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Law on the Campus 1960–1985: Years of Growth and Challenge

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I. INTRODUCTION: THE INCREASINGLY COMPLEX RELATIONSHIP BETWEEN LAW AND ACADEME

The last quarter century has witnessed an enormous expansion in the law's presence on America's campuses. Whether one is engaged in campus disputes, planning to avoid future disputes, or charting an institution's policies and priorities, law has become an indispensable component of decision making. Questions of educational policy have increasingly become converted into legal questions as well. The last twenty-five years have seen courts called upon to resolve thorny issues of academic discipline with respect to student misconduct, academic dishonesty, and unsatisfactory academic performance. Some institutions have been sued for failing to desegregate their student bodies and faculties, while others have been sued for implementing programs designed to correct racial imbalances in student bodies and faculties. Faculty members...
have challenged institutional decisions regarding the denial of tenure as well as its termination. Researchers have asserted that they possess an academic freedom privilege exempting them from having to disclose the results of their scholarship in courtroom settings, while other faculty members have claimed that academic freedom protects them from having to testify with respect to such matters as tenure decisions.

Institutional authority to regulate student organizations has been challenged. Colleges and universities have been held liable for breaches of campus security resulting in injury or death to students. Outsiders have sued institutions to gain access to the campus. Student-athletes injured during practice or competition have sought to apply workers' compensation law against institutions. Students and others have sought to apply federal non-discrimination laws to the campus, while some institutions have sought to limit the reach of these laws. Retirement programs at a number of institutions have been challenged on grounds that they discriminated on the basis of sex. Faculties have sought to apply federal non-discrimination laws to the campus, while some institutions have sought to limit the reach of these laws.


See, e.g., Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984); Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981); Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981); Davis v. Oregon State Univ., 591 F.2d 493 (9th Cir. 1978); McLendon v. Morton, 249 S.E.2d 919 (W. Va. 1978).

See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972); Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984); Frumkin v. Board of Trustees of Kent State Univ., 626 F.2d 19 (6th Cir. 1980); Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975).


See Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982); in re Dinnan, 661 F.2d 426 (5th Cir. 1981).


apply federal collective bargaining law to their employment relationships, while institutions have asserted that such law is inconsistent with the academic model of governance. Institutions themselves have challenged state decisions on chartering and licensure, as well as decisions of accrediting agencies. In this explosion of litigation, apparently no icon has been safe: Institutions have taken to the courts to sue the leading athletic association over television broadcast rights for football games.

As judicial business has expanded, so has the use of administrative agencies as alternative forums for airing legal disputes. Over the last twenty-five years, particularly through the 1970s, a torrent of new regulations has been promulgated by federal and, to a lesser extent, state and local, agencies. Despite recent talk of government deregulation, most of these regulations are still in force, and new regulations are still being issued. Thus, postsecondary institutions may find themselves before the federal Equal Employment Opportunity Commission, the National Labor Relations Board, the Education Appeal Board of the U.S. Department of Education or the administrative law judges for the Department’s Office for Civil Rights, agency boards of contract appeals, the appellate division of the Internal Revenue Service, state licensing or approval boards, state public employment or civil service commission, state workers’ compensation and unemployment compensation boards, state and local human relations commissions, local zoning boards, and other quasi-judicial bodies at all levels of government. Proceedings can be complex, and the legal sanctions that such agencies may invoke can be substantial. Paralleling these developments has been an increase in the forums for dispute resolution created by private organizations and associations involved in postsecondary governance or by institutions themselves.

16 See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Loretto Heights College v. NLRB, 742 F.2d 1245 (10th Cir. 1984); NLRB v. Stephens Inst., 620 F.2d 720 (9th Cir. 1980). See also Lewis Univ., 265 N.L.R.B. 1239 (1982), rev’d in part, 765 F.2d 616 (7th Cir. 1985); College of Notre Dame, 245 N.L.R.B. 386 (1979); Barber-Scotia College, Inc. 245 N.L.R.B. 406 (1979) (in all of these cases the NLRB declined to extend the principles of NLRB v. Catholic Bishop, 440 U.S. 490 (1979), to higher education). See infra notes 126-128 and accompanying text.


Thus, besides appearing before courts and administrative agencies, postsecondary institutions may become involved in grievance procedures for 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. Similarly, postsecondary institutions have created internal processes, such as faculty grievance committees, student judiciaries, and honor boards for resolving disputes without resort to outside agencies. Other new processes have been created by institutions because they are required by law—for instance, the institutional review boards that oversee certain scientific experimentation as mandated by federal regulations.20

The remainder of this article highlights some of the most significant evolving aspects of the relationship between law and academia. The discussion is not exhaustive; it is intended to whet, rather than satisfy, the reader's appetite and to provide the background against which other more specific developments of the past quarter century may be addressed.

II. LEGAL IMPLICATIONS OF CHANGES IN SOCIAL STRUCTURES AND EDUCATIONAL POLICIES

Traditionally, the law accorded postsecondary institutions extensive autonomy in their daily operations. The academic environment was thought to be delicate and complex. Outsiders such as lawyers or judges would, almost by definition, be ignorant of the special arrangements and sensitivities underpinning this environment. Academia could operate well, by this view, only when its traditional means of governance by consensus and collegiality was fully respected.

The judiciary developed various doctrines that had the effect of protecting this academic autonomy. The college's relationship to its students was said to be parental in nature. Since the college acted in loco parentis, it could exercise virtually unchecked authority over students' lives.21 Students similarly could not rely on claims to constitutional rights. Constitutional constraints did not apply at all to private education, and attendance at public postsecondary institutions was considered a privilege and not a right. Being a "privilege," attendance


21 See, e.g., Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913). In Gott, the court held that since:

[college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils . . . we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could make for the same purpose.]

Id. at 379, 161 S.W. at 206.
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 relation with the institution, but typically 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.

Courts were similarly deferential when it came to questions of academic employment. Academic judgments regarding appointment, promotion, and tenure were thought to be expert judgments suitably governed by the complex traditions of the academic world. Furthermore, the Constitution did not protect faculty members any more than it did students. The Constitution did not extend to private education, and academic employment in public institutions was also held to be a privilege, not a right.

In the years following World War II, various events conjoined to re-shape postsecondary education’s external and internal environment, thus laying the groundwork for later challenges to academic autonomy. The G.I. Bill expansions of the late 1940s and early 1950s, and the “baby-boom” expansion of the 1960s, brought large numbers of new students, faculty members, and administrative personnel into the educational process. The expanding pool of persons seeking postsecondary education also prompted the growth of new educational institutions and programs, as well as new methods for delivering educational services. The changed demographics of higher education resulted in other signifi-

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Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).

See, e.g., Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435 (1928) (the institution’s action in dismissing a student was upheld by the court without assigning a reason but apparently because she was not a “typical Syracuse girl”).

Oliver Wendell Holmes, serving at the time on the Massachusetts Supreme Judicial Court and writing an opinion upholding the firing of a police officer, enunciated what would come to be the classic statement of the right-privilege distinction in public employment:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

[McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-518 (1892).]

One of the most important legal changes during the last twenty-five years was the “demise” of this right-privilege distinction as applied to public employment and other matters. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

icant shifts as well. Because of the increased job and promotion opportunities occasioned by rapid growth, there were many new academics who were unfamiliar with and had insufficient time to learn the old rules. Other new arrivals were hostile to traditional attitudes and values because they perceived them as part of a process that had excluded their group or race or sex from access to academic opportunity in earlier days. For others in newer settings—such as junior and community colleges, technical institutes, and experiential learning programs—the traditional trappings of academia simply did not fit.

The established patterns of deference to authority and tradition were also increasingly irrelevant to many of the new students. The emergence of the student-veteran; the loosening of the "lock-step" pattern of educational preparation, which led students directly from high school to college to graduate work; and, finally, the lowered age of majority—all combined to make the in loco parentis relationship between institution and student less and less tenable. New demands for professional credentials also made higher education an economic necessity for many. Some students, such as the G.I. Bill veterans, had cause to view higher education as an earned right.

As a broader and larger cross section of the world passed through postsecondary education's gates, institutions became more tied to the outside world. Spurred on by Sputnik and then by promises of new frontiers and great societies, government signed on as a partner in the higher education enterprise. Links in the partnership were forged by the enactment of such laws as the National Defense Education Act of 1958, the Higher Education Facilities Act of 1963, and the Higher Education Act of 1965. An increasingly complex government also came to rely on the resources of higher education institutions in many fields of basic and applied research.

Higher education institutions came into contact with the outside world in other ways as well. During the past twenty-five years, private foundations became an increasingly important source of institutional income. Social and political movements—notably the civil rights movement and the movement against the Vietnam War—became a more integral part of campus life. And when these movements, along with the other

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outside influences, converged on postsecondary institutions, the law came also.

By the early 1970s the old autonomy was only a nostalgic reminiscence. The realities of the relationship between law and academe had dramatically changed. Federal and state governments had become heavily involved in postsecondary education, creating many new legal requirements and new forums for raising legal challenges. Students, teachers, other employees, and outsiders had become more willing and more able to sue postsecondary institutions and their officials. Courts had become more willing to entertain such suits on their merits and to offer relief from certain institutional actions. Institutions themselves were increasingly resorting to the courts to protect their own interests.

In the 1980s the development of higher education law continues to reflect, and be reflected in, social and political movements in higher education and in the world outside the campus. Perhaps the most obvious changes have been in the area of the federal government's support for the partnership that it had built with higher education. Budgets are cut, and programs are reduced or eliminated. In the scramble for funds, issues arise concerning equitable allocation of funds among and within institutions and among various categories of needy students. As the burden of diminishing support is perceived to fall on minority and low-income students, whose numbers may decrease if government aid is not forthcoming, or on the minority and women faculty newcomers most subject to layoffs prompted by budget cuts, new civil rights issues are emerging. As the pool of funds available for institutional aid shrinks, institutions consider alliances with the corporate hi-tech world that, in turn, create other new legal programs.

Government budget cutting also adds new impetus to yet another prominent trend: institutional responses to tighter financial times. Because of the combined pressures of inflation, new types of institutional costs (such as computers and other technology), declining enrollments, and now, government aid reduction, financial belt-tightening has become a fact of life affecting many aspects of institutional operation. Many legal questions have arisen concerning standards and procedures for faculty and staff layoffs, termination of tenured faculty, and reduction or termination of programs. As some institutions are strained to

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their financial limits, other questions concerning closures, mergers, and bankruptcies have arisen.\textsuperscript{35}

The story of higher education in the 1980s, however, is by no means primarily one of retrenchment. Numerous other trends and innovations seemingly foreshadow the path of future legal development. One of the most significant is the mushrooming technological revolution on campus. The use of computers creates new issues of privacy, as well as new contract, patent, and copyright issues.\textsuperscript{36} Biotechnological research raises issues concerning use of human subjects\textsuperscript{37} and the patentability and licensing of discoveries.\textsuperscript{38} Devising and enforcing specifications for the lease or purchase of technology for office support, laboratories, or innovative learning systems creates complex contract/commercial law problems.

Related to the technological revolution is the expanding alliance between the campus and the corporate world.\textsuperscript{39} As this alliance is forged, questions of institutional autonomy and academic freedom are being raised. Complex problems concerning the structuring of research agreements, patent and licensing arrangements, and trade secrets now present themselves.\textsuperscript{40} The specter of conflicts of interest, for both faculty researchers and the institution as a corporate entity, arises.\textsuperscript{41} And federal government support for university-industrial cooperative research has become an issue, as has federal regulation in such sensitive areas as genetic engineering and dissemination of research discoveries.\textsuperscript{42}


\textsuperscript{39} Bach & Thornton, Academic-Industrial Partnerships in Biomedical Research: Inevitability and Desirability, 64 EDUC. REC. 26 (1983).

\textsuperscript{40} Fowler, University-Industry Research Relationships: The Research Agreement, 9 J. COLL. & U.L. 515 (1982).


\textsuperscript{42} Regulations governing recombinant DNA research have proved to be especially volatile and subject to numerous revision; the most recent NIH regulations are found at 49 Fed. Reg. 46,256 (1984). Regarding dissemination of the work product of federally funded research, see the Uniform Patent Legislation found at Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified at 35 U.S.C. § 200-211 (1982)).
Another major trend is student (or educational) consumerism. A shift from a seller's to a buyer's market has spurred competition among institutions in the search for students and introduced marketing techniques and attitudes into postsecondary education. A new emphasis on students as consumers of education with attendant rights, to whom institutions owe corresponding responsibilities, has further undermined the traditional concept of education as a privilege. Student litigation on matters such as tuition and financial aid, course offerings, award of degrees, campus security, and support services has become more common, as have governmental efforts at consumer protection regulation on behalf of students.

Institutional self-regulation, partly a response to student consumerism, has also gained in significance. The movement is not back to the old days of institutional autonomy, when institutions governed their cloistered worlds by tradition and consensus. Rather, the new movement is spawning an increase in institutional guidelines and regulations on matters concerning students and faculty and in grievance processes for airing complaints. On the one hand, by creating new rights and responsibilities or making existing ones explicit, this movement gives members of campus communities more claims to press against one another. On the other hand, the new self-regulation facilitates the internal and more collegial resolution of claims, forestalling the intervention of courts, legislatures, and administrative agencies in campus matters.

Federal government deregulation of education, another nascent trend, is the flip side of institutional self-regulation: success at the latter may be urged as justification for the former and vice versa. Substantial deregulation, would, of course, reduce the numbers and types of federal requirements applicable to campuses; it would also reduce the potential for lawsuits and administrative agency proceedings concerning federal requirements. But the deregulation flame has not yet set fire to any forests. How far it will progress—or how much federal regulation, if removed, would be replaced by comparable state regulation or self-regulation—is not clear; nor is it clear that deregulation as currently envisioned would inevitably benefit education.

In addition to these trends, the post-World War II movement toward diversity in postsecondary education has continued into the 1980s in important ways. Although the 1970s brought some moderation in the birth and growth of institutions and expansion of student bodies, the diversity of students and of special educational programs to serve their needs has nevertheless increased. The percentage of women enrolled as students is greater than ever before; women, in fact, are now a majority.\textsuperscript{47} The proportion of blacks also increased in the 1970s, with black student enrollment increasing more rapidly than white student enrollment, especially in community colleges.\textsuperscript{48} The proportion of postsecondary students who are "adult learners," beyond the traditional college age of eighteen to twenty-four years old, has also increased markedly.\textsuperscript{49} The proportion of part-time students (many of whom are also women and/or adult learners) has similarly increased, with part-time enrollments rising much faster than full-time enrollments in the 1970s.\textsuperscript{50} Military personnel have become a substantial component of the adult-learner and part-timer populations. Moreover, new federal laws and regulations protecting handicapped persons have laid the basis for an influx of handicapped students into higher education.\textsuperscript{51}

One further category of students, posing challenges different from the categories above, has also begun substantial growth: foreign students. These students are making a particularly important contribution to campus diversity and are also having a direct impact on law. The application of immigration law to foreign students has become a major concern for federal officials who must balance shifting political and educational concerns as they devise and enforce regulations, and for postsecondary administrators who must work within these complex regulations on their own campuses.\textsuperscript{52}

These changes in the student population have been reflected, as expected, in changes in the universe of postsecondary institutions and programs. Community colleges and private two-year institutions have

\textsuperscript{47} Cowan, Higher Education Has Obligations to a New Majority, Chron. of Higher Educ., June 23, 1980, at 48, col. 1.
\textsuperscript{49} K. Cross, Adults As Learners: Increasing Participation And Facilitating Learning (1981).
\textsuperscript{52} For analysis of the actual and projected growth of the foreign student population, and the challenges it creates for institutions, see American Council on Education Committee on Foreign Students and Institutional Policy, Foreign Students and Institutional Policy: Toward an Agenda For Action (1982). Recent presidential administrations' use of
become more prominent, as their student enrollments and the numbers of new institutions grew at a faster rate than four-year and graduate institutions. Postsecondary education programs sponsored by private industry have increased, creating a new context for questions about state degree-granting authority and private accreditation, as well as about academic freedom and other faculty/student rights and obligations. Work-study programs, internships, and other forms of experiential education have increased in numbers and importance. The movement raises new questions on matters such as institutional liability for off-campus acts; the use of affiliation agreements with outside entities; and coverage of experiential learners under workers' compensation, unemployment compensation, and minimum wage laws.

As is evident from even this cursory review, the contemporary world of higher education stands in stark contrast to that of twenty-five years ago. Student bodies and faculties have changed in significant ways, having different needs and posing different challenges which higher education is addressing through a variety of innovations as well as through traditional structures. The federal government's partnership with higher education has gone through several metamorphoses as federal support, having steadily increased through much of the 1960s and 70s, is now trimmed back. Technological inventions undreamt of twenty-five years ago now demand equally innovative responses. Law has played a role in all these permutations, sometimes hindering creativity, at other times facilitating it, and often confounding those who would try to wish the law away.

III. THE EVOLUTION OF THE DICHOTOMY BETWEEN PUBLIC AND PRIVATE INSTITUTIONS

A. A Malleable Boundary

Since at least the nineteenth century, as states began to establish their own institutions, the public-private dichotomy has been essential the immigration laws as instruments of foreign policy has had a substantial impact on higher education. One of the Carter Administration's responses to the Iranian hostage crisis, for example, was the promulgation of a regulation (subsequently codified at 8 C.F.R. § 214.5 (1985)) requiring Iranian students resident in the United States to provide evidence of their continuing nonimmigrant status. This regulation was upheld in Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979): The Reagan Administration has used the broad authority of the federal government to exclude or condition the entry of visitors to the United States as a means of limiting exchanges between American and eastern bloc scholars. See, e.g., Hook, U.S. Denies Visas to 2 Marxist Cuban Professors Invited to Address Philosophy Meeting, CHRON. OF HIGHER EDUC., January 5, 1983, at 8, col. 1.

54 NEW DIRECTIONS FOR LEARNING BY EXPERIENCE—WHAT, WHY, HOW (M.T. Keeton and P.J. Tate ed. 1978).
to an understanding of higher education law. Historically, public and private institutions developed to serve different sets of interests. State institutions have provided a convenient and relatively inexpensive means of obtaining a postsecondary education. Private schools, on the other hand, although typically costing more to attend, have been able to address needs that public institutions often could not serve because of legal or political constraints.

The law historically has had markedly different applications to public and to private institutions. Public institutions were subject to the plenary authority of the government that created them. Private institutions, capitalizing on the concept of institutional autonomy, were largely shielded from intrusive government regulation. State and federal statutes, when they did apply to educational institutions, often treated public and private institutions differently. Public institutions and their officers were charged with responsibility for respecting the rights of individuals established in the federal constitution and in state constitutions; private institutions and their officers, in contrast, were not constrained by these constitutional requirements. On the other hand, public institutions could often avoid being sued for their torts and breaches of contract by claiming sovereign immunity, while private institutions had only the less-recognized protection sometimes accorded by the charitable immunity doctrine.

In the past quarter century, however, the public-private boundary has been redrawn at various points and at various times, and parts of the boundary line have become indistinct. Private institutions are now much more heavily regulated by government. Federal statutes and regulations now often accord similar treatment to public and private institutions. Through the device of the state action doctrine, private institutions and their officers are now sometimes subject to the constraints of the federal constitution, and there is a recent trend toward applying state constitutional constraints to private institutions in some circumstances. As for public institutions, the sovereign immunity doc-

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57 One commentator has noted that private education 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 justification that will be examined in a court of law." H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 30 (1969).

58 For classic applications of sovereign immunity, see, e.g., Livingston v. Regents of New Mexico College, 64 N.M. 306, 328 P.2d 78 (1953); Wolfe v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959). Regarding the charitable immunity, see the classic application in Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916); but see President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942), a case criticizing the doctrine and limiting its applicability.
trine has eroded sufficiently that they are often subject to tort and contract suits in much the same manner as private institutions.\(^{59}\) And as applied to both public and private institutions, tort law and contract law are better developed, increasing the liability risk exposure of both types of institutions.\(^{60}\) The remainder of this section focuses more specifically on some aspects of these developments in order to illustrate their impact on higher education law.

B. The Rise And Containment Of The State Action Doctrine

Before a court will apply constitutional guarantees of individual rights against a postsecondary institution, the court must first determine that the institution’s action is "state (or governmental) action."\(^{61}\) Over the past twenty-five years, the United States Supreme Court has first expanded,\(^{62}\) and then contracted,\(^{63}\) the circumstances in which state action may be found. The most recent cases, such as Rendell-Baker v. Kohn,\(^{64}\) discussed below, have further contained the doctrine and cast doubt upon how much of the state action law developed by federal courts in the past twenty-five years can still be considered valid.

Courts and commentators have dissected the state action concept in many ways, but at heart state action holdings can be fit into one of three categories: (1) the delegated power category (where the private entity acts as an agent of government in performing a particular task

\(^{59}\) Both legislatures and state judiciaries have acted to limit sovereign immunity. See, e.g., Lowe v. Texas Tech. Univ., 540 S.W.2d 297 (Tex. 1976) (applying statutory waiver of sovereign immunity); Brungard v. Hartman, 483 Pa. 200, 394 A.2d 1265 (1978), (applying a judicial abrogation of sovereign immunity to the higher education context).


delegated to it by government); (2) the public function category (where the private entity performs a function generally considered the responsibility of government); or (3) the government contacts category (where the private entity obtains substantial resources, prestige, or encouragement from its contacts with government). Two subcategories of the government contacts category may also be discerned in Supreme Court opinions: (1) the "joint venturer" (or "symbiotic relationship") subcategory, which requires the plaintiff to show that "the state has so far insinuated itself into a position of interdependence with . . . [the private entity] that it must be recognized as a joint participant in the challenged activity;" and (2) the "nexus" subcategory, which requires that an "inquiry [be made into] 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."

Of these theories, government contacts and its variants has been the most frequently applied to higher education. Arguments based on a "delegated power" theory are seldom litigated. Public function arguments have generally failed when they have been utilized. Thus the basis for most plaintiffs' victories in state action litigation has been the government contacts theory.

A Supreme Court case decided in 1982, Rendell-Baker v. Kohn, is the latest word on the application of these theories to education institutions. The Rendell-Baker litigation was instituted by teachers at a private 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 defendant school specialized in dealing

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13 Burton, 365 U.S. at 725.
14 Jackson, 419 U.S. at 351 (emphasis added).
15 One exception is Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), where the court held that Alfred University was acting as a delegate of the State of New York with respect to certain actions of its ceramics college.
16 Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975), enunciates the standard position: [W]e have considered whether higher education constitutes 'state action' because it is a 'public function' as that term has been developed . . . and have concluded that it is not . . . [E]ducation . . . has never been a state monopoly in the United States." Greenya, 512 F.2d at 561, n.10. But see State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), where the court accorded serious consideration and extended analysis to the public function theory.
17 See, e.g., Benner v. Oswald, 592 F.2d 174 (3d Cir. 1979); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (upholding trial court denial of motion to dismiss for want of state action); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973).
with students who have 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 boards and was 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 regulation on various matters, such as record keeping and student/teacher ratios, and to requirements concerning services provided under its contracts with the local school boards and the state health department. Few of these requirements, however, related to personnel policy.

Using an analysis based on the government contacts theory, the Supreme Court held that neither the government funding nor the government regulation was sufficient to make the school's discharge decisions state action. As to funding, the Court determined:

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in Polk County v. Dodson, 454 U.S. 312 (1982). There we concluded that, although the state paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client" (454 U.S. at 318). Here the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students.74

And as to regulations:

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.75

The Court also considered and rejected two other arguments of the teachers: that the school was engaged in state action because it performs

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74 Id. at 840-841.
75 Id. at 841-842.
a "public function" and that the school had a "symbiotic relationship" with—that is, was engaged in a "joint venture" with—government. As to the former argument, the Court reasoned:

[T]he relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the exclusive prerogative of the state"... There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. [Massachusetts law] demonstrates that the state intends to provide service for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the state. Indeed, the Court of Appeals [in Rendell-Baker] noted that until recently the state had not undertaken to provide education for students who could not be served by traditional public schools. That a private entity performs a function which serves the public does not make its acts state action. 7

As to the latter argument, the Court concluded simply that "the school's fiscal relationship with the state is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in Burton exists here."77

Rendell-Baker appears to confirm the validity of many of the more recent cases where the courts have refused to find state action respecting activities of postsecondary institutions, and to cast doubt on some other cases where state action has been found. The case may thus serve in many circumstances to insulate postsecondary institutions from state action findings and the resultant application of federal constitutional constraints to their activities. Rendell-Baker, however, does not create an impenetrable protective barrier for postsecondary institutions. In particular, there may be situations in which government is directly involved in the challenged activity—in contrast to the absence of government involvement in the personnel actions challenged in Rendell-Baker. Such involvement may supply the "nexus" missing in the Supreme Court case. 78 Moreover, there may be situations, unlike Rendell-Baker, in which government officials by virtue of their offices are members of, or nominate others for, an institution's board of trustees. Such involvement, perhaps in combination with other "contacts," may create the "symbiotic relationship" that did not exist in the Supreme Court case. 79

76 Id. at 842.
77 Id. at 843.
78 See Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), a case which, like Rendell-Baker, involved the operation of a private school specializing in the treatment of adolescents with behavioral problems. The court found state action because a nexus could be established between state regulations and laws and the actions challenged by the students who were the plaintiffs.
79 See Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984), where the court found both the University of Pittsburgh and Temple University to be engaged in
C. Alternative Sources Of Rights Assertable Against Private Institutions

The tightening of the state action doctrine has not meant that students, faculty members, and others in the private school community have no legal rights to assert against their institutions. There are other sources for individual rights, developed during the past twenty-five years, providing protections that sometimes approximate 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, applicable generally to public and private employment relationships, is a prominent example. The Title VI race discrimination law and the Title IX sex discrimination law, applicable to federal aid recipients, are other major examples. Such sources provide a large body of law which parallels and in some ways is more protective than the equal protection principles derived from the Constitution's fourteenth amendment.

Beyond such statutory rights, several common law approaches to protecting individual rights in private postsecondary institutions have been developed during the past quarter century. Most prominent by far is the contract theory, under which students and faculty members are said to have a contractual relationship with their institutions. Express or implied contract terms establish legal rights that can be enforced in court if the contract is breached. Although the theory is a useful one, most courts have agreed that the contract law of the commercial world cannot be imported wholesale into the academic environment and that state action because state statutes had in many respects incorporated the two universities into the "Commonwealth System of Higher Education" and had thus created symbiotic relationships with the two schools; see also McVarish v. Mid-Nebraska Community Mental Health Center, 696 F.2d 69 (8th Cir. 1982).

See supra note 60. Other theories for student common law rights have occasionally been suggested by commentators, but they are seldom reflected in court opinions. See, e.g., Goldman, The University and the Liberty of Its Students—A Fiduciary Theory, 54 Ky. L.J. 643 (1966); Note, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan. L. Rev. 95 (1973) (common law of private associations). For a comparison of the various theories and cites to illustrative cases, see Tedeschi v. Wagner College, 49 N.Y.2d 652, 404 N.E.2d 1302, 1304-1306 (1980).

See, e.g., Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975). The court in Slaughter stated:

The trial court's rigid application of commercial contract doctrine advanced by plaintiff was in error, and the submission on that theory alone was error.

It is apparent that some elements of the law of contracts are used and
the theory must be applied with sensitivity to academic customs and usages. Moreover, the theory's impact has been limited because the "terms" of the "contract" may be difficult to identify, particularly in the case of students. And once identified, the terms may sometimes be too vague or ambiguous to enforce, or may be so barren of content or so one-sided in favor of the institution as to be an insignificant source of individual rights.

Despite its shortcomings, the contract theory has gained substantial importance since the late 1960s as it has become clearer that most private institutions, most of the time, can escape the tentacles of the state action doctrine. With the lowering of the age of majority, postsecondary students attained the capacity to contract under state law—a capacity that many previously did not have. In what had become the age of the consumer, students were encouraged to import consumer rights into postsecondary education. And in an age of collective negotiation and increased sensitivity to employees' rights, faculties often sought to rely on a contract model for ordering employment relationships on campus.

State constitutions have also assumed critical importance as a source of individual rights assertable against private institutions. Several recent cases—two involving private universities—have relied on state constitutions to create individual rights of speech, petition, and assembly on private property. The key case is Prune Yard Shopping Center v. Robins.

A group of high school students 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 to access to the shopping center to engage in expressive activity. In the United States Supreme Court, the shopping center argued that the California court's should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted .... The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.


See R. Laudicina & J. Tramutola, A Legal Overview Of The New Student As Educational Consumer, Citizen, And Bargainer (1976); Comment, Consumer Protection and Higher Education—Student Suits Against Schools, 37 Ohio St. L.J. 608 (1976).

See Finkin, supra note 60.

ruling was inconsistent with an earlier Supreme Court precedent, *Lloyd Corp. v. Tanner*, 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 Court then determined that when the private entity was free to impose reasonable "time, place, and manner" restrictions on the expressive activity so as to "minimize any interference with its . . . functions," it did not suffer an unconstitutional deprivation of property under the federal Constitution.

*Prune Yard* gained significance in educational settings with the New Jersey Supreme Court's decision in *State v. Schmid*. 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 defendant claimed that the regulations violated his rights to freedom of expression under both the federal Constitution and the New Jersey state constitution. Although, in the absence of a state action finding, the federal first amendment could not apply to the defendant's claim, the court did not find itself similarly constrained in applying the state constitution. Addressing the defendant's state constitutional claim, the court determined that the state constitutional provisions protecting freedom of expression (even though similar to the first amendment) could be construed more expansively than the first amendment so as to reach Princeton's actions. The court reaffirmed that state constitutions are independent sources of individual rights; that state constitutional protections may surpass the protections of the federal Constitution; and that this greater expansiveness can exist even if the state provision is identical to the federal provision because state constitutional rights are not simply mirror images of federal rights.

**IV. THE DEVELOPING DISTINCTIONS BETWEEN SECULAR AND RELIGIOUS INSTITUTIONS**

To understand higher education law's development over the past twenty-five years, one must draw a distinction not only between public and private institutions but also among different types of private institutions. The most fundamental distinction is that between private insti-

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89 *Tanner*, 407 U.S. 551.
90 *Robins*, 447 U.S. at 81.
91 *Id.* at 83.
stitutions of a secular character and those institutions that are religious or sectarian. Further distinctions are also drawn among various types of sectarian institutions. These distinctions have grown in importance over the last twenty-five years, both with respect to the evolving constitutional law on church-state relations and with respect to various federal and state statutory enactments that have a direct or indirect regulatory impact on private higher education.

A. Constitutional Distinctions Between Secular and Religious Institutions

A glance backward twenty-five years would reveal a rather unfamiliar constitutional church-state landscape. Still in the future were such landmark cases as *Engel v. Vitale,*\(^*\) prohibiting state-sponsored nondenominational prayer in public elementary and secondary schools, and *Abington School District v. Schempp,*\(^*\) proscribing Bible reading at the opening of each school day. Also in the future lay the United States Supreme Court's formulation in *Lemon v. Kurtzman*\(^*\) of a three-pronged test for determining when government support for private schools violates the first amendment's establishment clause. In order for such aid to be constitutional, according to the *Lemon* standards announced in 1971, it "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster 'an excessive entanglement with religion.'"\(^*\) In the even more remote future there loomed cases that would explore the limits of the free exercise rights that private institutions could claim under the first amendment.\(^*\)

For private postsecondary institutions with a religious orientation, the most important development of the last quarter century may have been a trilogy of establishment clause cases that defines the types of assistance governments may permissibly give to religious institutions. The earliest of these cases, *Tilton v. Richardson*\(^*\) (a companion case to *Lemon*), upheld, by a 5-to-4 vote, grants made to particular religious colleges under the Higher Education Facilities Act. In *Hunt v. McNair,*\(^*\) the Court, by a 6-to-3 vote, sustained a state program that assisted colleges, including religious colleges, by issuing revenue bonds for their construction projects. And in *Roemer v. Board of Public Works,*\(^*\)

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\(^*\) *I. at 612-13* (quoting *Walz v. Tax Commissioner,* 397 U.S. 664, 674 (1970)).

\(^*\) For example, *Bob Jones Univ. v. United States,* 461 U.S. 574 (1983), discussed *infra* notes 103-107 and accompanying text.

\(^*\) *Tilton v. Richardson,* 403 U.S. 672 (1971).


the Court, by a 5-to-4 vote, upheld Maryland's program of general support grants to private, including religious, colleges.

Although all three cases upheld the extension of aid to religious institutions, the Court's opinions did recognize that the establishment clause forbids some forms of aid to such religious institutions. In particular, the Court in Hunt, relying on the second of Lemon's three prongs (primary effect), held:

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.¹⁰¹

This formulation, indicating that "pervasively sectarian" postsecondary institutions are ineligible for direct institutional aid, requires that a distinction be drawn not only between secular and religious institutions but also between religious institutions that are "pervasively" religious or sectarian and those that are not.¹⁰²

After the Tilton-Hunt-Roemer trilogy stimulated an uneasy truce in the battle over the meaning of the establishment clause, skirmishes began over the meaning of the free exercise clause in the higher education context. The most prominent case thus far has been Bob Jones University v. United States.¹⁰³ The case concerned the Internal Revenue Service's revocation, in 1971, of the tax-exempt status that Bob Jones University had enjoyed under the charitable contribution provisions of the federal tax code.¹⁰⁴ The IRS cited the university's racially discriminatory policies as the basis for the revocation.¹⁰⁵ The university defended itself from this charge by arguing, among other things, that its

¹⁰¹ Hunt, 413 U.S. at 743. See also, Greenawalt, Constitutional Limits on Aid to Secretarian Universities, 4 J. COLL. & U.L. 177 (1977); O'Hara, State Aid to Sectarian Higher Education, 14 J. OF L. & EDUC. 181 (1985).

¹⁰² The United States Supreme Court has recently issued a writ of certiorari in another higher education case raising establishment clause issues; see Witters v. State Comm'n for the Blind, 102 Wash. 2d 624, 689 P.2d 53 (1984), cert. granted, 53 U.S.L.W. 3697 (1985). Unlike the earlier cases, this case considers the validity of government assistance to students attending religious institutions (as opposed to institutions themselves). The student in Witters is a blind ministry student denied state assistance available to other blind students. The Washington Supreme Court upheld the denial because, in its view, such assistance would have the effect of advancing religion, thus violating the second prong of the Lemon test.

¹⁰³ Bob Jones Univ., 461 U.S. 574.


¹⁰⁵ Bob Jones Univ., 461 U.S. at 581.
racial policies were mandated by sincerely held religious beliefs and thus protected by the free exercise clause. The Supreme Court rejected the university's free exercise claim:

> [T]he free exercise clause provides substantial protection for lawful conduct grounded in religious belief . . . However, "not all burdens on religion are unconstitutional . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest" (United States v. Lee, 455 U.S. 252, 257-58 (1982)). On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously-based conduct. In Prince v. Massachusetts, 321 U.S. 158 (1944), for example, the Court held that neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature . . . .

> Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

> The governmental interest at stake here is compelling. As discussed . . . , the government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . and no "less restrictive means" . . . are available to achieve the governmental interest.  

The Court in Bob Jones thereby determined that the free exercise clause does not permit a religious institution that discriminates by race to take advantage of the tax treatment accorded other private nonprofit institutions. In so doing, the Court rejected the proffered distinction between secular and religious private institutions in the particular context of eligibility for government benefits where racial discrimination is at issue. The wording of the Court's opinion, however, may still permit distinctions to be drawn in other contexts. First, religious institutions that discriminate on a basis other than race may still remain eligible for governmental benefits if the government interest in eradicating other forms of discrimination is not as "compelling" as the interest in eradicating race discrimination. Second, other types of governmental actions, especially regulatory actions, may impose greater burdens on religious institutions, which in turn may prevent them from "observing their religious tenets." Either or both of these grounds may support distinctions between secular and religious institutions as well as among different types of religious institutions, depending on the nature of the clash between sincerely held religious beliefs and government interests.

100 Id. at 580-581.
107 Id. at 603-604.
A pre-Bob Jones case, EEOC v. Mississippi College, illustrates the free exercise clause's application to religious institutions in a context different from that in Bob Jones. The charging party was a non-Baptist female part-time psychology instructor at the college. When the college rejected her application for a full-time position, she filed a complaint with the Equal Employment Opportunity Commission charging sex discrimination violating the federal Title VII employment discrimination statute. The college, operated by the Mississippi Baptist Convention, had a policy of preferring active Baptists in filling faculty slots. The college refused to respond to an EEOC subpoena and asserted, in part, that any application of Title VII would impermissibly burden the college's free exercise of religion. The court, recognizing that Title VII has a built-in exception (sec. 702) permitting religious institutions to discriminate on the basis of religion, held that Title VII's impact on Mississippi College's religious beliefs would be minimal:

The impact of Title VII upon the exercise of the religious belief is limited in scope and degree. Section 702 excludes from the scope of Title VII those employment practices of the college that discriminate on the basis of religion. We acknowledge that, except for those practices that fall outside of Title VII, the impact of Title VII on the college could be profound. To the extent that the college's practices foster sexual or racial discrimination, the EEOC, if unable to persuade the college to alter them voluntarily, could seek a court order compelling their modification, imposing injunctive restraints upon the college's freedom to make employment decisions, and awarding monetary relief to those persons aggrieved by the prohibited acts. However, the relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs. The fact that those of the college's employment practices subject to Title VII do not embody religious beliefs or practices protects the college from any real threat of undermining its religious purpose of fulfilling the evangelical role of the Mississippi Baptist Convention, and allows us to conclude that the impact of Title VII on the free exercise of religious beliefs is minimal.

Second, the government has a compelling interest in eradicating discrimination in all forms . . . . Congress manifested that interest in the enactment of Title VII and the other sections of the Civil Rights Act of 1964. The proscription upon racial discrimination in particular is mandated not only by congressional enactments but also by the Thirteenth Amendment. We conclude that the government's compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the college's free exercise of religious beliefs that results from the application of Title VII.

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108 E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980).
111 Mississippi College, 626 F.2d at 488-489.
Unlike the tax statute at issue in Bob Jones, the Title VII statute at issue in Mississippi College is a regulatory statute, carrying with it a set of obligations and affirmative remedies for violation. Were it not for the exception in Section 702, this statute could impose greater burdens on the religious institution than the loss of governmental tax benefits did in Bob Jones. In two footnotes, the Mississippi College court referred to the college’s practice of hiring only males to teach courses on the Bible, a practice the college maintained was mandated by sincere religious belief. Had this practice been at issue, it would not have fallen within the Section 702 exception because it would have been discrimination based on the applicant’s sex rather than on her religion. Application of Title VII would thus have created a direct burden on the college’s religious beliefs. Moreover, the government’s interest would have been the eradication of sex discrimination rather than race discrimination. In these circumstances, reliance on the free exercise clause as a defense to EEOC jurisdiction may have led to a result different from that reached in either Mississippi College or Bob Jones.

Just as establishment clause case law requires a distinction between religious institutions that are “pervasively sectarian” and those that are not, the developing free exercise clause jurisprudence also requires that distinctions be drawn among types of religious institutions. For instance, in EEOC v. Southwestern Baptist Theological Seminary, a religious seminary raised a Title VII issue similar to that in Mississippi College. The seminary was a nonprofit corporation owned, operated, supported, and controlled by the Southern Baptist Convention. It offered degrees only in theology, religious education, and church music, and its purposes and character were described by the court as “wholly sectarian.” The EEOC had asked the seminary to complete form EEO-6, a routine information report. When the seminary refused, the EEOC sued to compel compliance under Title VII’s record-keeping and reporting provision.

The court determined that the general principles set out in Mississippi College applied to this case but that the differing factual setting required a result partly different from that in Mississippi College. In particular, the court held that “Title VII does not apply to the employment relationship between this seminary and its faculty.” Reasoning that the Southwestern Baptist Seminary, unlike Mississippi College, was “entitled to the status of ‘church’” and that its faculty “fit the definition of ‘ministers,’” the court determined that Congress did not intend to include this ecclesiastical relationship within Title VII, since the regulation of such relationships would violate the free exercise

112 Id. at 487-488, nn. 12-13.
113 EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981).
114 42 U.S.C. § 2000e-8(c); see Southwestern Baptist, 651 F.2d at 279-281.
115 Southwestern Baptist, 651 F.2d at 284.
Using the same reasoning, the court also excluded from Title VII administrative positions that are "traditionally ecclesiastical or ministerial," citing as likely examples the "president and executive vice-president of the seminary, the chaplain, the dean of men and women, the academic deans, and those other personnel who equate to or supervise faculty." But the court refused to exclude other administrative and support staff from Title VII, even if the employees filling those positions are ordained ministers. This reasoning, according special protection to institutions whose employment positions are based on ecclesiastical relationships, serves to create a distinction under the free exercise clause between religious seminaries and other types of religious institutions.

B. Statutory Distinctions Between Secular and Religious Institutions

The constitutional landscape is not the only church-state landscape altered during the last twenty-five years. The statutory enactments signed into law in this period, and their applications to religious institutions, would present the visitor from 1960 with a terrain that could then have been only vaguely charted. These laws were usually written to apply to private institutions generally, often in combination with public institutions. The special concerns attending the application of these statutes to religious institutions were sometimes explicitly recognized and resolved in the statutory language. At other times, where the applications were unclear, courts were called upon to plumb the depths of legislative histories to discern the intent of the drafters and to compare the statutory provisions with principles already established by first amendment case law.

Title VII contains a leading example of the explicit statutory provision dealing with religious educational institutions. Section 702 of Title VII, mentioned briefly above, provides:

This title shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The court based this portion of its opinion on McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). The plaintiff was an ordained Salvation Army minister who claimed that the Salvation Army had discriminated against her in violation of Title VII. The court held that Title VII did not apply to the employment relationship between a church and its minister, basing its conclusion on a line of Supreme Court cases holding that judicial interference in intra-ecclesiastical disputes would ordinarily violate the free exercise clause.

Southwestern Baptist, 651 F.2d at 284-285.

The precise application of this provision to religious postsecondary institutions was another issue (in addition to the free exercise clause issue) raised in EEOC v. Mississippi College.\textsuperscript{119} The disappointed job applicant had claimed that the college's decision not to hire her was an act of sex discrimination. The college argued that the EEOC had no authority to investigate the claim because it fell within the bounds of the Section 702 exemption. According to the court:

\begin{quote}
If a religious institution of the kind described in Section 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, Section 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination. This interpretation of Section 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the First Amendment and the EEOC's exercise of jurisdiction over religious educational institutions. If the district court determines on remand that the college applied its policy of preferring Baptists over non-Baptists in granting the faculty position to [the party hired for the position] rather than [the disappointed applicant], then Section 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the college used the preference policy as a guise to hide some other form of discrimination. On the other hand, should the evidence disclose only that the college's preference policy could have been applied, but in fact it was not considered by the college in determining which applicant to hire, Section 702 does not bar the EEOC's investigation of [the disappointed applicant's] individual sex discrimination claim.\textsuperscript{120}
\end{quote}

This treatment of religious institutions differs from that accorded secular institutions in Title VII investigations. Once the religious college has shown that the applicant's religion was a basis for its decision, the EEOC may not attempt to rebut this proof with evidence that religion was a pretext for some other form of discrimination. When challenging a secular institution's hiring policy, on the other hand, the EEOC would be free to inquire further to determine whether the institution's articulated policies were actually a pretext for race or sex discrimination.\textsuperscript{121}

Other statutes also recognize distinctions between religious and secular institutions. Title IX, for example, contains an exemption for religious institutions from any provision of the Act that would be inconsistent with their "religious tenets."\textsuperscript{122} Another example is the

\textsuperscript{119} Mississippi College, 626 F.2d 477.
\textsuperscript{120} Id. at 485-86.
\textsuperscript{121} See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which painstakingly clarifies the evidentiary standards generally applicable to Title VII disparate treatment cases.
\textsuperscript{122} 20 U.S.C. § 1681 (a)(3) provides:
Federal Unemployment Tax Act (FUTA). At one time the employees of most private postsecondary institutions, as well as of most private elementary and secondary schools, were exempt from FUTA. In 1970 and 1976, however, Congress approved a series of amendments that greatly narrowed this exemption. Private secular schools were clearly subjected to the Act as a result of these amendments; religious institutions could still be exempted, but only if they fell within this definition:

This section shall not apply to service performed—
(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

In St. Martin Evangelical Lutheran Church v. South Dakota, the United States Supreme Court construed this provision in a manner that would enable some religious postsecondary institutions—but probably only a small portion of the total—to remain exempt from FUTA.

The National Labor Relations Act is an example of a statute that has no explicit provision on coverage of religious institutions but has legislative history that courts have utilized to narrow its application to religious schools. In the leading case, NLRB v. Catholic Bishop of Chicago, the United States Supreme Court held that Congress did not intend the Act to apply to “church-operated” schools. The Catholic Bishop case dealt only with elementary and secondary schools, however, and it is unclear whether the opinion’s reasoning could be extended to “church-operated” postsecondary institutions. The NLRB has thus far declined to extend Catholic Bishop in this manner, but the judiciary has not yet provided an answer to the issue.

Statutory exceptions like these have been created in recognition of religious institutions’ special mission that differs from those of secular institutions and in recognition of the special status of religious institutions under the first amendment. Sometimes these considerations have yielded broad exemption for religious institutions; sometimes the exemption has been quite narrow or nonexistent. In either circumstance,
over the past twenty-five years, the debate about religious institutions' status under federal and state legislation has increased in visibility and scope as well as in complexity.

V. THE INSTITUTIONAL RESPONSE TO CHANGING TIMES: PREVENTIVE LEGAL PLANNING

As the introductory section to this article indicates, the past quarter century has been marked by rapid expansion in the types and numbers of lawsuits against postsecondary institutions, the occasions in which institutions themselves resort to the courts to protect their interests, and the availability of forums other than courts for the resolution of legal disputes. Inextricably linked with these developments has been the rapid expansion of the legal obligations to which postsecondary institutions are subject under the federal and state constitutions, federal and state statutes, government agency regulations, and judicially developed common law principles. The result is a dramatic increase in the legal risk exposure—the potential legal liabilities—of postsecondary institutions.

Postsecondary institutions have not stood passively aside watching these events transpire. As might be expected, the past twenty-five years have witnessed great changes in the way institutions and their attorneys have organized themselves to deal with legal risks—an era beginning with the establishment in 1960 of the National Association of College and University Attorneys. Over the years since then, colleges and universities—especially larger ones—have increasingly employed house counsel to undertake their legal work. Such arrangements have the advantage of providing daily coordinated services of resident counsel acclimated to the particular needs and problems of the institution. Though staff counsel can become specialists in higher education law, however, they normally will not have the time or exposure to become expert in all the specialty areas (such as labor law, tax law, patent law, or litigation) with which institutions must deal. Thus, institutions with house counsel also usually retain private law firms for such special problems.

Other institutions, large and small, still arrange for all their legal


services to be provided by one or more private law firms. This arrangement has the advantage of increasing the number of attorneys with particular expertise available for the variety of problems that confront institutions. A potential disadvantage that has developed over time is that no one attorney will be conversant with the full range of the institution's needs and problems nor be on call daily for early participation in administrative decision making. Institutions depending on private firms today thus need to ensure that at least one lawyer is generally familiar with and involved in the institution's affairs and regularly available for consultation even on routine matters.

With each of these organizational arrangements, it has become critically important for institutions to give serious consideration to the particular functions that counsel will perform and to the relationships that will be fostered between counsel and institutional administrators. Broadly stated, counsel’s role is to identify, define, and provide options for resolving legal problems. But there are two basic, and different, ways to fulfill this role: through treatment law or through preventive law. To analogize to another profession, the former involves curing legal diseases; the latter involves maintaining legal health.

Treatment law, as the more traditional of the two approaches, was predominant in 1960. It focuses on actual challenges to institutional practices and on affirmative legal steps by the institution to protect its interests when they are threatened. When suit is filed against the institution, or litigation is threatened; when a government agency cites the institution for noncompliance with its regulations; when the institution needs formal permission of a government agency to undertake a proposed course of action; when the institution wishes to sue some other party—then treatment law operates. The goal is to resolve the specific legal problem at hand. Treatment law today is indispensable to the functioning of a postsecondary institution, and virtually all institutions have such legal service.

Preventive law, in contrast, focuses on initiatives that the institution can take before actual legal disputes arise. Preventive law involves administrator and counsel in a continual process of establishing the degree of legal risk exposure the institution is willing to assume in particular situations and avoiding or resolving the legal risks it is unwilling to assume. The success of such legal planning depends on a careful sorting out and interrelating of legal and policy issues.

131 Id.


133 For a helpful checklist to guide this process, see A Legal Inventory for Independent Colleges and Universities (K.M. Weeks, ed., 1981).
Teamwork between administrator and lawyer is therefore a critical ingredient. Since the distinctions between the administrator's and the lawyer's functions are not always self-evident, roles should be developed by a process of mutual interchange between the two sets of professionals. While considerable flexibility is possible, institutions should be careful to maintain a distinction between the two roles. The purpose of preventive law is not to make the administrator into a lawyer or the lawyer into an administrator. It is the lawyer's job to sensitize administrators to legal issues and the importance of recognizing them early; to resolve doubts about the interpretation of statutes, regulations, and court decisions; to stay informed of legal developments and gauge their impact on institutional operations; and to suggest legal options for avoiding or resolving problems and analyze their relative legal risks. But it is for the administrator (along with boards of trustees) to stay informed of developments in the theory and practice of administration; to devise policy options within the constraints imposed by law and determine their relative effectiveness in achieving institutional goals; and ultimately, at the appropriate level of the institutional hierarchy, to make the policy decisions that give life to the institution.

Preventive law was not a general practice of postsecondary institutions at the beginning of this past quarter century. But the concept became increasingly valuable as law's presence on the campus increased, and acceptance of preventive law within postsecondary education has grown substantially, especially since the mid-1970s. Today it may fairly be said that preventive law is as indispensable as treatment law and provides the more constructive posture from which to conduct institutional legal affairs.

CONCLUSION

Higher education in 1985 operates in a vastly different legal environment than that existing in 1960. This article has identified and analyzed some of the broadest themes that mark these twenty-five years. It is equally important, however, to evaluate the impact that these developments have had on the campus.

Law's role on the campuses has been subject to much recent criticism. It is said that the law reaches too far and speaks too loudly. Especially because of the courts' and the federal government's involvement, it is said that legal proceedings and compliance with legal requirements are too costly in money, talents, and energies; 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 campus community's best interests. Such criticisms

highlight pressing issues for higher education’s future, but they do not reveal all sides of these issues. We cannot evaluate the role of law on campus by looking only at dollars expended, hours of time logged, pages of compliance reports completed, or numbers of legal proceedings participated in. We must also consider a number of less quantifiable questions: Are legal claims made against institutions, faculty, or staff usually frivolous or unimportant, or are they often justified? Are institutions providing adequate mechanisms for dealing with claims and complaints internally, thus helping themselves avoid any negative effects of outside legal proceedings? Are courts and college counsel doing an adequate job of sorting out frivolous from justifiable claims, and of developing means for summary disposition of frivolous claims, where appropriate, and settlement of justifiable ones? Are courts being sensitive to the mission of higher education when they apply legal rules to campuses or devise remedies in suits lost by institutions? Do government regulations for the campus implement worthy policy goals, and are they adequately sensitive to higher education’s mission? In situations where law’s message has appeared to conflict with the best interests of the campus community, what have been education’s responses: To kill the messenger, or to develop more positive remedies? To hide behind rhetoric, or to forthrightly document and defend its interests?

We do not yet know all we should about these questions. But they are surely questions worthy of study as we chart the impact of the past twenty-five years, and they provide a critical counterpoint to questions about dollars, time, and pages. We must have insight into both sets of questions before we can fully understand law’s influence on the campus and separate its beneficial from its detrimental effects in the various contexts in which law has made its presence known.

