

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.¹

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

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

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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 postsecondary 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 Merckx, “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 Przepyszny (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 Oultz, "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,² 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

²On 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>).³ 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 1867 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

³The 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 Thohoro 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.)⁴

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 postsecondary 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

⁴At 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.

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).⁵ 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

⁵For 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."⁶ 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

⁶Although 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.⁷

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

⁷The 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*.⁸)

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.⁹ 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).¹⁰

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 insulated 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.

⁸The 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.

⁹Subsequent to *Rendell-Baker*, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, discussed below, a fourth approach emerged: the "entwinement" approach.

¹⁰Such 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.¹¹ 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* (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

¹¹This 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 *Menavlos 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.¹² 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

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

¹²The 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.

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 "the 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.¹³ 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

¹³For 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 postsecondary 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,¹⁴ 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.¹⁵

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.

¹⁴The 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.

¹⁵As *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. Turner*, 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 interpret 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.¹⁶

¹⁶For 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.¹⁷ 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*

¹⁷The federal constitutional principles are developed in *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevic*, 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.¹⁸

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*

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 *Axson-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

¹⁸A 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).

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 *Waltz 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 bonds¹⁹ to finance the building projects of private religious

¹⁹Revenue 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 “non-religious” 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,²⁰ 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

²⁰For 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.²¹ 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 postsecondary 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

²¹Some 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 upper-classmen 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.²² 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,

²²The 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.²³

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

²³The 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.²⁴ 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

²⁴One 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 Hibbensee, “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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- American Association of University Professors. "Universities and the Law," 87 *Academe* 16 (November–December 2001). Special issue of the AAUP's journal, devoted to a variety of legal issues. Articles include David M. Rabban, "Academic Freedom, Individual or Institutional?"; Gary Pavela, "A Balancing Act: Competing Claims for Academic Freedom"; William R. Kaufman, Robert O'Neil, Robert Post, & Wendy White, "The University Counsel: A Roundtable Discussion"; Ann H. Franke, "Making Defensible Tenure Decisions"; Mary Ann Connell & Frederick G. Savage, "Does Collegiality Count?"; and Paul D. Grossman, "Making Accommodations: The Legal World of Students With Disabilities."
- Brevitz, Karl, Snow, Brian A., & Thro, William A. *The NACUA Handbook for Lawyers New to Higher Education* (National Association of College and University Attorneys, 2003). Includes more than sixty outlines from NACUA annual conferences and continuing legal education workshops, as well as articles from the *Journal of College and University Law*. Topics discussed include taxation, athletics, student discipline, computer issues, intellectual property, federal regulatory laws such as the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA), and discrimination.
- Campus Legal Information Clearinghouse (CLIC). A joint project of The Catholic University of America (CUA) and the American Council on Education, available at <http://counsel.cua.edu>. A Web site featuring information, tools, and resources to assist institutions in complying with an array of federal legal requirements. Includes summaries of federal laws pertinent to higher education, lists of FAQs, examples of innovative compliance practices, compliance checklists and charts, issues of the *CUA Counsel Online* newsletter, and links to other useful sites.
- The Chronicle of Higher Education*. "Academe Today." A valuable online research service. Access to this Web site via <http://www.chronicle.com> is available only on request using access codes provided to subscribers. This site allows access to the *Chronicle's* latest news stories concerning actions in Congress, the executive branch, and the courts, as well as other developments in higher education, along

with background material, such as the full text of court opinions. The *Chronicle* has also archived its past publications, allowing for easy access to past articles, cases, and citations.

- Edwards, Harry T. *Higher Education and the Unholy Crusade Against Governmental Regulation* (Institute for Educational Management, Harvard University, 1980). Reviews and evaluates the federal regulatory presence on the campus. Author concludes that much of the criticism directed by postsecondary administrators at federal regulation of higher education is either unwarranted or premature.
- Folger, Joseph, & Shubert, J. Janelle. "Resolving Student-Initiated Grievances in Higher Education: Dispute Resolution Procedures in a Non-Adversarial Setting," 3 *NIDR Reports* (National Institute for Dispute Resolution, 1986). A short monograph exploring the various methods employed at twenty different institutions to resolve conflicts. Includes a flowchart entitled "Model of Possible Options for Pursuing Resolutions to Student-Initiated Grievances" and a set of criteria for evaluating the effectiveness of particular grievance procedures.
- Gouldner, Helen. "The Social Impact of Campus Litigation," 51 *J. Higher Educ.* 328 (1980). Explores the detrimental effects on the postsecondary community of "the tidal wave of litigation . . . awash in the country"; identifies "increased secrecy on campus," "fragile friendships among colleagues," a "crisis in confidence" in decision making, and "domination by legal norms" as major effects to be dealt with.
- Helms, Lelia B. "Litigation Patterns: Higher Education and the Courts in 1988," 57 *West's Educ. Law Rptr.* 1 (1990). Reviews and classifies litigation involving higher education during a one-year period. Uses the geographical area, the court, the parties, and the issue as classifying factors. Includes tables summarizing litigation patterns. Article provides "baseline data for later comparison" and a methodology for collecting later data. See also the Helms entry for Section 1.2.
- Hobbs, Walter C. "The Courts," in Phillip G. Altbach, Robert O. Berdahl, & Patricia J. Gumpert (eds.), *Higher Education in American Society* (3d ed., Prometheus Books, 1994). Reviews the concept of judicial deference to academic expertise and analyzes the impact of courts on postsecondary institutions. Includes illustrative cases. Author concludes that, despite complaints to the contrary from academics, the tradition of judicial deference to academic judgments is still alive and well.
- Kaplin, William A. *The Importance of Process in Campus Administrative Decision-Making*, IHELG Monograph 91-10 (Institute for Higher Education Law and Governance, University of Houston, 1992). Distinguishes between the *substance* and the *process* of internal decision making by campus administrators; develops a "process taxonomy" with six generic classifications (rule making, adjudication, mediation, implementation, investigation, and crisis management); examines the "process values" that demonstrate the importance of campus processes; and sets out criteria for identifying "good" processes.
- Melear, Kerry B., Beckham, Joseph, & Bickel, Robert. *The College Administrator and the Courts* (College Administration Publications, 1988, plus periodic supps.). A basic casebook (by Bickel) written for administrators, supplemented by a second vol. of case briefs and quarterly supplements (by Melear & Beckham) each year. Briefs and explains leading court cases. Topics include the legal system, sources of law, the role of counsel, distinctions between public and private colleges, the state action concept, and issues regarding faculty.
- Olivas, Michael A. *The Law and Higher Education: Cases and Materials on Colleges in Court* (3d ed., Carolina Academic Press, 2006, with periodic supps.). A casebook

presenting both foundational and contemporary case law on major themes in higher education law and governance. Includes supportive commentary by the author, news accounts, and excerpts from and cites to writings of others.

- O'Neil, Robert. *Free Speech in the College Community* (Indiana University Press, 1997). Provides an excellent analysis and overview of free speech issues that arise within academic communities. Explores a range of free speech problems from speech codes, to academic freedom in the classroom, to free inquiry in research, to the challenges to free expression presented by technological advances. The presentation of each problem is lively, current, and very practical. The author's analysis interrelates legal issues and policy issues. The book is reviewed at 24 *J. Coll. & Univ. Law* 699 (1998) (review by J. W. Torke).
- Pavela, Gary (ed.). *Synfax Weekly Report* (Synfax, Inc.). Newsletter-style publication delivered by FAX technology to maintain optimum currency. Each issue digests and critiques one or more legal and policy developments as reflected in court opinions, news media accounts, and other sources.
- Weeks, Kent M., & Davis, Derek (eds.). *A Legal Deskbook for Administrators of Independent Colleges and Universities* (2d ed., Center for Constitutional Studies, Baylor University/National Association of College and University Attorneys, 1993). A resource containing legal analysis, practical advice, and bibliographical sources on issues of particular import to administrators and counsel at private institutions.
- West's Education Law Reporter* (Thomson/West). A biweekly publication covering education-related case law on both elementary/secondary and postsecondary education. Includes complete texts of opinions, brief summaries written for the layperson, articles and case comments, and a cumulative table of cases and index of legal principles elucidated in the cases.
- Zirkel, Perry A. "The Volume of Higher Education Litigation: An Update," 126 *West's Educ. Law Rptr.* 21 (1998); and Zirkel, Perry A. "Higher Education Litigation: An Overview," 56 *West's Educ. Law Rptr.* 705 (1989). Charts the course, and quantifies the increases, of higher education litigation in state and federal courts from the 1940s through the 1990s.
- Sec. 1.2 (Evolution of Higher Education Law)**
- Beach, John A. "The Management and Governance of Academic Institutions, 12 *J. Coll. & Univ. Law* 301 (1985). Reviews the history and development of institutional governance, broadly defined. Discusses the corporate character of postsecondary institutions, the contradictions of "managing" an academic organization, academic freedom, and the interplay among the institution's various constituencies.
- Bok, Derek. "Universities: Their Temptations and Tensions," 18 *J. Coll. & Univ. Law* 1 (1991). Author addresses the need for universities to maintain independence with regard to research and public service. Discusses three sources of temptation: politicization, diversion of faculty time and interest from teaching and research to consulting, and the indiscriminate focus on commercial gain when one is seeking funding.
- Clark, Burton R. *The Academic Life: Small Worlds, Different Worlds* (Carnegie Foundation for the Advancement of Teaching, 1987). Traces the evolution of postsecondary institutions, the development of academic disciplines, the nature of academic work, the culture of academe, and academic governance. The book

- emphasizes the rewards and challenges of the faculty role, addressing the significance of the "postmodern" academic role.
- Finkelstein, Martin J., Seal, Robert K., & Schuster, Jack H. *The New Academic Generation: A Profession in Transformation* (Johns Hopkins University Press, 1998). Uses data from the 1993 National Study of Postsecondary Faculty; analyzes faculty demographic data, work and career patterns, and attitudes. Discusses the use of part-time and adjunct faculty and the increase in nonwhite and female faculty.
- 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 college 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.