>7</sup> If a court were to find that an auxiliary enterprise serves an educational function or is related to the institution’s educational purposes, it probably would conclude that the institution has the requisite authority to operate the enterprise, even if an incidental purpose or result is generation of profits or competition between the institution and private businesses. In contrast, the institution’s authority will likely be questionable or nonexistent if the competitive or profit-seeking aspects of its enterprise are not incidental to

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<sup>7</sup>In some states there may be narrow and specific statutes that expressly authorize the institution to engage in particular entrepreneurial activities. See, for example, 110 ILCS § 75/1 (sale of television broadcasting rights for intercollegiate athletic events). Such a statute, as applied to the specified activity, would alleviate the need for the full analysis suggested in the text.



its educational aspects but instead are the primary or motivating force behind the institution's decision to operate the enterprise. It may be difficult, of course, to separate out, characterize, and weigh the institution's purposes, as all court opinions require. But if an institution carefully plans each auxiliary enterprise to further good-faith, genuine educational purposes, documents its purposes, and monitors the enterprise's operations to ensure that it adheres to its purposes, courts will be likely to construe a public institution's authority broadly and defer to its expert educational judgments.

A more recent case, *Medical Society of South Carolina v. Medical University of South Carolina*, 513 S.E.2d 352 (S.C. 1999), provides an example of how a state institution might handle a situation in which its authority is questionable. The university, Medical University of South Carolina (MUSC), sought to enter a complex affiliation agreement with a private, for-profit health care corporation. As part of the agreement, MUSC was to lease its medical center in Charleston to the health care corporation while MUSC staff continued to provide medical services at the center. A medical society in the state sought to halt the transaction. It challenged the board of trustees' statutory authority to dispose of its real estate. The court agreed that the board, as a statutorily authorized agency of the state, is limited to those powers granted to it by the legislature. Reviewing the South Carolina statutes enumerating the powers of the MUSC Board of Trustees, the statute confirming the charter of MUSC, and the statutes granting powers to state institutions of higher education generally, the court concluded that MUSC had no preexisting authority "to dispose of buildings or personal property" and thus no authority "to consummate its transaction" with the private health care corporation. However, shortly after MUSC had approved this transaction, the state legislature had enacted a provision, Act No. 390, which retroactively authorized the transaction. The court rejected the medical society's contention that this bill was an unconstitutional "special law" and held that it served to validate MUSC's disposition of its buildings as part of the transaction with Columbia/HCA.

15.3.1.2.2. *PRIVATE INSTITUTIONS*. Private institutions may also encounter issues concerning their authority to operate auxiliary enterprises, although such issues arise less frequently and present fewer difficulties than those regarding public institutions. For private institutions, the basic question is whether the institution's corporate charter and bylaws, construed in light of state corporation law and educational licensing laws, authorize the institution to engage in the particular auxiliary activity at issue (see generally Sections 3.1 and 12.3.1). *State ex rel. [various citizens] v. Southern Junior College*, 64 S.W.2d 9 (Tenn. 1933), provides a classic example. The issue was whether the college had authority to operate a printing business. The state sued the college on behalf of various individuals who operated commercial printing businesses in the college's locale. The college was chartered as a nonprofit corporation and operated under the sponsorship of the Seventh Day Adventist Church. In addition to academic education, the college offered training in various applied arts and occupations. It maintained the print shop and other enterprises (according to the court) in order to "instruct students in such lines of work, to give

them practical experience, but also to make these different enterprises self-sustaining, and, if possible, to procure from such operations a profit for the general support of the school.” Although the print shop printed the college’s catalogs and advertising matter, as well as religious literature for the Seventh Day Adventist Church, the majority of the shop’s receipts came from commercial printing, often in competition with local businesses, from which the college realized a profit.

The court held that the operation of the print shop exceeded the college’s authority under its charter. No authority could be implied from the charter’s express grants of power, “since the carrying on of the business of commercial printing had no reasonable relation to the conduct of the school.” Moreover, the print shop ran afoul of a charter provision stating that “by no implication shall [the college] possess the power to . . . buy or sell products or engage in any kind of trading operation.” Thus:

Instead of being an incident, the commercial feature absorbed the greater part of the activities of this printing shop. Without doubt the defendant school was entitled to own a printer’s outfit and to use that outfit in giving practical instructions to the students in this art. The institution, however, had no authority to employ this equipment commercially in the printing trade . . . [64 S.W.2d at 10].

The court thereby recognized the private college’s authority to operate auxiliary enterprises as long as they served a primary educational purpose but determined that the enterprise at issue went beyond the college’s authority because its core purposes were more commercial than educational. In such circumstances, the college’s only recourse was to modify its operation so that educational purposes predominated, or to obtain a charter amendment or other additional authority from the state legislature that permitted it to operate the enterprise in a commercial “profit-oriented” fashion.

As the *Southern Junior College* case illustrates, there are parallels between the issues facing private institutions and those facing public institutions. In each circumstance, the all-important factors may be the primary function of the enterprise and the institution’s primary purpose for operating it—a difficult inquiry without clear boundaries. Not all courts in all states will pursue this inquiry in the same way as the Tennessee court, according so little deference to the institution’s characterization of its purpose; and indeed the inquiry itself and the pertinent factors will differ depending on the particular wording of the institution’s charter and the state’s corporation laws. Other charters, for instance, may not have restrictive language about “trading” like that in Southern Junior College’s charter. In general, it appears that nonprofit private institutions will have at least as much authority as public institutions to operate auxiliary enterprises, and perhaps more—and that private, for-profit (proprietary) institutions may have even more authority than nonprofit institutions.

**15.3.2. State noncompetition statutes.** Various states now have statutes that prohibit postsecondary institutions from engaging in certain types of

competitive commercial transactions; and the number of such statutes is increasing. Virtually all these statutes focus on public institutions and do not cover private institutions.<sup>8</sup> Some statutes apply generally to state agencies and boards but include special provisions for state institutions of higher education; other statutes apply specifically and only to state higher education institutions. Some statutes apply broadly to sales of goods and services as well as to the commercial use of facilities, while others are limited to sales of goods. Yet others are even narrower, applying only to a particular type of goods or service—for example, sale of hearing aids (Idaho Code § 54-2902(d)) or leasing of revenue-producing buildings and facilities (Iowa Code § 262.44). Some statutes set out specific prohibitions and rules; others delegate rule-making authority to the state board or individual institutions. University medical centers and health care services often are exempted from these statutes.

An excellent example of the broader type of statute is a 1987 Arizona law on state competition with private enterprise (Ariz. Rev. Stat. Ann. § 41-2751 *et seq.*). The Arizona statute includes a specific section (41-2753) regulating state community colleges and universities; subsection (A)(1) of this section covers sales to “persons other than students, faculty, staff, and invited guests.” It prohibits community colleges and universities from selling such persons “goods, services or facilities that are practically available from private enterprise.” However, three important exceptions to this prohibition make it inapplicable (1) when the institution is “specifically authorized by statute” to provide a particular type of goods, service or facility; (2) when the “provision of the goods, service or facility offers a valuable educational or research experience for students as part of their education or fulfills the public service mission” of the institution; and (3) when the institution is “sponsoring or providing facilities for recreational, cultural and athletic events or . . . facilities providing food services and sales.”

In contrast to subsection A(1) of the Arizona statute, subsection A(3) covers sales to “students, faculty, staff, or invited guests.” It prohibits community colleges and universities from providing such persons with “goods, services or facilities that are practically available from private enterprise *except as authorized by the state governing board*” (emphasis added), thus delegating responsibility and discretion regarding such matters to the board of regents and the board of directors for community colleges. Other subsections contain special provisions regarding competitive bidding (§ 41-2753(A)(2)) and special provisions regarding the institution’s sale of “products and by-products which are an integral part of research or instruction” (§ 41-2753(B)). The entire section is implemented through rules adopted by the state governing board (§ 41-2753(C)) and is enforced through a complaint process administered by the governing board and through judicial review (§ 41-2753(D)).

Colorado has a statute similar to Arizona’s, passed in 1988 (Colo. Rev. Stat. § 24-113-101 *et seq.*). Other states have different types of laws. The State

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<sup>8</sup>One narrow exception apparently is Idaho Code § 54-2902(d), which prohibits both “state and local governmental entit[ies]” and “nonprofit organization[s]” from selling hearing aids for compensation.

of Washington law requires state higher education institutions, “in consultation with local business organizations and representatives of the small business community,” to develop policies and mechanisms regarding the sale of goods and services that could be obtained from a commercial source (Wash. Rev. Code § 28B.63.010 *et seq.*). The Illinois University Credit and Retail Sales Act (110 ILCS 115/1 & 2), restricts sales by any “retail store carrying any line of general merchandise” that is operated by a state higher education institution, or on the institution’s property, “when such an operation can reasonably be expected to be in competition with private retail merchants in the community” (with some exceptions). The Illinois statute also restricts credit sales by retail stores operated by state higher education institutions or on institutional property. The Iowa statute (Iowa Code. Ch. 23A) applies broadly to state agencies “engage[d] in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise,” but it provides substantial exemptions for public higher education institutions (§§ 23 A.2(2) & 23 A.2(10)(K)). And the Montana statute regulates the use of state higher education institutions’ “revenue-producing facilities” by listing the uses that the state regents “may” authorize (Mont. Code Ann. 20-25-302).

Since most of these statutes are relatively new, and since they may not permit enforcement by private lawsuits (see, for example, *Board of Governors of the University of North Carolina v. Helpingstine*, 714 F. Supp. 167, 175 (M.D.N.C. 1989)), there are few court opinions interpreting and applying the statutory provisions. A leading example thus far is *American Asbestos Training Center, Ltd. v. Eastern Iowa Community College*, 463 N.W.2d 56 (Iowa 1990), in which a private training center sought to enjoin a public community college from offering asbestos removal courses in competition with the center. The center relied on Chapter 23A of the Iowa Code (discussed above), arguing that the college’s training programs were “services” that could not be offered in competition with private enterprise. The court disagreed. Construing the term “services,” as applied to a community college, it held that “[t]eaching and training are distinct from, rather than included within, the meaning of ‘services,’” and that the statute therefore was inapplicable to a community college’s training programs. Alternatively, the court concluded that, even if training programs were considered “services,” the statute still would not apply. The statute does not restrict services that are authorized specifically by some other statute, and other sections of the Iowa Code do specifically authorize community colleges to offer vocational and technical training.

In another case, *Duck Inn, Inc. v. Montana State University-Northern*, 949 P.2d 1179 (Mont. 1997), the court interpreted and applied the Montana statute (above) and rejected a private competitor’s challenge to the university’s practice of “rent[ing] its facilities to private persons and organizations for parties, reunions, conventions, and receptions.” The pertinent provision of the statute specifies “that the regents of the Montana university system may . . . rent the

facilities to other public or private persons, firms, and corporations for such uses, at such times, for such periods, and at such rates as in the regents' judgment will be consistent with the full use thereof for academic purposes and will add to the revenues available for capital costs and debt service." The Duck Inn alleged that these rental activities "placed Northern in direct competition with the Duck Inn's business and violated [the Montana Code as well as the Montana State Constitution]." The court rejected the Duck Inn's arguments and held in favor of the university.

The Duck Inn's first argument was that the university's rental of its facilities for private functions was not "consistent with" the "academic purposes" of the institution. The court disagreed, reasoning that the statutory phrase "consistent with" means "compatible with" or "not contradictory to," and did not require (as the Duck Inn had contended) that the leasing be "directly related to" academic purposes. In light of the university's use of the rental income to supplement operating funds and to pay off the bond issues to which the revenue had been pledged, the court concluded that there was no evidence that the "rentals are incompatible with, or contradict, the full use of the facilities for academic purposes." Thus, the court held that the university's leasing activities were authorized by the Montana Code.

The Duck Inn's second argument was that § 20-25-302 is an unconstitutional delegation of legislative authority to an administrative agency (the university) and is also an improper "use of tax-supported facilities for a private purpose—competition with private enterprise—which violates the constitutional requirement that taxes may be levied only for public purposes." The court also rejected both prongs of this argument. Regarding the first prong, it found that the policy underlying the statute was to "increase revenues available for the capital costs of, and debt service on, campus facilities . . . [and] to minimize the tax support necessary to fund units of the . . . university system." Further, the statute "constrains" the university by providing that the rentals must not be inconsistent with the full use of the facilities for academic purposes. Thus, "the regents' discretion is sufficiently limited," and the statute does not constitute an unlawful delegation of legislative authority. Regarding the second prong of the Duck Inn's constitutional argument, the court concluded that the circumstances of the case did not directly implicate the taxation-for-public-purposes provision of the Montana constitution. Even if this provision did apply, the court concluded, § 20-35-302 of the Montana Code and the university's leasing activities have a "public purpose," and would not violate this provision of the constitution. (In a more recent case involving rentals, *In re Appalachian Student Housing Corp.*, 598 S.E.2d 701(N.C. App. 2004), the court held that the rental of apartments, when the rentals are restricted to students, "is not a service normally provided by private enterprise" and therefore does not conflict with the North Carolina anti-competition statute (N.C. Gen. Stat. § 66-58(a)).)

In light of these statutory developments, business officers and legal counsel of public institutions will need to understand the scope of any noncompetition

statute in effect in their state and to ensure that their institution's programs comply with any applicable statutory provisions. In addition, whether or not their state has a noncompetition statute, business officers, counsel, and governmental relations officers of public institutions should monitor state legislative activities regarding noncompetition issues and participate in the legislative process for any bill that is proposed. Some of the existing statutes are not well drafted, and it will behoove institutions faced with new proposals to avoid the weaknesses in some existing statutes. The State of Washington statute, discussed above, appears to embody the best approach and best drafting thus far available. And perhaps most important, both public and private institutions with substantial auxiliary enterprises—whether or not they are subject to a noncompetition statute—should maintain a system of self-study and self-regulation, including consultation with local business representatives, to help ensure that the institution's auxiliary operations serve the institutional mission and strike an appropriate balance between the institution's interests and those of private enterprise.

**15.3.3. Federal antitrust law.** Whenever a postsecondary institution sells goods or services in competition with traditional businesses, as in the various situations described in Section 15.3.2 above, it becomes vulnerable to possible federal as well as state antitrust law challenges (see generally Section 13.2.8). Also, in certain circumstances, it might need to invoke the antitrust laws to protect itself from anticompetitive activities of others. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), for example, the university successfully invoked the Sherman Act to protect its competitive position in selling the rights to televise its football games (see Section 14.4.4 of this book). Antitrust claims against universities are illustrated by the two cases below. (See also the *Jefferson County Pharmaceutical Ass'n.* case, discussed in Section 15.2.1, which is relevant to postsecondary institutions as sellers of goods as well as purchasers.)

In *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90 (3d Cir. 1982), a sidewalk discount bookseller (Sunshine) brought suit alleging that the university had engaged in “predatory pricing” at its on-campus bookstore in order to monopolize the market for itself. At the beginning of the fall 1980 semester, Sunshine and the university bookstore engaged in an undergraduate textbook price war. To combat Sunshine's typical price of 10 percent below retail, the university lowered its prices by 15 percent to retain its students' patronage. In retaliation, Sunshine lowered its prices the extra 5 percent plus an additional 25 cents per book and then filed suit in federal district court. To prevail on its claim, according to the court, Sunshine had to show that the alleged predatory prices would not return a profit to the seller. For its proof, Sunshine introduced accounting methods and calculations demonstrating that the university had sold the books below cost. In defense, the university offered its own accounting methods and calculations, which differed materially from the plaintiff's and showed that the university had made

a slight profit on its sale of the books. The district court adopted the university's version and granted summary judgment for the university. The appellate court reversed, holding that Sunshine's submissions on allocation of costs were sufficient to create genuine issues of material fact that precluded an order of summary judgment.

In *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988), Idaho State University had awarded an exclusive six-year lease to the local chamber of commerce and the *Idaho State Journal* to produce a spring trade show in the university's Minidome. The producers of a similar trade show that had previously been held at the Minidome brought suit against the university, the chamber of commerce, and the *Journal* for allegedly violating the Sherman Act. The federal district court granted summary judgment to the defendants, and the appellate court affirmed, because the plaintiffs were not able to show that the university's lease arrangement unreasonably restrained competition among producers of spring trade shows. The university had awarded the lease through a competitive bidding process, and all producers—including the plaintiffs—"had an equal opportunity to bid on the lease." The university "did not destroy competition for the spring trade show; it merely forced competitors to bid against one another for the one show [it] was willing to house." Moreover, the Minidome could not be considered an "essential facility"—that is, a facility that was necessary to competition in the trade show market and thus had to be accessible to competitors. (For more on the "essential facilities" doctrine in antitrust law, see Section 15.4.5.) The university itself was not a competitor of the plaintiffs, nor had it excluded or refused to deal with the plaintiffs: "It has merely refused to house more than one trade show per spring, and it has decided that the show will be given to the producer who makes the best bid. The [plaintiffs] simply failed to outbid *their* competitors."

As in other antitrust contexts, state institutions involved in competitive activities may escape antitrust liability by asserting the state action exemption as a defense (see Section 13.2.8). An example is *Cowboy Book, Ltd. v. Board of Regents for Agricultural and Mechanical Colleges*, 728 F. Supp. 1518 (W.D. Okla. 1989), another case involving competition between a campus bookstore and a private bookseller. When the bookseller filed suit under the Sherman Act, the court held that the defendant, a state university, was immune from liability and dismissed the plaintiff's complaint. Similarly, in *Humana of Illinois, Inc. v. Board of Trustees of Southern Illinois University*, 1986 WL 962 (C.D. Ill. 1986), a private for-profit hospital brought an antitrust action against a state university and a hospital affiliated with the university's medical school. The court held that the state action immunity covered both the university and the hospital affiliate; it therefore dismissed several parts of the suit challenging alleged anticompetitive effects of medical school policies. Such protection may not always be available to state institutions and their affiliates, however, since there are various limitations on the availability of the exemption, as discussed in Section 13.2.8 of this book.

**15.3.4. Taxation of income from entrepreneurial activities.**<sup>9</sup> Both public and private institutions that engage in entrepreneurial activities may face various taxation issues arising under federal tax laws (see generally Section 13.3 of this book) as well as state and local tax laws (see generally Sections 11.3 and 12.1). These issues may arise both with respect to the institution's own activities and with respect to the activities of captive and affiliated organizations (see Rev. Rul. 58-194, 1958-1 C.B. 240, and see generally Section 3.6.3 of this book). The following discussion illustrates the problem and briefly surveys the applicable law.

**15.3.4.1. Federal unrelated business income tax.** Under the Internal Revenue Code and implementing regulations, an organization that is exempt from income taxation may nevertheless be subject to a tax on the income derived from entrepreneurial activities unrelated to the purposes for which the organization received its tax exemption (see Section 13.3.6 of this book). Thus, despite their tax-exempt status, colleges and universities will need to consider this unrelated business income tax or "UBIT" if they operate auxiliary enterprises or engage in other entrepreneurial activities that are or may become income-producing activities. The basic question is whether the entrepreneurial activity fits within the Internal Revenue Code's test for identifying unrelated business income (I.R.C. § 512), that is, whether it is (1) a trade or business, (2) regularly carried on, that (3) is not "substantially related" to the organization's exempt purposes. The more difficult problems usually concern the third part—whether the activity generating the income is unrelated to the college or university's educational, scientific, or charitable purposes. (See *Iowa State University of Science & Technology v. United States*, 500 F.2d 508 (Ct. Cl. 1974) (in which the court concluded that a university-owned commercial television station's commercial attributes were "so overwhelming as to make it impossible for the operation of WOI-TV to be substantially related to the educational purposes of the University," and therefore that income from the station constituted unrelated business income to the university subject to UBIT).

Various Treasury Department revenue rulings further clarify the statutory concept of unrelated business income. For example, Treasury has ruled in a "dual use" problem that the fees a university collected from the general public for use of the university ski slope were taxable as unrelated business income, whereas income derived from students using the slope was not subject to UBIT, because student recreational use was substantially related to the university's educational purposes (Rev. Rul. 78-98, 1978-1 C.B. 167). Treasury has also ruled that the sale of broadcasting rights to an annual intercollegiate athletic event was substantially related to exempt educational purposes, and income from the sale was thus not subject to UBIT (Rev. Rul. 80-296, 1980-2 C.B. 195). In contrast, the leasing of a university stadium to a professional football team—with accompanying services such as utilities, ground maintenance, and security—was a trade

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<sup>9</sup>This Section was updated and reedited primarily by Randolph M. Goodman, partner at Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Washington, D.C., and Patrick T. Gutierrez, an associate at Wilmer, Cutler, Pickering, Hale and Dorr, LLP.



or business unrelated to the university's educational purposes, making the lease income subject to UBIT (Rev. Rul. 80-298, 1980-2 C.B. 197). More recently, Treasury has ruled that income from conducting elementary and secondary school teacher training seminars was not unrelated business income for a university, even though the business was operated through a limited liability corporation (LLC) that the university formed with a for-profit corporation, and the seminars were conducted off campus at sites selected by the for-profit corporation (Rev. Rul. 2004-51, 2004-22 I.R.B. 974).

Similarly, Treasury regulations include examples indicating that a university's sponsorship of theater productions and symphony concerts open to the public is related to the educational purpose of the university, and the income generated is therefore exempt from UBIT (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 2)); and that the solicitation of paid advertising by the student staff of a campus newspaper is substantially related to exempt educational purposes, so that the advertising income is also exempt from UBIT (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 5)).

Even if a particular entrepreneurial activity fits the statutory three-part test for an unrelated trade or business, the income may nevertheless be exempted from taxation under one of the various exceptions and modifications contained in the Code (see Section 13.3.6 of this book). Under the exclusion for activities conducted by an exempt organization "primarily for the convenience of its members, students, patients, officers, or employees" (I.R.C. § 513(a)(2)), for example, the income from sales at a campus bookstore or restaurant or at a university hospital's gift shop or cafeteria may escape taxation (see Treas. Reg. § 1.513-1(e)(2); see also Rev. Rul. 58-194, 1958-1 C.B. 240).<sup>10</sup> The operation of vending machines or laundromats on campus for student and faculty use would similarly fall within the convenience exception (Treas. Reg. § 1.513-1(e)(2)); see also Rev. Rul. 81-19, 1981-3 C.B. 353). However, the convenience must be the convenience of members, student, patients, officers, or employees (see Priv. Ltr. Rul. 9720035 (February 19, 1997), ruling that income from the use of a university golf course by students and faculty, but not income from use by alumni and family of students and faculty, qualifies for the convenience exception; and to the same effect, see Tech. Advice. Mem. 9645004 (July 17, 1996)).

Another important exception from UBIT is passive investment income, such as dividends, royalties, and gains and losses from the sale or disposition of property (that is not inventory or property held primarily for sale in a trade or business) (I.R.C. § 512(b)). Determining whether an amount falls within one of these passive income exceptions can be difficult. For example, in *Oregon State University Alumni Association v. Commissioner of Internal Revenue*, 193 F.3d 1098 (9th Cir. 1999), the Ninth Circuit considered the taxability of payments that colleges and universities receive under "affinity credit card" agreements with

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<sup>10</sup>A bookstore selling items that fall within the "convenience doctrine," however, may still be subject to taxation on the sale of other items, either because they are not "convenience" items or because they are sold to the general public (see Priv. Ltr. Rul. 8004010 (1980) & 8025222 (1980)).

financial institutions. The court concluded that payments from a bank to alumni associations under an affinity credit card program were payments for “the good will associated with the schools’ names, seals, colors, and logos” rather than for “mailing list management and promotional services,” and were therefore nontaxable royalties and not subject to the unrelated business income tax.

Although Revenue Ruling 80-298, discussed above, provides an example of how leasing campus facilities may create income subject to UBIT, in other instances income from renting campus sports facilities, auditoriums, or dormitories will be exempted from UBIT as passive investment income. The arrangement must be structured carefully, however, so that substantial support or maintenance services are not provided along with the facility, thus complying with the requirements for exclusion from UBIT of income from rents from real property (see I.R.C. § 512(b)(3)(A)(i) and (B)(i); Treas. Reg. § 1.512(b)-1(c)(5)). Entrepreneurial research is also subject to certain key UBIT exemptions and modifications, as discussed in Section 15.4.4 below.

There are a number of important limitations, however, on these UBIT exemptions. As discussed above, the exclusion of royalty income or rental income will be jeopardized if personal services are provided along with the rights licensed or property rented (see the *Oregon State University Alumni Association* case, above; Rev. Rul. 76-297, 1976-2 C.B. 178; and Rev. Rul. 81-178, 1981-2 C.B. 135). The income from rental of *personal* property is generally not exempt (I.R.C. § 512(b)(1)(A)(ii)). Thus, for example, a university could not deduct income from rental of computer time on a computer having excess capacity (see *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1388 (W.D. Mo. 1983), *affirmed per curiam*, 744 F.2d 635 (8th Cir. 1984)). And the exclusions will not apply to royalty or rental income, dividends, or capital gains derived from debt-financed property (property the institution has acquired with borrowed funds) (I.R.C. § 514; but see Rev. Rul. 95-8, 1995-1 C.B. 107, holding that exempt organizations may sell publicly traded stock short through a broker and not have the income treated as income derived from debt-financed property).

Only net income is subject to UBIT, so typical business deductions “which are directly connected with the carrying on of such trade or business” are permitted. Questions invariably arise, for example, regarding the allocation of deductible expenses between activities exempt from UBIT and those not exempt. In *Iowa State University*, above, for example, the court concluded that the university could not offset the taxable income generated by the commercial operations of the university-owned television station with expenses from the noncommercial operation of two university-owned radio stations, rejecting the argument that the three stations constituted an integrated operation. The court did, however, allow the university to pool the TV station’s income and expenses together with those of other trades or businesses that it operated that were also unrelated to the university.

A different type of allocation question was posed in *Rensselaer Polytechnic Institute v. Commissioner*, 732 F.2d 1058 (2d Cir. 1984), another “dual use” case (see generally Treas. Reg. § 1.512(a)-1(c) & 1.513-1(d)(4)(iii)). Rensselaer incurred expenses in operating its field house, which it used partly for exempt

purposes (student uses) and partly for nonexempt purposes (commercial ice shows, public ice skating, and similar uses). The court allowed Rensselaer to allocate a percentage of its expenses to the nonexempt use, the calculation to be based on the number of hours the field house was used for the nonexempt purposes compared to the total number of actual hours it was in use.<sup>11</sup>

As these examples suggest, the federal tax issues confronting institutions with auxiliary operations may be complex as well as numerous. In light of the increased attention on UBIT from Congress, the IRS, and the private business community, which has been evident since the mid-1980s, federal tax planning with the assistance of tax experts is a necessity. Institutions or their national education associations also should carefully monitor, and become involved in, congressional and IRS developments.

**15.3.4.2. State and local taxation.** Even though the property and activities of public and private nonprofit postsecondary institutions are generally exempt from state and local taxation (see generally Section 11.3), particular auxiliary operations may nevertheless subject institutions to property taxes, sales and use taxes, admission and entertainment taxes, and other such levies, depending on the purpose and character of the auxiliary activity and the scope of available exemptions. In *In re Middlebury College Sales and Use Tax* (Section 12.1 of this book), for example, the college's purchases of equipment and supplies for its golf course and skiing complex were subject to state taxes because the golf and skiing operations were "mainly commercial enterprises." And in *In Re University for Study of Human Goodness and Creative Group Work*, 582 S.E.2d 645 (N.C. App. 2003), the university's restaurant was subject to property taxes because it "was being operated predominantly as a business," "there was a material amount of business and patronage with the general public," and "any educational activity occurring on the property was incidental."

Similarly, in *DePaul University v. Rosewell*, 531 N.E.2d 884 (Ill. App. Ct. 1988), the court held that university-owned tennis facilities leased to a private tennis club were subject to local real property taxation. An Illinois statute exempted real property owned by schools from taxation if the schools were located on the property or if the property was "used by such schools exclusively for school purposes, not leased by such schools or otherwise used with a view to profit" (Ill. Rev. Stat. ch. 120, para. 500.1, now 35 ILCS 200/15(35 (1994))). The lease agreement limited the university's use of the tennis facilities (for physical education classes and the tennis team's use) to a fixed number of total hours and to certain times of the day, and permitted additional university use only with the tennis club's permission and for a fee. The university argued that it used the property "exclusively for school purposes," because the tennis club's use did not interfere with the university's own use of the facilities; and that it did not lease the facility "with a view to profit," because the rents were used to support the university's tennis program, a legitimate school purpose. The court

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<sup>11</sup>In private rulings, the IRS has expressed continuing disagreement with this judicial determination (see Field Service Advice 1999-783 (November 20, 1998); Priv. Ltr. Rul. 9147008 (August 19, 1991); 9149006 (August 12, 1991)).

rejected both arguments. Regarding exclusive use, the court applied the “well-established principle that a property used for more than one purpose, to qualify for an exemption, must be used primarily for an exempt purpose and only incidentally for a non-exempt purpose.” Since the tennis club’s use was primary, the university could not fit within this principle. Regarding profits, the court applied another established rule: that “the application of the revenues derived from [school-owned] property . . . to school purposes will not exempt the property producing the revenues from taxation unless the particular property itself is devoted exclusively to such purposes” (quoting an earlier case).

In other cases, however, institutions have been able to insulate particular auxiliary activities from taxation. In *City of Morgantown v. West Virginia Board of Regents*, 354 S.E.2d 616 (W. Va. 1987) (Section 11.3.3 of this book), for example, ticket sales for university athletic and entertainment events were not subject to a local amusement tax because the revenues generated were “public moneys” and not “private profit.”

Similarly, in *University of Michigan Board of Regents v. Department of Treasury*, 553 N.W.2d 349 (Mich. Ct. App. 1996), the court exempted various of the university’s sales transactions from state sales and use taxes. The Michigan Department of Treasury had levied sales taxes on the university’s sale of photocopies made on machines in the university libraries, dormitories, and the student union; on its sale of replacement diplomas to graduates; and on its charges for meals provided for participants in summer sports camps and an executive development program. The Department of Treasury had also levied use taxes on revenues from rentals of overnight guest rooms and cots in a residence hall. The Michigan appellate court overruled the Department of Treasury’s refusal to exempt the board of regents from these various taxes. The court rejected the tax on the photocopying because these sales were not profit making, and were incidental to the operations of an academic enterprise (the library); it rejected the tax on the diplomas because the product was unique, and the sales were not made for reasons of profit; and it rejected the tax on the meals because these sales were to students who, even though they were enrolled in non-degree-granting programs or were students in high schools and elementary schools, were nevertheless considered to be “bona fide enrolled students.” Regarding the use tax on the room and cot rentals, the court held that these rentals were exempt because they furthered an educational purpose, were not for purposes of profit, and were not available to the general public.

And in *In re University of North Carolina*, 268 S.E.2d 472 (N.C. 1980), the court relied on an exemption in the state constitution to reject the attempts of two towns and a county to levy taxes on the property a state university used for an airport, an inn, and off-campus electric and telephone systems. The state constitution provided that “[p]roperty belonging to the State, counties and municipal corporations shall be exempt from taxation” (N.C. Const. art. V, § 2(3)). The local governments argued that the exemption did not apply because the property at issue was used for private purposes unrelated to educational activities, and exemption would give the university an unfair competitive advantage over like businesses in the area that are taxed. The court rejected this

argument because the only prerequisite for an exemption under the constitution is ownership, not public use; state university property therefore need not be used for wholly public purposes in order to qualify for the exemption.

Such determinations on taxability will vary from jurisdiction to jurisdiction and statute to statute. Administrators and counsel must therefore focus on the relevant state and local tax laws of their jurisdiction, the applicable exemptions, and the relative strictness with which courts of their state construe them. State institutions should also consider the availability of sovereign immunity as a shield against local government taxation (see, for example, *City of Boulder v. Regents of the University of Colorado*, in Section 11.3.3). It is also important to distinguish between auxiliary enterprises that the institution operates itself and those operated by an affiliated organization (see Section 3.6), since the tax exemptions available in the two situations may differ (see, for example, *City of Ann Arbor v. University Cellar*, discussed in Section 11.3.3).

**15.3.5. Administering auxiliary enterprises.** As the discussion in subsections 15.3.1 to 15.3.4 suggests, decisions on establishing and operating auxiliary enterprises pose considerable challenges for public and private institutions alike, and involve considerations and judgments different from those that predominate in decision making on academic matters. Administrators should make sure that, through self-regulation and other means, questions about auxiliary enterprises receive high-level and continuing attention. Specifically, administrators should: identify and resolve threshold questions about the institution's authority to operate and to fund particular enterprises (see Sections 15.3.1.2 & 15.3.2); establish procedures and guidelines for reviewing and approving proposals for auxiliary enterprises; consult with representatives of local businesses as part of the review and approval process, in order to alleviate concerns of unfair competition; establish processes for monitoring the operations of auxiliary enterprises; and centralize decision making on major policy issues, so as to promote consistency in institutional objectives and to mobilize all institutional expertise.

Structural arrangements will also be important. An auxiliary enterprise may be operated by the institution itself, either through the central administration or by a school or an academic department. Alternatively, an enterprise may be operated by an outside entity with which the institution negotiates a lease of land or facilities, a joint venture or partnership agreement, or other arrangement; or an institution may establish a subsidiary corporation or other affiliate, either profit or nonprofit (see Section 3.6), to operate an auxiliary enterprise. The various choices may have different consequences for institutional control, availability of business expertise, legal liability, and tax liability.

To attend to the mix of considerations, institutions will need to engage in substantial legal and business planning. Legal counsel, administrative policy makers, business managers, risk managers, and accountants will all need to work together. Lines of communication to the local business community will need to be opened and cooperative relationships cultivated. And involvement and oversight of high-ranking *academic* officers will need to be maintained, to

ensure that auxiliary ventures are not inconsistent with and do not detract from the institution's academic mission. Probably the single most important factor for administrators to emphasize—if they seek to minimize legal authority problems and tax liabilities and to maximize good will with the campus community, the local business community, and local and state legislatures—is a correlative relationship between the objectives of the auxiliary enterprise and the academic mission of the institution.

## ***Sec. 15.4. The College as Research Collaborator and Partner***

***15.4.1. Potentials and problems.*** It has become increasingly common for higher education institutions to align themselves with one another or with other outside entities in the pursuit of common entrepreneurial objectives. The primary area of growth and concern is research collaboration involving institutions, individual faculty members, industrial sponsors, and government. The resulting structural arrangements, such as research consortia, joint ventures, and partnerships, are more complex and more cooperative than those for purchasing and selling transactions (discussed in Sections 15.2 & 15.3).

The potentials and problems arising from universities' and faculty members' research relationships with industry have garnered more attention than almost any other higher education development of the past thirty years. This attention has been manifested in a wealth of books, journal and magazine articles, newspaper accounts, op-ed pieces, conference presentations, legislative hearings, and committee and association reports and policy statements. No single book, let alone a section of a book, can cover all the significant developments or all the significant legal and policy questions. The purpose of this subsection is to identify the major themes and issues; subsections 15.4.2 to 15.4.7 relate these themes and issues to legal problems that emerge from them and to leading statutory provisions, regulations, rulings, and cases that apply to these problems.

Universities and faculty members undertake various types of research in collaboration with industry, but the primary focus is on biomedical and biotechnological research. The concerns escalate when such research moves from the pure science realm to the realm of technology transfer and product development, thus potentially placing entrepreneurial considerations in tension with academic considerations. (See generally M. Kenney, *Biotechnology: The University-Industrial Complex* (Yale University Press, 1986).) In this applied research context, questions about compliance with the federal government's environmental requirements (Section 13.2.10) and workplace safety requirements (Section 4.6.1) will often arise. Government also may become involved as a partial sponsor of university research done in affiliation with outside entities, thus raising legal questions about various government grant and contract requirements, such as the scientific misconduct prohibitions attached to research funding (see Section 13.2.3.4). Moreover, since biomedical and biotechnological research sometimes is conducted with human subjects, researchers will be expected to comply with federal requirements for such research (Section 13.2.3.2).

When animals are used, other federal requirements concerning animal research (Section 13.2.3.3) must be followed. States also may place restrictions on medical research under both common law and statute (see Section 12.5.5 and subsection 15.4.2 below). (See generally H. Leskovac, *Research with Human Subjects: The Effects of Commercialization of University-Sponsored Research*, IHELG Monograph no. 89-4 (University of Houston Law Center, 1989).) Research collaborations with industry will also frequently involve the university in complex legal problems concerning contract and corporation law, patent ownership and patent licenses, antitrust laws, copyright and trademark laws, federal and state taxes, federal technology transfer incentives, and conflict of interest regulations, all of which are discussed below. Litigation raising these types of issues can present sensitive questions regarding the scope of judicial review (see D. Sackin, "Commercialization of Academic Knowledge and Judicial Deference," 19 *J. Coll. & Univ. Law* 1 (1992)).

There are many reasons why universities seek to collaborate with business and industry. The financial benefits of such arrangements may be a major motivating factor, as institutions have sought to enhance research budgets that are shrinking because of reductions in federal and state research funding and institutional budgeting pressures. Clearly, however, research relationships can produce benefits other than the purely financial. An institution may seek to broaden the dialogue in which its researchers are engaged, especially to blend theory with practice; to open new avenues and perspectives to its students; to improve placement opportunities for its graduate students, thereby improving its competitive position in recruiting applicants to its various graduate programs; to enhance its ability to recruit new faculty members; or simply to gain access to new equipment and new or improved facilities for research. Institutions may also be motivated by a good-faith commitment to benefit society by putting academic research discoveries to practical use through the transfer of technology.

Various competitive and budgetary pressures also may encourage individual faculty members or their research groups to form their own relationships with industry. Faculty salaries that do not keep pace with those in industry or with inflation may be one factor. Pressures to produce research results in order to meet the demands of promotion and tenure may also encourage faculty members to seek the funds, resources, and technical information available from industrial liaisons in order to boost their productivity. Some researchers may also need particular types of equipment or facilities, or access to particular technology, that cannot be made available within the institution for reasons of cost or scarcity. Faculty members also face pressures to place their graduate students in desirable industrial positions and to have placement prospects that will help in recruiting other new graduate students. (See generally M. Davis, "University Research and the Wages of Commerce," 18 *J. Coll. & Univ. Law* 29, 31-36 (1991).)

In addition, federal and state governments have themselves encouraged university-industry collaboration. By placing new emphasis on economic vitality and technological competitiveness, they have created an increasingly hospitable governmental climate within which such collaborations can expand and flourish.

There are various structural and organizational arrangements by which universities or their faculties may engage in entrepreneurial research activities. The most traditional relationship is the grantor-grantee relationship, under which an industrial entity—the commercial sponsor—makes a grant to a particular university for the use of particular faculty members or departments in return for certain rights to use the research produced. Another traditional form is the purchase-of-services contract, under which the university provides training, consultant services, or equipment or facilities to an industrial entity for a fee. The most basic form, which is of great current importance, is the research agreement, especially the agreement for contracted research (see subsection 15.4.2 below). Another basic form is the patent-licensing agreement (see Section 15.4.3 below). A different type of arrangement is the industrial affiliation, an ongoing, usually long-term, relationship between a particular university and a particular industrial entity, in which mutual benefits (such as access to each other's research facilities and experts) flow between the parties (see Kenney, *Biotechnology* (cited above), at 40–41).

More complicated structural arrangements include partnerships, limited partnerships, joint ventures (a business arrangement undertaken for a limited period of time or for a single purpose, thus differing from a partnership), and the creation (by the institution) of subsidiary corporations to engage in entrepreneurial research functions or to hold and license patent rights. The particular arrangements that may emerge from such structures or a combination of them include the research consortium, the research park, the specialized laboratory, and the patent-holding company. More than one university and more than one business corporation may be involved in such arrangements, and government funding and sponsorship may also play an important role. The legal and policy issues that may arise in such research relationships will depend, in part, on the particular structural arrangement that is used.

Individual faculty members or research groups may form their own independent research relationships with industry. Faculty members may become part-time consultants or employees of a private research corporation; they may receive grants from industry and undertake particular research obligations under the grant; or they may enter contract research agreements of their own with industry. On another level, faculty members may become officers or directors of a private research corporation; they may become stockholders with an equity position in such a corporation; or they may establish their own private research corporations, in which they become partners or sole proprietors.

Virtually all such arrangements, involving either institutional or faculty relationships with industry, have the potential for creating complex combinations of legal, policy, and managerial issues. Perhaps most difficult are the potential conflict of interest issues (see subsection 15.4.7 below) arising from arrangements that precipitate split loyalties, which could detract attention and drain resources from the academic enterprise. Research priorities might be subtly reshaped, for instance, to focus on areas where money is available from industry rather than on areas of greatest academic challenge or need (see Kenney, *Biotechnology* (cited above), at 111–13). Split loyalties may also encourage



faculty to give more attention to research than to instruction, or to favor graduate education over undergraduate education. In addition, the university's traditional emphasis on open dialogue and the free flow of academic information may be undercut by university-industry arrangements that promote secrecy in order to serve industrial profit motives (see Kenney, *Biotechnology*, at 121–31). Disputes may also arise over the ownership and use of inventions and other products of research, as well as of equipment and facilities purchased for research purposes. The institution and its faculty may engage in contractual disputes over the faculty's obligations to the institution or freedom to engage in outside activities; the university and its research sponsors or partners may have similar disputes over interpretations of their research agreements. Products liability issues may arise if any persons are injured by the products that are moved to the market. And various other legal, financial, and political risks may be associated with university-industry relationships.

Because of the heightened potential for problems and risks, university or faculty involvement in collaborative research ventures requires the most careful attention. Before the institution enters any collaborative relationship, administrators and counsel should consider carefully all alternatives and options and weigh all possible benefits and risks. When they decide to enter new ventures, they should devise structural arrangements and draft the pertinent contracts with special care. The institution should consider appointing high-level officers to be in charge of sponsored research, technology transfer, and patent management; it might also consider appointing trustees with special sensitivities to the issues and forming a trustee committee to oversee the institution's outside research ventures. Institutions also should make sure that they are served by legal counsel with expertise in the complex problems of technology transfer and the structuring of commercial ventures, as well as by experienced risk managers familiar with commercial risks. Formal institutional policies should be adopted to deal with such matters as faculty conflicts of interest and patent ownership and licensing rights. And above all, administrators and institutional officers and trustees should be sensitive to the value questions that are raised by corporate collaborations (see Sheila Slaughter, "Professional Values and the Allure of the Market," *Academe*, September–October 2001, 22–26); and must maintain a keen appreciation for the institutional mission and the academic enterprise, so that they are not compromised or diluted by such research collaborations (see generally R. Carboni, *Planning and Managing Industry-University Research Collaborations* (Quorum Books, 1992)).

**15.4.2. The research agreement.** The research agreement is typically the heart of the university-industry research relationship. It is a type of contract, interpreted and enforced in accordance with the contract law of the state whose law governs the transaction (see Section 15.1 above). This agreement may be the entire legal arrangement between the parties, as in contracted research, or it may be part of a broader collaboration that involves other legal documents or other agreements on activities other than research. One or more universities or university research foundations, and one or more industrial sponsors, are typically

the parties to the contract. Particular faculty members (or departments or research groups) may be named in the agreement as principal investigators or may occasionally themselves be parties to the agreement. When the research will involve human subjects, there will also usually be subsidiary agreements with them, as discussed later in this Section. The research agreement may be either a short-term or a long-term agreement, or for a specific single project or a combination of projects. Depending on the type of project contemplated and the purposes of the arrangement, threshold questions may arise concerning the institution's authority to enter the agreement (see, for example, Section 15.3.1.2).

The complex process of negotiating and drafting a research agreement requires scientific and technical expertise as well as legal and administrative expertise. Like commercial contracts, the research agreement should include most of the types of provisions suggested in Section 15.1 above. In addition, there are numerous special concerns that will require the insertion of special provisions into the agreement. Such special provisions should normally cover such matters as:

1. Research tasks and objectives—and whether and how the parties may modify them during the course of the project.
2. Supervision of the research—including the responsible researchers and officers within the university and the role, if any, for the corporate sponsor or particular members of the corporate team.
3. Participation in the project—particular members of the university faculty or research staff, or particular departments or research groups, that are obligated to participate in the research.
4. Funding cycles and payment schedules that the sponsor will adhere to and the nonfinancial contributions, if any, that the sponsor will make to the project or the university.
5. Type and frequency of progress reports and oral briefings that the university will provide to the sponsor.
6. Equipment for the research: Who will provide it, and who will retain it when the project is concluded?
7. Inventions discovered during the project: Who will own the patents, and who will have rights to licenses (exclusive or nonexclusive) and to royalty payments? (Similar questions would also arise regarding copyrights in projects that produce copyrightable materials.)
8. University obligations to disclose research results to the industrial sponsor.
9. Researchers' rights to publish their research results—and whether the sponsor may require a delay in publication for a period of time necessary to apply for patent protection.
10. University obligation to protect any trade secrets and proprietary information that the sponsor may release to university researchers or that may result from the project research.

11. Extent of access the sponsor's staff will have to university laboratories and facilities used for the project.
12. Rights of the sponsor to use the university's name, marks, and logos, or prohibitions on their use by the sponsor.
13. Indemnification, hold-harmless, or insurance requirements regarding special matters, such as environmental hazards and products liability.
14. Parties' obligations to protect university and faculty academic freedom and to protect against university or faculty conflicts of interest.

(See generally Donald Fowler, "University-Industry Research Relationships: The Research Agreement," 9 *J. Coll. & Univ. Law* 515 (1982-83).)

If an industrial sponsor or university located in a foreign country is to be a party to the research agreement, the U.S. university will require additional expertise in U.S. laws governing foreign relations—for instance, the export control laws (see Section 13.2.4 of this book)—and in international and foreign law (see Section 1.4.2.5). The university also will need to understand and protect against its potential liabilities (including antitrust liability; products liability; and liability for patent, copyright, or trademark infringement) under the law of any foreign country in which project activities will take place or to which research products will be shipped. Equally, the university will need to understand and be ready to assert its rights under foreign law—for instance, rights to protection against patent, copyright, trademark, and trade secret infringement by others. Taxation and tariff questions may also arise. The applicable law may be found not only in the codes and regulations of particular foreign countries but also in the provisions of treaties and conventions that may apply, such as the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the European Patent Convention, the Patent Cooperation Treaty, the Universal Copyright Convention, or the Beirut Agreement (the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character). (See generally Marshall Leaffer (ed.), *International Treaties on Intellectual Property* (2d ed., Bureau of National Affairs, 1997).)

These concerns, among others, should be anticipated in the negotiation and drafting of international research agreements, and may lead to the inclusion of special provisions such as the following: (1) a choice-of-law clause specifying what role (if any) foreign law will have in the interpretation and application of the research agreement; (2) special indemnification, hold-harmless, or insurance clauses dealing with liabilities that arise under foreign or international law; (3) a special arbitration clause, or other dispute resolution clause, adapted to the international context of the agreement (see the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and footnote 1 in Section 15.1.5); (4) clauses regarding the parties' obligations to secure patent, trademark, or copyright protection under foreign or international law;

(5) a clause establishing responsibilities for payment of taxes and tariffs imposed by foreign governments; (6) a clause providing for instruction for project staff in the language, culture, and business practices of foreign countries where project activities will be conducted; and (7) a clause allocating responsibility for paying particular foreign travel and shipping costs.

Whether the research agreement is domestic or international, problems of performance may arise that could result in contract interpretation disputes, claims of breach, or attempts to terminate the agreement (see generally Section 15.1.4 above). In the latter case, the terminating party may argue that it has terminated the agreement because of the breach of the other party. The other party may argue that the terminating party has breached the agreement. In either situation, questions will arise concerning the rights and obligations of the parties upon termination. In general, the answers will depend on interpretation of the agreement's terms in accordance with the contract law of the state whose law governs the transactions. If the termination constitutes or was occasioned by a breach, the answers will also depend on the state law concerning money damages and other remedies for breach of contract (see Section 15.1.4 above).

The case of *Regents of the University of Colorado v. K.D.I. Precision Products, Inc.*, 488 F.2d 261 (10th Cir. 1973), illustrates the types of performance problems that can arise under a research agreement and, by implication, underscores the importance of a comprehensive and clear contract. The case addresses three questions that are likely to be asked when a research agreement is terminated: (1) What constitutes substantial performance under the contract? (2) Which party, or who besides the parties, has the rights to inventions developed or patents obtained under the contract? (3) Which party owns the equipment used in the project? The court looked to the express provisions of the agreement to resolve each of these issues. The University of Colorado, the plaintiff, had entered into a three-year research and development contract with K.D.I., the defendant, under which the university, for remuneration, was to help K.D.I. develop certain scientific devices. After the first year, K.D.I. terminated the contract. The university sued to recover payment for the work it had performed to the date of termination. K.D.I. defended on two grounds: first, that the university had failed to substantially perform its contract obligations and therefore was not entitled to recovery; second, that even if the university did substantially perform the contract, its recovery was subject to a set-off for the value of project equipment the university had allegedly "converted" to its use.

Regarding its first defense, K.D.I. made three arguments. First, it alleged that the university had failed to give it "exclusive" rights to the technical data developed under the research contract, including rights to all the original plans and designs. The court found that the university had specifically agreed to give K.D.I. "unlimited" (rather than "exclusive") rights to use, duplicate, or disclose the technical data and that the university had performed its obligations to extend such "unlimited" rights to K.D.I. Second, K.D.I. alleged that the university did not substantially perform because it

failed to complete a prior research contract whose work was continued in the current research contract. The court rejected this argument as well, because the current contract was “complete in itself as to the duties and obligations of the parties thereto. It comprises a separate research contract, and there is no intimation therein of the incorporation by reference to prior contracts.” Third, K.D.I. argued that the university did not substantially perform the research contract because it failed to disclose its development of a device called the Optical Communication Link (OCL). The court also rejected this argument, finding that the OCL was not developed under the research contract with K.D.I. Rather, it was developed by two of the university’s professors, with the university’s money and for use by the university; it was used for the university’s own purposes; and it was not necessary to K.D.I.’s purposes. The university therefore had no obligation to disclose the development of the OCL.

Regarding its second defense, K.D.I. argued that certain equipment used by the university for the research project, and retained by the university at termination, was actually the property of K.D.I. The court found that, although K.D.I. had contributed a small amount toward the purchase of one piece of equipment and had made some attempts under the contract to correct problems with another piece, K.D.I. had no legal claim to the equipment. K.D.I. had not loaned or assigned the contested equipment to the university; it had been donated to the project by the university itself and other corporate donors. Moreover, “in the operative and dispositive portions of the contract, as it describes the research to be undertaken, there is no suggestion that title to the equipment was either in K.D.I. or was to vest therein” (488 F.2d at 267). Since K.D.I. did not have legal rights to the equipment, the university could not have converted it; thus, there was no basis for set-off.

In rejecting K.D.I.’s second defense, the court compared the contract’s treatment of equipment ownership (where the contract was silent) to the contract’s treatment of patent rights—where the contract contained detailed clauses assigning patent rights to K.D.I. and requiring written disclosure by the university of each invention. K.D.I., therefore, did have patent rights under the contract, but not rights to equipment. No issue concerning patent rights arose in the case, however, because the university conceded K.D.I.’s rights in this realm, and K.D.I. did not allege that the university had attempted to assert patent rights belonging to K.D.I.

If the research project is to involve human subjects, the research agreement should contain supplementary provisions covering the special legal and ethical issues that arise in this context. If the parties contemplate using federal funds for some or all of the human subject research, or if the human subject research is to involve drugs within the jurisdiction of the Food and Drug Administration, the research agreement’s provisions must satisfy all requirements in the applicable federal regulations (see Section 13.2.3.2 of this book). In addition, whether or not federal regulations apply, the parties should arrange for separate agreements with each of the human subjects that are recruited for the project. These subsidiary agreements may be brief documents whose primary purpose is to

document the participants' informed consent, or they may cover in more detail the research subject's duties and the prospective benefits and risks of the research for the subject and for others. (If federal regulations apply, these subsidiary agreements will, of course, need to comply with the federal requirements on informed consent and other matters.)

In a case the court termed one "of first impression," *Grimes v. Kennedy Krieger Institute, Inc.*, 782 A.2d 807 (Md. 2001), Maryland's highest court analyzed many of the legal aspects (and some ethical aspects) of informed consent agreements with human research subjects. The defendant, Kennedy Krieger Institute (KKI), "a prestigious research institute, associated with Johns Hopkins University" (782 A.2d at 811), conducted a research project in cooperation with the university, the federal Environmental Protection Agency (EPA) (which awarded a contract for the project), and the Maryland Department of Housing and Community Development. The research project's purpose was to determine the relative effectiveness of "varying degrees of lead paint abatement procedures" performed on Baltimore low-income housing units, as measured "over a two-year period of time." The plaintiffs were two children who were human subjects in the project; they had lived in two different housing units included in the study and had had their blood tested periodically for evidence of lead contamination. A parent for each of the children had signed a consent form. Subsequently, however, after tests had revealed elevated levels of lead in dust collected from the housing units and in the children's blood samples, each parent, on behalf of her child, sued KKI for negligence. The primary thrust of the claims was that KKI had failed in its duty to fully inform the parents of the study's risks when the consent form was signed and later when the researchers' tests revealed a hazard to the children.

The trial court in each case granted KKI's motion for summary judgment, holding that the consent form was not a contract and that the families had no special relationship with KKI that would give rise to a duty of care. On appeal, the Court of Appeals of Maryland reversed the trial courts' summary judgments for KKI. The appellate court determined that the signed consent form created a "bilateral contract" between the parties: "Researcher/subject consent in nontherapeutical research can, and in this case did, create a contract." The parents' consent was not "fully informed," however, "because full material information was not furnished to the subjects or their parents." The "consent" in the contract was therefore not valid and could not be used by KKI as a defense. The appellate court also determined that the researcher-subject relationship under the contract should, in this circumstance, be considered a "special relationship":

Trial courts appear to have held that special relationships out of which duties arise cannot be created by the relationship between researchers and subjects of the research. While in some rare cases that may be correct, it is not correct when researchers recruit people, especially children whose consent is furnished indirectly, to participate in nontherapeutic procedures that are potentially hazardous, dangerous or deleterious to their health. . . . The creation of study conditions or protocols or participation in the recruitment of otherwise healthy

subjects to interact with already existing, or potentially existing, hazardous conditions, or both, for the purpose of creating statistics from which the scientific hypotheses can be supported, would normally warrant or create such special relationships as a matter of law [782 A.2d at 845–46].

In addition, the appellate court determined that the research project was subject to “standards of care that attach to federally funded or sponsored research projects that use human subjects.” These standards, found in the federal HHS regulations (see Section 13.2.3.2 of this book), imposed a duty of care on KKI. According to the court:

In this case, a special relationship out of which duties might arise might be created by reason of the federally imposed regulations. The question becomes whether this duty of informed consent created by federal regulation, as a matter of state law, translates into a duty of care arising out of the unique relationships that is researcher-subject, as opposed to doctor-patient. We answer that question in the affirmative. In this state, it may, depending on the facts, create such a duty [782 A.2d at 849].

An analysis of state tort law principles provided the appellate court yet another basis for determining that KKI owed a duty of care to the children. Focusing primarily on the foreseeability of personal harm, the court concluded that:

[t]he relationship that existed between KKI and both sets of appellants in the case at bar was that of medical researcher and research study subject. Though not expressly recognized in the Maryland Code or in our prior cases as a type of relationship which creates a duty of care, evidence in the record suggests that such a relationship involving a duty or duties would ordinarily exist, and certainly could exist, based on the facts and circumstances of each of these individual cases. . . . [T]he facts and circumstances of both of these cases are susceptible to inferences that a special relationship imposing a duty or duties was created in the arrangements [at issue] and, ordinarily, could be created in similar research programs involving human subjects [782 A.2d at 842–43].

Based on all these reasons, the Court of Appeals of Maryland stated its conclusion as follows:

We hold that informed consent agreements in nontherapeutic research projects,<sup>12</sup> under certain circumstances can constitute contracts; and that, under certain circumstances, such research agreements can, as a matter of law, constitute “special relationships” giving rise to duties, out of the breach of which

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<sup>12</sup>[Author’s footnote] The distinction between “nontherapeutic” and “therapeutic” research projects was important to the court and is also important in the ethics of medical research on human subjects. The former projects, unlike the latter, are not designed to directly benefit the human subjects participating in the project (782 A.2d at 812). This distinction appears to be important primarily for projects in which minors are the human subjects. The court in *Grimes* was unwilling to allow a parent to consent to his or her child’s participation in a nontherapeutic research project that involves more than minimal risk to the child (782 A.2d at 858, 862); but the court would apparently be more lenient if the research were therapeutic.

negligence actions may arise. We also hold that, normally, such special relationships are created between researchers and the human subjects used by the researchers. Additionally, we hold that governmental regulations can create duties on the part of researchers towards human subjects out of which “special relationships” can arise. . . .

We hold that there was ample evidence in the cases at bar to support a fact finder’s determination of the existence of duties arising out of contract, or out of a special relationship, or out of regulations and codes, or out of all of them, in each of the cases [782 A.2d at 858].

The court therefore remanded the case to the two trial courts for further proceedings consistent with its rulings.

**15.4.3. Application of patent law.**<sup>13</sup> Universities contemplating a collaborative research relationship that could result in a patentable discovery will find that federal patent law may affect their research projects.<sup>14</sup> Patent law will clarify (1) the types of discoveries that are patentable; (2) who will own and have the right to license the patents; (3) how research results will be reviewed and published; and (4) what must be done to avoid infringing *others’* patents. Section 13.2.6 of this book provides a general discussion of these and other issues. This Section focuses in more detail on issues of ownership and infringement that arise in the collaborative research context.

Ownership issues may arise even in the simplest of circumstances. They may become very complex when third-party sponsorship is involved. Fifteen years ago, courts were reluctant to imply an agreement to assign patent rights. Today, the law is much more settled on this subject. The case of *University Patents, Inc. v. Kligman*, 762 F. Supp. 1212 (E.D. Pa. 1991) illustrates the basic problem. The University of Pennsylvania and its patent manager, University Patents, Inc., sued Dr. Kligman and Johnson & Johnson Baby Products Company. They claimed that Kligman breached his employment contract and an implied agreement arising from the university’s patent policy when he assigned his rights to an invention to Johnson & Johnson rather than the university, and failed to assign his royalties to the university. Although Kligman and the university had no express contract, the university’s patent policy provided that any patentable discoveries made by employees with the use of university equipment, time, and staff belonged to the university. The university published many handbooks that delineated the policy, so the university relied on the professor’s knowledge of the patent policy and his continued employment with the university to infer that

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<sup>13</sup>This Section was updated and expanded by Georgia Harper, Senior Attorney and Manager, Intellectual Property Section, Office of General Counsel, the University of Texas System.

<sup>14</sup>Other federal intellectual property law may also be important. Federal copyright law, for example, protects computer software and other works used or developed in collaborative research ventures (see Section 13.2.5); and the Semiconductor Chip Protection Act of 1984 (17 U.S.C. §§ 901–914) protects the architecture of semiconductor chips (see Edward K. Esping, Annot., “Reverse Engineering Under Semiconductor Chip Protection Act of 1984,” 113 A.L.R. Fed. 381). State law may also protect research that qualifies as a “trade secret”; see P. Shockley, “The Availability of ‘Trade Secret’ Protection for University Research,” 20 *J. Coll. & Univ. Law* 309 (1994).



he had agreed to its provisions. The university also claimed that letters written twenty-three years earlier, when Kligman assigned his patent for Retin-A to the university, as well as the patent assignment itself, were evidence that he knew of and accepted the patent policy.

Focusing on general rules of contract formation (see Section 15.1.2) as well as specialized principles regarding employee handbooks and the assignment of patent rights, the district court somewhat reluctantly denied the professor's motion for summary judgment, allowing the university to proceed; but the judge cited the U.S. Supreme Court's opinion in *United States v. Dubilier*, 289 U.S. 178, 188 (1933), that emphasized that courts should be most reluctant to recognize implied contracts to assign patent rights.

Because the university's claim withstood a motion for summary judgment, the *Kligman* ruling seemed to recognize that employment handbooks containing the terms of a patent policy could be enough to imply an agreement to assign patents. The ruling also stood for the proposition, however, that employees should receive the benefit of the doubt. The parties later settled out of court, so *Kligman* ultimately did not answer the questions it had raised. Fortunately, later cases have clarified the law, solidifying the principle that an agreement to assign inventions can be inferred from knowledge of patent policies, and extending the principle to inventions created by graduate students not officially employed by the university. (See *E. I. DuPont de Nemours and Co. v. Okuley*, 2000 U.S. Dist. LEXIS 21385 (S.D. Ohio, December 21, 2000); *Chou v. University of Chicago and Arch Development Corp.*, 254 F.3d 1347 (Fed. Cir. 2001); *University of West Virginia Board of Trustees v. Van Voorhies*, 278 F.3d 1288 (Fed. Cir. 2002); and see also Naoko Ohasi, "The University Inventor's Obligation to Assign: A Review of U.S. Case Law on the Enforceability of University Patent Policies," 15 *J. Ass'n. Univ. Tech. Managers* 49 (2003).)

A patent infringement case brought by the University of Colorado and two professors against American Cyanamid illustrates additional complications that may arise in patent ownership disputes. In the most recent pair of decisions resulting from this lawsuit, *University of Colorado Foundation v. American Cyanamid*, 105 F. Supp. 2d 1164 (D. Colo. 2002), and 216 F. Supp. 2d 1188 (D. Colo. 2002), *affirmed*, 342 F.3d 1298 (Fed. Cir. 2003), the university, its research foundation, and two faculty inventors saw their rights vindicated twenty years after actions constituting fraudulent deception took place—even though the patent had since been invalidated and the product was no longer on the market. The plaintiffs alleged that, although the professors invented an improved formula for Materna, a prenatal vitamin supplement sold by a division of Cyanamid, the company filed a patent application claiming that one of its employees had developed the improved formula. The university sought damages for fraudulent nondisclosure, patent infringement, and copyright infringement, as well as disgorgement of the company's profits from sales of the improved vitamin supplement and equitable title to the patent. The court soundly rejected Cyanamid's claim that its employee actually developed the improved formula. This case strongly supports institutional assertions of rights to employee inventions as against industry collaborators; however, the rather

blatant corporate deception that occurred in 1980 seems much less likely to take place in today's more sophisticated university research environment.

Collaborative research raises infringement issues in addition to ownership questions. At times universities may be infringers themselves; other times they must pursue those who violate university rights. Both circumstances are more likely when universities and private industry engage in parallel or overlapping research.

Section 271(a) of the Patent Act states that whoever "makes, uses, offers to sell or sells any patented invention, within the United States . . . infringes the patent." Thus, universities and researchers engaged in collaborative research must obtain a license to use patented inventions. There is no general "research exemption" that excuses infringement for research purposes. The court-created "experimental use exemption" has been construed very narrowly to apply only to purely academic research. (See *Madey v. Duke University*, 307 F.3d 1351 (Fed. Cir. 2002); and see also, Eric W. Guttag, "Immunizing University Research from Patent Infringement: The Implications of *Madey v. Duke University*," 15 *J. Ass'n. Univ. Tech. Managers* 1 (2003).)

The case of *Regents of the University of California v. Eli Lilly & Co.*, 119 F.3d 1559 (Fed. Cir. 1997), illustrates the risks that universities take when they seek to stop third-party infringement. The plaintiff university, owner of two patents regarding DNA technology, claimed that Eli Lilly infringed both patents by manufacturing human insulin. The courts considered the validity of the university's patents, whether Eli Lilly had infringed them, and whether certain university conduct (misrepresenting in its patent application which vector it used in a test of its hypothesis) barred enforcement. After seven years of litigation, the Federal Circuit upheld the district court's determinations that one patent was invalid and that Eli Lilly did not infringe the other, but reversed the district court's determination that the misrepresentation in the patent application constituted inequitable conduct. Thus, the court reversed the district court's finding that neither patent was enforceable.

Technical procedural and evidentiary issues may frequently arise in patent litigation. In the case of *In re Regents of the University of California*, 101 F.3d 1386 (Fed. Cir. 1996), for example, issues arose concerning whether the attorney-client privilege (see Section 2.2.3.3) applied to communications between the university (the patent owner and patent applicant) and the attorneys for Eli Lilly (the university's licensee). The court held that, under the "community of interest" doctrine and the "joint client" doctrine, the privilege applied and protected the communications from discovery by the plaintiff, Genetech, Inc., a biotechnology firm.

**15.4.4. Federal tax exemptions for research.**<sup>15</sup> Like auxiliary enterprises (Section 15.3.4.1 above), income-producing research activities may precipitate numerous federal tax issues. The most common issues concern the

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<sup>15</sup>This Section was updated and reedited primarily by Randolph M. Goodman, partner at Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Washington, D.C., and Patrick T. Gutierrez, an associate at Wilmer, Cutler, Pickering, Hale and Dorr, LLP.

applicability of the unrelated business income tax (UBIT) (see generally Section 13.3.6 of this book) to the income generated from collaborative research arrangements. Fortunately for higher educational institutions, most of their research-related income can be insulated from UBIT if they engage in careful tax planning that is sensitive to the structure and characteristics of each proposed research activity.

First, any research activity that is “substantially related” to the institution’s exempt purposes (that is, the educational, scientific, or charitable purposes providing the basis for the institution’s tax exemption) does not fit the definition of an unrelated business, and the income will escape UBIT for that reason alone. Second, even if a particular institutional research activity is not “substantially related” (or its character is unclear in this respect), generated income may nevertheless be insulated from UBIT under a statutory exemption providing that “[i]n the case of a college, university, or hospital, there shall be excluded all income derived from research performed for any person” (I.R.C. § 512(b)(8); see, for example, Priv. Ltr. Rul. 9833030 (May 20, 1998)). Another statutory modification excludes research undertaken for the U.S. government, its agencies or instrumentalities, or a state or local government (I.R.C. § 512(b)(7)). The problem with these two modifications is that the statute does not define the key term “research,” thus making the scope of the provisions uncertain. The Treasury regulations (Treas. Reg. § 1.501(c)(3)-1(d)(5)(ii)) help by making clear that both theoretical and applied research may qualify, but that activities “of a type ordinarily carried on as an incident to commercial or industrial operations . . . [such as] ordinary testing or inspection of materials or products” do not qualify as research. Further guidance is available from a smattering of revenue rulings, Tax Court decisions, and federal court decisions. *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1385–89 (W.D. Mo. 1983), *affirmed per curiam*, 744 F.2d 635 (8th Cir. 1984), clarified the distinction between “research” and “testing or inspection” and stated, among other things, that research may qualify for the exclusion even if it is conducted for a fee for a private sponsor that receives a private benefit, and even if the research arrangement puts the exempt entity in competition with other taxpaying businesses. (See also *IIT Research Institute v. United States*, 9 Cl. Ct. 13 (1985); Priv. Ltr. Rul. 200303065 (October 25, 2002).)

Other UBIT modifications may also apply to research-related activities and provide further assistance in insulating the university from UBIT. Under Section 512(b)(2), for instance, royalty income—that is, payments from third parties for the use of some valuable right, such as a copyright, trademark, or patent—is excludable from taxation. Thus, if a university owns patents, and licenses its patent rights to third parties in return for license fees, the resulting income is excludable as royalty income (I.R.C. § 512(b)(2); see Rev. Rul. 76-297, 1976-2 C.B. 178). Similarly, income from the rental of real property is excludable (I.R.C. § 512(b)(3)(A)(i)). Thus, if a university rents laboratory space, for example, to a corporate organization, the rental income would generally not be taxable under UBIT. Dividends from passive investments are also generally excludable from UBIT (I.R.C. § 512(b)(1)), as are capital gains (I.R.C. § 512(b)(5)), thus

excluding certain passive income a university might receive if it held an equity position in a for-profit research corporation.

Whenever an institution moves beyond basic structural arrangements, such as sponsored research agreements and patent-licensing agreements, to more complex arrangements, such as joint ventures and subsidiary corporations, additional considerations may affect UBIT's application to the income generated (see, for example, Priv. Ltr. Rul. 9833030 (May 20, 1998), regarding a research consortium created by a university). If a university contracts with or creates a separate corporation for patent management, this arrangement would make it more difficult to determine whether and to whom the royalty exclusion applies (see Rev. Rul. 73-193, 1973-1 C.B. 262). Or if a university establishes a taxable subsidiary corporation to engage in certain product development functions, this arrangement would raise additional questions concerning the taxability of royalties, rent, or dividend income the university received from its subsidiary (see I.R.C. § 512(b)(13) regarding amounts received from controlled entities). Moreover, such other research arrangements as the establishment of a subsidiary corporation or joint venturing with another separately established corporation may raise questions about whether the subsidiary or other corporation qualifies for tax-exempt status under I.R.C. § 501(c)(3) (see Sections 13.3.2 & 13.3.7 of this book). In *Washington Research Foundation v. Commissioner*, T.C. Memo 1985-570, 50 T.C.M. 1457 (1985), for example, the Tax Court affirmed the IRS's denial of WRF's application for recognition as a tax-exempt organization under Section 501(c)(3). The court rejected each of WRF's characterizations of its purposes and determined that WRF was operated for a substantial commercial purpose, because its primary function was to develop patents to make them available to private industry, it competed with other commercial firms, and it planned its activities so as to maximize profits.<sup>16</sup>

Besides raising questions about the tax status of a subsidiary or separate corporation, some research arrangements could involve the university so deeply in commercial, profit-making activities that its own tax-exempt status would be questioned. Joint ventures and partnerships are the arrangements most likely to raise such concerns and thus to require especially careful tax planning (see Randolph M. Goodman & Linda A. Arnsbarger, "Trading Technology for Equity: A Guide to Participating in Start-Up Companies, Joint Ventures and Affiliates" (Matthew Bender, 1999) (reprinted from the Proceedings of the New York University 27th Conference on Tax Planning for 501(c)(3) Organizations); C. Kertz & J. Hasson, "University Research and Development Activities: The Federal Income Tax Consequences of Research Contracts, Research Subsidiaries and Joint Ventures," 13 *J. Coll. & Univ. Law* 109, 124-45 (1986)).

**15.4.5. Application of antitrust law.** Federal antitrust laws (see Section 13.2.8 of this book) apply to and create potential liabilities for universities or their separate research entities when the universities or research entities engage

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<sup>16</sup>The result in *Washington Research Foundation* was overturned by Congress in Pub. L. No. 99-514 § 1605 (October 22, 1986), which specifically provided for tax-exempt status for an organization introducing into public use technology developed by qualified organizations.

in certain types of collaborative research activities. As with other applications of antitrust law to the campus, the predicate to liability is the existence of concerted research activities that have anticompetitive or monopolistic effects on the market. The risks of such effects are probably greater with applied than with basic research because of the potential competitive market uses for the products of applied research.

Particular activities within or adjunct to an overall research collaboration (joint venture, consortium, or other concerted activity) may make the collaboration vulnerable to antitrust challenges. Such challenges might be made, for example, when patent-licensing and enforcement activities, taken together, allow a research venture to control a certain market or access to a certain technology needed to compete in the market (see generally *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978), *certified question answered*, 645 F.2d 1195 (2d Cir. 1981)); or when the joint operation of a common facility, such as a laboratory or medical treatment facility involving expensive specialized equipment, puts the collaborators in a competitive position in the market and they exclude potential competitors from use of the facility (see generally *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983)); or when a computer network is operated under similar circumstances as part of a research collaboration.

Fortunately for higher education, the National Cooperative Research and Production Act of 1993, as amended (15 U.S.C. § 4301 *et seq.*) provides protection from antitrust liability for two or more organizations that wish to enter a collaborative research joint venture. The law was enacted to encourage collaborative research and development, particularly in the area of science and technology, by removing much of the potential for antitrust liability under federal and state law. The Act states that such joint ventures will be evaluated by the rule of reason, “taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets” (15 U.S.C. § 4302). The Act also limits the damages recoverable in an antitrust action against a joint venture covered by the Act (15 U.S.C. § 4305). To claim the Act’s protections, the joint venture previously must have filed a written notification with the U.S. Attorney General and the Federal Trade Commission, as provided in Section 4305. (See generally D. Foster, G. Curtner, & E. Dell, “The National Cooperative Research Act of 1984 as a Shield from the Antitrust Laws,” 5 *J.L. & Com.* 347 (1985).)

#### **15.4.6. Federal government incentives for research collaboration.**

The federal government provides numerous types of incentives for technology transfer and university-industry research collaboration. Knowledge of such incentives, and how to obtain and deploy their benefits, will be important for higher education institutions contemplating or participating in collaborative activities.

One type of incentive involves the creation of exemptions from or modifications of federal regulatory requirements. The Patent and Trademark

Amendments of 1980 (94 Stat. 3015), for example, modified federal patent law to facilitate technology transfer and university-industry collaborations involving inventions discovered during federally funded research projects. The National Cooperative Research Act of 1984 (discussed in subsection 15.4.5 above) provides special protections against antitrust liability for “joint research and development ventures.” And amendments to export control laws and regulations have been implemented to ease their impact on university research collaborations with foreign scientists (Margaret Lam, “Restrictions on Technology Transfer Among Academic Researchers: Will Recent Changes in the Export Control System Make a Difference?” 13 *J. Coll. & Univ. Law* 311 (1986); but see more recent developments in Section 13.2.4 of this book).

Congress may also build incentives for research collaboration into the federal tax laws. The statutory modifications to UBIT that exclude certain research income and royalty income (see subsection 15.4.4 above) are examples. In addition, special tax treatment for investors in certain research and development ventures may facilitate university participation in such ventures (see J. Bartlett & J. Siena, “Research and Development Limited Partnerships as a Device to Exploit University Owned Technology,” 10 *J. Coll. & Univ. Law* 435 (1984)). At various times and in various ways, Congress has provided other tax credits, charitable deductions, expense deductions, accelerated depreciation formulas, and similar devices that encourage involvement of sponsors in university research (see, for example, 26 U.S.C. § 41). Such incentives, combined with the lenient treatment of income from research-related activities, have created a highly favorable tax environment for universities to exploit their expertise in new technologies.

Government also provides direct monetary incentives for biotechnology and biomedical research that may involve or lead to university-industry collaborations. Many National Science Foundation and National Institutes of Health grant programs, for instance, would fall into this category. Government agencies also may provide funds for technology risk assessment projects. The U.S. Department of Agriculture, for example, has awarded grants under its Biotechnology Risk Assessment Research Grants Program (see 57 Fed. Reg. 14308 (April 17, 1992)).

Other legislation and Executive Orders have created yet other types of incentives. The Stevenson-Wydler Technology Innovation Act of 1980 (94 Stat. 2311, 15 U.S.C. § 3701 *et seq.*), as amended, is a primary example. The Act constituted a first step toward development of a comprehensive national policy on technology and acknowledged the role of academia in scientific discoveries and advances. One of its stated purposes is to “encourag[e] the exchange of scientific personnel among academia, industry, and Federal laboratories” (15 U.S.C. § 3702(5)). Another purpose—added by a later amendment, the National Competitiveness Technology Transfer Act of 1989—is to stimulate “collaboration between universities, the private sector, and government-owned, contractor-operated laboratories in order to foster the development of technologies in areas of significant economic potential” (15 U.S.C. § 3701).

The 1980 Stevenson-Wydler Act established Centers for Industrial Technology, since renamed Cooperative Research Centers, to be operated by universities or

other nonprofit organizations for the purpose of “enhanc[ing] technological innovation” through various means specified in the statute (15 U.S.C. § 3705(a)). Among these means are “the participation of individuals from industries and universities in cooperative technological innovation activities” (15 U.S.C. § 3705(a)(1)); and one of the specific activities the centers are authorized to engage in is “research supportive of technological and industrial innovation including cooperative industry-university research” (15 U.S.C. § 3705(b)(1)). These centers were developed under the auspices of the Secretary of Commerce. In later amendments, Congress enhanced the Secretary’s functions by creating the Technology Administration in the Department of Commerce (15 U.S.C. § 3704(a)–(c)). Congress has also directed the Secretary to provide financial assistance for “regional centers for the transfer of manufacturing technology,” which are to encourage “the participation of individuals from . . . universities [and] State governments . . . in cooperative technology transfer activities” (15 U.S.C. § 278k(a)(2)). “United States-based nonprofit institutions(s)” are eligible for such assistance (15 U.S.C. § 278k(a)). (See also 15 U.S.C. § 278n, establishing an Advanced Technology Program in the Department of Commerce, which facilitates universities’ participation in joint ventures with private industry; and 15 U.S.C. § 3710(e), establishing a Federal Laboratory Consortium for Technology Transfer, which is to assist and cooperate with colleges and universities in various ways (see, for example, 15 U.S.C. § 3710 (e)(1)(C), (I), (J)).)

The Federal Technology Transfer Act of 1986 (100 Stat. 1795, codified at 15 U.S.C. §§ 3710a–3710d) added important new provisions to assist in the transfer of commercially useful technology from federal laboratories to the private sector. Under this Act, federally operated laboratories are authorized to enter into cooperative research and development agreements and intellectual property licensing agreements with state and local government agencies, nonprofit organizations (including universities), corporations, partnerships, and foundations (15 U.S.C. § 3710a(a)). The Act also governs the distribution of royalties received from the licensing of inventions under such agreements.

**15.4.7. Conflicts of interest.** The growth of university-industry research collaborations, with the resultant potential for financial gains and split loyalties (subsection 15.4.1 above), has created an enhanced awareness of ethical issues in research and technology transfer. Increased attention to scientific misconduct (see Sections 6.6.2 & 13.2.3.4) is one manifestation. Another, and perhaps most prominent, manifestation is the emphasis on conflict of interest issues. (See generally H. Leskovic, Comment, “Ties That Bind: Conflicts of Interest in University-Industry Links,” 17 *U.C. Davis L. Rev.* 895 (1984).)

The concept of conflict of interest, as applied to higher education, has several important variables. In the traditional conflict of interest situation, an employee or officer of an institution—motivated by an outside financial interest or the prospect of personal financial gain—exerts inappropriate influence on the institution’s business judgments or contracting decisions. A newer and more subtle conflict situation is the “conflict of commitment,” in which outside commitments (or the search for outside commitments) lead an institutional employee

or officer to lessen or subvert commitment to the institution. See generally Association of American Medical Colleges, "Guidelines for Dealing with Faculty Conflicts of Commitment and Conflicts of Interest in Research," 65 *Acad. Med.* 487 (1990). In either situation the conflict may be an actual conflict or merely a potential conflict or appearance of conflict; the institution must be concerned about both. Furthermore, conflicts may be occasioned either by an individual employee acting on his own behalf rather than on behalf of the university, or by the university itself acting for itself through its officers and employees. Thus, the university itself may have a conflict, and may need to monitor its own activities as well as the outside activities of its employees if it is to escape the debilitating effects of conflicts of interest.

The potential debilitating effects are numerous. As one author has described: "Among the manifestations of these conflicts are the use of students and university equipment for private gain, the division of working time in such a way as to slight the university, the shifting of research to accommodate corporate sponsors, the transfer of patentable inventions from the university to private laboratories, and the suppressing of research results" (Kenney, *Biotechnology* (cited in subsection 15.4.1 above), 113). Another commentator, focusing especially on conflicts of commitment, has noted three sets of concerns:

(1) the concern that the industrial sponsor will attempt to *improperly control the scientific or technical approach* to the work funded by the sponsor, thereby invading and diminishing the objectivity and independence of the scientific investigator; (2) the problem that faculty investigators, induced by proprietary concerns on the part of the industrial sponsor, may become *improperly secretive about their work*, not only to the detriment of free and open dissemination of any scientific and technological developments, but also to the detriment of interaction with and among their students; and (3) the concern that the industrial sponsor will *improperly attempt to influence or control the choice of, or approach to, future research* in the same or related areas. These problems are generally regarded as particularly acute if the faculty investigators involved (or the university itself) have, or will have, *an equity or some other on-going financial interest in the industrial sponsor* [D. Fowler, "Conflicts of Interest: A Working Paper" (presented at conference of National Association of College and University Attorneys, March 11-12, 1983, at 1-2)].

And yet another commentator has focused on other types of conflicts, called "intellectual conflicts," which may "be less obvious" than conflicts of commitment but nevertheless strike "at the heart of the academic enterprise." Such conflicts may create "[c]ognitive dissonance—the subtle shifting of one's ideas toward those positions favoring personal interests" (R. H. Linnell, "Professional Activities for Additional Income: Benefits and Problems," in R. H. Linnell (ed.), *Dollars and Scholars* (University of Southern California Press, 1982), 43-70, at 62).

Both the legislative and the executive branches of the federal government and of state governments have become increasingly concerned with conflicts of interest in university-industry research relationships, especially for research supported with government funding. In such circumstances, yet another variation



on conflict of interest may occur: the “risk of conflict between the private interests of individuals, or of the companies with which they are involved, and the public interest that [government] funding should serve” (National Science Foundation, Investigator Financial Disclosure Policy, 59 Fed. Reg. 33308 (June 28, 1994), amended by 60 Fed. Reg. 35820 (July 11, 1995); supplemental guidelines published at 61 Fed. Reg. 34839 (July 3, 1996)).

At the federal level, some older and more general conflict of interest statutes, such as the Anti-Kickback Act (41 U.S.C. §§ 51 & 54), could apply to research activities. More recently, narrower conflict of interest provisions have appeared in appropriations acts, Office of Management and Budget (OMB) circulars, departmental contracting regulations, and agency grant policies or terms and conditions. Examples include the Department of Defense Federal Acquisition Regulations (48 C.F.R. § 235.017(a)(2), and 48 C.F.R. Part 203: “Improper Business Practices and Personal Conflicts of Interest”); the Department of Energy Acquisition Regulations (48 C.F.R. §§ 909.503–507.2: “Organizational and Consultant Conflicts of Interest”); the National Science Foundation’s “Investigator Financial Disclosure Policy,” above; the Food and Drug Administration’s regulations on “Financial Disclosure by Clinical Investigators” (21 C.F.R. §§ 54.1 *et seq.*); the Department of Health and Human Services’ conflict of interest regulations (42 C.F.R. §§ 50.604–606; and the U.S. Department of Health and Human Services (HHS) guidelines on “Financial Relationships and Interests in Research Involving Human-Subject Protection,” 69 Fed. Reg. 26393–402 (May 12, 2004). The latter document is specifically for the guidance of research institutions, Institutional Review Boards (see Section 13.2.3.2 of this book), and researchers, and applies to human subject research that is funded by HHS or regulated by the Food and Drug Administration.

At the state level, a number of states have ethics-in-government statutes or administrative regulations that would have some application to state college and university employees and officers and to research activities at state colleges and universities. Under the Illinois Governmental Ethics Act (5 ILCS 420/4A-101 to 4A-107), for example, certain state government employees annually must file a statement of economic interest that lists income, honoraria, gifts, and capital assets, and identifies the source thereof, and that also lists outside employment and professional practice activities. Members of the state board of regents and trustees and employees of the state colleges and universities are expressly covered. Additionally, faculty members are subject to the following conflict of interest requirement:

No full time member of the faculty of any State-supported institution of higher learning may undertake, contract for or accept anything of value in return for research or consulting services for any person other than that institution on whose faculty he serves unless (a) he has the prior written approval of the President of that institution, or a designee of such President, to perform the outside research or consulting services, such request to contain an estimate of the amount of time which will be involved, and (b) he submits to the President of that institution or such designee, annually, a statement of the amount of actual time he has spent on such outside research or consulting services [110 ILCS 100/1].

Under the Georgia statutes, Ga. Stat Ann. § 45-10-23 *et seq.* (“Conflicts of Interest”), state employees are prohibited from entering business transactions with the agency that employs them (§ 45-10-23) and must also disclose any financial transaction they enter into with any other state agency (§ 45-10-26). Another provision prohibits financial conflicts specifically involving the Board of Regents of the University System of Georgia or the trustees or officers of individual institutions (§ 45-10-40; and see Opin. Atty Gen. Ga. No. 04-7 (July 23, 2004)). There are various exceptions (for example, § 45-10-24.1; §45-10-25), some of which focus on employees of the University System of Georgia. One section, for instance, allows such employees to serve “as members of the governing boards of private, nonprofit, educational, athletic, or research related foundations and associations which are organized for the purpose of supporting institutions of higher education in [Georgia],” even though these organizations may transact business with the employee’s institution.

Virginia has a statute (Va. Code Ann. § 2.2-3100 *et seq.*) titled the “State and Local Government Conflict of Interests Act.” Its provisions apply to all state and local government employees, prohibiting them from receiving gifts, honoraria, fees for services, or any other thing of value in circumstances creating the potential for conflicts of interest. State and local government employees must also file financial disclosure forms under certain circumstances. There are exceptions to the Act’s requirements (see, for example, § 2.2-3110), including important exceptions dealing specifically with higher education. Once such exception relates to an employee’s involvement “in a contract for research and development or commercialization of intellectual property” between a public higher education institution and a company in which the employee has a personal interest (§ 2.2-3106(C)(7)). Any knowing violation of the Act is a misdemeanor; and upon conviction, a judge may also order the employee to vacate his or her employment position (§ 2.2-3120 to 3122).

Institutions that engage in sponsored research activities, or whose faculty and staff engage in them, will, of course, need to track the continuing debate and developments at all levels and branches of government and in the national educational and professional organizations. Institutions involved in research affiliations with corporations or governments in foreign countries will also need to keep track of developments in those countries and in international forums. The key to success in managing conflicts of interest, however, is effective institutional policies and enforcement mechanisms—whether or not government may require them. Such policies may range from disclosure requirements and confidentiality requirements to prohibitions of certain types of transactions and limitations on outside employment. If sensitively constructed and clearly drafted, such policies are likely to be constitutional. In *Adamsons v. Wharton*, 771 F.2d 41 (2d Cir. 1985), for example, a state medical school enacted a rule limiting the amount of a faculty member’s income from private practice. The plaintiff challenged the constitutionality of the regulation on three grounds: that it deprived him of his “property” without due process of law; that, in exempting part-time professors, the regulation discriminated against him in violation of equal protection; and that the regulation violated his First Amendment freedom of

association. The court rejected all three claims, calling them “farfetched at best” and noting that the regulation was supported by the medical school’s “legitimate interest in promoting devotion to teaching.”

Numerous resources are available to guide institutions that are devising or reviewing conflict of interest policies. Among the most helpful are the reports and statements of various national associations. See, for example, the Association of American Medical Schools’ Web site on conflicts of interest, <http://www.aamc.org/members/coitf/>; the AAHC Task Force on Science Policy, *Conflicts of Interest in Academic Health Centers* (Association of Academic Health Centers, 1990); the Association of American Universities’ 1985 report on *University Policies on Conflict of Interest and Delay of Publication*, reprinted at 12 *J. Coll. & Univ. Law* 175 (1985); and the 1965 joint statement of the AAUP and the American Council on Education, “On Preventing Conflicts of Interest in Government-Sponsored Research at Universities,” along with the AAUP’s 1990 “Statement on Conflicts of Interest,” both reprinted in *AAUP Policy Documents and Reports* (9th ed., 2001), 144–48. In addition, for helpful governmental guidance, see, for example, Government Accounting Office, *University Research: Most Federal Agencies Need to Better Protect Against Financial Conflicts of Interest* (GAO-04-31, 2003), which includes a survey of the policies of 171 universities; and NIH’s “Compendium of Findings and Observations” from two years of compliance site visits, available at [http://grants1.nih.gov/grants/compliance/compendium\\_2002.htm](http://grants1.nih.gov/grants/compliance/compendium_2002.htm).

State criminal laws may also apply to some conflict of interest problems on college campuses and may prompt criminal prosecutions and convictions in certain situations. The case of *Smith v. State*, 959 S.W.2d 1 (Texas Ct. App. 1997), is illustrative.<sup>17</sup> The defendant had been vice president for finance and administration at Texas A&M University. In that capacity, in 1990, he had negotiated a contract with Barnes & Noble Bookstores, Inc., for the operation of the university’s bookstore. In 1993 he made a trip to Barnes & Noble’s corporate offices in New York to negotiate an extension of the contract. According to evidence later submitted at trial, Smith either had stated to Barnes & Noble employees that his wife would accompany him on this New York trip, or this arrangement was “understood” from the course of conduct between the parties regarding Smith’s previous trips to New York. Barnes & Noble thereupon “provided round trip plane tickets, hotel accommodations, meals, ground transportation, and theatre tickets” for Smith and his wife (and for another university official and his wife).

The state claimed that Smith had solicited a benefit in violation of Texas Penal Code Ann. § 36.08 (d):

[A] public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of discretion.

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<sup>17</sup>See generally, for other criminal and civil cases, John Theuman, Annot., “Validity and Construction of Orders and Enactments Requiring Public Officers and Employees, or Candidates for Office, to Disclose Financial Conditions, Interests, or Relationships,” 22 A.L.R.4th 237.

After trial, a jury convicted Smith of this offense. On appeal, the court upheld the conviction, asserting that the trial judge had correctly instructed the jury on the statute's interpretation, and that the statute was neither overbroad nor vague.

Thus, numerous sources of law, and numerous sources of guidance from both governmental and private sources, are now being brought to bear on ethical issues confronting universities involved in biomedical and biotechnological research, technology transfer, and related activities. In this context, and in broader academic contexts as well, ethical issues and issues concerning commercialization and "technologization" are among the cutting-edge issues facing higher education for the present and future.

## Selected Annotated Bibliography

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Art. I, § 8, cl. 1, 1299, 1301;  
Art. I, § 8, cl. 3, 1268, 1301;  
Art. I, § 8, cl. 8, 1334, 1355;  
Art. I, § 8, cl. 17, 27;  
Art. I, § 10, 735;  
Art. I, § 10(1), 272;  
Art. III, 96;  
Art. IV, § 1, 119, 405*n*;  
Art. VI, para. 2, 836;  
Amend. 1, 23, 30, 53, 55–58,  
61, 63–66, 69, 71–73, 94, 103,  
127, 129–130, 219, 229, 233,  
244, 248, 272, 282–287,  
290–292, 300, 308–309,  
329–330, 338, 341, 422–423,  
435, 436, 453, 457, 459,  
461–462, 485, 487, 489, 498,  
509, 529, 535, 552, 565, 588,  
605–612, 613–615, 617–622,  
624–625, 627, 628–632, 634,  
636–637, 640, 642, 645–647,  
648, 653, 655, 657, 659–663,  
665, 666, 667, 669, 671–672,  
675, 677–679, 682–683, 685,  
687–691, 694–695, 698,  
706–708, 711–713, 714, 716,  
738–743, 841, 867–873, 878,  
890, 900–901, 912, 914, 922,  
944–945, 964, 994–998, 1000,  
1002–1004, 1006, 1008,  
1011–1012, 1013, 1015–1017,  
1019–1028, 1038–1039,  
1050–1055, 1057–1060, 1062,  
1064, 1068*n*, 1069–1070,  
1073–1075, 1078, 1082–1083,  
1086, 1097–1098, 1100–1104,  
1106–1108, 1112, 1114,  
1119–1121, 1170, 1203–1204,  
1210–1217, 1219–1224, 1227,  
1229–1234, 1236, 1238–1243,  
1264–1268, 1270–1272,  
1276, 1317, 1350, 1354,  
1370, 1384, 1386–1387,  
1389–1397, 1430–1432,  
1444–1445, 1448–1449, 1461,  
1548, 1660;  
Amend. 4, 257, 268–269,  
612–613, 621, 741,  
861–866, 867*n*, 912, 1097,  
1142–1147, 1207–1208,  
1210, 1387;  
Amend. 5, 269, 453–454, 914,  
1086, 1175, 1215, 1228, 1439;  
Amend. 10, 1297, 1302;  
Amend. 11, 97, 123, 192, 226,  
231–239, 249, 316–317, 353,  
384, 391, 399, 403, 409, 819,  
844, 960, 1216, 1298,  
1307–1312, 1335, 1351, 1361,  
1367, 1373–1374, 1405,  
1498, 1500;  
Amend. 13, 1305;  
Amend. 14, 30, 45*n*, 51, 54–55,  
60–61, 67, 69, 92, 97, 117,  
123, 233, 244, 317, 352–354,  
356, 384, 403–404, 426, 437,  
443, 445, 447, 490, 498,  
529–530, 534, 547, 549, 561,  
568, 588–591, 593, 606*n*,  
617–618, 649, 687–688, 753,  
758, 763, 767, 778, 782, 786,  
789, 791, 795, 805, 826, 830,  
833, 837, 854, 892, 922, 939,  
956, 959, 973*n*, 974, 981, 982,  
984, 1065–1066, 1086, 1125,  
1128, 1142, 1181, 1205, 1215,  
1220–1221, 1244, 1263, 1270,  
1289–1290, 1300, 1304–1307,  
1309–1311, 1351–1352, 1360,  
1367, 1383, 1451–1453, 1464,  
1475, 1499–1500, 1563, 1615;  
Amend. 15, 1307, 1309;  
Amend. 16, 1301;  
Amend. 26, 38, 726, 1199,  
1202
- Act to Incorporate Howard  
University, 27–28
- Administrative Dispute Resolution  
Act of 1996, 1505
- Administrative Procedure Act  
(APA), 1440–1441, 1503
- Age Discrimination Act of 1975,  
121, 776–777, 819–820,  
858–859, 1469–1471:  
1474–1477, 1490*n*,  
1493–1501
- Age Discrimination in Employ-  
ment Act (ADEA), 298, 364,  
373, 399–403, 404, 432–433,  
456*n*, 482*n*, 516, 517:  
§4(d), 300;  
§4(f)(1), 400;  
§ 4(f)(2), 432;  
§ 4(l)(3)(B), 432–433;  
§14(b), 401

- American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), 318*n*
- American Jobs Creation Act of 2004, 1416
- Americans With Disabilities Act (ADA) of 1990, 313, 325, 357, 373, 391–399, 425–430, 515–516, 768, 773–775, 876 925–927, 960–962, 1381–1384:  
 Title I, 391–394, 1306;  
 Title II, 394, 773, 807, 819, 1141–1142, 1306–1307, 1381–1383;  
 Title III, 773, 819, 1096, 1141–1142, 1382–1383, 1577–1581;  
 §102, 269
- Animal Enterprise Protection Act of 1992, 1328–1329
- Animal Welfare Act (AWA), 1325
- Anticybersquatting Consumer Protection Act (ACPA), 1366, 1389
- Anti-Kickback Act, 1659
- Architectural Barriers Act of 1968, 1384, 1466*n*
- Armed Services Procurement Act, 1424
- Arms Export Control Act, 1334, 1394
- Bankruptcy Code, 1313, 1553–1554:  
 Chapter 7, 842–843, 847;  
 Chapter 13, 842–843, 847
- Bank Secrecy Act of 1970, 1333
- Bayh-Dole Act, 1358–1359
- Byrd Amendment, 1427–1428
- Cable Act, 1332
- Campus Sex Crimes Prevention Act (CSCPA), 888, 1032
- Child Online Protection Act (COPA), 1388–1389
- Child Pornography Prevention Act of 1996 (CPPA), 1388
- Children’s Online Privacy Protection Act of 1998, 1389
- Civil Monetary Penalty Act (CMPA), 1401
- Civil Rights Act of 1866, 390:  
 § 1981. *See* United States Code, Title 42, § 1981
- Civil Rights Act of 1871:  
 § 1983. *See* United States Code, Title 42, § 1983
- Civil Rights Act of 1964:  
 Title II, 874;  
 Title VI, 54, 749, 758, 782–783, 820–823, 856, 1450–1462, 1474–1477, 1483, 1488–1489, 1490*n*, 1493–1501, 1574–1577;
- Title VII, 54, 121, 246*n*, 298–301, 318, 373, 374–383, 385, 387–388, 390, 406–410, 411–413, 414–419, 420–424, 433–435, 436–439, 445–449, 510–512, 517, 522–526, 943;  
 § 601, 1497–1498;  
 § 602, 1498;  
 § 702(a), 456–459, 462;  
 § 702(e)(2), 457–458;  
 § 703, 379, 446, 456;  
 § 703(e)(1), 458;  
 § 703(e)(2), 462;  
 § 703(j), 445;  
 § 703(k), 381;  
 § 706, 106*n*
- Civil Rights Act of 1991, 373, 375, 379, 381:  
 § 102, 121
- Civil Rights Attorney’s Fees Awards Act of 1976, 123, 124, 1500–1501
- Civil Rights Remedies Equalization Amendment of 1986, 1497, 1498
- Civil Rights Restoration Act (CRRRA) of 1987, 396, 891–892, 1067–1068, 1480
- Clayton Act:  
 §12, 1374
- Clean Air Act, 1378–1380
- Clean Water Act, 1378–1379
- Clergy Act, 885, 1436
- Communications Act of 1934, 1384
- Communications Decency Act (CDA) of 1996, 1387–1393:  
 § 509, 874–876, 1389
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 1378
- Computer Fraud and Abuse Act of 1986, 1385
- Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 312
- Contract Disputes Act, 1425
- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM), 1314
- Copyright Act, 1334–1355:  
 § 103(b), 1346;  
 § 107, 1335–1336;  
 § 110(1), 1342;  
 § 110(2), 1342;  
 § 512(a), 1349;  
 § 512(c), 1349;  
 § 512(h), 1349
- Copyright Amendments Act, 1339
- Copyright Remedy Clarification Act in 1990, 1351–1352
- Crime Awareness and Campus Security Act, 885–888
- Criminal Penalties for Copyright Infringement, 1346
- Cyber Security Enhancement Act of 2002, 1386
- Davis-Beacon Act, 1425
- Debt Collection Improvement Act, 852
- Digital Millennium Copyright Act (DMCA), 875–876, 1347–1350, 1353, 1389
- Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, 1350
- DREAM Act, 781, 840
- Drug-Free Schools and Communities Act Amendments of 1989, 1434–1435
- Drug-Free Workplace Act of 1988, 267, 393, 1432–1434
- Education Amendments of 1972, 386–389, 414, 420–424:  
 Title IX, 54, 121, 136, 376, 439, 749–752, 762–768, 782–783, 817–818, 820–823, 856, 889, 892, 899, 943, 945–954, 1127–1140, 1462–1464, 1479–1482, 1483–1484, 1484–1485, 1490*n*, 1493–1501, 1573–1574;  
 § 106.31(c), 818;  
 § 106.37(a)(1), 817;  
 § 106.37(a)(2), 817;  
 § 106.37(a)(3), 817;  
 § 106.37(b), 817;  
 § 106.37(b)(2), 818;  
 § 408, 783;  
 § 902, 388, 1480*n*
- Education Amendments of 1976:  
 § 412(a)(4), 818
- Education Department General Administrative Regulations (EDGAR), 1428
- Education for All Handicapped Children Act, 959
- Electronic Communications Privacy Act (ECPA) of 1986, 867*n*, 1385–1387
- Emergency Planning and Community Right-to-Know Act (EPCRA), 1377–1379
- Employee Retirement Income Security Act of 1974 (ERISA), 311–313
- Enhanced Border Security and Visa Entry Reform Act:  
 § 501, 898*n*
- Equal Access to Justice Act, 123, 1072*n*, 1503
- Equal Pay Act, 373, 376, 383–386, 411, 420–424, 456*n*, 517
- Equity in Athletics Disclosure Act of 1994, 420, 1123

- Export Administration Act of 1979, 1334, 1394
- Fair and Accurate Credit Transactions Act of 2003, 1376
- Fair Credit Reporting Act (FCRA), 358–359, 1376
- Fair Debt Collection Practices Act, 848
- Fair Housing Act, 859–860, 1182–1183
- Fair Labor Standards Act (FLSA), 258, 305–311, 314, 328, 383–384, 399, 1310–1311
- False Claims Act (FCA), 328, 1401, 1404–1405, 1436–1438
- Family and Medical Leave Act (FMLA) of 1993, 313–317, 413*n*, 428, 1306
- Family Educational Rights and Privacy Act (FERPA), 212, 753, 812, 848, 867*n*, 876*n*, 925, 1029–1034
- Federal Advisory Committee Act, 1502
- Federal Arbitration Act (FAA), 137–138, 1597–1598:  
§ 1, 274
- Federal Food, Drug and Cosmetic Act, 1319
- Federal Property and Administrative Services Act of 1949:  
Title III, 1424
- Federal Technology Transfer Act of 1986, 1657
- Federal Trade Commission Act, 1368, 1375–1376
- Federal Unemployment Tax Act (FUTA), 325–326, 1414
- Foreign Intelligence Surveillance Act, 1332
- Fraud by Wire, Radio, or Television Communications Act, 1394
- Freedom of Information Act Amendments, 1506
- Freedom of Information Act (FOIA), 1327–1328
- General Education Provisions Act (GEPA), 1428
- GI Bill, 1424
- Government in the Sunshine Act, 1507
- Gramm-Leach-Bliley Act, 815
- Hazard Communication Standard, 303–304
- Hazardous and Solid Waste Amendments of 1984, 1379
- Health Insurance Portability and Accountability Act (HIPAA), 198, 889, 1401–1404
- Higher Education Act of 1965, 814, 816, 885, 994, 1202, 1424, 1437–1438:  
Title IV, 813, 1435–1436;  
Part H, 1532–1533;  
§ 103, 1435;  
§ 104, 1435;  
§ 485, 1435
- Higher Education Amendments of 1992, 885, 1030
- Higher Education Amendments of 1998, 402, 814, 1031*n*, 1032*n*, 1083–1084, 1555:  
§ 112, 994;  
§ 119, 1429;  
§ 483(f)(1), 1429;  
§ 489(b), 1432
- Higher Education Facilities Act of 1963, 1424
- Higher Education Technical Amendments of 1991, 850
- Homeland Security Act of 2002, 1386
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 318*n*, 778–780, 839–840, 1331:  
§ 641, 898*n*;  
§ 641(c)(2), 899
- Immigration Act of 1990 (IMMACT), 318*n*, 319
- Immigration and Nationality Act of 1952, 836, 837, 1315:  
§ 1101(a)(15)(F), 1262–1263
- Immigration Reform and Control Act of 1986 (IRCA), 318–319, 410–411
- Improving America's Schools Act (IASA) of 1994, 1031*n*, 1372
- Individuals With Disabilities Education Act (IDEA), 926, 959
- Individuals With Disabilities Education Improvement Act of 2004, 959
- Internal Revenue Code (IRC):  
§ 1–1563, 1406;  
§ 25A, 1415;  
§ 41, 1408;  
§ 74, 1408;  
§ 108(f), 1414;  
§ 115, 1408;  
§ 117, 1408;  
§ 117(a), 1412;  
§ 117(d), 1414;  
§ 127, 1408;  
§ 135, 1415;  
§ 170(b)(1)(A)(ii), 1415;  
§ 170(f), 1410;  
§ 170(m), 1416;  
§ 221, 1415;  
§ 222, 1415;  
§ 501(c)(3), 245, 1408–1410, 1415, 1422, 1654;  
§ 509(a)(3), 1413;  
§ 511–514, 1416–1419;  
§ 512, 1634;  
§ 512(a)(1), 1418;  
§ 512(a)(2), 1416*n*;  
§ 512(b), 1635;  
§ 512(b)(1), 1653;  
§ 512(b)(1)(A)(ii), 1636;  
§ 512(b)(2), 1417*n*, 1653;  
§ 512(b)(3), 1417;  
§ 512(b)(3)(A)(i), 1636, 1653;  
§ 512(b)(3)(B)(i), 1636;  
§ 512(b)(5), 1653;  
§ 512(b)(6), 1418;  
§ 512(b)(7), 1417, 1653;  
§ 512(b)(8), 1417, 1653;  
§ 512(b)(9), 1417;  
§ 512(b)(13), 1418, 1654;  
§ 512(c), 1417;  
§ 512(e), 1418;  
§ 513(a), 1417;  
§ 513(a)(1), 1417*n*;  
§ 513(a)(2), 1417, 1635;  
§ 513(a)(3), 1417*n*;  
§ 513(b), 1417;  
§ 514, 1636;  
§ 514(b)(1)(A), 1418;  
§ 514(b)(1)(C), 1418;  
§ 514(c)(9), 1418;  
§ 529, 811–812, 1414;  
§ 871, 1408;  
§ 2001–2704, 1406;  
§ 2055, 1415;  
§ 2503(e), 1416;  
§ 2522, 1415;  
§ 3101–3501, 1406;  
§ 3121(b)(10), 1413, 1414;  
§ 3121(b)(13), 1413;  
§ 3121(b)(19), 1413;  
§ 3306(c)(10)(B), 1414;  
§ 3306(c)(13), 1414;  
§ 3306(c)(19), 1414;  
§ 3309(b)(1), 1414*n*;  
§ 4001–5000, 1406;  
§ 4958, 1411;  
§ 6033(a)(1), 1410, 1418;  
§ 6050S, 1415;  
§ 6104(e), 1410;  
§ 7701(k), 1416
- International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001, 1333
- Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 888
- Labor-Management Relations Act of 1947 (Taft-Hartley Act), 279
- Lanham Act, 1361–1368
- Lobbying Disclosure Act of 1995, 1313

- Local Government Antitrust Act of 1984, 1370
- Military Selective Service Act, 1313
- Miscellaneous and Technical Immigration and Naturalization Amendments (MTINA) of 1991, 318*n*
- Morrill Act, 1424
- National Competiveness Technology Transfer Act of 1989, 1656
- National Cooperative Research and Production Act of 1993, 1655, 1656
- National Defense Education Act, 1424
- National Labor Relations Act of 1935, 279–282, 283–286, 288, 289, 290, 293, 328, 491–496: § 8(b), 496
- National Voter Registration Act (NVRA), 895, 1313, 1432
- Need-Based Educational Aid Act of 2001, 1372
- Negotiated Rulemaking Act of 1990, 1503–1504
- No Electronic Theft Act (NET), 1347
- Occupational Safety and Health Act (OSHA), 93, 261, 303–305
- Office of Federal Procurement Policy Act of 1974, 1424
- Older Workers Benefit Protection Act (OWBPA), 364, 401–402, 432–433
- Omnibus Transportation Employee Testing Act of 1991, 267, 269
- Patent Act, 1356–1361: § 271(a), 1652
- Patent and Plant Variety Protection Remedy Clarification Act of 1992, 1360–1361
- Patent and Trademark Amendments of 1980, 1655–1656
- Pendleton Act, 275
- Pension Reform Act, 311–313
- Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 839
- Pregnancy Discrimination Act of 1978, 412
- Privacy Act of 1974, 1040–1041, 1506–1507: § 3(m), 1041; § 7, 1041
- Privacy Protection Act of 1980, 1208: §101(a), 1208–1209; §101(b), 1209; §106, 1209
- Program Fraud Civil Remedies Act of 1986 (PFCRA), 1405–1406, 1436–1437
- Public Health Act, 1329
- Public Health Security and Bioterrorism Preparedness and Response Act (BPARA) of 2002, 1333
- Public Health Service Act Title X, 892, 1443–1445
- Regulatory Flexibility Act, 1503–1504
- Rehabilitation Act Amendments of 1992, 394–395
- Rehabilitation Act of 1973, 925–927: Title I, 894; § 503, 396, 444; § 504, 391–399, 429–430, 768–775, 818–819, 856, 876, 889, 893–894, 960–962, 1140–1142, 1312, 1464–1468, 1475–1477, 1485–1486, 1489, 1490*n*, 1493–1501
- Religious Freedom Restoration Act (RFRA), 60, 285*n*, 890
- Religious Land Use and Institutionalized Persons Act, 60*n*
- Resource Conservation and Recovery Act of 1976 (RCRA), 1377–1380
- Retirement Equity Act of 1984: § 102(e), 312; § 103, 312; § 104, 312
- Robinson-Patman Act, 1368–1375, 1600–1601
- Safe Drinking Water Act, 328
- Sarbanes-Oxley Act, 1314
- Semiconductor Chip Protection Act of 1984, 1650*n*
- Senior Reserve Officers' Training Corps Act, 27
- Service Contract Labor Standards Act, 1425
- Sherman Act, 1081–1082, 1368–1375, 1566–1571, 1632–1633: § 2, 1570, 1571
- Single Audit Act of 1984, 1427
- Solid Waste Disposal Act (SWDA), 1380
- Solomon Amendment, 1429–1432
- Sonny Bono Copyright Term Extension Act (CTEA), 1354
- Stevenson-Wydler Technology Innovation Act of 1980, 1656–1657
- Student Loan Default Prevention Initiative Act of 1990: § 668.15, 852; § 1085, 850
- Student Right-to-Know and Campus Security Act, 813, 1031*n*, 1122, 1435: Title I, 1435
- Superfund Amendments and Reauthorization Act (SARA): Title III, 1377–1379
- Superfund Law, 1378
- Taft-Hartley Act, 279
- Taxpayers' Bill of Rights 2, 1410–1412
- TEACH Act, 1342–1344, 1389: § 110(2), 1343; § 110(f), 1344
- Telecommunications Act of 1996, 1384: Title V, 1387–1393
- Toxic Substances Control Act, 328, 1379
- Trademark Act of 1946, 1361–1368
- Trademark Law Revision Act of 1988, 1362–1363
- Trademark Remedy Clarification Act (TRCA), 1367
- Tribally Controlled College or University Assistance Act, 27
- Truth-in-Lending Act, 811
- Uniformed Services Employment and Reemployment Rights Act (USERRA), 330–332
- USA PATRIOT Act, 624, 1032, 1330–1334, 1385, 1394: § 210, 1386; § 212, 1386; § 217, 1386; § 416, 898*n*, 1331; § 505(a), 1387; § 507, 899; § 817, 1331; Title III, 1333
- Veterans Programs Enhancement Act, 331
- Victims of Trafficking and Violence Protection Act of 2000: § 1601, 1032
- Vietnam Era Veterans Readjustment Assistance Act of 1974, 330
- Violence Against Women Act, 1303, 1304*n*

- Wagner Act. *See* National Labor Relations Act of 1935
- Wetterling Act, 888
- United States Code:
- Title 5:
- § 552, 1327–1328, 1506;
- § 552(a)(1), 1426;
- § 552(b), 1506;
- § 552(b)(4), 1328;
- § 552(b)(5), 1328;
- § 552(b)(6), 1507;
- § 552a(m), 1041;
- § 552b, 1507;
- § 561 note, 1504;
- § 565, 1504;
- § 571(2), 1505;
- § 571(3), 1505;
- § 572(a), 1505;
- § 572(c), 1505;
- § 601(3), 1504;
- § 601(4), 1504;
- § 601(5), 1504;
- § 602, 1503;
- § 603, 1503;
- § 604, 1503;
- § 609, 1504;
- § 610, 1504;
- § 706, 1442;
- § 706(2)(A), 1443;
- Title 7:
- § 2132(g), 1325;
- Title 8:
- § 1101(a)(15), 835;
- § 1101(a)(15)(B), 837, 1315, 1316;
- § 1101(a)(15)(F), 897;
- § 1101(a)(15)(F)(i), 897;
- § 1101(a)(15)(H), 1316;
- § 1101(a)(15)(H)(i)–(iii), 318;
- § 1101(a)(15)(J), 897, 1315, 1316;
- § 1101(a)(15)(M), 837, 897;
- § 1101(a)(15)(M)(i), 897;
- § 1101(a)(15)(O), 319, 1316;
- § 1101(a)(15)(P), 319, 1316;
- § 1101(a)(15)(Q), 319, 1316;
- § 1151–1159, 1315;
- § 1182(a)(3)(C), 1317;
- § 1182(a)(3)(C)(ii), 1317;
- § 1182(a)(3)(C)(iii), 1317;
- § 1182(e), 1315;
- § 1182(j), 897;
- § 1184(n), 319;
- § 1227(a), 898*n*;
- § 1324a(a), 318;
- § 1324a(b), 318;
- § 1324b, 410;
- § 1372(a), 898*n*, 1331;
- § 1372(c)(2), 899;
- § 1621(a), 839–840;
- § 1621(c), 779;
- § 1621(c)(1)(B), 840;
- § 1621(d), 840;
- § 1623, 840;
- § 1623(a), 780;
- § 1641(b), 779*n*;
- Title 9:
- § 1, 274;
- Title 10:
- § 983, 1429–1432;
- § 983(d), 1429;
- § 2111a(a)–(c), 27;
- § 2111a(e), 27;
- § 2111a(f), 27;
- § 9315, 27;
- Title 11:
- § 362, 843, 847;
- § 362(a)(6), 847;
- § 362(b)(3), 1553;
- § 362(b)(14), 1553;
- § 362(d)(1), 843;
- § 523, 842;
- § 523(a)(8), 843–846;
- § 524(a)(2), 846;
- § 525, 847*n*;
- § 525(a), 1554*n*;
- § 541(b)(3), 1553;
- § 727, 842;
- § 1321–1323, 842;
- § 1324–1325, 842;
- § 1324, 843;
- § 1328(a), 843;
- Title 15:
- § 1, 1372;
- § 13c, 1374*n*, 1600–1601;
- § 33(1), 1370;
- § 34–36, 1370;
- § 36(a), 1370;
- § 44, 1375;
- § 45(a)(1), 1375;
- § 278k(a), 1657;
- § 278k(a)(2), 1657;
- § 278n, 1657;
- § 1114, 1362;
- § 1117, 1362;
- § 1122, 1367;
- § 1125(a), 1363, 1367;
- § 1603(7), 811;
- § 1681(b), 359;
- § 1681a(x), 359, 1376;
- § 2601(b)(2), 1379;
- § 2622, 328, 1380;
- § 3701, 1656;
- § 3702(5), 1656;
- § 3704(a)–(c), 1657;
- § 3705(a), 1657;
- § 3705(a)(1), 1657;
- § 3705(b)(1), 1657;
- § 3710(e), 1657;
- § 3710(e)(1)(C), 1657;
- § 3710(e)(1)(I), 1657;
- § 3710(e)(1)(J), 1657;
- § 3710a(a), 1657;
- § 4302, 1655;
- § 4305, 1655;
- § 6801(b), 815;
- § 6805(b), 815;
- Title 17:
- § 101, 1347;
- § 107, 1351;
- § 108(d), 1351;
- § 108(e), 1351;
- § 108(h), 1354;
- § 201(b), 1345;
- § 504(c), 1350;
- § 512(a)–(d), 875;
- § 512(c), 875;
- § 512(e), 875;
- § 512(f), 875;
- § 512(g), 875;
- Title 18:
- § 175(b), 1332;
- § 875(c), 1394–1397;
- § 1030(a)(1), 1394;
- § 1030(a)(5)(A), 1385;
- § 1030(a)(5)(A)(i), 1385;
- § 1030(a)(5)(A)(ii)–(iii), 1385;
- § 1030(a)(5)(B)(ii), 1394;
- § 1030(a)(5)(B)(v), 1394;
- § 1362, 1394;
- § 1465, 1393;
- § 1693–1699, 292;
- § 2251, 1394;
- § 2252, 1394;
- § 2252A, 1394;
- § 2252B, 1394;
- § 2252B(b), 1394;
- § 2256, 1394;
- § 2319(a), 1346;
- § 2319(b), 1346, 1394;
- § 2319(c)(1), 1394;
- § 2319(c)(2), 1394;
- § 2331, 1032;
- § 2332b, 1394;
- § 2332b(g)(5)(B), 1032;
- § 2510 *et seq.*, 1332;
- § 2511(1)(a), 1385;
- § 2511(1)(c), 1385, 1386;
- § 2511(1)(d), 1385;
- § 2511(2), 1385;
- § 2511(2)(a)(i), 1385;
- § 2511(2)(a)(ii), 1385;
- § 2511(2)(c), 1386;
- § 2511(2)(i), 1386;
- § 2701(a), 1385;
- § 2701(c), 1385;
- § 2701(c)(1), 1385;
- § 2702(a), 1385;
- § 2702(b), 1386;
- § 2702(b)(8), 1387;
- § 2702(c)(3), 1386;
- § 2702(c)(4), 1386;
- § 2703, 1386;
- § 2703(c), 1386;
- § 2709(b), 1387;
- § 2709(c), 1387;
- Title 20:
- § 1001(a)(5), 1554;
- § 1001(c), 1554;
- § 1011a, 994;
- § 1011a(a), 1083–1084;
- § 1011a(b)(2), 1084;
- § 1011i, 1429;
- § 1011i(a), 1429;
- § 1011i(e), 1429;
- § 1070a *et seq.*, 814;

## United States Code: (Continued)

- § 1070b *et seq.*, 814;  
 § 1070c *et seq.*, 814;  
 § 1070d-31, 814;  
 § 1070d-33, 814;  
 § 1071 *et seq.*, 814;  
 § 1078-2, 815;  
 § 1078-3, 815;  
 § 1082(a)(2), 1441;  
 § 1087a *et seq.*, 815;  
 § 1087aa-1087ii, 814;  
 § 1087cc(4), 849;  
 § 1091a(a)(1)-(2), 852;  
 § 1091(r), 814, 1429;  
 § 1092, 420;  
 § 1092(a)(1)(L), 1435;  
 § 1092(e), 1435;  
 § 1092(e)(1)(A), 1122;  
 § 1092(e)(1)(B), 1122;  
 § 1092(e)(1)(C), 1122;  
 § 1092(e)(1)(D), 1122;  
 § 1092(e)(1)(E), 1122;  
 § 1092(e)(1)(F), 1122;  
 § 1092(e)(2), 1122;  
 § 1092(e)(6), 1122;  
 § 1092(e)(8), 1122;  
 § 1092(f), 885;  
 § 1092(f)(1), 888;  
 § 1092(f)(13), 1436;  
 § 1092(g), 1123;  
 § 1092(g)(1), 1123;  
 § 1094(a)(10), 814;  
 § 1094(a)(23), 1202, 1432;  
 § 1094(b), 1439;  
 § 1094(c)(1)(A), 1435;  
 § 1094(c)(1)(D), 1435, 1439;  
 § 1094(c)(1)(F), 1435, 1436, 1439;  
 § 1094(c)(2)(A), 1439;  
 § 1094(c)(3)(A), 1435;  
 § 1094(c)(3)(B), 1436;  
 § 1094(c)(5)-(7), 1435;  
 § 1097(a), 1406, 1437;  
 § 1099a, 1260*n*;  
 § 1099a-3, 1533;  
 § 1099a(a), 1248*n*;  
 § 1099a(a)(1), 1260*n*;  
 § 1099a(a)(2), 1260*n*;  
 § 1099b, 1556;  
 § 1099b(a)(3)(A), 1555;  
 § 1099b(a)(4), 1555;  
 § 1099b(a)(5), 1555;  
 § 1099b(a)(5)(J), 1555, 1556;  
 § 1099b(a)(6), 1555;  
 § 1099b(a)(7), 1555;  
 § 1099b(a)(8), 1555;  
 § 1099b(c)(5), 1555;  
 § 1099b(c)(6), 1555;  
 § 1099b(e), 1536;  
 § 1099b(f), 1536-1538, 1542-1543;  
 § 1232, 1426, 1428;  
 § 1232b, 1425;  
 § 1232g(a)(4)(A), 1030, 1033;  
 § 1232g(a)(4)(B)(ii), 876*n*;  
 § 1232g(a)(4)(B)(iii), 1030;  
 § 1232g(a)(4)(B)(iv), 1402;  
 § 1232g(b)(4), 1032;  
 § 1232g(b)(6)(C), 1031*n*;  
 § 1232g(b)(7), 1032;  
 § 1232g(h), 1036;  
 § 1232g(i), 1032*n*;  
 § 1232g(j), 899;  
 § 1232i(c), 783;  
 § 1234i(2), 1428;  
 § 1681(a)(1), 762, 1462;  
 § 1681(a)(2), 1462;  
 § 1681(a)(3), 386, 767, 1462;  
 § 1681(a)(4), 1462;  
 § 1681(a)(5), 762, 767, 1462;  
 § 1681(a)(6)(A), 1462;  
 § 1681(a)(6)(B), 1462;  
 § 1681(a)(7), 1462;  
 § 1681(a)(8), 1462;  
 § 1681(a)(9), 818;  
 § 1682, 1480*n*, 1489;  
 § 1683, 1490*n*;  
 § 1684, 768;  
 § 1686, 856;  
 § 1687, 1480;  
 § 1688, 892;  
 § 1994, 813;  
 Title 21;  
 § 802, 1331;  
 Title 26;  
 § 41, 1656;  
 § 190, 1466*n*;  
 § 401 *et seq.*, 311;  
 § 410(a)(1)(B)(ii), 312;  
 § 414(d), 312;  
 § 529(b)(1), 812;  
 § 792, 1466*n*;  
 § 2415(a), 851;  
 § 6402(d), 851;  
 Title 28;  
 § 1331, 1440;  
 § 1367, 97;  
 § 1441, 97;  
 § 1738, 119;  
 § 2412(d)(1)(A), 1504;  
 § 2412(d)(2)(B), 1504-1505;  
 Title 29;  
 § 152(2), 279;  
 § 152(3), 280, 289;  
 § 152(11), 280, 289;  
 § 152(12), 282*n*;  
 § 157, 279;  
 § 158(a), 280;  
 § 158(a)(1), 288;  
 § 158(a)(2), 288;  
 § 158(a)(3), 288;  
 § 158(a)(5), 294;  
 § 158(b), 280, 496;  
 § 158(b)(3), 294;  
 § 158(d), 294;  
 § 159(b), 288;  
 § 163, 295;  
 § 173(b), 296;  
 § 203(x), 309, 1310;  
 § 206(d)(1), 384, 421;  
 § 207(o), 307;  
 § 207(p), 307;  
 § 213(a)(1), 306;  
 § 213(a)(17), 306;  
 § 216(b), 309, 1310;  
 § 218, 306;  
 § 254(a)(2), 311;  
 § 255(a), 306;  
 § 623, 400;  
 § 623(f)(1), 400, 401;  
 § 623(f)(2)(B)(ii), 433;  
 § 623(f)(3), 401;  
 § 623(h), 373;  
 § 623(k), 402;  
 § 623(l), 402;  
 § 623(m), 402;  
 § 626(d), 401;  
 § 626(f)(1), 402;  
 § 628(d), 300;  
 § 631, 399;  
 § 633(b), 401;  
 § 653(b)(4), 304;  
 § 654, 303;  
 § 657(c), 304;  
 § 665, 303;  
 § 666, 303;  
 § 667, 304-305;  
 § 793, 444;  
 § 794, 391-399, 1464;  
 § 794a(a), 1493;  
 § 794a(a)(2), 1480*n*, 1490*n*, 1498;  
 § 794a(b), 1501;  
 § 794c, 1489;  
 § 1001 *et seq.*, 312;  
 § 1001(b), 311;  
 § 1002(1), 311;  
 § 1002(2), 311;  
 § 1002(32), 312;  
 § 1052(a)(1)(B)(ii), 312;  
 § 1144(a), 313;  
 § 1144(b), 313;  
 § 2601(b)(1), 317;  
 Title 31;  
 § 3716(c)(3)(A)(i), 852;  
 § 3730, 1404;  
 § 3801(a)(6), 1406, 1436;  
 § 3802, 1405, 1436;  
 § 3803, 1405, 1436;  
 Title 33;  
 § 1367, 1380;  
 Title 35;  
 § 101, 1356-1357;  
 § 102, 1356;  
 § 103, 1356;  
 § 200, 1359;  
 § 201, 1359;  
 § 202, 1359;  
 § 202(a)(i)-(iii), 1359;  
 § 202(c)(4), 1359;  
 § 202(c)(7), 1359;  
 § 202(e)(5), 1359;  
 § 202(f), 1359;  
 § 203, 1359;  
 § 205, 1359;  
 § 284, 1359;  
 § 285, 1359;

- Title 38;  
 § 3001 *et seq.*, 814;  
 § 3452, 1556;  
 § 3675(a)(2), 1532;  
 § 4212, 444;  
 § 4212(a)(1), 444;  
 § 4304(4)(A)(1), 330–330;  
 § 4312, 331;  
 § 4323, 331;  
 Title 39;  
 § 601–606, 292;  
 § 4121(a), 330;  
 Title 41;  
 § 403(11), 1432;  
 § 609(a)(1), 1425;  
 § 701(b)(1), 1433;  
 § 702(a)(1), 1433;  
 § 702(a)(2), 1433;  
 § 702(b)(1), 1433;  
 Title 42;  
 § 262a, 1332;  
 § 289b(b), 1329;  
 § 292 *et seq.*, 850;  
 § 296(6), 1554, 1556;  
 § 296g, 767;  
 § 300a-6, 1443–1445;  
 § 300ee(d), 1442;  
 § 706(8)(D), 1467;  
 § 1320d-6, 1404;  
 § 1395f(g), 1399;  
 § 1395h, 1398;  
 § 1395cc, 1397;  
 § 1395cc(a)(1)(A), 1397;  
 § 1395cc(a)(1)(F)(i),  
 1397–1398;  
 § 1395cc(f)(1), 1289*n*;  
 § 1395oo, 1398;  
 § 1395oo(f)(1), 1398;  
 § 1395ww, 1397;  
 § 1395ww(d)(5), 1398;  
 § 1396a(w)(1), 1289*n*;  
 § 1973gg05(a)(2)(B), 895;  
 § 1981, 332, 389–391, 404,  
 510–512, 760–762, 782–783,  
 820;  
 § 1981A, 393;  
 § 1983, 42, 102–103, 104*n*,  
 230–241, 332, 346–357,  
 436–437, 576*n*, 943, 956–957,  
 1033, 1464;  
 § 1988, 123, 124;  
 § 2000d-1, 1480*n*, 1489, 1493;  
 § 2000d-2, 1490*n*;  
 § 2000d-3, 1472;  
 § 2000e(j), 433–435;  
 § 2000e-2, 456;  
 § 2000e-2(a), 374, 408,  
 433–435;  
 § 2000e-2(e)(1), 374, 433–435,  
 458;  
 § 2000e-2(e)(2), 433–435,  
 457–458;  
 § 2000e-2(j), 445;  
 § 2000e-2(k)(1)(a)(i), 381;  
 § 2000e-3(a), 373;  
 § 2000e-5(e), 381;  
 § 2000e-5(k), 510;  
 § 2000e-8(c), 461;  
 § 2000bb-2(1), 60;  
 § 2000bb-3(a), 60;  
 § 2751 *et seq.*, 814;  
 § 3604, 859;  
 § 3607(b)(1), 1183;  
 § 5851, 1380;  
 § 6103(a)(4), 1489;  
 § 6103(b), 776;  
 § 6103(c), 776, 1472;  
 § 6104, 1493;  
 § 6104(b), 1480*n*, 1489;  
 § 6104(e), 1493;  
 § 6104(e)(1), 1501;  
 § 6104(e)(2)(B), 1496;  
 § 6104(f), 1496;  
 § 6105, 1490*n*;  
 § 6928, 1378;  
 § 6971(a), 1380;  
 § 7604(b), 1379;  
 § 7604a, 1379;  
 § 9607(a)(B), 1379;  
 § 9610, 328, 1380;  
 § 9659, 1379;  
 § 12101–12213, 392*n*;  
 § 12102, 1381;  
 § 12102(2), 392*n*, 960;  
 § 12102(a), 391;  
 § 12111(8), 392;  
 § 12111(9), 392;  
 § 12111(9)(B), 430;  
 § 12111(10), 393;  
 § 12112(a), 392*n*;  
 § 12112(d)(3)(B), 430;  
 § 12131–12134, 1141;  
 § 12131, 1381;  
 § 12132, 392*n*, 1381;  
 § 12181–12189, 1141;  
 § 12181, 1382;  
 § 12181(7), 1578;  
 § 12182(a), 1577;  
 § 12182(b)(2)(A)(i), 1579;  
 § 12182(b)(2)(A)(ii), 1579;  
 § 14071, 888;  
 § 14071(j), 888;  
 Title 47;  
 § 223(a)(1)(A), 1388;  
 § 223(a)(1)(A)(ii), 1387;  
 § 223(a)(1)(B), 1387, 1388,  
 1389–1390;  
 § 223(a)(2), 1387, 1388;  
 § 223(d), 1387, 1388, 1389;  
 § 223(d)(2), 1388;  
 § 223(e)(4), 1388;  
 § 223(e)(5), 1391;  
 § 230, 874–876;  
 § 230(c), 1389;  
 § 230(c)(1), 874;  
 § 230(c)(2), 874;  
 § 230(c)(2)(A), 875, 1389;  
 § 230(e)(1), 875;  
 § 230(e)(2), 875;  
 § 230(f)(2), 874;  
 § 230(f)(3), 874;  
 § 231(a)(1), 1388;  
 § 231(e)(6)(A), 1388;  
 Title 50;  
 § 1861, 1332;  
 § 1861(b)(2), 1332;  
 § 1861(d), 1332
- Uniform Commercial Code  
 (U.C.C.):  
 § 1-103, 1592;  
 § 2-104, 1603;  
 § 2-105, 1592;  
 § 2-207, 1594;  
 § 2-313, 1601;  
 § 2-314, 1601–1602;  
 § 2-315, 1601–1602;  
 § 2-316(1), 1602;  
 § 2-316(2), 1602;  
 § 2-718(1), 1597
- Federal Rules of Appellate  
 Procedure:  
 Rule 38, 123
- Federal Rules of Civil Procedure:  
 Rule 11, 123;  
 Rule 12(b)(6), 113;  
 Rule 23(a), 106, 108;  
 Rule 23(b), 106;  
 Rule 23(b)(3), 107;  
 Rule 26(b)(1), 107–108, 109;  
 Rule 26(b)(3), 110;  
 Rule 56, 113
- Federal Rules of Criminal  
 Procedure:  
 Rule 42, 126
- Federal Rules of Evidence  
 § 501, 109
- Code of Federal Regulations:  
 Title 5;  
 § 353.103, 331;  
 Title 7;  
 Part 1c, 1320;  
 Title 8;  
 Part 103, 898;  
 Part 104, 898;  
 § 204.5(h)(2), 320;  
 § 214.2(f), 898;  
 § 214.2(h), 320;  
 § 214.2(m), 898;  
 § 214.2(o), 319, 1316;  
 § 214.2(p), 319, 1316;  
 § 214.2(q), 319, 1316;  
 § 214.3, 898;  
 Title 9;  
 § 2.31(c), 1326;  
 § 2.31(d), 1326;  
 § 2.31(e), 1326;  
 Title 10;  
 Part 745, 1320;  
 Title 14;  
 Part 1230, 1320;  
 Part 1275, 1329;  
 Title 15;  
 Part 27, 1320;  
 § 120–130, 1334;

- Code of Federal Regulations:  
*(Continued)*
- § 730–774, 1334;  
 § 738.2(d)(2), 1394;  
 § 772, 1394;  
 § 774, 1394;  
 Title 16;  
 Part 254, 1375;  
 § 254.0(a), 1375;  
 Part 314, 815;  
 Part 316, 1314;  
 § 433.2(d), 1376;  
 Part 600, 359;  
 Part 1028, 1320;  
 Title 20;  
 Part 501, 320;  
 § 656.2, 320;  
 § 656.21a, 320;  
 § 1082(a)(2), 816;  
 § 1681(a)(6)(A), 1067;  
 Title 21;  
 Part 50, 1319;  
 § 50.20, 1319;  
 § 50.23, 1323;  
 § 50.25, 1323;  
 § 50.25(a), 1323;  
 § 50.25(b), 1323;  
 § 54.1 *et seq.*, 1659;  
 Part 56, 1319, 1324;  
 § 56.108–56.112, 1322;  
 § 56.109(b), 1319;  
 § 56.111(a)(1), 1319;  
 § 56.111(a)(2), 1319;  
 § 56.111(a)(3), 1319;  
 § 56.111(a)(4), 1319;  
 § 56.120, 1320;  
 § 56.121(d), 1320;  
 § 56.123, 1320;  
 Title 22;  
 § 41.31, 319;  
 § 41.53, 319;  
 § 41.61, 898;  
 Part 62, 1316;  
 § 62.9, 1316;  
 § 62.20, 1316;  
 § 121.1, 1394;  
 Part 225, 1320;  
 Title 24;  
 Part 60, 1320;  
 § 60.102, 1320;  
 Title 26;  
 § 301.6402-6(c)(1), 852;  
 Title 28;  
 Part 35, 1382;  
 § 35.104, 965*n*;  
 § 35.130(b)(1)(iii), 819;  
 § 35.130(h)(7), 965*n*;  
 § 35.140, 394;  
 § 36.104, 819;  
 § 36.202(b), 819;  
 Part 36.301, 1382;  
 § 36.301–10, 773;  
 Part 36.302, 1382;  
 § 36.302(a), 965*n*;  
 Part 36.303, 1382;  
 Part 36.304, 1382;
- Part 36.305, 1382;  
 Part 36.306, 1382;  
 Part 36.307, 1382;  
 Part 36.308, 1382;  
 Part 36.309, 1382;  
 Part 36.310, 1382;  
 § 36.401–6, 773;  
 Part 41, 1489;  
 Part 42, 1488;  
 § 42.404, 1488;  
 § 42.406, 1488;  
 § 42.407, 1488;  
 § 42.408, 1488;  
 § 42.411, 1488;  
 § 42.413, 1488;  
 § 42.415, 1488;  
 Part 46, 1320;  
 § 50.3, 1488;  
 § 85.3, 1404;  
 Title 29;  
 Part 4, 1425;  
 Part 5, 1425;  
 § 5.2(h), 1425;  
 Part 24, 1380;  
 § 103.1, 279;  
 § 103.30, 280–281;  
 Part 541, 306;  
 § 541.202, 308;  
 § 541.202(a), 306;  
 § 541.202(a)(2), 306;  
 § 541.300(a)(2), 306;  
 § 541.301(e)(8), 307;  
 § 541.303, 308;  
 § 541.303(a), 306;  
 § 541.303(d), 307;  
 § 541.400(a), 307;  
 § 541.602, 309;  
 § 541.603(c), 310;  
 § 541.710, 307;  
 Part 553, 307;  
 Part 825, 314;  
 § 825.110(c), 314;  
 § 825.113, 314;  
 § 825.114, 315;  
 § 825.204, 315;  
 § 825.216–218, 315;  
 § 825.301, 315;  
 § 825.305–307, 315;  
 § 825.310, 315;  
 § 825.400–404, 315;  
 § 825.500, 315;  
 § 825.700(a), 315–316;  
 Parts 1600–1610, 374–375;  
 Part 1601, 375;  
 § 1604.10, 412;  
 § 1604.11, 414;  
 Part 1605, 434;  
 Part 1606, 409;  
 § 1606.7, 409;  
 Parts 1620–1621, 385;  
 Part 1625, 401;  
 § 1625.23, 402;  
 Part 1627, 401;  
 § 1630, 393;  
 § 1630.2(j), 397;  
 § 1630.2(r), 394, 1467;
- § 1630.15(b)(2), 399;  
 § 1630.21(j), 960;  
 § 1641, 395;  
 § 1910.1030, 304;  
 § 1910.1200, 303–304;  
 § 1910.1450, 304;  
 Part 2509, 312;  
 Part 2510, 312;  
 Part 2520, 312;  
 Part 2530, 312;  
 Part 2550, 312;  
 Part 2590, 312;  
 § 2590.606, 312;  
 Title 31;  
 § 500, 1334;  
 Title 32;  
 Part 26, 1432*n*;  
 § 28.100 *et seq.*, 1428;  
 § 216.3, 1429;  
 § 216.3(b)(1), 1429;  
 § 216.4, 1429;  
 Part 219, 1321;  
 Title 34;  
 Part 5b, 1041;  
 § 5b.1 *et seq.*, 1507;  
 Part 21, 1505;  
 Parts 74–81, 1428;  
 § 74.1(a), 1428;  
 § 74.4(b), 1428;  
 § 74.61, 1435;  
 § 75.901, 1435;  
 § 75.903, 1435;  
 § 81.2, 1428;  
 § 82.100 *et seq.*, 1428;  
 Part 84, 1434;  
 Part 85, 1438;  
 § 85.105, 1438;  
 § 85.200–85.220, 1438;  
 § 85.811, 1438;  
 Part 86, 1434;  
 § 86.100, 1434;  
 Part 97, 1321;  
 § 99.1, 1029;  
 § 99.1(d), 753  
 § 99.3, 753, 876*n*, 1030, 1036;  
 § 99.5, 753;  
 § 99.8, 1031;  
 § 99.12, 753;  
 § 99.30, 1033;  
 § 99.31, 108*n*, 1031;  
 § 99.31(a)(4), 812;  
 § 99.31(a)(9)(iii), 1031;  
 § 99.31(a)(13), 1031;  
 § 99.31(a)(14), 1031;  
 § 99.31(a)(15), 1032;  
 § 99.32, 1032;  
 § 99.34, 1033;  
 § 99.37, 1030;  
 § 99.61, 1029*n*;  
 § 100.2, 1472;  
 § 100.3(b)(1)–(b)(5), 856;  
 § 100.3(b)(1), 1067;  
 § 100.3(b)(2), 1474, 1497;  
 § 100.3(b)(4), 1067;  
 § 100.3(b)(6), 1471;  
 § 100.3(b)(6)(i), 783;



- § 100.3(b)(6)(ii), 783;  
 § 100.3(c), 1472;  
 § 100.4, 1488;  
 § 100.4(d), 856;  
 § 100.5(i), 783;  
 § 100.6(b), 1488;  
 § 100.7, 1488;  
 § 100.7(d), 1488;  
 § 100.7(e), 1483;  
 § 100.8, 1488;  
 § 100.8(c), 1489;  
 § 100.8(d), 1493;  
 § 100.9, 1489;  
 § 100.9(a), 1493;  
 § 100.10, 1489;  
 § 100.13(g), 1479;  
 Part 104, 1464–1467;  
 § 104.3(j), 1465;  
 § 104.3(k)(1), 395;  
 § 104.3(k)(4), 965*n*;  
 § 104.3(l)(1), 1465;  
 § 104.3(l)(3), 768, 962, 1465;  
 § 104.3(l)(4), 1465;  
 § 104.4(b)(4), 1474;  
 § 104.4(b)(5), 1474;  
 § 104.6(a), 1471;  
 § 104.6(b), 1471;  
 § 104.6(c)(2), 1489;  
 § 104.7(a), 1489;  
 § 104.7(b), 1489;  
 § 104.11, 395;  
 § 104.12(a), 395;  
 § 104.13(a), 395;  
 § 104.13(b), 395;  
 § 104.14(a), 395;  
 § 104.22, 1466, 1467;  
 § 104.37, 889;  
 § 104.42(b)(1), 768;  
 § 104.42(b)(2), 768;  
 § 104.42(b)(3), 769;  
 § 104.42(b)(4), 768, 769;  
 § 104.42(c), 768;  
 § 104.43, 889, 1465;  
 § 104.43(a), 1479;  
 § 104.43(d), 1466;  
 § 104.44, 965*n*, 1466, 1467;  
 § 104.44(d), 894;  
 § 104.45, 856;  
 § 104.45(a), 856;  
 § 104.46(a), 818;  
 § 104.46(a)(2), 818;  
 § 104.46(c), 1465;  
 § 104.47(a), 1140;  
 § 104.47(b), 1466;  
 § 104.47(c), 1466;  
 § 104.61, 1483, 1493;  
 Part 104 App. A, 1140;  
 Part 106, 762, 1128, 1462;  
 § 106.2(g), 1477;  
 § 106.2(g)(1), 1478;  
 § 106.2(h), 1478, 1573;  
 § 106.2(n), 762;  
 § 106.2(o), 762;  
 § 106.2(p), 762;  
 § 106.3, 1471;  
 § 106.3(a), 783, 1471;  
 § 106.3(b), 783;  
 § 106.4, 1478;  
 § 106.6(c), 1067;  
 § 106.8, 1489;  
 § 106.12, 386, 767;  
 § 106.15(b), 762;  
 § 106.15(d), 762;  
 § 106.15(e), 762, 767;  
 § 106.21–106.23, 762;  
 § 106.21(b), 762–763;  
 § 106.21(b)(2), 1474;  
 § 106.21(c), 763;  
 § 106.22, 763;  
 § 106.23(b), 763;  
 § 106.31, 1129;  
 § 106.31(a), 1479;  
 § 106.31(b)(6), 1067;  
 § 106.32, 856, 1462;  
 § 106.33, 856, 1462;  
 § 106.34, 1129, 1462, 1474;  
 § 106.36, 1463;  
 § 106.37(b), 825*n*;  
 § 106.37(c), 1129, 1139;  
 § 106.38, 1463;  
 § 106.39, 889, 892, 1463;  
 § 106.40, 889, 892, 1463, 1474;  
 § 106.41, 1129, 1139;  
 § 106.41(a), 1139;  
 § 106.41(b), 1129, 1130, 1139;  
 § 106.41(c), 1130, 1139;  
 § 106.41(c)(1), 1130;  
 § 106.51–106.61, 386;  
 § 106.51(a)(3), 1474;  
 § 106.61, 386;  
 § 106.71, 1483, 1489, 1493;  
 Part 110, 1469;  
 § 110.10(a), 819;  
 § 110.12, 819;  
 § 110.13, 819, 1471;  
 § 110.31, 1469;  
 § 110.32, 1469;  
 § 110.33, 1470;  
 § 110.34, 1483;  
 § 110.35, 1470;  
 § 110.39, 1470  
 § 361.47, 894;  
 Part 602, 1555, 1556;  
 § 602.1, 1556;  
 § 602.10, 1556;  
 § 602.13–602.26, 1556;  
 § 602.14(b), 1557;  
 § 602.14(b)(2), 1557;  
 § 602.15(a)(5), 1557;  
 § 602.15(a)(6), 1557;  
 § 602.18, 1557;  
 § 602.18(a), 1557;  
 § 602.18(b), 1557;  
 § 602.21(c), 1560;  
 § 602.22(c), 1556;  
 § 602.23, 1560;  
 § 602.23(c)(3), 1557;  
 § 602.24, 1556;  
 § 602.25, 1557;  
 § 602.26, 1559;  
 § 602.27(e)–(f), 1556;  
 § 602.28, 1556;  
 § 602.31(b)(2), 1556, 1557;  
 § 602.31(b)(3), 1556, 1557;  
 § 602.34–602.45, 1558;  
 § 602.35(b)(1)(ii), 1556;  
 § 602.36(c), 1556;  
 § 602.45, 1558;  
 Part 603, 1556;  
 Part 654.1, 814;  
 Part 668, 812–813, 1122–1123;  
 § 668.3, 813;  
 § 668.8, 812;  
 § 668.8(e), 813;  
 § 668.14, 813;  
 § 668.15, 851;  
 § 668.19, 813;  
 § 668.24, 816;  
 § 668.37, 815;  
 § 668.40, 814;  
 § 668.46, 887, 1123;  
 § 668.46(b)(12), 888;  
 § 668.48, 1123;  
 § 668.49, 1123;  
 § 668.84, 1436;  
 § 668.85–668.98, 1435;  
 § 668.92, 1436;  
 § 668.133, 816;  
 § 668.136(c), 816;  
 Part 673, 814;  
 Part 674, 814;  
 § 674.4, 850;  
 § 674.41 *et seq.*, 849;  
 § 674.41(a), 849;  
 § 674.42(b), 849;  
 § 674.42(b)(4), 849;  
 § 674.42(c), 849;  
 § 674.43, 850;  
 § 674.46, 851;  
 § 674.47, 851;  
 Part 675, 814;  
 § 675(a), 850;  
 Part 676, 814;  
 Part 682, 814, 815;  
 § 682.610(a), 850;  
 § 682.713, 1435;  
 § 688.185–668.198, 1435;  
 Part 690, 814;  
 Part 692, 814;  
 Title 36;  
 Part 1190, 1384, 1466*n*;  
 Part 1191, 1384, 1466*n*;  
 Title 38;  
 Part 16, 1321;  
 Part 21, 814;  
 Title 40;  
 Part 26, 1321;  
 Title 41;  
 Part 60-1, 443;  
 § 60-1.1, 1425;  
 § 60-1.4, 405;  
 § 60-1.5, 405;  
 § 60-1.5(a)(4), 406;  
 § 60-1.5(a)(5), 406;  
 § 60-1.7(a), 405;  
 § 60-1.20, 406;  
 § 60-1.21–60-1.24, 406;  
 § 60-1.26(b)(2), 406;

## Code of Federal Regulations:

*(Continued)*

§ 60-1.27(b), 406;  
 § 60-1.40, 443;  
 Part 60-2, 443;  
 § 60-2.1(d)(4), 406;  
 § 60-2.10, 443;  
 § 60-2.16, 443;  
 § 60-2.16(e)(1), 443;  
 Part 60-250, 444;  
 § 60-250.21(f), 444;  
 § 60-250.21(g), 444;  
 Part 60-741, 444;  
 § 60-741.21(f), 444;  
 § 60-741.21(g), 444;  
 Title 42;  
 § 50.604–50.606, 1659;  
 Part 57, 850;  
 § 57.210(b), 850;  
 § 57.215(c), 850;  
 § 59.1–59.12, 892;  
 § 59.5, 892;  
 Part 60, 850;  
 § 60.61, 850;  
 Part 73, 1333;  
 Part 93, 1329;  
 § 93.103, 1330;  
 § 93.224, 1330;  
 § 93.226, 1330;  
 § 93.307, 1330;  
 § 93.308, 1330;  
 § 93.310, 1330;  
 § 93.311, 1330;  
 § 93.313, 1330;  
 § 93.315, 1330;  
 § 93.413, 1330;  
 Part 121, 1333;  
 Part 331, 1333;  
 § 412.2(f)(2), 1398;  
 § 412.2(f)(7), 1398;  
 § 412.105, 1398;  
 § 413.75 *et seq.*, 1398;  
 § 413.75–413.83, 1400, 1401;  
 § 413.75, 1399;  
 § 413.17(a), 1398;  
 § 413.81(a)(1), 1399;  
 § 413.85, 1398;  
 § 413.85(c), 1399;  
 § 413.86, 1401;  
 § 413.86(e), 1400;  
 § 413.90(a), 1398;  
 Title 45;  
 Part 46, 1319, 1321, 1324;  
 § 46.102, 1321;  
 § 46.109(b), 1319;  
 § 46.111(a)(1), 1319;  
 § 46.111(a)(2), 1319;  
 § 46.111(a)(3), 1319;  
 § 46.111(a)(4), 1319;  
 § 46.116, 1319;  
 Part 90, 776, 1469;  
 § 90.2(a), 1469;  
 § 90.3(a), 1479;  
 § 90.3(b)(2), 1472;  
 § 90.12, 1474;  
 § 90.14, 776;

§ 90.15, 777;  
 § 90.31, 1489;  
 § 90.41–90.50, 1493;  
 § 90.44(a), 1489;  
 § 90.47(b), 1480*n*, 1489;  
 § 90.49, 1472;  
 § 90.50, 1496;  
 Part 91, 1469;  
 § 91.45, 1483;  
 Part 160, 1402;  
 § 160.103, 1402, 1403;  
 Part 164, 1402;  
 § 164.501, 1402;  
 § 164.502(e), 1402;  
 § 164.504(a)–(c), 1403;  
 § 164.504(e), 1402;  
 § 164.530(a)(1), 1403;  
 § 164.530(b), 1403;  
 § 164.530(d)(1), 1403;  
 Part 689, 1329;  
 § 689.2(c), 1330;  
 Part 690, 1321;  
 Title 48;  
 § 3.104–3.111, 1425;  
 § 9.104-1(d), 1425;  
 § 16.1–16.7, 1425;  
 § 22.300 *et seq.*, 1425;  
 § 49.101(b), 1425;  
 Part 203, 1659;  
 § 235.017(a)(2), 1659;  
 § 324.70, 713;  
 § 352.224-70, 713;  
 § 909.503–507.2, 1659;  
 Title 49;  
 Part 11, 1321;  
 § 382.303, 269;  
 § 382.305, 269;  
 § 382.309, 269;  
 § 382.311, 269;  
 § 382.605, 269

## State statutes:

Alabama:  
 Alabama Code;  
 § 16-1-28(a), 1054;  
 § 16-1-28(b), 1054;  
 Alaska:  
 Alaska Human Rights  
 Act, 440;  
 Arizona:  
 Arizona Revised Statutes;  
 § 13-1093, 883;  
 § 13-1982, 883;  
 § 15-442(A)(16), 884;  
 § 15-679(A)(3), 883;  
 § 15-679(A)(9), 883;  
 § 15-1637, 246;  
 § 32-1401(25)(x), 1290;  
 § 32-1854(45), 1290;  
 § 36-2302, 1290;  
 § 41-2751 *et seq.*, 1629;  
 § 41-2753, 1629;  
 § 41-2753(A)(2), 1629;  
 § 41-2753(B), 1629;  
 § 41-2753(C), 1629;  
 § 41-2753(D), 1629;

Arkansas;  
 Arkansas Constitution;  
 Amend. 68, § 1, 1289;  
 Arkansas Code Annotated;  
 § 6-63-104(a), 542;  
 California:  
 California Constitution;  
 Art. I, § 1, 1145;  
 Art. I, § 2, 1210;  
 Art. I, § 13, 1210;  
 Art. I, § 31(a), 791;  
 Art. IX, § 6, 1607;  
 Art. IX, § 9, 188, 1256;  
 Art. XIII, § 3(a), 1187;  
 Art. XIII, § 3(d), 1187;  
 California Fair Employment  
 and Housing Act, 376;  
 § 12940, 425*n*;  
 California Leonard Law, 1023;  
 California Tort Claims Act;  
 § 835, 884;  
 California Proposition 209, 455,  
 791;  
 California Business &  
 Professions Code;  
 § 1260, 1532;  
 California Code of Civil  
 Procedure;  
 § 1094.5, 577;  
 California Education Code  
 § 23604, 1164;  
 § 23604.1, 1164;  
 § 23751, 1164;  
 § 32050, 1086, 1275;  
 § 66010.8(a), 839–840;  
 § 66301, 994;  
 § 66400–66402, 1275;  
 § 67381, 879;  
 § 68062(h), 837–839;  
 § 76120, 994, 1013;  
 § 87100–87107, 455;  
 § 87101(d), 455;  
 § 92612, 705;  
 § 94367, 994, 1023;  
 California Government Code;  
 § 820.2, 334;  
 § 995 *et seq.*, 154;  
 § 12940, 425*n*;  
 § 19130, 1607;  
 § 53060, 1607;  
 § 53094, 1178;  
 California Health & Safety Code  
 Ch. 1.3, 1288;  
 § 7054.4, 1288;  
 California Penal Code;  
 § 290(a)(1)(A), 1275;  
 § 626.2, 1217;  
 § 626.4, 1217, 1218;  
 § 626.6, 1217, 1246;  
 § 626.7, 1217;  
 California Public Contract Code;  
 § 3410, 1599;  
 § 10500.5(a), 1615;  
 § 10501, 1615;  
 § 10503, 1612;  
 § 10860, 1599;

- California Administrative Code;  
Title 5, § 4000 *et seq.*, 1164;  
Colorado:  
Colorado Constitution;  
Art. VIII, § 5, 243;  
Art. VIII, § 5(1), 1258;  
Art. VIII, § 5(2), 1258;  
Colorado Revised Statutes;  
§ 23-5-124, 1275;  
§ 23-21-403(1)(a), 243;  
§ 24-113-101 *et seq.*, 1629;  
Connecticut:  
Connecticut Uniform Manage-  
ment of Institutional Funds  
Act, 181;  
District of Columbia:  
District of Columbia Nation's  
Capitol Religious Liberty and  
Academic Freedom Act,  
1056*n*;  
District of Columbia Non-Profit  
Corporation Act, 177;  
District of Columbia Self-  
Government and Governmen-  
tal Reorganization Act, 1056*n*;  
Florida:  
Florida Tort Claims Act, 192;  
Florida Statutes;  
§ 240.605, 1531;  
§ 240.4022, 1531;  
§ 240.5339-240.5349, 1564;  
§ 468.454, 1122, 1275;  
§ 468.4562, 1564;  
§ 481.223, 1612;  
§ 489.113, 1612;  
§ 768.28, 192;  
§ 768.075, 200;  
§ 1006.63(2), 1086;  
Florida Administrative Code  
Annotated;  
Rule 6C-6.002(7), 801;  
Georgia:  
Georgia Open Records Act,  
1282;  
Georgia Code Annotated;  
§ 16-9-93.1, 868;  
§ 45-10-23, 1660;  
§ 45-10-24.1, 1660;  
§ 45-10-25, 1660;  
§ 45-10-26, 1660;  
§ 45-10-40, 1660;  
Idaho:  
Idaho Code;  
§ 54-2902(d), 1629, 1629*n*;  
§ 63-3029A, 1532;  
§ 67-2309, 1613;  
§ 67-5711C, 1613;  
Illinois:  
Illinois Community College  
Tenure Act, 484;  
Illinois Governmental  
Ethics Act, 1659;  
Illinois University Credit and  
Retail Sales Act, 1630;  
Illinois Compiled Statutes;  
Title 5, § 350(2)(d), 154;  
Title 20, § 3110/0.01 *et seq.*,  
1612;  
Title 30, § 575/1 *et seq.*, 1615;  
Title 35, § 200/15-35, 1637;  
Title 35, § 205/19.1, 1194;  
Title 110, § 25/1 *et seq.*, 1564;  
Title 110, § 75/1, 1626*n*;  
Title 110, § 100/1, 1659;  
Title 720, § 120/5, 1122;  
Illinois Revised Statutes;  
Ch. 38, para. 81-26, § 6(1),  
1289;  
Ch. 144, para. 221, 1086;  
Indiana:  
Indiana Teachers Tenure Act,  
479;  
Indiana Code;  
§ 6-3-3-5(d), 1532;  
§ 10-4533, 1220;  
Iowa:  
Iowa Code;  
Ch. 23A, 1630;  
§ 23 A.2(2), 1630;  
§ 23 A.2(10)(K), 1630;  
§ 73.6, 1599;  
§ 262.44, 1629;  
§ 279.24, 594;  
Kansas:  
Kansas Act for Judicial  
Review and Civil  
Enforcement of Agency  
Actions, 1287;  
Kansas Statutes Annotated;  
§ 76-711(a), 1287;  
§ 76-729(c)(4), 831;  
§ 76-731(a), 840;  
Louisiana:  
Louisiana Administrative  
Procedure Act, 1287;  
Louisiana Public Records Act,  
247;  
Louisiana Revised Statutes  
Annotated;  
§ 17:3361(A)(5), 1606;  
§ 39:1551-1755, 1606;  
§ 39:1556, 1606;  
§ 42.1111C(2)(d), 1600;  
§ 42.1112B(2), 1600;  
§ 42.1112B(3), 1600;  
Maryland:  
Maryland Education Code;  
§ 26-201, 1275;  
§ 26-301, 1275;  
Maryland Health Code;  
§ 20-214(b), 1289;  
Maryland State Finance and  
Procurement Code;  
§ 14-207(c), 1599;  
Massachusetts:  
Massachusetts Fair Educational  
Practices Act, 777;  
Massachusetts General Laws;  
Ch. 40, § 3, 1178;  
Ch. 41, § 98F, 887;  
Ch. 75 App., § 1-18, 1614;  
Ch. 93A, 1609-1610;  
Ch. 112, § 52, 1275;  
Ch. 151C, § 2(f), 1035;  
Ch. 151C, § 2A(a), 763;  
Ch. 231, § 85K (2002), 194;  
Ch. 266, § 120, 1217;  
Ch. 266, § 121A, 1217;  
Ch. 266, § 123, 1217;  
Ch. 269, § 17-19, 1086, 1275;  
Michigan:  
Michigan Employee  
Right-to-Know Act, 704;  
Michigan Compiled Laws;  
§ 691.1408, 154;  
§ 722.52, 726;  
§ 750.411e, 1122, 1275;  
Minnesota:  
Minnesota Statutes;  
§ 16B.17, 1607;  
§ 137.35, 1599;  
§ 336.2-104(1), 1603;  
§ 363A.01 *et seq.*, 1289;  
§ 604.10, 1603;  
Mississippi:  
Mississippi Public Records Act,  
1035;  
Missouri:  
Missouri General Not-for-Profit  
Corporation Law, 175;  
Montana:  
Montana Code Annotated;  
§ 20-25-302, 1630-1631;  
§ 39-2-901 *et seq.*, 1273;  
Nebraska:  
Nebraska Revised Statutes;  
§ 81.15, 1599;  
Nevada:  
Nevada Revised Statutes;  
§ 398.155 *et seq.*, 1564;  
§ 398.245, 1564;  
§ 398.490, 1564;  
New Hampshire:  
New Hampshire Consumer  
Protection Act, 178;  
New Jersey:  
New Jersey Act of 1909, 479;  
New Jersey Act of 1933, 479;  
New Jersey Charitable  
Immunity Act, 194;  
New Jersey Desert Storm  
Law, 155;  
New Jersey Domestic  
Partnership Act, 441;  
New Jersey Law Against  
Discrimination, 425*n*,  
440-441;  
New Jersey Tort Claims Act,  
155-156;  
New Jersey Statutes Annotated;  
§ 26:3D-17, 1274;  
§ 40:55-39(d), 1177;  
§ 52:13D-12-27, 1274;  
§ 59:10A-1, 155;  
§ 59:10A-2, 155;  
§ 59:10A-4, 156;  
New York:  
New York Bundy Law, 1261;

- State statutes: (*Continued*)
- New York Freedom of Information Law (FOIL), 1328;
- New York Standardized Testing Act, 1355;
- New York State Human Rights Law, 860;
- New York State Roommate Law, 860;
- New York Agriculture and Markets Law, 1275;
- New York Civil Practice Law and Rules;
- Art. 78, 577–578;
- New York Education Law;
- § 201, 1259;
- § 207, 1259;
- § 216, 1259;
- § 217, 1259;
- § 224(1)(a), 1275;
- § 224(2), 1275;
- § 236, 175;
- § 355(2)(m), 183, 877;
- § 376, 1612;
- § 6401, 1261;
- § 6450, 988;
- North Carolina:
- North Carolina Open Meetings Law, 1040;
- North Carolina General Statutes;
- § 105-278.4, 1194;
- § 116-15, 1270;
- Ohio:
- Ohio Administrative Procedure Act, 1286;
- Ohio Public Records Act, 704, 1038;
- Ohio Revised Code Annotated;
- § 3333.38, 1275;
- § 3343.06, 184;
- § 3345.45, 1275;
- § 3354.161, 1615;
- § 4115.34, 1599;
- Oklahoma:
- Oklahoma Constitution;
- Art. 6, § 31a, 1257;
- Art. 13-A, 1257;
- Art. 13-B, 1257;
- Oklahoma Competitive Bidding Act, 1613;
- Oregon:
- Oregon Constitution;
- Art. I, § 20, 442;
- Art. XIO-F(1), 1625;
- Oregon Revised Statutes;
- § 20.107, 124;
- § 183.480(1), 101;
- § 348.835, 1268;
- § 351.070(2)(a), 1626;
- § 351.070(2)(c), 1626;
- § 351.160(1), 1625;
- Pennsylvania:
- Pennsylvania English Fluency in Higher Education Act, 1274;
- Pennsylvania Unfair Trade Practices and Consumer Protection Law, 848;
- Pennsylvania Whistleblower Law, 1274*n*;
- Pennsylvania Consolidated Statutes;
- Title 18, § 7107, 1275;
- Title 24, § 2502, 887, 1275;
- Title 35, § 7602 *et seq.*, 1289;
- Title 53, § 2181, 1164;
- Title 71, § 646.1, 877;
- Title 72, § 5020-204(a)(3), 1196;
- South Carolina:
- South Carolina Freedom of Information Act, 247;
- South Carolina Code Annotated;
- § 1-23-360, 111–112;
- § 59-102-30, 1275;
- § 59-103-30 (2001), 542;
- South Dakota:
- South Dakota Codified Laws;
- § 10-4-9.2, 1190;
- Tennessee:
- Tennessee Code Annotated;
- § 49-8-304, 1288;
- Texas:
- Texas Tort Claims Act, 193;
- Texas Education Code Annotated;
- § 4.30(a), 1275;
- § 4.30(b)(2), 1275;
- § 37.152, 914;
- § 51.803, 790;
- § 51.842(b), 1274;
- § 54.052(f), 828;
- § 54.054, 828;
- § 61.301–61.319, 1267;
- Texas Penal Code Annotated;
- § 36.08, 1661;
- Texas Revised Civil Statutes Annotated;
- Art. 601b, 1599, 1612;
- Utah:
- Utah Higher Education Act of 1969, 172;
- Utah Compiled Laws;
- § 1855, 172;
- Vermont:
- Vermont State Employee Labor Relations Act, 442;
- §961(6), 442;
- Vermont Statutes Annotated;
- Title 1, § 317(c)(11), 1040;
- Title 16, § 2282, 831;
- Title 32, § 3001(c), 439;
- Virginia:
- Virginia Constitution;
- Art. VIII, § 11, 1248;
- Virginia Education Facilities Authority Act, 1248;
- Virginia State and Local Government Conflict of Interests Act, 1660;
- Virginia Code Annotated;
- § 2.2-2827(B) (2001), 659;
- § 2.2-3106(C)(7), 1660;
- § 2.2-3110, 1660;
- § 2.2-3120–3122, 1660;
- § 18.2-56, 1086;
- § 23-7.4:3(A), 832;
- § 182–423, 1020;
- Washington:
- Washington Revised Code;
- § 28B.10.814, 68;
- § 28B.63.010 *et seq.*, 1630;
- § 28B.101.040, 67–68;
- § 43.19.190, 1607–1608;
- § 49.60.400(1), 791;
- West Virginia:
- West Virginia Administrative Procedure Act, 1287;
- West Virginia Code;
- § 5G-1-1–5G-1-4, 1612;
- § 18-29-1 *et seq.*, 275;
- § 29A-5-4(g), 1287;
- Wisconsin:
- Wisconsin Administrative Code;
- § UWS 17.01, 919;
- Wisconsin Statutes;
- § 36.11(22), 1275;
- § 939.645(1)(b), 1020

# Cases Index

## A

- A&M Records v. Napster*, 1340, 1347-1348
- Aase v. South Dakota Board of Regents*, 579n
- Aase v. State*, 736
- AAUP v. Bloomfield College*, 580-581, 728
- AAUP v. Central State University*, 500
- AAUP, University of Toledo Chapter v. University of Toledo*, 139
- Abalkhail v. Claremont University Center*, 940-941
- Abate v. Mundt*, 1205
- ABL Management, Inc. v. Board of Supervisors of Southern University and Agricultural & Mechanical College*, 1605-1606, 1621
- Abood v. Detroit Board of Education*, 290, 1059
- Ackerman v. Metropolitan Community College Area*, 595
- Ackerman v. President & Trustees of the College of Holy Cross*, 991-992
- ACLU Student Chapter v. Mote*, 1224
- Adair v. Troy State University of Montgomery*, 1379-1380
- Adamian v. Jacobson*, 535
- Adams v. Bell*, 1452n, 1492
- Adams v. Bennett*, 1492
- Adams v. Califano*, 1451
- Adams v. Richardson*, 1451, 1491-1492
- Adamson v. Wharton*, 1660-1661
- Adarand Constructors, Inc. v. Pena*, 788, 796
- Adelphi University*, 495
- Adelphi University v. Board of Regents of the State of New York, In re*, 175
- Ad-Hoc Committee of Baruch Black & Hispanic Alumni Association v. Bernard M. Baruch College*, 243-244
- Adler v. Board of Education*, 620-621
- Advent Systems, Ltd. v. Unysis Corp.*, 1592-1593
- Advocates for the Arts v. Thomson*, 1447
- Agostini v. Felton*, 62
- Ahlum v. Administrators of Tulane Educational Fund*, 989
- Ahmed v. University of Toledo*, 778, 834
- Aievoli v. State University of New York*, 557
- Aimster Copyright Litigation, In re*, 1348
- Alabama; United States v.*, 1255
- Alabama A&M University v. King*, 309
- Alabama State Teachers Association v. Alabama Public School & College Authority*, 1452-1453, 1455
- Alamo Foundation v. Secretary of Labor*, 308
- Albach v. Odle*, 1116
- Albany Medical College v. Lobel*, 475-476
- Albert v. Carovano*, 46-47, 988-989
- Albertini; United States v.*, 1005
- Albert Merrill School v. Godoy*, 734
- Albertson's v. Kirkingburg*, 961
- Albright College, In re*, 1186
- Alcorn v. Vaksman*, 930-931
- Alden v. Maine*, 239, 309, 1298, 1303-1304, 1310-1313, 1500
- Alderson v. New York State College of Agriculture & Life Sciences*, 1281-1282
- Alexander v. Choate*, 1475-1477, 1498
- Alexander v. Gardner-Denver Co.*, 274, 299-300
- Alexander v. Sandoval*, 947n, 1135-1136, 1476-1477, 1483-1484, 1487, 1497-1498, 1576
- Alexander v. Yale University*, 943, 945-946
- Alford v. Emory University*, 1188-1189
- Alicea v. New Brunswick Theological Seminary*, 487-488

- Alkhabaz aka Jake Baker; United States v.*, 869–870, 1395–1396
- Allaire v. Rogers*, 695–696
- Allen v. Regents of the University System of Georgia*, 1301
- Allen; State v.*, 748, 1086
- Allis-Chalmers Corp. v. Lueck*, 293
- Alpha Gamma Zeta House Association v. Clay County Board of Equalization*, 1190
- ALS Scan, Inc. v. RemarQ Communities, Inc.*, 1348–1349
- Altschuler v. University of Pennsylvania Law School*, 936–937
- Alumni Association of the University of Oregon v. Commissioner*, 1419n
- American Asbestos Training Center, Ltd. v. Eastern Iowa Community College*, 1630
- American Association of Cosmetology Schools v. Riley*, 1440, 1441, 1487
- American Association of University Women v. Board of Trustees of the California State University*, 839
- American Bar Association; United States v.*, 1548n
- American Civil Liberties Union v. Reno*, 1389
- American Civil Liberties Union of Georgia v. Miller*, 868–869, 872–873, 1384n
- American Future Systems v. Pennsylvania State University* (618 F.2d 252), 1230–1232
- American Future Systems v. Pennsylvania State University* (688 F.2d 907), 1232–1234, 1236
- American Future Systems v. Pennsylvania State University* (752 F.2d 854), 1234
- American Future Systems v. Pennsylvania State University* (553 F. Supp. 1268), 1234
- American Future Systems v. Pennsylvania State University* (568 F. Supp. 666), 1234
- American Geophysical Union v. Texaco, Inc.*, 1338–1339
- American Hospital Association v. NLRB*, 281
- American International College*, 494
- American Library Association v. Pataki*, 1272, 1384n
- American Library Association; United States v.*, 1390n, 1391n
- American Society for the Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York, In re*, 1280, 1328
- American Society of Mechanical Engineers v. Hydrolevel Corp.*, 1370, 1547
- Ames Contracting Co. v. City University of New York*, 1605, 1612
- Amherst College v. Assessors*, 1186
- Anderson v. Creighton*, 349
- Anderson; People v.*, 1086, 1122
- Anderson v. University of Wisconsin*, 805
- Anderson v. Vanden Dorpel*, 342
- Andover Newton Theological School, Inc. v. Continental Casualty Company*, 152–153
- Andre v. Pace University*, 215
- Andrews v. Knowlton*, 917
- Animal Legal Defense Fund v. Espy*, 1327
- Animal Legal Defense Fund v. Institutional Animal Care & Use Committee of the University of Vermont*, 1280, 1328
- Animal Legal Defense Fund v. Madigan*, 1325, 1327
- Animal Legal Defense Fund v. Quigg*, 1358
- Anker v. G. D. Searle & Co.*, 711
- Ann Arbor, City of v. University Cellar*, 1193, 1639
- Ansari v. New York University*, 215
- Anthony v. Syracuse University*, 10, 988
- Antioch University, In re*, 178–179
- Antonelli v. Hammond*, 1107
- Apex Hosiery Co. v. Leader*, 1570
- Apfel v. Huddleston*, 209
- Apollo Media Corp. v. Reno*, 1388
- Appalachian Student Housing Corp., In re*, 1185–1186, 1631
- Appeal of. See name of party*
- Application of. See name of party*
- Arabian American Oil Co.; EEOC v.*, 1484
- ARA v. NLRB*, 281
- Arcadia Development Corp. v. Bloomington*, 1176
- Arenson v. Southern University*, 512
- Arista Records, Inc. v. MP3Board, Inc.*, 1349
- Arizona v. Hicks*, 865–866
- Arizona Board of Regents v. Wilson*, 754
- Arkansas Educational Television Commission v. Forbes*, 997, 998, 999, 1216
- Arkansas Gazette Co. v. Pickens*, 1277–1278
- Arkansas Writers' Project, Inc. v. Ragland*, 1448
- Arlene Egelberg, In re Claim of*, 327
- Arlosoroff v. NCAA*, 1562
- Armstrong v. Accrediting Council for Continuing Education & Training, Inc.*, 853
- Armstrong v. United States*, 56
- Armeson v. Board of Trustees, McKendree College*, 470
- Armeson v. Jezewinski*, 350–351
- Arnett v. Kennedy*, 530
- Arnold v. State*, 1275
- Aronson v. University of Mississippi*, 809
- Arriaga v. Members of Board of Regents*, 735–736
- Arrington v. Taylor*, 1098
- Arroyo v. Rosen*, 339–340
- Ashcroft v. ACLU* (535 U.S. 564), 1389, 1390n
- Ashcroft v. ACLU* (542 U.S. 656), 1389, 1392n
- Ashcroft; Doe v.*, 1387
- Ashcroft v. Free Speech Coalition*, 1388, 1394
- Ashiegbu v. Williams*, 980
- Associated Press v. Crofts*, 1278
- Associated Press v. Walker*, 1108n
- Associated Students of the University of California at Riverside v. Regents of the University of California*, 1058
- Associated Subcontractors of Massachusetts, Inc. v. University of Massachusetts Building Authority*, 1614
- Association for Disabled Americans v. Florida International University*, 1307
- Association of Accredited Cosmetology Schools v. Alexander*, 851
- Association of American Medical Colleges v. Carey*, 1355
- Association of American Medical Colleges v. Cuomo*, 1355
- Association of New Jersey State College Faculties v. Dungan*, 499
- Atascadero State Hospital v. Scanlon*, 1308, 1309, 1498, 1500
- Atlanta College of Medical & Dental Careers, Inc. v. Riley*, 1440
- Atlantic Cleaners & Dyers v. United States*, 1369
- Atlantic Coast Conference, In re*, 1194
- Atlantic Community College v. Civil Service Commission*, 1163
- Auburn Alliance for Peace & Justice v. Martin*, 1005, 1009–1010
- Auburn University v. Advertiser Co.*, 1277

- Auburn University v. Southern Association of Colleges & Schools*, 1542, 1546
- Auer v. Robbins*, 309–310
- Auerbach v. Rettaliata*, 1200–1201
- Avery v. Midland County*, 1205
- Avila v. Citrus Community College*, 1152n
- Avins v. White*, 1550–1553
- Axon-Flynn v. Johnson*, 39, 653, 741–745
- Ayers v. Allain*, 1455, 1456
- Ayers v. Fordice*, 1460
- Ayers v. Thompson*, 1460n
- Aymes v. Bonelli*, 259
- Ayoub v. Texas A&M University*, 668, 671
- B**
- Bair v. Shippensburg University*, 1023–1024
- Bakalis v. Board of Trustees of Community College District No. 504*, 188
- Baker v. Lafayette College*, 572
- Baker v. Southern University*, 173–174
- Bakke v. Regents of the University of California*, 786, 798, 800, 821
- Ballou v. Sigma Nu General Fraternity*, 1090n
- Bally v. Northeastern University*, 1146
- Baltimore, City of v. Poe*, 1172
- Baltimore Teachers Union v. Mayor of Baltimore*, 478
- Banks v. Dominican College*, 937
- Banks v. NCAA*, 1569
- Barazi v. West Virginia State College & the Board of Directors of the State College System*, 276
- Barbay v. NCAA & Louisiana State University*, 1564
- Bargstedt v. Cornell University*, 577
- Barham v. University of Northern Colorado*, 482, 543
- Barker v. Hardway*, 1002
- Barnes v. Gorman*, 1383, 1497, 1498
- Barran, Ex parte*, 1094
- Barrett v. Rosenthal*, 875
- Barrett v. University of Colorado Health Sciences Center*, 1018n
- Barrett v. University of Texas Medical Branch at Galveston*, 329
- Barrett v. West Chester University*, 1136
- Bartlett v. New York State Board of Law Examiners*, 961
- Bartlett, State ex rel. v. Pantzer*, 755
- Bartnicki v. Vopper*, 1386
- Basic Books v. Kinko's Graphics Corp.*, 1337
- Bason v. American University*, 37
- Batcheller v. Commonwealth ex rel. Rector & Visitors of University of Virginia*, 1622
- Bates v. United States*, 1406, 1437
- Batzel v. Smith*, 875
- Bauer v. Dann*, 210
- Baughman v. Freienmuth*, 1107
- Baughman v. State*, 879
- Bayless v. Martine*, 1004, 1005
- Bazaar v. Fortune*, 1101
- Bazemore v. Friday*, 519, 1454n
- Beach v. University of Utah*, 197
- Bearman v. University of Notre Dame*, 1212n
- Beaulieu, State ex rel. v. Clausen*, 1289
- Beck v. Board of Trustees of State Colleges*, 104, 576
- Begel v. Wisconsin Labor & Industry Review Commission*, 323
- Begley v. Corporation of Mercer University*, 1124
- Behagen v. Intercollegiate Conference of Faculty Representatives*, 1116
- Behrend v. State*, 1534n
- Behrens v. Pelletier*, 349
- Beitzel v. Jeffrey*, 553
- Belle Terre, Village of v. Boraas*, 1180–1181
- Bellevue College v. Greater Omaha Realty Co.*, 1595–1596
- Belliveau v. Rerick*, 219
- Bence v. Breier*, 530
- Bender v. Alderson-Broadbuss College*, 932
- Bennett v. Wells College, In re*, 541
- Bennun v. Rutgers, The State University of New Jersey*, 509–511, 529
- Benson v. Allphin*, 351
- Bercovitch v. Baldwin School*, 925–926
- Berkowitz v. President & Fellows of Harvard College*, 474–475
- Berkshire School v. Town of Reading*, 1184
- Bethel School District v. Fraser*, 630
- Betts v. Rector & Visitors of the University of Virginia*, 962
- Beukas v. Fairleigh Dickinson University*, 579n, 728–729, 731
- Bexar Appraisal District v. Incarnate Word College*, 1187
- Bickerstaff v. Vassar College*, 513
- Bicknese v. Sultana*, 345
- Bidwell v. Zoning Board of Adjustment*, 1177
- Bienkowski v. Northeastern University*, 311
- Biggiam v. Board of Trustees of Community College District No. 516*, 484
- Bigler v. Cornell University, In re*, 531
- Billingsley, In re*, 847
- Billmyre v. Sacred Heart Hospital of Sisters of Charity*, 263
- Bilut v. Northwestern University*, 807–808
- Bingler v. Johnson*, 1412n
- Bird v. Lewis & Clark College*, 971, 1485–1486
- Bishop v. Aronov*, 39, 611, 631–634, 644, 650, 653, 655, 1015
- Bishop v. Texas A&M University*, 207
- Bishop v. Wood*, 549–550
- Bishop Ford Central Catholic High School; NLRB v.*, 284
- Blackwell College of Business v. Attorney General*, 1262–1263
- Blair v. Board of Regents for the Oklahoma Agricultural & Mechanical College*, 142
- Blair v. Washington State University*, 1128
- Blair Academy v. Blainstown*, 1192
- Blake v. University of Rochester*, 1152
- Blanchard v. Lansing Community College*, 173
- Blank v. Board of Higher Education of the City of New York*, 185, 934–935
- Blanton v. State University of New York*, 979
- Blatt v. University of Southern California*, 1529–1530
- Bloch v. Temple University*, 676
- Bloss v. University of Minnesota*, 206
- Blum v. Schlegel*, 642n, 649
- Blum v. Yaretsky*, 43, 1544
- Board of Community College Trustees for Baltimore County—Essex Community College v. Adams*, 586–587
- Board of Control of Eastern Michigan University v. Burgess*, 1593
- Board of County Commissioners v. Umbehr*, 1448–1449
- Board of Curators, University of Missouri v. Horowitz*, 131, 132, 592–593, 929, 983–985
- Board of Education of Independent School District No. 92 v. Earls*, 1144–1145
- Board of Education of Rogers, Arkansas v. McCluskey*, 924
- Board of Governors of State Colleges & Universities; EEOC v.*, 300
- Board of Governors of the University of North Carolina v. Helplingstine*, 1363–1364, 1630

- Board of Governors of Wayne State University v. Building Systems Housing Corp.*, 1593
- Board of Regents v. Board of Trustees for State Colleges & Universities*, 174
- Board of Regents v. Carter*, 142
- Board of Regents v. Roth*, 547–549, 551, 811, 983, 1118, 1584
- Board of Regents of Higher Education v. Judge*, 1253
- Board of Regents of Kentucky State University v. Gale*, 471
- Board of Regents of Oklahoma State University v. Oklahoma Merit Protection Commission*, 1257
- Board of Regents of the Regency University System v. Reynard*, 188, 248, 1279
- Board of Regents of Universities & State College v. City of Tempe*, 1165
- Board of Regents of the University of Oklahoma v. Baker*, 1257
- Board of Regents of the University of the State of New York v. Tomanio*, 102
- Board of Regents of the University of Washington v. Frederick & Nelson*, 1602
- Board of Regents of the University of Wisconsin v. Dane County Board of Adjustment*, 1168
- Board of Regents of the University of Wisconsin v. Southworth*, 648, 651n, 739–740, 1058–1065, 1098, 1238n
- Board of Trustees v. City of Los Angeles*, 1164, 1165
- Board of Trustees v. Department of Administrative Services*, 1286–1287
- Board of Trustees for the University of Alabama; United States v.*, 770
- Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 1253
- Board of Trustees of Junior College District No. 508 v. Cook County College Teachers Union*, 287
- Board of Trustees of the Leland Stanford Junior University v. Sullivan*, 1445
- Board of Trustees of Ohio State University v. Department of Administrative Services*, 595
- Board of Trustees of Stanford University v. Sullivan*, 623, 713
- Board of Trustees of State Institutions of Higher Learning v. Ray*, 172
- Board of Trustees of the State of New York v. Fox*, 1106, 1235
- Board of Trustees of the University of Alabama v. Garrett*, 819, 1306, 1310, 1383
- Board of Trustees of the University of Arkansas v. Professional Therapy Services*, 1364
- Board of Trustees of the University of Illinois v. Barrett*, 141
- Board of Trustees of the University of Illinois v. City of Chicago*, 1166
- Board of Trustees of the University of Massachusetts & United Automobile, Aerospace & Agricultural Implement Workers of America*, 303
- Bob Jones University v. Johnson*, 1478
- Bob Jones University v. United States*, 59, 761, 1408n
- Boehm v. University of Pennsylvania School of Veterinary Medicine*, 728n, 913, 990
- Boerne, City of v. Flores*, 60, 317, 1298, 1305, 1309
- Boettner; People v.*, 866
- Bogart v. Nebraska Student Loan Program*, 853
- Boise v. Boufford*, 521
- Boise Junior College District v. Mattefs Construction Co.*, 1596
- Bollard v. California Providence of the Society of Jesus*, 944n
- Bonnell v. Lorenzo*, 635–636, 651, 652–653, 682–683, 745, 1018n
- Borough of. See name of borough*
- Boston Medical Center Corp.*, 302
- Boston University Chapter, AAUP v. NLRB*, 494
- Bougher v. University of Pittsburgh*, 948
- Boulahanis v. Board of Regents*, 1137, 1140
- Boulder, City of v. Regents of the University of Colorado*, 1198–1199, 1639
- Bourgault v. Yudof*, 1212–1213, 1223–1224
- Bowen v. American Hospital Association*, 1503
- Bowers v. NCAA*, 1142, 1575, 1578–1581
- Bowling v. Scott*, 532, 559
- Bowling Green, City of v. T. & E. Electrical Contractors*, 1162
- Boyd; State v.*, 1086
- Boyett v. Troy State University at Montgomery*, 530
- Boy Scouts of America v. Dale*, 1069, 1082, 1430–1431
- Braden v. Texas A&M University System*, 102
- Bradford College & Milk Wagon Drivers & Creamery Workers Union, Local 380*, 493
- Bradshaw v. Rawlings*, 196–197, 208
- Brady v. Board of Trustees of Nebraska State Colleges*, 472
- Brainerd v. Governors of the University of Alberta*, 98
- Brakeman v. Theta Lambda Chapter of Pi Kappa Alpha*, 1096
- Brandenburg v. Ohio*, 1003, 1052, 1216
- Branti v. Finkel*, 612
- Branzburg v. Hayes*, 710
- Braxton v. Municipal Court*, 1218–1220
- Breiner-Sanders v. Georgetown University*, 135
- Brennan v. King*, 105, 135, 139
- Brennan v. Stewart*, 772
- Brentwood Academy v. Tennessee Secondary School Athletic Association*, 45n, 49–50, 1546
- Bresnick v. Manhattanville College*, 538, 540
- Bridgeman Art Library, Ltd. v. Corel Corporation*, 1353
- Bridston v. Dover Corp.*, 154
- Brine v. University of Iowa*, 593–594
- Broadway Maintenance Corp. v. Rutgers, The State University*, 1617
- Brockman v. Wyoming Department of Family Services*, 317
- Brody v. Finch University of Health Sciences/Chicago Medical School*, 756–757
- Brooklyn Law School v. Aetna Casualty & Surety Co.*, 152
- Brooklyn Law School v. Raybon, Inc.*, 1601
- Brooks v. Auburn University*, 1215–1216
- Brooks v. Mendoza*, 321
- Brotherton v. Cleveland*, 1290
- Brouillette v. Board of Directors of Merged Area IX*, 529, 544
- Brown v. Armenti*, 647–648
- Brown v. Board of Education*, 758, 1047, 1452
- Brown v. Board of Regents of the University of Nebraska*, 1213
- Brown v. Florida State Board of Regents*, 193
- Brown v. George Washington University*, 37, 481
- Brown v. Li*, 39, 740–741, 743
- Brown v. Trustees of Boston University*, 509, 515
- Brown v. Wichita State University*, 168, 192, 226–227, 242
- Brown University; United States v. (5 F.3d 658)*, 1372
- Brown University; United States v. (805 F. Supp. 288)*, 1371



- Brown University; United States v. (Civil Action No. 91-CV-3274)*, 1371
- Brown University & International Union, United Automobile, Aerospace & Agricultural Implement Workers of America*, 302
- Browzin v. Catholic University of America*, 579–580
- Brueckner v. Norwich University*, 748, 1085
- Brumbach v. Rensselaer Polytechnic Institute*, 572–573
- Bruner v. Petersen*, 733
- Brunner v. New York State Higher Education Services Corp.*, 844
- Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 712
- Brush v. Pennsylvania State University*, 1236–1237
- Bryant, In re*, 845
- Bryant v. Independent School District No. I-38 of Gavin County*, 749
- Brzica v. Trustees of Dartmouth College*, 178, 1082
- Brzonkala v. Virginia Polytechnic Institute & State University*, 1303
- Buchanan v. American Motors Corp.*, 708n
- Buchwald v. University of New Mexico School of Medicine*, 777–778
- Bunger v. University of Oklahoma Board of Regents*, 676–677, 679n
- Burbridge v. Sampson*, 1005–1006, 1013
- Burka v. U.S. Dept. of Health & Human Services*, 711
- Burlington Industries v. Ellerth*, 950
- Burnett v. Barnes*, 174–175
- Burnett v. Grattan*, 240–241
- Burnham v. Ianni*, 692, 995–996, 999–1001
- Burroughs; State v.*, 866
- Burtner v. Hiram College*, 953
- Burton v. Wilmington Parking Authority*, 43, 44, 45, 54
- Buttny v. Smiley*, 1002
- Butts v. Higher Education Interim Governing Board/Shepherd College*, 360
- Bynes v. Toll*, 855, 859
- Byrd v. Lamar*, 217
- C**
- Cahn v. Antioch University*, 179n
- Caledonian-Record Publishing Co. v. Vermont State College*, 1040, 1280
- Califano v. Sanders*, 1440
- California Cosmetology Coalition v. Riley*, 1440, 1441, 1442, 1503
- California Dental Association v. Federal Trade Commission*, 1375
- California Faculty Association v. Superior Court of Santa Clara County*, 138–139
- California School Employees Association v. Sunnyvale Elementary School District of Santa Clara County*, 1607
- California State Polytechnic University-Pomona v. Workers' Compensation Appeals Board*, 321
- California State University, Fresno v. Gustafson*, 847
- California State University, Hayward v. NCAA*, 1572–1573
- California Statewide Communities Development Authority v. All Persons Interested in Matter of Validity of Purchase Agreement*, 66
- Camara v. Municipal Court*, 863
- Campanelli v. Bockrath*, 364
- Campanelli v. Regents of the University of California*, 219
- Canisius College v. City of Buffalo, In the Matter of*, 1171
- Cannon v. University of Chicago*, 127, 128, 1034, 1494–1496
- Cantanes v. Ceros-Livingston*, 704
- Canterbury Career School, Inc. v. Riley*, 851
- Career Education v. Department of Education*, 1440, 1487
- Carey v. Brown*, 1071
- Carey v. Phipus*, 240, 353
- Carlin v. Trustees of Boston University*, 806
- Carlson v. United Academics*, 291
- Carol "WW" v. Stala*, 212
- Carpetta v. Pi Kappa Alpha Fraternity*, 1086
- Carr v. St. John's University, New York*, 727, 924, 988
- Carroll v. Blinken*, 1057, 1065
- Cary v. Adams Arapahoe School Board*, 39n
- Catholic Bishop of Chicago; NLRB v.*, 282–286
- Cedars of Lebanon Hospital v. Los Angeles County*, 1184
- Central Hudson Gas & Electric Corp. v. Public Service Commission*, 869, 1106, 1233
- Central State University v. American Association of University Professors*, 500
- Central Wesleyan College v. W. R. Grace & Co.*, 107
- Cerrato v. San Francisco Community College District*, 238
- Certain Scholarship Funds, In re*, 809
- Chalenor v. University of North Dakota*, 1138, 1443
- Chan v. Miami University*, 546
- Chaplinsky v. New Hampshire*, 1023, 1047
- Chapman v. Thomas*, 1073, 1237
- Chapman v. United States*, 862
- Charles E. Brohawn & Bros., Inc. v. Board of Trustees of Chesapeake College*, 225–226
- Chasin v. Montclair State University*, 154–156, 1276
- Chaudhuri v. Tennessee*, 72–73
- Chavez v. Arte Publico Press*, 1351
- Chess v. Widmar*, 1071
- Chevron U.S.A. v. Natural Resources Defense Council*, 316, 1442–1443
- Chiavarelli v. Williams*, 342
- Chicago Board of Trade v. United States*, 1371n
- Chicago, City of v. Board of Trustees of the University of Illinois*, 1166
- Chicago School of Automatic Transmissions v. Accreditation Alliance of Career Schools & Colleges*, 1536–1538, 1542–1543
- Chicago Teachers' Union v. Hudson*, 290, 291n
- Childress v. Virginia Commonwealth University*, 926
- Chontos v. Rhea*, 952–953, 958
- Chou v. University of Chicago & Arch Development Corp.*, 1360, 1651
- Christensen v. Harris County*, 307–308, 1443
- Christophel & Williams v. University of Cincinnati*, 276–277
- Chung v. Park*, 272–273, 562, 578
- Churchill v. Board of Trustees of University of Alabama in Birmingham*, 1624–1625
- Church of the Lukumi Babalu Aye v. City of Hialeah*, 60–61, 69, 857
- Cincinnati, City of v. Discovery Network*, 1098n
- Circuit City Stores, Inc. v. Adams*, 274–275
- Citizens Association of Georgetown v. District of Columbia Board of Zoning Adjustment*, 1179
- Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York, In re*, 1328
- City Colleges of Chicago; EEOC v., City of. See name of city*

- City University v. Oregon Office of Educational Policy & Planning*, 1268–1269
- City University of New York v. Finalco, Inc.*, 1593–1594
- Civil Service Employees Association, Inc., Local 1000, AFSCME v. State University of New York*, 277
- Claim of*. See name of claimant
- Clark v. Claremont University Center*, 511
- Clark v. Community for Creative Non-Violence*, 1005, 1006, 1014, 1229
- Clark v. Holmes*, 628–629, 652
- Clark v. Whiting*, 502, 552
- Clarke v. United States*, 1056n
- Clarke v. West Virginia Board of Regents*, 562–563
- Clawson v. Grays Harbor College District No. 2*, 484
- Clayton v. Trustees of Princeton University*, 728n
- Cleburne, City of v. Cleburne Living Center*, 1181–1182
- Clement v. Delgado Community College*, 222
- Cleveland Board of Education v. Loudermill*, 273n, 558, 565
- Clinger v. New Mexico Highlands University, Board of Regents*, 676–677, 679n, 681
- Clissuras v. City University of New York*, 238
- Coalition for Economic Equity v. Wilson*, 791
- Coddington v. Adelphi University*, 731–732, 1468
- Coghlan v. Beta Theta Pi Fraternity*, 1091, 1095
- Cohen v. Brown University* (991 F.2d 888), 123, 1132–1134, 1138
- Cohen v. Brown University* (101 F.3d 155), 1138
- Cohen v. California*, 636–637, 1025
- Cohen v. San Bernardino Valley College*, 636n, 637–641, 649–650
- Coker v. Sullivan*, 1492
- Colangelo v. Theta Psi Chapter of Tau Kappa Epsilon*, 1095
- Colburn v. Trustees of Indiana University*, 669–671
- Cole v. Burns International Security Services*, 275
- Cole v. National Collegiate Athletic Association*, 1580
- Cole v. Richardson*, 612
- Coleman v. Gettysburg College*, 994
- Coleman v. Western Michigan University*, 324
- College Area Renters & Landlord Association v. City of San Diego*, 1182
- College Entrance Examination Board v. Pataki*, 1355
- College Football Association & Capital Cities/ABC, Inc., In re*, 1567n
- College of Osteopathic Medicine*, 497
- College of Osteopathic Medicine & Surgery*, 494
- College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 1300–1301, 1310, 1351, 1367
- Collins v. Colorado Mountain College*, 265
- Colorado Association of Public Employees v. Board of Regents of the University of Colorado*, 242–243
- Colorado Civil Rights Commission v. Regents of the University of Colorado*, 1257–1258
- Colorado Seminary v. NCAA*, 1116
- Columbia Union College v. Clarke*, 64
- Columbia Union College v. Oliver*, 64–65
- Committee to Save Adelphi v. Daimandopoulos*, 1411n
- Commonwealth v.* See name of opposing party
- Communication Workers v. Beck*, 290
- Community Blood Bank of Kansas City Area v. FTC*, 1375
- Community College of Allegheny County v. Unemployment Compensation Board of Review*, 326
- Community College of Delaware County, Appeal of*, 1163, 1169
- Community College of Philadelphia*, 495
- Community College System of Nevada v. DR Partners*, 1279
- Community for Creative Non-Violence v. Reid*, 1344
- CompuServe, Inc. v. Cyber Promotions, Inc.*, 867
- Conard v. University of Washington*, 811, 1125
- Conaway v. Smith*, 680
- Connelly v. University of Vermont*, 928
- Connick v. Myers*, 606, 607–608, 630–631, 647, 1449
- Connolly v. County of Orange*, 1187–1188
- Consolidated Edison Co. v. Public Service Commission*, 1236
- Consolidated Rail Corp. v. Darrone*, 1473–1474, 1496
- Constantine v. The Rectors & Visitors of George Mason University*, 1307, 1311
- Constantino v. University of Pittsburgh*, 337
- Continental Training Services, Inc. v. Cavazos*, 1439, 1443
- Cook v. Colgate University*, 101–102, 1133n
- Cook County Collector v. National College of Education*, 1187
- Cooper v. Nix*, 855, 859
- Cooper v. Ross*, 696
- Cooper, People ex rel. v. Rancho Santiago College*, 1163
- Cooper Union for Advancement of Science; NLRB v.*, 493
- Cornelius v. NAACP Legal Defense & Education Fund*, 997n, 998, 1000, 1075
- Cornell University*, 281
- Cornell University v. Board of Assessors*, 1189
- Cornforth v. University of Oklahoma Board of Regents*, 317
- Corporation of Mercer University v. Barrett & Farahany, LLP*, 1283
- Corporation of Mercer University v. Smith*, 178
- Corr v. Mattheis*, 811
- Corry v. Stanford University*, 1023, 1047
- Corso v. Creighton University*, 734
- Cort v. Ash*, 1494
- Cortes v. State of Florida, Board of Regents*, 1058
- CoStar Group, Inc. v. LoopNet, Inc.*, 1348
- Council v. Commonwealth*, 877
- Council of New Jersey State College Locals v. State Board of Higher Education*, 595
- Coveney v. President & Trustees of the College of the Holy Cross*, 735
- Cowan v. University of Louisville School of Medicine*, 1308
- Cowboy Book, Ltd. v. Board of Regents for Agricultural & Mechanical Colleges*, 1633
- Craft v. Vanderbilt University*, 48–49
- Craig v. Alabama State University*, 511–512
- Craig v. Forest Institute of Professional Psychology*, 736, 1534n
- Craik v. Minnesota State University Board*, 124
- Craine v. Trinity College*, 504–505, 574
- Crandell v. New York College of Osteopathic Medicine*, 942–943
- Crannan v. Maxwell*, 1292

- Crawford v. Davis*, 1464, 1499  
*Crawford-El v. Britton*, 351n  
*Cremins v. Atlanta Journal*, 1283  
*Crockett v. Edinboro University*, 848  
*Crook v. Baker*, 939–941  
*Cross v. Rector & Visitors of the University of Virginia*, 976–977  
*Crown Cork & Seal Co.*, 281  
*Crue v. Aiken*, 349, 611, 1120  
*Cruzan v. Director, Missouri Department of Health*, 1289  
*Curators of University of Missouri v. Brown*, 1169, 1249  
*Cureton v. NCAA*, 1574–1577  
*Curley v. St. John's University*, 521  
*Curran v. Catholic University of America*, 486–487, 654, 714  
*Curtis Publishing Co. v. Butts*, 1108n  
*Cusumano & Yoffie, In re*, 711–713  
*C. W. Post Center of Long Island University*, 281
- D**
- Dacosta v. Nwachukwa*, 923  
*Daley v. Wesleyan University*, 502, 574  
*Dallas, City of v. Stanglin*, 775  
*Dallas County Community College District v. Bolton*, 173  
*Dalton; State v.*, 862  
*Dambrot v. Central Michigan University*, 1018n, 1025, 1120, 1121  
*Daniel v. American Board of Emergency Medicine*, 1374  
*Dantley v. Howard University*, 266–267  
*Darby v. Bratch*, 317  
*Dartland v. Metropolitan Dade County*, 350  
*Dartmouth Corp. of Alpha Delta v. Town of Hanover*, 1195  
*Dartmouth Review v. Dartmouth College*, 989  
*Davey v. Locke*, 69  
*Davidson v. Board of Governors of State Colleges & Universities*, 518  
*Davidson v. University of North Carolina at Chapel Hill*, 1149  
*Davidson & Jones, Inc. v. North Carolina Department of Administration*, 1617–1618  
*Davis v. Goode*, 938  
*Davis v. Goord*, 610  
*Davis v. Halpern*, 788  
*Davis v. J. F. Drake State Technical College*, 276  
*Davis v. Monroe County Board of Education*, 749, 750–752, 1464, 1487, 1497n  
*Davis v. Oregon State University*, 553–554  
*Davis v. Southerland*, 356  
*Davis v. Williams*, 532n  
*Dean v. Wissman*, 341  
*DeBauche v. Trani*, 53–54, 1216  
*DeCanas v. Bica*, 780  
*Decker v. Oklahoma State Technical University*, 324–325  
*Defoor v. Evesque*, 334  
*DeFunis v. Odegaard*, 784–785, 797–799  
*Dehaan v. Brandeis University*, 924  
*Deitchman v. E. R. Squibb & Sons, Inc.*, 708–709  
*De La Cruz v. Tormey*, 899–900  
*Delaware State College v. Ricks*, 103  
*Delbridge v. Maricopa County Community College District*, 203  
*Delgado v. Stegall*, 951, 952, 1464  
*de Llano v. Berglund*, 564–565, 678–681, 697  
*Del Papa v. Board of Regents of University & Community College System of Nevada*, 1277  
*Delta Tau Delta v. Johnson*, 1093  
*DePaul University v. Rosewell*, 1637  
*Deras v. Myers*, 124–125  
*Derdeyn v. University of Colorado*, 1143  
*DeRonde v. Regents of the University of California*, 788  
*DeShaney v. Winnebago County Department of Social Services*, 353–354, 357  
*Desyllas v. Bernstine*, 1014  
*Determination of Executive Commission on Ethical Standards, In re*, 1242, 1274  
*Detroit College of Business & Detroit College of Business Faculty Association*, 495  
*Devers v. Southern University*, 864–865  
*Diamond v. Chakrabarty*, 1356–1357  
*Diamond v. Diehr*, 1357  
*DiBona v. Matthews*, 637, 644  
*Dickson; People v.*, 1207–1208  
*Dickson v. Sitterson*, 1215  
*DiLoreto v. Downey Unified School District Board of Education*, 1014n  
*Dilworth v. Dallas Community College District*, 937  
*Dinnan, In re*, 700–701  
*Dinnan v. Regents of the University System of Georgia*, 125–126  
*Dinu v. Harvard College*, 938  
*Disesa v. St. Louis Community College*, 937  
*Dismissal Proceedings Against Huang*, 564  
*Dismuke v. Quaynor*, 212–213  
*District of Columbia v. Catholic Education Press*, 1193  
*Dixon v. Alabama State Board of Education*, 725, 974  
*Doe v. See name of opposing party*  
*Doherty v. Southern College of Optometry*, 731, 772  
*Dolan v. City of Tigard*, 1170  
*Dole v. Shenandoah Baptist Church*, 308  
*Donahue v. State*, 1278  
*Donnelley v. Rhode Island Board of Governors for Higher Education*, 519  
*Donohue v. Coptague Unified Free School District*, 214  
*Doria v. University of Vermont*, 191–192  
*Dorsett v. Board of Trustees for State Colleges & Universities*, 529, 668–669  
*Doru Tsaganea, In re Claim of*, 326  
*Dow Chemical Co. v. Allen*, 707–708  
*Draughon Training Institute, In re*, 1554  
*Drogaris v. Trustees of Columbia University*, 202–203  
*DTH Publishing Corp. v. The University of North Carolina at Chapel Hill*, 1040  
*Duarte v. Commonwealth*, 866  
*Dube v. State University of New York*, 637  
*Dubilier; United States v.*, 1651  
*Duck Inn, Inc. v. Montana State University-Northern*, 1630–1631  
*Duello v. Board of Regents, University of Wisconsin*, 510, 1474  
*Duffield v. Robertson Stephens & Company*, 274  
*Duffy; United States v.*, 1436  
*Dugan v. Stockton State College*, 545  
*Dugan & Meyers Construction Co. v. State of Ohio Department of Administrative Services*, 1615–1616  
*Duke v. The American University*, 1180n  
*Dunkel v. Elkins*, 1220–1221  
*Duquesne University of the Holy Ghost & Duquesne University Law School Faculty Association*, 494  
*Dybczak v. Tuskegee Institute*, 513

*Dynamic Student Services v. State System of Higher Education*, 1284

## E

*Easley v. Cromartie*, 1205  
*Easley v. University of Michigan Board of Regents*, 981  
*Eastern Connecticut State University v. Connecticut Freedom of Information Commission*, 1036  
*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 1370, 1546  
*Eastman v. University of Michigan*, 827–828, 829–830  
*Eden v. Board of Trustees of State University*, 579n, 727, 756  
*Educational Credit Management Corp. v. Ross*, 845  
*Edwards v. Aguillard*, 621  
*Edwards v. California University of Pennsylvania*, 39, 625, 634, 647, 648  
*Edwards v. Wallace Community College*, 351  
*EEOC v. See name of opposing party*  
*E. I. DuPont de Nemours & Co. v. Okuley*, 1360, 1651  
*Eiland v. Wolf*, 731, 733–734  
*Eiseman v. State*, 882  
*El-Attar v. Mississippi State University*, 767  
*Elcom, Ltd.; United States v.*, 1354  
*Eldred v. Ashcroft*, 128, 1354  
*Electromation v. NLRB*, 281  
*Eli Lilly & Co. v. Sav-On Drugs*, 1268n  
*Elkins v. Moreno*, 827, 835  
*El Kouni v. Trustees of Boston University*, 926  
*Elliott v. City of Athens*, 1182–1183  
*Ellison v. Robertson*, 1348  
*Elmira College*, 494  
*Elsinore Christian Center v. City of Lake Elsinore*, 60n  
*Elter v. Great Lakes Higher Education Corp.*, 846  
*Emery v. Boise State University & Embry Riddle Aeronautical*, 326  
*Emory University v. Porubiansky*, 158  
*Employees of Temple University, In the Matter of*, 301–302  
*Employment Division v. Smith*, 59–60, 744, 890n, 891n, 1266n  
*Encore College Bookstores, Inc. v. Auxiliary Services Corp. of*

*State University of New York at Farmingdale*, 248  
*Engel v. Vitale*, 57  
*Enright v. California State University*, 525n  
*Epilepsy Foundation of Northeast Ohio v. NLRB*, 279  
*Epperson v. Arkansas*, 621  
*Equal Access Education v. Merton (305 F. Supp. 585)*, 779–781  
*Equal Access Education v. Merton (325 F. Supp. 655)*, 781  
*Erzinger v. Regents of the University of California*, 890  
*Escobar v. State University of New York/College at Old Westbury*, 169–170  
*Estate of. See name of decedent*  
*Esteban v. Central Missouri State College*, 168, 915, 922, 975–976, 978  
*Evans v. Employment Security Department*, 326  
*Evans v. Newton*, 49–50  
*Evans v. West Virginia Board of Regents*, 804–805  
*Excelsior College v. New York State Education Department, In the Matter of*, 1261  
*Ex parte. See name of party*  
*Ezrailson v. Rohrich*, 340

## F

*Fabunmi v. University of Maryland at College Park*, 505–506  
*Faculty of City University of New York Law School at Queens College v. Murphy*, 184  
*Fairleigh Dickinson University & Fairleigh Dickinson University Council of American Association of University Professors Chapters*, 494  
*Faragher v. City of Boca Raton*, 950  
*Farmington v. Tokushige*, 41  
*Farnsworth v. The Proctor & Gamble Co.*, 708  
*Faro v. New York University*, 502  
*Fauley v. Forrest County, Mississippi*, 1205n  
*Faulkner v. Jones*, 767  
*Faur v. Jewish Theological Seminary of America*, 271–272  
*Favia v. Indiana University of Pennsylvania*, 1134n  
*Fay v. Thiel College*, 156–157, 158  
*Fayetteville, City of v. Phillips*, 1191–1192  
*F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 352, 1615  
*FDIC v. Providence College*, 183–184  
*Federal Maritime Commission v. South Carolina Ports Authority*, 1298, 1304, 1311  
*Federated Publications v. Board of Trustees of Michigan State University*, 1279  
*Felder v. Casey*, 239  
*Feldman v. Ho*, 130, 625, 677–678, 680–681  
*Feldman v. Regents of the University of New Mexico*, 173  
*Fellheimer v. Middlebury College*, 729, 990  
*Felton v. Recording Industry Association of America*, 1354  
*Ferguson v. Greater Pocatello Chamber of Commerce*, 1633  
*Ferrer v. Trustees of the University of Pennsylvania*, 475  
*Fieno v. State of Minnesota*, 339  
*Finley v. National Endowment for the Arts*, 648  
*Finstand v. Washburn University of Topeka*, 214  
*First Equity Corp. of Florida v. Utah State University*, 172–173, 227n  
*Fisher v. Dillard University*, 512  
*Fisher v. Vassar College*, 503–504, 526  
*Fitzpatrick v. Bitzer*, 1304, 1309  
*Flanagan v. President & Directors of Georgetown College*, 820–821, 1471  
*Fleming v. New York University*, 858  
*Flores v. Morgan Hill Unified School District*, 959  
*Florida Board of Regents v. Armesto*, 103–104, 133  
*Florida ex rel. Hawkins v. Board of Control*, 758, 1452  
*Florida Memorial College; NLRB v.*, 493  
*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 1310, 1360–1361  
*Florida State University v. Dann*, 1286  
*Foley Brothers v. Filardo*, 1484  
*Fong v. Purdue University*, 563–564  
*Forasté v. Brown University*, 1344–1345  
*Forbes v. Napolitano*, 1290  
*Forbes v. Woods*, 1289–1290  
*Ford v. Nicks*, 509  
*Ford v. Schering-Plough*, 1578  
*Fordice; United States v.*, 758–759, 1456–1460  
*Forester v. State of New York*, 222  
*Forsham v. Harris*, 1506n  
*Forsyth County v. Nationalist Movement*, 1010n

- 44 *Liquormart v. Rhode Island*, 1106, 1236
- Forum for Academic & Institutional Rights (FAIR), Inc. v. Rumsfeld*, 1429–1432
- Foster v. Board of Trustees of Butler County Community College*, 197–198, 748
- Foster v. Purdue University*, 1089
- Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 1542, 1549
- Fox v. Board of Supervisors of Louisiana State University & Agricultural & Mechanical College*, 1150
- Fox v. Board of Trustees of State University of New York*, 1235n
- Frabotta v. Meridia Huron Hospital School*, 930
- Frank v. Ivy Club*, 1068
- Frank Briscoe Co. v. Rutgers, the State University*, 142
- Franklin v. Gwinnett County Public Schools*, 121, 749, 946–947, 1463, 1467, 1496–1498
- Franklin & Marshall College; EEOC v.*, 701
- Franklin & Marshall College v. Zoning Hearing Board of the City of Lancaster*, 1172
- Fraser v. Nationwide Mutual Insurance Co.*, 1385
- Freeman v. Busch*, 210
- Friday v. Uzzell*, 1066–1067
- Frisby v. Schultz*, 1028
- Frumkin v. Board of Trustees, Kent State*, 560
- Fruth v. New York University*, 773
- Fry v. Board of Regents of University of Wisconsin System*, 1060
- Fry v. United States*, 1301
- Fu v. University of Nebraska*, 202
- Fuller v. Rayburn*, 1499
- Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 1356
- Furek v. University of Delaware*, 208–209, 1084, 1087
- Furomoto v. Lyman*, 1016–1017
- Furutani v. Ewigleben*, 918
- Futrell v. Ahrens*, 855–856
- Futrelle v. Duke University*, 138
- G**
- Gabrilowitz v. Newman*, 920, 979
- Gade v. National Solid Waste Management Association*, 305
- Gaffney v. Cummings*, 1205
- Gaines v. NCAA*, 1569–1570
- Gaither v. Wake Forest University*, 361–362
- Galdikas v. Fagan*, 1534n
- Galiatsatos v. University of Akron*, 574
- Galloway v. Roger Williams University*, 266
- Gally v. Columbia University*, 229
- Gamma Phi Chapter of Sigma Chi Building Fund Corp. v. Dade County*, 1191
- Gamma Phi Chapter of Sigma Chi Fraternity v. University of Miami*, 1081
- Ganden v. NCAA*, 1142, 1577–1581
- Gannett Rivers States Publishing Corp. v. Mississippi State University*, 1035–1036
- Garcia v. San Antonio Metropolitan Transit Authority*, 1302
- Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 807
- Gardetto v. Mason (Eastern Wyoming College)*, 679n
- Gardiner v. Tschechtelin*, 477
- Garner v. Michigan State University*, 566
- Garofalo v. Lambda Chi Alpha*, 1096
- Garrett v. Matthews*, 532, 807
- Garrett v. University of Alabama at Birmingham Board of Trustees*, 1312, 1500
- Garrison v. Louisiana*, 219, 1109
- Garstang v. Superior Court of Los Angeles County*, 136n
- Garvie v. Jackson*, 569
- Gaskill v. Ft. Hays State University*, 578, 1287
- Gaspar v. Bruton*, 928–929, 982–983
- Gay Activists Alliance v. Board of Regents of University of Oklahoma*, 1053
- Gay & Lesbian Students Association v. Gohn*, 1053–1054, 1102
- Gay Law Students v. Board of Trustees*, 1432
- Gay Lesbian Bisexual Alliance v. Pryor*, 1054–1055
- Gay Lesbian Bisexual Alliance v. Sessions*, 1054
- Gay Lib v. University of Missouri*, 1053
- Gay Men's Health Crisis v. Sullivan*, 1442, 1446
- Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 1055–1056
- Gay Student Services v. Texas A&M University*, 1051n
- Gay Students Organization of the University of New Hampshire v. Bonner*, 1051–1052
- Gebser v. Lago Vista Independent School District*, 750–752, 948–950, 953, 1136, 1487, 1497n
- Gedes v. Northwest Missouri State University*, 472
- Gehling v. St. George's School of Medicine*, 99, 197
- Geier v. Alexander*, 796, 1454n
- Geier v. Sundquist*, 125, 1454n
- Geier v. University of Tennessee*, 1453–1454
- General Dynamics Corp. v. Superior Court*, 141n
- General Telephone Company of the Northwest v. EEOC*, 106n
- George v. University of Idaho*, 958
- George Washington University v. District of Columbia*, 1175
- George Washington University v. District of Columbia Board of Zoning Adjustment*, 1175
- Georgia Association of Educators v. Harris*, 268
- Gernander v. Winona State University*, 338
- Gertz v. Robert Welch, Inc.*, 219, 1108n, 1551
- Gibbs Construction Co. v. Board of Supervisors of Louisiana State University*, 1613
- Giebel v. Sylvester*, 612, 1013, 1014, 1223
- Gilbert v. Homar*, 569–570
- Gilbert v. Seton Hall University*, 194
- Giles v. Howard University*, 804
- Gill v. Franklin Pierce Law Center*, 806, 963
- Gilmer v. Interstate-Johnson Lane*, 137, 274, 299
- Girardier v. Webster College*, 846, 848
- Givhan v. Western Line Consolidated School District*, 606–607, 608, 672
- Gladney v. Thomas*, 509n
- Glassboro, Borough of v. Vallorosi*, 1181
- Glenbrook Road Association v. District of Columbia Board of Zoning Adjustment*, 1179–1180
- Glockson; United States v.*, 850
- Glover v. Cole*, 1237–1238
- Goehring v. Brophy*, 890–891
- Goldberg v. Northeastern University*, 194
- Goldberg v. Regents of the University of California*, 168–169
- Goldfarb v. Virginia State Bar*, 1369, 1547
- Gomes v. University of Maine System*, 980–981
- Gomez v. Toledo*, 348
- Gomez-Gil v. University of Hartford*, 321
- Gomillion v. Lightfoot*, 782

- Gonzaga University v. Doe*, 1033, 1437, 1487  
*Gonzaga University; Doe v.*, 48n, 212, 219–220, 1034  
*Gonzales v. National Board of Medical Examiners*, 961–962  
*Gonzales v. Raich*, 1303  
*Gonzalez v. North American College of Louisiana*, 817  
*Good v. Associated Students of the University of Washington*, 1057  
*Goodisman v. Lytle*, 553  
*Goodkind v. University of Minnesota*, 473  
*Goodman v. President & Trustees of Bowdoin College*, 731  
*Goodman & Barnard College, In re*, 326–327  
*Goodman, People ex rel. v. University of Illinois Foundation*, 1192  
*Good News Club v. Milford Central School*, 58n, 998, 1238n  
*Goodreau v. Rector & Visitors of the University of Virginia*, 941  
*Goodwin v. Keuka College*, 962–963  
*Gorenberg v. Onondaga County Board of Elections*, 1200  
*Gorman v. St. Raphael Academy*, 55  
*Gorman v. University of Rhode Island*, 979  
*Goss v. Lopez*, 939–940, 975, 980, 984  
*Goss v. San Jacinto Junior College*, 237, 694–695  
*Gossett v. State of Oklahoma ex rel. Board of Regents*, 805–806  
*Gott v. Berea College*, 10  
*Gottschalk v. Benson*, 1357  
*Graczyk v. Workers' Compensation Appeals Board*, 324  
*Graduate Employees Organization v. Illinois Educational Labor Relations Board*, 302  
*Gragg v. Wichita State University*, 200  
*Grand Jury Subpoena, In re*, 710–711  
*Grandson v. University of Minnesota*, 1136–1137  
*Grant v. Tulane University*, 321  
*Gratz v. Bollinger*, 523, 791–803, 821–823, 825  
*Gray v. Board of Higher Education*, 132, 701  
*Gray v. Board of Regents of University System of Georgia*, 545  
*Gray v. Mundelein College*, 482, 585–586  
*Grayned v. City of Rockford*, 1003, 1007  
*Great A&P Tea Co. v. Cottrell*, 1268  
*Greaton Properties v. Lower Merion Township*, 1180  
*Green v. County School Board*, 1454  
*Green v. Trinity International University*, 224  
*Greenberg v. CBS, Inc.*, 1113  
*Greene v. Howard University*, 480, 1582  
*Greenhill v. Bailey*, 983  
*Greenya v. George Washington University*, 44, 46n  
*Gregorich v. Lund*, 349  
*Gregory v. Hunt*, 361  
*Grider v. Cavazos*, 852  
*Grimes v. Kennedy Krieger Institute, Inc.*, 1291, 1648–1650  
*Grine v. Board of Trustees, University of Arkansas*, 100  
*Griswold v. Connecticut*, 618–619, 652  
*Grody v. State*, 1220  
*Gross v. Family Services Agency & Nova Southeastern University, Inc.*, 203–204  
*Grossner v. Trustees of Columbia University*, 918  
*Grove v. Ohio State University*, 754–755  
*Grove City College v. Bell*, 1128–1129, 1478, 1479–1480, 1573  
*Grutter v. Bollinger*, 128–129, 523, 527–528, 619n, 626–627, 788, 791–803, 821–823, 825  
*Guardians Association v. Civil Service Commission of the City of New York*, 1451, 1474–1477, 1495  
*Guckenberger v. Boston University (957 F. Supp. 306)*, 963–964  
*Guckenberger v. Boston University (974 F. Supp. 106)*, 964–965, 966–967  
*Guckenberger v. Boston University (8 F. Supp. 2d 82)*, 967–968  
*Guidi v. California*, 1165  
*Gulf Regional Education Television Affiliates v. University of Houston*, 243  
*Guste, State ex rel. v. Nicholls College Foundation*, 247–248, 1281  
*Gutzwiller v. University of Cincinnati*, 508–509
- ## H
- Haben v. Anderson*, 1090n  
*Hack v. President & Fellows of Yale College*, 857–858, 1371  
*Hackel v. Vermont State Colleges*, 500  
*Hadley v. Junior College District*, 1205  
*Hadley v. North Arkansas Community Technical College*, 237–238  
*Hafer v. Melo*, 231n, 347  
*Haffer v. Temple University*, 1131–1132, 1479  
*Hahn v. Vermont Law School*, 98–99  
*Hairston v. Pacific 10 Conference*, 1570, 1572  
*Halasz v. University of New England*, 966  
*Hall v. Kutztown University*, 682n  
*Hall v. Medical College of Ohio at Toledo*, 235–236  
*Hall v. University of Minnesota*, 1116  
*Hall v. Virginia*, 877  
*Hallal v. RDV Sports, Inc.*, 322  
*Halper; United States v.*, 919  
*Hamilton v. Regents of the University of California*, 10  
*Hamilton Chapter of Alpha Delta Phi v. Hamilton College*, 1082, 1371  
*Hammarstrom, In re*, 845  
*Hammond v. Brown*, 623  
*Hammond v. South Carolina State College*, 1008–1009  
*Hand v. Mitchell*, 941  
*Hander v. San Jacinto Junior College*, 237, 686–687  
*H & V Engineering, Inc. v. Board of Professional Engineers and Land Surveyors*, 532n  
*Hans v. Louisiana*, 1308  
*Hanson v. Kynast*, 1149, 1151  
*Harden v. Adams*, 696  
*Hardin v. Phillips*, 334  
*Hardy v. Jefferson Community College*, 642–644, 651, 653, 742n  
*Harlow v. Fitzgerald*, 348  
*Harper v. Board of Regents, Illinois State University*, 1140  
*Harrell v. Southern Illinois University*, 1204  
*Harrington v. Harris*, 521, 530, 609–610  
*Harris v. Blake*, 985–986  
*Hartford Accident & Indemnity Co. v. Village of Hempstead*, 157  
*Hartman v. Merged Area VI Community College*, 594–595  
*Hartwig v. Albertus Magnus College*, 490  
*Harvard Manual on Tax Aspects of Charitable Giving*, 1415n  
*Harwood v. Johns Hopkins University*, 732–733, 938  
*Hatchett v. Philander Smith College*, 316

- Hawes v. Emory University*, 809  
*Hawkins v. NCAA*, 1116  
*Hayden v. University of Notre Dame*, 200–201, 1212n  
*Hays County Guardian v. Supple*, 1098, 1238–1239  
*Hayut v. State University of New York*, 52n, 745n, 748, 943, 944, 951, 956–957  
*Hazelwood School District v. Kuhlmeier*, 39, 632, 642, 650, 740, 743, 1102–1103  
*Healy v. James*, 629, 738, 995–996, 1003, 1004, 1009–1010, 1051–1052, 1071, 1101, 1107, 1210, 1227  
*Healy v. Larsson*, 727  
*HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*, 1266–1267  
*Heffron v. International Society for Krishna Consciousness*, 1013n, 1073, 1229  
*Heinritz v. Lawrence University*, 266  
*Heirs & Wrongful Death Beneficiaries of Branning v. Hinds Community College District*, 1620–1621  
*Helvering v. Davis*, 1299  
*Henderson State University v. Spadoni*, 974  
*Hendricks v. Clemson University*, 215–216, 1127  
*Hendrickson v. Amazon.com, Inc.*, 1349  
*Hendrickson v. eBay, Inc.*, 1348, 1349  
*Hennessey v. Coastal Eagle Point Oil Company*, 269  
*Hensley v. Erie Insurance Co.*, 158  
*Henson v. Honor Committee of the University of Virginia*, 976  
*Herbert v. Lando*, 1109  
*Hernandez, Estate of v. Board of Regents*, 1088–1089  
*Hernandez-Wheeler v. Flavio*, 1089  
*Herzog Foundation v. University of Bridgeport*, 181  
*Hess v. Port Authority Trans-Hudson Corp.*, 238  
*Hetrick v. Martin*, 628  
*Hewitt v. Helms*, 555  
*Hibbs v. Department of Human Resources*, 316  
*Hickey v. Zezulka*, 879  
*Hickman v. Taylor*, 110  
*Higher Education Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Association*, 499  
*Hildebrand v. Board of Trustees of Michigan State University*, 94–95, 696  
*Hill v. Board of Trustees of Michigan State University*, 980  
*Hill v. Colorado*, 636  
*Hill v. NCAA*, 1145–1146, 1564  
*Hill v. Ross*, 524–525  
*Hill v. Talladega College*, 544–545  
*Hillis v. Stephen F. Austin State University*, 696  
*Hillsborough County v. Automated Medical Laboratories*, 1297n  
*Hollister v. Tuttle*, 569  
*Holm v. Ithaca College*, 531  
*Honadle v. University of Vermont & State Agricultural College*, 234n  
*Hoover v. Morales*, 1242–1243  
*Hopf v. Topcorp, Inc.*, 1278–1279, 1281  
*Hopwood v. Texas*, 788–790, 800–801  
*Horowitz v. Board of Curators of the University of Missouri*, 983–985, 987  
*Horton v. Commonwealth of Pennsylvania*, 877  
*Hoshijo ex rel. White; State v.*, 1028, 1121n  
*Hosty v. Carter*, 39, 1097n, 1105  
*House Bill 2620, In re*, 1205–1206  
*Howard Savings Institution v. Peep*, 810  
*Howard University v. Best*, 37, 573  
*Howard University v. Good Food Services, Inc.*, 1595  
*Howlett v. Rose*, 239  
*Howren, In re*, 847n  
*H. P. Hood & Sons v. DuMond*, 1269  
*Huang v. Board of Governors of the University of North Carolina*, 568  
*Huddleston v. University of Vermont*, 831  
*Hudson v. Craven*, 644  
*Hudson v. United States*, 919–920  
*Hudson v. Wesley College*, 541  
*Hughes v. Beta Upsilon Building Association*, 1089  
*Hulen v. Yates*, 568–569, 679–681  
*Hull v. Cuyahoga Valley Joint Vocational School District Board of Education*, 351  
*Humana of Illinois, Inc. v. Board of Trustees of Southern Illinois University*, 1633  
*Hunt v. McNair*, 62–63  
*Hunt v. State of Missouri, Department of Corrections*, 258n  
*Hunt v. University of Alaska at Fairbanks*, 755n  
*Hunter; State v.*, 863, 864  
*Hupart v. Board of Higher Education of the City of New York*, 797  
*Hupp v. Sasser*, 340–341  
*Hutto v. Finney*, 123  
*Hyman v. International Business Machines Corp.*, 342  
*Hynes v. Mayor & Council of Oradell*, 1007
- I
- IBP, Inc. v. Alvarez*, 311  
*Idaho v. Coeur d' Alene Tribe of Idaho*, 1311n  
*IIT Research Institute v. United States*, 1653  
*Illini Media Company v. Department of Revenue*, 1193–1194  
*Illinois Nurses Association v. Board of Trustees of the University of Illinois*, 140  
*Imperiale v. Hahnemann University*, 47, 940  
*Indiana ex rel. Anderson v. Brand*, 272, 479  
*In re. See name of party*  
*Inspector of Buildings of Salem v. Salem State College*, 1165–1166  
*Institute of Computer Technology; United States v.*, 1436  
*Inter-Faculty Organization v. Carlson*, 1247  
*International Association of Machinists v. Street*, 290  
*International Ladies Garment Workers Union v. NLRB*, 288  
*International Primate Protection League v. Institute for Behavioral Research, Inc.*, 1327  
*International Society for Krishna Consciousness v. Lee*, 998n, 999  
*International Textbook Co. v. Pigg*, 1268  
*In the Matter of. See name of party*  
*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 1022–1023, 1086  
*Iowa Hotel Association v. State Board of Regents*, 1624  
*Iowa State University of Science & Technology v. United States*, 1634, 1636  
*Iron Arrow Honor Society v. Heckler*, 1479  
*Ithaca College & Ithaca College Faculty Association*, 494  
*Ivy Club v. Edwards*, 100, 1068n
- J
- Jaar v. University of Miami*, 242, 1292  
*Jackson v. Birmingham Board of Education*, 1483–1484  
*Jackson v. Culinary School of Washington*, 853, 1376

- Jackson v. Drake University*, 1127  
*Jackson v. Metropolitan Edison Co.*, 44, 45  
*Jackson v. Strayer College*, 1050, 1055  
*Jacobs v. Mundelein College*, 482  
*Jaffee v. Redmond*, 112–113  
*Jain v. State of Iowa*, 210–211  
*Jaksa v. Regents of the University of Michigan*, 981  
*James v. Langford*, 1253  
*James v. Nelson*, 1203–1204  
*James, State ex rel. v. Ohio State University*, 704–705, 1285  
*Janes v. Jane*, 335–336  
*Jansen v. Atiyeh*, 1625–1627  
*Jarzyńska v. St. Thomas University School of Law*, 925  
*Javetz v. Board of Control, Grand Valley State University*, 513  
*Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 1370, 1600, 1632  
*Jeffries v. Harleston*, 609, 656n, 684, 689–691, 1018n  
*Jeldness v. Pearce*, 783  
*Jenkins v. Louisiana State Board of Education*, 922, 978, 1007  
*Jesik v. Maricopa County Community College District*, 883–884  
*Jew v. University of Iowa*, 510  
*J. I. Case Co. v. NLRB*, 289  
*Jiménez v. Almodovar*, 582, 584–585  
*Jirau-Bernal v. Agrait*, 612  
*John Grace & Co. v. State University Construction Fund*, 1617  
*Johns Hopkins University v. Ritter*, 184, 472, 546–547  
*Johnson v. Board of Regents of University of Georgia*, 789n  
*Johnson v. Board of Regents of University of Wisconsin System*, 588–590  
*Johnson v. Christian Brothers College*, 545  
*Johnson v. Colorado State Board of Agriculture*, 543  
*Johnson v. Dallas Independent School District*, 355, 356  
*Johnson v. Edinboro State College*, 847–848  
*Johnson v. Lincoln University*, 672–674, 677  
*Johnson v. Louisiana Department of Education*, 818–819  
*Johnson v. Schmitz*, 216, 732, 735  
*Johnson v. Southern Greek Housing Corp.*, 1189  
*Johnson v. Southern University*, 1287–1288  
*Johnson v. Transportation Agency*, 800  
*Johnson v. University System of Georgia*, 782n, 783  
*Johnson-Taylor v. Gannon*, 590–591  
*Jolicoeur v. Mihaly*, 1199–1200  
*Jones v. Alfred H. Mayer Co.*, 1305  
*Jones v. Board of Governors*, 913  
*Jones v. Board of Regents of the University System of Georgia*, 330  
*Jones v. Illinois Department of Rehabilitation Services*, 894  
*Jones v. Kappa Alpha Order*, 1092, 1094  
*Jones v. Tennessee State Board of Education*, 978, 979  
*Jones v. University of Central Oklahoma*, 470  
*Jones v. University of North Carolina*, 122  
*Jones v. University of Pennsylvania*, 362–363  
*Jones v. Wittenberg University*, 878  
*Jones v. Wolf*, 59n  
*Joye v. Hunterdon Central Regional High School Board of Education*, 1146  
*Joyner v. Whiting*, 1065–1066, 1100–1101  
*Judson v. Essex Agricultural & Technical Institute*, 322–323  
*Jung v. Association of American Medical Colleges* (300 F. Supp. 2d 119), 1373  
*Jung v. Association of American Medical Colleges* (339 F. Supp. 2d 26), 1373  
*Junger v. Daly*, 1394  
*J. Weingarten, Inc.; NLRB v.*, 279
- K**
- Kadiki v. Virginia Commonwealth University*, 943, 953  
*Kaiser Aetna v. United States*, 55  
*Kaltenberger v. Ohio College of Podiatric Medicine*, 968–969  
*Kamehameha Schools/Bernice Pauahi Bishop Estate; Doe v.*, 761, 783n, 821n  
*Kanaly v. State of South Dakota*, 1252  
*Kania v. Fordham*, 1098  
*Kantor v. Schmidt*, 935n  
*Kappa Alpha Educational Foundation, Inc. v. Holliday*, 1190  
*Kaprelian v. Texas Woman's University*, 550  
*Karibian v. Columbia University*, 944  
*Karle v. Board of Trustees/Marshall University*, 573  
*Karr v. Board of Trustees of Michigan State University*, 271  
*Kashani v. Purdue University*, 234–235  
*Kashif v. Central State University*, 480  
*Kaspar Wire Works, Inc. v. Secretary of Labor*, 304  
*Katz v. Georgetown University*, 480  
*Katz v. United States*, 1207  
*Katzenbach v. Morgan*, 1304  
*Kavanagh v. Trustees of Boston University*, 1152  
*Kay v. Board of Higher Education*, 623  
*Kazmier v. Widmann*, 316  
*K.D. v. Educational Testing Service*, 734  
*Keams v. Tempe Technical Institute* (39 F.3d 222), 853, 1553  
*Keams v. Tempe Technical Institute* (110 F.3d 44), 1553  
*Keddie v. Rutgers, The State University*, 1285  
*Kedroff v. Saint Nicholas Cathedral*, 59n  
*Keegan v. University of Delaware*, 58n  
*Keen v. Penson*, 646  
*Keles v. Yale University*, 757  
*Keller v. State Bar of California*, 1059  
*Kelley v. Board of Trustees of University of Illinois*, 1137, 1138  
*Kelly v. Arriba Soft Corporation*, 1340  
*Kelly v. Gwinnell*, 210  
*Kelly v. Yale University*, 745n, 749  
*Kelm v. Carlson*, 827  
*Kendall Memorial School v. NLRB*, 493  
*Kenner v. Kappa Alpha Psi Fraternity*, 1094–1095  
*Kern v. University of Notre Dame du Lac*, 703  
*Keyishian v. Board of Regents*, 611, 619–621, 650, 738, 1270  
*Khademi v. South Orange Community College District*, 1001–1002, 1005–1006, 1009, 1013, 1106  
*Kientzy v. McDonnell Douglass Corp.*, 136n  
*Kilcoyne v. Morgan*, 555–556  
*Kimel v. Florida Board of Regents*, 1305–1307, 1309, 1310  
*Kincaid v. Gibson*, 39, 1097, 1102–1105  
*Kinder v. Industrial Claim Appeals Office of the State of Colorado*, 322  
*King v. Board of Control of Eastern Michigan University*, 1485–1486  
*King v. Riverside Regional Medical Center*, 96



- King v. University of Minnesota*, 536, 559–560
- Kingery Construction Co. v. Board of Regents of the University of Nebraska*, 1612
- Kirsch v. Prince Georges County*, 1181
- Kirschenbaum v. Northwestern University*, 471–472
- Kirwan v. Diamondback*, 1039
- Kissinger v. Reporters Committee for Freedom of the Press*, 1506n
- Klan-Rastani v. Clark University*, 321
- Klein v. Solomon*, 335
- Kleindienst v. Mandel*, 1317
- Klein Independent School District v. Mattox*, 1030n
- Kleinknecht v. Gettysburg College*, 207–208, 1148–1150
- Klemencic v. Ohio State University*, 953
- Knapp v. Northwestern University*, 1141
- Kneeland v. NCAA*, 1565
- Kniepp v. Tedder*, 354
- Knight v. Alabama*, 1461
- Knight v. Minnesota Community College Faculty Association*, 287, 498
- Knoll v. Board of Regents of the University of Nebraska*, 209, 861, 882, 1092
- Knowles v. Ohio State University*, 264
- Kobluk v. University of Minnesota*, 110
- Kobrin v. University of Minnesota*, 537
- Korf v. Ball State University*, 532–533
- Kort v. Diversified Collection Services*, 848
- Kovats v. Rutgers, The State University*, 234n, 235
- Kracunas & Pallett v. Iona College*, 943, 947
- Kraft v. William Alanson White Psychiatric Foundation*, 338
- Krasnow v. Virginia Polytechnic Institute*, 913, 915
- Krause v. Rhodes*, 347n
- Krebs v. Rutgers, The State University of New Jersey*, 1034n
- Kroll v. Board of Trustees of the University of Illinois*, 193
- Krotkoff v. Goucher College*, 37, 582–584
- Krynicky v. University of Pittsburgh*, 47, 50n
- Ku v. State of Tennessee*, 987n
- Kumbhojkar v. University of Miami*, 540–541
- Kunda v. Muhlenberg College*, 127, 131–132, 506–508, 515
- Kunz v. New York*, 1010n
- Kurtz v. Vickrey*, 672
- Kwiatkowski v. Ithaca College*, 988
- Kyriakopoulos v. George Washington University*, 130
- Kyriazis v. West Virginia University*, 156, 159, 734

## L

- Lafayette College v. Commissioner, Department of Labor & Industry*, 704
- Lafayette College v. Zoning Hearing Board of the City of Easton*, 1174
- Laidlow v. Hariton Machinery Co.*, 320
- Laird v. Tatum*, 1211
- Lake County Estates v. Tahoe Regional Planning Agency*, 232, 1308
- Lake of the Ozarks Community College Steering Committee, State ex rel. v. Coordinating Board for Higher Education*, 1252
- Lam v. Curators of University of Missouri*, 1481–1482
- Lamb's Chapel v. Center Moriches Union Free School District*, 58n, 1000, 1075, 1212, 1238n
- Lamphere v. Brown University*, 106, 514
- Lamvermeyer v. Denison University*, 532
- Lance; Doe v.*, 1464
- Lane v. Pena*, 1468
- Lanford, In re*, 847
- Lansdale v. Tyler Junior College*, 38
- Lapides v. Board of Regents of the University System of Georgia*, 97, 1308
- LaPorte, Application of*, 1172
- Larson v. Board of Regents of the University of Nebraska*, 1098
- Lau v. Nichols*, 1475
- Laura O. v. State*, 884–885
- Lavin-McEleney v. Marist College*, 520
- Law v. National Collegiate Athletic Association*, 1567–1568
- Lawhorne v. Harlan*, 336
- Lawrence v. Curators of the University of Missouri*, 537
- Lawrence v. Texas*, 688
- Lawrence Bicentennial Commission v. Appleton, Wisconsin*, 1240
- Leach v. New Mexico Junior College*, 237
- League of United Latin American Citizens; United States v.*, 759–760
- League of United Latin American Citizens v. Wilson* (908 F. Supp. 755), 839–840
- League of United Latin American Citizens v. Wilson* (997 F. Supp. 1244), 840
- League of United Latin American Citizens v. Wilson* (1998 WL 141325), 840
- Leathers v. Medlock*, 1448
- Lebron v. National Railroad Passenger Corp.*, 51, 248–249, 858
- Lee v. International Society for Krishna Consciousness*, 1013n
- Lee v. Life Insurance Co. of North America*, 892–893
- Lee v. Paige*, 852
- Lee v. Trustees of Dartmouth College*, 962, 1468
- Lee v. Weisman*, 58, 72, 73
- Leeds v. Meltz*, 51, 1102
- Leffall v. Dallas Independent School District*, 355
- Legal Services Corporation v. Velazquez*, 901
- Lehnert v. Ferris Faculty Association*, 290–291, 1059
- Lekutis v. University of Osteopathic Medicine*, 993
- Lemon v. Kurtzman*, 62, 1070–1071
- Lemoyne-Owens College*, 493
- Leonard; People v.*, 1218
- Lesage v. State of Texas*, 790n, 1499
- Lesage v. University of Texas*, 1311
- Lesser v. Board of Education of New York*, 754
- Leticia A. v. Regents of the University of California*, 838–839
- Levin v. Harleston*, 655–658, 740n
- Levin v. Yeshiva University*, 860–861
- Levine v. George Washington University*, 755, 803–804
- Levitt v. University of Texas*, 558
- Levy v. Scranton*, 1201
- Levy v. University of Cincinnati*, 272
- Lewis v. Loyola University of Chicago*, 473–474, 474
- Lewis v. St. Cloud State University*, 191, 1113
- Lewis v. Salem Academy & College*, 37, 482
- Lewis v. Wilson*, 1003
- Lewis & Clark College*, 494
- Lewis University*, 284
- Lewis University; NLRB v.*, 494
- Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, 1162–1163
- Lexington Theological Seminary v. Vance*, 931–932
- L'ggrke v. Benkula*, 816, 1437
- Lidecker v. Kendall College*, 1534n

- Lieber v. Board of Trustees of Southern Illinois University*, 1284
- Lieberman v. University of Chicago*, 1496
- Lifchez v. Hartigan*, 1289
- Lin v. Trustees of Indiana University*, 538
- Lincoln v. Board of Regents of the University System of Georgia*, 512
- Lincoln County v. Luning*, 1308
- Linden Lumber Division v. NLRB*, 288
- Lingle v. Norge Division of Magic Chef*, 293
- Linkage Corp. v. Trustees of Boston University*, 227, 1608-1610
- Linkey v. Medical College of Ohio*, 264-265
- Linnemeir v. Board of Trustees, Indiana University-Purdue University*, 611, 624, 633n
- Lipsett v. University of Puerto Rico*, 944, 957
- Lister v. Hoover*, 830
- Litman v. George Mason University*, 1301, 1312, 1483, 1500
- Little v. City of North Miami*, 1241
- Liu v. Striuli*, 951, 953
- Livingstone College*, 285, 494
- Lloyd v. Alpha Phi Alpha & Cornell University*, 1091-1092
- Lloyd v. Tanner*, 55
- Local 4501 Communications Workers of America v. Ohio State University (466 N.E.2d 912)*, 1608
- Local 4501 Communications Workers of America v. Ohio State University (494 N.E.2d 1082)*, 1608
- Local 93, International Association of Firefighters v. City of Cleveland*, 781n
- Locke v. Davey*, 68-70, 841
- Lockhart v. United States*, 852
- Loder v. State of New York*, 201-202
- Loebel v. New York University, In re*, 574
- Logan v. Bennington College Corp.*, 47-48
- Logan v. Zimmerman Brush Co.*, 556
- Logan Lanes v. Brunswick Corp.*, 1600-1601
- Lombard v. Fireman's Fund Insurance Co.*, 191
- Long v. Board of Trustees*, 1622
- Long v. Samson*, 104-105
- Long Island University v. Tappan*, 1171
- Lopez; United States v.*, 1298, 1300, 1302-1303
- Lorance v. AT&T Technologies, Inc.*, 103
- Loretto Heights College*, 493
- Louisiana; United States v. (692 F. Supp. 642)*, 1456
- Louisiana; United States v. (751 F. Supp. 606)*, 1456
- Louisiana ex rel. Guste v. United States*, 1456
- Lovelace v. Southeastern Massachusetts University*, 645
- Lovell v. Griffin*, 1013n
- Loving v. Boren*, 871-872
- Ludwig v. Board of Trustees of Ferris State University*, 361
- Lueth v. St. Clair County Community College*, 1106
- L.W. v. Western Golf Association*, 200, 882
- Lynch v. Donnelly*, 71
- Lynch v. Indiana State University Board of Trustees*, 633n
- Lyons v. Salve Regina College*, 170

## M

- Maas v. Cornell University*, 321, 473, 482
- Mabey v. Reagan*, 588, 595
- MacKay v. State*, 104
- MacMurray College v. Wright*, 1187
- MacPherson v. University of Montevallo*, 517
- Maczaczynj v. State of New York*, 971
- Mader v. Health Care Authority*, 483-484
- Mader v. State of Washington*, 484
- Madey v. Duke University*, 1652
- Madsen v. Women's Health Center*, 1011-1012
- Mahan v. Howell*, 1205
- Mahavongsanan v. Hill*, 727-728
- Mailloux v. Kiley*, 631n
- Maine v. Sterling*, 918-919
- Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 868, 872, 875
- Maitland v. University of Minnesota*, 520
- Mallory v. Ohio University*, 220
- Malone v. Academy of Court Reporting*, 1534n
- Mandel v. U.S. Department of Health, Education & Welfare*, 1490
- Mangaroo v. Nelson*, 346
- Mangla v. Brown University*, 731
- Manhattan College*, 494
- Manor Junior College v. Kaller's, Inc.*, 1612
- Maples v. Martin*, 568, 674-675, 677
- Marbury v. Central State University*, 184
- Marbury v. Madison*, 60
- Marcum v. Dahl*, 1119
- Marder v. Board of Regents of the University of Wisconsin System*, 1286
- Martin v. University of Puerto Rico*, 974
- Marjorie Webster Junior College v. District of Columbia Board of Zoning Adjustment*, 1173-1174
- Marjorie Webster Junior College v. Middle States Association of Colleges & Secondary Schools*, 1369, 1535-1536, 1540, 1541, 1543, 1546
- Marlboro Corp. v. Association of Independent Colleges & Schools*, 1535-1536, 1543-1544
- Marlow v. United States Department of Education*, 1492-1493
- Marsh v. Chambers*, 71, 74
- Marshall v. Regis Educational Corp.*, 308-309
- Marshall v. State ex rel. Department of Transportation*, 877
- Marson v. Northwestern State University*, 470
- Martin v. Guillot*, 126
- Martin v. Helstad*, 753
- Martin v. Occupational Safety & Health Review Commission*, 949
- Martin v. Parrish*, 39, 630, 636, 649, 651, 652, 742n, 1018n
- Martinez v. Bynum*, 833
- Mary Galloway, State ex rel. v. Grimm*, 67-68
- Marymount College of Virginia*, 493
- Mason v. State ex rel. Board of Regents of the University of Oklahoma*, 224
- Mason v. State of Oklahoma*, 808
- Mason v. Wolf*, 1006, 1223
- Massachusetts Board of Retirement v. Murgia*, 775
- Massachusetts Community College Council v. Commonwealth of Massachusetts*, 478
- Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 1548-1549
- Mastronito; United States v.*, 850
- Mathews v. Diaz*, 834n
- Mathews v. Eldridge*, 560, 570, 918
- Mathis v. Phillips Chevrolet, Inc.*, 359
- Matikas v. University of Dayton*, 264
- Matthew Bender & Co. & Hyperlaw v. West Publishing Co.*, 1352

- Mathews v. National Collegiate Athletic Association*, 1579–1581
- Mathews v. Superior Court*, 332
- Mauriello v. University of Medicine & Dentistry of New Jersey*, 985
- Mayberry v. Dees*, 538
- Mayor & City Council of Baltimore v. Mathews*, 1490–1491
- Mazart v. State*, 191, 748, 1110–1114
- McCallum v. North Carolina Cooperative Extension Service*, 262
- McClendon v. City of Columbia*, 355
- McConnell v. Howard University*, 116–117, 473, 481, 532, 654
- McCormack v. NCAA*, 1568–1569
- McCulloch v. PNC Bank, Inc.*, 1437–1438
- McDaniels v. Flick*, 560–562
- McDonald v. City of West Branch*, 299
- McDonald v. Hogness*, 788
- McDonald v. Santa Fe Trail Transportation Co.*, 760
- McElearney v. University of Illinois*, 124
- McEnroy v. St. Meinrad School of Theology*, 489, 714, 716
- McEvaddy v. City University of New York*, 191
- McGann v. H&H Music Co.*, 313
- McGill v. The Regents of the University of California*, 539–540
- McGlinchy v. Shell Chemical Co.*, 1571
- McGough v. University of San Francisco*, 293
- McGrath v. University of Alaska*, 1287
- McGuinness v. Regents of the University of New Mexico*, 121
- McGuinness v. University of New Mexico School of Medicine*, 960–961
- MCI Communications Corp. v. American Telephone & Telegraph Co.*, 1655
- McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 1545–1546
- McKelvey v. Pierce*, 57
- McKelvy v. Diocese of Camden*, 228
- McLachlan v. Tacoma Community College District No. 22*, 273
- McLaughlin v. Richland Shoe Co.*, 306
- McLemore, State ex rel. v. Clarksville School of Theology*, 1265–1266
- McLendon v. Morton*, 553
- McMaster Construction, Inc. v. Board of Regents of Oklahoma Colleges*, 1613–1614
- Medical Institute of Minnesota v. National Association of Trade & Technical Schools*, 1541–1542, 1544
- Medical Society of South Carolina v. Medical University of South Carolina*, 1627
- Medina v. City & County of Denver*, 351
- Medlock v. Board of Trustees of the University of Massachusetts*, 1328
- Mehta, In re*, 846
- Meling, In re*, 845
- Mellen v. Bunting*, 73–75
- Melvin v. Union College*, 989
- Memphis, City of v. Alpha Beta Welfare Association*, 1191
- Memphis Community School District v. Stachura*, 121–122, 240
- Mendez v. Reynolds*, 184–185
- Mentavlos v. Anderson*, 46n, 51–52, 748
- Mercer v. Duke University*, 1139
- Mercy Catholic Medical Center v. Thompson*, 1401, 1443
- Meritor Savings Bank, FSB v. Vinson*, 750
- Merwine v. Board of Trustees for State Institutions of Higher Learning*, 1532
- Messina v. Burden*, 336
- Metropolitan Life Insurance v. Taylor*, 313
- Meyer v. Burger King Corporation*, 325
- Meyer v. Nebraska*, 41
- MGM Studios, Inc. v. Grokster, Ltd.*, 1341
- Miami Student, State ex rel. v. Miami University*, 1037–1038
- Miami University; United States v.*, 1038, 1436
- Miami Wrestling Club v. Miami University*, 1138
- Michaelson v. Cox*, 830
- Michigan v. VanTubbergen*, 877
- Microsoft; United States v.*, 711–713
- Middlebury College Sales & Use Tax, In re*, 1249, 1637
- Middletown v. Hartman*, 311
- Midwest Research Institute v. United States*, 1636, 1653
- Milbouer v. Keppler*, 591
- Milkovich v. Lorain Journal Co.*, 338
- Miller v. California*, 1107–1108
- Miller v. Loyola University of New Orleans*, 217
- Miller v. Sonoma County Junior College District*, 776
- Miller v. State*, 880–881
- Miller v. Washington State Community College*, 99–100
- Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 138
- Miller ex rel. Miller v. HCA, Inc.*, 1291
- Millien v. Colby College*, 991
- Milton S. Hershey Medical Center of the Pennsylvania State University, In re*, 1289
- Milwaukee Journal v. Board of Regents of the University of Wisconsin System*, 1283
- Minger v. Green*, 332
- Mink v. University of Chicago*, 1291
- Minnesota State Board for Community Colleges v. Knight*, 289, 497–498, 666
- Missert v. Trustees of Boston University*, 1324n
- Mississippi Gay Alliance v. Goude-lock*, 1102
- Mississippi State Alumni Association, Inc. v. Commissioner*, 1419n
- Mississippi University for Women v. Hogan*, 763–764
- Mitchell v. Helms*, 62–63, 64
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 1645
- Mitra v. University of Medicine & Dentistry of New Jersey*, 729
- Mohawk Book Co. v. State University of New York*, 1284
- Molpus v. Fortune*, 1215
- Monell v. Department of Social Services of the City of New York*, 232–233, 239–240
- Monroe v. Pape*, 1562
- Montefiore Hospital & Medical Center & New York State Federation of Physicians & Dentists*, 493
- Moore v. Board of Regents of the University of the State of New York*, 1253–1254, 1259
- Moore v. Regents of the University of California*, 1290
- Moore v. University of Notre Dame*, 219
- Moore v. Vanderloo*, 214
- Moosa v. State Personnel Board*, 567
- Moose Lodge v. Irvis*, 43n
- Morales; United States v.*, 870, 1396–1397
- Moresco v. Clark*, 973, 976
- Morgan v. American University*, 267, 566

- Morgantown, City of v. West Virginia Board of Regents*, 1199, 1638
- Morgantown, City of v. West Virginia University Medical Corporation*, 245–246
- Morris v. Nowotny*, 168
- Morris; United States v.*, 1385
- Morrison v. Kappa Alpha Psi Fraternity*, 209, 1090–1091
- Morrison; United States v.*, 1298, 1303, 1304
- Morse v. Regents of the University of Colorado*, 748, 950n
- Mostaghim v. Fashion Institute of Technology*, 938
- Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 1443
- Motz v. Johnson*, 1093
- Motzkin v. Trustees of Boston University*, 515–516
- Mt. Healthy City School District Board of Education v. Doyle*, 691–692, 694, 696–698, 790n
- Mt. Sinai School of Medicine v. American Tobacco Co.*, In re, 709
- Mull v. Oregon Institute of Technology*, 973
- Mullins v. Pine Manor College*, 194, 880
- Mumford v. Godfried*, 675
- Murdy v. Bureau of Blindness & Visual Services*, 895
- Murphy v. Duquesne University of the Holy Ghost*, 135, 574–575
- Murphy v. Office of Vocational & Educational Services for Individuals With Disabilities*, 894–895
- Murphy v. United Parcel Service*, 961
- Murray v. New York University College of Dentistry*, 943
- Murrell v. Mount St. Clare College*, 881–882
- Murtaugh v. Emory University*, 476
- Muskovitz v. Lubbers*, 704
- Myles v. Regents of the University of California*, 297
- N**
- NAACP v. Alabama ex rel. Patterson*, 619
- NAACP v. Button*, 612, 1025
- Nabozny v. Podlesny*, 958
- Namenwirth v. Regents of the University of Wisconsin*, 514
- Napolitano v. Trustees of Princeton University*, 735, 992–993
- Naranjo, In re*, 845
- Nash v. Auburn University*, 978
- Nash v. Trustees of Boston University*, 267
- Nasson College, In re*, 1553
- National Board of Medical Examiners; Doe v.*, 775
- National Coalition for Students With Disabilities Education & Legal Defense Fund v. Allen*, 1314
- National Coalition for Students With Disabilities Education & Legal Defense Fund v. Gilmore*, 895–896
- National Collegiate Athletic Association. See NCAA*
- National Endowment for the Arts v. Finley*, 1447–1448
- National Labor Relations Board v. See name of opposing party*
- National League of Cities v. Usery*, 1302
- National Movement for the Student Vote v. Regents of the University of California*, 1204
- National Society of Professional Engineers v. United States*, 1369–1370, 1547, 1571
- National Treasury Employees Union; United States v.*, 610–611, 661
- National Treasury Employees Union v. Von Raabe*, 268
- National Wrestling Coaches Association v. Department of Education*, 101, 1138–1139, 1440–1441, 1530
- Native American Heritage Commission v. Board of Trustees of the California State University*, 627
- NCAA v. Board of Regents of the University of Oklahoma*, 1374–1375, 1566–1567, 1571, 1632
- NCAA v. Miller, Governor, State of Nevada*, 1564–1565
- NCAA v. Roberts*, 1565
- NCAA v. Smith*, 1573–1574
- NCAA v. Tarkanian*, 1546, 1562–1563
- NCAA v. Yeo*, 1116–1119
- Neal v. California State University*, 1137–1138
- Near v. State of Minnesota*, 1112
- Nebraska Press Association v. Stuart*, 1008
- Nedder v. Rivier College*, 516
- Neighborhood Action Coalition v. City of Canton*, 1496
- Nelson; Commonwealth v.*, 863–864
- Neiman v. Yale University*, 576
- Nelson v. Pima Community College*, 329
- Nemani v. St. Louis University*, 223
- Nemser; State v.*, 866
- Neo Gen Screening, Inc. v. University of Massachusetts*, 1373–1374
- Nero v. Kansas State University*, 200, 883
- Nevada Department of Human Resources v. Hibbs*, 316, 1306, 1311
- Newark, City of v. University of Delaware*, 1168
- Newberry v. East Texas State University*, 515
- New Era Publications International v. Henry Holt & Co.*, 1339
- New Jersey v. T.L.O.*, 862n
- New Jersey Board of Higher Education v. Shelton College*, 1264–1265
- New Jersey Chamber of Commerce v. Hughey*, 304
- New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 1228
- New Jersey State College Locals v. State Board of Higher Education*, 499
- Newman v. Sathyavaglswaran*, 1290
- Newport, City of v. Fact Concerts, Inc.*, 240
- New York v. Coury*, 808–809
- New York v. Ferber*, 869, 1388
- New York v. United States*, 1298
- New York Association of Career Schools v. State Education Department*, 1261
- New York Botanical Garden v. Board of Standards & Appeals & Fordham University, In re*, 1180
- New York Institute of Technology v. LeBoutillier*, 1174
- New York State Board of Law Examiners v. Bartlett*, 961
- New York Times v. Sullivan*, 338–339, 1108n, 1551n
- New York University*, 302, 495
- New York University; Doe v.*, 771
- New York University v. Taylor*, 1197
- Nicholas v. Pennsylvania State University*, 564, 696
- Nicholson v. Northeast Louisiana University*, 199
- Nieswand v. Cornell University*, 881
- Nigro v. Research College of Nursing*, 217
- Niles v. Board of Regents of the University System of Georgia*, 202
- Nisbet v. Bucher*, 1094

- NLRB v. *See name of opposing party*
- Noah v. AOL Time Warner, Inc., 874
- Nollan v. California Coastal Commission, 1170
- Norman-Bloodshaw v. Lawrence Berkeley Laboratory, 269–270
- Norris v. State Council of Higher Education, 1453
- North v. West Virginia Board of Regents, 753–754
- North Carolina v. Pendleton, 877
- North Dakota v. North Central Association of Colleges & Secondary Schools, 1534
- North Haven Board of Education v. Bell, 1473
- Northwestern University v. City of Arden Hills, 1171
- Northwestern University v. City of Evanston, 1170
- Norwood v. Harrison, 45n
- Nova Southeastern University v. Gross, 204–205
- Nova University v. Board of Governors of the University of North Carolina, 1270–1271
- Nova University v. Educational Institution Licensure Commission, 1271–1272
- Nyquist v. Jean-Marie Mauclet, 833–835
- Nzuve v. Castleton State College, 918
- O**
- O'Brien v. New England Telephone & Telegraph Co., 105
- O'Brien; *United States v.*, 1431
- O'Connell v. State of New Jersey, 194
- O'Connor v. Davis, 1482
- O'Connor v. Ortega, 612–613
- Oda v. State of Washington, 519
- Oden v. Northern Marianas College, 951–952
- Ohio v. Spingola, 999, 1218, 1223
- Ohio Civil Rights Commission v. Case Western Reserve University, 773–774
- Ohio Dominican College v. Krone, 534–535
- Ohrlick v. Ohio State Bar Association, 1232
- Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 1094
- Okruhlik v. University of Arkansas ex rel. May, 1311
- Olin v. Wakinekona, 555
- Ollman v. Toll, 696
- Olsson v. Board of Higher Education of the City of New York, 184, 934–935
- Olsson v. Indiana University Board of Trustees, 218
- 164 Mulberry Street Corp. v. Columbia University, 221, 1318n
- Online Policy Group v. Diebold, Inc., 875
- Oona v. McCaffrey, 956
- Orange v. District of Columbia, 275–276
- Oregon Health Sciences University, State ex. rel. v. Haas, 110
- Oregon State University Alumni Association v. Commissioner, 1419n, 1635, 1636
- Organiscak v. Cleveland State University, 804
- Orin v. Barclay, 878, 1218, 1222–1223
- Orozco-Santillan; *United States v.*, 870
- Ortwein v. Mackey, 550
- Osborn & Center for Equal Opportunity v. Board of Regents of the University of Wisconsin System, 1285
- Osborne v. Johnson, 110
- Osborne v. Stone, 566
- Oshkosh, City of v. Winkler, 919
- Ostasz v. Medical College of Ohio, 340
- Osteen v. Henley, 918
- Ostrander v. Duggan, 1092n, 1096
- Ottgen v. Clover Park Technical College, 730
- Owasso Independent School District v. Falvo, 1034n
- Owen v. City of Independence, 239n, 241
- Owens v. Storehouse, 313
- P**
- Pace v. Bogalusa City School Board, 819, 1312
- Pace v. Hymas, 581–582
- Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 1297n
- Packer Collegiate Institute v. University of the State of New York, 1262
- Pahulu v. University of Kansas, 1140–1141
- Paine v. Board of Regents of the University of Texas System, 914–915
- Palmer v. District Board of Trustees of St. Petersburg Junior College, 524n
- Panarella v. Birenbaum, 1112
- Papadakis v. Iowa State University of Science & Technology, 277
- Papish v. Board of Curators of the University of Missouri, 738, 1004, 1107
- Paradise; *United States v.*, 796
- Parate v. Isibor, 645–646, 653
- PARC v. Pennsylvania, 768
- Parham, In re, 847
- Parish v. NCAA, 1561
- Parker v. Brown, 1369
- Parker v. Flook, 1356, 1357
- Parraway v. Andrews University, 847
- Parsons College v. North Central Association of Colleges & Secondary Schools, 1535–1536, 1538–1540, 1541–1542, 1543
- Passonno v. State University of New York at Albany, 277
- Patsy v. Board of Regents of the State of Florida, 104n, 240–241, 576n
- Patterson v. Southwestern Baptist Theological Seminary, 489–490
- Pauk v. Board of Trustees of the City University of New York, 102–103, 118–119
- Paul v. Davis, 550n
- Paulsen v. Golden Gate University, 755
- Peacock v. Board of Regents of University & State Colleges of Arizona, 578
- Peck v. University Residence Committee of Kansas State University, 828, 831
- Pederson v. Louisiana State University, 818, 1135, 1136, 1500
- Peel v. Salliemae Servicing-HEAL Loan, 845
- Peirce Junior College v. Schumaker, 1179
- Pelkowski, In re, 845
- Penn v. Harris, 879
- Pennhurst State School & Hospital v. Halderman, 1299–1300, 1308
- Pennsylvania v. Croushore, 877
- Pennsylvania v. Downing, 1212
- Pennsylvania v. Tate, 56, 1228
- Pennsylvania v. Union Gas, 1308–1309
- Pennsylvania State University v. Commissioner, Department of Labor & Industry, 704
- Pennsylvania State University v. University Orthopedics, 1364–1365
- People v. *See name of opposing party*
- People ex rel. *See name of party*
- People for the Ethical Treatment of Animals v. Institutional Animal Care & Use Committee of the University of Oregon, 100–101, 1327
- Perez v. City University of New York, 188, 1277

- Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 1348
- Perry v. Sindermann*, 36, 470, 547, 549, 605, 606n, 1584
- Perry Education Association v. Perry Local Educators' Association*, 292, 997n, 1000
- Petaluma City School District; Doe v.*, 749, 947
- Peters v. Jenney*, 1483
- Peterson v. San Francisco Community College District*, 884
- Pfaff v. Columbia-Greene Community College*, 104, 912–913
- PGA Tour, Inc. v. Martin*, 1383–1384
- Phelps v. Board of Education of West New York*, 479
- Phelps v. President & Trustees of Colby College*, 1080
- Phelps v. Washburn University of Topeka*, 753
- Philadelphia v. New Jersey*, 1268
- Philadelphia, City of; United States v.*, 1164–1165, 1297
- Phillip v. Fairfield University & The National Collegiate Athletic Association*, 1573
- Phillips v. Martin Marietta*, 503
- Phillips v. Moore*, 364
- Physicians Committee for Responsible Medicine v. National Institutes of Health*, 1327–1328
- Physicians National House Staff Association v. Fanning*, 302
- Piarowski v. Illinois Community College*, 611–612, 625, 726
- Piazzola v. Watkins*, 862, 865
- Pickering v. Board of Education*, 350, 606, 607, 621, 1239–1240
- Pickings v. Bruce*, 1240
- Pierce v. Ortho Pharmaceutical*, 328
- Pierce v. Smith*, 268
- Pierce v. Society of Sisters*, 41
- Pike v. Bruce Church*, 1269
- Pikulin v. City University of New York*, 238
- Pi Lambda Phi Fraternity v. University of Pittsburgh*, 1082–1083
- Pima Community College v. Arizona Department of Economic Security*, 327
- Pioneer Roofing Co. v. Mardian Construction Co.*, 1595
- Piotrowski v. City of Houston*, 355
- Pitock v. State*, 100
- Pitre v. Louisiana Tech University*, 198–199
- Pitt News v. Pappert*, 1106
- Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 1105
- Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Advocates*, 870–871
- Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1289
- Phyler v. Doe*, 778, 837
- Podberesky v. Kirwan*, 789, 823–825
- Poe v. Leonard*, 337
- Polaski v. Clark*, 831–832
- Police Department v. Mosley*, 1024, 1071
- Polishook v. City University of New York, In re*, 180
- Pomona College v. The Superior Court of Los Angeles County*, 577
- Potemra v. Ping*, 559
- Powe v. Miles*, 42
- Powell v. Syracuse University*, 131, 502
- Power v. Summers*, 241, 610, 1308
- Prairie View A&M University of Texas v. Mitchell*, 192
- Pred v. Board of Instruction of Dade County, Florida*, 631n
- Presbyterian Church v. Hull Church*, 59n
- Presbyterian Medical Center of the University of Pennsylvania Health System v. Shalala*, 1401
- President & Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment*, 1176
- President & Directors of Georgetown College v. Hughes*, 194
- Preyer v. Dartmouth College*, 1481
- Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 1095
- Princeton University & State of New Jersey v. Schmid*, 1227n, 1228, 1246
- Princeton University Press v. Borough of Princeton*, 1192–1193
- Princeton University Press v. Michigan Document Services, Inc.*, 1337
- Printz v. United States*, 1298
- Proctor & Gamble Co. v. Swilly*, 711
- Procurier v. Navarette*, 348
- Property Owners Association v. Board of Zoning Appeals*, 1172
- Pro Schools, Inc. v. Riley*, 851
- Prostrollo v. University of South Dakota*, 854, 859
- PruneYard Shopping Center v. Robins*, 55–56
- Prusack v. State*, 733
- Pryor v. NCAA*, 1576
- Psi Upsilon v. University of Pennsylvania*, 1085–1086
- Pugel v. Board of Trustees of the University of Illinois*, 981–982
- Pugh v. See's Candies, Inc.*, 265
- Purdie v. University of Utah*, 776
- Pushkin v. Regents of the University of Colorado*, 770, 968, 1496
- Putnam v. Keller*, 551
- Pyeatte v. Board of Regents of the University of Oklahoma*, 1243–1244

## Q

- Quern v. Jordan*, 232–233
- Quilichini v. Universidad Católica*, 685–686, 687
- Quinn v. Mississippi State University*, 229
- Quinn v. Sigma Rho Chapter*, 1090n
- Quinnipiac College; NLRB v.*, 280, 289

## R

- Rabel v. Illinois Wesleyan University*, 197, 882
- Radcliffe College v. City of Cambridge*, 1173
- Rader v. Johnston*, 856–857
- Ragsdale v. Wolverine Worldwide, Inc.*, 315–316
- Railroad Commission of Texas v. Pullman*, 100n
- Raines v. Haverford College*, 265
- Rajender v. University of Minnesota*, 514
- Ramos v. California Committee of Bar Examiners*, 1263–1264
- Rancho Santiago College; People v.*, 1178
- Randi W. v. Muroc Joint Unified School District*, 221, 343–344
- Ranney v. Instituto Pontificio Delle Maestre Filippini*, 1177
- Rashed v. State of New York*, 193
- R.A.V. v. City of St. Paul*, 1019–1020, 1022–1023, 1047, 1238n
- Ravindranathan v. Virginia Commonwealth University*, 832–833
- Ray v. Wilmington College*, 915
- R.B. Plummer Memorial Loan Fund Trust, In re*, 810
- Recording Industry Association of America v. Verizon Internet Services, Inc. (351 F.3d 1229)*, 1350
- Recording Industry Association of America v. Verizon Internet Services, Inc. (240 F. Supp. 2d 24, 257 F. Supp. 2d 244)*, 1350

- Red & Black Publishing Co. v. Board of Regents*, 1280, 1283  
*Regan v. State*, 1150–1151  
*Regan v. Taxation With Representation*, 1448  
*Regan v. Time, Inc.*, 1243  
*Regensburger v. City of Bowling Green, Ohio*, 1206  
*Regents of the University of California, In re*, 1652  
*Regents of the University of California v. Bakke*, 626n, 782, 785–788, 1471, 1475  
*Regents of the University of California v. City of Santa Monica*, 1169  
*Regents of the University of California v. Doe*, 225, 236n  
*Regents of the University of California v. Eli Lilly & Co.*, 1652  
*Regents of the University of California v. Public Employment Relations Board*, 292, 301  
*Regents of the University of California v. Superior Court*, 838–839  
*Regents of the University of Colorado v. K.D.I. Precision Products, Inc.*, 1646–1647  
*Regents of the University of Michigan v. Ewing*, 130, 131–132, 564, 626, 929, 1584  
*Regents of the University of Michigan v. Michigan Employment Relations Commission*, 1258  
*Regents of the University of Michigan v. State of Michigan*, 1255–1256, 1257  
*Regents of the University of Minnesota v. Chicago & North Western Transportation Co.*, 1249–1250  
*Regents of the University of Minnesota v. Chief Industries, Inc.*, 1602–1603  
*Regents of the University of Minnesota v. NCAA*, 1116  
*Regents of the University System of Georgia; State v.*, 1623  
*Regions Hospital v. Shalala*, 1400  
*Rehor v. Case Western Reserve University*, 271  
*Reilly v. Daly*, 117–118, 127n, 977  
*Reimer v. Champion Healthcare*, 310  
*Rendell-Baker v. Kohn*, 43–46, 1544, 1562  
*Reno v. American Civil Liberties Union*, 659–660, 872n, 873, 1387, 1389–1393  
*Renshaw, In re*, 846  
*Rensing v. Indiana State University Board of Trustees*, 324  
*Rensselaer Polytechnic Institute v. Commissioner*, 1636–1637  
*Rensselaer Society of Engineers v. Rensselaer Polytechnic Institute, In re*, 989, 1081  
*Reproductive Rights Network v. President of the University of Massachusetts*, 1216–1217  
*Retired Adjunct Professors of the State of Rhode Island v. Almond*, 478–479  
*Revell v. Lidov*, 98  
*Reynolds v. Sims*, 1205  
*Rhode Island Department of Environmental Management v. United States*, 1380  
*Richards v. League of United Latin American Citizens*, 760  
*Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 708  
*Richardson v. Blanton*, 1453  
*Richardson v. McKnight*, 878  
*Richmond, City of v. J.A. Croson Co.*, 787–788, 796, 800, 1614–1615  
*Rieder v. State University of New York*, 576  
*Riggio v. Board of Trustees of Ball State University*, 115–116, 529  
*Riggio v. Burns*, 1274n  
*Riggs; United States v.*, 1394  
*Rivera v. Hospital Universitario*, 335  
*R.L.R. v. Prague Public School District I-103*, 947n  
*Roberson, In re*, 845  
*Roberts v. Colorado State Board of Agriculture*, 1133, 1134n  
*Roberts v. Haragan*, 999, 1006, 1025–1026  
*Roberts v. United States Jaycees*, 1082  
*Robertson v. State of Louisiana*, 199  
*Robins v. PruneYard Shopping Center*, 55  
*Robinson v. University of Akron School of Law*, 960, 1383  
*Rocha v. Pi Kappa Alpha*, 1095  
*Rockland Institute v. Association of Independent Colleges & Schools*, 1536n, 1541–1542  
*Roe v. Cheyenne Mountain Conference Resort*, 269  
*Roemer v. Board of Public Works*, 63–64, 1071  
*Rogers v. Lodge*, 782  
*Rogers v. New York University*, 299–300  
*Roklina v. Skidmore College*, 541  
*Rome, City of v. United States*, 1475  
*Romer v. Evans*, 1069  
*Rosado v. Wyman*, 1029n  
*Rosa H. v. San Elizario Independent School District*, 947–948  
*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 274  
*Rosenberger v. Rector & Visitors of University of Virginia*, 64, 619, 634, 662, 738–740, 871, 901, 997n, 998–999, 1001, 1014n, 1051n, 1054, 1074–1078, 1099–1100, 1153, 1238n, 1446–1448  
*Rosenstock v. Board of Governors of the University of North Carolina*, 777  
*Rosenthal v. Webster University*, 807, 926–927  
*Ross v. Creighton University*, 213–214, 1126–1127  
*Ross v. Medical University of South Carolina*, 110–112, 150  
*Ross v. St. Augustine's College*, 343, 937  
*Ross Learning, Inc. v. Riley*, 851  
*Rothbard v. Colgate University*, 1092  
*Rothstein v. City University of New York*, 1212n  
*Roufaiel v. Ithaca College*, 541–542  
*Rounds v. Oregon State Board of Higher Education*, 236, 238–239, 1058, 1065  
*Rowe v. Laidlaw Transit, Inc.*, 310  
*Rumsfeld v. FAIR*, 1431  
*Runyon v. McCrary*, 760, 1305  
*Russell v. Salve Regina College*, 932–933  
*Russell v. Yale University*, 181  
*Russo v. Nassau County Community College*, 1284  
*Rust v. Fitzhugh*, 1594  
*Rust v. Sullivan*, 892, 1443–1447  
*Rutan v. Republican Party of Illinois*, 612  
*Rutcosky v. Board of Trustees of Community College District No. 18*, 544  
*Rutgers, The State University v. Piluso*, 1168–1169  
*Ryles v. Durham County Hospital Corp.*, 322

## S

- Sackman v. Alfred University*, 576, 577–578  
*Sacred Heart University*, 494  
*Saenz v. Roe*, 778, 830  
*St. Agnes Hospital v. Riddick*, 1289, 1544–1545  
*St. Joseph's College*, 285  
*St. Martin Evangelical Lutheran Church v. South Dakota*, 1414n  
*St. Mary's Honor Center v. Hicks*, 503

- St. Norbert College Foundation v. McCormick*, 1594
- St. Paul-Ramsey Medical Center v. Shalala*, 1400n
- St. Thomas University*, 493
- Salehpour v. University of Tennessee*, 740n, 1016
- Salem College & Academy v. Employment Division*, 326
- Salinger v. Random House*, 1339
- Salvador v. Bennett*, 772, 1493
- Salve Regina College v. Zoning Board of Review of City of Newport*, 1177
- Samaan v. Trustees of California State University & Colleges*, 117, 129n
- Samuel v. University of Pittsburgh*, 107, 827
- San Antonio Independent School District v. Rodriguez*, 826
- San Diego, City of v. Roe*, 608
- Sandoval v. Board of Regents of the University & Community College System of Nevada*, 1276
- San Filippo v. Bongiovanni*, 533–534, 612
- San Francisco Labor Council v. Regents of the University of California*, 1256–1257
- San Jose Christian College v. City of Morgan Hill*, 60n
- Santa Fe Independent School District v. Doe*, 73
- Santa Rosa Junior College v. Workers' Compensation Appeals Board*, 325
- Sarkisian Brothers, Inc. v. Hartnett*, 1605
- Sarvis v. Vermont State Colleges*, 267
- Saucier v. Katz*, 348, 349, 878
- Scallet v. Rosenblum*, 634–635, 649, 650, 675–676, 692, 697–698
- Scanlan v. Texas A&M University*, 356
- Scarce v. United States*, 711
- Scelsa v. City University of New York*, 524
- Schaer v. Brandeis University*, 991
- Schaper v. City of Huntsville*, 562
- Scharf v. Regents of the University of California*, 705
- Schaumburg v. Citizens for Better Environment*, 1237
- Schenck v. Pro-Choice Network of Western New York*, 1011–1012
- Scherer v. Curators of the University of Missouri*, 98
- Scheuer v. Rhodes*, 347
- Scheuller v. Board of Adjustment*, 1172
- Schier v. Temple University*, 47, 50n
- Schieszler v. Ferrum College*, 211
- Schiff v. Williams*, 1101–1102
- Schmid; State v.*, 46n, 56, 1212, 1224–1228, 1246
- Schneider v. State of New Jersey*, 1013
- School Board of Nassau County v. Arline*, 1467
- School District of Abington Township v. Schempp*, 57–58
- SchorNSTein v. New Jersey Division of Vocational Rehabilitation Services*, 894
- Schrier v. University of Colorado*, 679n
- SCM Corp. v. Xerox Corp.*, 1655
- Scott v. State*, 1148
- Scott v. Western State University College of Law*, 963
- Seal v. Morgan*, 923
- Seare v. University of Utah School of Medicine*, 735
- Searle v. Regents of the University of California*, 187–188
- Seidlitz; United States v.*, 1394
- Selective Service System v. Minnesota Public Interest Research Group*, 815
- Self v. Texas A&M University*, 354–356
- Seminole Tribe v. Florida*, 1298, 1303, 1308–1309, 1351, 1498–1499
- Serbian Orthodox Diocese v. Milivojevich*, 59n
- Seton Hall University Faculty Association v. Seton Hall University*, 286
- Settle v. Dickson County School Board*, 744
- Seus v. John Nuveen & Co.*, 274
- SE/Z Construction, L.L.C. v. Idaho State University*, 1613
- Shamloo v. Mississippi State Board of Trustees*, 1002, 1004, 1007
- Shapiro v. Columbia Union National Bank & Trust Co.*, 52, 810
- Shapp v. Sloan*, 1247–1248
- Sharick v. Southeastern University of the Health Sciences, Inc.*, 733
- Sharif v. Salahuddin v. New York State Education Department*, 767, 820
- Sharik v. Southeastern University of the Health Sciences*, 930n
- Sharon v. City of Newton*, 159
- Sharp v. Zoning Hearing Board of the Township of Radnor*, 1179
- Shaw v. Board of Trustees*, 630
- Shaw v. Reno*, 1205
- Shea v. Emmanuel College*, 328
- Shearer v. Lambert*, 218
- Sheet Metal Workers v. EEOC*, 800
- Shelton v. Tucker*, 618
- Shelton College v. State Board of Education*, 1258, 1264n
- Shepard v. Irving*, 960
- Sherbert v. Verner*, 1266
- Sheridan v. Trustees of Columbia University*, 848
- Sherman v. Community Consolidated School District*, 71
- Sherman v. Curators of the University of Missouri*, 236–237
- Sherman College of Straight Chiropractic v. U.S. Commissioner of Education*, 1558
- Shimer v. Bowling Green State University*, 198
- Shin v. MIT*, 211, 335
- Shlien v. Board of Regents of University of Nebraska*, 223
- Sholvin v. University of Medicine & Dentistry of New Jersey*, 681–682
- Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University*, 1036–1037
- Shriners Hospitals for Crippled Children v. First Security Bank of Utah*, 180–181
- Shurben v. Dollar Rent-A-Car*, 204
- Shuttlesworth v. Birmingham*, 1010n
- Sibler v. Colorado State Board of Agriculture*, 986
- Sicard v. University of Dayton*, 1151
- Siegel v. National Periodical Publications, Inc.*, 1344
- Siegert v. Gilley*, 348, 930
- Sierra Club v. Commissioner*, 1419n
- Sigall, State ex rel. v. Aetna Cleaning Contractors of Cleveland, Inc.*, 1607
- Siler-Khodr v. University of Texas Health Science Center San Antonio*, 520
- Silva v. University of New Hampshire*, 637, 641–642, 649–651
- Silverman v. University of Colorado*, 182–183, 185
- Silvers v. Associated Technical Institute, Inc.*, 204n
- Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 1448
- Simonson v. Iowa State University*, 570
- Sinn v. The Daily Nebraskan*, 1102
- Sipfle v. Board of Governors of the University of North Carolina*, 186



- Sirohi v. Lee*, 215  
*Sisters of Holy Cross v. Brookline*, 1173  
*Siu v. Johnson*, 554–555  
*Skehan v. Board of Trustees of Bloomsburg State College*, 544, 561, 578  
*Skehan v. State System of Higher Education*, 235  
*Skinner v. Railway Labor Executives Association*, 268, 1142, 1143–1144  
*Skorin-Kapov v. State University of New York at Stony Brook*, 557  
*Slatkin v. University of Redlands*, 541  
*Slaughter v. Brigham Young University*, 728, 924, 933  
*Slovinec v. DePaul University*, 816, 848, 1437  
*Small v. Juniata College*, 262  
*Smith v. Alabama Aviation & Technical College*, 120  
*Smith v. Atkins*, 341–342  
*Smith v. Board of Regents of the University of Houston*, 828–829  
*Smith v. California*, 1007  
*Smith v. City University of New York*, 248  
*Smith v. Duquesne University*, 47  
*Smith v. Gardner & Board of Regents, San Jacinto College District*, 222–223  
*Smith v. Goguen*, 1007  
*Smith v. Hennepin County Technical Center*, 957  
*Smith v. NCAA*, 1479, 1570–1571, 1573–1574  
*Smith; People v.*, 877  
*Smith v. Regents of the University of California*, 1058  
*Smith v. State*, 1661  
*Smith v. University of Texas*, 198  
*Smith v. University of Washington Law School* (233 F.3d 1188), 791n  
*Smith v. University of Washington Law School* (392 F.3d 367), 791n, 801  
*Smith v. Virginia Commonwealth University*, 520  
*Smith v. Wade*, 353  
*Snyder, In re*, 711  
*Sobel v. Yeshiva University*, 518–519  
*Sodergren v. The Johns Hopkins University Applied Physics Laboratory*, 339  
*Soglin v. Kauffman*, 922, 923  
*Sohmer v. Kinnard*, 915  
*Sola v. Lafayette College*, 470  
*Solo Cup Co. v. Federal Insurance Co.*, 157  
*Soni v. Board of Trustees of University of Tennessee*, 550  
*Sonnichsen v. Baylor University*, 266  
*Sony Corp. of America v. Universal City Studios, Inc.*, 1340  
*Soong v. University of Hawaii*, 930  
*Soper v. Hoben*, 953, 1464  
*Sophianopoulous v. McCormick*, 340  
*Sorey v. Kellett*, 336  
*Sosna v. Iowa*, 830  
*Souders v. Lucero*, 1221–1222  
*South Carolina v. Baker*, 1301  
*South Carolina v. Katzenbach*, 1305  
*South Dakota v. Dole*, 1299  
*South Dakota Board of Regents v. Meierhenry*, 142  
*South Dakota Education Association v. South Dakota Board of Regents*, 294–295  
*South Dakota Sigma Chapter House Association v. Clay County*, 1190  
*Southeastern Community College v. Davis*, 769–770, 965, 1467–1468  
*Southeastern Promotions v. Conrad*, 1010n, 1107  
*Southeastern University of the Health Sciences, Inc. v. Sharick*, 733  
*Southern Christian Leadership Conference v. Supreme Court*, 1241–1242  
*Southern Illinois University Foundation v. Booker*, 1185, 1188  
*Southern Junior College; State ex rel. various citizens*, 1627–1628  
*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 101  
*South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 286  
*South Texas College of Law and Texas A&M University, In re*, 174  
*South Texas College of Law and Texas A&M University v. Texas Higher Education Coordinating Board*, 1254–1255  
*Southwest Center for Biological Diversity v. U.S.D.A.*, 711  
*Southworth v. Board of Regents of University of Wisconsin System*, 1058–1065  
*Southworth v. Grebe*, 1059  
*Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 1015, 1098n  
*Spah v. NCAA*, 1564  
*Spencer v. St. John's University*, 493  
*Spire, State ex rel. v. Conway*, 1242  
*Spring Branch I.S.D. v. Stamos*, 1118–1119  
*Spring Valley Wesley Heights Citizens Association v. District of Columbia Board of Zoning Adjustment*, 1180n  
*Spuler v. Pickar*, 541  
*Stacy v. Williams*, 1003, 1214–1215  
*Staheli v. Smith*, 337  
*Stanley v. Big Eight Conference*, 1563  
*Stanley v. Magrath*, 1098–1099  
*Stanton v. Tulane University*, 265  
*Stanton v. University of Maine System*, 881  
*Starns v. Malkerson*, 826, 829  
*Starsky v. Williams*, 683–684, 688–689  
*Star Tribune Co. v. University of Minnesota Board of Regents*, 1279–1280  
*State v. See name of opposing party*  
*State Board for Community Colleges v. Olson*, 631n  
*State ex rel. See name of party*  
*State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 1357  
*State System of Higher Education v. State College & University Professional Association*, 139  
*Statewide Oilfield Construction, Inc., d/b/a Golden State School, In re*, 1554  
*Staton v. Miami University*, 703  
*Stearns v. Mariani*, 1163  
*Steel v. Industrial Development Board of Metropolitan Government of Nashville*, 66  
*Steelworkers v. American Manufacturing Co.*, 137n  
*Steelworkers v. Enterprise Wheel & Car Corp.*, 137n  
*Steelworkers v. Warrior & Gulf Navigation*, 137n  
*Stein v. Kent State University Board of Trustees*, 538  
*Stephens v. Roane State Community College*, 1288  
*Stephens Institute; NLRB v.*, 493  
*Stapp v. Review Board of the Indiana Employment Security Division*, 327  
*Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*, 175–178  
*Stern v. Trustees of Columbia University*, 525–526  
*Steward Machine Co. v. Davis*, 1299, 1300

- Stockinger v. Feather River Community College*, 205
- Stoll v. New York State College of Veterinary Medicine at Cornell University*, 1282
- Stone by Stone v. Cornell University*, 42n, 56
- Strank v. Mercy Hospital of Johnstown*, 36–37
- Stratton v. Kent State University*, 730
- Student Association of the University of Wisconsin-Milwaukee v. Baum*, 188, 1050
- Student Government Association v. Board of Trustees of the University of Massachusetts*, 900–901
- Student House, Inc. v. Board of Regents of Regency Universities*, 186–187, 189
- Student Loan Fund of Idaho, Inc. v. U.S. Department of Education*, 815n
- Students Against Apartheid Coalition v. O'Neil*, 1007–1008
- Subryan v. Regents of the University of Colorado*, 264
- Sugano v. University of Washington*, 556–557
- Sullivan v. Washington*, 336
- Summers v. Howard University*, 310–311
- Sunshine Books, Ltd. v. Temple University*, 1632–1633
- Susan M v. New York Law School*, 935–936, 938
- Sutton v. Providence St. Joseph Medical Center*, 60
- Sutton v. United Air Lines*, 961
- Swain v. Wiley College*, 228–229
- Swanson v. University of Cincinnati*, 962
- Swanson v. University of Hawaii Professional Assembly*, 291
- Swanson v. Wabash College*, 1151
- Swartley v. Hoffner*, 229
- Swartz v. Scruton*, 567
- Sweezy v. New Hampshire*, 617–618, 626, 647, 738, 1313
- Sword v. Fox*, 923
- Symm v. United States*, 1200
- T**
- Tacka v. Georgetown University*, 218, 481
- Talley v. California*, 1013n, 1015
- Tanaka v. University of Southern California*, 1571
- Tanberg v. Weld County Sheriff*, 772, 1467
- Tanford v. Brand*, 71–72
- Tanja H. v. Regents of the University of California*, 882
- Tanner v. Oregon Health Sciences University*, 124–125
- Tarasoff v. Regents of the University of California*, 334–335, 925
- Tarkanian v. NCAA*, 1562
- Tatum v. National Collegiate Athletic Association*, 1578–1581
- Tau Kappa Epsilon; Commonwealth v.*, 1208
- Taylor v. St. Vincent's Medical Center*, 304
- Taylor v. Wake Forest University*, 1124–1125
- Tayyari v. New Mexico State University*, 778, 835
- T.D. v. New York State Office of Mental Health*, 1290–1291
- Teamsters v. Lucas Flour Co.*, 293
- Teamsters v. University of Vermont*, 289
- Tedeschi v. Wagner College*, 728n, 972
- Teichgraeber v. Memorial Union Corporation of Emporia State University*, 249
- Teitel v. University of Houston Board of Regents*, 829
- Temple Terrace, City of v. Hillsborough Association*, 1167–1168
- Temple University v. Tsokas*, 1365
- Temple University v. Unemployment Compensation Board of Review*, 327
- Tennessee v. Lane*, 1306–1307, 1309n, 1311
- Tennessee Student Assistance Corporation v. Hood*, 844
- Terminiello v. Chicago*, 1003
- Terrell v. University of Texas System Police*, 671
- Texas v. Boyd*, 914
- Texas v. Johnson*, 995, 1025
- Texas v. Lesage*, 790n, 1499n
- Texas; United States v.*, 1200, 1312
- Texas A&M University v. Bishop*, 207
- Texas Faculty Association v. University of Texas at Dallas*, 591–592
- Texas Farm Bureau v. Commissioner*, 1419n
- Texas Tech University Health Sciences Center v. Mendoza*, 1292
- Texas Woman's University v. Chayklintaste*, 855, 859
- Textile Workers v. Lincoln Mills*, 1537
- Theodore v. Delaware Valley School District*, 1146–1147
- Theta Kappa, Inc. v. City of Terre Haute*, 1172
- Thiel College & Thiel College Chapter, AAUP*, 494
- Thomas v. Bennett*, 851, 1441
- Thomas v. Chicago Park District*, 1009, 1014
- Thomas v. City of Mount Vernon*, 357
- Thomas v. Davidson Academy*, 926n
- Thomas v. Granville Board of Education*, 1240
- Thomas v. Lamar University-Beaumont*, 1088
- Thomas; United States v.*, 1393–1394
- Thomas Jefferson University v. Shalala*, 1399–1400
- Thomas M. Cooley Law School v. American Bar Association*, 1542, 1546, 1557
- Thompson v. City of Los Angeles*, 234
- Thompson, United States ex rel. v. Columbia/HCA Healthcare*, 1401
- Tiger Inn v. Edwards*, 100
- Tilton v. Richardson*, 62–63
- Time, Inc. v. Firestone*, 1108n
- Tinker v. Des Moines Independent Community School District*, 629, 674, 995–996, 1003, 1053, 1219, 1227, 1240
- Tips v. Regents of Texas Tech University*, 963
- Tipton v. Alexander*, 816–817, 853
- Tobin v. University of Maine System*, 776
- Toledo Blade Co., State ex rel. v. University of Toledo Foundation*, 1281
- Toll v. Moreno*, 836
- Tolman v. CenCor Career Colleges, Inc.*, 214
- Toney v. Reagan*, 558
- Torres v. State*, 323
- Tourville v. Office of Vocational & Educational Services for Individuals With Disabilities*, 895
- Townsend v. State*, 1151
- Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 970n
- Traficanti v. Morre Catholic High School*, 213
- Trammel v. United States*, 112
- Trejo v. Shoben*, 551–552, 684–685, 689, 945
- Trimble v. Washington State University*, 557
- Trimble v. West Virginia Board of Directors, Southern West Virginia Community & Technical College*, 565–566, 1287
- Trister v. University of Mississippi*, 687
- Troknya v. Cleveland Chiropractic Clinic*, 216–217

- Troy v. Rutgers, the State University of New Jersey*, 499
- Trustees of Columbia University v. Columbia/HCA Healthcare Corp.*, 1365
- Trustees of Dartmouth College v. Woodward*, 41
- Trustees of Rutgers University v. Piscataway Township in Middlesex County*, 1191
- Trustees of State Colleges & Universities v. NCAA*, 1572
- Trustees of Tufts College v. City of Medford*, 1178
- Trustees of Tufts College v. Ramsdell*, 851
- Trustees of Union College v. Members of the Schenectady City Council*, 1178
- Tucker v. State of California Department of Education*, 611
- Tucker v. Watkins*, 1253
- Tullis v. Pittsburgh State University*, 207
- Tulsa Area Hospital Council v. Oral Roberts University*, 1288
- Tuma v. Board of Nursing*, 532*n*
- Tunkl v. Regents of University of California*, 158–160
- Tuomala v. Regent University*, 470–471
- Turkovich v. Board of Trustees of the University of Illinois*, 1622–1623
- Tuskegee Institute v. May Refrigeration Co.*, 185
- Tuttle v. Brandeis University*, 521–522
- U**
- UAW-Labor Employment & Training Corp. v. Chao*, 290
- UDC Chairs Chapter, American Association of University Professors v. Board of Trustees of the University of the District of Columbia*, 571
- Unborn Child Amendment Committee v. Ward*, 1289
- Unger v. National Residents Matching Program*, 579*n*, 729–730
- Unincorporated Operating Division of Indiana Newspapers v. Trustees of Indiana University*, 1285
- United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 233–234, 237
- United Mine Workers v. Gibbs*, 96–97
- United Mine Workers; United States v.*, 125
- United States v. See name of opposing party*
- United States Department of Transportation v. Paralyzed Veterans of America*, 1478–1479, 1574
- United States ex rel. See name of party*
- United States Fidelity & Guaranty Co. v. Jacksonville State University*, 1618
- United States Trust Co. v. New Jersey*, 272, 477–478
- United Steelworkers v. Warrior & Gulf Navigation Co.*, 36
- Uni-United Faculty v. Iowa Public Employment Relations Board*, 295
- Universal City Studios, Inc. v. Carey*, 1354
- Universal City Studios, Inc. v. Reimerdes*, 1354
- Universidad Central de Bayamon v. NLRB*, 284
- University & Community College System of Nevada v. Farmer*, 526–527
- University Book Store v. Board of Regents of the University of Wisconsin System*, 1364
- University Education Association v. Regents of the University of Minnesota*, 499
- University for Study of Human Goodness & Creative Group Work, In re*, 1637
- University Hospital, University of Cincinnati College of Medicine v. State Employment Relations Board*, 301
- University Medical Center Corporation v. The Department of Revenue of the State of Arizona*, 245
- University of Alabama v. Garrett*, 960
- University of Alaska v. Geistauts*, 704, 1278
- University of Alaska v. Modern Construction, Inc.*, 1598
- University of Baltimore v. Peri Iz*, 538–539
- University of Colorado Foundation v. American Cynamid*, 1651–1652
- University of Connecticut v. Freedom of Information Commission*, 1036, 1283
- University of Denver v. Whitlock*, 207–208
- University of Detroit; EEOC v.*, 291, 301
- University of Dubuque*, 494
- University of Florida v. KP&B, Inc.*, 1365–1366
- University of Great Falls v. NLRB*, 285
- University of Hawaii Professional Assembly v. Cayetano*, 478
- University of Houston v. Elthon*, 329
- University of Illinois; Doe v.*, 1499, 1500
- University of Iowa Hospitals & Clinics v. Shalala*, 1400–1401
- University of Kentucky v. Courier-Journal*, 1283
- University of Maryland v. Maas*, 225–226
- University of Maryland Medical System Corporation; Doe v.*, 970–971
- University of Michigan; Doe v.*, 1021, 1023
- University of Michigan Board of Regents v. Department of Treasury*, 1638
- University of Minnesota v. Chase*, 1280
- University of Nevada v. Stacey*, 557
- University of New Hampshire Chapter AAUP v. Haselton*, 287
- University of New Haven*, 494
- University of North Carolina, In re*, 1638–1639
- University of North Dakota v. Young Men's Christian Association*, 154
- University of Notre Dame; EEOC v.*, 701
- University of Pennsylvania v. EEOC*, 113, 127, 132, 623, 625, 700, 702–703, 705, 1584
- University of Pittsburgh*, 494
- University of Pittsburgh, Appeal of*, 1186
- University of Pittsburgh v. City of Pittsburgh, Commission on Human Relations*, 1161
- University of Rhode Island v. University of Rhode Island Chapter of the American Association of University Professors*, 298
- University of Rochester v. Wagner*, 1189–1190
- University of San Francisco*, 495
- University of San Francisco & University of San Francisco Faculty Association*, 483
- University of Tennessee v. Elliott*, 119–120, 240*n*
- University of Texas v. Camenisch*, 893–894
- University of Texas Medical School v. Than*, 917, 986, 1119
- University of Vermont & State Agricultural College*, 278–279

- University of West Virginia Board of Trustees v. Van Voorhies*, 1360, 1651
- University Patents, Inc. v. Kligman*, 1360, 1650–1651
- University System of Maryland v. The Baltimore Sun Co.*, 1283–1284
- University System of New Hampshire v. United States Gypsum Co.*, 1602
- University System of New Hampshire Board of Trustees, Appeal of*, 495
- Upadhyia v. Langenburg*, 572
- Upjohn Co. v. United States*, 109–110
- Urbano v. Board of Managers of New Jersey State Prison*, 235–236
- Urofsky v. Allen*, 659, 1384n
- Urofsky v. Gilmore*, 622, 625, 626n, 655, 658–665
- UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 1022, 1023
- Uzzell v. Friday*, 1066–1067
- V**
- Vaca v. Stipes*, 298
- Vacco v. Quill*, 1289n
- Valentine v. Smith*, 523
- Vanderbilt v. Colorado Mountain College District*, 650n
- Vanderbilt University; Doe v.*, 806–807
- Vangeli v. Schneider*, 881
- Vargo v. Hunt*, 914
- Varma v. Bloustein*, 555
- Veal v. First American Savings Bank*, 853, 1376
- Vega v. Miller*, 957
- Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 1405, 1438
- Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 289, 495
- Vernonia School District 47J v. Acton*, 1143–1144
- Village of*. See name of village
- Villyard v. Regents of the University System of Georgia*, 1623–1624
- Virginia v. Black*, 869, 995–996, 1020–1021, 1026
- Virginia; United States v.*, 74, 129, 525, 764–767, 783, 1499
- Virginia College Building Authority v. Lynn*, 66, 1248
- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 1105–1106, 1229, 1230
- Vizcaino v. Microsoft Corporation*, 259
- Vlandis v. Kline*, 826–827, 828, 830
- Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 1597–1598
- W**
- Waffle House; EEOC v.*, 274
- Wagenblast v. Odessa School District*, 158–160
- Wagner v. Misikin*, 98
- Wahba v. New York University*, 44
- Waldrep v. Texas Employers Insurance Association*, 324
- Walgren v. Board of Selectment of the Town of Amherst*, 1202–1203
- Waliga v. Board of Trustees of Kent State University*, 168, 938–941
- Walker v. Board of Regents of the University System of Georgia*, 475
- Walker v. Phi Beta Sigma Fraternity*, 1095
- Walker v. Schwalbe*, 351n
- Wallace v. Broyles*, 1151–1152
- Wallace v. Florida A&M University*, 913
- Walters v. President & Fellows of Harvard College*, 1481
- Walz v. Tax Commission of City of New York*, 62, 69
- Wang v. Moore*, 334
- Ward v. Rock Against Racism*, 1005, 1014
- Ward v. Temple University*, 830
- Warder v. Board of Regents of the University of the State of New York*, 1258–1259
- Ware; People v.*, 182
- Waring v. Fordham University*, 473
- Warren County Community College v. Warren County Board of Chosen Freeholders*, 172
- Wascara v. Carver*, 317
- Washington v. Central State University*, 263–264
- Washington v. Chrisman*, 865
- Washington v. Glucksberg*, 1289
- Washington, City of v. Board of Assessment Appeals of Washington County*, 1196
- Washington Federation of State Employees, AFL-CIO Council 28 v. Spokane Community College*, 1607–1608
- Washington Research Foundation v. Commissioner*, 1654
- Washington University; Doe v.*, 1467
- Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 1203, 1230, 1237
- Watergate West v. District of Columbia Board of Zoning Adjustment*, 1175–1176
- Waters v. Churchill*, 606, 608–609, 690, 691, 692, 698, 1243
- Waters v. Metropolitan State University*, 944
- Waterson v. Cleveland State University*, 1109–1110
- Watson v. Board of Regents of the University of Colorado*, 1220–1221
- Watson v. Jones*, 59n
- Watson v. University of Utah Medical Center*, 249
- Watts v. United States*, 869, 870, 1020–1021
- Weaver v. University of Cincinnati*, 292
- Webb v. Board of Trustees of Ball State University*, 634, 648, 677, 680, 681
- Webb v. Student Loan Funding Corp.*, 845
- Weber v. Kaiser Aluminum Co.*, 446, 522–523
- Weidmann v. SUNY College at Cortland*, 976
- Weinberger v. Salfi*, 827
- Weiner Merchant, Debtor, In re*, 847
- Weinstein v. University of Illinois*, 123–124
- Weinstock v. Columbia University*, 505, 537–538
- Weise v. Syracuse University*, 45
- Weismann v. Freeman*, 1346
- Weist v. State of Kansas*, 531
- Weitz v. State*, 223, 921
- Wellner v. Minnesota State Junior College Board*, 550
- Wells v. Tennessee Board of Regents*, 531
- Welsh v. Boy Scouts of America*, 1577
- Welsh v. Wisconsin*, 865
- Welter v. Seton Hall University*, 488–489
- Wentworth Institute; NLRB v.*, 282, 495
- Weser v. Glen*, 798
- Wesley; People v.*, 877
- West v. Atkins*, 42
- West Caldwell v. Caldwell*, 728
- Western Pennsylvania Socialist Workers 1982 Campaign*, 1228
- Western State University of Southern California v. American Bar Association*, 1542, 1546, 1557–1558
- Western Waterproofing Co. v. Lindenwood Colleges*, 1602
- Weston v. Carolina Research & Development Foundation*, 246–248, 1281

- West Virginia ex rel. Darrell V. McGraw v. Burton*, 142–143  
*West Virginia State Board of Education v. Barnette*, 653, 742  
*Whaley v. County of Tuscola*, 1290  
*Whately v. Clark*, 1201  
*Wheaton College v. Department of Revenue*, 1195, 1249  
*Wheeler v. Miller*, 986–987  
*White v. Board of Regents of the University of Nebraska*, 1364  
*White v. Davis*, 623, 1035, 1210–1211  
*White v. Winona State University*, 292–293  
*Whiting v. Jackson State University*, 512  
*Whitlock v. University of Denver*, 1089  
*Whittingham v. Board of Elections*, 1200  
*Widmar v. Vincent*, 58, 738, 996, 998, 1051n, 1069–1073, 1078, 1221, 1223  
*Wiemer v. Updegraff*, 618, 620  
*Wilbur v. University of Vermont*, 810  
*Wilfred Academy v. Southern Association of Colleges & Schools*, 1541–1542  
*Wilkins v. Bentley*, 1200  
*Will v. Michigan Department of State Police*, 238  
*Williams v. Alabama State University*, 350  
*Williams v. Eaton*, 1119  
*Williams v. Howard University*, 45n  
*Williams v. Lindenwood University*, 132, 992  
*Williams v. Salerno*, 1201  
*Williams; State v.*, 1262  
*Williams v. Texas Tech University Health Sciences Center*, 570–571  
*Williams v. Trevecca Nazarene College*, 1470  
*Williams v. University of Cincinnati*, 1124  
*Williamson v. Liptzin*, 925  
*Willis v. Dean Witter Reynolds, Inc.*, 138  
*Willner v. University of Kansas*, 518  
*Wills v. Brown University*, 950, 958  
*Wilson v. Glenwood Intermountain Properties, Inc.*, 859–860  
*Wilton v. Seven Falls Company*, 1376n  
*Wimberly v. Labor & Industrial Commission of Missouri*, 327  
*Winberg v. University of Minnesota*, 1258  
*Winnick v. Manning*, 973  
*Wirin v. Parker*, 1210  
*Wirsing v. Board of Regents of the University of Colorado*, 629–630, 648–649  
*Wisconsin v. Constantineau*, 548  
*Wisconsin v. Mitchell*, 1020  
*Wisconsin v. Yoder*, 1266  
*Witczak v. Gerald*, 343  
*Witters v. Department of Services for the Blind*, 841–842  
*Witters v. State Commission for the Blind*, 67  
*Witters v. Washington Department of Services for the Blind*, 63, 67  
*Wolfe v. Yudichak*, 323–324  
*Wolff v. South Colonie Central School District*, 1486  
*Wolsky v. Medical College of Hampton Roads*, 102  
*Women's Equity Action League v. Bell*, 1492  
*Women's Equity Action League v. Cavazos*, 1451, 1492  
*Wong v. Regents of the University of California*, 969–970  
*Wong-Opasi v. Tennessee State University*, 308  
*Wood v. Davison*, 1053  
*Wood v. Marston*, 1278  
*Wood v. Strickland*, 347–348, 924  
*Woodbridge Terrace Associates v. Lake*, 1240–1241  
*Woodis v. Westark Community College*, 915  
*Woods v. The Wright Institute*, 761  
*Woody v. Burns*, 972  
*Wooley v. Maynard*, 653, 742  
*Woolley v. Hoffmann-La Roche, Inc.*, 265  
*Worldwide Volkswagen Corp. v. Woodson*, 97  
*Wounaris v. West Virginia State College*, 262–263  
*Wozniak v. Conry*, 645  
*Wright v. Columbia University*, 1140  
*Wright v. Jeep Corp.*, 708  
*Wright v. Schreffler*, 878–879  
*Wright v. Universal Maritime Service Corp.*, 299  
*Wurth v. Oklahoma City University*, 543  
*Wygant v. Jackson Board of Education*, 512, 796, 824  
*Wynne v. Loyola University of Chicago*, 337  
*Wynne v. Tufts University School of Medicine*, 773, 965–966, 967–968  
*Wyoming ex rel. Wyoming Agricultural College v. Irvin*, 1299
- Y
- Yacovelli v. Moeser*, 624–625, 746n  
*Yale Club of Chicago v. Department of Revenue*, 244  
*Yale University*, 302  
*Yanow v. Seven Oaks Park*, 1171  
*Yapuncich, In re*, 845  
*Yarcheski v. Reiner*, 630n  
*Yates v. Board of Regents of Lamar University System*, 470  
*Yeagle v. Collegiate Times*, 1108–1109  
*Yellow Springs Exempted Village School District v. Ohio High School Athletic Association*, 1129n  
*Yench v. Stockmar*, 973  
*Yeshiva University v. Greenberg*, 1359–1360  
*Yeshiva University; NLRB v.*, 491–493  
*Yesudian ex rel. United States v. Howard University*, 1405  
*YMCA of Philadelphia v. City of Philadelphia*, 1197  
*Young, Ex parte*, 235, 1311n  
*Younger v. Harris*, 100n  
*Younus v. Shabat*, 509n
- Z
- Zablocki v. Redhail*, 619  
*Zahorik v. Cornell University*, 108  
*Zarilla v. Reading Area Community College*, 312n  
*Zavaletta v. American Bar Association*, 1548  
*Zelman v. Simmons-Harris*, 841  
*Zinno v. Patenaude*, 329  
*Zuelsdorf v. University of Alaska, Fairbanks*, 544  
*Zukle v. Regents of the University of California*, 962, 968  
*Zumbrun v. University of Southern California*, 730  
*Zurcher v. Stanford Daily*, 1097, 1208, 1245

# Subject Index

## A

- AAAHC (Accreditation Association for Ambulatory Health Care), 893
- AACRAO. *See* American Association of Collegiate Registrars and Admissions Officers
- AAHE (American Association for Higher Education), 718
- AAUP. *See* American Association of University Professors
- AAUW (American Association of University Women), 941–42
- Abbe, K. H., 1369
- Abelson, R., 419
- ABOR. *See* Academic Bill of Rights
- Abortion, legal issues regarding, 890–892, 1289, 1443–1446
- Abstention doctrine, 100
- Academic Bill of Rights (ABOR), 746–747, 1018
- Academic custom and usage: faculty contracts, 479–482, 582–586; overview, 35–37, 1582
- Academic deference, 8, 80–81, 126–132
- Academic freedom: Academic Bill of Rights (ABOR), 746–747, 1018; administrators' authority over, 693–699; basic concepts and distinctions, 613–615; claims, methods of analyzing, 648–653; in classroom, 628–644; confidential information, privilege for, 699–706; defamation, defense against, 221; external versus internal restraints, 622–625; extramural speech, 688–692; foundational constitutional law cases, 617–622; generally, 605–613; governance matters, speech on, 667–683; in grading, 644–648; “institutional” academic freedom, 625–627, 665–685; intramural speech on extramural public affairs, 683–685; personnel issues, 700–706; in private institutions, 653–654; in private life, 685–692; professional versus legal concepts, 615–617; in publication, 654–665; in religious institutions, 714–716; in research, 654–665, 706–714; of students, 737–747; in teaching, 627–654; terrorism, war on, effect of, 624; Title VII, 702
- Academic sanctions. *See* Sanctions
- Academic senates, authority of, 187–188
- Access to campus. *See* Campus access
- Accreditation: agencies, 1530–1534, 1559–1560; antitrust law, 1546–1549; bankruptcy law, 1553–1554; case law, 1534–1538; common law, 1534–1543; constitutional requirements, 1543–1546; courts and, 1534–1554; defamation law, 1549–1553; formative developments, 1534–1538; Secretary of Education, role of, 1532–1533, 1534, 1546, 1554, 1559–1560; types, 1531; U.S. Department of Education, role of, 1554–1559
- Accreditation Association for Ambulatory Health Care (AAAHC), 893
- ACE. *See* American Council on Education (ACE)
- ACHA (American College Health Association), 893
- Achtenberg, R., 464, 599
- ADA. *See* Americans With Disabilities Act
- Adams, J. F., 151, 157, 164
- Adams, M., 790
- Administrative Conference of the United States, 1521
- Administrative procedure laws, 1286–1288

- Administrators:  
 academic freedom over, 693-699;  
 authority of, 181-187;  
 unauthorized acts, 185-186
- Admissions:  
 affirmative action programs, 781-803;  
 age discrimination, 775-777;  
 of aliens, 778-781;  
 arbitrariness standard of review, 754-755;  
 basic legal requirements, 752-754;  
 contract theory, 755-758;  
 disability discrimination, 768-775;  
 immigration-status discrimination, 778-781;  
 learning disabilities, students with, 773-775;  
 racial discrimination, 758-762;  
 readmission, 803-808;  
 residency discrimination, 777-778;  
 sex discrimination, 762-768;  
 standardized tests, 767
- Admission taxes, 1197-1199
- ADR. *See* Alternative dispute resolution
- Adverse impact claims. *See* Disparate impact claims
- Advertising in student press, 1105-1106
- Advisory Commission on Intergovernmental Relations, 1517
- Affiliated organizations. *See* Captive and affiliated organizations
- Affirmative action:  
 in admissions, 781-803;  
 conclusions, 455-456;  
 equal protection, 449-455;  
 Executive Order 11246, 443;  
 Executive Order 11375, 443;  
 faculty employment decisions, 522-528;  
 federal civil rights statutes, 1471-1472;  
 in financial aid, 820-825;  
 overview, 442-445;  
 Section 1981, 820-821;  
 state regulation of, 455;  
 Title VI, 782-783, 786-788, 795, 1471-1472;  
 Title VII, 443-449;  
 Title IX, 782-783, 1471-1472
- Age discrimination. *See also* Age Discrimination Act; Age Discrimination in Employment Act:  
 in admissions, 775-777;  
 in employment, 378-379, 399-403, 430-433, 516-517;  
 older faculty and changes in work assignments, 521-522;  
 retirement incentive packages, 402, 432-433;  
 salary decisions, 517-521;  
 termination of employees, 364
- Age Discrimination Act:  
 administrative enforcement, 1489, 1490*n*;  
 affirmative action, 1472;  
 enforcement remedies, 1493-1501;  
 overview, 1469-1471;  
 "program or activity," defined, 1479-1481;  
 retaliatory acts, coverage of, 1483;  
 scope, 1472;  
 unintentional discriminatory acts, coverage of, 1474-1477
- Age Discrimination in Employment Act (ADEA):  
 collective bargaining, 298;  
 disparate impact claims, 401;  
 generally, 399-403;  
 retaliation claims, 300;  
 retirement incentive packages, 402, 432-433;  
 salary discrimination, 517
- Agency law and legal liability, 91
- Age of majority, 726-727
- Agthe, D. R., 913*n*, 1239*n*
- Ahrens, R. Z., 721
- Aiken, R., 164
- Alcohol use and abuse:  
 alcoholics, employment discrimination against, 393;  
 fraternities and sororities, use by, 1088-1090, 1093-1096;  
 institutional tort liability for injuries related to, 210;  
 reporting requirements, 1429
- Alexander, K., 1385
- Alexander, L., 391
- Alger, J. R., 14, 81, 1046
- Alienage discrimination. *See* National origin discrimination
- Aliens:  
 admission of, 778-781;  
 documented versus undocumented status, 833-840;  
 employment of, 317-320, 408-411;  
 federal regulation of, 1314-1318;  
 financial aid discrimination, 833-840;  
 visas, 318-319
- Alkire, A., 213
- Allee, D., 1183
- Alston, E. R., 415*n*
- Alternative dispute resolution (ADR):  
 application to colleges and universities, 138-140;  
 arbitration, 137-138;  
 mediation, 136-137;  
 overview, 134;  
 Title IX, 136;  
 types, 135-138
- Amaury, N., 20
- Ambash, J. W., 1511, 1521
- Amendment of employment contracts, 271-272
- American Association for Higher Education (AAHE), 718
- American Association for the Advancement of Science, 1526
- American Association of College Registrars and Admissions Officers (AACRAO), 1048, 1528*n*
- American Association of Community Colleges, 1525
- American Association of State Colleges and Universities, 1525
- American Association of University Professors (AAUP):  
 academic custom and usage, 1582;  
 academic freedom, 135, 613-614, 615-617, 628, 652, 693;  
 academic governance, 666;  
 conflicts of interest, 1661;  
 copyright, 1336, 1345-1346;  
 distance education, 1345-1346;  
 external regulation of academic activities, 1275;  
 faculty contracts, 472-473, 482;  
 faculty dismissals, 558;  
 financial exigency, 579-580, 583*n*, 585, 596;  
 institutional responsibility for legal demands on faculty, 156;  
 Internet address, 1526;  
 nonrenewal of contracts, 552;  
 overview, 1581-1584;  
 part-time faculty, 485;  
 post-tenure review, 542;  
 publications, 81, 597, 603, 901, 1589, 1590;  
 religious institutions, academic freedom in, 715-716;  
 sexual harassment, 955;  
 student rights, 737-738;  
 tenure issues, 531, 572
- American Association of University Women (AAUW), 941-942
- American College Counseling Association, 1528*n*
- American College Health Association (ACHA), 893
- American College Personnel Association, 1528*n*
- American Council on Education (ACE), 34, 747, 768, 959*n*, 1380, 1525, 1527
- American Council on Learned Societies, 1526

- American Federation of Teachers, 366
- American Immigration Lawyers Association, 368
- American Institute for Architects, 1611
- American Legion and Title IX issues, 1462
- Americans With Disabilities Act (ADA):  
athletic associations and conferences, 1577–1581;  
contingent workers, 260;  
drug testing, 269;  
employment discrimination, 391–399;  
extraterritorial application, 373;  
financial aid, 819;  
health insurance, 313;  
overview, 959–960, 1381–1384, 1468;  
reasonable accommodations, 316;  
student athletes, 1141
- Amusement taxes, 1197–1199
- Anderson, E., 164
- Anderson, P., 1157
- Anderson, R. N., 210*n*
- Anderson, T. H., 466
- Andrews, G., 1588
- Angell, G. W., 366
- Animal and Plant Health Inspection Service, 1325, 1334
- Animals:  
laws governing using in research, 1325–1329;  
patentability of, 1358
- Antiterrorism measures, 1334
- Antitrust law:  
accreditation actions, 1546–1549;  
athletic associations and conferences, 1546–1549;  
auxiliary enterprises, 1632–1633;  
overview, 1368–1375;  
research collaboration, 1654–1655
- Antonini, T., 890
- Applebome, P., 1459
- Applegate, J. S., 1379
- Arbitration:  
collective bargaining, 296–297;  
contract cases, 1597–1598;  
litigation involving, 138–140;  
mandatory, 273–275;  
overview, 137–138
- Argetsinger, A., 1250
- Armstrong, J. R., 1663
- Arnsbarger, L. A., 1422, 1654
- Aronowitz, S., 19
- Arriola, E., 1517
- Article I of U.S. Constitution:  
chartering of D.C. colleges, 27;  
commerce power, 1301–1304;  
contracts, state power to modify, 272;  
copyright law, basis for, 1334;  
patent law, basis for, 1355;  
spending power, 1299;  
taxing power, 1299
- Article III of U.S. Constitution:  
federal courts, judicial power of, 1307–1308;  
immunity, 231–240
- Article IV of U.S. Constitution, 119, 405*n*
- Article VI of U.S. Constitution, 836
- Ashenfelter, O., 517
- Ashford, D., 1515
- Association for Student Judicial Affairs, 1527
- Association of Academic Health Centers, 1661
- Association of American Colleges and Universities, 737–738, 1528*n*
- Association of American Law Schools, 1336
- Association of American Medical Colleges, 1528*n*, 1658, 1661
- Association of American Universities, 1525
- Association of Catholic Colleges and Universities, 1528*n*
- Association of College and University Housing Officers—International, 1528*n*
- Association of Community College Trustees, 1528*n*
- Association of Fraternity Advisors, 1528*n*
- Association of Governing Boards of Universities and Colleges, 1155, 1528*n*
- Association of Jesuit Colleges and Universities, 1528*n*
- Assumption of risk, 202–203
- Athletic associations and conferences:  
ADA, 1577–1581;  
antitrust laws, 1566–1571;  
common law, 1571–1573;  
federal constitutional constraints, 1561–1564;  
overview, 1560–1561;  
state statutes regulating, 1564–1566;  
Title VI, 1574–1577;  
Title IX, 1573–1574
- Athletic coaches, sex discrimination against, 420–425
- Athletics teams and clubs:  
disability discrimination, 1140–1142;  
drug testing, 1142–1147;  
due process rights of athletes, 1115–1119;
- Equity in Athletics Disclosure Act, 1123;  
freedom of speech for athletes, 1119–1121;  
general principles, 1114–1115;  
injuries, liability for, 1147–1153;  
scholarships, 1123–1127;  
sex discrimination, 1127–1140;  
statutory law, 1121–1123;  
Student-Right-to-Know Act, 1122–1123
- Attorney-client privilege, 109–112
- Attorneys:  
ethical issues, 150;  
in-house staff counsel, 143;  
services, delivery of, 140–144;  
student legal services, 900–901;  
treatment law versus preventive law, 144–150
- Attorney's fees, 123–125, 510
- At-will doctrine of contracts, 262–263
- Authority:  
of administrators and officers, 181–187;  
of campus organizations, 187–188;  
question of, 167–171;  
sources and scope of, 171–189;  
of trustees, 171–181, 188–189
- Auxiliary enterprises:  
administering, 1639–1640;  
antitrust law, 1632–1634;  
institutional authority to operate, 1621–1628;  
noncompetition statutes, 1628–1632;  
overview, 1618–1621;  
in private institutions, 1627–1628;  
in public institutions, 1621–1627;  
taxation of income from entrepreneurial activities, 1634–1639

## B

- Babbitt, E. M., 220, 587, 603, 1043
- Bach, J. L., 1042
- Background checks of potential employees, 358–359
- Baez, B., 599, 721
- Baharlias, A. D., 1508
- Bailey, C. M., 1087*n*
- Bakaly, C., 1295
- Baker, T. R., 1042
- Bakken, G. M., 86
- Baldrige, J. V., 496
- Baldus, D. C., 463, 599
- Bales, R. A., 161
- Bandman, M., 1599
- Banick, L., 1611



- Bankruptcy law:  
 accreditation, withdrawal of,  
 1553-1554;  
 federal student loan programs,  
 849-854;  
 overview, 842-846;  
 school closings, 1376;  
 transcripts, withholding of  
 from debtors, 846-849
- Barbre, E. S., 222*n*
- Barefoot, B. L., 1509
- Barmore Zucker, L. S., 882-883
- Barnard, T. H., 464, 599
- Barnett, S., 1294
- Bartlett, J., 1656
- Bartow, A., 1508
- Basinger, J., 1533
- Bateman, M., 905
- Bateman, T. A., 190*n*, 809*n*
- Baxter, F. V., 1518
- Bayer, A., 719
- Bazluke, F. T., 251
- Beach, J. A., 83
- Beale, J. R., 163
- Bearby, S., 1364
- Beauchamp, T. L., 1665
- Beckham, J. C., 82, 871, 902, 1292
- Beh, H. G., 735, 902, 1508
- Bell, D. A., Jr., 904, 1518
- Bell, H., 77*n*
- Bell, S., 1509
- Bello, C., 333*n*
- Belman, D., 286
- Benbow, S., 1509
- Bender, K., 75*n*
- Bennett, B., 1509
- Berenson, R. A., 1514
- Berger, B. J., 324
- Berger, C. J., 973, 1045
- Berger, V., 973, 1045
- Berman, E. M., 276*n*, 365
- Berman, J., 907
- Berman, P., 623*n*, 658*n*, 746
- Bernard, D. J., 270
- Berne Convention, 34
- Berrian, A. L., 1521
- Berry, R. C., 1156
- Beshara, D., 718
- Bess, J. L., 249
- Biagioli, M., 1509
- Bickel, R. D., 82, 163, 251, 1114,  
 1245
- Biedzynski, K. W., 1157
- Bienstock, R. E., 1509
- Biles, G. E., 598
- Bittker, B., 1515
- Bjork, L. G., 903
- Black, B., 721
- Blackwell, J. E., 1521
- Blasi, V., 904, 1046
- Blechman, R. S., 84
- Block, D. J., 163
- Boland, H., 1531, 1586
- Blum, D., 494
- Blum, G. L., 266*n*
- Blum, K., 346
- Blumenstyk, G., 33, 140, 1336,  
 1339
- Blumrosen, A., 1502
- Bodner, G., 492
- Bok, D., 18, 83, 1663
- Bollag, B., 20, 897, 1069
- Bolton, J., 1533
- Bombardieri, M., 211
- Bompey, S. H., 599
- Bond, J., 874
- Bookman, M., 254, 900, 1662
- Bordone, R. C., 162
- Boswell, D. A., 1509
- Boswell, L., 1588
- Bourdeau, J. A., 1381*n*
- Bowen, H., 483
- Bowen, W. G., 902, 1115
- Bowie, N. E., 1663
- Bowman, C. G., 251
- Bowman, J. S., 276*n*, 365
- Boyd, J. P., 108*n*
- Boy Scouts and Title IX  
 issues, 1462
- Boys Nation and Title IX  
 issues, 1462
- Boys State and Title IX  
 issues, 1462
- Brademus, J., 1521
- Brainard, J., 1377*n*
- Brake, D., 1156, 1157
- Bramhall, E. H., 721
- Brand, N., 161
- Brandenburg, J., 955
- Branscomb, A. W., 908
- Braxton, J., 719
- Breach of contract, 1595-1597
- Brennan, W. J., 86
- Brevitz, K., 81
- Brint, S., 13
- Brody, P. M., 1665
- Brown, K. W., 231*n*, 1295
- Brown, R. S., Jr., 597, 613, 719,  
 1363, 1582
- Brown, V. L., 1043, 1079, 1251
- Brown, W., 89, 1183
- Brown-Scott, W., 1518
- Brunner, M. T., 1186*n*, 1195*n*
- Bryant, J. A., Jr., 412*n*
- Buckman, D. F., 314*n*, 1402*n*
- Buckner, D. E., 1192*n*
- Bucy, P., 1401
- Burdens of proof, 114-118
- Bureau of National Affairs, 602
- Burgan, M., 623
- Burgoyne, R., 110, 160
- Burk, D., 1514
- Burke, A. M. W., 1405
- Burling, P., 164, 252, 367,  
 908, 1437
- Burns, B. H., 1156
- Busey, J. C., 1567
- Business/industrial community:  
 auxiliary enterprises,  
 1618-1628;  
 competitor, college as,  
 1618-1640;
- contract context for college  
 business transactions,  
 1591-1598;  
 purchaser, college as,  
 1599-1618;  
 research collaborator, college  
 as, 1640-1662;  
 seller, college as, 1618-1640
- Buss, W. G., 985
- Butler, B. B., 905
- Butterfield, F., 753
- Byman, A., 1509
- Byrne, J. P., 613, 665, 717, 718,  
 742*n*, 1046

## C

- Cabranes, J. A., 181
- Cage, M. C., 13, 1261
- Calamari, J. D., 580, 1592, 1596
- Cameron, C. A., 542
- Campbell, A. M., 400*n*, 433*n*, 843*n*
- Campbell, B., 41
- Campbell, T., 519
- Campfire Girls and Title IX issues,  
 1462
- Campus access:  
 commercial solicitation on  
 campus, 1230-1236;  
 noncommercial solicitation on  
 campus, 1236-1239;  
 public versus private institu-  
 tions, 1211-1213;  
 speakers and events, exclusion  
 of, 1213-1217;  
 trespass statutes, 1217-1229
- Campus computer networks. *See*  
*also* Internet:  
 freedom of speech, 866-873;  
 liability issues, 873-876;  
 negligence issues, 198;  
 overview, 1384;  
 statutes regarding, 1385-1397
- Campus Legal Information  
 Clearinghouse, 81
- Campus Mediation Resources, 161
- Campus organizations, adminis-  
 trative authority of, 187-188
- Campus security:  
 CSA, 885-888;  
 CSCPA, 885-888;  
 security officers, 876-879;  
 violent crime, protecting  
 students against, 880-885
- Campus Security Act (CSA),  
 885-888
- Campus Sex Crimes Prevention  
 Act (CSCPA), 885-888
- Captive and affiliated  
 organizations:  
 liability issues, 249-250;  
 overview, 241-242;  
 regulatory laws, 246-248;  
 "state action" issues, 248-249;  
 structural problems, 242-244;  
 taxation issues, 244-246

- Carboni, R., 1643  
 Card, D., 517  
 Carlson, R. R., 365  
 Carmichael, M. L., 1291*n*  
 Carnegie Council on Policy Studies in Higher Education, 15  
 Carnegie Foundation for the Advancement of Teaching, 11  
 Carnevale, D., 782*n*  
 Carstensen, P. C., 1589  
 Carter, S. L., 1509  
 CAS (Council for the Advancement of Standards in Higher Education), 1527  
 Catalano, C. G., 990*n*  
 Catholic Church, academic freedom and, 714–716  
 Catlin, E., 1157  
 CCC (Copyright Clearance Center), 1338  
 CDC (Centers for Disease Control and Prevention), 1334  
 Cecil, J. S., 721  
 Center for Academic Integrity, 916  
 Center for Information Technology and Privacy Law, 907  
 Center for Women's Policy Studies, 748  
 Centers for Disease Control and Prevention (CDC), 1334  
 Centra, J. A., 599  
 Chadd, C. M., 1510  
 Chait, R., 17, 250  
 Chait, R. P., 597  
 Chamallas, M., 956  
 Chamberlain, L., 205  
 Chamberlin, G. K., 1041*n*  
 Chambers, C. M., 1547, 1588  
 Chamblee, D. A., 1518  
 Chapman, M., 1572  
 Chapus, D. P., 213*n*, 222*n*  
 Charles, R., 1514  
 Charney, S., 1385  
 Chase, M. P., 1510  
 Chase, R. F., 1197*n*  
 Chastain, G., 1510  
 CHEA (Council for Higher Education Accreditation), 1531  
 Cherry, R. L., Jr., 902  
 Child care services for students, 899–900  
 Childress, J., 1510  
 Chin, G., 801  
 Christman, D. E., 907  
 Church, T. W., 1047  
 Civil rights compliance:  
   administrative enforcement, 1486–1493;  
   affirmative action, 1471–1472;  
   Age Discrimination Act. *See* Age Discrimination Act;  
   disability statutes, 1573–1577;  
   employment discrimination; Employment discrimination;  
   enforcement remedies, 1493–1501;  
   extraterritorial acts of discrimination, 1484–1486;  
   federal enforcement powers, 1304–1307;  
   general considerations, 1449–1450;  
   “program or activity,” scope of, 1479–1482;  
   “receiving federal financial assistance,” scope of, 1477–1479;  
   Rehabilitation Act, 1464–1468;  
   retaliation claims, 1482–1484;  
   scope and coverage problems, 1472–1486;  
   spending statutes, 1573–1577;  
   Title VI. *See* Title VI;  
   Title VII. *See* Title VII;  
   Title IX. *See* Title IX;  
   unintentional discriminatory acts, coverage of, 1474–1477  
 Civil Rights Restoration Act (CRRRA), 1480–1481  
 Civil service rules, 275–277  
 Clague, M. W., 602  
 Claim preclusion, 118–121  
 Clark, B. R., 83  
 Clark, M., 464  
 Clark, R. L., 464  
 Class action suits, 105–107  
 Classroom, academic freedom in, 628–644  
 Claussen, C., 1157  
 Clemons, J., 367  
 Cleveland, H., 1295  
 Closures. *See also* Reductions  
   in force:  
     constitutional considerations, 587–594;  
     contractual considerations, 579–587;  
     preparing for, 596–597;  
     statutory considerations, 594–595  
 Clothier, R. C., 251  
 Clune, W., III, 1521  
 Cocurricular activities, liability for injuries related to, 206–210  
 Cohn, L. M., 392*n*  
 Cole, E. K., 464, 599, 902, 956, 1045, 1662  
 Cole, J. L., 463, 599  
 Colecchia, T. J., 1510, 1663  
 Coleman, A. L., 903, 1046  
 Coleman, B. J., 367  
 Collective bargaining:  
   agency fees, 290–292;  
   antidiscrimination laws and, 298–301;  
   arbitration, 296–297;  
   bargainable subjects, 293–298;  
   bargaining unit eligibility, 490–496;  
   campus mail systems, use of, 292;  
   certification, 287–293;  
   fact finding, 296;  
   impasse resolution techniques, 295–297;  
   interest arbitration, 296;  
   mediation, 296;  
   minority unions, 288;  
   organization, 287–293;  
   overview, 277–278;  
   past practices clauses, 497;  
   at private institutions, 279–282;  
   at public institutions, 286–287;  
   public-private dichotomy and, 278;  
   recognition, 287–293;  
   at religiously affiliated institutions, 282–286;  
   rival unions, 288;  
   by students, 301–303;  
   Title VII, 298–301;  
   traditional academic practices, coexistence with, 496–501;  
   unfair labor practice claims, 297–298;  
   zipper clauses, 497  
 College and University Professional Association for Human Resources, 1528*n*  
 Colombo, J. D., 1515  
 Colvin, A. J. S., 161  
 Commanger, H. S., 737  
 Commerce Clause:  
   athletic conferences, application to, 1565;  
   multistate institutions, state regulation of, 1268–1272;  
   overview, 1301–1304  
 Commercial solicitation on campus, 1230–1236  
 Committee on Foreign Students and Institutional Policy, 13  
 Committee on Nonprofit Corporations, 1293  
 Common law:  
   accreditation actions, 1534–1543;  
   athletic associations and conferences, 1571–1573;  
   postsecondary education, law of, 32  
 Community. *See* Local governments and local community  
 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 1378–1379  
 Computers. *See* Campus computer networks  
 Condrey, S. E., 366  
 Conference on Fair Use, 1336  
 Confidentiality. *See* Privilege  
 Conflicts of interest, 150, 1657–1662  
 Connell, M. A., 164, 420, 437, 540, 1588  
 Connolly, S. J., 419

- Connor, K., 767, 820  
 Consent decrees, 456  
 Consortium of College and University Media Centers, 1336  
 Constitution, U.S. *See* U.S. Constitution; *specific articles and amendments*  
 Constitutional liability:  
   of employees, 346–357;  
   of institutions, 230–241;  
   issues on the merits, 353–357;  
   qualified immunity, 346–353;  
   substantive due process, 353–357  
 Construction contracts:  
   general principles, 1610–1612;  
   liability problems, 1615–1618;  
   in public institutions, 1612–1615  
 Consumer Product Safety Commission, 1320  
 Contempt of court, 125–126  
 Contingent workers, 260  
 Contracting out. *See* Outsourcing  
 Contracts:  
   academic custom and usage, 479–482, 582–586;  
   amendment, 271–272;  
   applicants, rights of, 755–758;  
   arbitration, 1597–1598;  
   at-will doctrine, 262–263;  
   breach of contract, 1595–1597;  
   collective bargaining, 490–501;  
   constitutional due process rights, 547–552;  
   construction contracts, 1610–1618;  
   defining, 261–262;  
   drug testing required by, 267–269;  
   elements, 1593–1595;  
   employee handbooks as, 265–267;  
   employee liability, 344–346;  
   executive contracts, 270;  
   institutional liability, 225–230;  
   interpretation, 263–265;  
   legal planning, 273–275;  
   mandatory arbitration clauses, 273–275;  
   medical screening required by, 269–270;  
   nonrenewal, 547–552;  
   overview, 469–476, 1591;  
   part-time faculty, 482–485;  
   promissory estoppel, 345;  
   in public institutions, 264–265;  
   quasi-contractual claims, 266–267;  
   in religious institutions, 485–490;  
   remedies for breach, 1595–1597;  
   rescission, 267;  
   sources, 263;  
   statutory rights versus contract rights, 476–479;  
   students, rights of, 727–737;  
   types and terms, 1591–1593;  
   waiver of rights, 272–273  
 Contracts Clause, 272  
 Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, 34  
 Conway, M., 1588  
 Cook, C. E., 1533, 1586  
 Cooper, C., 599  
 COPA (Council on Postsecondary Accreditation), 1531  
 Copeland, J. D., 603  
 Copyright:  
   anticircumvention laws, 1353–1354;  
   author's own work, 1339;  
   coauthorship, 1346;  
   coursepacks, 1337–1338;  
   fair use doctrine, 1335–1342;  
   generally, 1335–1336;  
   guidelines, 1336–1337;  
   infringement, liability for, 1346–1350;  
   Internet service providers, liability of, 1347–1350;  
   licensing, 1350–1351;  
   music, 1353;  
   overview, 1334–1335;  
   peer-to-peer file-sharing technologies, 1340–1341;  
   performance rights, 1342–1344;  
   research copies, 1338–1339;  
   scope of protection, 1352–1353;  
   sovereign immunity, 1351–1352;  
   standardized tests, 1355;  
   term extension, 1354–1355;  
   unpublished material, 1339;  
   video and other types of expression, 1339–1341;  
   “work made for hire” doctrine, 1344–1346  
 Copyright Clearance Center (CCC), 1338  
 Copyright Management Center, 1342  
 Corbally, J., Jr., 163  
 Council for Higher Education Accreditation (CHEA), 1531  
 Council for Opportunity in Education, 1528*n*  
 Council for the Advancement of Standards in Higher Education (CAS), 893, 1527  
 Council on Postsecondary Accreditation (COPA), 1531  
 Coursepacks, fair use of, 1337–1338  
 Courtade, C. R., 395*n*, 1465*n*  
 Courts:  
   abstention doctrine, 100;  
   access to, 95–105;  
   accreditation actions, 1534–1554;  
   burdens of proof, 114–118;  
   class action suits, 105–107;  
   courts of claims, 99;  
   deference, academic and judicial, 8, 80–81, 126–132;  
   discovery, 107–108;  
   evidence, 108–113;  
   exhaustion of remedies, 103–105;  
   final judgments, 118–121;  
   jurisdiction, 95–100;  
   litigation management, 132–134;  
   mootness doctrine, 101–102;  
   motions to dismiss, 113;  
   overview, 93–95;  
   pretrial and trial issues, 105–121;  
   remedies. *See* Remedies;  
   standards of judicial review, 114–118;  
   standing doctrine, 100–101;  
   statutes of limitations, 102–103;  
   summary judgments, 113  
 Cowan, R., 13  
 Cowen, L., 1245  
 Cozzillio, M., 1124  
 Crabb, B. B., 707, 721  
 Credits. *See* Grades, credits, and degrees  
 Crego, S., 164  
 Crews, K. D., 1510  
 Crime and student protections, 880–885  
 Criminal prosecutions for student protests, 1010–1012  
 Crocca, C. A., 1377*n*  
 Crockett, R. B., 1292  
 Croissant, J., 1620  
 Croyley, A., 14  
 Cross, K. P., 11, 13  
 “Cross-cutting” conditions in financial aid programs, 1428–1435  
 Crow, R. B., 1153*n*  
 CRRA (Civil Rights Restoration Act), 1480–1481  
 CSA (Campus Security Act), 885–888  
 CSCPA (Campus Sex Crimes Prevention Act), 885–888  
 Cullen, F. T., 908  
 Curran, C. E., 719, 721  
 Curry, J. L., 1510, 1664  
 Curry, S. J., 1154  
 Curtner, G., 1655  
 Customs and Border Protection Bureau, 1315
- ## D
- Daane, R. K., 163, 1257, 1277  
 Daggett, L. M., 1048

- Damages:  
 capping of, 375*n*;  
 for employment discrimination,  
 375*n*, 382–383;  
 overview, 121–122;  
 punitive, 383;  
 Title VI, 1483;  
 Title VII, 121, 387, 1463;  
 Title IX, 121
- Daniel, P. T. K., 1373
- Danne, W. H., Jr., 392*n*
- Dannels, M., 1042
- Daugherty, M. S., 250
- Davis, C. N., 1295
- Davis, D., 83
- Davis, M., 1641
- Davis, R. J., 289*n*, 495*n*
- Davis, R. N., 1124
- Davis, T., 1005, 1115, 1156,  
 1157, 1589
- Debt collection:  
 federal bankruptcy law,  
 842–846;  
 student loan programs, 849–854;  
 transcripts, withholding of,  
 846–849
- DeChiara, P., 720, 956
- Defamation:  
 academic freedom as  
 defense, 221;  
 by accrediting agencies,  
 1549–1553;  
 by employees, 337–342;  
 institutional liability for,  
 217–222;  
 privilege as defense, 218–219;  
 public figures, 1551–1553;  
 in student press, 1108–1114
- Defenses:  
 assumption of risk, 195,  
 202–203;  
 sovereign immunity, 192–194,  
 1307–1313, 1351–1352,  
 1360–1361, 1405
- Deference. *See* Academic defer-  
 ence; Judicial deference
- De George, R. T., 717, 718
- Degrees. *See* Grades, credits, and  
 degrees
- Delgado, R., 907
- Dell, E., 1655
- DelPo, A., 370
- De Mitchell, T., 649
- Denicola, R. C., 1363
- De Palma, A., 514
- DeParle, J., 1376
- Derrick, J. H., 222*n*
- Design contracts. *See*  
 Construction contracts
- DHS. *See* U.S. Department of  
 Homeland Security
- Dickerson, J. D., 1572
- DiGiovanni, N., Jr., 282, 463, 517,  
 598, 599
- Digital database providers,  
 licensing from, 1350–1351
- Dimond, P. R., 1521
- DiNardo, L. C., 134, 161
- Director, J. J., 298*n*
- Disabilities, persons with:  
 discrimination against. *See*  
 Disability discrimination;  
 federal statutes, 1381–1384;  
 hiring, 357;  
 learning disabilities, students  
 with, 773–775;  
 mental disorders, 427;  
 reasonable accommodations,  
 316, 391–393, 395–396,  
 428–429;  
 services for students. *See*  
 Students with disabilities
- Disability discrimination. *See also*  
 ADA; Rehabilitation Act:  
 in admissions, 768–775;  
 in athletics, 1140–1142;  
 in employment, 391–399,  
 425–430, 515–516;  
 federal statutes, 1577–1581
- DiScala, J., 927
- Disciplinary and grievance  
 systems:  
 codes of student conduct,  
 913–916;  
 due process requirements,  
 361;  
 employee discipline, 360–362;  
 establishment of, 911–913;  
 judicial systems, 917–921;  
 overview, 910–911, 921;  
 in private institutions, 924;  
 psychiatric illnesses,  
 disciplining students with,  
 924–927;  
 in public institutions, 921–924
- Disciplinary sanctions. *See*  
 Sanctions
- Discovery, 107–108
- Discrimination. *See specific types  
 of discrimination*
- Dismissals. *See* Sanctions
- Disner, E. G., 1369
- Disparate impact claims:  
 ADEA, 401;  
 constitutional challenges, 404;  
 Equal Pay Act, 385–386;  
 sex discrimination, 1135–1136;  
 sexual orientation  
 discrimination, 441–442;  
 Title VI, 1497–1498;  
 Title VII, 375–376, 380–381,  
 385–386, 388, 401, 404,  
 1135–1136, 1474, 1476–1477,  
 1497–1498;  
 Title IX, 388;  
 unintentional discriminatory  
 acts, 1474, 1476–1477
- Disparate treatment claims:  
 pregnancy discrimination, 413;  
 Title VII, 375–377, 379–380,  
 382, 413
- Distance education, 1342–1344
- Dixon, R. G., Jr., 904
- DOJ. *See* U.S. Department of  
 Justice
- DOL. *See* U.S. Department of  
 Labor
- Domestic partner benefits,  
 439–442
- Donaldson, D. M., 1415*n*, 1416
- Donaldson, R. G., 1315*n*
- DOT (U.S. Department of  
 Transportation), 1321
- Dougherty, F. M., 289*n*, 395*n*,  
 1465*n*, 1501*n*
- Douglas, J., 494
- Douvanis, G., 905
- Downing, T. J., 464, 599
- Dressel, P., 1588
- Drinan, R. F., 160, 163
- Drug-Free Schools and  
 Communities Act  
 Amendments, 1434–1435
- Drug-Free Workplace Act of 1988,  
 1432–1434
- Drug testing:  
 of athletes, 1142–1147;  
 of employees, 267–269;  
 Fourth Amendment limitations,  
 268–269
- Drug use and abuse:  
 Drug-Free Schools and  
 Communities Act  
 Amendments, 1434–1435;  
 Drug-Free Workplace Act of  
 1988, 1432–1434;  
 employment discrimination  
 against users, 393;  
 federal financial aid assistance  
 for programs, 1434–1435;  
 reporting requirements, 1429;  
 in workplace, 1432–1434
- Dry, M., 1047
- Duckworth, M. B., 325
- Duderstadt, J. J., 1115
- Due process:  
 for athletes, 1115–1119;  
 civil rights enforcement  
 powers, 1304;  
 employee disciplinary actions,  
 361;  
 nonrenewal of contracts,  
 547–552;  
 in private institutions,  
 571–575;  
 procedural, 169, 545,  
 547–571, 617–622;  
 substantive, 353–357,  
 922–924;  
 tenure denials, 552–557;  
 tenure terminations, 557–567
- Duff, J., Jr., 295*n*
- Duffala, D. P., 324*n*
- Dunham, S. S., 163
- Duryea, E. D., 22, 1587
- Duscha, J., 1155
- Dutile, F. N., 987, 1056, 1294
- Dziech, B. W., 464, 599

## E

- Eaton, A. E., 162  
 Eaton, J., 1533  
 Eaton, T., 230*n*  
 Ebbs, S., 16  
 ED. *See* U.S. Department of Education  
 Educational malpractice, institutional liability for, 213–217  
 Education associations. *See also specific associations:*  
   accrediting agencies, 1530–1560;  
   athletic associations and conferences, 1560–1581;  
   dealing with, 1584–1585;  
   legal principles, 1528–1530;  
   overview, 1525–1528  
 Education Commission of the States, 1260  
 EDUCAUSE/Cornell Institute for Computer Policy and Law, 907  
 Edwards, H. T., 82, 86  
 EEOC. *See* Equal Employment Opportunity Commission  
 Egerton, J., 1521  
 Ehrenberg, R. G., 19, 517, 1250  
 Eisenberg, R. S., 719, 1664  
 Electronic Privacy Information Center, 621*n*  
 Eleventh Amendment:  
   ADEA, 403;  
   constitutional liability, 353;  
   copyright laws, 1351–1352;  
   false claims suits, 1405;  
   patent laws, 1361;  
   salary discrimination, 384;  
   Section 1981 claims, 391;  
   Section 1983 claims, 231–240;  
   state immunity from federal law, 1307–1313;  
   waiver of immunity, 97, 234*n*  
 Elias, S., 1510, 1511  
 Emotional distress, infliction of:  
   by employees, 343;  
   institutional liability for, 224;  
   NLRA, 293  
 Employee handbooks as employment contracts, 265–267  
 Employee performance. *See* Performance management  
 Employee protections:  
   ERISA, 311–313;  
   FLSA, 305–311, 328;  
   FMLA, 313–317, 428, 1306;  
   immigration laws, 317–320;  
   OSHA, 303–305, 328;  
   unemployment compensation laws, 325–327;  
   USERRA, 330–332;  
   whistleblower protections, 327–330, 1274*n*, 1329, 1437;  
   workers' compensation laws, 320–325  
 Employee Retirement Income Security Act (ERISA), 311–313  
 Employees:  
   background checks, 358–359;  
   civil service rules, 275–277;  
   collective bargaining. *See* Collective bargaining;  
   constitutional liability, 346–357;  
   contract liability, 344–346;  
   contracts. *See* Contracts;  
   defamation by, 337–342;  
   disciplinary actions, 360–362;  
   emotional distress, infliction of by, 343;  
   employment relationships, defining, 258–261;  
   evaluations, 359–360;  
   independent contractors, distinguished from, 258–260;  
   interference by, 342–343;  
   invasion of privacy by, 342;  
   leased, 260;  
   liability, 332–357;  
   negligence, 334–337;  
   negligent hiring, supervision, or retention, 222–224;  
   noncitizens, 317–320;  
   overview, 255–258;  
   performance improvement plans, 360;  
   performance management, 357–364;  
   personal liability, 332–357;  
   pre-hire issues, 357–359;  
   promotions, 362–363;  
   protections, 303–332;  
   telecommuters, 261;  
   termination. *See* Termination of employment;  
   tort liability, 332–334  
 Employment discrimination:  
   affirmative action. *See* Affirmative action;  
   age discrimination. *See* Age discrimination;  
   against alcoholics, 393;  
   against athletics coaches, 420–425;  
   “bona fide occupational qualification” exception, 374;  
   constitutional prohibitions, 403–405;  
   damages, 375*n*, 382–383;  
   disability discrimination. *See* Disability discrimination;  
   disparate impact claims. *See* Disparate impact claims;  
   disparate treatment claims. *See* Disparate treatment claims;  
   against drug abusers, 393;  
   Equal Pay Act, 383–386;  
   Executive Order 11246, 405–406;  
   Executive Order 11375, 405–406;  
   executive orders, 405–406;  
   federal civil rights statutes, 1472–1474;  
   health benefits discrimination, 412–414;  
   interplay of statutes, regulations, and constitutional protections, 371–373;  
   judicial deference, 501–510;  
   national origin discrimination, 390, 408–411, 510–513;  
   overview, 501;  
   pregnancy discrimination, 412–414;  
   protected classes, 406–442;  
   racial discrimination, 389–391, 406–408, 510–513;  
   Rehabilitation Act, 391–399;  
   religious discrimination, 433–435;  
   by religious institutions, 456–462;  
   remedies, 382–383, 501–510;  
   retaliation claims, 373;  
   Section 1981. *See* Section 1981;  
   Section 1983. *See* Section 1983;  
   sex discrimination, 386–389, 411–425, 513–515;  
   sexual harassment, 414–420;  
   sexual orientation discrimination, 435–442;  
   sources of law, 374–406;  
   tenure denial, 501–510;  
   timely filing requirements, 381–382;  
   Title VI. *See* Title VI;  
   Title VII. *See* Title VII;  
   Title IX. *See* Title IX  
 Ende, H., 164  
 Engle, K., 464  
 English, F. M., 1191*n*  
 English-only laws, 409–410  
 Entrepreneurial activities, taxation of income from, 1634–1639  
 Environmental laws, 1376–1381  
 Environmental Protection Agency (EPA), 305, 1321, 1377, 1380–1381  
 Epstein, E. S., 160  
 Epstein, M. A., 163  
 Equal Employment Opportunity Commission (EEOC):  
   age discrimination, 400, 401;  
   contingent workers, 260;  
   disability discrimination, 393–394, 516;  
   employment discrimination, 106*n*, 374–375;  
   English-only laws, 409–410;  
   mandatory arbitration, 275;  
   pregnancy discrimination, 412;  
   religious practices, reasonable accommodation of, 434;

- Equal Employment (*Continued*)  
 salary discrimination, 385;  
 sex discrimination, 421–422;  
 sexual harassment, 414, 420;  
 workers' compensation, 325
- Equal Pay Act, 383–386, 421–424
- Equal protection:  
 affirmative action, 449–455;  
 civil rights enforcement  
 powers, 1304;  
 racial discrimination,  
 1451–1452;  
 Section 1983 claims, 1464
- Equity in Athletics Disclosure Act,  
 1123
- ERISA. *See* Employee Retirement  
 Income Security Act
- Establishment clause:  
 government funds, use of in  
 religious institutions, 61–71;  
 public institutions, religious  
 autonomy rights in, 71–75
- Estoppel doctrine and unautho-  
 rized acts of administrators,  
 185–186
- Ethical issues for attorneys, 150,  
 1657–1662
- Euben, D. R., 315, 368, 519,  
 625, 746*n*
- Eurich, N., 14
- Evans, E. M., 250
- Evans, G. R., 87
- Evans, R. B., 19, 252
- Evans, T. S., 425
- Evans, W. D., Jr., 250
- Evidence, 108–113
- Exchange visitor program, 1316
- Executive contracts, 270
- Executive Orders:  
 11246, 405–406, 443;  
 11375, 405–406, 443;  
 12250, 1489;  
 12549, 1438;  
 12866, 1505, 1507;  
 12958, 1507
- Exhaustion of remedies, 103–105
- External governance, 25–29
- Extraterritorial acts of discrimina-  
 tion, covered by federal civil  
 rights statutes, 1484–1486
- F**
- Fact finding and collective  
 bargaining, 296
- Faculty:  
 community activities of,  
 1239–1244;  
 contracts. *See* Contracts;  
 freedom of speech. *See*  
 Academic freedom;  
 part-time faculty, 482–485;  
 private lives, 685–693
- Faculty employment decisions:  
 affirmative action, 522–528;  
 challenges to, 510–517;
- closures, mergers, and  
 reductions in force, 579–597;  
 judicial deference, 501–510;  
 miscellaneous issues, 567–571;  
 nonrenewal of contracts,  
 547–552;  
 overview, 501;  
 post-tenure review, 542–544;  
 private institutions, 571–575;  
 procedures, 544–547;  
 public institutions,  
 constitutional due process in,  
 547–571;  
 salary decisions, challenges to,  
 517–521;  
 standards and criteria, 528–544;  
 tenure denials, 536–542,  
 552–557;  
 tenure terminations, 531–536,  
 557–567
- Fahleson, M. A., 263
- Fairchild, J., 194*n*
- Fair Labor Standards Act (FLSA):  
 overview, 305–311;  
 retaliation claims, 311, 328
- Fair use doctrine, 1335–1342
- Fairweather, J. S., 1664
- False Claims Act, 328, 1404–1406,  
 1436–1438
- Family and Medical Leave  
 Act (FMLA), 313–317,  
 428, 1306
- Family Educational Rights and  
 Privacy Act (FERPA):  
 admissions records, 753;  
 certified transcripts, withhold-  
 ing from student debtors, 848;  
 computerized records, 867*n*;  
 consent requirements, 108*n*;  
 financial aid records, 812;  
 health records, 1402–1403;  
 international students'  
 records, 899;  
 overview, 1029–1034;  
 private causes of action, 1487;  
 sex offender records, 888;  
 state open records laws,  
 1035–1040, 1283–1285;  
 suicide threats, 212
- Fanning, R. W., 368
- Fantel, J. I., 536, 603
- Farnsworth, E. A., 87
- Farrell, E. F., 1069, 1202
- Farrington, D. J., 87
- Faulkner, F., 938
- Faulkner, J. E., 1043
- FBI (Federal Bureau of  
 Investigation), 1332
- FDA. *See* Food and Drug  
 Administration
- Federal Bureau of Investigation  
 (FBI), 1332
- Federal Family Educational Loans  
 (FFEL), 814, 850–851
- Federal Mediation and  
 Conciliation Service, 296
- Federal Trade Commission Act,  
 1375–1376
- Federal Unemployment Tax Act  
 (FUTA), 325–326, 1406, 1414,  
 1421
- Feliu, A. G., 252
- Feller, D., 497
- Feller, I., 1292
- Ferdico, J. N., 1245
- Ferguson, R., 206
- FERPA. *See* Family Educational  
 Rights and Privacy Act
- FFEL. *See* Federal Family Educa-  
 tional Loans
- Fields, K. A., 1665
- Fifteenth Amendment, 1307, 1309
- Fifth Amendment, 61
- Fighting words, 1019, 1023, 1026,  
 1028, 1121*n*
- Final judgments, 118–121
- Financial aid:  
 affirmative action, 820–825;  
 aliens, discrimination against,  
 833–840;  
 athletic scholarships,  
 1123–1127;  
 bankruptcy law, 842–846;  
 college savings plans, 811–812;  
 “cross-cutting” aid conditions,  
 1428–1435;  
 documented aliens,  
 discrimination against,  
 833–837;  
 enforcing compliance,  
 1435–1438;  
 federal aid versus federal  
 procurement, 1424–1425;  
 federal programs, 812–817;  
 funding agencies, disputes  
 with, 1438–1449;  
 general principles, 808–812;  
 history, 1423–1424;  
 legal structure of, 1425–1428;  
 nondiscrimination principles,  
 817–820;  
 nonresidents, discrimination  
 against, 825–833;  
 race-exclusive scholarships,  
 823–825;  
 “receiving federal financial  
 assistance,” scope of phrase,  
 1477–1479;  
 religious institutions, use  
 of government funds at,  
 840–842;  
 student debts, collection of,  
 842–846;  
 Title VI, 820, 822, 823, 825;  
 Title IX, 817–818, 820, 822,  
 825*n*;  
 transcripts, withholding of  
 as debt collection tool,  
 849–854;  
 undocumented aliens,  
 discrimination against,  
 837–840

- Financial exigency. *See* Reductions in force
- Fincher, R. D., 162
- Finkelstein, M. J., 84
- Finkin, M. W., 17, 84, 366, 492, 497, 517, 597, 603, 667, 719, 720, 722, 1246, 1582, 1586, 1587
- FIRE. *See* Foundation for Individual Rights in Education
- First Amendment:
- academic freedom, 613–614, 617–622, 627, 648–653, 666, 688;
  - for athletes, 1119–1121;
  - campus computer networks, 866–873, 1389–1393;
  - canvassers, rights of, 1203–1205;
  - collective bargaining, 282–287, 290–292;
  - commercial speech, 1230–1236;
  - community access to campus, 1212–1213, 1217–1229;
  - community activities of faculty members and students, 1239–1244;
  - compelled speech, 1430–1431;
  - English-only laws, 409–410;
  - events, exclusion of, 1213–1217;
  - extramural speech, 688–692;
  - faculty contracts in religious institutions, 485–490;
  - faculty freedom of expression, 605–613;
  - faculty terminations, 588;
  - fighting words, 1019, 1023, 1026, 1028, 1121*n*;
  - free speech zones, 1005–1006;
  - governance matters, speech on, 667–683;
  - hate speech, 1017–1029;
  - intramural speech on extramural public affairs, 683–685;
  - multistate institutions and programs, state regulation of, 1270–1272;
  - noncommercial solicitation speech, 1236–1239;
  - opinion privilege, 219;
  - personnel decisions, 529;
  - police surveillance, 1210–1211;
  - “public forum” concept, 996–1001, 1390*n*;
  - religious institutions, 61, 714–716, 1264–1266;
  - religious neutrality, 57–58;
  - research findings, protection of, 711–713;
  - retaliation claims, 422–423, 588;
  - sexual harassment cases, 944–945;
  - soliciting and canvassing on campus, 1229–1230;
  - speakers, exclusion of, 1213–1217;
  - speech codes, 1017–1029;
  - student organizations, 1050–1078;
  - student press, 1096–1114;
  - student protests, 993–1017;
  - for students, 993–1029;
  - symbolic speech, 995;
  - threats, communication of, 1395–1397;
  - viewpoint neutrality, 1238*n*
- Fischer, P. A., 412*n*
- Fischer, T., 1155
- Fish, S., 747
- Fishbein, E. A., 84
- Fisher, B. S., 908
- Fishman, J. J., 250
- Fishman, P., 1295
- Fisk, R. S., 1587
- Fiss, O., 907
- Fitzgerald, L. F., 600
- Fitzgibbon, S. A., 300
- Fleming, T. M., 1291*n*
- FLSA. *See* Fair Labor Standards Act
- Flygare, T. J., 315, 368, 1044, 1511
- FMLA. *See* Family and Medical Leave Act
- Foerstel, H. N., 1521
- Foerster, A., 301
- Fogg, P., 540
- Folger, J., 82
- Food and Drug Administration (FDA), 1319–1324, 1659
- Ford, A. T., 597
- Ford, D. L., 1045
- Foreigners. *See* Aliens
- Fossey, R., 649, 885, 905, 909, 1519
- Foster, A. L., 1285
- Foster, D., 1655
- Foster, S., 466, 602
- Foster, W. F., 71*n*
- Foundation for Individual Rights in Education (FIRE), 916, 1017
- Fourteenth Amendment:
- academic freedom, 617–618, 688;
  - civil rights enforcement, 1304–1307;
  - community access to campus, 1220–1222;
  - constitutional liability, 353–357;
  - due process. *See* Due process;
  - employment discrimination, 403–405;
  - equal protection. *See* Equal protection;
  - faculty terminations, 588–591;
  - minimum contacts clause, 97–98;
  - multistate institutions and programs, state regulation of, 1270–1272;
  - personnel decisions, 529, 530;
  - racial discrimination, 1451–1452;
  - religious autonomy in religious institutions, 61;
  - Section 1983 claims, 1464;
  - state immunity from federal civil rights claims, 1309, 1311;
  - student organizations, 1065–1069;
  - unwanted medical treatment, right to refuse, 1289
- Fourth Amendment:
- athletes, drug testing of, 1142–1147;
  - drug testing, limitations on, 268–269;
  - local police authority, 1207–1208;
  - medical screening, limitations on, 269–270;
  - student housing, searches and seizures in, 861–866;
  - student press, 1097;
  - teaching and research materials, protection for, 612–613
- Fowler, D. R., 1664
- Francis, L. P., 1044
- Frank, R., 1515
- Franke, A. H., 135, 162, 212, 213, 362, 462
- Franklyn, D. J., 1513
- Fraternities and sororities:
- alcohol-related issues, 1088–1090, 1093–1096;
  - hazing, 1084–1095;
  - houses, tax treatment of, 1188–1191;
  - institutional liability, 1087–1093;
  - institutional recognition and regulation, 1079–1087;
  - liability of, 1093–1096;
  - overview, 1078–1079
- Fraud, federal regulation of, 1404–1406
- Freedom of press. *See* First Amendment
- Freedom of religion. *See* First Amendment
- Freedom of speech. *See* First Amendment
- Free exercise clause, 59–61
- Free speech zones, 1005–1006
- Freitag, C. N., 1416
- Freitas, M., 1156
- Frey, J. C., 250
- Friedman, R. I., 222*n*
- Friendly, H., 41
- Fritz, T. P., 365
- Frug, J., 1244
- Full Faith and Credit Clause, 119
- Furniss, W. T., 597, 1590

Fusco, T., 411*n*  
 FUTA. *See* Federal Unemployment  
 Tax Act

## G

- Gaal, J., 425  
 Gaffney, E. M., 88, 252,  
 1294, 1507  
 Galanter, M., 95  
 Gallin, A., 84  
 Gamber, C., 89  
 Gamble, B. S., 600  
 Gappa, J. M., 483, 598  
 Garbarino, J. W., 1584  
 Garcia, M., 20  
 Garry, P., 1391*n*  
 Gasaway, L. N., 1511  
 Gay rights. *See* Homosexuals  
 Geevarghese, S., 247  
 Gehring, D. D., 252, 902,  
 907, 1518  
 Geller, R., 1509  
 General Agreement on Trade in  
 Services (GATS), 34  
 George, B. G., 1589  
 Geraci, C. P., 252  
 Getman, J., 719  
 Ghent, J. F., 407*n*, 854*n*, 1128*n*,  
 1167*n*, 1214*n*, 1218*n*  
 Gifis, S., 87  
 Giles, M., 909  
 Gill, J., 87  
 Gillespie, J. F., 282*n*  
 Gindin, S. E., 1511  
 Ginsberg, W. R., 1244  
 Girl Scouts and Title IX  
 issues, 1462  
 Girls Nation and Title IX  
 issues, 1462  
 Girls State and Title IX  
 issues, 1462  
 Gitlin, T., 717  
 Glazer, N., 717  
 Glazier, M. S., 425  
 Goldberg, C., 514  
 Goldberg, D., 1511  
 Goldblatt, S. M., 1662  
 Goldman, A. L., 735  
 Goldoftas, L., 1511  
 Goldstein, P., 900, 1662  
 Goode, E., 924  
 Gooden, N. A., 84  
 Goodman, R. M., 1406*n*, 1408,  
 1422, 1634*n*, 1652*n*, 1654  
 Goods, purchases of, 1599–1603  
 Gordon, J., III, 714, 715  
 Gordon, M. L., 1664  
 Gose, B., 21  
 Gouldner, H., 82  
 Government employees and civil  
 service, 275–277  
 Grades, credits, and degrees:  
 academic freedom and,  
 644–648;  
 awarding of, 927–938;  
 degree revocation, 938–941;  
 overview, 927;  
 sexual harassment complaints  
 and, 941–959;  
 students with disabilities,  
 evaluation of, 959  
 Graduate teaching assistants and  
 collective bargaining, 301–303  
 Gravois, J., 483  
 Gray, M., 1157  
 Green, R. M., 252  
 Greenawalt, R. K., 904  
 Greer, D. G., 1295  
 Gregory, B., 1567  
 Gregory, D. E., 908, 1154  
 Gregory, D. L., 252, 313, 366  
 Gregory, J. D., 599  
 Grey, T. C., 1023, 1047  
 Grier, M. W., 137  
 Grievances. *See* Disciplinary and  
 grievance systems  
 Gross, A. J., 365  
 Grossman, J., 1295  
 Grossman, P., 463  
 Groves, A. W., 904  
 Guaranteed Student Loans (GSL).  
*See* Federal Family Educa-  
 tional Loans  
 Guarino, G. A., 303*n*  
 Guerin, L., 370  
 Gulbis, V. M., 1180*n*  
 Gulland, E. D., 1084, 1087  
 Gumpert, P. J., 367  
 Gunderson, M., 286  
 Gurdus, J., 324  
 Gutek, B., 600  
 Gutierrez, P. T., 1406*n*, 1634*n*,  
 1652*n*  
 Guttag, E. W., 1652

## H

- Haddon, P. A., 719  
 Hajian, T., 1511, 1521  
 Hall, J. T., 206  
 Hall, J. W., 151, 157, 164, 1588  
 Hall, T. M., 410*n*  
 Hamilton, D., 895  
 Hamilton, J., 20  
 Hamilton, N., 615, 616, 617,  
 666*n*, 717, 718  
 Hammond, P. B., 464  
 Hardin, P., 366  
 Harding, B. M., Jr., 1408,  
 1515, 1516  
 Harper, G. K., 1334*n*, 1339, 1342,  
 1355*n*, 1511, 1650*n*  
 Harpool, D., 250  
 Harrington, P. J., 1512, 1664  
 Harris, J., 1588  
 Harris, R. G., 1588  
 Harrison, D. B., 809*n*, 1291*n*  
 Harrison, D. L., 1331, 1386*n*  
 Hartley, R., 291*n*, 1508  
 Hartman, J. L., 908  
 Harvard Civil Rights Project, 792  
 Hassman, P. E., 406*n*, 809*n*,  
 1171*n*, 1273*n*  
 Hasson, J., 1654  
 Hasty, K. N., 325  
 Hate speech:  
 case law, 1019–1026;  
 guidelines for dealing with,  
 1026–1029;  
 overview, 1017–1019  
 Hauser, G. F., 1154  
 Hawke, C., 867*n*, 876  
 Hawkings, M. W., 464  
 Hawkins, H., 1586  
 Hawkins, M. W., 599  
 Hawthorn, K., 861, 887  
 Hawthorne, E., 14  
 Hayden, G. M., 303  
 Hazard, G., Jr., 144  
 Hazing by fraternities and  
 sororities, 1084–1095  
 Health Education Assistance  
 Loans (HEAL), 850  
 Health insurance:  
 discrimination, 412–414;  
 regulation of, 1397–1404  
 Health Insurance Portability and  
 Accountability Act (HIPAA),  
 1401–1404  
 Health Professions Student Loans,  
 850  
 Health services for students,  
 888–893  
 Hebel, S., 746, 747, 1250, 1460*n*  
 Heilbron, L. H., 1587  
 Heisman, L. J., 849*n*  
 Heller, D. E., 1293  
 Heller, G., 1589  
 Helms, L. B., 82, 84  
 Hendrickson, R., 1870  
 Henkin, L. J., 904, 938*n*  
 Herman, J., 1046  
 Hernandez, W., 1066*n*, 1153  
 Heumann, M., 1047  
 HEW (U.S. Department of  
 Health, Education and  
 Welfare), 1130  
 Heydrich, M. W., 34  
 HHS. *See* U.S. Department  
 of Health and Human Services  
 Hiers, R., 626, 627, 665, 690  
 Higgins, B., 342  
 Higgins, J. E., Jr., 366  
 Hill, F. R., 1408*n*  
 Hillman, B., 301  
 Hines, E. R., 1293  
 HIPAA, Health Insurance Portabil-  
 ity and Accountability Act  
 Hippensteele, S., 955  
 Hobbs, W. C., 82  
 Hodges, M., 873  
 Hofstadter, R., 625, 737  
 Hoke, J. R., 846, 905  
 Hold-harmless agreements,  
 153–156  
 Holland, T. P., 250  
 Hollander, P., 164



- Hollis, J. M., 906  
Holloway, W., 365  
Holmes, G. W., 901  
Homosexuals:  
  domestic partner benefits, 439–442;  
  employment benefits for partners, 439–442;  
  military ban on, 442;  
  same-sex harassment, 437–438  
Honan, W. H., 17, 1372  
Hoofnagle, C., 649, 717  
Hoover, E., 211, 303, 775, 1024*n*, 1080, 1202, 1283  
Hoover, N. C., 1153  
HOPE Scholarship Credit, 1415  
Hopkins, B., 1295, 1516  
Horger, K., 1400  
Hornby, R. S., 249  
Horowitz, D., 717, 746, 747  
Horowitz, H. W., 1293  
Horowitz, I. L., 717, 1589  
Horton, N. S., 1080  
Houle, C. O., 250  
Haupt, C., 587  
Hovenkamp, H., 1512  
Hovey, R., 206  
Hoye, W. P., 201, 206, 252  
Hoyt, J. W., 28*n*  
Hugel, P. S., 1045  
Hughes, E., 1294  
Human subjects, laws governing use of in research, 1318–1325  
Hunnicut, K., 1017  
Hunter, R. J., 368  
Hurd, R., 301  
Hurley, B., 903, 909  
Hursh, R. D., 160*n*  
Hustoles, T. P., 464, 530, 598, 599  
Hutchens, M. B., 366  
Hutcheson, P. A., 1590  
Hutchins, N. H., 366  
Hyatt, D., 286  
Hyliden, T., 1588  
Hynes, J. D., 160
- I**
- IACUC (Institutional Animal Care and Use Committees), 1325–1327  
IMMACT. *See* Immigration Act of 1990  
Immigration:  
  admissions and, 778–781;  
  employees and, 317–320;  
  federal regulation of, 1314–1318  
Immigration Act of 1990 (IMMACT), 319  
Immigration and Customs Enforcement, 1314–1315  
Immigration Reform and Control Act (IRCA) of 1986, 318  
Immunity:  
  charitable, 194–195;  
  copyright laws, 1351–1352;  
  Eleventh Amendment, 231–240;  
  false claim suits, 1405;  
  patent laws, 1360–1361;  
  qualified, 346–353;  
  sovereign, 192–194;  
  state immunity from federal law, 1307–1313;  
  waiver of, 97, 234*n*  
Indemnification agreements, 153–156  
Independent contractors distinguished from employees, 258–260, 1604  
Industrial community. *See* Business/industrial community  
Information, obtaining from federal government, 1506–1507  
Ingelhart, L. E., 1155  
Ingram, R. T., 250  
Injunctions, 122–123, 1010–1012  
*In loco parentis* doctrine, 196–197  
Institute of Laboratory Animal Resources, 1327  
Institute of Medicine, 1526  
Institutional Animal Care and Use Committees (IACUC), 1325–1327  
Institutional constitutional rights liability, 230–241  
Institutional contract liability, 225–230  
Institutional review boards, 1319–1324  
Interest arbitration, 296  
Interference by employees, 342–343  
Internal governance, 24–25  
Internal Revenue Service (IRS), 1407, 1411–1412, 1420–1423  
International Development Cooperation Agency, 1320  
International students:  
  services for, 896–899;  
  visa requirements, 1314–1318  
Internet. *See also* Campus:  
  computer networks;  
  freedom of speech, 866–873;  
  jurisdiction issues, 98;  
  liability issues, 873–876;  
  service providers, copyright liability of, 1347–1350;  
  trademark issues, 1366–1367  
Invasion of privacy:  
  by employees, 342;  
  institutional liability for, 224  
IRCA (Immigration Reform and Control Act of 1986), 318  
IRS. *See* Internal Revenue Service
- J**
- Jackson, J., 614  
Jacobson, J. S., 420, 908  
Jacoby, S. B., 1522  
Jaffree, N. A., 420  
Jameson, J. K., 1042  
Jannarone, A., 876  
Janosik, S. M., 908  
Jasanoff, S., 721  
Jaschik, S., 1461  
Javanovic, T. B., 400*n*  
Jennings, B. M., 905  
Jennings, E. K., 1045  
Jewett, C. L., 463, 1519  
Joffe, P., 212  
Johnson, A. B., 604  
Johnson, A. M., Jr., 903  
Johnson, L. T., 463  
Johnson, W. B., 1184*n*, 1274*n*, 1378*n*  
Johnson, W. T., Jr., 252  
Johnston, R. G., 1044  
Jones, C. J., 1141, 1157  
Jones, D. K., 1516  
Jones, N., 1295  
Judge, J., 425  
Judicial deference:  
  faculty employment decisions; 501–510;  
  overview, 8, 80–81, 126–132  
Judicial systems for student discipline, 917–921  
Juergensmeyer, J. C., 1244  
Julius, D. J., 367  
June, A. W., 1170  
Jung, S., 1294  
Jurisdiction:  
  abstention doctrine, 100;  
  Internet, issues relating to use of, 98;  
  overview, 95–100;  
  public institutions, suits against, 99  
Justiz, M. J., 903
- K**
- Kadue, D. D., 463, 465, 601  
Kahin, B., 1357  
Kahn, K., 282  
Kalaidjian, E., 1245  
Kamai, E., 542  
Kane, M. J., 1157  
Kane, M. K., 161  
Kanter, A., 1484  
Kaplan, R. L., 1516  
Kaplin, W. A., 26*n*, 82, 84, 88, 145*n*, 627, 762*n*, 869*n*, 907, 923, 953, 997*n*, 1017*n*, 1041, 1047, 1129*n*, 1294, 1508, 1529*n*, 1536*n*, 1587  
Kappel, B., 1378  
Kapusta, T. J., 392*n*  
Karabel, J., 13  
Karnezis, K. C., 305*n*  
Karst, K. L., 1327  
Kasunic, R., 1338  
Katerberg, R. J., 1324  
Katsh, M. E., 874, 908, 1514

- Katz, K., 717  
 Kaufman, H. E., 1468, 1512  
 Kay, D., 1183  
 Kaye, R. E., 965*n*  
 Keane, A., 1384*n*  
 Kearns, E. C., 368  
 Keefe, J. H., 162  
 Keeton, M. T., 14  
 Keeton, W. P., 253  
 Keith, J. L., 624, 1332, 1334  
 Kelch, T. G., 1512  
 Keller, E., 956  
 Keller, J. J., 368  
 Kellogg, A. P., 400*n*  
 Kells, H. R., 1588  
 Kelly, E. P., Jr., 366  
 Kelly, K., 14  
 Kelly, M., 1516  
 Kemerer, F., 496  
 Kempner, D., 900, 1662  
 Kennedy, R., 903  
 Kenney, M., 1640, 1642, 1643, 1658  
 Kepley, D. E., 1408  
 Kerr, C., 84, 85  
 Kertz, C., 1654  
 Kesselman, M. L., 600  
 Khatcheressian, L. W., 1315  
 Kibler, W. L., 1044, 1045  
 King, H. M., 251  
 King, J. E., 905  
 King, K., 365  
 King, R. D., 902  
 King, R. F., 1520  
 Kinney, E. D., 1514  
 Kinsler, K., 1559  
 Kirby, W. T., 1512  
 Kirk, R., 1266  
 Kirklin, J., 230*n*  
 Kirkwood, J. F., 1517  
 Kirsch, L., 1380  
 Kirschten, B. L., 1408*n*, 1416  
 Klein, A. S., 810*n*  
 Klein, D. A., 973*n*  
 Kliever, L. D., 719  
 Knapper, C., 14  
 Knight, J., 1583  
 Kobasic, D. M., 882  
 Kobylak, W., 411*n*, 413*n*  
 Korpela, A. E., 160*n*, 190*n*, 192*n*, 194*n*, 222*n*  
 Koster, P., 1400  
 Kramer, D. T., 389*n*, 407*n*, 444*n*, 1097*n*, 1199*n*  
 Krattenmaker, T. G., 908  
 Kreiser, R. R., 1665  
 Krejsa, D., 1243  
 Kris, M. E., 1380  
 Kruk, T. L., 217*n*  
 Kuhns, E., 1559*n*  
 Kumin, L. A., 213  
 Kurland, J. E., 597, 613, 717, 719, 1583  
 Kurzweil, M., 902  
 Kushner, M. G., 369  
 Kussman, P. C., 326*n*
- L
- Labor standards, regulation of, 305–311  
 Lacovara, P., 1441, 1517  
 Ladenson, R., 717  
 Ladimer, I., 162, 598  
 Lake, P. F., 212, 251, 253, 335, 1114  
 Lam, M., 1656  
 LaManque, A. S., 87  
 Landis, D. T., 306*n*  
 Landrum, R. E., 1510  
 Land use. *See* Zoning and land use regulation  
 Langford, L., 75*n*  
 LaNoue, G., 502, 513, 515, 600  
 Lape, L. G., 1512  
 Larose, C. J., 1333  
 Larsen, S., 210*n*  
 Larson, A., 324  
 LaTourette, A. W., 902  
 Lattinville, R., 1362  
 Lawler, J. D., 296*n*  
 Lawrence, C. R., III, 1047  
 Laycock, D., 719, 722  
 Lazarus, R. J., 1512  
 Leafner, M., 1645  
 League for Innovation in the Community College, 1525  
 Leased employees, 260  
 Leatherman, C., 17, 1533  
 Ledbetter, B. E., 1588  
 Lee, B. A., 367, 425*n*, 502, 513, 515, 516, 600, 703, 1480  
 Leech, M., 365  
 Legal services. *See* Attorneys  
 Leiser, B., 718  
 Lemley, M., 1514  
 Lemons, S., 1149*n*  
 Leonard, J., 128, 903, 1044  
 Leskovac, H., 1641, 1657, 1665  
 Leslie, D. W., 483, 598  
 Lessig, L., 873, 908  
 Leveraging Educational Assistance Partnership Program, 814  
 Levi, J. H., 1516  
 Levin, S. A., 1115  
 Levine, A., 85  
 Levine, R. J., 1512  
 Lewis, D. M. H., 1154  
 Lewis, H., Jr., 87  
 Lewis, L., 717  
 Liability. *See also* Risk: management; agency law, 91; avoiding, 93; captive and affiliated organizations, acts of, 249–250; constitutional liability. *See* Constitutional liability; contract liability, 344–346; copyright infringement, 1346–1350; of employees, 332–344; enforcement mechanisms, 92–93; overview, 90–91; personal, 188–189; remedies for violations, 93; tort liability. *See* Tort liability of trustees, 188–189; types, 91  
 Liability insurance, 152–153  
 Libel. *See* Defamation  
 Licata, C., 544  
 Licensing from digital database providers, 1350–1351  
 Lifetime Learning Credit, 1415  
 Light, P., 366  
 Light, R. J., 903  
 Light, S. A., 1520  
 Lindemann, B. T., 463, 465, 601  
 Linden, D. A., 477*n*  
 Linehan, P. F., 1376  
 Linnell, R. H., 1658  
 Lipinski, T., 1332, 1386*n*  
 Lipka, S., 1069  
 Lipp, M., 251  
 Lipset, S. M., 717  
 Lipsky, D. B., 162  
 Lisman, N., 1521  
 Litigation. *See* Courts  
 Lobbying, restrictions on federal funds for, 1427–1428  
 Local governments and local community: community access to campus, 1211–1239; community activities of faculty members and students, 1239–1244; general principles, 1161–1166; land use regulation, 1167–1183; police, institutional relations with, 1206–1211; soliciting and canvassing on campus, 1229–1239; student voting in the community, 1199–1206; taxation, 1183–1199; trespass statutes, 1217–1229; zoning, 1167–1183  
 Lockhart, J., 402*n*, 1465*n*  
 Loewe, E. Y., 903  
 Loewy, A., 903  
 Long, N. T., 163  
 Loomis, F., 1480  
 Lopez, D. E., 713  
 Loundy, D. J., 1512  
 Lovain, T., 531  
 Lowell, C. H., 1157  
 Lowery, J. W., 916  
 Ludolph, R. C., 604

- Lukianoff, G., 1023  
Lund, J., 286, 367
- M**
- MacLachlan, J., 1154  
Madsen, H. H., 1296  
Magner, D. K., 17, 19  
Majestic, M., 1509  
Makar, S. D., 733  
Malin, M., 717  
Mallon, W. T., 470  
Malpert, R. A., 369  
Manas, A. E., 1366  
Mandatory retirement, 399–400, 430, 516–517  
Mangan, K. S., 174, 760, 1017, 1534  
Manley, A., 194*n*  
Manley, F. B., 140  
Mann, R. J., 1358  
Mansfield, C., 1376  
Manthei, J. R., 324  
Maranto, C. L., 286, 367  
Marcotte, P., 1379  
Marcus, E. H., 416  
Marmur, S., 1129*n*  
Marsh, G. H., 251  
Martin, J. C., 16, 604, 1587  
Martin, R., 85  
Martorana, S. V., 1559*n*  
Marzulla, R., 1378  
Mason, P., 368  
Massaro, T. M., 1047  
Massler, H., 1407*n*  
Matasor, R., 88  
Mathewson, A., 1156, 1157  
Matthews, K. A., 367, 1437  
Mayes, T., 748  
McBride, S. P., 1154  
McCarthy, J. T., 162, 598, 1513  
McCaskey, A. S., 1157  
McCaughy, M., 621, 655  
McConnell, M. W., 719, 722  
McCorkle, C. R., 289*n*, 1268*n*  
McDaniel, D. L., 905  
McDonald, S. J., 1033, 1048, 1337  
McGillicuddy, M., 762*n*  
McGuinness, A. C., 86, 1293  
McHugh, W., 597  
McKay, R., 1246  
McKee, P. W., 598  
McKendall, M., 75*n*  
McKenna, J. A., 721  
McKeown, J., 519  
McMahon, M. J., 700*n*, 1363*n*  
McMurtrie, B., 206, 1531  
McNabb, S., 110, 160  
McSherry, C., 1513  
Mediation:  
    collective bargaining, 296;  
    Federal Mediation and Conciliation Service, 296;  
    overview, 136–137  
Medical leave, regulation of, 313–317  
Medical privacy:  
    drug testing, 269;  
    preemployment examinations, 393  
Medical screening of employees, 269–270  
Medical services and research, laws regulating, 1288–1292  
Medicare, 1397–1401  
Meers, E., 823, 903  
Meiklejohn, A., 1024  
Melear, K. B., 82, 902  
Melville, A. L., 1367  
Menand, L., 718  
Menard, A. P., 282, 499–500  
Menkel-Meadow, C., 162  
Mergers. *See also* Reductions in force:  
    constitutional considerations, 587–594;  
    contractual considerations, 579–587;  
    statutory considerations, 594–595  
Merges, R., 1358  
Merico-Stephens, A. M., 1508  
Merkx, G., 12  
Metzger, W. P., 85, 613, 614, 616, 625, 718–719, 737, 1581*n*, 1583*n*, 1590  
Meyers, D. K., 1589  
Michaelson, M., 717  
Milani, A. A., 1142  
Military recruiting:  
    homosexuals, military ban on, 442;  
    institutional interference with, restrictions on, 1429–1432  
Military veterans. *See* Veterans  
Millard, R. M., 1251*n*, 1293, 1294  
Miller, J., 1588  
Miller, L. S., 903  
Miller, N., 713, 1522  
Miller, R. C., 190*n*, 437*n*  
Milligan, R. B., 842*n*  
Mingle, J. R., 604  
Minicucci, R., 1533  
Minimum contacts standard, 97–98  
Minimum wage requirements, 305–311  
Mink, B. P., 370  
Mink, O. G., 370  
Minor, J. T., 25, 665  
Minow, M., 1332, 1386*n*  
Mintz, B., 1522  
Mintz, J., 719  
Mitchell, B. C., 1196  
Mitchell, M. R., 162  
Mitten, M., 1157  
Modesitt, N. M., 369  
Moffitt, M. L., 162  
Monaghan, P., 711  
Money damages, 121–122  
Montell, G., 543  
Montgomery, V. W., 276*n*  
Mooney, P., 33  
Moorman, J., 1380  
Mootness doctrine, 101–102  
Moots, P. R., 88, 164, 1507  
Morreale, J., 544  
Morris, A., 517, 621  
Mosely, D. M., 253  
Moskow, M., 293  
Motions to dismiss, 113  
Mumper, M., 904  
Mundel, D. S., 1517  
Munsch, M. H., 1043  
Murray, J. W., Jr., 603  
Music and copyright protection, 1353  
Myers, C., 623
- N**
- Nahmod, S. H., 230*n*, 254  
Nash, N., 14  
NASPA. *See* National Association of Student Personnel Administrators  
National Academy of Engineering, 1526  
National Academy of Sciences, 1526  
National Advisory Committee on Institutional Quality and Integrity, 1554  
National Aeronautics and Space Administration, 1320, 1329  
National Association for Women in Education, 737–738  
National Association of College and University Attorneys (NACUA), 161, 253, 815–816, 1527  
National Association of College and University Business Officers, 601, 905, 908, 909, 1380–1381, 1516, 1662  
National Association of Independent Colleges and Universities, 1526  
National Association of State Universities and Land-Grant Colleges, 1525–1526  
National Association of Student Personnel Administrators (NASPA), 737–738, 1526, 1527  
National Coalition for Women and Girls in Education, 942  
National Collegiate Athletic Association (NCAA):  
    antitrust laws, application of, 1566–1571;  
    common law, application of, 1571–1573;  
    external governance of higher education, role in, 29;  
    federal civil rights statutes, application of, 1573–1581;

- National Collegiate (*Continued*)  
 federal constitutional constraints, 1561–1564;  
 overview, 1560–1561;  
 state statutes regulating, 1564–1566
- National Construction Law Center, 1611
- National Direct Student Loan. *See* Perkins Loans
- National Foundation of Arts and Humanities, 1425
- National Institute of Education, 1267*n*
- National Institutes of Health (NIH), 29, 1324–1325
- National Labor Relations Act (NLRA):  
 bargainable subjects, 293–298;  
 certification, 287–293;  
 emotional distress claims, 293;  
 faculty bargaining unit eligibility, 491–492, 495–496;  
 organization, 287–293;  
 private institutions, collective bargaining at, 279–282;  
 public institutions, collective bargaining at, 286–287;  
 recognition, 287–293;  
 religious institutions, collective bargaining at, 282–286;  
 retaliation claims, 280, 328;  
 student workers, 302
- National Labor Relations Board (NLRB):  
 higher education, jurisdiction over, 490–491;  
 unfair labor practice claims, 297–298
- National Organization on Legal Problems in Education, 517
- National origin discrimination:  
 in employment, 390, 408–411, 510–513;  
 in financial aid, 833–840;  
 Title VII, 318, 408–411
- National Research Council, 1526
- National Science Foundation (NSF), 1321:  
 financial aid programs, 1426;  
 financial disclosure policy, 1659;  
 grant programs, 1656;  
 research misconduct, regulation of, 1329
- Naughton, J., 1134*n*
- Nave, M. E., 1663
- NCAA. *See* National Collegiate Athletic Association
- Neff, E., 744*n*
- Negligence:  
 alcohol consumption, injuries related to, 210;  
 assumption of risk, 202–203;  
 cocurricular activities, injuries related to, 206–210;  
 computer security, 198;  
 of employees, 334–337;  
 institutional liability for, 195–198;  
 negligent hiring, supervision, or retention of employees, 222–224;  
 off-campus instruction, injuries related to, 203–206;  
 on-campus instruction, injuries related to, 201–203;  
 outreach programs, injuries related to, 212–213;  
 premises liability, 198–201;  
 social activities, injuries related to, 206–210;  
 student suicide, 210–212;  
 of volunteers, 198
- Neiger, J. A., 866, 1519
- Nelson, F., 1294
- Neumeg, R., 510*n*
- “New GI Bill,” 814
- Newman, S., 690
- Niccolls, C. S., 927, 1663
- Nichols, D. H., 261
- Nichols, J. E., 1155
- Nicklin, J., 654*n*
- NIH. *See* National Institutes of Health
- NLRA. *See* National Labor Relations Act
- NLRB. *See* National Labor Relations Board
- Noncitizens, employment of, 317–320
- Noncommercial solicitation on campus, 1236–1239
- Noncompetition statutes, 1628–1632
- Nondiscrimination. *See Types of discrimination*
- Nonresidents  
 admissions, 777–778  
 financial aid, 825–833
- Nordin, V. D., 86
- Norman, E., 87
- Norris, J. T., 624, 1522
- NSF. *See* National Science Foundation
- Nuss, E. M., 1044
- Nuwer, H., 1154
- O**
- Oberlander, J., 1514
- Obesity as disability, 429–430
- O’Brien, D., 425
- O’Brien, M., 1519
- O’Brien, T., 425
- Obscenity in student press, 1107–1108, 1114
- Occupational Safety and Health Act (OSHA), 303–305, 328
- Occupational Safety and Health Administration:  
 enforcement role, 92, 303;  
 ergonomics standards, 305;  
 external governance of higher education, role in, 29
- O’Connell, J. B., 160
- O’Connor, E., 746
- OCR. *See* Office for Civil Rights
- O’Donnell, M. L., 1048
- Off-campus injuries, institutional liability for, 203–206, 261
- Office for Civil Rights (OCR):  
 admissions practices, complaints regarding, 760;  
 athletics, sex discrimination in, 1131, 1135–1136;  
 civil rights compliance, 1449–1450;  
 health insurance laws, enforcement of, 1402;  
 race neutrality, guidelines on, 802*n*;  
 sexual harassment, guidelines on, 948
- Office for Good Clinical Practice Staff, 1318–1324
- Office for Human Research Protections (OHRP), 1318–1324
- Office of Information Technology, University of Maryland, 907
- Office of Management and Budget (OMB)  
 conflicts of interest, 1659  
 financial aid policies, 1427
- Office of Patent and Trademark, 1361
- Office of Public Health and Science, 1324
- Office of Research Integrity (ORI), 1329–1330
- Officers, administrative authority of, 181–187
- Ohasi, N., 1651
- OHRP (Office for Human Research Protections), 1318–1324
- Oleck, H., 1294
- Olivas, M. A., 13, 83, 719, 779, 812, 826*n*, 839, 840, 905, 906, 1517
- Oliveiri, D. J., 1167*n*
- Olsen, F., 1533
- Olswang, S. G., 291*n*, 536, 542, 603, 604, 902, 927, 1480, 1663
- Olzowka, P., 1589
- OMB. *See* Office of Management and Budget
- On-campus injuries, institutional liability for, 201–203
- O’Neil, R. M., 11, 83, 127, 163, 617, 621, 622, 654*n*, 655, 706, 717, 718, 719, 720, 721, 904, 907, 1023, 1047, 1517, 1518, 1522
- O’Neill, J. P., 1294
- Online Ombuds Office, 874

- Open meetings laws, 1276–1280  
 Open records laws, 1281–1286  
 Oppenheimer, D. B., 466, 602  
 Oren, L., 953*n*, 956  
 Organizations, captive and affiliated:  
   liability issues, 249–250;  
   overview, 241–242;  
   regulatory laws, application of, 246–248;  
   state action issues, 248–249;  
   structural problems, 242–244;  
   taxation issues, 244–246  
 ORI (Office of Research Integrity), 1329–1330  
 Orleans, J., 894, 1157  
 OSHA. *See* Occupational Safety and Health Act  
 Osteen, C. M., 1415*n*, 1416  
 Ostrow, A. P., 1245  
 Oswald, J. D., 1044  
 Out-of-state institutions and programs, state regulation of, 1267–1272  
 Out-of-state students. *See* Nonresidents  
 Outreach programs, institutional liability for injuries related to, 212–213  
 Outsourcing, 1604, 1606–1608  
 Overland, M. A., 34  
 Overtime pay, 305–311  
 Overton, G. W., 250  
 Owen, K. Q., 370  
 Owensby, D. D., 1454
- P**
- Page, R., 1017  
 Palfreyman, D., 87  
 Palmer, A. R., 134, 161  
 Palmer, C., 1518  
 Palmer, S., 903  
 Paludi, M. A., 465, 601  
 Paradis, L., 1513  
 Parent Loans for Undergraduate Students (PLUS), 814–815  
 Parker, J. W., 266  
 Parkin, L., 1514  
 Parsons, M., 1586  
 Part-time workers and contracts, 482–485  
 Pashman, S., 844  
 Patai, D., 717  
 Patents:  
   animals, patentability of, 1358;  
   infringement lawsuits, 1360;  
   overview, 1355–1356;  
   ownership of, 1358–1360;  
   patentability requirement, 1356–1358;  
   research collaboration, 1650–1652;  
   sovereign immunity, 1360–1361  
 Paterson, B. G., 1045  
 Patry, W. F., 1513  
 Patti, C. M., 1401  
 Paulsen, M., 1153  
 Paulson, C., 1293  
 Pauly, M. V., 1514  
 Pavela, G., 83, 85, 113, 253, 746, 873, 907, 916, 927, 1042, 1044, 1046, 1096*n*, 1121  
 Payne, J. T., 477*n*  
 Pearlman, K., 1244  
 Pearson, T. C., 955  
 Peck, C. J., 263  
 Peer-to-peer file-sharing technologies and copyright law, 1340–1341, 1347–1350  
 Pell Grants, 814, 1433  
 Peltz, R., 1104  
 Performance management:  
   background checks, 358–359;  
   disciplinary actions, 360–362;  
   employee evaluations, 359–360;  
   performance improvement plans, 360;  
   pre-hire issues, 357–359;  
   promotions, 362–363;  
   termination, 363–364;  
 Perillo, J. M., 580, 1592, 1596, 1662  
 Perkins Loans, 814, 849  
 Perritt, H. H., Jr., 365, 463, 601  
 Perry, M., 688  
 Peterson, A., 369  
 Peterson, B. G., 1044  
 Peterson, N., 1516  
 Phelps, W. G., 138*n*  
 Phillips, E., 369  
 Phillips, G. L., 1599*n*  
 Phillips, M. J., 88  
 PHS (Public Health Service), 1327  
 Picozzi, J. M., 981, 1043  
 Pieronek, C., 1131, 1157  
 PLUS (Parent Loans for Undergraduate Students), 814–815  
 Police, institutional relations with, 1206–1211  
 Polishook, I., 719  
 Porter, H. V., 1588  
 Porto, B. L., 400*n*, 1135*n*  
 Posner, R. A., 904  
 Post, D., 719  
 Postsecondary education, law of:  
   academic custom and usage, 35–37;  
   administrative laws and regulations, 31–32;  
   case law, 37–40;  
   common law, 32;  
   constitutions, 30;  
   evolution of, 9–22;  
   external governance, 25–29;  
   federal regulation, 1313–1406;  
   governance, basic concepts of, 22–24;  
   institutional contracts, 35;  
   institutional rules and regulations, 35;  
   internal governance, 24–25;  
   international law, 32–34;  
   law and policy, relationship between, 75–81;  
   private institutions, legal rights in, 54–57;  
   public-private dichotomy, 40–57;  
   religion and public-private dichotomy, 57–75;  
   scope of, 3–9;  
   sources of, 29–40;  
   state action doctrine, 42–54;  
   statutes, 30–31  
 Postsecondary Education  
   Convening Authority, 1294  
 Post-tenure review, standards and criteria for, 542–544  
 Powe, L. A., Jr., 908  
 Powell, M. B., 1084, 1087  
 Preemployment examinations and medical privacy, 393  
 Preemption, 304, 313, 1163–1164, 1297, 1368  
 Preer, J., 1519  
 Pregnancy discrimination, 412–414  
 Premises liability, 198–201  
 Prestage, J. L., 1521  
 Pretrial and trial issues:  
   class action suits, 105–107;  
   discovery, 107–108;  
   evidence, 108–113;  
   motions to dismiss, 113;  
   summary judgments, 113  
 Preventive law, 144–150  
 Privacy Act of 1974, 1040–1041  
 Private institutions. *See also* Religious institutions:  
   auxiliary enterprises, 1627–1628;  
   collective bargaining at, 279–282;  
   community access to campus, 1211–1213;  
   disciplinary rules and regulations, 924;  
   due process, 571–575;  
   legal rights in, 54–57;  
   sanctions, 988–993;  
   state chartering and licensure of, 1258–1267;  
   and student press, 1114;  
   trustees, 174–181;  
   zoning regulations, 1169–1173  
 Privilege:  
   academic information, 699–706;  
   attorney-client, 109–112;  
   defamation, defense against, 218–219;  
   psychotherapist-patient, 112–113

- Procurement. *See* Purchases  
 Profit, J., 1588  
 Promissory estoppel, 345  
 Promotions of employees, 362-363  
 Property taxes, 1184-1197  
 Prosser, W. L., 253, 1547  
 Protests. *See* Student protests  
 Przepyszny, J. R., 14, 81  
 Psychotherapist-patient privilege, 112-113  
 Publication, academic freedom in, 654-665  
 Public disclosure laws, 1276-1280  
 Public figures, defamation of, 1551-1553  
 Public Health Service (PHS), 1327  
 Public institutions:  
   auxiliary enterprises, 1621-1627;  
   collective bargaining at, 286-287;  
   community access to campus, 1211-1213;  
   constitutional due process, 547-571;  
   constitutionally based institutions, 1255-1258;  
   construction contracts, 1612-1615;  
   disciplinary rules and regulations, 921-924;  
   disciplinary sanctions, 973-982;  
   employment contracts, 264-265;  
   faculty personnel decisions, standards and criteria for, 529-530;  
   religious autonomy rights in, 71-75;  
   state actions by, 42-54;  
   state authority over, 1250-1258;  
   statutorily based institutions, 1253-1255;  
   statutory rights versus contract rights, 476-479;  
   and student press, 1107-1114;  
   suits against, 99-100;  
   trustees, 172-174;  
   unionization of employees, 276;  
   zoning regulations, 1167-1169  
 Public-private dichotomy:  
   collective bargaining and, 278;  
   overview, 40-57;  
   religion and, 57-75  
 Pulley, J., 1604  
 Purcell, E., 297  
 Purchases:  
   construction contracts, 1610-1618;  
   of goods, 1599-1603;  
   of real estate, 1610;  
   of services, 1603-1610  
 Purver, J. M., 1600*n*
- Q**
- Qualified immunity, 346-353  
 Qualified state tuition programs, 1414
- R**
- Rabban, D. M., 294, 367, 492, 625, 719, 1664  
 Rabinowitz, R. S., 369  
 Racial discrimination:  
   admissions, 758-762;  
   employment, 389-391, 406-408, 510-513;  
   equal protection, 1451-1452;  
   racial harassment, 408, 749, 958;  
   reverse discrimination, 511-513;  
   Section 1981. *See* Section 1981;  
   Title VI. *See* Title VI;  
   Title VII. *See* Title VII  
 Rahdert, G. K., 1515  
 Rains, R. E., 938  
 Ramares, A. K., 843*n*, 849*n*  
 Ramphele, M., 903  
 Rampino, K. J., 826*n*, 1199*n*  
 Ranney, J. T., 1157  
 Rap, R. E., 721  
 Rape, awareness of, 886  
 Ratcliff, J., 1534  
 RCRA (Resource Conservation and Recovery Act of 1976), 1377-1378  
 Readmissions, 803-808  
 Real estate, purchases of, 1610  
 Reams, B., Jr., 18, 941  
 Reapportionment, 1205-1206  
 Reasonable accommodations of persons with disabilities, 391-393, 395-396, 428-429  
 Recombinant DNA research, 1324-1325  
 Recording Industry Association of America (RIAA), 1341, 1349-1350  
 Redlawsk, D., 1047  
 Reductions in force:  
   constitutional considerations, 587-594;  
   contractual considerations, 579-587;  
   overview, 579;  
   preparing for, 596-597;  
   statutory considerations, 594-595  
 Regulatory laws and captive and affiliated organizations, 246-248  
 Rehabilitation Act of 1973:  
   administrative enforcement, 1487, 1489, 1490*n*, 1493;  
   affirmative action, 1471-1472;  
   athletic teams and clubs, 1140-1142;  
   computer access, 876;  
   employment discrimination, 391-399;  
   enforcement remedies, 1493-1501;  
   extraterritorial acts of discrimination, 1485-1486;  
   financial aid, 818;  
   obesity as disability, 429-430;  
   overview, 768-775, 959-972, 1464-1469;  
   "program or activity," defined, 1479-1481;  
   retaliation claims, 1483;  
   scope, 1472-1474;  
   unintentional discriminatory acts, 1474-1477  
 Reibstein, R. J., 252  
 Reidhaar, D. L., 85  
 Reisberg, L., 1032  
 Religion. *See also* Religious institutions:  
   employment discrimination, 433-435;  
   public-private dichotomy and, 57-75;  
 Religious institutions:  
   academic freedom in, 714-716;  
   collective bargaining in, 282-286;  
   employment discrimination in, 456-462;  
   faculty contracts, 485-490;  
   government funds, use of, 61-71, 840-842;  
   religious autonomy rights in, 59-61  
 Remedies:  
   attorney's fees, 123-125;  
   for breach of contract, 1595-1597;  
   contempt of court, 125-126;  
   for employment discrimination, 382-383, 501-510;  
   exhaustion of, 103-105;  
   injunctions, 122-123;  
   for legal violations, 93;  
   money damages, 121-122;  
   overview, 121  
 Remis, R., 1122, 1157, 1296  
 Rescission of employment contracts, 267  
 Research:  
   academic freedom in, 654-665, 706-714;  
   animal subjects, laws governing use of, 1325-1329;  
   confidentiality of findings, 706-714;  
   copies, fair use of, 1338-1339;  
   federal regulation of, 1318-1330;

- human subjects, laws  
governing use of, 1318–1325;  
Institutional Animal Care and  
Use Committees (IACUC),  
1325–1327;  
institutional review boards,  
1319–1324;  
misconduct, 1329–1330;  
recombinant DNA, 1324–1325
- Research collaboration:  
antitrust law, application of,  
1654–1655;  
conflicts of interest, 1657–1662;  
federal government incentives,  
1655–1657;  
patent law, application or,  
1650–1652;  
potentials and problems,  
1640–1643;  
research agreements,  
1643–1650;  
tax exemptions for research,  
1652–1654
- Reserve Officer Training  
Corps (ROTC) programs,  
1429
- Residency discrimination in  
admissions, 777–778
- Res judicata* doctrine, 118–121
- Resource Conservation and  
Recovery Act (RCRA) of 1976,  
1377–1378
- Respondet superior* doctrine,  
222
- Retaliation claims:  
ADEA, 300;  
False Claims Act, 328,  
1404–1405, 1437;  
federal civil rights statutes,  
1482–1484;  
First Amendment, 422–423,  
588;  
FLSA, 311, 328;  
generally, 330, 373, 425, 612,  
937–938, 955;  
National Labor Relations Act,  
280, 328;  
OSHA, 303, 328;  
Rehabilitation Act of 1973,  
1483;  
Safe Drinking Water Act, 328;  
Title VI, 1483;  
Title VII, 422–423;  
Title IX, 388–389, 422–423,  
424, 1483–1484;  
Toxic Substances Control  
Act, 328
- Retirement incentive packages,  
402, 432–433
- Retirement income security,  
regulation of, 311–313
- Reverse discrimination, 511–513,  
519–520
- Reynolds, O. M., 1183*n*, 1244
- Reynolds, W. L., 161
- Rhodes, G. M., 206
- RIAA. *See* Recording Industry  
Association of America
- Rich, B. A., 1296
- Richards, R. F., 601
- Richmond, D. R., 253, 981, 1513
- Riesman, D., 15
- Rigelhaupt, J. L., Jr., 1180*n*
- Rigney, D. P., 905
- Rinden, G., 210
- Risk management:  
hold-harmless and indemnifica-  
tion agreements, 153–156;  
liability insurance, 152–153;  
overview, 150–151;  
releases, 156–157;  
risk avoidance versus risk  
control, 151;  
risk retention, 157;  
risk transfer, 152–160;  
suggestions, 150–151;  
waivers, 156–157
- Rizzo, M. J., 1250
- Roady, C., 1516
- Robert C. Byrd Honors  
Scholarship Program, 814
- Roberts, M., 1093
- Roberts, T. E., 1244
- Robinson, F., 110, 160, 1514
- Robinson, J. H., 87, 722
- Robison, W. L., 1665
- Rodin, J., 1018
- Roots, R., 849, 906
- Rosenblum, J. E., 1665
- Rosenblum, V., 597
- Rosenhouse, M. A., 158*n*
- Rosenthal, A., 1299
- Rosenzweig, E. M., 1048
- Rosner, S. R., 1153*n*
- ROTC (Reserve Officer Training  
Corps) programs, 1429
- Rothstein, L. F., 16, 465, 601,  
959*n*, 1513, 1519
- Rotunno, N., 437*n*
- Rowland, J., 303
- Rubenstein, W. B., 465
- Rubin, R., 1611
- Rudolph, F., 40
- Ruebhausen, O., 517
- Ruger, P. H., 163, 516
- Rules and regulations. *See* Disci-  
plinary and grievance systems
- Rush, S., 900, 1662
- Russo, C. J., 366
- Rutherford, L. H., 463, 1519
- Rutledge, G. E., 1093, 1154
- Ryan, C. S., 465
- Rydstrom, J. F., 289*n*, 390*n*,  
761*n*, 1051*n*
- S**
- Sacken, D., 646, 1641
- Safe Drinking Water Act, 328
- St. John, E. P., 21, 906
- Salary discrimination, 383–386,  
517–521
- Sales:  
antitrust law, 1632–1633;  
auxiliary enterprises,  
1618–1628, 1639–1640;  
entrepreneurial activities,  
taxation of income from,  
1634–1639;  
noncompetition statutes,  
1628–1632
- Sales taxes, 1197–1199
- Samels, J. E., 16, 604
- Sanctions:  
academic, at public  
institutions, 982–988;  
disciplinary, at public  
institutions, 973–982;  
hearings, 978–982;  
notice, 978;  
overview, 972–973;  
private institutions, 988–993
- Sanders, J. T., 1665
- Sandin, R. T., 466, 601
- Sandler, B. R., 465, 601
- Sangree, 945
- Santora, K. C., 145*n*
- Satinover, T., 1510
- Saunders, C., 1501
- Savage, F. G., 164, 540
- Scaraglino, P., 1403
- Schaefer, H., 1293
- Schaeffer, S., 1276*n*
- Schechter, R. E., 1513
- Schmid, W., 871
- Schmidt, P., 1250, 1255, 1285
- Schneider, A., 622*n*
- Scholarships. *See* Financial aid
- Schoonmaker, L. C., 463
- Schopler, E. H., 296*n*, 978*n*
- Schruers, M., 874
- Schupansky, S. P., 1043
- Schuster, J., 483
- Schuster, J. H., 84
- Schwartz, B., 1292
- Schwartz, D., 1522
- Schwartz, M., 230*n*
- Schwartz, R., 305
- Schweitzer, T. A., 938, 1044
- Seal, R. K., 84
- Searches and seizures in student  
housing, 861–866
- Seavey, W., 1547
- Secretary of Education,  
1532–1533, 1534, 1546, 1554,  
1559–1560
- Secretary of Health and Human  
Services, 1397–1401
- Section 504. *See* Rehabilitation  
Act of 1973
- Section 1981:  
affirmative action, 820–821;  
national origin discrimination,  
408, 410;  
1991 amendment to, 408;  
racial discrimination, 389–391,  
510–512, 760–762;  
racial harassment, 408

- Section 1983:  
 damages, 121;  
 equal protection, 1464;  
 exhaustion of remedies, 104*n*,  
 240–241, 576*n*;  
 institutional liability, 230–241;  
 personal liability, 346–357, 748;  
 qualified immunity, 346–353;  
 sex discrimination, 1464;  
 sexual harassment, 953*n*,  
 956–957, 959;  
 sexual orientation  
 discrimination, 436–437;  
 state-created dangers, 353–357;  
 statute of limitations, 102–103
- Security. *See* Campus security
- Sedler, R. A., 88
- Seeber, R. L., 162
- Seep, Ralph V., 1501*n*, 1505*n*
- Segregation cases, 1451–1462
- Seitz, J. L., 1373
- Selden, W. K., 1588
- Seldin, P., 370
- Selingo, J., 895, 1377*n*
- Sensenbrenner, R., 164
- SEOG (Supplemental Educational  
 Opportunity Grants), 814
- Sergent, R., 1390*n*
- Sermersheim, M. D., 163, 908,  
 1513
- Services, purchases of, 1603–1610
- SEVIS. *See* Student and Exchange  
 Visitors Information System
- Sex discrimination. *See also*  
 Sexual harassment:  
 in admissions, 762–768;  
 in athletics, 420–425,  
 1127–1140;  
 disparate impact claims,  
 1135–1136;  
 in employment, 386–389,  
 513–515;  
 overview, 411–412;  
 pregnancy, 412–414;  
 reverse discrimination, 519–520;  
 salary, 517–521;  
 Section 1983 claims, 1464;  
 sexual orientation  
 discrimination, 435–442;  
 in standardized testing, 767;  
 Title VII, 411–412;  
 Title IX, 439
- Sexual harassment. *See also* Sex  
 discrimination:  
 in employment, 414–420;  
 First Amendment concerns,  
 944–945;  
 peer sexual harassment,  
 749–752;  
 same-sex, 437–438;  
 of students by faculty  
 members, 941–959;  
 Title VII, 414–417, 419,  
 943–945, 950;  
 Title IX, 414, 749–752,  
 943–954, 959
- Shapiro, R. A., 1172*n*
- Shapiro, S. R., 1002, 1239*n*
- Sharp, L. A., 213, 415*n*
- Shattuck, J., 1665
- Shea, C., 1229
- Shea, L., 1324, 1514
- Shearer, P., 901
- Shekleton, J. F., 182, 1293
- Sherman, M., 690
- Sherrill, J. A., 134, 161
- Sherry, S., 1026
- Shields, M. A., 273*n*, 1288, 1363*n*
- Shiell, T. C., 1047
- Shockley, P., 1650*n*, 1665
- Shoop, R. J., 465, 601
- Showalter, J. M., 129
- Shropshire, K., 1156
- Shubert, J. J., 82
- Shuck, P. H., 1519
- Shulman, J. L., 1115
- Sidbury, B. F., 1048
- Siegel, B., 1364
- Siegler, L. C., 845
- Siena, J., 1656
- Silvergate, H., 1023
- Silverman, L., 767
- Silverstein, Z., 220
- Simon, R., 717
- Sims, J. C., 718
- Sinder, J., 719
- Sindler, A. P., 904
- Sirefman, J., 162, 598
- Sixteenth Amendment, 1301
- Sizer, J. R., 1511, 1521
- Skeel, D. A., Jr., 1589
- Skitol, R. A., 1514
- Sklansky, D., 1245
- Skojec, S. A., 412*n*
- Slaughter, S., 1643
- Slivka, J., 1250
- Smallwood, S., 302, 303
- Smelser, N. J., 903
- Smith, B. L., 210*n*
- Smith, E. R., 882
- Smith, F. S., 810
- Smith, J. E., 200*n*, 213*n*, 876*n*
- Smith, M. A., 894
- Smith, M. C., 885, 909
- Smith, S. G., 641, 720
- Smith, T., 75*n*
- Smith, W. M., 313
- Smolla, R. A., 719
- Snow, B. A., 81, 1157, 1307
- Social activities, liability for  
 injuries related to, 206–210
- Soliciting and canvassing on  
 campus, 1229–1230
- Somers, P., 906
- Song, J. K., 369
- Sorensen, P. M., 252
- Sorenson, G., 87
- Sororities. *See* Fraternities and  
 sororities
- Sovereign immunity. *See* Immunity
- Speech. *See* Academic freedom;  
 First Amendment
- Speiser, S., 213
- Spille, H., 1294
- Spitzer, R., 719
- Sports. *See* Athletics teams and  
 clubs
- Sroka, S. L., 1461
- Stafford Loans, 814
- Stallworth, S. B., 85
- Standardized tests  
 copyright laws, application  
 of, 1355  
 sex discrimination, 767
- Standards of judicial review,  
 114–118
- Standing doctrine, 100–101
- Stanley, K. O., 866
- Stanton, T. H., 1514
- Stark, J. S., 85
- State action:  
 accreditation actions,  
 1543–1546;  
 by athletic associations and  
 conferences, 1561–1564;  
 of captive and affiliated  
 organizations, 248–249;  
 overview, 42–54
- State governments:  
 administrative procedure laws,  
 1286–1288;  
 medical services and research,  
 laws regulating, 1288–1292;  
 noncompetition statutes,  
 1628–1632;  
 open meetings laws,  
 1276–1280;  
 open records laws, 1281–1286;  
 out-of-state institutions and  
 programs, regulation of,  
 1267–1272;  
 postsecondary education,  
 relationship with, 1247–1250;  
 private postsecondary  
 institutions, chartering and  
 licensure of, 1258–1267;  
 public disclosure laws,  
 1276–1280;  
 public postsecondary  
 education, authority over,  
 1250–1258;  
 regulatory laws, 1273–1276;  
 religious institutions,  
 chartering and licensure of,  
 1264–1267
- Statutes of limitations, 102–103
- Steadman, J. M., 1522
- Steele, C. M., 903
- Steinbach, S. E., 1381
- Steneck, N. H., 1665
- Stepka, D., 1394
- Stern, J., 296
- Sternberg, R., 797
- Stevens, A. R., 1665
- Stevens, E., 1046
- Stevens, G. E., 253
- Stewart, D., 1294
- Stim, R., 1514



- Stokes, J. W. D., 904  
 Stone, K. V., 162  
 Stoner, E. N., II, 129, 465, 916  
 Strickland, L. S., 1332  
 Strohm, L. C., 253  
 Strobe, J. L., Jr., 1045  
 Strossen, N., 1048  
 Strout, E., 623  
 Student and Exchange Visitors Information System (SEVIS), 898, 1316-1317  
 Student files and records:  
   FERPA. *See* FERPA;  
   Privacy Act, 1040-1041;  
   state laws, 1035-1040  
 Student housing:  
   off-campus housing, zoning of, 1180-1183;  
   regulations, 854-861;  
   searches and seizures, 861-866;  
   Title VI, 856, 861;  
   Title IX, 856  
 Student organizations:  
   fraternities and sororities, 1078-1096;  
   institutional liability for acts of, 191-192;  
   mandatory student activity fees, 1058-1065;  
   nondiscrimination principles, 1065-1069;  
   religious activities, 1069-1078;  
   right not to join, 1056-1057;  
   right to organize, 1050-1056;  
   Title VI, 1067  
 Student press:  
   advertising in, 1105-1106;  
   general principles, 1096-1098;  
   institutional regulation of, 1100-1104;  
   libel, 1108-1114;  
   obscenity, 1107-1108, 1114;  
   in private institutions, 1114;  
   in public institutions, 1107-1114;  
   student fee allocations, 1098-1100  
 Student Press Law Center, 1097*n*, 1155  
 Student protests:  
   in classroom, 1015-1017;  
   criminal prosecutions, 1010-1012;  
   injunctions, 1010-1012;  
   overview, 993-996;  
   posters and leaflets, 1012-1015;  
   prior approval of, 1008-1010;  
   "public forum" concept, 996-1001;  
   regulation of, 1001-1008  
 Student referenda, 1059-1061, 1065  
 Student Right-to-Know Act, 1122-1123, 1435  
 Students:  
   academic freedom, 737-747;  
   activity fees, 1058-1065;  
   admission of. *See* Admissions;  
   age of majority, 726-727;  
   athletics. *See* Athletic teams and clubs;  
   campus security. *See* Campus security;  
   child care services, 899-900;  
   codes of conduct, 913-916;  
   community activities of, 1239-1244;  
   computers and. *See* Campus computer networks;  
   conduct codes, 913-916;  
   contractual rights, 727-737;  
   with disabilities. *See* Students with disabilities;  
   discipline. *See* Disciplinary and grievance systems;  
   financial aid for. *See* Financial aid;  
   fraternities and sororities. *See* Fraternities and sororities;  
   health services, 888-893;  
   housing. *See* Student housing;  
   international students, services for, 896-899;  
   with learning disabilities, admission of, 773-775;  
   legal relationships with other students, 747-752;  
   legal services, 900-901;  
   legal status, 725-752;  
   mandatory activity fees, 1058-1065;  
   organizations, 1050-1078. *See* Student organizations;  
   peer harassment, 748-749;  
   press of. *See* Student press;  
   protests by. *See* Student protests;  
   with psychiatric illnesses, disciplining, 924-927;  
   records. *See* Student files and records;  
   sexual harassment, 749-752;  
   suicide by, 210-212;  
   taxation of, 1412-1415;  
   voting by, 1199-1206  
 Students for Academic Freedom, 746  
 Students with disabilities. *See also* Disabilities, persons with  
   Disability discrimination:  
     accommodations, requests for, 965-972;  
     concept of disability, 960-962;  
     notice and documentation of disabilities, 962-965;  
     overview, 959-960;  
     psychiatric illnesses, discipline for students with, 924-927;  
     services for, 893-896;  
   study abroad programs, participation in, 971  
 Student voting:  
   canvassing and registering on campus, 1203-1205;  
   elections, scheduling of, 1202-1203;  
   reapportionment, 1205-1206;  
   registration, 1199-1202  
 Student workers:  
   collective bargaining and, 301-303;  
   Title VII, 374  
 Study abroad programs:  
   liability issues, 205-206;  
   students with disabilities, 971  
 Sudia, D., 1122  
 Suggs, W., 1142  
 Suicide, institutional liability for, 210-212  
 Sullivan, C. A., 601  
 Sullivan, K. M., 904  
 Sum, P. E., 1520  
 Summary judgments, 113  
 Sun, J. C., 136*n*, 1373  
 Sunstein, C. R., 908, 1048, 1327  
 Supplemental Educational Opportunity Grants (SEOG), 814  
 Suspensions. *See* Sanctions  
 Sussberg, J. A., 1153*n*  
 Sweet, J., 1663  
 Swink, D. R., 261  
 Symbolic speech, 995  

**T**

 Tagg, J., 21  
 Tanaka, P., 847, 905  
 Tate, P. J., 14  
 Taxation:  
   admission taxes, 1197-1199;  
   amusement taxes, 1197-1199;  
   audit guidelines, 1420-1423;  
   of captive and affiliated organizations, 244-246;  
   commercialization, 1419-1420;  
   entrepreneurial activities, income from, 1634-1639;  
   FICA withholdings, 1413-1414;  
   fraternity and sorority houses, treatment of, 1188-1191;  
   general tax concepts, 1183-1184;  
   gifts and contributions, 1415-1416;  
   intermediate sanctions, 1410-1412;  
   overview, 1406-1408;  
   property taxes, 1184-1197;  
   qualified state tuition programs, 1414;  
   related entities, 1419-1420;  
   research, exemptions for, 1652-1654;  
   sales taxes, 1197-1199;

- Taxation: (*Continued*)  
state and local taxes,  
1637–1639;  
of students, 1412–1415;  
tax-exempt status, 1408–1410;  
tuition tax credits, 1415;  
unemployment compensation,  
1414;  
unrelated business income tax  
(UBIT), 1416–1419,  
1634–1637, 1653–1654
- Taylor, C. W., 1588
- Taylor, B. E., 250
- Taylor, B. R., 602
- Telecommuters, 261
- Tenth Amendment, 1297
- Tenure denials and terminations.  
*See also* Faculty employment  
decisions:  
constitutional due process,  
552–567;  
judicial deference, 501–510;  
overview, 531–542;  
post-tenure review, 542–544;  
remedies, 501–510;  
Title VII, 506–508
- Tepker, H. F., 131, 599
- Termination of employment:  
age discrimination, 364;  
at-will doctrine, 262–263;  
employee performance,  
363–364;  
wrongful discharge, 262–263
- Terrell, M. C., 86
- Terrorism:  
federal response, 1330–1334;  
war on, and academic freedom,  
624
- Tewksbury, D., 41
- Thelin, J. R., 1115
- Theuman, J. E., 1029*n*, 1369*n*,  
1661*n*
- Thielens, W., 717
- Thigpen, R., 88
- Thirteenth Amendment, 1305,  
1307
- Thomas, G., 13
- Thomas, T. A., 390*n*, 410*n*
- Thompson, A. J., 369
- Thomsen, S. H., 313
- Thomson, J. J., 719, 722
- Thornton, S. R., 315, 368
- Thrasher, F., 1382
- Thro, W. A., 81, 823, 903, 1157,  
1307, 1361
- Tien, C., 903
- Tierney, W. G., 13, 22, 25, 665
- Tilles, E. A., 466
- Title VI:  
administrative enforcement,  
1487–1492;  
affirmative action, 782–783,  
786–788, 795, 1471–1472;  
athletic associations and  
conferences, 1574–1577;  
damages, 1483;  
disparate impact claims,  
1497–1498;  
enforcement remedies,  
1493–1501;  
extraterritorial acts of discrimi-  
nation, coverage of, 1484;  
financial aid programs, 820,  
822, 823, 825;  
overview, 54, 1450–1462;  
“program or activity,” defined,  
1479–1481;  
racial discrimination, 758–761,  
762;  
racial harassment, 749, 958;  
retaliatory acts, coverage of,  
1483;  
scope, 1472;  
student housing, 856, 861;  
student organizations, 1067;  
unintentional discriminatory  
acts, coverage of, 1474–1477
- Title VII:  
academic freedom, 702;  
affirmative action, 443–449;  
athletics coaches, 420–424;  
attorney’s fees, 510;  
back pay awards, 390;  
collective bargaining, 298–301;  
consent decrees, 456;  
damages, 121, 387, 1463;  
disparate impact claims,  
375–376, 380–381, 385–386,  
388, 401, 404, 1135–1136,  
1474, 1476–1477, 1497–1498;  
disparate treatment claims,  
375–377, 379–380, 382, 413;  
extraterritorial application,  
373;  
national origin discrimination,  
318, 408–411;  
overview, 54, 374–383;  
pregnancy discrimination,  
412–413;  
racial harassment, 408;  
religious discrimination,  
433–435;  
religious institutions, 456–462;  
retaliation claims, 422–423;  
reverse discrimination,  
511–512, 519;  
salary discrimination, 385;  
scope, 1474;  
sex discrimination, 411–412;  
sexual harassment, 414–417,  
419, 943–945, 950;  
sexual orientation  
discrimination, 435–439;  
state and local governments,  
1304;  
student workers, 374;  
tenure denials, 506–508
- Title IX:  
administrative enforcement,  
1487, 1489, 1490*n*;  
admissions policies, 762–764,  
767–768;  
affirmative action, 782–783,  
1471–1472;  
alternative dispute resolution,  
136;  
athletic associations and  
conferences, 1573–1574;  
athletics coaches, 420–424;  
athletic teams and clubs,  
1127–1140;  
damages, 121;  
disparate impact claims, 388;  
employment discrimination,  
386–389;  
enforcement remedies, 1489,  
1493–1501;  
extraterritorial acts of  
discrimination, coverage of,  
1484–1485;  
financial aid programs,  
817–818, 820, 822, 825*n*;  
overview, 1462–1464;  
“program or activity,” defined,  
1479–1482;  
“receiving federal financial  
assistance,” defined,  
1477–1479;  
retaliation claims, 388–389,  
422–423, 424, 1483–1484;  
scope, 1472–1474;  
sex discrimination, 439;  
sexual harassment, 414,  
749–752, 943–954, 959;  
student child care, 899–900;  
student health services,  
889–890;  
student housing, 856;  
unintentional discriminatory  
acts, coverage of, 1474, 1477
- Tobin, E., 902
- Tollett, K. S., Sr., 1461, 1520
- Tort liability:  
accreditation actions,  
1549–1553;  
alcohol consumption, injuries  
related to, 210;  
athletic injuries, 1147–1153;  
curricular and social  
activities, injuries related to,  
206–210;  
defamation, 217–222, 337–342;  
educational malpractice,  
213–217;  
emotional distress, 224;  
of employees, 332–344;  
employees, negligent hiring,  
supervision, or retention of,  
222–224;  
interference, 342–343;  
invasion of privacy, 224, 342;  
*in loco parentis* doctrine,  
196–197;  
negligence. *See* Negligence;  
off-campus instruction, injuries  
related to, 203–206;  
on-campus instruction, injuries  
related to, 201–203;

- outreach programs, injuries related to, 212–213;  
 overview, 189–195, 332–334;  
*respondeat superior* doctrine, 222;  
 student organizations, acts of, 191–192;  
 student suicide, 210–212;  
 study abroad programs, 205–206
- Toxic Substances Control Act, 328
- Tracy, J., 1244
- Trademark, 1361–1368
- Transcripts, withholding from debtors, 846–849
- Traynor, M., 369, 721
- Treatment law, 144
- Treisman, P. U., 903
- Trespass statutes, 1217–1229
- Trial issues. *See* Pretrial and trial issues
- Tribbensee, N. E., 77*n*, 212, 1043, 1049, 1386*n*, 1514
- Tribe, L., 904
- Trout, W., 1588
- Trower, C. A., 470
- Trubek, D. M., 95
- Trustees:  
   authority of, 171–181;  
   overview, 171–172;  
   personal liability of, 188–189;  
   in private institutions, 174–181;  
   in public institutions, 172–174
- Tuckman, H. P., 598
- Turner, C., 20
- Turner, M. G., 908
- Tussey, D., 294*n*
- Twenty-sixth Amendment:  
   scheduling elections, 1202;  
   voter registration, 1199;  
   voting age, 726
- U
- UBIT. *See* Unrelated business income tax
- Ugland, E., 1246
- Ultra vires* doctrine, 169
- Unemployment compensation:  
   Federal Unemployment Tax Act, 1414–1415;  
   generally, 325–327, 412*n*, 413
- Unfair competition, regulation of, 1375–1376
- Uniformed Services Employment and Reemployment Rights Act (USERRA), 330–332
- Unintentional discriminatory acts, coverage by federal civil rights statutes, 1474–1477
- Unions. *See* Collective bargaining
- United Educators Risk Retention Group, 164
- Universal Copyright Convention, 34
- Unrelated business income tax (UBIT):  
   auxiliary enterprises, 1634–1637;  
   overview, 1416–1419;  
   research, exemptions for, 1653–1654
- U.S. Citizenship and Immigration Services:  
   and foreign workers, 319;  
   immigration laws, enforcement of, 1314
- U.S. Constitution. *See also specific articles and amendments*:  
   accreditation actions, application to, 1543–1546;  
   civil rights enforcement powers, 1304–1307;  
   commerce clause, 1268–1272;  
   commerce power, 1301–1304;  
   free exercise clause, 485–490;  
   overview, 1297–1299;  
   spending power, 1299–1301;  
   state sovereign immunity, 1307–1313;  
   supremacy clause, 836;  
   taxing power, 1301
- U.S. Department of Agriculture, 1320, 1325, 1327
- U.S. Department of Commerce, 1320
- U.S. Department of Defense:  
   colleges operated by, 27;  
   external governance of higher education, role in, 29;  
   lobbying activities, restrictions on funds for, 1428;  
   procurement contracts, 1424
- U.S. Department of Education (ED):  
   accreditation, role in, 1554–1559;  
   accrediting institutions, 1527;  
   Age Discrimination Act regulations, 1469–1470;  
   athletics, 1130–1131;  
   civil rights regulations, 1449–1450;  
   education associations, listed, 1525;  
   enforcement role, 92;  
   external governance of higher education, role in, 28;  
   Family Policy Compliance Office (FPCO), 1030, 1032, 1033;  
   financial aid programs, 1425, 1435–1436;  
   Freedom of Information requests, 1506;  
   human research subjects, laws governing use of, 1321;  
   lobbying activities, restrictions on funds for, 1428;  
   Office for Civil Rights (OCR). *See* Office for Civil Rights;
- peer sexual harassment, guidance on, 749–750, 752;  
   race-exclusive scholarships, guidance on, 823, 825;  
   racial harassment, guidance on, 958;  
   Rehabilitation Act of 1973 regulations, 1464–1466;  
   sexual harassment, guidance on, 941–942, 953, 954–955;  
   student aid programs, eligibility requirements for, 835;  
   student records, 1029–1034;  
   Title VI regulations, 1451;  
   Title IX regulations, 1462–1463
- U.S. Department of Energy, 1320
- U.S. Department of Health, Education and Welfare (HEW), 1130
- U.S. Department of Health and Human Services (HHS):  
   antiterrorism measures, 1333;  
   conflicts of interest, 1659;  
   external governance of higher education, role in, 28;  
   financial aid programs, 1425;  
   human research subjects, laws governing use of, 1318–1324;  
   research misconduct, regulation of, 1329–1330
- U.S. Department of Health Education and Welfare (HEW), 796
- U.S. Department of Homeland Security (DHS):  
   Bureau of Citizenship and Immigration Services (CIS), 898;  
   Bureau of Immigration and Custom Enforcement (ICE), 898;  
   external governance of higher education, role in, 28;  
   immigration laws, enforcement of, 1314
- U.S. Department of Housing and Urban Development, 1320
- U.S. Department of Justice (DOJ):  
   ADA enforcement, 1382;  
   antitrust investigations, 1548*n*;  
   athletic eligibility requirements, 1580–1581;  
   FCA, 1404–1405;  
   as plaintiff, 92;  
   student records, 1041
- U.S. Department of Labor (DOL):  
   enforcement role, 92;  
   external governance of higher education, role in, 29;  
   family and medical leave, 314;  
   foreign workers, 318, 319–320;  
   Office of Federal Contract Compliance Programs (OFCCP), 406, 443–444;  
   Wage and Hour Division, 306

- U.S. Department of State:  
 exchange visitor program, 1316;  
 and foreign workers, 318, 319;  
 international students, role in  
 regulating, 897–898
- U.S. Department of the Interior, 27
- U.S. Department of  
 Transportation (DOT), 1321
- U.S. Department of Veteran  
 Affairs, 1321, 1426
- U.S. Patent and Trademark Office,  
 1357–1358
- U.S. Student Association, 737–738
- USA PATRIOT Act, 1330–1334
- USERRA (Uniformed Services  
 Employment and Reemploy-  
 ment Rights Act), 330–332
- V**
- Van Alstyne, W. W., 86, 615, 719,  
 720, 722, 901
- Vance, D., 1517
- Van den Haag, E., 718
- Van Der Werf, M., 1604
- Vannelli, G. L., 1380
- Van Tol, J. E., 602, 938
- Van Wart, M., 365
- Vargyas, E. J., 767, 820, 1463, 1497
- Vazquez, C. M., 1361
- Vento, C. S., 1274*n*
- Veterans:  
 employment of, 330–332;  
 hiring preferences, 275
- Viewpoint discrimination, 693,  
 738, 901, 998, 1019, 1023,  
 1024, 1026, 1028, 1054–1055,  
 1075, 1078, 1099, 1243*n*,  
 1444, 1448
- Vinluan, R. A., 1080*n*
- Virtual Magistrate Project, 874
- Visas:  
 for foreign workers, 318–319;  
 for international students,  
 897–899
- Volokh, E., 908
- Volunteers, negligence of, 198
- W**
- Waelbroeck, S. E., 719, 722
- Wagner, J. F., Jr., 392*n*, 1377*n*
- Wagner, S. C., 412*n*
- Waiver of contract rights,  
 272–273
- Waldo, C. N., 251
- Walker, G., 1597*n*
- Wallach, P. G., 1514
- Wallick, R. D., 1518
- Walton, S. J., 1155
- Ward, J. A., 901
- Ware, L., 1520
- Wasserman, H. M., 1121
- Wattley, M. A., 901
- Weaver, S., 144
- Weber, M. C., 465, 602
- Weeks, K. M., 83, 163
- Wegner, J. W., 1520
- Weinstein, J., 631*n*
- Weistart, J. C., 1157, 1589
- Weitzner, D. J., 907–908
- Welch, E. M., 369
- Wellmann, J., 906
- Wells, M., 230*n*
- Wergin, J., 1534
- West, J. P., 276*n*, 365
- West, M. S., 602
- Westman, D. P., 369
- Wetherington, G. T., 721
- Whistleblower protections,  
 327–330, 1274*n*, 1329, 1437
- White, L., 1434
- White, R. H., 466
- Whitehead, K. D., 1518
- Whitman, R. S., 455
- Whitten, A. D., 253
- Wiggins, E. C., 721
- Wilcox, J., 16
- Wilhelm, S., 1045
- William D. Ford Direct Loan  
 Program, 815
- Williams, D. T., 22
- Williams, E., 437*n*
- Williams, J. B., IV, 1520
- Williams, P., 1157
- Williams, R. E., 906
- Williams, W. M., 905
- Wilson, J. B., 717, 902
- Wilson, R., 17, 470, 652, 684*n*,  
 903, 1161, 1521
- Winston, G. C., 14
- Witten, R. E., 599
- Wolverton, B., 1283
- Wong, G. M., 1156, 1157, 1560
- Woodcock, R. L., 906
- Woods, G. W., 1404
- Wooster, A. K., 314*n*, 389*n*, 392*n*,  
 1381*n*
- Workers' compensation:  
 athletes and, 1122;  
 employees and, 320–325, 1402
- “Work made for hire” doctrine,  
 1344–1346
- Wright, B., 13
- Wright, T. W., 86
- Wrongful discharge, 262–263
- Wu, T., 873
- Y**
- Yale-Loehr, S., 1515
- Yamada, D. C., 369
- YMCA and YWCA and Title IX  
 issues, 1462
- Young, D. P., 902
- Young, K. E., 1588
- Young, S., 1589
- Youngers, J., 1522
- Ytreberg, D. E., 1050*n*
- Z**
- Zamansky, J., 1514
- Zeiner, C., 1610
- Zelin, J. E., 296*n*
- Zimbalist, A., 1115
- Zimmer, M. J., 601
- Zipp, E. K., 400*n*
- Zirkel, P. A., 83, 1043, 1045
- Zitter, J. M., 917*n*, 925*n*, 1171*n*
- Zoning and land use regulation:  
 amendment of ordinances,  
 1177–1178;  
 off-campus housing, 1180–1183;  
 overview, 1167;  
 private institutions and,  
 1169–1173;  
 property owners, rights of,  
 1178–1180;  
 public institutions and,  
 1167–1169;  
 special exceptions, 1173–1177;  
 variances, 1173–1177
- Zulkey, E., 342
- Zupanec, D. M., 854*n*, 855*n*,  
 1229*n*