Suing Alma Mater
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PART I
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The year 1970 was in the middle of the civil rights era, the height of the anti-Vietnam War period, the tail end of the best rock-and-roll years (in this year Van Morrison wrote *Moondance*, Jimi Hendrix and Janis Joplin died, and the Beatles disbanded),¹ and the time of the Kent State and Jackson State University shootings. During this momentous year, John S. Brubacher wrote in *The Courts and Higher Education*:

The occasion for judicial prying into discretionary matters has grown out of an accentuated public interest in civil liberties. As never before, courts are applying the principles of the First, Fifth, and Fourteenth Amendments to the transaction of academic affairs. Take the due process clause of the First and Fourteenth Amendments as an illustration. Dismissing a student used to be a simple matter within the autonomous discretion of the dean or faculty disciplinary committee. But now the courts may review this discretion both procedurally and substantively. Procedurally they inquire whether the student had a fair hearing, and substantively they examine whether college rules on discipline are reasonable. This review amounts to an important reduction in the traditional autonomy of the college or university. How much further is this encroachment likely to go?²

The “encroachment” he lamented has gone much further than he even had dared fear. However, not all observers of this period were as mortified as he was. Political scientist Stephen K. Bailey, looking out at the same landscape, saw a more balanced review of the relationship between the state and higher education that had given rise to Brubacher’s concerns over the legalization of the academy:
Today, as we perceive this elemental paradox in the tensions between the academy and the state, it is useful to keep in mind its generic quality. For at heart we are dealing, I submit, with a dilemma we cannot rationally wish to resolve. The public interest would not . . . be served if the academy were to enjoy an untroubled immunity. Nor could the public interest be served by the academy’s being subjected to an intimate surveillance. . . . Whatever our current discomforts, because of a sense that the state is crowding us a bit, the underlying tension is benign. . . . The academy is for the state a benign antibody and the state is the academy’s legitimator, benefactor, and protector. Both perspectives are valid. May they remain in tension.³

I graduated from college seminary in 1972. When I first began doctoral work and legal studies hoping to carve out a niche in the growing field of higher education law, I leaned toward the Stephen Bailey view; after nearly forty years of observation, I have come to appreciate how prescient he was, writing in 1974. But even the most observant and astute scholar of higher education politics would be surprised at today’s developments. In modern higher education, few major decisions are made without considering the legal consequences; although the core functions of higher education—instruction and scholarship—are remarkably and relatively free from external legal influences, no one would plausibly deny the increase of legalization on campus. We know surprisingly little about the law’s effect upon higher education, but virtually no one in the enterprise is untouched by statutes, regulations, case law, or institutional rules promulgated to implement legal regimes. It is rather like the persistent heat and humidity in Houston: You need not measure them, but you know they are there, even if you do not consult a meteorologist.

Lewis Thomas, among our most thoughtful commentators on medicine and science in society, ascribed organic qualities to the university, and his view of a college as a “community of scholars” is grounded in an appreciation of the history of education. Paul Goodman’s The Community of Scholars and John Millett’s The Academic Community, both published in 1962, also exemplify this perspective.⁴ Like a prism refracting light differently depending upon how you hold it up for viewing, higher education can appear differently. For Herbert Stroup and many other sociologists, colleges are essentially bureaucracies, a view from which no student confronting course registration today is likely to be dissuaded.⁵ To Victor Baldridge, universities are indisputably political organizations, as they have also appeared to Clark Kerr, Burton Clark, and Cary Nelson.⁶ To thirty years’ worth of critics, higher education is stratified by class, resistant to legal
change, too easily given to political correctness, too easily given to conservative politics, and in need of fundamental restructuring. As many observers would insist, all are equally close to the truth or truths, depending upon which truth is being refracted. The cases to be examined in this book reveal many truths and, often frustratingly, few answers. To paraphrase the astute Stephen Bailey: All these perspectives are valid. May they remain in tension.

Legal Governance

As many cases reveal, legal considerations can pare governance issues down to essentials, chief among them the question: What is a college? Despite the seeming obviousness of this question, a variety of cases probe this fundamental definitional issue. In *Coffee v. Rice University*, the issues were whether the 1891 trust charter founding Rice University (then Rice Institute), which restricted admissions to “white inhabitants” of Houston and required that no tuition be charged, could be maintained in 1966. The court held that an “institute” was a postsecondary institution by any other name, and its postcompulsory collegiate nature rendered it a “college.” On the issue of whether the trust could be maintained with its racial restrictions and tuition prohibition, the court applied the doctrine of *cy pres*, which theory allowed the trustees to reformulate the provisions and admit minorities and charge tuition, for to continue the practices would have been impracticable; if the trust provisions can no longer be realistically carried out, a court can reconstitute the trust to make it conform to the changed circumstances.

A court is not always so disposed as the *Coffee* court. In *Shapiro v. Columbia University National Bank and Trust Co.*, a 1979 case, the court allowed a trust reserved only for male students to remain male-only, refusing to apply *cy pres*. My personal favorite is *U.S. on Behalf of U.S. Coast Guard v. Cerio*, a 1993 case in which a judge allowed the Coast Guard Academy to reformulate a major student prize when the endowment’s annual interest had grown to over $100,000. The judge begins, “This is essentially a case of looking a gift horse in the mouth and finding it too good to accept as is.” He then allowed the academy to reconstitute the gift and to use some of the prize interest for other support services.

Sometimes it is a zoning ordinance that raises the issue of what constitutes a college. In 1983’s *Fountain Gate Ministries v. City of Plano*, a city wished to restrict colleges from being located in residentially zoned housing areas. The Fountain Gate Ministries argued that its activities were those of a church, rather than those of a college. However, the court took notice of the educational
instruction, faculty, degree activities, and other college-like activities and determined that these constituted a college, protestations to the contrary notwithstanding. In the opposite direction, a court held that a consultant firm’s use of the term “Quality College” to describe its activities did not make it a “college” or subject it to state regulation. In wry fashion, the court noted that to make use of “college” in an organization’s title would make a college bookstore or the Catholic College of Cardinals into postsecondary institutions.

Sometimes the definition drives a divorce decree. In *Hacker v. Hacker*, a father who had agreed to pay for his daughter’s college tuition did so while she was a theater major at the University of California, Los Angeles, but refused to do so when she moved to Manhattan and enrolled in the Neighborhood Playhouse, a renowned acting school; that it was not degree-granting persuaded the judge that the Neighborhood Playhouse failed to meet the definition of a college. Occasionally the definition turns on accreditation language (*Beth Rochel Seminary v. Bennett*), while other times it turns on taxation issues (*City of Morgantown v. West Virginia Board of Regents*).

The Establishment of Public and Private Colleges

Due to the different constitutional considerations, such as free speech and due process not applying to private colleges, issues that vexed Brubacher when he wrote in 1970, it is important to distinguish between the two forms in order to understand the full panoply of rights and duties owed to institutional community members. Consider the public/private distinction as a continuum, with the 1819 case of *Trustees of Dartmouth College v. Woodward* at the purely private end and, 165 years later, the purely public colleges, such as the University of Texas, Ohio State University, and other flagship institutions at the other. In *Dartmouth*, the first higher education case ever considered by the U.S. Supreme Court, the State of New Hampshire had attempted to rescind the private charter of Dartmouth College, which had been incorporated in the state nearly fifty years earlier, and to make it a public college with legislatively appointed trustees to replace the college’s private trustees. The Court held that the college, once chartered, was private and not subject to the legislature’s actions, unless the trustees wished to reconstitute it as a public institution.

Of course, if there are pure archetypes such as Dartmouth and the University of Pittsburgh, there must be intermediate life forms, such as Alfred University, where, in the 1968 case, *Powe v. Miles*, several students were arrested; the court held that the regular students were entitled to no elaborate due process, as the
institution was private. However, the ceramics engineering students were entitled to hearings before dismissal, as the Ceramics College in which they were enrolled was a state-supported entity; New York contracted with the private college to provide this program rather than establish such a program in a state school. Other such hybrid examples of a state-contracted unit within a private school include Cornell University’s statutory agricultural sciences program and Baylor’s College of Medicine, both of which operate as if they were state institutions. Also in the mix would be colleges such as Temple and Pitt: Krynicky held that Temple University and the University of Pittsburgh were public colleges, due to the amount of money given them by the state, the reconstitution of their boards to have publicly appointed trustees (including ex officio elected officials), state reporting requirements, and other characteristics that injected state action into the act of incorporating the institutions into the state system of higher education. Even in the smallest institutions, such as those operated by Indian tribes, complex governance issues arise, as in Clark v. Dine College, in which the Navajo Nation court had to sort out conflicts over who was responsible for the institution.

Complex issues also arise that are unique to public institutions, such as the reach of sovereign immunity. A state’s sovereign immunity is often referred to as its Eleventh Amendment immunity, although this nomenclature is somewhat of a misnomer. The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” While the Eleventh Amendment grants a state immunity from suit in federal court by its citizens and citizens of other States, sovereign immunity is much more.

When the United States was formed, the Constitution created a system of government consisting of two sovereigns—one national and one state. Although the states have conceded some of their sovereign powers to the national government over the years, the states retained substantial sovereign powers within the constitutional scheme. Of this relationship, the Supreme Court has observed:

The sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.
Although a state’s sovereign immunity is significant, it is not absolute. Three exceptions have been created by the Supreme Court to limit a state’s sovereign immunity: waiver, abrogation, and the *Ex Parte Young* exceptions.

The first exception to the doctrine of sovereign immunity occurs when a state waives its immunity. A state’s waiver of sovereign immunity may subject it to suit in state court but it is not enough, absent some other indicator of intent, to subject the state to suit in federal court. A state can also abrogate its Eleventh Amendment immunity against suits in federal court by other clearly stated means such as successfully moving a federal case to state court. Brian Snow and William E. Thro have summarized the *Ex Parte Young* exemption as follows: “This doctrine holds that sovereign immunity does not bar federal court actions against individual state officer . . . seeking (1) declaratory judgment that the state officer is currently violating federal law; and (2) an injunction forcing the state officer to conform his current conduct to federal law.” This exception does not apply to violations that occurred in the past; rather, it “applies only where there is an ongoing violation of federal law, which can be cured by declaratory or injunctive relief.” The court has imposed two significant limitations on this doctrine. First, the Court found the *Young* doctrine inapplicable in those situations where Congress had enacted a comprehensive remedial scheme; and second, the Court has ruled “that the *Young* doctrine was inapplicable when there were ‘special sovereignty interests’ involved.”

Other important foundational issues have also resulted in litigation, resulting in a complex governing definitional process. For example, in *Cahn and Cahn v. Antioch University*, trustees of the institution were sued by co-deans of the law school to determine who had authority for governance decisions; the court ruled that trustees have the ultimate authority and fiduciary duty. In contrast to *Dartmouth*, where there was a “hostile takeover” of the institution by the state, private trustees can close a college or surrender its assets, such as its accreditation (*Fenn College v. Nance* [1965] and *Nasson College v. New England Association of Schools and Colleges* [1988]) or insurance coverage, as happened with the defunct College of Santa Fe, in New Mexico, where the complex litigation continued years after the death of the institution and its rise as a reconstituted proprietary arts college (*Radian Asset Assurance, Inc. v. College of the Christian Bros. of New Mexico* [2010]). Another important issue involving the definition and legal governance of colleges turns on consortial or collective behavior of institutions: Does their mutual recognition in athletics accreditation and information-sharing subject them to state action? In the 1984 decision *NCAA v. University of Oklahoma*, the U.S. Supreme Court held that the NCAA was a “classic cartel”
engaged in restraint of trade by its negotiated television contract; another court held that the activities of the Overlap Group—a group of elite institutions that share information on financial aid offers with other colleges that had also admitted the same students, so as to “coordinate” the awards—had similarly violated antitrust law (U.S. v. Brown University, 1993).\(^30\) However, in accreditation activities, the mutual-recognition agreements have been allowed by courts as not constituting a restraint of trade, as in Marjorie Webster Junior College v. Middle States Association (1970)\(^31\) and Beth Rochel Seminary v. Bennett,\(^32\) where an institution that was not yet accredited failed to negotiate the complex exceptions to the accreditation requirement for financial aid eligibility.

In sum, despite the seeming simplicity of legally defining a “college,” it is not always an easy task. Cases were cited where entities not labeled as colleges were indeed found to be colleges, while some institutions that very much resemble colleges were held not to be, including a commercial program (“Quality College”) that was held not to be an institution of higher education. For some technical, eligibility-driven issues—such as child support or taxation—the definition was extremely important. From these cases, the bottom line appears to be that a college is an entity with instructional programs and degree-granting authority. In addition, the definitional issue is raised in the context of who is responsible for governance of the institution. The answer is ultimately the trustees, although the Yeshiva case, to be discussed in the next section, appears to hold the opposite. With this foundational layer in place, this chapter turns to the two major campus actors: the faculty and students.

**Faculty and the Law**

A growing number of studies examining litigation patterns in postsecondary law will be examined throughout. Several show that faculty bring many of the suits in higher education: A 1987 study of Iowa case law showed that, the litigation against colleges brought by students totaled 11 percent, faculty 31 percent;\(^33\) a 1988 study of one hundred years of Texas litigation showed that faculty brought 35 percent of all college cases in that state.\(^34\) These numbers are surprising, for two reasons. First, higher education has traditionally been a “Victorian gentlemen’s club,” to use William Kaplin’s term.\(^35\) This meant that if faculty members did not receive tenure or were forced to move for some other reason, they would simply find another position or fall upon their sword. To do otherwise would brand them as troublemakers or contentious colleagues. Second, there were no civil rights laws or widespread collective bargaining until the 1960s and 1970s,
so faculty had fewer statutory or regulatory opportunities to bring suit or engage in collective protection, such as that afforded by security provisions in collective bargaining agreements.

Tenure and Employment Law

The two leading Supreme Court tenure cases were decided on the same day in 1972, and both *Perry v. Sinderman*[^36] and *Board of Regents v. Roth*[^37] turn on what process is due to faculty, should institutions wish to remove them. In *Perry*, a community college instructor who had been a thorn in the side of college administrators was fired for “insubordination,” without a hearing or an official declaration of the reasons. The college’s full tenure policy consisted of the following sentence: “The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his supervisors, and as long he is happy in his work.” The court, holding that he thus had a property interest in his continued employment, ordered the lower court to determine whether he had been fired for his protected speech or for cause. In short, they were required to give him notice of the reasons for his firing and an opportunity to explain his side of the matter. This is what tenure grants: a presumption of continued employment, absent certain circumstances (financial exigency and so on). In *Roth*, the Court held that an untenured professor had no constitutional right to continued employment beyond the contractual period for which he was hired.

These two cases, taken together with several others fleshing out the terms of faculty employment, delineate the contours of tenure. For example, in *Wellner v. Minnesota State Junior College Board* (1973), an untenured teacher was removed from his position for allegedly making racist remarks; he was sanctioned without a hearing or an opportunity to explain his behavior. The appeals court ordered that he be accorded a hearing, as his liberty interest had been infringed; that is, his record was stigmatized and his reputation was at stake. The court ordered a hearing to allow him to clear his name. In addition to contract and liberty interests, faculty may have property interests as well, as in *State ex rel. McLendon v. Morton* (1978),[^38] where the court held that Professor McLendon had a property interest in being considered for tenure when she had ostensibly qualified by being in rank for the requisite period of time. Although many cases, including *Roth*, have held that no reasons need be given for denying tenure, she had,
on the surface, appeared to earn tenure by default, and a hearing was required to show why she was not entitled to tenure. Such cases as these will be very fact-grounded and case-specific, due to the terms of the individual institutional policy and the development of contract law or employment law in each state.

A surprising number of cases have arisen exploring the ambiguities of tenure rights, as in whether or not American Association of University Professors (AAUP) guidelines apply (Hill v. Talladega College, 1987), exactly when the tenure clock applies (Honore v. Douglas, 1987), if financial reasons can apply without a declaration of financial exigency once a candidate has been evaluated in the tenure review process (Spuler v. Pickar, 1992), and whether institutional error can be sufficient grounds for overturning a tenure denial (Lewis v. Loyola University of Chicago, 1986). As for discrimination in the tenure process, hundreds of cases have been reported, most of which defer to institutional judgments about the candidates. Most of the cases find that the plaintiffs, whether a person of color or Anglo woman, do not carry their burden of proof that the institution acted in an unfair or discriminatory fashion. In those cases, like Scott v. University of Delaware (1978), the court held, “While some of this evidence is indicative of racial prejudice on the University campus, it does not suggest to me that [Professor] Scott was a victim of racial discrimination by the University in its renewal process, or that he was treated differently than [were] non-black faculty by the University.” That this is so is particularly due to the extraordinary deference accorded academic judgments, as in Faro v. NYU: “Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”

Even so, occasionally an institution goes too far and gets caught, as occurred in the 1992 case of Clark v. Claremont University Center, examined more carefully in chapter 9. In this extremely interesting case, a black professor chanced upon the meeting where his departmental tenure consideration was being reviewed. From the adjacent room, where the door was apparently left ajar, he overheard the committee making racist remarks, such as “us white folks have rights, too” and “I couldn’t work on a permanent basis with a black man.” When the court and jury reviewed his entire record, compared it with others at the institution who had recently been considered for (and received) tenure, and noted that no other minority professor had ever received tenure at Claremont, it was determined that Professor Clark had been discriminated against due to his race, and he was awarded $1 million in compensatory damages as well as punitive damages and lawyers’ fees.
While few minority men have won discrimination claims, women, particularly white women, have won several cases where it was held that they were treated discriminatorily, as in *Sweeney v. Board of Trustees of Keene State College* (1978), *Kunda v. Muhlenberg College* (1978), *Mecklenberg v. Montana State Board of Regents* (1976), *Kemp v. Ervin* (1986), and *Jew v. University of Iowa* (1990), among others, where courts or juries found for women faculty plaintiffs. Professor Jan Kemp particularly prevailed, winning six years on the tenure clock and over $2.5 million in compensatory and punitive damages from the University of Georgia. She left the university at a later date without having earned tenure.

Collateral developments in employment law have made it more difficult for faculty to prevail in state and federal court, particularly by extending cases outside higher education to the college enterprise. Thus, *Hazelwood School District v. Kuhlmeier*, a 1988 U.S. Supreme Court decision about the right of school boards to control editorial content in a public K–12 school setting, has been cited in college faculty cases such as *Bishop v. Aronov* (1991) and *Scallet v. Rosenblum* (1997), while *Connick v. Myers* (1983), a New Orleans District Attorney’s office employment matter, affected dozens of college law cases, and *Waters v. Churchill* (1994), a public hospital case that held that public employees whose speech was “disruptive” could be removed for cause, reached into a 1995 faculty case, *Jeffries v. Harleston*. Professor Leonard Jeffries, removed from his department chair position for his offensive and anti-Semitic speech, had won at trial and upon appeal, but the Supreme Court remanded and ordered the appeals court to review his case in light of *Waters*. After this review, the appeals court overturned and vacated its earlier opinion. And the 2006 *Garcetti v. Ceballos* case involving the Los Angeles District Attorney’s staff lawyers has begun to show up in public college employment decisions, as I note in chapter 10. As the theme of this chapter and book indicate, higher education is highly contextual, and cases from a variety of other subject matter often will have bearing upon college law.

**Collective Bargaining**

Since the first college faculties were unionized in the 1960s and 1970s, collective bargaining has become widespread in higher education. In a 1988 article, Joel Douglas compiled union data indicating that more than 800 of the 3,284 institutions in the United States (25%) were covered by faculty collective bargaining agreements; the figures for nonfaculty college employees were even higher. By 1984, nearly 200,000 faculty (27% of all faculty) were unionized. Of these, 83 percent were in public colleges, while 17 percent were in private institutions.
Unionized public senior colleges total 220, private four-year colleges total 69, public two-year colleges total 524, and private two-year colleges include 13. He also reported that, in the last two decades, there had been 138 full-time college faculty strikes (or work stoppages), averaging almost 15 days each; the longest was 150 days at St. John’s University in 1966.50

Collective bargaining is governed by federal and state laws, although several states also authorize local boards of junior colleges (hence local laws) to govern labor. More than half the states and the District of Columbia have such authorizing legislation. While state or local laws, if they exist, govern the respective state or local institutions, the National Labor Relations Act (NLRA) governs faculty collective bargaining in private institutions. In 1951, the National Labor Relations Board (NLRB) decided that colleges would not fall under NLRB jurisdiction if their mission was “noncommercial in nature and intimately connected with the charitable purposes and education activities” (Trustees of Columbia University).51 This refusal to assert jurisdiction remained in force until 1970, when the NLRB reversed itself in the Cornell University case, in which Syracuse University was also included. After reviewing the development of labor law trends in the twenty years that had passed, the NLRB noted, “We [now] are convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective and uniform application of the national labor policy.”52 The board set a $1 million gross revenue test for its standard, a figure that would today cover even the smallest colleges.

The NLRB decision to extend collective bargaining rights to Yeshiva University faculty, however, was overruled by the U.S. Supreme Court, which held that faculty members are, in effect, supervisory personnel and therefore not covered by the NLRA.53 This important decision, of course, reversed a decade of organizing activity and struck a heavy blow to faculty unionizing efforts. Since the decision not to entitle Yeshiva faculty to organize collectively, over one hundred private colleges have sought to decertify existing faculty unions or refused to bargain with faculty on Yeshiva grounds. Dozens of faculty unions have been decertified, and an untold number of organizing efforts have been thwarted because of the decision or because of the absence of state enabling legislation.54

The decision, which affected only private colleges, has come to be applied even to public institutions, such as the University of Pittsburgh. The state of Pennsylvania has a labor law (Public Employment Relations Act, PERA) that was construed in 1987 by a Pennsylvania Labor Relations Board hearing examiner to exclude faculty: “As the faculty of the University of Pittsburgh participate with
regularity in the essential process which results in a policy proposal and the decision to [hold a union election] and have a responsible role in giving practical effect to insuring the actual fulfillment of policy by concrete measures, the faculty of the university are management level employees within the meaning of PERA and thereby are excluded from PERA's coverage.55

In some instances, a court has found that Yeshiva criteria were not met, and the faculty really did not govern the institution, as in NLRB v. Cooper Union (1985) and NLRB v. Florida Memorial College (1982).56 Scholars and courts will continue to sort out the consequences of Yeshiva and its successors; unless legislation is enacted at the federal level (to amend the NLRA, for instance) or in the states (to repeal “right to work” legislation), this issue will remain a major bone of contention between faculty and their institutions, both public and private. In addition, since the late 1990s, graduate students, adjunct faculty, and academic staff have successfully negotiated labor contracts, although these remain a small part of the organized higher education enterprise. By 2011, approximately a quarter of the full-time faculty members and one-fifth of the part-time faculty are represented by collective-bargaining units, according to National Center for the Study of Collective Bargaining in Higher Education and the Professions data.57

Students and the Law

There are many ways to approach the topic of students and the law, but the most interesting and historically based approach is to note how the common law has changed to define the legal relationship between colleges and college students. This is a useful and stimulating review, as the history of the legal status of students has resembled that of faculty—namely, from relatively few rights to a more balanced contemporary state of common law and statutory protections. However, as is the case with faculty, private institutions afford students fewer rights than their public college counterparts have, and most constitutional rights extend only to students in public institutions. Moreover, nowhere is there evident the statutory development to improve their status comparable to the rise of Title VII in employment, or the Equal Pay Act, or other safeguards afforded faculty employees. Since Bakke,58 applicants have used Title VI to gain legal standing, while student athletes, especially women, have used Title IX to litigate for parity in intercollegiate athletic programs. Nonetheless, the status of students is largely the province of more inchoate constitutional protections.

The traditional status of students relative to their colleges was that of child to parent or ward to trustee: in loco parentis, literally, “in the place of the parent.”
This plenary power gave institutions virtually unfettered authority over students’ lives and affairs. Thus, the hapless Miss Anthony of *Anthony v. Syracuse University* (1928) could be expelled from school for the simple offense of “not being a typical Syracuse girl.” An even earlier case, *Gott v. Berea College* (1913), had held that colleges could regulate off-campus behavior, while more recent cases, up until the 1970s, still held that students were substantially under institutional control. The weakening of this doctrine began with *Dixon v. Alabama State Board of Education*, a 1961 case involving black students dismissed from a public black college for engaging in civil disobedience at an off-campus lunch counter. When the court held that they were entitled to a due process hearing before expulsion, it was the first time such rights had been recognized.

The age of majority changed from twenty-one to eighteen years in 1971; since that time, student rights have either been grounded in tort law (*Tarasoff v. Regents of University of California*, 1976, or *Mullins v. Pine Manor College*, 1983) or in contract theories (*Johnson v. Lincoln Christian College*, 1986, or *Ross v. Creighton University*, 1992). An area that has developed recently to accord rights to students has been “consumer fraud” or “deceptive trade practices” legislation. While it has been used primarily for tuition refunds or assorted proprietary-school (for-profit) issues, such cases have picked up momentum and, in some states, can provide for damage awards. For example, courts used the theory of fraudulent misrepresentations against a college in *Gonzalez v. North American College of Louisiana* (1988) and consumer statutes in *American Commercial Colleges, Inc. v. Davis* (1991).

The case studies that follow in this book are excellent proxies for the many cases in admissions, affirmative action, and other student issues; they involve subjects that are litigated often and represent important societal developments outside the academy. I have tried to situate the case studies in their proper legal and societal context and to suggest alternative ways in which they could have been decided. In law, as in life, it is not always the end result that is important but, often, the reasoning itself.

**Admissions and Race**

In June 2003, the Supreme Court decided two admissions cases involving the University of Michigan, the undergraduate program (*Gratz v. Bollinger*) and the law school (*Grutter v. Bollinger*). In *Gratz*, the Court struck down UM’s use of a racial point system in undergraduate admissions by a 6–3 majority. The Court found that the use of a points system was not “narrowly tailored” sufficiently to survive strict scrutiny. UM had awarded 20 points (on a 100-point scale) to all
minority applicants, and the Court ended this particular practice. However, by a 5–4 decision, the Court upheld the full-file review practice of the UM Law School, which took racial criteria into account for reasons of diversity (upholding the original rationale of *Bakke*) and to obtain a “critical mass” of minority students. This opinion has become the key decision, as many schools follow the full-file review of the *Gratz* case and now have the imprimatur of the Supreme Court to use race as *Bakke* had allowed twenty-five years earlier. Race is a fugue that plays throughout U.S. society, including higher education. Since the 1980s, there has been a strong societal backlash against affirmative action, as evidenced by a major political party’s platform plank against the principles, the California and Michigan voters’ ballot initiative to outlaw affirmative action in state services and employment, the University of California regents’ action to overturn years of admissions affirmative action (later rescinded), and congressional action to dismantle a number of federal education programs.

In addition, there is a new and resurgent nativism evident, as seen in the 1994 California Ballot Initiative 187, which sought to deny public education to undocumented children (struck down by the courts) and which resurfaced nearly two decades later in Alabama and Arizona initiatives to deny school attendance to undocumented children and to exclude college students. Some of these prejudicial measures have even taken deep root in areas of the country where the number of Latinos and other recent arrivals has been very small and where employers actively seek workers from the same segment of society, especially in agricultural and other dangerous and low-paying employment sectors. As the polity has become more conservative on affirmative action, immigration, and other social issues, so too have the courts and legislatures. The *Grutter* decision will likely lead to other state ballot initiatives in the thermodynamics of college admissions politics.

**Faculty Rights versus Student Rights**

In several important legal cases, faculty and student rights have come into direct conflict. One involved prayer in the public college classroom, in which the court precluded the practice, finding that the Establishment Clause mandated that the college teacher discontinue the practice (*Lynch v. Indiana State University*). Another religion case, *Bishop v. Aronov*, pitted a public university, the University of Alabama, against an exercise physiology professor who invited students in his class to judge him by Christian standards and to admonish him if he deviated from these tenets. The appeals court held that colleges exercised broad authority
over pedagogical issues, and that “a teacher’s speech can be taken as directly and deliberately representative of the school.”73 This troubling logic, which reaches the correct decision to admonish the professor, does so for the wrong reasons and rests upon the erroneous ground that faculty views are those of the institution. The court could have more parsimoniously and persuasively reached the same result by analyzing the peculiar role of religion injected into secular fields of study, especially when the teacher invites a particular religious scrutiny.

In another course, a studio art teacher was dismissed for his habit of not attending his studio classes or supervising his students; he argued that this technique taught students to act more independently (Carley v. Arizona Board of Regents).74 The court disagreed that his behavior was a protected form of professorial speech, as did a court that considered another professor’s extensive use of profanity in the classroom (Martin v. Parrish).75 A professor also lost his position for making derogatory references during class to one of his students as “Monica Lewinsky” in an attempt to humiliate her (Hayut v. SUNY).76

These and other cases made it clear that students are not without rights in a classroom, while well-known cases such as Levin v. Harleston77 and Silva v. University of New Hampshire78 have made it clear that courts will still go a long way in protecting professors’ ideas—however controversial (Levin)—and teaching styles—however offensive (Silva). A proper configuration of professorial academic freedom is one that is normative and resilient enough to resist extremes from without or within, to fend off the New Hampshire legislative inquiry of Sweezy and the proselytizing of Bishop. In this view, professors have wide-ranging discretion to undertake their research and to formulate teaching methods in their classroom and laboratories. However, this autonomy is, within broad limits, highly contingent upon traditional norms of peer review, codes of ethical behavior, and institutional standards. In the most favorable circumstances, these norms will be faculty-driven, subject to administrative guidelines for ensuring requisite due process and fairness. Even the highly optimistic and altruistic 1915 AAUP Declaration of Principles holds that “individual teachers should [not] be exempt from all restraints as to the matter or manner of their utterances, either within or without the university.”79 In short, academic freedom does not give and never has given carte blanche to professors but rather vests faculty with establishing and enforcing standards of behavior to be reasonably and appropriately applied in evaluations. Although I have attempted to persuade that the academic common law is highly normative, contextual, and faculty-driven, I have not lost sight of the range of acceptable practices and extraordinary heterogeneity found in classroom styles.
Additionally, persuasive research has emerged to show that persons trained in different academic disciplines view pedagogy differently. John Braxton and his colleagues summarize how these norms operate across disciplines: “Personal controls that induce individual conformity to teaching norms are internalized to varying degrees though the graduate school socialization process. Graduate school attendance in general and doctoral study in particular are regarded as a powerful socialization experience. The potency of this process lies not only in the development of knowledge, skills, and competencies, but also in the inculcation of norms, attitudes, and values. This socialization process entails the total learning situation. . . . [T]hrough these interpersonal relationships with faculty, values, knowledge, and skills are inculcated.” Moreover, to paraphrase Tolstoy, they are all inculcated differently. To grab a student and put my hands on his chest would be extraordinarily wrong in my immigration law class, but it could happen regularly and appropriately in a voice class, a physical education course, or an acting workshop. Discussing one’s religious views in an exercise physiology class may be inappropriate, but certainly it is appropriate in a comparative religion course. Discussions of sexuality, salacious in a legal ethics course, could be appropriately central to a seminar in human sexuality. Each academic field has evolved its own norms and conventions.

However, courts are not in the business of contextualizing pedagogical disputes, as was evident in Mincone v. Nassau County Community College, a case that wended its awkward way through the judicial system. Although Mincone had forebears in other decisions, it is sufficient to make my points: If colleges do not police themselves, others will; disputes between teachers and pupils are on the rise; and poor fact patterns and sloppy practices will lead to substantial external control over the classroom. One other thread is that it arose in a two-year community college, making it likely that the results will be taken by subsequent judges as directly pertinent for higher education in a way that K–12 cases have not been held to be controlling. Given the overlap with the mission of senior institutions and their usual transfer function, two-year colleges will not be easily distinguished. If a K–12 case is not in my favor, I can always try and convince a judge to limit it to the elementary/secondary sector; I will not be able to muster such a finely graded distinction in a postcompulsory world, even though two-year colleges are, on the average, more authoritarian and administrator-driven than four-year colleges. The widespread use of part-time and non-tenure-track faculty makes academic freedom more problematic at community colleges, where faculty do not always have the security or autonomy to develop the traditional protections of tenure and academic freedom.
The second round of this case began as a request for public records or, in this instance, course materials for Physical Education 251 (PER 251), “Family Life and Human Sexuality.” The course is taught in several sections to nearly three thousand students each year, and in Mincone, a senior citizen auditor (enrolled under terms of a free, noncredit program for adults over sixty-five years of age) who reviewed the course materials before he took the class to be offered in summer 1995 sued to enjoin the course from using the materials or from using federal funds to “counsel abortion in the PER 251 course materials.” Mincone, the representative of a co-plaintiff party, the Organization of Senior Citizens and Retailers (OSCAR), filed in May 1995 a lawsuit with eight causes of action: PER 251, under these theories, violates the strict religious neutrality required of public institutions by the New York State Constitution; burdens and violates state law concerning the free exercise clause of the New York State Constitution by “disparagement” of Judeo-Christian faiths and by promotion of the religious teaching of Eastern religions with regard to sexuality; violates the federal First Amendment; violates the plaintiffs’ civil rights guaranteed under Sec. 1983; teaches behavior that violates Sec. 130.00 of the New York State Penal Law (sodomy statutes); violates federal law concerning religious neutrality by singling out one “correct view of human sexuality”; disregards the duty to warn students of course content so that they can decide whether or not to enroll in the course; endangers minors who may be enrolled in the course; and violates federal law enjoining abortion counseling.

This broad frontal attack on the course was virtually without precedent, as the plaintiff was not even enrolled in the course for credit and enjoined the course even before the term had begun and before he had taken the course as an auditor. But the wide-ranging claims, particularly those that allege religious bias, were so vague and poorly formulated that it was difficult to believe they would survive. But as in Axson-Flynn, examined in detail in chapter 5, religious challenges continue to flummox courts and present special circumstances.

We begin with the premise that faculty members have the absolute right, within the limits of germaneness and institutional practice, to assign whatever text they wish, subject only to the text being appropriate for the course and to academic custom. Sometimes this means a compromise, as in using a central text supplemented by all the extra materials you wish were in the basic text, because not everyone can or is inclined to write his or her own book. As AAUP General Counsel, I would have no qualms in defending the physical education course materials: They were picked by professionals with considerable expertise in this field; the course is required for the major, widely accepted, and regularly
fully enrolled; it does what it sets out to do, expose students to wide-ranging issues of sexuality; and the materials clearly put students on notice about what the course covers. Except for the personal and moral objections of the plaintiffs concerning the materials, this course is generically like any course. Context counts, as does the professional authority to determine how it will be taught.82

Cases like this are fraught with implications for higher education practice, especially for teacher behavior. In Cohen v. San Bernardino Community College, the District Court could have gone in the opposite direction83 as courts had done for Professors Silva and Levin, primarily by stressing academic freedom rather than by balancing the competing interests. However, by characterizing the issues as those of classroom control and students’ learning environment, Professor Cohen’s interests are trumped, at least with the admonishment. (His orders were to do essentially as Professor Silva was ordered by the University of New Hampshire to do: take counseling, alter his class style, and so forth.) He had been admonished to stop teaching from Hustler and other “pornographic” materials in his remedial English class. And the court did suggest that the admonishment was mild: “A case in which a professor is terminated or directly censored presents a far different balancing question.” But does it? Can there be any doubt that Cohen considers himself “directly censored” by the formal complaint of one student? Was Levin censored by City University of New York’s “shadow section”? Is reading Hustler letters a good idea for a remedial English class?

Additionally, there is the issue of a solution to the conundrum of faculty autonomy and sexual harassment jurisprudence. The difficulty is in acknowledging that a classroom can be a hostile environment in some instances. The AAUP hammered out a compromise attempt to preserve faculty autonomy yet to acknowledge and deal with an environment so hostile that it can stifle learning opportunities. The 1995 AAUP Statement of Policy for Sexual Harassment, suggested for institutional adoption, reads as follows:

It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other speech or conduct of a sexual nature constitute sexual harassment when:

1. Such advances or requests are made under circumstances implying that one’s response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or

2. Such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or
3. Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.84

In our search for the perfect, clarifying epiphany—one that will illuminate once and for all examples that can guide behavior—this proposed policy falls short: what is “severely humiliating”? How much more “humiliating” is it than just “humiliating”? How long does harassment have to persist in order to be found “persistent”? Most important, isn’t the classroom a “workplace” for faculty?

Even so, to me, in interpreting academic standards, what’s surprising isn’t that things work so badly but rather that they work so well. My own experiences as a student and professor lead me to believe that any comprehensive theory of professorial authority to determine “how it shall be taught” must incorporate a feedback mechanism for students to take issue, voice complaints, and point out remarks or attitudes that may be insensitive or disparaging. At a minimum, faculty should encourage students to speak privately with them to identify uncomfortable situations. Professor Bishop asked his students to point out inconsistencies between his Christian perspectives and his lifestyle. This is excessive and could itself provoke anxiety on the part of both Christian and non-Christian students. But a modest attempt to avoid stigmatizing words and examples is certainly in order for teachers, and schools should have in place some mechanism to address these issues and resolve problems. I cringe when I see exam questions that consign “Jose,” “Maria,” or “Rufus” to criminal questions, or when in-class hypotheticals use “illegal aliens” or sexist examples and stereotypes to illustrate legal points. Such misuse may be especially prevalent in difficult fact patterns involving criminal activities, such as rape and consent. Given the asymmetrical relationships between faculty and students in a classroom, students have a right to expect more thoughtful pedagogical practices, and such carelessness and insensitivity is evidence of faculty corner-cutting or worse. But increasingly emboldened by the availability of counsel and a larger agenda about the place of religion in the curriculum and secular public college settings, students will bring these cases, which will likely increase.85

Finally, there is the issue of grading. For years, I have told my students that no properly awarded grade has ever been overturned by a court, so they should not try and overturn mine. (For the record, several have done so, unsuccessfully,
over the years.) However, that was before *Sylvester v. Texas Southern University*.\(^{86}\) *Sylvester* is, arguably, the first federal case where a grade was overturned. But the circumstances are so bizarre that no one can really insist that the grade was “properly awarded.” Therein lies a very odd tale, one that should make everyone aware of just how obstinate a faculty member can be and how badly a mistake can compound without proper faculty or administrative leadership.

Karen Sylvester, a Two L at Thurgood Marshall Law School, of Texas Southern University in Houston, was at the top of her class, having received almost all As. In the spring of 1994, she completed her wills and trusts class and was awarded a D. This had the effect of dropping her from first in her class, whereas a C or a “Pass” would have kept her in first place. First, she protested orally to the associate dean, who did not respond. The next semester, she protested in writing several times without receiving any response from the professor or the administration of the law school. The professor was later asked to produce her exam book. He said it had been lost. After a more thorough search, it was discovered. She had appealed to the law school’s committee that had review powers over such disputes, a standing committee that included faculty and student members. Nearly a year later, when she was scheduled to graduate, Sylvester sought to enjoin the graduation ceremony until her grade and its effect upon her rank in class could be resolved. TSU promised the judge that if he allowed the ceremony to go forward, it would review the case and adjust her standing accordingly.

What follows is not pretty. The judge found that “[Professor] Bullock was defiant.” The court ordered him to meet with the student to review the grade. As she now lived in Dallas, she had to return to Houston, where it developed that the professor either had no answer key or had not used one, so he could not review the exam properly. Angered, the judge ordered him to pay her travel expenses and to attach all subsequent meetings scheduled on this issue. The record tersely records, “He did neither.” At the next court session, the judge sent marshals to fetch the missing professor, who admitted that he had received proper notice.

The issue was punted back to the law school committee, which decided—contrary to its published regulations—that students could not serve on the committee, as there were issues of privacy. The committee, without its student members, decided that the review had been adequate and that “no inconsistencies were found.” Yet one member told the court that the committee had been informed by the professor that the correct answer to the essay question was “Yes.” The judge, incredulous that this defiance had been ratified by the committee, threw the book at them. He wrote in a remarkable and sweeping voice, “Governmental actions cannot be arbitrary. Having no basis for comparison is arbitrary.
Changing the committee on the chairman’s malicious whim is arbitrary. Once the committee had been changed from the official, university-constituted form it was nothing but a mob.” He then ordered that she be given a “Pass” for the course and that she be listed as co-valedictorian, extraordinary actions needed to provide an “equitable adjustment.”

This may be the only federal case overturning a grade, but its extraordinary facts reveal poor faculty and law school judgment and decisionmaking. Therefore it is likely that such judicial action will be limited to similarly egregious situations. Rather than expanding grade challenges, this decision will rein in excesses in institutional behavior and extend a modicum of due process to aggrieved students harmed by faculty carelessness or fecklessness.

Policy Implications

If events continue as in the past, there can be no doubt that higher education will become increasingly legalized, by the traditional means of legislation, regulation, and litigation as well as the growing areas of informal lawmaking, such as ballot initiatives, insurance carrier policies, and commercial or contract law in research.87 This cascade will shower down upon institutions, each leaving its residue in the form of administrative responsibility for acknowledging and implementing the responsibilities.

Understanding better how legal initiatives become policy, particularly complex regulatory or legislative initiatives, should contribute greatly to improving administrative implementation of legal change on campus. Even with this modest review, it is clear that some legal policies will be more readily adopted than others. It is also clear that academic policymakers have substantial opportunities and resources to shape legal policy and smooth the way for legal changes on campus. Of course, no one can be expected to endorse all legal initiatives with equal enthusiasm or to administer them as if they were all high institutional priorities. Not all will be. Some will be implemented only grudgingly. However, understanding the implementation of legal change will influence the amount of policy output produced, the distribution of policy outputs, and the overall extent of compliance achieved.

The considerable autonomy and deference accorded higher education often translate into institutions designing their own compliance regimes for legislative and litigative change, and increased understanding of this complex legal phenomenon should increase this independence. As no small matter, higher education officials could begin to convince legislators that mandated legal change
has a better chance of achieving the desired effects if institutions are allowed to
design their own compliance and implementation strategies. This role could ease
the sting so many campuses feel when another regulatory program is thrust
upon them, or when they lose an important case in court, as happened at the
University of Texas in *Hopwood v. State of Texas*. But it would require complete
and full compliance, with the particularized regime and administrative details
necessary to effectuate the statutes. It could also lead higher education officials
to seek reasonable compliance rather than exemption, as occurs often in prac-
tice. As higher education continues to be reliant upon government support, and
as colleges offer themselves for hire as willing participants in commercial ven-
tures and as social change agents, additional regulatory legal restrictions are sure
to follow.

Apprehending the consequences of legalization is an essential first step to-
ward controlling our own fate. This review and the other chapters in this book
show how interdependent the higher education system is and reveal why we
need to adapt to the times but also to secure our timeless values, such as academic
freedom, tenure, institutional autonomy, and due process. These safeguards are
in danger of being legislated or litigated away should we fail to remain vigilant
and alert, and if we do not self-police. If we do not, there are many police outside
the academy all too willing to do so.