

# Contents

Notice of Web Site and Periodic Supplements for This Edition v

Preface xvii

Acknowledgements xxv

The Authors xxix

## **PART ONE PERSPECTIVES AND FOUNDATIONS 1**

### **1 Overview of Higher Education Law 3**

*1.1. How Far the Law Reaches and How Loud It Speaks 3*

*1.2. Evolution of Higher Education Law 7*

*1.3. The Governance of Higher Education 9*

*1.3.1. Basic concepts and distinctions 9*

*1.3.2. Internal governance 12*

*1.3.3. External governance 13*

*1.4. Sources of Higher Education Law 16*

*1.4.1. Overview 16*

*1.4.2. External sources of law 16*

*1.4.2.1. Federal and state constitutions 16*

*1.4.2.2. Statutes 17*

*1.4.2.3. Administrative rules and regulations 18*

*1.4.2.4. State common law 19*

*1.4.2.5. Foreign and international law 19*

*1.4.3. Internal sources of law 20*

*1.4.3.1. Institutional rules and regulations 20*

*1.4.3.2. Institutional contracts 20*

*1.4.3.3. Academic custom and usage 21*

*1.4.4. The role of case law 23*

1.5. <i>The Public-Private Dichotomy</i>	23
1.5.1. <i>Overview</i>	23
1.5.2. <i>The state action doctrine</i>	25
1.5.3. <i>Other bases for legal rights in private institutions</i>	33
1.6. <i>Religion and the Public-Private Dichotomy</i>	35
1.6.1. <i>Overview</i>	35
1.6.2. <i>Religious autonomy rights of religious institutions and individuals</i>	36
1.6.3. <i>Government support for religious institutions</i>	38
1.6.4. <i>Religious autonomy rights of individuals in public postsecondary institutions</i>	45
<i>Selected Annotated Bibliography</i>	49

## **2. Legal Planning and Dispute Resolution 57**

2.1. <i>Legal Liability</i>	57
2.1.1. <i>Overview</i>	57
2.1.2. <i>Types of liability</i>	58
2.1.3. <i>Agency law</i>	58
2.1.4. <i>Enforcement mechanisms</i>	58
2.1.5. <i>Remedies for legal violations</i>	59
2.1.6. <i>Avoiding legal liability</i>	60
2.1.7. <i>Treatment law and preventive law</i>	60
2.2. <i>Litigation in the Courts</i>	66
2.2.1. <i>Overview</i>	66
2.2.2. <i>Judicial remedies</i>	68
2.2.2.1. <i>Overview</i>	68
2.2.2.2. <i>Money damages</i>	69
2.2.2.3. <i>Injunctions</i>	69
2.2.2.4. <i>Contempt of court</i>	70
2.2.3. <i>Judicial (academic) deference</i>	72
2.2.4. <i>Managing litigation and the threat of litigation</i>	77
2.3. <i>Alternate Dispute Resolution</i>	79
2.3.1. <i>Overview</i>	79
2.3.2. <i>Types of ADR</i>	80
2.3.3. <i>Applications to colleges and universities</i>	83
2.4. <i>Institutional Management of Liability Risk</i>	85
2.4.1. <i>Overview and suggestions</i>	85
2.4.2. <i>Risk avoidance and risk control</i>	86
2.4.3. <i>Risk transfer</i>	86
2.4.3.1. <i>Liability insurance</i>	86
2.4.3.2. <i>Hold-harmless and indemnification agreements</i>	88
2.4.3.3. <i>Releases and waivers</i>	90
2.4.4. <i>Risk retention</i>	91
2.4.5. <i>Legal limits on authority to transfer risk</i>	92
2.5. <i>The Relationship Between Law and Policy</i>	94
<i>Selected Annotated Bibliography</i>	98

## **PART TWO THE COLLEGE, ITS GOVERNING BOARD, AND EMPLOYEES 103**

### **3. The College and Its Trustees 105**

3.1. <i>The Question of Authority</i>	105
3.1.1. <i>Overview</i>	105

3.1.2.	<i>Trustee authority</i>	108
3.2.	<i>Institutional Tort Liability</i>	109
3.2.1.	<i>Overview</i>	109
3.2.2.	<i>Negligence</i>	112
3.2.2.1.	<i>Premises liability</i>	114
3.2.2.2.	<i>Liability for injuries related to on-campus instruction</i>	116
3.2.2.3.	<i>Liability for injuries in off-campus courses</i>	118
3.2.2.4.	<i>Liability for cocurricular and social activities</i>	120
3.2.2.5.	<i>Student suicide</i>	123
3.2.2.6.	<i>Liability for injuries related to outreach programs</i>	126
3.2.3.	<i>Educational malpractice</i>	127
3.3.	<i>Institutional Contract Liability</i>	128
3.4.	<i>Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability)</i>	132
	<i>Selected Annotated Bibliography</i>	138
<b>4.</b>	<b>The College and Its Employees</b>	142
4.1.	<i>Overview of Employment Relationships</i>	142
4.2.	<i>Employment Contracts</i>	144
4.2.1.	<i>Defining the contract</i>	144
4.2.2.	<i>The at-will doctrine</i>	145
4.3.	<i>Collective Bargaining</i>	145
4.3.1.	<i>Overview</i>	145
4.3.2.	<i>The public-private dichotomy in collective bargaining</i>	146
4.3.3.	<i>Collective bargaining and antidiscrimination laws</i>	146
4.4.	<i>Personal Liability of Employees</i>	149
4.4.1.	<i>Overview</i>	149
4.4.2.	<i>Tort liability</i>	149
4.4.2.1.	<i>Overview</i>	149
4.4.2.2.	<i>Negligence</i>	150
4.4.3.	<i>Contract liability</i>	152
4.4.4.	<i>Constitutional liability (personal liability under Section 1983)</i>	153
4.4.4.1.	<i>Qualified immunity</i>	153
4.4.4.2.	<i>Issues on the merits: State-created dangers</i>	155
4.5.	<i>Employment Discrimination</i>	159
4.5.1.	<i>Overview: The interplay of statutes, regulations, and constitutional protections</i>	159
4.5.2.	<i>Sources of law</i>	160
4.5.2.1.	<i>Title VII</i>	160
4.5.2.2.	<i>Equal Pay Act</i>	167
4.5.2.3.	<i>Title IX</i>	168
4.5.2.4.	<i>Section 1981</i>	169
4.5.2.5.	<i>Americans with Disabilities Act and Rehabilitation Act of 1973</i>	170
4.5.2.6.	<i>Age Discrimination in Employment Act</i>	174
4.5.2.7.	<i>Constitutional prohibitions against employment discrimination</i>	176
4.5.2.8.	<i>Executive Orders 11246 and 11375</i>	177
4.5.2.9.	<i>State law prohibitions on sexual orientation discrimination</i>	178

- 4.6. *Affirmative Action* 182
  - 4.6.1. *Overview* 182
  - 4.6.2. *Affirmative action under Title VII* 185
  - 4.6.3. *Affirmative action under the equal protection clause* 188
- 4.7. *Application of Nondiscrimination Laws to Religious Institutions* 190
- 4.8. *Faculty Academic Freedom and Freedom of Expression* 196
  - 4.8.1. *General concepts and principles* 196
    - 4.8.1.1. *Faculty freedom of expression in general* 196
    - 4.8.1.2. *Academic freedom: Basic concepts and distinctions* 203
    - 4.8.1.3. *Professional versus legal concepts of academic freedom* 205
    - 4.8.1.4. *The foundational constitutional law cases* 207
    - 4.8.1.5. *External versus internal restraints on academic freedom* 210
    - 4.8.1.6. *“Institutional” academic freedom* 212
  - 4.8.2. *Academic freedom in teaching* 214
    - 4.8.2.1. *In general* 214
    - 4.8.2.2. *The classroom* 214
    - 4.8.2.3. *Grading* 228
    - 4.8.2.4. *Private institutions* 231
  - 4.8.3. *Academic freedom in religious colleges and universities* 232
- Selected Annotated Bibliography* 235

## **PART THREE THE COLLEGE AND ITS STUDENTS 241**

- 5. **The Legal Status of Students** 243
  - 5.1. *The Legal Status of Students* 243
    - 5.1.1. *Overview* 243
    - 5.1.2. *The age of majority* 244
  - 5.2. *The Contractual Rights of Students* 244
  - 5.3. *Student Academic Freedom* 253
  - 5.4. *Students’ Legal Relationships with Other Students* 262
  - 5.5. *Student Files and Records* 269
    - 5.5.1. *Family Educational Rights and Privacy Act (FERPA)* 269
    - 5.5.2. *State law* 273
  - Selected Annotated Bibliography* 278
- 6. **Admissions and Financial Aid** 280
  - 6.1. *Admissions* 280
    - 6.1.1. *Basic legal requirements* 280
    - 6.1.2. *Arbitrariness* 281
    - 6.1.3. *The contract theory* 283
    - 6.1.4. *The principle of nondiscrimination* 284
      - 6.1.4.1. *Race* 284
      - 6.1.4.2. *Sex* 288
      - 6.1.4.3. *Disability* 292
      - 6.1.4.4. *Immigration status* 299
    - 6.1.5. *Affirmative action programs* 301
    - 6.1.6. *Readmission* 327

6.2. <i>Financial Aid</i>	330
6.2.1. <i>General principles</i>	330
6.2.2. <i>Federal programs</i>	332
6.2.3. <i>Nondiscrimination</i>	336
6.2.4. <i>Affirmative action in financial aid programs</i>	338
6.2.5. <i>Discrimination against nonresidents</i>	343
6.2.6. <i>Discrimination against aliens</i>	349
6.2.6.1. <i>Documented (immigrant and nonimmigrant) aliens</i>	349
6.2.6.2. <i>Undocumented aliens</i>	352
<i>Selected Annotated Bibliography</i>	355
<b>7. The Campus Community</b>	<b>359</b>
7.1. <i>Student Housing</i>	359
7.1.1. <i>Housing regulations</i>	359
7.1.2. <i>Searches and seizures</i>	365
7.2. <i>Campus Computer Networks</i>	371
7.2.1. <i>Freedom of speech</i>	371
7.2.2. <i>Liability issues</i>	377
7.3. <i>Campus Security</i>	380
7.3.1. <i>Security officers</i>	380
7.3.2. <i>Protecting students against violent crime</i>	383
7.3.3. <i>Federal statutes and campus security</i>	387
7.4. <i>Other Support Services</i>	390
7.4.1. <i>Overview</i>	390
7.4.2. <i>Health services</i>	391
7.4.3. <i>Services for students with disabilities</i>	394
7.4.4. <i>Services for international students</i>	396
7.4.5. <i>Legal services</i>	398
<i>Selected Annotated Bibliography</i>	399
<b>8. Academic Policies and Concerns</b>	<b>402</b>
8.1. <i>Overview</i>	402
8.2. <i>Awarding of Grades and Degrees</i>	402
8.3. <i>Sexual Harassment of Students by Faculty Members</i>	410
8.4. <i>Evaluating Students with Disabilities</i>	426
8.4.1. <i>Overview</i>	426
8.4.2. <i>The concept of disability</i>	427
8.4.3. <i>Notice and documentation of disabilities</i>	430
8.4.4. <i>Requests for programmatic or instructional accommodations</i>	432
<i>Selected Annotated Bibliography</i>	438
<b>9. The Disciplinary Process</b>	<b>441</b>
9.1. <i>Disciplinary and Grievance Systems</i>	441
9.1.1. <i>Overview</i>	441
9.1.2. <i>Establishment of systems</i>	441
9.1.3. <i>Codes of student conduct</i>	443
9.1.4. <i>Judicial systems</i>	446
9.2. <i>Disciplinary Rules and Regulations</i>	451
9.2.1. <i>Overview</i>	451
9.2.2. <i>Public institutions</i>	451

- 9.2.3. *Private institutions* 453
- 9.2.4. *Disciplining students with psychiatric illnesses* 454
- 9.3. *Procedures for Suspension, Dismissal, and Other Sanctions* 456
  - 9.3.1. *Overview* 456
  - 9.3.2. *Public institutions: Disciplinary sanctions* 457
    - 9.3.2.1 *Basic principles* 457
    - 9.3.2.2. *Notice* 463
    - 9.3.2.3. *Hearing* 463
  - 9.3.3. *Public institutions: The legal distinction between disciplinary sanctions and academic sanctions* 466
  - 9.3.4. *Private institutions* 470
- Selected Annotated Bibliography* 474

## **10. Students' Freedom of Expression 478**

- 10.1. *Student Protests and Freedom of Speech* 478
  - 10.1.1. *Student free speech in general* 478
  - 10.1.2. *The "public forum" concept* 480
  - 10.1.3. *Regulation of student protest* 486
  - 10.1.4. *Prior approval of protest activities* 492
  - 10.1.5. *Posters and leaflets* 493
  - 10.1.6. *Protests in the classroom* 496
- 10.2. *Speech Codes and the Problem of Hate Speech* 498
  - 10.2.1. *Hate speech and the campus* 498
  - 10.2.2. *The case law on hate speech and speech codes* 499
  - 10.2.3. *Guidelines for dealing with hate speech on campus* 506
- Selected Annotated Bibliography* 508

## **PART FOUR: THE COLLEGE AND ITS STUDENT ORGANIZATIONS 511**

### **11. Student Organizations and Their Members 513**

- 11.1. *Student Organizations* 513
  - 11.1.1. *The right to organize* 513
  - 11.1.2. *The right not to join, or associate, or subsidize* 519
  - 11.1.3. *Mandatory student activities fees* 520
  - 11.1.4. *Principle of nondiscrimination* 526
  - 11.1.5. *Religious activities* 531
- 11.2. *Fraternities and Sororities* 538
  - 11.2.1. *Overview* 538
  - 11.2.2. *Institutional recognition and regulation of fraternal organizations* 539
  - 11.2.3. *Institutional liability for the acts of fraternal organizations* 545
- 11.3. *The Student Press* 549
  - 11.3.1. *General principles* 549
  - 11.3.2. *Mandatory student fee allocations to student publications* 550
  - 11.3.3. *Permissible scope of institutional regulation* 551
  - 11.3.4. *Obscenity* 559
  - 11.3.5. *Libel* 561
  - 11.3.6. *Obscenity and libel in private institutions* 565
- Selected Annotated Bibliography* 565

**12. Athletics 568**

- 12.1. *General Principles* 568
- 12.2. *Athletes' Due Process Rights* 569
- 12.3. *Athletes' Freedom of Speech* 570
- 12.4. *Pertinent Statutory Law* 573
- 12.5. *Athletic Scholarships* 574
- 12.6. *Sex Discrimination* 578
- 12.7. *Discrimination on the Basis of Disability* 589
- 12.8. *Drug Testing* 591
- 12.9. *Tort Liability for Athletic Injuries* 596
- Selected Annotated Bibliography* 601

**PART FIVE: THE COLLEGE AND THE OUTSIDE WORLD 605****13. Local and State Governments 607**

- 13.1. *Local Governments and the Local Community* 607
  - 13.1.1. *Overview of local government authority* 607
  - 13.1.2. *Community access to the college's campus* 611
    - 13.1.2.1. *Public versus private institutions* 611
    - 13.1.2.2. *Exclusion of speakers and events* 613
    - 13.1.2.3. *Trespass statutes and ordinances, and related campus regulations* 617
    - 13.1.2.4. *Soliciting and canvassing* 629
      - 13.1.2.4.1. *Overview* 629
      - 13.1.2.4.2. *Commercial solicitation* 630
      - 13.1.2.4.3. *Noncommercial solicitation* 636
  - 13.1.3. *Community activities of students* 638
  - 13.1.4. *Zoning* 640
    - 13.1.4.1. *Overview* 640
    - 13.1.4.2. *Zoning off-campus housing* 641
  - 13.1.5. *Student voting in the community* 643
    - 13.1.5.1. *Registering to vote* 643
    - 13.1.5.2. *Canvassing and registration on campus* 646
- 13.2. *State Government* 648
  - 13.2.1. *Overview of state government authority* 648
  - 13.2.2. *State provision of public postsecondary education* 651
  - 13.2.3. *State chartering and licensure of private postsecondary institutions* 653
  - 13.2.4. *Open meetings and public disclosure* 657
  - 13.2.5. *Open records laws* 661
  - 13.2.6. *State administrative procedure laws* 667
- Selected Annotated Bibliography* 669

**14. The Federal Government 672**

- 14.1. *Overview of Federal Government Authority* 672
  - 14.1.1. *Federal constitutional powers over education* 672
  - 14.1.2. *Federal regulation of postsecondary education* 673

14.2. Copyright Law	675
14.2.1. Overview	675
14.2.2. <i>The fair use doctrine</i>	676
14.2.3. Performance rights	681
14.2.4. Liability for infringement	683
14.2.5. Licensing	687
14.2.6. Other copyright issues	687
14.2.6.1. Scope of copyright protection	687
14.2.6.2. Music	688
14.2.6.3. Anti-circumvention	688
14.2.6.4. Term extension	689
14.3. Trademark Law	690
14.4. Antitrust Law	696
14.5. Americans with Disabilities Act	702
14.6. Laws Regulating Computer Network Communications	705
14.6.1. Overview	705
14.6.2. Computer statutes	706
14.6.3. General statutes	714
14.7. Federal Taxation of Postsecondary Education	718
14.7.1. Introduction and overview	718
14.7.2. Tax rules regarding students	719
14.8. Federal Aid-to-Education Programs	722
14.8.1. Functions and history	722
14.8.2. Legal structure of federal aid programs	723
14.9. Civil Rights Compliance	725
14.9.1. General considerations	725
14.9.2. Title VI	726
14.9.3. Title IX	735
14.9.4. Section 504	738
14.9.5. Coverage of unintentional discriminatory acts	741
14.10. Dealing with the Federal Government	744
14.10.1. Handling federal rule making and regulations	744
14.10.2. Obtaining information	748
Selected Annotated Bibliography	750
<b>15. Private Entities</b>	<b>758</b>
15.1. Education Associations	758
15.2. Accrediting Agencies	760
15.3. Athletic Associations and Conferences	762
15.3.1. Overview	762
15.3.2. Federal constitutional constraints	763
15.3.3. State statutes regulating athletic associations' enforcement activities	766
15.3.4. Antitrust laws	768
15.3.5. Common law principles	771
15.3.6. Federal civil rights statutes	772
15.3.6.1. The civil rights spending statutes	772
15.3.6.2. The Americans with Disabilities Act	776

15.4. *Private Business* 780

- 15.4.1. *Overview* 780
- 15.4.2. *Auxiliary enterprises* 781
  - 15.4.2.1. *Scope and purposes* 781
  - 15.4.2.2. *Institutional authority to operate auxiliary enterprises* 783
    - 15.4.2.2.1. *Public institutions* 783
    - 15.4.2.2.2. *Private institutions* 787
- 15.4.3. *State noncompetition statutes* 788
- 15.4.4. *Federal antitrust law* 790

*Selected Annotated Bibliography* 792

*Appendix A. Constitution of the United States of America:  
Provisions of Particular Interest to Postsecondary Education* 794

*Cases Index* 799

*Statute Index* 811

*Subject Index* 815