RECENT SUPREME COURT DECISIONS AND
IMPLICATIONS FOR HIGHER EDUCATION

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by The Hon. Harry T. Edwards

PREFACE

When I commenced work on my paper for this conference, I realized that I may have bitten off more than I can reasonably chew (and maybe even more than you can reasonably digest) in the limited time which we will share together tonight. In preparing to discuss "Recent Supreme Court Decisions and Implications for Higher Education," I confronted several dilemmas, including: the difficulties associated with facing an audience immediately after cocktails and just before dinner; the problem of too little time to cover too much material; the hazard of addressing cases that may overlap materials to be addressed by other speakers; a question regarding the appropriate time span within which to limit my review of Supreme Court decisions; and finally, the risky business of trying to assess the potential significance of certain cases in which the Supreme Court has declined to review the judgment of a lower court. Despite these dilemmas, I will plow ahead and ask your indulgence in recognition of the monumental nature of my task.

In my presentation, I will focus on four principal areas: Substantive and Procedural Due Process; Unlawful Discrimination and Affirmative Action; Labor Relations and Faculty/Administration Relations; and First Amendment issues dealing with the rights of Free Speech and Association. For lack of time, I will not address some potentially important cases dealing with Establishment Clause issues under the First Amendment, nor will I cover some interesting judicial decisions attempting to define "public" (versus "private") institutions of higher education. A number of the subjects and cases that I will discuss will be addressed in much greater detail by succeeding speakers;
my principal mission will be to give a general overview of the current work of the Supreme Court insofar as it may affect higher education, and to speculate on possible future directions of the case law from the Court.

INTRODUCTION

My general impression of the Supreme Court's decisions in recent years is that they reflect a firm reluctance on the part of the Justices to intervene in the affairs of higher education, especially when colleges and universities are carrying out their uniquely academic functions. However, I also have the impression that the Court has eschewed the notion of an "academic privilege" to protect educational institutions in cases in which colleges or universities are functioning as employers, administrators of federal funds, or, in the case of public institutions, as arms of the state.

Furthermore, it would appear that the Supreme Court has had little reluctance in upholding the applicability of federal statutes regulating employment in public colleges and universities; at the same time, however, the Court has appeared disinclined to scrutinize the constitutionality of actions taken by those institutions. While there is no evidence that the Court will tolerate infringements of well-settled constitutional rights, particularly in the First Amendment area, recent cases have continued to acknowledge the legitimate interest of public (as well as private) institutions to carry out the business of education unimpeded by judicial second-guessing.
I. DUE PROCESS IN THE ACADEMIC SETTING

A. Employees

1. Procedural Due Process

As you may recall, public institutions present unique issues in the consideration of higher education and the law. Although all institutions of higher learning operate under the constraints of statutory and common law in addition to their own moral dictates, public institutions face special constraints because they must also conform their activities to the due process requirements of the Fourteenth Amendment. Due process concerns frequently arise in two academic contexts: (1) decisions to terminate employees, and (2) decisions to sanction or deny benefits to students either for academic or disciplinary reasons. Even though these due process cases do not directly affect private schools, I have always believed that constitutional rights and protections establish a sort of moral boundary of good behavior for all institutions of higher education. Therefore, even though due process cases involve only public institutions, educators and administrators in the private sector have a continuing interest in developments in this area of constitutional law.

In one such case, the Supreme Court recently addressed the procedures that must be afforded under the due process clause to a tenured public employee who is dismissed for cause. In Cleveland Board of Education v. Loudermill, the plaintiff was hired as a security guard after falsely stating on his application that he had never been convicted of a felony. The plaintiff was later dismissed for dishonesty without an opportunity to respond to the charges. Under Ohio law, the plaintiff could be dismissed only "for cause," and he was entitled to a post-dismissal hearing before the state civil service

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commission. Loudermill filed suit alleging that the state law deprived him of liberty and property without due process because it gave him no opportunity to respond to the charges before dismissal. The Supreme Court held that the plaintiff was entitled to a pre-termination hearing even though the state statute creating his right to be terminated only "for cause" did not provide for one. In other words, the Supreme Court majority made clear that procedural due process is defined by our federal Constitution, not state law, even when it is the state law that defines the "property" interest that gives rise to a claim for procedural due process.

Yet, Loudermill stops short of requiring that the state conduct a full evidentiary hearing before dismissing a tenured employee. In the Supreme Court's view, where the state makes post-termination remedies available to the employee, the essential requirements of pre-termination due process are minimal -- they include simply notice and an opportunity to respond. Thus, a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. "To require more than this," the Court held, "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 2

The Court also noted that when the employer "perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." 3 The Court did not indicate, however, whether the existence of such a hazard is a constitutional prerequisite to such suspension. Recently, the Fourth Circuit held that a public employee's property right is limited to his paycheck, and rejected a due process

2  Loudermill, 53 U.S.L.W. at 4309.
3  Id.
challenge by an employee who was relieved of his duties. The Supreme Court has declined to review that decision.

2. Substantive Due Process

Untenured employees may also possess property rights that may not be taken away without due process. In some cases, such rights can exist independent of written contracts or express statutory provisions.

The Supreme Court introduced this concept -- sometimes known as "de facto tenure" -- in the 1972 cases of Board of Regents of State Colleges v. Roth and Perry v. Sindermann. These cases advanced the notion that faculty members subject to dismissal are entitled to procedural due process even if they do not have formal tenure, as long as they possess an expectancy of continued employment based on the employer's rules or "mutually explicit understandings" between employer and employee. In 1984, following some years of doubtful precedent, the Court gave an indication that de facto tenure is still a viable theory.

In Board of Education of Paris Union School District No. 95 v. Vail, the Court upheld a decision by the Seventh Circuit allowing a teacher to challenge the nonrenewal of his one-year contract based on an employer's oral promise that the contract would be

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4 Royster v. Board of Trustees of Anderson County Sch. Dist. No. 5, 774 F.2d 618 (4th Cir. 1985), cert. denied, 54 U.S.L.W. 3697 (U.S. Apr. 21, 1986).

5 408 U.S. 564 (1972).

6 408 U.S. 593 (1972).

7 Id. at 601.

renewed for a second year. Even though the contract itself specified only a one-year term, the court of appeals found that the teacher had a reasonable expectation of renewal that gave him a property interest beyond the strict terms of the one-year contract. 9

Because the Vail decision was issued without opinion by an equally divided Supreme Court, it offers no definite insight into the Court's current thinking on de facto tenure. However, Justice Marshall, the Justice who did not participate in Vail, previously has recognized de facto tenure in the Roth and Sindermann cases; thus, his vote in Vail would have resulted in a majority opinion of the Court recognizing that a property interest can arise from a mere oral promise of contract renewal.

B. Students

While the Court has tempered its generosity in recognizing property rights in public employment by minimizing the procedural hurdles that state educational institutions must overcome in dismissing tenured employees, it has traditionally shown even greater deference to the academic decisions of those institutions. Its recent decisions confirm its commitment to academic deference.

In the 1985 case of Regents of the University of Michigan v. Ewing, 10 the Supreme Court was asked to decide whether a university's decision to dismiss a student for academic reasons is subject to judicial review as a violation of substantive due process.

In Ewing, a state university had dismissed a student from a joint undergraduate

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9 706 F.2d 1435 (7th Cir. 1983).

and medical degree program after he failed part I of the National Board of Medical Examiners test. The plaintiff conceded that he was afforded an adequate opportunity to contest the dismissal; thus the constitutional adequacy of the pre-dismissal procedures was not at issue. Rather, the student contended that regardless of the procedural protections he was afforded, the substance of the school's decision was unreasonable, and thus the dismissal violated his substantive due process right to pursue his education free from arbitrary state action. In considering Ewing's claim, the Supreme Court assumed the applicability of substantive due process, but then ruled that the university's decision could not be judicially reversed as arbitrary unless it constituted a "substantial departure from accepted academic norms."\(^{11}\) Because the Court found that there had been no such departure in Ewing, it ruled in favor of the school.

The Ewing opinion does not hold that a university's decision to dismiss a student for academic reasons is completely unreviewable. However, the Court's adoption of a highly deferential standard of substantive review greatly decreases the likelihood that future challenges to the constitutionality of academic decisions will succeed. Indeed, the opinion is replete with language emphasizing "the insusceptibility of [academic] decisions ... to rigorous judicial review."\(^{12}\)

The Court's decision in Ewing is consistent with its 1978 opinion in Board of Curators of the University of Missouri v. Horowitz.\(^{13}\) In Horowitz, you may recall, the Court reviewed a medical school's decision to dismiss a student for academic deficiency. In rejecting Ms. Horowitz's claim for procedural due process, the Court ruled

\(^{11}\) Ewing, 54 U.S.L.W. at 4058-59.

\(^{12}\) Id. at 4059 n.14.

\(^{13}\) 435 U.S. 78 (1978).
that, even assuming that the student had a liberty interest in continued enrollment, the university was not required to use rigidly formal procedures to assess the student's academic performance. Indeed, the Court expressly noted that academic sanctions call for less stringent procedural requirements than disciplinary dismissals. 14

Ewing can be viewed as the substantive counterpart of Horowitz. Just as the Court has refused to impose strict procedural requirements on academic decisions, it has now severely limited the occasions on which a court can review the substance of those decisions.

A special problem may arise with respect to the applicability of procedural due process when the reasons for a student's dismissal are unclear. In a case the Supreme Court has just declined to review, Mauriello v. University of Medicine & Dentistry of New Jersey, 15 one issue which the court of appeals addressed was whether the student's dismissal was for academic or disciplinary reasons. Because the appellate court ruled that the dismissal was for academic reasons, it held that an informal faculty evaluation was all that procedural due process required under the Supreme Court's decision in Horowitz. In light of Mauriello, which suggests a stricter judicial scrutiny with respect to the procedures accompanying a disciplinary dismissal, a university would be well advised to articulate its reasons for a dismissal and, if they are not purely academic, to err on the side of providing more process rather than less.

A survey of the Supreme Court's disposition of recent petitions in cases involving academic judgment reveals that the only case it agreed to review — Ewing — was the one case in which a lower court had decided against the university. This pattern may be mere coincidence. It is consistent, however, with the substance of the Court's recent due

14 Id. at 86.
process decisions, which suggest that while the decisions made by an academic institution as a public employer are reviewable under the same standards that apply to other public employers, a presumption of judicial non-interference applies to the decisions it makes as an academic entity.

II. UNLAWFUL DISCRIMINATION AND AFFIRMATIVE ACTION

With respect to compliance with federal laws prohibiting certain types of discrimination in education and employment, neither public nor private universities should anticipate a "hands off" approach from the high Court. Compliance with anti-discrimination statutes, such as Title VI, Title VII, Title IX, and section 504 of the Rehabilitation Act of 1973, does not involve questions of academic judgment. In addition, public institutions that were once exempt from the requirements of the federal laws that governed their counterparts in the private sector have increasingly lost that immunity. In recent Terms, the Court has upheld the extension to public employers of the Age Discrimination in Employment Act \(^{16}\) and the Fair Labor Standards Act. \(^{17}\) Thus, public academic institutions must now adjust to greater accountability when functioning in the role of employer. With respect to such laws, there is no reason to believe that the educational actor stands on a different footing from any other public or private entity, and the Court's recent decisions in these areas therefore require close attention even when rendered in a non-education context.

Once again, as with the due process cases, special problems are presented in connection with discrimination at public institutions of higher education. This was seen

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in the Court's recent opinion in *Bazemore v. Friday*,\(^{18}\) where it was held that the North Carolina Agricultural Extension Service had no legal or constitutional obligation to desegregate its all-black and all-white 4-H clubs, even though the lingering de facto segregation of those clubs was the result of prior de jure segregation in the state's public school system. A majority of the Justices found it sufficient that the members of the single-race clubs had made a voluntary choice to join one club over another, and that each club had a neutral admissions policy. Thus, despite the clubs' historical links to de jure segregation in the schools, the majority found that no affirmative steps beyond the neutral admissions policy were required by the Constitution or Title VI. This part of the *Bazemore* opinion stands in sharp contrast to the school desegregation cases of the 1960s and 1970s,\(^{19}\) which held that a voluntary choice program was not a constitutionally adequate means to remedy the effects of prior de jure segregation in public schools.

Because students are not legally required to attend college, and because the state does not assign a student to a particular college, the *Bazemore* decision has potential implications for public universities whose student bodies are exclusively or predominantly of one race. Although *Bazemore* by no means suggests that the government will stop enforcing antidiscrimination laws where it finds patterns of exclusion, it does suggest that wherever a truly neutral admissions policy exists, the Court may tolerate a less aggressive policy towards affirmative desegregation at the college and university levels. At the same time, however, *Bazemore* may offer some protection to traditionally black colleges whose desire to retain their racial identity might otherwise be frustrated. A possible side-effect of such tolerance for racially segregated colleges,

\(^{18}\) 54 U.S.L.W. 4972 (U.S. July 1, 1986) (per curiam).

\(^{19}\) E.g., *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968).
however, could be the maintenance of unequal higher education facilities for blacks and whites. 20

There is another part to the Bazemore decision, however, holding that the state agency had an affirmative statutory obligation to eradicate salary disparities between black and white employees. On this point, the Court relied on Title VII, and ordered the disparities eliminated even though they originated before Title VII became applicable to public employers in 1972. This decision serves as a reminder to all employers, private as well as public, of their duty to ascertain whether the effects of unlawful employment discrimination linger on, and if they do, to take affirmative steps to erase them.

Bazemore was but one of several recent decisions evincing the court's determination to require both public and private employers to comply scrupulously with the requirements of Title VII. While Bazemore concerns the effects of past racial discrimination, the court's other Title VII decisions concerned that statute's proscription against still-pervasive sex discrimination.

In two recent cases that did not arise in the education context, the Supreme Court gave favorable treatment to plaintiffs alleging sex discrimination in both the public and private sectors. In Hishon v. King & Spalding, 21 the Court rejected a law firm's claim that its partnership decisions were exempt from the dictates of Title VII. In Anderson v.

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City of Bessemer City,\textsuperscript{22} the Court reinstated a district court judgment in favor of a plaintiff who was denied the job of city recreation director on account of her sex. These decisions have probably encouraged Title VII litigation at the professional and managerial levels. It is too soon to tell, however, whether these victories presage improved prospects for plaintiffs alleging unlawful bias in faculty tenure or promotion decisions. A quick survey of recent lower court decisions reveals that relatively few faculty plaintiffs are prevailing.\textsuperscript{23}

Because the substance of tenure review decisions is not immune from judicial scrutiny, universities and colleges can expect both the courts and the Equal Employment Opportunity Commission to use their broad subpoena authority to require production of records documenting the tenure review process. In a case involving Shell Oil, the Supreme Court recently upheld the EEOC's broad authority to enforce its administrative subpoenas in investigating Title VII complaints.\textsuperscript{24} In addition, the Court recently declined, over two dissents, to review a decision rejecting a university's claim that tenure review records are protected from an investigative subpoena by a qualified academic privilege; the Court let stand a Third Circuit decision compelling Franklin & Marshall College to comply with a broad-sweeping EEOC subpoena requiring the college to produce documents relevant not only to the plaintiff's tenure review but to the reviews of all other candidates who were considered during the preceding three and a

\textsuperscript{22} 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985).

\textsuperscript{23} But see Jepsen v. Florida Bd. of Regents, 754 F.2d 924 (11th Cir. 1985) (awarding back pay, benefits, and attorney fees for sex discrimination in faculty promotion); Fields v. Clark Univ., No. 80-1011-5 (D. Mass. Mar. 14, 1986) (available on Lexis; genfed file) (awarding back pay, reinstatement, and reconsideration for tenure after another two years' probationary employment).

\textsuperscript{24} EEOC v. Shell Oil Co., 466 U.S. 54 (1984).
half years. The Court's decision not to hear the case leaves unresolved a conflict among the circuits, of which only two have recognized a qualified academic privilege in tenure review documents.

In another significant decision in the Title VII arena, the Supreme Court substantially broadened the concept of sexual discrimination and increased the potential for vicarious employer liability. In *Meritor Savings Bank v. Vinson*, the Court held that a plaintiff can sue under Title VII for sexual harassment in the workplace even though the plaintiff did not lose her job or suffer any other economic loss. The mere existence of a "hostile environment," the Court found, violated Title VII's mandate of equal treatment. The EEOC has announced that it will revise its enforcement guidelines to conform to the Supreme Court's pronouncements.

In addition to broadening the definition of unlawful discrimination, *Vinson* also broadened the scope of employer liability. Although the Court declined to find that an employer is always liable for sexual harassment by its supervisory personnel, the Court did hold that an employer's lack of notice will not necessarily insulate it from liability, even where the employer has a policy against sexual harassment and provides an internal grievance procedure which the employee fails to use.

While employers can expect the courts to continue enforcement of Title VII in clear cases of unlawful discrimination, some observers, including members of the current

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26 See EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983) (qualified privilege); Gray v. Board of Higher Education, 692 F.2d 901 (2d Cir. 1982) (qualified privilege).


administration, have in recent years predicted the eclipse of both court-ordered and voluntary affirmative action programs in the public sector in the face of successful court challenges based on the equal protection clause of the Fourteenth Amendment. The EEOC's recent abandonment of goals and timetables as remedies against private employers \(^{29}\) demonstrates the current administration's distaste for court-imposed affirmative action programs. And not long ago, Assistant Attorney General Reynolds predicted that the Supreme Court would soon hear and invalidate a voluntary public sector affirmative action program as a violation of the equal protection clause. \(^{30}\)

After turning away several such challenges, \(^{31}\) the Supreme Court finally agreed to hear a public sector challenge in *Wygant v. Jackson Board of Education*. \(^{32}\) Although the Court invalidated the program in question as a violation of the equal protection clause, the decision does not prohibit voluntary affirmative action in the public sector. Rather, it provides important guidance for public employers considering implementation of such programs.

The plaintiffs in *Wygant* were non-minority public school teachers who had been laid off pursuant to a collective bargaining agreement which provided that the percentage of minority teachers laid off at any given time could not exceed the percentage of minority teachers employed at the time of the layoff. This meant that non-minority teachers would sometimes be laid off ahead of minority teachers with less

\(^{29}\) *Id.*, vol. 14, no. 29 (1986).

\(^{30}\) *Id.*, vol. 13, no. 33 (1985).


\(^{32}\) 54 U.S.L.W. 4479 (U.S. May 19, 1986).
seniority. The plaintiffs contended that the program was unlawful because it was implemented without any evidence that the employer had discriminated in the past. The Supreme Court agreed. A plurality of the Court held that a public employer's voluntary affirmative action program could be upheld only if it satisfied two requirements. First, the racial classification "must be justified by a compelling governmental interest," and second, the means chosen to effectuate the state's purpose must be "narrowly tailored to the achievement of that goal." 33

The racial preference in Wygant satisfied neither test. The first test was not satisfied because the existence of societal discrimination alone does not constitute a "compelling state interest." Instead, the state must make some showing that there has been unlawful discrimination by the state employer itself before the Court will uphold a race-conscious remedy. Although the Court stopped short of holding that a formal finding of past discrimination by a court or other competent body is a constitutional prerequisite to a public sector affirmative action plan, it cautioned public employers that they must have "sufficient evidence to justify the conclusion that there has been prior discrimination." 34 The plan also failed to satisfy the second part of the Court's test, because even if the state could establish a compelling interest in remedying past discrimination, the preferential layoff arrangement was not "narrowly tailored" to achieving that goal. The Court emphasized the heavy burden that layoffs impose on individuals, in contrast to less burdensome means such as race-conscious hiring goals.

However, the Court did not explain which means and which goals would satisfy its two-part test, and there is confusing language in Justice O'Connor's concurrence. Justice

33 Id. at 4481.
34 Id. at 4482.
O'Connor apparently would distinguish the impermissible affirmative action goal of providing "role models" for minority schoolchildren from the "very different goal of promoting racial diversity among the faculty." Yet, to view the latter goal as sufficiently compelling to justify a race-conscious remedy seems inconsistent with the plurality's holding that a public sector affirmative action plan must be premised on evidence of past discrimination by the employer rather than society at large.

The lack of a clear majority in Wygant, together with its narrow holding, suggests that the reversal in Wygant is not the death knell for voluntary public sector affirmative action. Wygant's requirement that the public employer have evidence of past discrimination and use narrowly tailored means is consistent with the Supreme Court's other recent decisions in the affirmative action arena. In 1984, in Firefighters Local Union No. 1784 v. Stotts, the Court held that under Title VII a court cannot order a public employer to conduct preferential layoffs to preserve the jobs of minority workers who were not themselves victims of past discrimination; however, in the recent case of Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, the Court upheld a court-ordered affirmative action plan that did not involve layoffs, finding that Title VII allows such plans where either the employer or the union has discriminated in the past, or the plan is necessary to dissipate the lingering effects of discrimination. On the same day, in Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, a case involving evidence of past discrimination, the Supreme Court upheld a consent decree providing for a limited number of racial preferences in promotion decisions, even though the plan would benefit

35 Id. at 4485 n.*.
38 54 U.S.L.W. 5005 (U.S. July 2, 1986).
minority employees who had not been victims of past discrimination. In contrast to Wygant, the plan upheld in the Cleveland case did not involve any white employees who were displaced pursuant to layoffs. The remedy in City of Cleveland was also limited and of temporary duration, whereas the racial quota in Wygant was of indefinite duration and was justified as an attempt to remedy societal discrimination by providing "role models" for schoolchildren.

Apart from the cases dealing with affirmative action and quotas, the Supreme Court has also rendered some major decisions interpreting section 504 of the Rehabilitation Act of 1973, 39 which prohibits discrimination against the handicapped in any program or activity receiving federal funds. Specifically, the Court has confronted two issues. First, it has struggled to define the "program or activity" receiving federal funds, since only that program or activity is subject to the strictures of section 504. Second, the Court has faced the question whether and when disparate impact in the absence of intent to discriminate is a violation of section 504.

The problem of defining the "program or activity" receiving federal assistance was foreshadowed by the Court's controversial 1984 decision in Grove City College v. Bell. 40 That case dealt not with section 504 but with Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally assisted programs or activities. In Grove City, the Court held that even though federal financial aid funds eventually find their way into the college's general budget, that does not make the entire institution subject to Title IX. Thus, in Grove City, only the financial aid program of the college was found to be covered by Title IX by virtue of the financial aid money given to students.

Because so much attention has been focused on this part of the Grove City
decision, observers have frequently overlooked the Court's two other important rulings.
First, the Court ruled that a violation of Title IX can be found even absent a finding of
actual discrimination. Mere failure to execute the statutorily-required assurance of
compliance will warrant termination of funds; thus, neglecting one's paperwork can be
expensive. Second, the Court ruled that even though the aid in question went to the
students, and only indirectly reached the college, the college should nonetheless be
treated as the recipient of the federal funds.

The significance of Grove City for civil rights enforcement will be addressed at
length by Professor Salomone. I will simply note here, before returning to section 504,
that the same "program or activity" language that the Court interpreted narrowly in
Grove City appears in both Title VI and section 504. Thus, absent legislative action,
Grove City provides the definitive construction of this language in all three statutes.

In two cases involving section 504, the Court has tried to carry out the line-
drawing task it created for itself in Grove City. In one case the results were definitive,
but in the second case the opinion is less than illuminating. The first case, Consolidated
Rail Corp. v. Darrone,\(^{41}\) was decided the same day as Grove City. In Darrone, the
Court rejected the widely-held view that section 504 applies to employment
discrimination only when the federal aid is for the primary purpose of promoting
employment. It also expressly held that section 504 authorizes a handicapped plaintiff
alleging intentional employment discrimination to sue for back pay.\(^{42}\) After Darrone,
the Court summarily vacated a Ninth Circuit decision that denied a handicapped
professor's cause of action against a state university on the ground that providing

\(^{41}\) 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984).
\(^{42}\) Id. at 4303.
employment was not one of the primary purposes of the instructional and research grants received by the university from the federal government. 43

The second case, United States Department of Transportation v. Paralyzed Veterans of America, 44 raised the issue whether section 504 reaches programs and activities that merely benefit from federal aid or only those that actually receive it. From the Court's decision in Grove City, that aid to students should be treated as aid directly to their college, it might have been assumed that indirect beneficiaries were covered to the same extent as the actual recipients. Instead, it was held that Grove City permitted a Court to distinguish between a "program" receiving aid and a "program" merely benefitting from it. Thus, federal aid to airports that ultimately benefitted airlines did not bring the airlines under section 504. Together, Grove City and Paralyzed Veterans suggest that the recipient/beneficiary distinction will continue to create a problem when courts are asked to trace the benefits of federal funds to programs that do not comply with section 504.

In addition to the Grove City tracing problem, the Court has addressed a second problem in section 504 compliance. In Alexander v. Choate, 45 the Court suggested that section 504 is not limited to cases of intentional discrimination but reaches some cases of disparate impact as well. The Court did not, however, attempt to define the circumstances under which such discriminatory effects would violate the statute. The only guidance the Court offered was the principle it had enunciated in Southeastern

Community College v. Davis, 46 that otherwise qualified handicapped individuals must be provided with meaningful access to the benefit offered by the federal grantee, and that such access includes "reasonable accommodations" for handicapped individuals. Clearly, federal grantees face some uncertainty in determining what they must do to comply with this standard.

The Court's current docket also includes a case that may shed some light on the definition of the statutory terms "handicap" and "otherwise qualified" as used in section 504. In School Board of Nassau County v. Arline, 47 the Court will review an Eleventh Circuit ruling that the contagious disease of tuberculosis constitutes a "handicap" under section 504. The Court has also asked the parties to address a second question, whether individuals afflicted with tuberculosis are precluded from "being otherwise qualified" for the job of elementary school teacher under section 504. If they are so precluded, then section 504's "reasonable accommodation" requirement will not be triggered. Although the case arises in the context of elementary schools, it could have significant implications for higher education, particularly in light of the controversy surrounding discrimination against AIDS victims in employment and in the classroom. Assistant Attorney General Reynolds recently issued an opinion stating that while AIDS is a handicap under section 504, employment discrimination based on fear of contagiousness, even if unreasonable, does not violate the Rehabilitation Act. 48

The Court's recent activity in interpreting section 504 is thus likely to continue into this and future Terms, and its decisions warrant the attention of those charged with implementation of federal law on campus.

III. LABOR RELATIONS AND THE FACULTY/ADMINISTRATION RELATIONSHIP

In recent years, college faculty have increasingly demanded a voice in the governance of their institutions. According to the Supreme Court's 1980 decision in NLRB v. Yeshiva University, the faculty at some universities have achieved managerial status, thereby losing the opportunity to demand university recognition of faculty unions. Although university administrators have been quick to embrace Yeshiva (and the NLRB recently has followed it in denying faculty bargaining at Boston University), faculty feeling less than omnipotent are not utterly without recourse. The Second Circuit recently ordered Cooper Union to recognize a faculty union, and the Supreme Court has just declined to review the decision.

A more interesting judicial development in labor-management relations in the university setting has taken place in the public sector. In Minnesota State Board for Community Colleges v. Knight, the Supreme Court refused to find that the faculty at public institutions have a constitutional right to participate in academic governance.

The plaintiffs in Knight were state college instructors who were not members of an existing faculty union. Minnesota law gave the faculty the right to "meet and confer" with their employers on matters that were related to employment but were outside the

49 444 U.S. 672 (1980).
scope of collective bargaining — matters such as curriculum, academic standards, and budgeting. However, once a faculty selected an exclusive representative, their employer could "meet and confer" only with that representative. The plaintiffs contended that the state law deprived them of their First and Fourteenth Amendment associational and speech rights by denying them an opportunity to participate in their employer's policymaking. The Supreme Court disagreed, holding that state faculty have no constitutional right to participate in academic governance.

The Court acknowledged that faculty at state colleges and universities have First Amendment rights to speak and associate freely. Faculty excluded from the formal policy conferences are, of course, free to communicate their views to the administration and to one another, and to form advocacy groups to speak with a collective voice. However, the Court made it clear that they have no guarantee, constitutional or practical, that the administration will listen.

The Supreme Court often has acknowledged that academic freedom is "a special concern of the First Amendment." 53 However, Knight implicitly recognizes that academic freedom does not exist apart from the legitimate institutional concerns of a college (such as a requirement to bargain with a recognized faculty union). Indeed, Knight seems to make the critical point that faculty authority is not conferred by the First Amendment. Rather, the First Amendment only ensures the rights of free speech and association (which, in turn, offer an opportunity for an exercise of the "power of persuasion"). But faculty members really have no authority within the institution except as conferred by the institution or compelled by federal or state labor laws.

53 See id. at 4211 (Brennan, J., dissenting) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1966)).
IV. FREE SPEECH AND ASSOCIATION UNDER THE FIRST AMENDMENT

Other than the decision in *Knight*, the Court's recent Terms have produced few decisions in the First Amendment area that are likely to have an impact on public colleges and universities. The Court's one decision affecting the free speech of teachers is not a binding precedent because it was issued without opinion by an equally divided Court. There, the Court affirmed a decision that a law allowing public school teachers to be fired for publicly advocating homosexuality violates the First Amendment. 54 There seems little doubt that college-level faculty enjoy a like protection against similar state-imposed constraints on speech.

It does not follow, however, that all faculty speech is protected from adverse state action. In fact, the last few years have witnessed a string of refusals by the Supreme Court to address the question whether and when a public employer's retaliation for employee speech in an educational setting violates the First Amendment. The Court has declined to review lower court decisions upholding the firing of a public school teacher for telling co-workers that she was bisexual 55 (a decision which at least two Supreme Court Justices voted to review); the denial of a salary increase to a college instructor in retaliation for criticizing academic policy; 56 and the firing of a public school teacher for filing job-related grievances. 57 The Court also declined to review a decision awarding damages to a college librarian fired for criticizing library remodeling

plans. 58

The constitutionality of the adverse personnel action in such cases turns on the distinction which the Supreme Court drew in the 1983 case of Connick v. Myers, 59 in which the Court held that the speech of public employees is protected only when it relates to matters of public concern. Connick is consistent with the Supreme Court's well-settled view that a state has wider latitude in imposing restrictive regulations on its employees than in regulating the citizenry at large. 60 Because Connick arose in the law enforcement context, however, some petitioners have questioned whether it is appropriate to apply the same distinction in the education context, or whether the maintenance of academic freedom demands that faculty receive more generous protection, at least at the college level. Despite the importance of this question, and despite the evident confusion among the courts as to what constitutes a matter of public concern in the academic context, the Supreme Court seems disinclined to address the problem.

The Court has been similarly reluctant to hear constitutional challenges to actions of college and university administrations that arguably infringe the First Amendment rights of students. It declined to review two decisions upholding university rules that prohibited the use of dormitory rooms for commercial sales demonstrations and restricted door-to-door solicitation in residence halls. 61 At the same time, a number of

the Court's recent decisions have rejected claims that would broaden current notions of personal liberty, an inclination illustrated by the Court's recent decision, rendered outside the education context, that anti-sodomy laws do not violate privacy rights. 62 Viewed together with the Court's tendency toward non-interference in the relationship between university and student, the Court's conservatism in the personal liberties area suggests that the Court will be inclined to defer to a public institution's attempt to regulate the conduct of students while they occupy its residence halls.

CONCLUSION

While in recent Terms the Court has rendered few decisions in the specific context of higher education, a number of its decisions in other contexts have the potential to affect public and private colleges and universities. Overall, the Court's activities have had far more impact on public institutions than on private ones.

Generally, although the Supreme Court has declined to recognize any "academic privilege" to insulate institutions of higher education from the legal proscriptions affecting society-at-large, it is clear that the courts have tended to defer to purely academic judgments on teacher qualifications and student performance. Judges are still reluctant to second-guess the presumed expertise of college educators and administrators in these areas. By the same token, as colleges and universities have sought to exist more as "businesses," they have been accorded the right to operate efficiently (for example, as against faculty claims for institutional authority under the guise of "academic freedom"), but they have also been held accountable as are other businesses (for example, with respect to proscriptions against employment discrimination and obligations to bargain). The law still recognizes the image of the "ivory tower," but the image is changing both because of and without regard to legal regulations.