

PART ONE

PERSPECTIVES AND FOUNDATIONS

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Overview of Higher Education Law

Chapter 1 provides background information on the reach of law into virtually every aspect of higher education and develops the foundational principles and conceptual distinctions that have guided the law's ever-expanding reach. After brief overviews of how the law's impact on academia has expanded, and the body of higher education law has evolved, since the 1950s, the chapter explains how decisions concerning colleges and universities, and their personnel and students, are made (governance). The chapter then reviews the sources of higher education law, distinguishing between those from outside the institution (such as constitutions, statutes, and common law) and those from within the institution (such as policies and contracts). Differences in how the law treats public institutions versus private institutions are examined, as is the state action doctrine (which serves to require public institutions, but usually not private institutions, to comply with the individual rights guarantees of the U.S. Constitution). Differences in how the law treats private religious, versus private secular, institutions are also addressed. The chapter then concludes with an examination of the relationship between law and policy (institutional policy as well as public policy), and legal counsel's role in advising the institution on the development and implementation of policy.

Section 1.1. How Far the Law Reaches and How Loudly It Speaks

Law's presence on the campus and its impact on the daily affairs of postsecondary institutions are pervasive and inescapable. Litigation and government regulation expose colleges and universities to jury trials and large monetary damage awards, to court injunctions affecting institutions' internal affairs, to

government agency compliance investigations and hearings, and even to criminal prosecutions against administrative officers, faculty members, and students.

Many factors have contributed over the years to the development of this legalistic and litigious environment. Students' and parents' expectations 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 students and faculty, has led to more sophisticated demands on institutions. 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.

In addition, advocacy groups have used litigation against institutions as the means to assert faculty and student claims against institutions—and applicant claims as well, in suits concerning **affirmative action**¹ in admissions and employment. Contemporary examples of such groups include the Foundation for Individual Rights in Education (FIRE) (<http://www.thefire.org>); Students for Academic Freedom (see Section 7.1.4); the Center for Law and Religious Freedom (<http://www.clsnet.org/clrfpages>), a project of the Christian Legal Society; the Student Press Law Center (<http://www.splc.org>); and the Center for Individual Rights (<http://www.cir-usa.org>), which has been particularly active in the cases on affirmative action in admissions. More traditional examples of advocacy groups include the American Civil Liberties Union (ACLU) (www.aclu.org) and the NAACP Legal Defense and Educational Fund, Inc. (<http://www.naacpldf.org>). National higher education associations also sometimes involve themselves in advocacy (in court or in legislative forums) on behalf of their members. The American Council on Education, whose members are institutions, is one example (<http://www.acenet.org>); the American Association of University Professors (AAUP), whose members are individual faculty members, is another example (<http://www.aaup.org>; see Section 6.1.3 of this book).

In this environment, law is an indispensable consideration, whether one is responding to campus disputes, planning to avoid future disputes, or crafting an institution's policies and priorities. 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.²

There are many striking examples of cutting-edge cases that have attracted considerable attention in higher education circles or have had a substantial

¹Terms appearing in **bold face** type are included in the Glossary, which is found in Appendix D.

²Much of the introductory content of this section is adapted from Kathleen Curry Santora and William Kaplin, "Preventive Law: How Colleges Can Avoid Legal Problems," *Chron. Higher Educ.*, April 18, 2003, B20 (copyright © 2004 by Chronicle of Higher Education, Inc.).

impact on higher education. Students have sued their institutions for damages after being accused of plagiarism or cheating or after being penalized for improper use of a campus computer network; objecting students have sued over mandatory student fee allocations; victims of harassment have sued their institutions and professors alleged to be 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 accommodations 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 challenged their grades in court, such as the student who filed suit in 2007 claiming that being required to type led to his receiving a lower grade because he typed more slowly than other students, or the student who fell asleep during an exam and claimed that she was unfairly penalized on the basis of a disability. 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 another student, injured in a Jell-O wrestling event at a college residence hall party that he himself had organized, attempted to pin liability on his university.

Faculty members have been similarly active. Professors have sought legal redress after their institutions changed the professors' laboratory or office space, their teaching assignments, or the size of their classes or after research data or curricular materials were discarded when a faculty member's office was relocated. A group of faculty challenged their institution's decision to terminate several women's studies courses, alleging sex discrimination and violation of free speech. 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 have been named as defendants in cases brought by student athletes. Fraternities are sometimes defendants in the hazing cases. Media organizations have brought suits and other complaints under open meetings and public records laws. Drug companies have sued and been sued in disputes over human subjects research and patent rights to discoveries. 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 2009, clients of a university's Center for Reproductive Health sued the university when the center gave fertilized embryos to unrelated couples without the consent of the parents of the embryos; another institution was sued for alleged mishandling of the cremated remains of a cadaver donated to the university's research program.

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. Drug abuse problems have spawned legal 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 has 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-Arab, homophobic, and political and ideological tensions on campuses have led to speech codes, academic bills of rights, and the eruption of a range of issues concerning student and faculty academic freedom. Initiatives to strengthen women’s teams, prompted by alleged sex-based inequities in intercollegiate athletics, have led to suits by male athletes and coaches whose teams have been eliminated or downsized. Sexual harassment concerns have grown to include student peer harassment and harassment based on sexual orientation, as well as date rape and sexual assault. Hazing, alcohol use, and behavioral problems, implicating fraternities and men’s athletic teams especially, have reemerged as major issues.

The development of more relationships between research universities and private industry has led to more legal issues concerning technology transfer. Heightened sensitivities to alleged sexual harassment and political bias in academia have prompted disputes between faculty and students over academic freedom, manifested especially in student complaints about faculty members’ classroom comments and course assignments. Increased attention to student learning disabilities and to psychological and emotional conditions that may interfere with learning has 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 has resulted in lawsuits, state legislation, and state referenda and initiative drives among voters. Disputes persist on campus concerning student organizations that promote gay rights, student religious organizations that exclude gay and lesbian students from membership or leadership, and the rights and concerns of transgender students.

As the number and variety of disputes have increased, the use of administrative agencies as alternative forums for airing disputes has grown alongside litigation in court. 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 or an analogous state agency; the National Labor Relations Board or a state’s public employee relations board; the administrative law judges of the U.S. Department of Education; 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; local zoning boards; or mediators or arbitrators of various agencies at all levels of government.

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, processes for appealing denials of promotion or tenure, student judiciaries, honor boards, and grade appeals panels are common examples. In recent years, **mediation** has 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.

Of course, some counter-trends have emerged over time that have served to ameliorate the more negative aspects of the greater role of 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 preventive legal planning. On a broader scale, not only institutions but also their officers have increasingly banded together in associations to 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 rule making, and for mediation of disputes. The trial courts have developed processes for pretrial 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.

Administrators, counsel, public policy makers, and scholars have all reflected on the role of law on campus. While the influence of law is frequently criticized, this criticism 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 acknowledge 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 sometimes 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 the courts and counsel for colleges and universities 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 higher education implement worthy policy goals, and are they adequately sensitive to the mission of higher education? In situations where the message of the law 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 the interests of higher education?

We still do not know all we should about these questions. But we know that they are clearly a critical counterpoint to questions about money, time, and energy 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.

Section 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 these requirements were not a major factor in most administrative decisions. Those in the higher education world, moreover, tended to think of themselves 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 was thought to operate 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.

The special higher education environment was also thought to support a special virtue and ability in its personnel. College faculty 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.

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, 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.

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.

In the latter half of the twentieth century, however, events and changing circumstances worked a revolution in the relationship between academia and the law. Changes in the composition of student bodies and faculties, growth in the numbers and diversity of institutions and educational programs, advances in technology, greater dependence of both private and public institutions on federal financial assistance and research support, increases in study abroad programs and joint ventures between American institutions and those in other countries, and expanded relationships with private sector commercial entities dramatically altered the legal and policy landscape for colleges and

universities. The civil rights and student rights movements contributed to the legal demands on institutions, as individuals and groups claimed new rights and brought new challenges. Demands for accountability by federal and state governments and private donors also spawned new challenges, including most recently issues concerning inadequate access to higher education for students from families of lower socioeconomic status.

As a result of these developments, the federal government and state governments became heavily involved in postsecondary education, creating many new legal requirements and new forums for raising legal challenges. Students, faculty, other employees, and outsiders became more willing and more able to sue postsecondary institutions and their officers (see Section 1.1). Courts became more willing to entertain such suits on their merits and to offer relief from certain institutional actions. New legal doctrines and requirements that developed outside of higher education increasingly were applied to colleges and universities. In short, by the end of the twentieth century, higher education no longer enjoyed much of the judicial and legislative deference it once knew. Virtually every area of the law now applies to institutions of higher education, and keeping up with this vast body of continually evolving law is a great challenge for administrators, faculty, students, and scholars of higher education.

As these developments continue into the twenty-first century, postsecondary education remains a dynamic enterprise, as societal developments and technological breakthroughs continue to be mirrored in the issues, conflicts, and litigation that colleges and universities face. The key trends that are now shaping the future, broadly speaking, are the *diversification* of higher education, the *technologization* of higher education, the *commercialization* of higher education, and the *globalization* of higher education. In this context, the challenge for the law is to keep pace with such trends 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 is to understand and respond constructively to change and growth in the law while maintaining focus on multiple purposes and constituencies.

Section 1.3. The Governance of Higher Education

1.3.1. Basic concepts and distinctions. **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. 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 and within the structures of other organizations with authority over higher education; (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 of this book); 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 11.3), state governments (see Section 11.2), 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 12.1.2), athletic associations and conferences (see Section 12.1.3), the American Association of University Professors, and other higher education associations. Other examples include national employee unions with “locals” or chapters at individual institutions (see Sections 4.3 and 5.3); outside commercial, research, public service, or other entities with which institutions may affiliate; 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 Section 1.7). In some circumstances, governance structures and processes may themselves create problems or become the focus of disputes. Internal disputes (often turf battles) may erupt between various constituencies within the

institution—for example, a dispute over administrators’ authority to change student grades given by faculty members. 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 Section 6.2.3 for examples concerning internal governance and Sections 11.2 and 12.1 for examples concerning external governance.) Whether a problem or dispute centers on governance, or governance simply 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 3 through 9 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 10 and 11 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 in Title IX of the Education Amendments of 1972 (see Section 8.5 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. 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 Section 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 U.S. 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 campus-wide organization that represents the interests of faculty members (such as a faculty senate) and a campus-wide 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. Nationwide, faculty participation in governance has long been sufficiently established that internal governance is often referred to as “shared governance” or “shared institutional governance.” 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 11.2.1 of this book); 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 11.2.3). 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. 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. And more generally, state courts establish and enforce the common law of contracts and torts that forms the foundation of the legal relationships 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 11.3.1 of this book). Through other express powers, however, such as its spending power, and through its implied powers,³ the federal government exercises substantial governance authority over both public and private higher education. Under its express powers to raise and spend money, 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 12.1.2). 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 8.4); for keeping student records (see Section 7.8.1); for achieving racial and ethnic diversity through admissions and financial aid programs (see Sections 7.2.5 and 7.3.4); and for preventing and remedying sex discrimination and sexual harassment (see, for example, Sections 8.5 and 11.5.3).

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 11.3.2.3); for enrolling and monitoring foreign students (see Section 7.7.3); for resolving employment disputes involving unionized workers in private institutions (see Sections 4.3 and 5.3); and for resolving other employment disputes concerning health and safety, wages and hours, leaves of absence, unemployment compensation, retirement benefits, and discrimination. 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.

³For an overview of Congress’s express powers, and an explanation of its implied powers, see William Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004), chapter 6, section B. A through F.

Furthermore, the federal courts are the primary forum for resolving disputes about the scope of federal powers over education, and for enforcing the federal constitutional rights of faculty members, students, and others (see, for example, Sections 6.1 and 9.4). 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.

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. 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 11.1.1).

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 11.2.2). The statewide structures for higher education, public and private, also differ from state to state (see Section 11.2.1). What is common to most states is a state board (such as a state board of higher education) or state officer (such as a commissioner) that is responsible for public higher education statewide. This board or officer may also be responsible for private higher education statewide, or some other board or officer may have that responsibility. If a state has more than one statewide system of higher education, there may also be separate boards for each system (for example, the University of California system and the California State University system). In all of these variations, states are typically much more involved in external governance for public institutions than they are for private institutions.

At the federal level, there are also a variety of structures pertinent to the external governance of higher education, but they tend to encompass all post-secondary institutions, public or private, in much the same way. The most obvious and well known part of the federal structure is the U.S. Department of Education. In addition, there are numerous other cabinet-level departments and administrative agencies that have either spending authority or regulatory authority over higher education. The Department of Homeland Security (DHS), for instance, monitors foreign students while they are in the country to study (see Section 7.7.4); the Department of Health and Human Services (HHS) administers the Medicare program, which is important to institutions with medical centers; the Department of Labor administers various laws concerning wages, hours, and working conditions; the Occupational Safety and Health Administration (OSHA) administers workplace health and safety laws; several agencies have authority

over certain research conducted by colleges and universities; 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.

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 11.1.1). 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.

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. 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 12.1.3). 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.

Section 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. (See Figure 1.2, “The External Law Circumscribing the Internal Law,” in the General Introduction to this book, Section C).

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 guarantees of individual rights that limit government powers 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. 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).

An abridged version of the federal Constitution, highlighting provisions of particular interest to higher education, is contained in Appendix A of this book.

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 Section 11.2.3). 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 11.4). 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 Section 11.5), state unemployment compensation and workers' compensation laws, and local zoning and tax laws. 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.). Federal and state 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.

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.

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.

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 4.2 and 7.1.3) is a critical component of this common law. Tort law (Sections 3.2 and 4.4.2) and agency law (Sections 3.1 and 3.3) 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 U.S., or domestic, sources of law noted, the laws of other countries (**foreign law**) 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 12.2.1), or seeks to establish educational programs in other countries. (For a discussion of potential liability for **injuries** that may occur in study abroad programs, see Section 3.2.2.4.)

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.

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. And international agreements and treaties, such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights, have important implications for colleges and universities.

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 of a government agency (see Section 1.4.2.3). 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 5.2), staff (see Section

4.2), students (see Section 7.1.3), government agencies (see Section 11.4.1), and outside parties such as construction firms, suppliers, research sponsors from private industry, and other institutions. 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's terms.

Contracts, especially with faculty members and students, may incorporate some institutional rules and regulations (see Section 1.4.3.1), so that these 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 and 1.4.2.3). Contracts 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. Academic custom and usage differs from institutional rules and regulations (Section 1.4.3.1) in that custom and usage 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 one another 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 nonrenewal (see Section 5.7.2). Academic custom and usage is also important in contract cases in which courts, arbitrators, or grievance committees must interpret provisions of the faculty-institution contract (see Sections 5.2 and 5.3) or the student-institution contract (see Section 7.1.3). 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). Similarly, in *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978), the court rejected another professor’s claim that “national” academic custom and usage protected her from termination of tenure due to financial exigency.

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 a reasonable or consistent interpretation of such rules (see, for example, *Brown v. George Washington University*, 802 A.2d 382 (D.C. App. 2002)).

Custom and usage may also sometimes apply to outsiders who are not members of the campus community. In *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007), for example, a federal appellate court cited a university’s unwritten custom of barring all “uninvited” individuals from speaking on the “library lawn.” An itinerant preacher, Gilles, had attempted to preach on the library lawn of the Vincennes University, a public university. The university cited its policy of requiring that anyone speaking on campus property be invited by a faculty member or student; Gilles had not been invited to speak. Rejecting Gilles’s First Amendment claim, the court noted that the university’s custom and practice was content-neutral and thus not a violation of Gilles’s right to free speech.

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 4.4.4 and the *Goss v. Lopez* case in Section 9.3.2). 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. (For an example of a court's application of precedent developed in the secondary education context to a higher education issue, see the discussion of *Hosty v. Carter* in Section 10.3.3.)

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 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.

1.4.5. Researching case law. 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., A.2d, or A.3d), (2) *North Eastern Reporter* (N.E. or N.E.2d), (3) *North Western Reporter* (N.W. or N.W.2d), (4) *Pacific Reporter* (P., P.2d, or P.3d), (5) *South Eastern Reporter* (S.E. or S.E.2d), (6) *South Western Reporter* (S.W., S.W.2d, or S.W.3d), and (7) *Southern Reporter* (So., So.2d, or So.3d). 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.) 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 F. Supp. 2d) 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 LexisNexis 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>. The Federal Judicial Center's Web site (<http://www.uscourts.gov/links.html>) provides links to the Web sites of the U.S. Courts of Appeals and the U.S. District Courts. There are also other free Web sites that provide access to court opinions. Two good examples are FindLaw (<http://www.findlaw.com>) and Cornell Law School's Legal Information Institute (<http://www.law.cornell.edu>).

Section 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. 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. 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 11.2.2 of this book); 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. 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.

1.5.2. The state action doctrine.

1.5.2.1. When private postsecondary institutions may be engaged in state action. 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**.⁴ When suit is filed under 42 U.S.C. § 1983 (**Section 1983**) (see Sections 3.4 and 4.4.4 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 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.

⁴Although 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).

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.

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 students 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 the government, but is not considered to be engaged in state action. And as to the regulation, it did not address personnel matters. Therefore, said the court, state regulation was insufficient to transform a private personnel decision into state action.

The Court also rejected two other arguments of the teachers: that the school was engaged in state action because it performed 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).

As to the former argument, the Court reasoned in *Rendall-Baker* that the appropriate inquiry was whether the function performed has been “traditionally the *exclusive* prerogative of the state” (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353). The court explained that the state never had exclusive jurisdiction over the education of students with special needs and had only recently assumed the responsibility to educate them.

As to the teachers’ second 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.

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. The Court in *Rendall-Baker* evaluated each of these approaches. 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), “the 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.

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

The third approach, “public function,” focuses on the particular function being performed by the private entity. The Court has very narrowly defined the type of function that will give rise to a state action finding. It is not sufficient that the private entity provide services to the public, or that the services are considered essential, or that government also provides such services. Rather, according to the *Jackson* case (above), 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.

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.⁵ Various lower court cases subsequent to *Rendell-Baker* illustrate the application of the nexus and symbiotic relationship approaches to higher education, and also illustrate how *Rendell-Baker*, *Blum v. Yaretsky* (*Rendell-Baker's* companion case (see above)), and other Supreme Court cases such as *Jackson v. Metropolitan Edison* (see above) have served to insulate postsecondary institutions from state action findings and the resultant application of federal constitutional constraints to their activities. The following cases are instructive examples.

In *Albert v. Carovano*, 824 F.2d 1333, *modified on rehearing*, 839 F.2d 871 (2d Cir. 1987), *panel opinion 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:

[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 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937–39 (1982)]. Yet nothing in either the legislation or those rules required that these appellants be suspended for

⁵This 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 opinion), 633–36 (Pashman, J., concurring and dissenting), 639–40 (Schreiber, J., concurring in result) (N.J. 1980). For another substantial and more recent work-up, see *Mentavlos v. Anderson*, 249 F.3d 301, 314–18 (4th Cir. 2001), discussed below in this subsection.

occupying Buttrick Hall. Moreover, it is undisputed that the state's role under the Henderson Act has 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 opinion*, 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. The court characterized the expulsion decision as "an academic judgment made by a purely private institution according to its official university policy" (612 F. Supp. at 78), a decision in which the government had played no part.

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 some challenged activity—in contrast to the absence of government involvement in the actions challenged in *Rendell-Baker* and the 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.⁶ Moreover, there may be situations, unlike *Rendell-Baker* and the 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.

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, composed 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

⁶The 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 8.7.1 of this book.

any of the three analytical approaches sketched above. Instead, Justice Souter, writing for the majority, articulated a “pervasive entwinement” test under which a private entity will be found to be engaged in state action when “the relevant facts show pervasive entwinement to the point of largely overlapping identity” between the state and the private entity (531 U.S. at 303). The majority grounded this entwinement theory in *Evans v. Newton*, 382 U.S. 296 (1966), where the Court had “treated a nominally private entity as a state actor . . . when it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control’” (531 U.S. at 296, quoting *Evans*, 382 U.S. at 299, 301). Following this approach, the Court held that “[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . .” (531 U.S. at 298).

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

The most obvious application of *Brentwood* is to situations where state action issues arise with respect to an association of postsecondary institutions rather than an individual institution. 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. Similarly, the entwinement approach might be useful in circumstances in which a postsecondary institution has created a captive organization (such as an athletics booster club), or affiliated with another organization outside the university

(such as a hospital or health clinic), and the question is whether the captive or the affiliate would be considered a state actor.

1.5.2.2. When students, employees, and others may be engaged in state action. 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 student, employee, student organization, or affiliated entity—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 in Section 1.5.2.1 above, are primarily of interest to ostensibly private institutions, the state action cases focusing on individuals and organizations can be pertinent to public institutions as well as private.

In a case involving both students and an employee (a dean), *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 engaged in state action. Law school employees exercised little or no control over the publications 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 of this book.) 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 granted 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 were expressly prohibited, punishments meted out by upper-class

cadets might include mild verbal abuse or assignment to complete undesirable maintenance tasks. Ultimately, authority for observing the Citadel's rules rested 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,⁷ 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.⁸

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.

Husain v. Springer, 494 F.3d 108 (2d. Cir. 2007), provides another example of state action issues concerning students. A Student Government Publications Commissioner at a public university impounded copies of an issue of the student newspaper, and certain members of the student senate had supported this action. These students were among the defendants in a First Amendment suit brought by the newspaper editors and other students. (For analysis of the First Amendment issues in *Husain*, see Section 10.3.3.) The student defendants argued that they had not engaged in state action and therefore should be dismissed from the case. The district court and the appellate court agreed. The college did not compel or require the student defendants to impound the newspaper, nor did the college encourage this action. To the contrary, the college president had overruled the student government's action. Moreover, even if it could be said that college regulations and policies provided authorization for the students to act, "state authorization was insufficient to establish that the student government defendants were state actors in the circumstances presented here." (For a contrary case, in which a court held student government members to be engaged in state action, see *Amidon v. Student Association of the State University of New York at Albany*, 399 F. Supp.2d 136 (N.D.N.Y. 2005).)

⁷The 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.

⁸As *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 case of *Limpuangthip v. United States*, 932 A.2d 1137 (D.C. Ct. App. 2007), provides another example of state action issues concerning employees. A private university's search of a student's room had led to the student's conviction on drug charges, and the student argued that the search was state action violating the Fourth Amendment. The search had been conducted by a university administrator accompanied by two university police officers. The administrator was concededly a private actor, not subject to the Fourth Amendment, but the police officers, although employees of the university, were Special Police Officers (SPOs) under District of Columbia law, "authorized to exercise arrest powers broader than that of ordinary citizens and security guards." The student claimed that this governmental authority of the SPOs present at the search made the search state action. The appellate court agreed that SPOs do become state actors when they invoke their state authority "through manner, word, or deed"—that is, when they act "like . . . regular police officer[s]" rather than employees of a private entity. But the two SPOs, according to the court, did not act in this manner at the search. The administrator had initiated and conducted the search herself; the SPOs had not influenced the administrator's actions; and their "involvement in the search was peripheral." Their conduct therefore "does not amount to state action." (For a contrary case, in which university police officers were found to be state actors, see *Boyle v. Torres*, 756 F. Supp. 2d 983 (N. Dist. Ill. 2010).)

In contrast, *Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. 1978), considers when a private entity's relationship with a public institution may subject the private entity to a state action finding. The specific 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.

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 affirmed the dismissal:

[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 in his will 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 by the University 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].

(For a discussion of the treatment of sex-restricted scholarships under the federal Title IX statute, see Section 7.3.3 of this book.)

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 4.5.2.1), 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 11.5.2 and 11.5.3 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. A related claim of breach of **fiduciary duty** has also been gaining traction in recent years, in particular for student claims (see Section 7.1.3). Under the

contract theory, implied contract terms as well as express terms may establish legal rights enforceable in court if the contract is breached. Although the theory is a useful one that is often referred to in the cases (see Sections 5.2.1 and 7.1.3), 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 most 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. 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 4.3).

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

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) (see Section 11.1.2 of this book). 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. art. I, paras. 6, 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 of 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 and 1.6.2 below). Federal and state statutes may provide exemptions for certain actions of religious institutions (see, for example, Section 4.7). 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, out of concern for the institution's establishment and free exercise rights under the First Amendment or parallel state constitutional provisions (see, for example, Section 5.2.4). 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 court's 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 and its members."

Section 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.

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. 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.

Such litigation may also 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 Sections 4.7 and 6.4 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). 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 v. Smith*, 494 U.S. 872 (1990), and thus severely limited the protection against governmental burdens on religious practice that is 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 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)). As to these applications, the Court has apparently conceded that RFRA remains constitutional (*Gonzales v. O Centro Espirita Beneficente Unias Do Vegetal*, 126 S. Ct. 1211 (2006)).

The invalidation of RFRA's application to the states 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 reinstituted 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 regulations of state and local governments that interfere with the institutions' 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 regulations of state and local governments that interfere with these individuals' 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 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 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 7.1.4 of this book.)

The second avenue is to seek protection under some other clause of the federal Constitution. The best bet is probably to look to 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* (see Section 10.1.5) and *Rosenberger v. Rectors and Visitors of the University of Virginia* (see Sections 10.1.5 and 10.3.2) provide good examples of protecting religious activity under these clauses. Another possibility is to rely on 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 to

invoke 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 Section 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 4.7 of this book) and protects employees from intrusions by employers into some religious practices. And some states have their own RFRA-type statutes that protect religious exercise (see, e.g., Fla. Stat. Ann. § 761.01).

1.6.3. Government support for religious institutions. Although the establishment clause itself imposes no neutrality obligation on private institutions, this clause does have another kind of importance for private institutions that are religious. When government—federal, state, or local—undertakes to provide financial or other support for private postsecondary education, the question arises whether this support, insofar as it benefits religious institutions, constitutes government support for religion. If it does, such support would violate the establishment clause because government would have departed from its position of neutrality.

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

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

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

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

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

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

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

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.

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.

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 parallel provisions in state constitutions. The first case in the line is the U.S. Supreme Court’s decision in *Witters v. Washington Department of Services for the Blind* (hereinafter, *Witters I*), discussed earlier in this subsection, 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 Wash. Rev. Code § 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 Section), 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 and other states, are now governed by a 2004 decision of the U.S. Supreme Court in *Locke v. Davey*, discussed below. In addition, challenges to such prohibitions may be brought by the religiously affiliated institutions that are excluded from the student aid program. An institution's challenge could also be based on *Locke v. Davey* (below), at least if the institution offered "nonreligious" studies; but could just as likely be based on an equal protection claim of discrimination against religious organizations or an establishment clause claim of hostility toward religion (see Section 1.6.2 above).

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

At issue was the state of Washington's Promise Scholarship Program, which provided scholarships to academically gifted students for use at either public or private institutions—including religiously affiliated institutions—in the state. Consistent with article I, section 11 of the state constitution as interpreted by the Washington Supreme Court in *Witters II* (see above), however, the state stipulated that aid may not be awarded to "any student who is pursuing a degree in theology" (see Wash. Rev. Code § 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. Applying strict scrutiny and relying on the U.S. Supreme Court's decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), the appellate court invalidated the state's exclusion of Davey from the scholarship program "based on his being a theology major." 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* (Section 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, 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 *Locke*—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, 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 than the federal establishment clause does. 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, religious institutions should exercise great care in using government funds and should keep in mind that, at some point, religious influences within the institution can still jeopardize government funding, especially institution-based funding.

1.6.4. Religious autonomy rights of individuals in public post-secondary institutions. Whereas Sections 1.6.2 and 1.6.3 focused on church-state problems involving private institutions, this section focuses on church-state problems in public institutions. As explained in Section 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 court rejected the plaintiffs' First Amendment establishment clause claims, holding that the prayer tradition "'is simply a tolerable acknowledgement of beliefs widely held among the people of this country.'" *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)." Moreover, according to the Court, the prayers at the commencements were voluntary and not coercive. Nearly 2,500 of the 7,400 graduating students had elected not to attend the previous 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.

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) (Section 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 a 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 because individuals could use the moment of silence for any purpose—religious or not. 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 (TSU) (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.

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 2005 case provides an instructive example of institutional activities other than group prayer that may raise establishment clause issues. The case, *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005), also illustrates the type of establishment claim premised on institutional *disapproval* of or *hostility* to religion rather than institutional *endorsement* of or *support* for religion.

In *O'Connor*, a professor and a student claimed that the university (a public university) had installed a statue on campus that negatively and offensively portrayed Roman Catholicism, thus violating their establishment clause rights. According to the appellate court, the statue, “entitled ‘Holier Than Thou,’ depicts a Roman Catholic Bishop with a contorted facial expression and a miter that some have interpreted as a stylized representation of a phallus.” The statue had been selected, along with four others, in an annual competition, “for displaying in a temporary outdoor sculpture exhibition [that] supplements the university's collection of twenty-five [permanent] outdoor statues.” Selection of the five temporary statues was made by a three-person jury of art professionals chosen by the university's Campus Beautification Committee, and both the committee and the university president had approved the selections. Once the statue was installed along a “high traffic sidewalk,” the university began receiving numerous complaints from within and outside the university. The university considered the complaints but declined to remove the statue.

In ruling on the establishment clause claim, the appellate court applied the *Lemon* test, as modified by the “endorsement or disapproval” test (see 416 F.3d at 1223–24), placing more emphasis on the latter test (often called just the “endorsement test”) than did the courts in the cases discussed above. The endorsement test focuses on whether the governmental activity at issue “has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred,” on the one hand, or disapproved or disparaged on the other. Under the first prong of the test, “purpose,” the question is “whether ‘the government's actual purpose is to

endorse or disapprove of religion.” Under the second prong, “effect,” the question is “whether a reasonable observer aware of the history and context of the [activity at issue] would find the [activity] had the effect of favoring or disfavoring a certain religion [or religious belief].” (See 415 F.3d at 1227–31, quoting *Bauchman ex rel. Bauchman v. W. High School*, 132 F.3d at 551–52.) Applying this test, the court focused on whether, in the context of all the pertinent facts, the university’s selection or placement of the statue, or its refusal to remove it after receiving complaints, had “either (1) the purpose or (2) the effect of conveying a message” that the university disapproved of or disparaged Roman Catholicism or a particular Catholic belief. Regarding “purpose,” the court determined that the plaintiffs had not produced any evidence that the university’s actions were motivated by a disapproval of Catholicism and that the university had other aesthetic and educational “reasons” for its decisions. Regarding “effect,” the court determined that, even if the effect of the statue was to convey “an anti-Catholic message” (a point on which the court did not rule), a “reasonable observer viewing [the statue] in context would understand that the university had not approved or agreed with that message.”

It was important to the court’s reasoning that the “Holier Than Thou” statue was displayed on a university campus rather than, say, in a city park or on the grounds of a county office building. The court emphasized that a campus is “peculiarly the marketplace of ideas” (citing *Healy v. James*, 408 U.S. at 180), a place where government “acts against a background and tradition” of **academic freedom** (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. at 835)). Moreover, the placement and retention of the statue, in context, had implicated the university’s educational mission and its curriculum. Even though the statue was not created as part of a course, it was nevertheless “part of [the University’s] educational curriculum”; the president and the vice-president of academic affairs had both “testified that they strove to extend the educational environment . . . beyond the classroom to encompass various stimuli including art, theatre, music, debate, athletics, and other activities.”

Apparently, in such academic, higher education contexts, courts may accord public colleges and universities more leeway than other governmental entities to establish religiously neutral educational reasons for engaging in activities that involve religion in some way. Similarly, in this context, courts may find it less likely that a reasonable observer “would associate” a particular, allegedly religious message with the college or university itself (416 F.3d at 1229–1230). More broadly, these attributes of higher education serve to support the assertion, made by the U.S. Supreme Court and repeated by lower courts, “that religious themes ‘may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like’” (416 F.3d at 1230, quoting *Stone v. Graham*, 449 U.S. 39, 42 (1980)).

A recent U.S. Supreme Court case, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), introduces an additional dimension to cases like *O’Connor v. Washburn University*. In particular, *Pleasant Grove* illustrates how there could be not only an establishment challenge but also a free speech clause challenge to a governmental entity’s placement of religious monuments or statues

on public property. Faced with such a challenge, according to the Court, the governmental entity may often prevail by characterizing the placement of the monument or statue as “governmental speech” rather than “private speech.” Success with this argument, however, would not insulate the governmental entity from an establishment clause challenge, which requires a separate analysis as illustrated by *O'Connor*.

Section 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 policy makers in higher education, as well as the work of lawyers.⁹ 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 of this book; 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 (see 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,

⁹The 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: Stephen Dunham, “Preventive Lawyering: Drafting and Administering Policies to Avoid Litigation” (February 2001), a conference paper delivered at the 22nd Annual Law and Higher Education Conference sponsored by Stetson University College of Law; 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, available (along with additional resources on developing and implementing policy) on the association’s Web site at <http://www.acupa.org/>.

legislatures, executive branch officials, and administrative agencies 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, in particular for internal policy. 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 team 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.¹⁰

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

¹⁰The focus on administrators and counsel, here and elsewhere in this section, does not mean that faculty (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 faculty under the institution’s internal governance documents.

they work?) and of proposed policies (How well will they work?). Attorneys, in contrast:

- Identify existing and potential problems that create, or may create, exposure to legal risk for the institution or that may raise legal compliance issues
- Analyze the legal aspects of these problems using the applicable sources of law (Section 1.4)
- Generate legally sound options for resolving these problems and present them to the responsible administrators
- Assess the legal risk (if any) to which the institution would be exposed (see Section 2.4) under policy options that the policy makers have proposed either in response to the attorneys' advice or on their own initiative
- Participate in—and often take the lead in—drafting new policies and revising existing policies
- Suggest legally sound procedures for implementing and enforcing the policy choices of the policy makers
- 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
- Make suggestions for enhancing the legal soundness of existing policies and reducing or eliminating any risk of legal liability that they may pose
- 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).

Still other connections between law and policy are important for administrators and attorneys, as well as faculty and student leaders, to understand. 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. This does not mean that policy should trump law but rather that policy is more than legal compliance, and the law leaves considerable room for policy making that is not dictated by legal considerations. Legal considerations, therefore, generally should not drive policy making, and policy making generally should not be confined to that which is necessary to fulfill legal requirements. Regarding internal policy, institutions that are serious about their institutional missions and goals will often choose to do more than the law requires. 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 8.5 of this book). An institution will be liable to the victim for money damages 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 monetary liability under these standards, but doing so would not come close to ensuring the safety and health of students or ensuring that there is no hostile learning environment on campus. Institutions, therefore, would be unwise to limit their policy making regarding sexual harassment to only what 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. Courts may do so, for instance, when considering duties of care under negligence law, when determining whether certain contracts or contract provisions are contrary to public policy, and when making decisions, in various fields of law, based on a general standard of "reasonableness." In the internal realm of institutional policy, institutions also 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. This incorporation may be accomplished 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. For internal policy, such deference would be given to the higher educational institution; for external policy, it would be given to the legislature or administrative agency whose policy is being challenged. Courts often defer to particular decisions or judgments of the institution, for example, when they are genuinely based upon the academic expertise of the institution and its faculty (see Section 2.2.2). 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.