RECENT SUPREME COURT DEVELOPMENTS AFFECTING HIGHER EDUCATION

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THE FUTURE OF HIGHER EDUCATION LAW IN THE U.S. SUPREME COURT

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There are several issues facing the Supreme Court that could have a profound impact on colleges and universities. I have identified three areas in which decisions by the Supreme Court could bring about major change: affirmative action; statutory civil rights laws; and freedom of expression.

Affirmative Action

Colleges and universities have been at the center of the ongoing national controversy regarding affirmative action. After decades of *de facto* and *de jure* racial segregation, about 20 years ago institutions of higher learning began to institute new admissions policies designed substantially to increase the presence of minority students on campus. In some instances this may have been done to redress past institutional discrimination. But in most cases it reflected a combination of other purposes, including a desire to combat the effects of societal racial discrimination, to address under-representation of minorities in learned professions, and to increase the level of diversity on campus. While these efforts have occurred on campus, the courts have struggled with the constitutional status of benign race-conscious measures. Initially, in *Regents of University of California v. Bakke,*[1] the Burger Court prohibited set-asides and separate admissions tracks but gave some limited support to other forms of higher education affirmative action. However, Rehnquist Court decisions treating affirmative action as a form of constitutionally suspect racial classification have raised doubts about the validity of campus

[1]438 U.S. 265 (1978).

affirmative action programs. Over the past decade many college affirmative action policies have been challenged in federal court, and more such challenges are likely in the near future.

After years of fractured and often contradictory decisions on the constitutionality of affirmative action, the Rehnquist Court attained a consistent approach in two leading cases. In *Richmond v. J.A. Croson Co.*[2] and *Adarand Constructors, Inc. v. Pena,*[3] the Court established that government sponsored affirmative action measures which use explicit racial classifications for benign purposes are subject to strict scrutiny, meaning that such measures will be struck down as violations of equal protection unless they are "narrowly tailored" to serve a "compelling" governmental interest. The Supreme Court has never upheld an affirmative action measure under this test.

What the Court did not decide in *Croson* or *Adarand* is whether achieving diversity in an educational setting constitutes the kind of compelling government interest that would permit the use of racial preferences. Those cases involved racial preferences in government contracting, so they did not directly involve affirmative action in college admissions. Since the Court's decision in *Adarand*, lower courts have divided on the constitutionality of college admissions programs.

In *Hopwood v. Texas*[4], the Court of Appeals for the Fifth Circuit concluded that the University of Texas's affirmative action program violated the equal protection clause. The court of appeals read the Supreme Court's decisions in *Croson* and *Adarand* as permitting affirmative action measures only when necessary to redress documented instances of past institutional racial discrimination. Concluding that diversity is not a sufficient goal to justify race-conscious affirmative measures, *Hopwood* specifically rejected attempts by the University to justify its admissions process as a means of achieving greater diversity in the student body. The court reasoned that a diversity rationale for affirmative action was inconsistent with *Adarand* and *Croson*. Other courts have followed *Hopwood*, and the decision has provoked many colleges and universities into restructuring, or in some instances even abandoning, their affirmative action

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[2]488 U.S. 469 (1989).

[3]515 U.S. 200 (1995)

[4]84 F.3d 720 (5th Cir.), *cert. denied,* 518 U.S. 1033 (1996).

programs.

Last December, however, the Ninth Circuit Court of Appeals disagreed with *Hopwood.* In *Smith v. University of Washington,*[5] the Ninth Circuit held that racial and cultural diversity are potentially compelling governmental interests which may justify race-conscious affirmative action measures in higher education admissions. The Ninth Circuit decision was quickly followed by a similar ruling in *Gratz v. Bollinger.*[6] In a case challenging affirmative action measures by the University of Michigan, the court held that strict quotas, set-asides, and separate admissions tracks are unconstitutional, but that affirmative action programs which accord racial preferences along with a variety of other nonracial preference factors survive strict scrutiny. In both *Smith* and *Gratz*, the courts rested their decisions on Justice Powell's opinion announcing the judgment in *Bakke*, which they believed remains good law.

Bakke was the Court's first major attempt to deal with the merits of affirmative action and its only decision dealing directly with diversity in higher education. *Bakke* was a fragmented decision with no majority position on the constitutional question. Justice Powell's lead opinion applied strict scrutiny to strike down a two-track admissions program operated by the University of California at Davis Medical School. Powell reasoned that racial set-asides and quotas were anathema to the objective of equal protection, but he argued that a more subtle form of affirmative action, in which race was used as one among many factors designed to secure a diverse student body, would be permissible. Such a program, he argued, would be narrowly tailored to the compelling objective of achieving greater diversity in the educational environment of the medical school. Four other Justices, led by Justice Brennan, would have applied a less stringent standard of review but nonetheless agreed with Powell that race-conscious admissions practices could be justified as a means of achieving diversity.

The Court's later decisions in *Croson* and *Adarand* confirmed Justice Powell's strict scrutiny approach, but in neither instance did the Court directly address the vitality of Powell's endorsement of a multifaceted admissions process designed to achieve a diverse educational

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[5]233 F.3d 1188 (9th Cir. 2000).

[6]122 F. Supp. 2d 811 (E.D. Mich. 2000).

environment. The current crop of lower-court college affirmative action decisions present a fundamental legal issue that only the Supreme Court can answer: whether the diversity rationale advanced by Justice Powell in *Bakke* is still good law. In view of the current lower court conflict, it is highly likely that the Court will take up this question soon.

Just what *Bakke*'s fate will be remains uncertain. Of the current Justices, only two (Rehnquist and Stevens) also served when *Bakke* was decided, and neither of them found it necessary to reach the constitutional equal protection issue in that case. Clearly, the Court has tacked sharply to the right on affirmative action issues in the two decades since *Bakke* came down. Yet like so many Rehnquist Court decisions on pressing social issues, the decision on this matter promises to be sharply divided. Three Justices on the current Court (Rehnquist, Scalia, and Thomas) will probably vote against a diversity rationale. Three other Justices (Stevens, Ginsburg, and Breyer) are reasonably likely to support a diversity rationale. Three other Justices (O'Connor, Kennedy, and Souter) represent the middle "swing" votes. A closer look at their views suggests that the outcome will be exceedingly close.

Though his vote is somewhat less certain than those of Stevens, Ginsburg and Breyer, Justice Souter has shown a fair degree of tolerance for race-conscious affirmative measures in other settings and thus may likely vote in favor of a diversity rationale for affirmative action in college-university admissions. Justice Kennedy, on the other hand, has registered strong antipathy to race conscious measures elsewhere and is thus likely to vote against a diversity rationale.

That leaves eight of the Justices evenly split, with the outcome probably dependent on the outlook of the remaining Justice – O'Connor. Her prior opinions in this area, particularly her opinion for the majority in *Adarand*, show a firm commitment to vigorous strict scrutiny analysis wherever racial classifications have been used. But at the same time she has cautioned that the strict-scrutiny standard is not "fatal in fact" as applied to affirmative action but can be met with a proper showing. While her opinion in *Adarand* rejected a diversity justification for government contracting and licensing programs, she stopped short of ruling that diversity may *never* be used as a justification for race-conscious measures. Though she is likely to be skeptical regarding diversity justifications for affirmative action, her vote could go either way and might very well depend on the particular affirmative action methods employed in the case or cases before the

Court.

In view of the Court's probable sharp division, it should also be apparent that a change in Court personnel, by even a single Justice, could fundamentally affect the outcome on college affirmative action programs. Should President Bush have an opportunity to nominate a Justice, his nominee's views on affirmative action should be a subject for intense scrutiny in the Senate confirmation process.

Behind the vote counting on the Court lie deep legal and philosophical questions about both the nature of equality and the character of higher education. With regard to equality, the question is whether equal opportunity regardless of race is wholly defined by nondiscrimination – the use of exclusively race-neutral criteria in government decisionmaking – or whether it also includes some consideration of proportional access to important government benefits, such as higher education, which can ameliorate the effects of past and present racial discrimination. Is formal racial neutrality enough to secure true racial equality, or is there some need or obligation for government to address structural barriers to opportunity that have historically disadvantaged racial minorities in our society? As Justice Blackmun put it in his separate opinion in *Bakke*, "in order to get beyond racism [must we] first take account of race[?]"

With regard to higher education, the question is whether the kind of human environment in which learning takes place is relevant to the educational process itself. Does the diversity of the student body – political, religious, philosophical, economic, cultural, racial – affect the quality of learning? And if it does, is the value of that diversity sufficient to warrant the use of race-conscious measures to attain it? Folded into these questions is yet another: who will decide the importance of diversity to higher education – the colleges or the courts? Ultimately, the Supreme Court of the United States will determine all these matters. The answers it gives will vitally affect the shape and character of higher education in the first decades of the 21st century.

Statutory Civil Rights Law

Although we tend to think first of the Supreme Court as arbiter of the Constitution, it also plays a major role in the interpretation and application of federal statutory law. In recent years the Court has been active in interpreting federal civil rights laws, and every year it reviews numerous petitions for certiorari seeking review of claims that colleges and universities have

violated those statutes. Although the Court denies review in most of these cases, they inevitably color the Justices' perception of modern higher education. Inevitably, the Court sees colleges and universities as proving grounds that test the extent – and the limits – of federal statutory commands regarding civil rights. When the Court decides new questions of federal civil rights law, the answers it supplies are likely to have a significant impact on higher education.

The leading federal civil rights statutes include Title IX, which bans gender discrimination by participants in federally funded programs; the ADEA, which prohibits age discrimination in employment; and the ADA, which prohibits discrimination against and requires accommodation of individuals with disabilities. A new addition to the federal civil rights arsenal is the Violence Against Women Act (VAWA). There have been important recent developments under each of these statutes that have portent for college and university administration.

Title IX – Institutional Liability for Deliberate Indifference to Sexual Harassment.

Under Title IX, the Court has recently extended liability to institutions covered by the statute (including most colleges and universities) that respond with "deliberate indifference" to circumstances of employee-on-student or student-on-student sexual harassment. In the process, the Court imported into Title IX a legal concept – "deliberate indifference" – that the Court previously developed and applied to institutional liability for civil rights violations under 42 U.S.C. 1983, one of the fountainhead federal civil rights statutes dating back to the Reconstruction era that followed the Civil War.

The concept of "deliberate indifference" originated in the Court's attempts to define governmental liability for denial of civil rights to prison inmates and institutionalized individuals. When the Court established municipal civil rights liability under §1983, it applied the concept of deliberate indifference more broadly to define the kind of "policy or practice" that would give rise to municipal liability for damages under §1983. In the space of 25 years, the deliberate indifference principle has grown under §1983 from something virtually unknown in the law to a major determinant of municipal liability for civil rights violations.

From this base, recent cases extended the deliberate indifference principle to Title IX. I take this as a signal that deliberate indifference may become a bedrock federal "common law" principle governing institutional damage liability for interference with individual civil rights. In

Gebser v. Lago Vista Independent School District,[7] the Court extended the deliberate indifference principle to define institutional liability for employee-on-student sexual harassment under Title IX. The following Term, in *Davis v. Monroe County Boar of Education*,[8] the Court applied the deliberate indifference concept again to assess institutional liability for student-on-student sexual harassment under Title IX. In both instances, the Court phrased its analysis in terms of statutory interpretation and the implementation of Congressional intent. But it will be the Court, not Congress, that will give the concept of deliberate indifference its ultimate scope and content, as it has done for years under §1983.

Just exactly what constitutes "deliberate indifference" in the context of sexual harassment in an educational institution remains uncertain. In *Davis*, in particular, the Justices debated what would be required to meet this new standard in the context of peer sexual harassment, and several Justices expressed concern about the implications of the deliberate indifference standard for policing student behavior on college campuses. In the first instance, it will be up to the lower federal courts to try to develop some criteria for measuring institutional conduct. Early signs point to an emphasis on clearly articulated and communicated policies prohibiting sexual harassment, systems for investigating and disciplining individual violators, and prompt action upon receipt of complaints. The Court is likely to give the lower courts some additional opportunity to develop and refine standards for deliberate indifference in this area before it issues further rulings, but the matter is likely to return to the Court for further review and elaboration in the next couple of years. In the meantime, Court pronouncements on the "deliberate indifference" standard elsewhere, particularly in the context of municipal liability under 1983, will have reverberations for colleges and universities under Title IX.

The application of the deliberate indifference standard in these cases conveys a deeper meaning about the duties of public educational institutions to regulate the actions of their constituents, at least with respect to issues of sexual misconduct. Until recently, such conduct was regarded wholly as a matter of individual responsibility. In the *Gebser* and *Davis* cases, while

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[7]524 U.S. 274 (1998).

[8]526 U.S. 629 (1999).

it avoided imposing full vicarious responsibility, the Court clearly recognized that educational institutions – colleges and universities included – have affirmative responsibilities to create and maintain an environment in which individuals may pursue learning without fear of sexual misconduct, whether by teachers or peers. Such misconduct may not be tolerated , condoned, or, as happened all too frequently in the past, simply ignored.

ADEA and ADA – Sovereign Immunity, Legislative Power, and the New Federalism

With respect to the ADEA and the ADA, a different sort of issue has captured the Court's attention. It is a complex problem that involves issues of federal jurisdiction, state sovereign immunity, and federal legislative power under the Fourteenth Amendment. Some of the leading cases have involved colleges and universities.

For the issue to make any sense at all, a little background information is needed. Shortly after the Constitution was ratified, the Supreme Court held that the Constitution permitted citizens of one state to sue another state in federal court on questions of state law.[9] The decision produced sharp protest from the states, which feared that federal law suits by creditors might propel them into bankruptcy. The Court's decision was swiftly overturned by adoption of the Eleventh Amendment. Though the language of the Eleventh Amendment seems narrow, the Court has given it a broad reading that generally protects the sovereign immunity of states and state entities (such as many state universities) in federal court.[10] The Court has also held that Congress generally lacks the power to abrogate state immunity by legislation in cases involving violations of federal law,[11] although it has acknowledged that Congress *may* take away state immunity when it enacts legislation enforcing the guarantees of the Civil War Amendments, most importantly the Fourteenth Amendment.[12]

As a consequence of this fairly technical law, Congress may take away the sovereign immunity of the states, thus subjecting them to damages suits in federal court, if it is legislating

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[9] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[10] Hans v. Louisiana, 134 U.S. 1 (1890).

[11] Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[12] Fitzpatrick v. Bitzer, 417 U.S. 445 (1976).

under powers granted by the Fourteenth Amendment. But it may not take away the sovereign immunity of the states when it is legislating under powers, such as the power to regulate interstate commerce, granted by Article I of the Constitution. In a case where Congress has authorized suits for damages against state entities in federal court, its power to do so therefore depends on whether the legislation in question is authorized under the Fourteenth Amendment. Where federal civil rights statutes are involved the source of legislative authority for applying them to state governmental entities is often unclear.

In *Kimel v. Board of Florida Regents,*[13] which involved a variety of age discrimination claims by university professors and librarians, the Court had to decide whether the ADEA, which prohibits age discrimination in employment and purports to authorize suits for damages in federal court, is a valid exercise of Congressional legislative authority under the Fourteenth Amendment. Applying a narrow reading of Fourteenth Amendment legislative power that limits congressional authority to providing remedies for constitutional violations, the Court concluded in a 5-4 decision that the ADEA is not within Congress's Fourteenth Amendment powers, even though it attempts to secure equal protection from unjustified discrimination for an arguably vulnerable group. In *Kimel*, the Court held that age discrimination is not necessarily unconstitutional, so the statute could not be characterized as remedying a constitutional violation. Hence, a suit for damages against the university in federal court was prohibited by the Eleventh Amendment.

Kimel produced intense disagreement between majority and dissent. Ordinarily the majority opinion in a case responds to some of the arguments of the dissent, and the dissenters, while registering a preference for a different outcome, accept the precedential effect of the majority's decision for future cases. In *Kimel*, however, the majority opinion announced that it would make no attempt to address the arguments of the dissenters, because those arguments rested on a completely flawed understanding of the doctrine of federalism. And the dissenters announced that the majority decision was so patently incorrect that they would not accept it as precedent. Rarely do the Justices reach such a public impasse.

This term, the Court is facing the same set of issues under the ADA – once again in a case

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[13] 528 U.S. 62 (2000).

involving higher education. In *Garrett v. University of Alabama,*[14] in which the Justices took oral arguments last fall, the issue is whether ADA plaintiffs alleging violations of the statute may sue state colleges and universities in federal court. This issue has produced a split in the lower courts. Once again, the power to subject state entities to such suits depends on whether the statute's limits on disability discrimination, and its requirements for accommodation, are remedial measures proportionally related to the equal protection guarantees of the Fourteenth Amendment, or are substantive protections that operate independently of constitutional violations. If the Court determines that they are not enforceable under the Fourteenth Amendment, colleges and universities will still be subject to the ADA's requirements, but individual claimants will be unable to enforce those guarantees through damages suits in federal court.

As with the affirmative action question, larger issues lurk behind the question of federal court immunity. The Rehnquist Court has shown a strong affinity for the constitutional doctrine of Federalism, which guarantees the states substantial independence and autonomy from the federal government. To be sure, this doctrine is one of the unique components of our constitutional democracy. Yet an overly vigorous application of this concept in the civil rights context is troubling. It conflicts with the central aim of the Civil Rights Amendments, which was to subject the states to paramount federal authority on civil rights matters. Furthermore, it is fairly clear from the history of the Fourteenth Amendment that its drafters envisioned a powerful, proactive role for Congress in enforcing basic civil rights guarantees. After decades of failure in this mission, in the last 40 years Congress has shown great leadership in developing the concept of civil equality, and in devising measures to secure it to a broad range of people who would otherwise suffer the effects of societal discrimination. In my lifetime, this has come to be regarded as one of the principal responsibilities of national government. Decisions of the Court restricting congressional authority to enact and enforce federal civil rights guarantees threaten to interfere with Congress's ability to perform this important function for the nation.

VAWA – Limits on Commerce Clause Legislative Authority

Congress's power to legislate regarding civil rights may be further constrained by another

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[14] 193 F.3d 1214 (11th Cir. 1999), *cert. granted,* 120 S. Ct. 1669 (2000).

constitutional development under the Commerce Clause that also affects colleges and universities. Since the 1960s, Congress has often found it expedient to enact civil rights legislation as a form of regulation of interstate commerce. The landmark Civil Rights Act of 1964, for example, rests primarily on a Commerce Clause justification. For a long time, the Court has given Congress almost unlimited authority to determine what kind of behavior bears a "substantial relation" to interstate commerce, so that Congress has been able to exercise this power with relatively little judicial oversight. About five years ago, however, the Court signaled that it was going to take a more restrictive view of Congress's authority to regulate interstate commerce. Last Term, in *United States v. Morrison*,[15] in a case involving allegations of student-on-student sexual assault at Virginia Polytechnic Institute (Virginia Tech), the Court invalidated a portion of the Violence Against Women's Act that subjected the perpetrator to civil liability in federal court, on the ground that sexual assault did not bear a sufficiently substantial relation to interstate commerce to warrant Congressional regulation. This decision may exemplify a new restrictive approach to Congress' commerce clause authority that, especially in combination with the Court's restrictive approach to legislative power under the Fourteenth Amendment, may further restrain Congress' ability to undertake new statutory civil rights initiatives.

Freedom of Expression

While in some respects the Court has come to view the modern university as a microcosm of the larger society, in one respect the college community remains constitutionally unique. The Court regards colleges and universities as playing a special role in our system of freedom of expression. Since the 1960's, the Court has consistently regarded state colleges and universities as centers of trade in the "marketplace of ideas" protected by the First Amendment. Although the Rehnquist Court has often been sharply divided concerning the implications, it has shared this general view of the university as a place where free expression enjoys a specially protected status. For example, in *Rosenberger v. Rector of the University of Virginia*,[16] where the Court struck down viewpoint discriminatory funding of student organizations, the Court described the public

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[15] 529 U.S. 598 (2000).

[16] 515 U.S. 819 (1995).

university as having a special obligation to ensure the free exchange of ideas:

> "[The] danger [of chilling individual thought and expression] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. ... The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."

Consequently, Court decisions regarding First Amendment rights of free expression frequently involve universities, and even where they do not they typically have significant ramifications of college and university administration.

Numerous recent First Amendment decisions have implications for colleges and universities. One recent decision that stands out is *Board of Regents of the University of Wisconsin v. Southworth*,[17] a case involving free expression issues in the context of mandatory student activity fees. The decision yields some interesting clues about how the Court regards the modern university.

In *Southworth*, the Court considered one of the corollary rights to freedom of expression: the right not to speak. At issue was the constitutionality of the fairly common college practice of charging all students a general activity fee that is used to provide financial support to a number of student organizations, many of which engage in expressive activities. Students at the University of Wisconsin who objected to the viewpoints of some of these organizations claimed a First Amendment right to a pro rata reduction of their fee, so that they would not be required to support organizations with whose messages they disagreed. The Seventh Circuit Court of Appeals held that such a reduction was constitutionally required, but the Supreme Court disagreed. Stressing the University's "commitment to explore the universe of knowledge and ideas," the Court recognized countervailing First Amendment interests of both the university and the students. The University, the Court held, had a right to foster free exchange of ideas by funding a wide array of student organizations with different beliefs and perspectives. The "sole

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[17] 529 U.S. 217 (2000).

purpose" of the activity program, the Court observed, was " facilitating the free and open exchange of ideas by, and among, its students." The students, however, also had a keen First Amendment interest in avoiding being forced to advance viewpoints with which they fundamentally disagreed. The Court concluded that they could "insist upon certain safeguards with respect to the expressive activities which they are required to support." But the Court held that pro rata fee reductions were unnecessary. Instead, it concluded that a "viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students." As long as the University sought not to promote a particular viewpoint or discriminate against a particular viewpoint, the student contributors would be subsidizing a limited forum, not a particular set of beliefs or ideas. This approach allowed the Court to balance the students right not to speak against the important and substantial purposes of the University, which seeks to facilitate a wide range of speech ."

In reaching this decision, the Court rejected application of the "germaneness" test that it has used in the past to analyze comparable claims in other contexts. The Court explained that such a test, difficult to apply in any circumstance, would be completely unmanageable in the context of higher education:

> The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

The vast array of potential subjects, however, also underscored the danger of "intrusion" into the belief system of students. While the Court imagined the possibility of allowing students to list the causes which they would be willing to support with their fees, the Court ultimately declined to impose such an impracticable requirement on the university. Instead, the Court concluded: "The proper measure, and the principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support."

While the Court imposed this requirement on what it characterized as the open forum of subsidized student activities, it cautioned that a different standard would apply elsewhere in the University:

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or -- of particular importance -- its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. . .
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> When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position. In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered

The decision in *Southworth* was unanimous, but three Justices concurred separately to emphasize the need to safeguard the University's academic freedom. Noting that the student activity fee system was "far afield" from "controlled or compelled speech," the concurring Justices pointed to the educational value of broad discourse. They refused to draw as sharp a divide as the majority opinion implied between speech on in the classroom and extracurricular speech:

> [T]he weakness of Southworth's claim is underscored by its setting within a university, whose students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach.

Concluding that imposition of a viewpoint neutrality requirement was unnecessary to resolve the case, the concurring Justices warned of the need to respect the University's autonomy in deciding what sorts of speech on campus will facilitate its educational mission.

Especially when viewed in the context of other recent decisions, *Southworth* reflects the Court's increasing reliance on public forum analysis and requirements of viewpoint neutrality as safeguards for free expression. In the Court's emerging vision of the modern state university, content and viewpoint discrimination are permissible, even inevitable, in the classroom and in other circumstances where the university itself can be characterized as the speaker. But in addition to its own speech activities, the university has an obligation to facilitate the speech of others – particularly its students – by creating a forum for such speech and remaining neutral to the viewpoints expressed in that forum. While the Court is reluctant to micromanage university decisions about what kinds of expression will facilitate learning, it will intervene to preserve

viewpoint neutrality in the university forum.

Conclusion

As the university has become more complex, so has the Court's vision of the university. At its heart, the university remains a center for learning, and the Court continues to respect the university's need for substantial autonomy in determining how best to pursue its core educational mission. But the university is also a community that is both a microcosm and a reflection of the larger society. In some ways, it functions as a small government. In others, it functions as an employer, a business and entertainment outlet, a housing agency, an administrator of government spending and public welfare programs, a community service organization, and a public forum. Overarching all these functions, it is the quintessential marketplace of ideas. As a consequence of these multiple roles, the university has become a proving ground for many of the pressing legal and constitutional issues of our day. While it respects the independence and academic freedom of the university, the Court has made it clear that it will not shrink from intervening in university affairs when, in the Court's estimation, it is necessary to do so either to safeguard fundamental liberties or implement fundamental policies of constitutional government. From this brief review, it should be equally clear that the Court's intervention will have a profound effect on the shape and character of 21st century higher education.