LEGAL CHALLENGES FACING
STATE COLLEGES AND UNIVERSITIES

Robert W. Rieder, University Counsel
The University of Alabama in Huntsville

30th Annual Conference
"Higher Education and the Law: Issues for the New Millennium"
The Institute for Higher Education
Athens, Georgia
July 19-20, 1999

I.INTRODUCTION. Public four-year institutions continue to be confronted with a variety of legal issues as the year 2000 approaches. Many of these issues are shared with private institutions. Because state universities are considered a public entity, however, they also face unique constitutional and statutory limitations imposed on the state and its instrumentalities.

II.MANDATORY STUDENT FEES

A.Ongoing Controversy. At most campuses, a portion of student fees is allocated to student groups and organizations as a means of subsidizing their operation and activities. In recent years, students at a number of campuses who disagree with the values and goals of some of these groups have objected to the use of their student fees to support such groups. Legal action initiated by these students around the country has resulted in inconsistent judicial rulings. The U.S. Supreme Court has agreed to hear the appeal of a decision of the Seventh Circuit Court of Appeals, Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998), in its 1999-2000 term and should, hopefully, provide needed clarification regarding this question.

B.The Southworth Case.

1.Facts. Southworth involves the student activity fee at the University of Wisconsin at Madison. Most of it is used for health services and buses but some is allocated by the student government association to student groups. Several students objected, on the basis of "deeply held religious and personal beliefs," to being forced to pay this fee to support groups involved in political and ideological advocacy. These groups included a public interest research group, a womens' center, an environmental group, an AIDS support group, a NOW student organization, a lesbian-gay campus center, etc.

2.Trial. The students filed suit, asserting that their free speech and association rights under the First Amendment were violated by their being required to support these organizations. The trial court agreed with the students and issued an injunction. The injunction prohibited the University from collecting fees from the students for such use, and it established an opt-out procedure.

3.Appellate Court Ruling. The University appealed to the Seventh Circuit Court of Appeals. The appellate court affirmed the lower court, although it narrowed the scope of the injunction.

a.The court approached the case by balancing two competing rights. On the students' side there was the right under the First Amendment not to be compelled to contribute to organizations whose expressive activities conflicted with their

beliefs. From the perspective of the University, there was the right to choose to carry out its educational mission by providing a forum for a range of diverse expressive activities. The court concluded as follows:

> Funding of private organizations which engage in political and ideological activities is not germane to a university's educational mission, and even if it were, there is no vital interest in compelled funding, and the burden on the plaintiff's First Amendment rights to "freedom of belief" outweighs any governmental interest.

b.The Court held that the University could not use activity fees of objecting students to fund such organizations. In so holding, it relied upon two earlier Supreme Court rulings, involving mandatory fees paid to a state bar association and mandatory union dues where part of the funds in each instance was used, impermissibly under the Court's holding, to support political or ideological purposes. Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Keller v. State Bar of California, 496 U.S. 1 (1990).

c.Finally, the Seventh Circuit held that the University could devise a fee system that would protect these student rights, presumably referring to an "opt-out" system of some kind. However, the court indicated that it would not develop such a system and impose it on the university.

C.Other Rulings.

1.A Different Judicial Approach. Other cases have addressed the same issue but with a different outcome. The courts in these cases accepted the view that the student fees supported, not so much any particular group, but rather a forum or marketplace for the exchange of ideas through the mechanism of a diversity of student organizations. The institution's interest in facilitating an environment in which learning, competing ideas, debate, and dissent were encouraged was held to be a legitimate interest and was viewed as sufficiently substantial in these cases to outweigh any intrusion on the speech/associational interests of objecting students. This was the holding in a recently decided case in Oregon where students objected to fees going to a public interest research group. Rounds v. Oregon State Board of Higher Education, No. 97-35189 (9th Cir. Feb. 23, 1999). See also Good v. Associated Students of the University of Washington, 542 P.2d 762 (Wash. 1975)(students successfully challenged mandatory membership in associated students of University of Washington but not the mandatory student fee); Veed v. Schwartzkopf, 353 F.Supp. 149 (D.Neb 1973)(student challenge to mandatory fees to fund campus speakers and newspaper rejected); Larson v. Board of Regents of the University of Nebraska, 204 N.W.2d 568 (Neb. 1973).

2.California Litigation. Another recent "mandatory fee" case receiving attention arose in California. Students there challenged, by means of a lawsuit, the authority of the Regents of the University of California to impose a mandatory fee in several contexts: with respect to fee-support of the Student Senate, with respect to fee-support of student government association lobbying activities, and with respect to fee-support of registered student groups engaging in political/ideological activities. Smith v. Regents of the

University of California, 844 P.2d 500 (Cal. 1993).

a.The case found its way to the California Supreme Court.

-Concerning the fee-support for the Student Senate, the court sent the issue back to the trial court for a determination as to whether the educational benefit of such organization did or did not outweigh the burden on dissenting student speech. On remand, the lower court found that the Student Senate had substantial educational value and upheld fee-based funding, even though the Senate occasionally took positions on local, state, and national issues that could be characterized as "political." This ruling was affirmed on appeal. On remand, 65 Cal.Rptr.2d 813 (Ct.App. 1997).

-Concerning the matter of fee-support for lobbying by the SGA and other student groups, the California Supreme Court held that the incidental educational benefit of such activities did not justify the burden on the First Amendment free speech rights of objecting students. The University therefore had to either eliminate the groups that were predominately political/ideological (as contrasted with being predominantly educational) from being eligible for funding or offer students an "opt out" arrangement allowing them to deduct an appropriate amount from their activity fee.

b.In 1997, the Regents responded by adopting an absolute ban on fee funding for any group that engages in lobbying, even if dissenting students were given the opportunity to "opt out." In January of this year, the federal district court for the Northern District of California ruled that such an absolute ban was not required by previous holdings in the case. Associated Students of the University of California at Riverside v. Regents of the University of California, No. C 98-0021 CRB (N.D.Cal. Jan 8, 1999).

3.Pending Cases. Other challenges to mandatory student fees are currently pending in Minnesota and Ohio.

D.Supreme Court Decision Awaited. The Supreme Court's ruling will provides some much needed guidance in this area for public universities. Interestingly, fifteen states and a number of higher education organizations have filed "friend-of-the-court" briefs asking that the Seventh Circuit decision be reversed.

III.AFFIRMATIVE ACTION AND "DIVERSITY"

A.The Center of the Storm. Affirmative action is being challenged in the courts and debated throughout our society today. Much of the litigation and debate relates to hiring and admissions practices on college and university campuses. When is affirmative action permissible? When does it violate the rights of non-minorities? For public universities, the controversy typically implicates the Equal Protection Clause of the Fourteenth Amendment, which is invoked by those claiming that affirmative action involves public entities in reverse discrimination.

B.Important Recent Ruling - Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998). Wessman represents the latest in a number of cases of relevance to higher education in which race-

based policies were subjected to constitutional review at the level of a federal court of appeal.

1.Facts. Boston Latin High School, a prestigious public high school, had an admissions policy under which one-half of the places were assigned based on a composite of grades and standardized test performance. The other one-half were allotted generally in proportion to the racial composition of the applicant pool (e.g., if 10% of pool were Hispanic, 10% of class should be Hispanic). A 35% set-aside for minority students had been required under a court order in effect from 1974-1987 and had been voluntarily maintained after that until it was abandoned following a 1996 reverse discrimination law suit. If admissions were strictly merit-based, approximately 15-20% of each entering class over a 10 year period would have been black and Hispanic. A white student was rejected, although she had a composite score higher than some black and Hispanic individuals who were admitted. She sued.

2.Trial Court Ruling. The district court upheld the plan, using a "strict scrutiny" analysis. This test, the most difficult to satisfy of several used for Equal Protection claims, requires that a race-conscious plan or action serve a compelling governmental interest and to be narrowly tailored to achieve goal. The necessity of using strict judicial scrutiny to evaluate race-based practices was established by the U.S. Supreme Court in City of Richmond v. J.S. Croson Company, 488 U.S. 469 (1989) and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); see also Miller v. Johnson, 515 U.S. 900 (1995)(central mandate of Equal Protection Clause is racial neutrality in governmental decision-making; "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). The district court found here that an interest in promoting a diverse student body, as well as an interest in overcoming the vestiges of past discrimination, were compelling. Wessman v. Boston School Committee, 996 F.Supp. 120 (D.Mass. 1998).

3.Court of Appeals Decision. On appeal, the First Circuit Court of Appeals reversed the lower court (2-1).

a.It rejected the idea that diversity can never be a compelling government interest, thus supporting Justice Powell's concurring opinion in the famous case of Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and recognizing Bakke as having continuing validity until the Supreme Court declares otherwise. The Court further acknowledged the educational value of diversity in backgrounds among students.

b.But the Court found that diversity failed as a sufficient justification for this policy.

-First, it criticized the policy for focusing only on racial/ethnic diversity and taking into account only five racial groups. Real diversity is broader than that.

-Since a merit-based approach would have produced a measure of racial diversity, the policy appeared to be simply a means for achieving what was regarded by school officials as a desirable racial mix. The school asserted that it was attempting to address racial "underrepresentation" but the

court replied: "Underrepresentation is merely racial balancing in disguise - another way of suggesting that there may be optimal proportions for representation of races and ethnic groups in institutions." Id. at 799.

-The school also advanced the concept of avoiding "racial isolation," a phenomenon that was thought to make it difficult for minority students to express themselves. Some minimum level of minority presence, arguably, was needed to overcome the effects of racial isolation. This concept the Court found "extremely suspect," because it was premised on the notion that individuals are a product of their race, in terms of how they think and behave. The Court characterized such a view as amounting to impermissible racial stereotyping. Moreover, the school failed to produce evidence to support this proposition.

-Finally, the Court observed that Bakke did not endorse a policy under which a student might be foreclosed from vying for a place in a class because of the student's race, which happened here to non-minority students. The policy therefore failed to meet the Bakke standard regarding diversity.

c.The school also argued that the policy should be upheld as a means for addressing vestiges of past discrimination. The First Circuit disagreed.

-The court emphasized that the public schools in Boston, though once found to have been guilty of racial discrimination, had carried out their desegregative duties; in 1987 the school system had been declared "unitary," that is, desegregated. After that, there was no ongoing obligation on the part of the school system to remedy any particular racial balance: "The mere fact that an institution once was found to have practiced discrimination is insufficient, in and of itself, to satisfy a state actor's burden of producing the reliable evidence required to uphold race-based action." Id. at 1021.

-The school then attempted to argue that an alleged achievement gap at the primary level between these minorities and white and Asian students constituted a vestige.

*The court was not convinced that the gap was the product of discrimination; that is, the causal connection was not established by the evidence.

*Moreover, the discrimination may be that of society in general, not the school.

*Beyond that, the policy was viewed by the Court as too broad and not narrowly tailored to curing the harm done to the actual victims.

4.Broader Implications. Wessman had several implications for higher education.

a.The First Circuit Court of Appeals was equivocal regarding whether or not diversity may be a compelling state interest. It assumed without deciding that diversity may in some circumstances be sufficiently compelling to justify race-conscious actions. Here it parted company with the Fifth Circuit in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (University of Texas law school admissions policy targeting certain percentages of Mexican-American and African-American students held unconstitutional; diversity not a compelling interest) and perhaps the District of Columbia Circuit in Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C.Cir. 1998)(diversity not a compelling interest in an employment context; FCC regulations requiring stations to make special efforts to recruit minorities were unconstitutional). But it imposed a heavy, particularized burden of proof on any entity that would base race-conscious actions on such a foundation. The Court insisted that proponents of the race-based admissions policy demonstrate from the evidence how use of the policy would improve learning over learning outcomes that may be expected in the absence of the policy.

b.Similarly, reliance on present effects of past discrimination must be sustained by clear and strong evidence tying current problems to past illegal actions.

C.Other Cases. There are a number of other cases, presently in litigation or recently concluded, in which challenges are being raised to affirmative action activities of colleges and universities.

1.F.Buddie Contracting, Ltd. v. Cuyahoga Community College District No. 1 (N.D.Ohio Oct. 21, 1998). In Ohio, a federal district court judge ruled late last year that a college minority set-aside policy applied to prime contractors was unconstitutional and held college officials who approved such policy personally liable. The set-aside was adopted pursuant to state law which required it.

2.Wooden v. Board of Regents of University System of Georgia (S.D. Ga.).

a.In Georgia, a federal district court judge held in January of this year that the University of Georgia's admissions policy that gave a preference to black applicants was unconstitutional. Suit had been filed in 1997 by a group of white and black students and parents opposed to affirmative action; they charged that the state had failed to desegregate the system of higher education. The policy, which had been dropped by the University in 1996, used two tracks, one for black applicants and one for all others; standards in the first track were lower than standards in the second. The judge rejected the diversity defense, stating that any benefits it might bring were outweighed by "stigmatizing, polarizing costs imposed by racial classifications." The University now uses race as one of fifteen factors.

b.In a ruling issued July 6, the same judge dismissed a claim brought by a white applicant challenging racial preferences used by the University of Georgia to admit minority students. The University admitted from 10-20% of the class by considering one or more non-academic factors, including race. The dismissal was based on the fact that the plaintiff would not have qualified for admission even if the racial preferences had not been used. While the judge did not rule on the

University's affirmative action admissions program, he was sharply critical of it: "UGA cannot constitutionally justify the affirmative use of race in its admissions decisions." The use of diversity as a justification is insufficient, he said, as it is not a compelling interest and derives from stereotypical thinking about race (i.e., those of one race are assumed to think differently from those of another race).

3.Smith v. University of Washington Law School (W.D.Wash.). In the State of Washington, a ruling has been reported in the affirmative action lawsuit involving the University of Washington law school. The federal district court has decided that Bakke is the authority that will be used to evaluate the constitutionality of the law school's affirmative action admissions program. This means that "racial diversity" may be asserted as a "compelling interest." The court added, however, that rigorous scrutiny would be applied to determine whether the program was narrowly tailored to achieve such diversity. The ruling has apparently been appealed and the parties are now awaiting a ruling the Ninth Circuit Court of Appeals. The plaintiffs are represented by the Center for Individual Rights, which represented Cheryl Hopwood and other plaintiffs in the Hopwood case.

4.Gratz v. Bollinger (E.D.Mich) and Grutter v. Bollinger (E.D.Mich). These cases challenging University of Michigan admissions policies, generally and in the law school, remain pending. The cases include a claim of personal liability against university administrators, on the theory that they should have known that the admissions criteria violated the Constitution. Cf. Alexander v. Estepp, 95 F.3d 312 (4th Cir, 1996) (county administrators operating race-based hiring program were not protected by qualified immunity defense available to public officials because recent court decisions have put officials on notice regarding the legal vulnerability of affirmative action programs). The plaintiffs in these suits are also represented by the Center for Individual Rights. It has been reported that a compendium entitled "The Compelling Need for Diversity in Higher Education" has recently been published by a team of scholars assembled to serve as experts in this case.

D.Where We Are.

1.Some Light. Under Supreme Court decisions in Croson and Adarand, it is clear that all race-based policies or practices, whether benign or not, are to be assessed under the strict scrutiny standard. The objective of remedying the present effects of past discrimination is without question a legitimate "compelling governmental interest" under strict scrutiny. Brown v. Board of Education, 347 U.S. 483 (1954). What has remained unclear is whether the goal of fostering racial diversity also qualifies as such a compelling interest.

2.Assault on "Diversity" Justification. Since Adarand, diversity has been rejected by circuit courts of appeal as a sufficient compelling interest in admissions (Hopwood) and in employment (Taxman v. Piscataway, 91 F.3d 1547 (3rd Cir. 1996)(diversity found not to be a valid Title VII objective in case involving public school district lay-off plan) and Lutheran Church). Some hostility to it was expressed in the case of Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1138 (1995)(case involved scholarship reserved for black students at public university). It has not been accepted by any federal appellate court. Other decisions at the trial court level are mixed. Diversity is almost certainly vulnerable to challenge as a basis for employment decisions at present and is, at best, a questionable basis for any race-based policy by educational entities.

3.CIR. The Center for Individual Rights, a conservative organization based in Washington, D.C., has been and is aggressively challenging race-based policies in higher education in a number of states, including Michigan, Washington, Texas, California, Florida, and Alabama. It has published a manual entitled, "Racial Preferences in Higher Education" for students, suggesting that universities with affirmative action policies are violating the law, and for trustees, suggesting that they risk personal liability for their institution's affirmative action policies.

4.Developing and Articulating a Defense for Affirmative Action. On the other hand, there are initiatives being taken to support and defend on an empirical basis the value of affirmative action policies generally for higher education. William G. Bowen and Derek Bok have just published The Shape of the River, characterized by Newsweek as "the most ambitious and comprehensive study to date of the effects of affirmative action in higher education." The document, "The Compelling Need for Diversity in Higher Education," developed for the University of Michigan, was mentioned above.

5.Permissible "Diversity-Related" Factors in Admissions. What kinds of factors may presently be considered by public universities to increase racial diversity in their student bodies, without inviting legal challenge?

a.Justice Powell, in his concurring opinion in the Bakke case, recognized certain permissible diversity factors: exceptional personal talents, unique work or service experience, leadership potential, demonstrated compassion, a history of overcoming disadvantage, an ability to communicate with the poor, and geographical background.

b."While the use of race per se is proscribed, state-supported schools may reasonably consider a host of factors - some of which may have some correlation with race - in making admissions decisions." Hopwood at 946. Some of the factors identified by the Hopwood court included economic and social background, whether an applicant's parents attended college, home state, relationship to university alumni, and (for a graduate school) unusual or substantial extracurricular activities affecting undergraduate grades. "We recognize that the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race. This correlation, however, will not render the use of the factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race." Id. at 947, n. 31.

c.The Handbook for Trustees published by the Center for Individual Rights suggests the following as permissible "diversity" enhancing considerations: geographic origin, work experience, record of leadership, civic involvement, record of overcoming hardship, demonstrated maturity, scholarly interests, and musical or other talents. The Handbook further suggests that an institution may do the following in an attempt to increase the number of minority admittees: broaden admissions criteria, increase the weight given grades, discontinue giving differential weight to high school grades based on the high school, increase the weight given applicant essays, increase the number of applicants given full-file review, increase the number of applicants interviewed, and aggressively recruit admitted applicants.

d.Several systems, such as public colleges in Texas and the University of California, are granting automatic admission to applicants who graduate within a specified percentage (e.g., 4%, 10%) at the top of their class in an attempt to increase the number of minority admissions.

E.Help from the Supreme Court. It seems likely that the Supreme Court will address this issue in the near future.

IV.ACADEMIC FREEDOM

A.Faculty Speech in the Classroom - What Limits?. A number of cases in recent years have dealt with the intersection of institutional vs. individual faculty member rights in the context of classroom speech. Unlike the foregoing issues, there appears to be a generally clear judicial consensus about the extent of respective university and faculty rights to determine at least the content of instructional speech in the classroom.

B.Edwards v. California University of Pennsylvania, 156 F.3d 488 (3rd Cir. 1998). The Third Circuit Court of Appeals dealt with this issue recently in a suit brought against the university by a tenured professor claiming his First Amendment rights had been violated.

1.Factual Setting. Professor Edwards was a faculty member in the Education Department at the California University at Pennsylvania. He taught a course, "Introduction to Educational Media," which historically dealt with the use of various classroom tools (film, writing boards, etc.). As time went on, Edwards began to place more emphasis, in the syllabus, on issues of religion, humanism, bias, censorship, etc. After a student complained in 1990, Edwards was told to cease using materials of a religious nature in class. A new department chair in 1992, with faculty support, instructed Edwards to use an earlier version of the syllabus. He was later suspended with pay for a semester when he failed to attend all classes of a new course he was assigned to teach.

2.Suit and Trial. Edwards sued the University, claiming violation of his First Amendment free speech rights; the complaint also included due process, equal protection, and other claims. The latter were dismissed prior to trial. The jury returned a verdict for the University and Edwards appealed.

3.Appellate Court Holding. The appellate court ruled against Edwards.

a.At the heart of his claim was the assertion that the University violated his constitutional free speech rights when he was restricted in his choice of curriculum materials and subjects for his classes. The Court of Appeals rejected, however, any claim that the First Amendment gave Edwards such rights: "[A]s a threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom." Id. at 491.

b.In reaching this conclusion, the Court relied on Supreme Court law making a distinction between speech outside the classroom and in-class speech. The key to this distinction is understanding when it is that the university is "speaking." The Court quoted from the case of Rosenberger v. Rector and Visitors of University

of Virginia, 515 U.S. 819 (1995), as follows:

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker.

In this case, the university's actions dictating the syllabus and content of Edwards' course fell within the scope of its rights under this language - it was acting as speaker and was entitled to make content based choices. This was quite different from the situation where the university was dealing with the speech of private parties and groups, in which case it could not discriminate based on the content of the speech involved.

c.The Court concluded by revisiting the definition of academic freedom established by the Supreme Court in earlier cases as including four essential elements, two of which were a university's right to determine what may be taught and how it may be taught.

d.Thus, Edwards could exercise discretion in making decisions about course content, consistent with established or expressed university policy regarding the curriculum, but he had no right to use curriculum materials in contravention of university policy.

C.Other Decisions.

1.Higher Education Context.

a.A similar case was decided by the Eleventh Circuit in 1991. Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

-There a faculty member at the University of Alabama, Dr. Bishop, had been instructed, in a memorandum from his department chair, to refrain from interjecting his religious beliefs during the teaching of his classes and to cease conducting optional classes at the University during which he discussed various academic topics from a Christian perspective. Dr. Bishop sued, claiming the restrictions violated his free speech and free exercise of religion rights under the First Amendment.

-The issue, according to the Court, was, "to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher." The Court did conclude that the restrictions involved here implicated Dr. Bishop's First Amendment rights. However, it also recognized the university's authority to reasonably control the content of its curriculum, especially as presented in the classroom, and also at any other times when it may appear that a faculty member is acting under the auspices or sponsorship of the university. The latter encompassed voluntary classes conducted on campus by Dr. Bishop.

In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute. [Dr. Bishop's] educational judgment can be qualified and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgment.

Again,

The University has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish . . . on them; nor could it prohibit him. The University has simply said that he may not discuss his religious beliefs or opinions under the guise of University courses.

b.A request from college officials to a faculty member not to discuss in class an incident involving a student did not violate the faculty member's First Amendment rights. Bowers v. Reutter, 951 F.Supp. 666 (E.D. Mich. 1997).

2.Secondary School Context.

a.A school board's termination of a teacher for allowing students to use profanity in plays and poetry did not violate the teacher's First Amendment free speech rights, in view of fact that board had a policy of prohibiting profanity in creative activities and such policy was related to a legitimate academic interest. Lacks v. Ferguson Reorganized School District R-2, 147 F.3d 718, 127 Ed.Law Rep. 568 (8th Cir. 1998), suggestion for rehearing denied 154 F.3d 904.

b.A secondary school teacher's showing of an R-rated film in class could be regulated by the school district without violating the teacher's free speech rights. Use of such a film constituted curriculum and thus was school-sponsored speech. As such, it fell within the district's policy regarding "controversial learning resources." The court said it would allow regulation as long as the policy was reasonably related to legitimate pedagogical concerns (which here had to do with preventing students from being exposed to graphic sex, violence, vulgarity, etc.). Board of Education of Jefferson County School District R-1 v. Wilder, 960 P.2d 695 (Colo. 1998).

D.Speech "Outside the Classroom". Different issues are presented when a university attempts to regulate or sanction a faculty member for non-course related speech. The Supreme Court has provided the framework for analyzing such issues in a series of decisions rendered during the period from the late 1960s to the early 1980s. Pickering v. Board of Education, 391 U.S. 563 (1968); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); and Connick v. Meyers, 461 U.S. 138 (1983).

1.Personal vs. "Public" Speech. The courts have distinguished here between speech that relates to personal concerns and speech that relates to public concerns.

a.Where speech falls into the former category and does not deal in some way with political, social, or other community concerns, it is not constitutionally protected. Generally speaking, a faculty member who speaks about matters of primarily private interest may be subject to discipline by the university without implicating the First Amendment. Examples would include individual employment issues - salary, assignments, departmental or university policy, etc.

b.On the other hand, expressive activity that relates to broader issues of public concern where the faculty member speaks not just as an individual employee but as a citizen of the community, is First Amendment speech. This might include, for example, comments about lowering of academic standards, the use of public funds, preferential treatment given to athletes, etc.

2.Balancing Test. Once it is determined that a faculty member's speech, for which he/she was disciplined, related to matters of public concern, then courts engage in a balancing test to decide whether the university is entitled to impose discipline. A court will weigh first the individual's interest in having the speech activity protected and may also take into account the value of the speech to the public. On the university's side, the court will take into account the impact of the speech on legitimate employer interests, such as morale, the effective functioning of the unit, employee relations, etc.

3.Recent Illustrative Decision. In Williams v. Alabama State University, 102 F.3d 1179 (11th Cir. 1997), an English instructor was denied tenure at ASU. She claims that the decision was made in retaliation for her criticisms of a textbook authored by an administrator and other faculty. The Eleventh Circuit Court of Appeal held that such criticisms do not touch matters of sufficiently general interest to be protected. Such speech was contrasted with a critique of facilities, curriculum, faculty-student ratios, status of accreditation, performance of graduates on licensing exams, etc., which would touch on general concern. Therefore, according to the Court, the plaintiff had no claim.

V.SUNSHINE LAWS - PUBLIC RECORDS AND OPEN MEETINGS.

A.Student Disciplinary Records - FERPA vs. Public Records Laws.

1.Background. For some time, there has been confusion about extent to which student discipline records can be obtained by requesting parties, often campus or local newspapers, under state public records laws. Those requests have been viewed by many universities as conflicting with their obligation of nondisclosure under the federal Family Education Rights and Privacy Act (FERPA), which protects education records against unconsented disclosure.

a.Under FERPA, any document that is considered an "education record" is protected against disclosure without the student's consent, unless one of several exceptions apply. An education record is any document, file, etc. containing information directly related to a student and maintained by an educational institution.

20 U.S.C.S. §1232g(a)(4)(A). Under the Higher Education Amendments (HEA) of 1992, law enforcement records - records created by a campus law enforcement unit for a law enforcement purpose - are expressly placed outside the scope of what is an education record. Thus law enforcement records are subject to disclosure under state public records laws.

b.What about campus discipline records? Are they law enforcement records or education records? In January 1995, the Department of Education addressed this issue through the issuance of administrative regulations; it said that discipline records are education records. The regulations further defined a "disciplinary action or proceeding" and stated that a record created by a campus law enforcement unit but maintained by it for some other purpose or maintained by some other campus unit was not a law enforcement record.

2.Controversy Continues. Notwithstanding that clarification, the issue has remained unsettled in the courts.

a.The Miami Student v. Miami University., 680 N.E.2d 956 (Ohio 1997). In this case, campus newspaper editors sought full disclosure of student discipline proceedings for specified years under the Ohio public records law. They intended to develop a data base and track student crime trends. The editors agreed that the name and PIN of any student defendant could be redacted. The University deleted other data and provided the records. Suit was filed by the newspaper.

-The court held that the public records law was to be broadly construed in favor of disclosure and all doubts resolved in favor of access. Interestingly, it then found that these discipline records were not education records as defined by FERPA, because they were nonacademic in nature (that is, not related to academic performance, financial aid, etc.). Therefore, disclosure was required. As "salt on the wound," the University had to pay the plaintiffs' attorneys' fees. The court relied on a similar ruling in a 1993 case involving the University of Georgia (Red & Black Publishing Co. v. Board of Regents of University System of Georgia, 427 S.E.2d 257 (1993)(discipline records regarding hazing charges filed against a fraternity were not an "education record" and must be disclosed to the campus newspaper pursuant to a public records request).

-The dissenting judge pointed out the 1992 HEA and the Department of Education interpretation in administrative regulations and argued that federal law is to take precedence over the public records statute under the express terms of that statute. He took the position that the records could be released as long as all personally identifiable information therein was deleted.

b.Two related cases.

-Kirwan v. Diamondback, No. 57 (Md. 1998): The campus newspaper at the University of Maryland sought the records of parking tickets issued to basketball players. There were allegations that a player had

accepted a loan to pay his ticket fines, resulting in an NCAA investigation, and the paper also asked to see correspondence between the University and the NCAA regarding this matter. The University contended that student ticket records were protected by FERPA. The Maryland Supreme Court disagreed, however, finding that these documents were not part of the education record.

-Connoisseur Communications of Flint, L.P., dba WFDR-FM v. University of Michigan, 584 N.W.3d 747 (1998): A radio station reporter requested, under the state freedom of information law, copies of University of Michigan records regarding an accident involving a basketball player. The University refused on the ground that such records fell within FERPA and could not be disclosed without the student's consent. The court agreed and refused to order the records' release.

3.Statutory Changes. Under two amendments to FERPA, some limited disciplinary record information may now be released.

a.Universities were allowed under an earlier, 1990 amendment to release to a victim of a crime of violence the results of any disciplinary proceeding conducted by the institution regarding such offense. 20 U.S.C.S. §1232g(b)(6).

b.The Higher Education Amendments of 1998 extended that rule to victims of any nonforcible sex offense. 20 U.S.C.S. §1232g(b)(6)(A). Also, the types of "releasable" information have now been specified: the "final results," defined to include the name of the student-perpetrator, the violation, and the sanction imposed. 20 U.S.C.S. §1232g(b)(6)(C).

B.Open Meetings. Almost all states have "open meeting" laws that require public bodies to provide some kind of notice of, and to allow members of the public to be present during, meetings during which deliberations occur and decisions are made.

1.Who is Covered? What entities are subject to a state's open meeting statutes? That was the issue in Smith v. City University of New York, 685 N.Y.S.2d 910 (Ct.App. 1999).
a.In New York, a Community College Association was established as a separately incorporated organization comprised of administrators, faculty, and students. It was authorized to take certain actions with respect to student activity fees collected by LaGuardia Community College, namely, to review budgets from student groups, to allocate student activity fees, and to authorize disbursements. It also had the power to oversee and regulate student publications. In 1993 the Association suspended publication of the student newspaper; the suspension was subsequently lifted, but restrictions were imposed on the newspaper. The editors attempted to attend the meeting at which these actions were taken but they were excluded. They sued under the New York open meetings law, which applied to any entity performing a "governmental function for the state".

b.The case went to highest New York appellate court, which held that the Association was a public body. Its actions were not advisory. It possessed real

decision-making powers regarding the expenditure of public funds (student activity fees) and to regulate student publications. "All these functions taken together render it a public body." Id. at 914.

c.The lesson is clear: even an organization that is separate and autonomous from a state educational institution may, if it exercises substantive public functions, be subject to open meetings laws in some states.

2.Presidential Searches. The question of the extent to which university presidential-searches must be conducted in public has produced considerable conflict. The Michigan Supreme Court recently ruled in favor of state university in a lawsuit brought by several newspapers seeking an injunction prohibiting a Michigan State University (MSU) search panel from conducting its sessions in public. Federated Publications, Inc. v. Board of Trustees of Michigan State University, No. 109663 (Mich. Jun 15, 1999). Since the Michigan Constitution confers upon the MSU board of trustees the absolute authority to manage and control the university, the Court ruled that the legislature lacked the power to mandate how the board may carry out this important prerogative: "We hold that the application of the OMA [open meetings act] to the internal operations of the university in selecting its president infringes on the defendant's constitutional power to supervise the institution."

3.Informal Communications. Can members of a board of regents communicate with each other using the telephone and the facsimile machine, in the context of open meeting law requirements? No, according to the Nevada Supreme Court. In a 1998 decision, the Nevada high court held that "use of serial electronic communication to deliberate toward a decision or to make a decision" contravenes the intent of such law. Papa v. The Board of Regents of the University and Community College System of Nevada, No. 28966 (Nev. Apr. 1998).

VI.THE ELEVENTH AMENDMENT IMMUNITY FOR STATE ENTITIES.

A.Historical Background.

1.The Nature of the Immunity. The Eleventh Amendment to the U.S. Constitution grants states, along with their agencies and instrumentalities, an immunity from suits brought in federal court by private parties. Public universities have generally been held to be state instrumentalities entitled to the protection of the Eleventh Amendment. This "state sovereignty" immunity has been applied to protect more than simply the state or state instrumentality itself. An action brought against the officials of such an entity "in their official capacity," that is, where the claim seeks to impose a liability that would be paid from public funds, is also barred by the Eleventh Amendment.

2.The Fourteenth Amendment "Exception". In recent years, the U.S. Supreme Court has recognized a significant limitation on the scope of this immunity.

a.That limitation traces back to the post-Civil War period when another Amendment, the Fourteenth, was added to the Constitution. The Fourteenth Amendment imposed on states the obligation to act in such a manner as not to deny persons "due process of law" or "equal protection of the laws." The power to enforce

this obligation through implementing legislation was conferred upon Congress by §5 of the Amendment.

b.In 1976 the Supreme Court addressed the issue of whether Title VII of the Civil Rights Act of 1964, barring discrimination based on race, color, national origin, sex, and religion, could be extended by Congress to state and local governments. The Court answered this question in the affirmative, on the theory that such an extension was a legitimate exercise of Congress' enforcement powers under the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Thus, after Fitzpatrick it was clear that Congress may, acting pursuant to the Fourteenth Amendment, abrogate state immunity by passing a law that creates private rights and authorizes individuals to sue a state or state officials in federal court for breach of those rights. In a more recent case, a plurality of justices found that the Interstate Commerce clause of Article I of the federal Constitution also granted Congress the power to override a state's Eleventh Amendment immunity. Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989).

3.Other Exceptions. There are two other exceptions to state sovereign immunity. A state may waive its immunity, though the intent to do so must be clear. The typical scenario raising the issue of waiver is presented when a state chooses to participate in a federally funded program and Congress has declared that participation constitutes a waiver regarding suits arising out of such program. As a second exception, a federal court may entertain a suit against a state official for injunctive relief to apply prospectively to end or prevent violations of federal law. Ex parte Young, 209 U.S. 123 (1908).

4.Suits by United States/Other States. It is important to note that the Eleventh Amendment bar applies only to suits brought by private parties in federal court against a state or a state entity. The United States or another state may bring such a suit without any constitutional impediment.

B.A "Watershed" Decision - Seminole Tribe. The Supreme Court has now reformulated some of these rules in the case of Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996).

1.History of the Case. The Seminole Tribe had sued the Governor and the State of Florida under the Indian Gaming Regulatory Act (IGRA). This legislation, enacted under the Indian Commerce Clause of the U. S. Constitution, permits an Indian tribe to conduct certain gambling activities if authorized under a compact entered into by the tribe and the state. The state is obligated to negotiate regarding such a compact, failing which the Act authorizes suit to be brought against the state to compel it to do so. When the Seminole Tribe brought such a suit, the defendants argued that it was precluded by the Eleventh Amendment.

2.Article I and the Power to Abrogate. The Supreme Court agreed (in a 5-4 split decision). Since Congress evidenced an unmistakably clear intent in the IGRA to abrogate state immunity, the question before the Court was whether it had the power to accomplish that intent. That is, was the IGRA enacted pursuant to a constitutional provision adequate to confer such power upon Congress? The Indian Commerce Clause is indistinguishable from the Interstate Commerce Clause in Article I of the Constitution, so

the former provision was advanced as the basis for Congressional authority under the rule of the Union Gas case. The Supreme Court, however, decided that the Union Gas holding was in error and overruled it. Article I, it declared, cannot be used to expand federal jurisdiction over states (that is, allowing federal courts to entertain claims against state entities) in the face of the Eleventh Amendment restriction on that jurisdiction.

3.Power to Abrogate under the Fourteenth Amendment. Fitzpatrick was left in place by the Court, which recognized that the Fourteenth Amendment was passed with the specific objective of "expanding federal power at the expense of state autonomy." Seminole Tribe, 116 S.Ct. at 1125.

4.Claims against State Officials. With respect to the claims asserted against the Florida Governor, the Court decided that, because the IGRA included a detailed remedial scheme directed at states, but not state officials, it would not be consistent with congressional intent to allow a state official to be brought into federal court, under Ex parte Young, as a means of enforcing the Act.

5.Reverberations in the Circuits. Seminole Tribe has been called a "watershed" case in Eleventh Amendment jurisprudence. The Fourteenth Amendment now stands as the only source of congressional authority to abrogate a state's federal court immunity. The Court's ruling has prompted review of the underlying authority for a number of regulatory laws currently applicable to states. Analysis of subsequent cases in the three Southeastern federal circuits (the Fourth Circuit, encompassing South Carolina, North Carolina, Virginia, West Virginia, and Maryland), the Eleventh Circuit (encompassing Alabama, Georgia, and Florida), and the Fifth Circuit (encompassing Texas, Louisiana, and Mississippi) is summarized below.1

a.Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, which bars discrimination in employment based on race, color, religion, sex, or national origin, is clearly based on the Fourteenth Amendment and should be unaffected by Seminole Tribe. A federal district court in Alabama has so held. Reynolds v. Alabama Department of Transportation, 4 F.Supp.2d 1092 (M.D.Ala. 1998).

b.With respect to the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., Congress declared, in the findings and purposes preamble, that it was proceeding under the Fourteenth Amendment (and the Commerce Clause) § 12101(b)(4), U.S.C.S., so it was anticipated that the ADA would likely remain enforceable against states by private parties in federal courts. All three Circuit Courts of Appeal have agreed. Amos v. Maryland Department of Public Safety, ___ F.3d ___ (4th Cir. Jun 24, 1999); Coolbaugh v. State of Louisiana, 136 F.3d 430 (5th Cir. 1998); Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998).

c.The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-634I, has been reviewed under Seminole with different outcomes: the Fifth Circuit of Appeals has held that Congress manifested an express intent to abrogate Eleventh Amendment immunity in passing the ADEA, Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998), while the Eleventh Circuit Court reached the opposite conclusion. Kimel v. State of Florida Board of Regents, 139 F.3d 1426

(11th Cir. 1998), cert. granted 119 S.Ct. 901 (1998). The U.S. Supreme Court has taken this latter case on appeal.

d.The Fifth Circuit and a federal district court in Georgia have found that Congress successfully abrogated the state's Eleventh Amendment immunity when it enacted the Equal Pay Act, 29 U.S.C. §206(d), which prohibits discrimination on the bases of sex for "equal" work. Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998); Belch v. Regents of the University System of Georgia, 27 F.Supp.2d 1341 (M.D.Ga. 1998).

e.Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, prohibits discrimination on the basis of sex in any educational program or activity receiving federal funds. A federal district court in Virginia has held that Title IX does abrogate a state's Eleventh Amendment immunity. Thorpe v. Virginia State University, 6 F.Supp.2d 507 (E.D.Va. 1998).

f.As expected, courts have generally agreed that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., which makes illegal race and national origin discrimination in any program receiving federal funds, was passed by Congress with the requisite intent to eliminate state sovereign immunity. Lesage v. State of Texas, 158 F.3d 213 (5th Cir. 1999); Sandoval v. Hagan, 7 F.Supp.2d 1234 (M.D.Ala. 1998).

g.Courts in these Circuits have viewed the Fair Labor Standards Act, 29 U.S.C. §201 et seq., as having been enacted under the Commerce Clause, thus leaving the states' Eleventh Amendment immunity intact. Palotai v. University of Maryland College Park, 959 F.Supp 714 (Md. 1997); Frazier v. Courter, 958 F.Supp. 252 (W.D.Va. 1997); Chauvin v. Louisiana, 937 F.Supp. 567 (E.D.La. 1996); Walden v. Florida Department of Corrections, No. 95-40357 (N.D.Fla. Jun 24, 1996); see Abril v. Virginia, 145 F.3d 182 (4th Cir. 1998).

h.Federal jurisdiction to entertain suits against a state or one of its instrumentalities has been assessed under several other statutory schemes. The Fourth Circuit has held that claims may not be brought against a state under the Bankruptcy Code, Schlossbergv. Comptroller of Treasury, 119 F.3d 1140 (4th Cir. 1997), cert. denied 118 S.Ct. 1517 (1998), while the Eleventh Circuit has ruled that the state of Georgia waived its Eleventh Amendment immunity by filing a proof of claim in two bankruptcy proceedings, In re Burke, 146 F.3d 1313 (11th Cir. 1998), cert. denied ___ U.S. ___ (U.S. Jun. 24, 1999). A Florida federal district court has dismissed a claim brought against the state under the Family and Medical Leave Act, 29 U.S.C. §2901 et seq., guaranteeing a period of unpaid leave to certain employees to care for young children, ailing family members, or themselves, because of the Eleventh Amendment. Driesse v. State of Florida, 26 F.Supp.2d 1328 (M.D.Fla. 1998).

i.The issue of whether claims under another federal statute, the Federal Claims Act, can be brought against a state will be decided by the Supreme Court. The False Claims Act permits individual "whistleblowers" to sue on the government's behalf when it is alleged that fraud has been committed against the

federal government. The high court has accepted the appeal of a Second Circuit Court of Appeal case in which a Vermont state agency, defending charges brought under this Act, was unsuccessful in asserting immunity under the Eleventh Amendment. U.S.A. v. State of Vermont, No. 97-61-41 (2d Cir. Dec. 7, 1998), cert. granted, _____ U.S. ____. The Fifth Circuit Court of Appeals has dismissed a Federal Claims Act suit filed by an individual based on a Seminole analysis. United States ex rel. Foulds v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999).

C.The Supreme Court Solidifies and Expands State Immunity. In three decisions issued in June 1999, the U.S. Supreme Court took further steps to expand and solidify the immunity of states against federal law claims.

1.Immunity from Patent and Trademark Claims. In two companion cases, the Court held (in split 5-4 decisions) that a state cannot be sued in federal court for patent and trademark-type violations. A Florida bank had sued an instrumentality of the state alleging that the latter had, by using a tuition investment/savings program developed by the bank, violated the federal Lanham Act, which forbids false advertising of a product in comparison with a competing product, and the Patent Remedy Act. The Supreme Court, however, ruled that neither law was a valid exercise of Congressional authority under §5 of the Fourteenth Amendment and that, therefore, the federal courts lacked jurisdiction to hear these claims. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, No. 98-149 (U.S. Jun. 23, 1999); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, No. 98-531 (U.S. Jun. 23, 1999).

2.The Constitution and Immunity in State Courts. A third decision issued the same day as the College Savings Bank cases added significantly to the scope of state immunity.

a.A group of probation officers had filed suit in state court charging the state of Maine with failing to give them overtime pay under the Fair Labor Standards Act (FLSA). Under Seminole, most courts considering the issue had concluded that a FLSA claim could not be brought against the state in federal court.

b.Under the rule announced in Alden v. Maine, No. 98-436 (U.S. Jun. 23, 1999), the Supreme Court (by a slim 5-4 majority) held that a state now cannot be sued in state court for violation of any federal law enacted pursuant to Congress' Article I powers. The Court explained that while the Eleventh Amendment articulates the principle of state sovereign immunity, it "confirmed rather than established sovereign immunity as a constitutional principle." The right of a state to assert an immunity in its own courts was seen as a principle that is inherent in the very structure of the Constitution: "[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."

D.What Recourse Remains? While the right of parties seeking to collect damage against state entities for federal law violations has been considerably narrowed, several options remain available.

1.United States Claims. States and their instrumentalities are still subject to suit by the federal government, which, for example, can bring Federal Claims Act and FLSA

suits.

2.Claims against State Officials. State officials can be sued for declaratory or injunctive relief and even for monetary damages in certain instances.

3.Suits under "§5, 14th Amendment" Laws. Suits brought under legislation enacted pursuant to Congress' power under §5 of the Fourteenth Amendment can still be prosecuted in federal or state court.

4.Waiver. An argument may be made that a state has waived its immunity, though that is not easy to establish.
5.Arms of the State. This immunity is enjoyed only by the state and those entities that are considered an "arm of the state"; municipalities, county governments, and other local bodies are not within the scope of the state's Constitutional immunity.

6.Claims under State Law. Finally, in some instances, it may be possible to sue in state court under a parallel state law.

E.More to Come. The last chapter in this story has not yet been written, since the Supreme Court will be ruling in the Kimel and Vermont cases mentioned above regarding a state's immunity in the context of claims asserted under the ADEA and the False Claims Act, respectively.