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TODD F. SIMON*

INTRODUCTION

The Civil Rights Act of 1871, codified in section 1983 of title 42 of the United States Code (section 1983), has developed into a comprehensive remedy for those whose constitutional or legal rights have been abridged by any “person” acting under color of state law. These persons most often have been police officers,*

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Monroe v. Pape, 365 U.S. 167, 183-84 (1961); Lucom v. Atlantic Nat'l Bank, 354 F.2d 51, 55 (5th Cir. 1965), cert. denied, 385 U.S. 898 (1966). A plaintiff under § 1983 must prove two elements to recover: first, he must show that he has been deprived of a right protected by either the Constitution or the laws of the United States, and, second, that the defendant has deprived him of this right “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.” This second element requires that the plaintiff show that the defendant acted “under color of law.” Adickes, 398 U.S. at 150; see also Edwards v. Vasel, 349 F. Supp. 164, 166 (E.D. Mo.) (wrongdoer must not only be clothed with state authority, he must use such authority to deprive plaintiff of his rights in order for plaintiff to recover), aff'd, 469 F.2d 338 (8th Cir. 1972). Section 1983 is restricted to cases involving state wrongdoing and does not apply to federal officials acting under federal law. See Williams v. Rogers, 449 F.2d 513, 517 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

3 See Monroe v. Pape, 365 U.S. 167, 171-72 (1961); Morgan v. Labiak, 368 F.2d 338, 340 (10th Cir. 1966). When a state police officer denies a criminal suspect rights guaranteed by the Due Process Clause of the Constitution, that officer is subject to civil liability under § 1983. Stringer v. Dilger, 313 F.2d 536, 540-41 (10th Cir. 1963). Federal courts have held the following to be deprivations of rights by law enforcement officials that can give rise to § 1983 claims: illegal search and seizure, illegal arrest, detention without a warrant or arraignment, physical abuse, threats and intimidation, failure to provide needed medical attention, and refusal to permit consultation with an attorney. Id. at 541 (citations omitted).
state and local government officials, and public school officials. One group of officials, however, has been largely excluded from the development of section 1983 jurisprudence. When they are defendants in section 1983 actions, college officials and professors have been treated by the courts as *sui generis.* The institutions themselves have been accorded what amounts to a "special status" by the courts in such actions.

The solicitous treatment of colleges and universities runs counter to the development of the section 1983 doctrine as applied to other entities and officials. While the courts, particularly the Supreme Court, have enlarged the liability of most governmental entities, a number of doctrines have been established that effectively create an educational immunity in section 1983 actions. Individual

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7 See, e.g., Prebble v. Brodrick, 535 F.2d 605, 610 (10th Cir. 1976) (action for damages against state university barred because recovery would require expenditure from public treasury); Braden v. University of Pittsburgh, 477 F.2d 1, 7 n.10 (3d Cir. 1973) (§ 1983 action impermissible against university *qua* state agency); Anthony v. Cleveland, 355 F. Supp. 789, 789-90 (D. Hawaii 1973). Some courts have held the eleventh amendment to be a bar to actions against a state university, see Prebble, 535 F.2d at 610, while at least one court has held that a state university is not a "person" who can be sued under § 1983, see Anthony, 355 F. Supp. at 789-90.


Section 1983, which was enacted during the post-Civil War reconstruction era, was seldom used as a remedy before 1961. See Comment, Civil Rights: The Supreme Court Finds New Ways to Limit Section 1983, 33 U. Fla. L. Rev. 776, 777 (1981). In Monroe v. Pape, 365 U.S. 167 (1961), the Court abandoned the view that a litigant in a § 1983 action had to prove an intentional invasion of a constitutional right. See id. at 187. Today, courts hold that "liability [is] not dependent on the mind of the actor, but upon the result of the act." Comment, *supra,* at 777-78. This new interpretation allows § 1983 to be used as a potent tool to redress deprivations of rights caused by persons acting under color of state law.
officials in academia have been treated differently from all other section 1983 individual defendants. The qualified official immunity rules devised by the Supreme Court in other contexts have seldom been applied to academic officials.9

This Article is an examination of colleges and universities, and also their individual officers, as defendants in section 1983 proceedings. Section I addresses the development of the special treatment accorded colleges and universities in section 1983 cases. Section II considers the types of actions that have been brought against colleges and universities under section 1983; the nature of the challenged action appears to make a difference in how these defendants are treated under section 1983. Section III examines the doctrinal foundation for granting educational institutions and personnel a special status under section 1983; this special status appears to have developed by analogy from other legal contexts. Section III also analyzes recent Supreme Court decisions regarding higher education issues. Section IV contains a summary of the functions of section 1983 as they have been developed by the courts, focusing on the various forms of official immunity. Section V proposes an application of traditional section 1983 principles generally, and immunity analysis in particular, to college and university defendants. By inference, Section V rejects the analyses that have resulted in special status for academic defendants. This section also discusses the potential benefits to be derived from treating academic defendants like other section 1983 defendants.

A few notes on style and method are appropriate. The word university is used throughout the text and is meant to include colleges. This Article does not concern itself with the “state action” problem, for which plentiful literature exists.10 The discussion as-

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9 See infra notes 354-376 and accompanying text; see also C. Antieau, Federal Civil Rights Acts § 98 (2d ed. 1980). Officers and trustees of a university have been held to be totally immune from § 1983 liability when exercising discretionary functions. See Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184, 188 (E.D. Va. 1970); see also Rubenstein v. University of Wis. Bd. of Regents, 422 F. Supp. 61, 64 (E.D. Wis. 1976). But see Procunier v. Navarette, 434 U.S. 555, 561 (1978) (president of state university entitled to only qualified immunity in § 1983 action); Prebble v. Brodrick, 535 F.2d 605, 612 (10th Cir. 1976) (president, trustees, and officers of state university entitled to only qualified immunity).

10 State action is a theory that is used to apply constitutional norms, particularly the fourteenth amendment, to institutions over which the state exercises control. See Thippen, The Application of Fourteenth Amendment Norms to Private Colleges and Universities, 11 J.L. & Educ. 171, 171-72 (1982). The Court of Appeals for the Second Circuit has identified five factors relevant in considering whether an institution may be the proper subject of
assumes that state action applies to all universities and individuals discussed.

I. OF COLLEGES AND KINGS

It cannot be said that section 1983 has primary targets. Nevertheless, the classic defendants are police forces, local governments, public schools and their respective officials. These institutions and their officials dominate the majority of section 1983 cases. Although there are also many cases concerning universities and university officials, the similarity often ends there. Against governmental defendants, a plaintiff establishes a prima facie case by showing that the defendant caused the denial of constitutional or legal rights while acting under color of law. If there is no immunity available to the defendant, the plaintiff normally will prevail. When a university or university official is the defendant, however, the rules seem to change. The courts question whether an action should be allowed against such a defendant in the first instance.

A state action claim:

1. the degree to which the "private" organization is dependent on governmental aid;
2. the extent and intrusiveness of the governmental regulatory scheme;
3. whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation;
4. the extent to which the organization serves a public function or acts as a surrogate for the State;
5. whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Weise v. Syracuse Univ., 522 F.2d 397, 407 (2d Cir. 1975). A plaintiff, to recover, does not have to state with particularity the exact types of control present; it is sufficient for the complaint to show that in the aggregate, the defendant's action was state action. See Brown v. Strickler, 422 F.2d 1000, 1002 (6th Cir. 1970). The various indicia should be examined through an inductive process to ascertain if state participation is sufficient to confer liability. See Rowe v. Chandler, 332 F. Supp. 336, 340 (D. Kan. 1971). See generally Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1056-64 (1968) (overview of theories of state action). For a court to find state action, the state control must exceed mere financial perpetuation of the institution. See Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969). Furthermore, federal control or participation is entirely irrelevant when considering possible § 1983 liability. Id. at 595.

11 See Parratt v. Taylor, 451 U.S. 527, 535 (1981). Section 1983 has no requirement that the defendant act with any specific state of mind. See Parratt, 451 U.S. at 535; see also Comment, supra note 8, at 777-78 (defendant should be liable under § 1983 for natural consequences of his act, just as under traditional tort principles).

12 See, e.g., Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974). The Faro court hypothesized that "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at the University level are probably the least suited for federal supervision." Id. But see Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir.) ("common-sense" position of Faro should not be forced "beyond all reasonable limits"), cert. denied, 439 U.S. 984 (1978).
Plaintiffs encounter a greater burden of proof when academia is on trial. Colleges and universities are allowed defenses that cannot be found in the cases or treatises. Plaintiffs find themselves facing the potent affirmative defense of "educational immunity."

Under the notion of educational immunity, the academic defendant has a choice of three defenses, either singly or in combination, that are unavailable to most other section 1983 defendants. The first defense is the doctrine of "academic abstention," which provides that courts should maintain a "hands-off" approach to higher education. The second defense often cited by the courts is academic freedom. A third academic defense is the assertion of an educational purpose for the challenged action. All three have been invoked to defeat plaintiffs in section 1983 cases.

Of these defenses, academic abstention is the most often cited and the least analyzed. The concept of academic abstention, simply stated, is that courts should not inject themselves into controversies involving universities. The major reason given for abstention is that university officials are peculiarly well-suited to make academic decisions, while judges are particularly ill-suited. This position stems from a number of sources, most notably a 72-year-old Massachusetts case decided under tort principles and an old New York case decided under contract principles. From these
cases, and similar cases in other jurisdictions, courts have concluded that "the student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category." This statement clearly reveals its origins in the doctrine of *in loco parentis*, although that doctrine is not applicable to universities. The contention that judges are peculiarly ill-suited to consider academic questions is weak. The federal judiciary regularly hears cases containing complicated scientific and economic evidence. By contrast, the evidence in academic cases tends to be relatively simple.

Academic abstention has been relied upon primarily in cases in which students are dismissed for academic reasons, but has

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21 See, e.g., Booker v. Grand Rapids Medical College, 156 Mich. 95, 100, 120 N.W. 589, 591 (1909) (students' rights to admission depend on implied contract; court will not issue writ of mandamus to compel college to readmit students); Tate v. North Pac. College, 70 Or. 160, 165, 140 P. 743, 745 (1914) (matriculation is a contract between college and student such that student must comply with contract terms to receive degree; court will not review discretionary refusal by college to issue degree); State ex rel. Burg v. Milwaukee Medical College, 128 Wis. 7, 14-15, 106 N.W. 116, 118 (1906) (court will not issue mandamus to force educational institution to perform contract by issuing diploma).


23 The doctrine of *in loco parentis* provides that educational institutions stand in the shoes of parents when in custody of minor children, rendering rules and regulations generally not subject to challenge. See Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913).


25 See Ray, supra note 17, at 183-84. Clearly, most academic cases are not more complex than many typical patent and antitrust cases.


The seminal decision to posit the doctrine of academic abstention in cases of academic dismissal is Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913). In Barnard, a private school dismissed a student for failing three subjects. Id. at 19, 102 N.E. at 1096. In upholding the dismissal, the court held that the conduct of the school was not subject to review "[s]o long as the school committee act[ed] in good faith." Id. More importantly, the court established a clear demarcation regarding reviewability of academic, as opposed to disciplinary, dismissals:

When the real ground of exclusion is not misconduct there is no obligation on the part of the school committee to grant a hearing . . . . Misconduct is a very different matter from failure to attain a standard of excellence in studies . . . . A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.
also been used in employment and discipline cases.\textsuperscript{27} Even when a case is decided on other grounds, recitation by the court of academic abstention language seems almost obligatory.\textsuperscript{28} The notion that courts should stay out of cases that involve academic defendants in effect creates a presumption against section 1983 plaintiffs and may tip the scales in an otherwise evenly divided case.\textsuperscript{29} Moreover, the indefinite nature of academic abstention makes it a favorite judicial tool that is difficult to counter.

Academic freedom is far more complicated than academic abstention as a defense in a section 1983 action. There exists a line of cases that clearly establishes an individual's right to academic freedom.\textsuperscript{30} This individual right has commonly been posed as a defense against the civil rights claims of plaintiffs. For example, a student may contend that expulsion from school, or failure in a class, has violated his section 1983 rights. The school official might then defend with the claim that the expulsion or failing grade is protected under the aegis of academic freedom. In considering this issue, most courts have relied upon Justice Frankfurter's list of four coordinate rights in academic freedom: what will be taught, how it will be taught, who will teach, and who will be taught.\textsuperscript{31} Each of these four rights has been used as the basis of decision,\textsuperscript{32} although

\textit{Id.} at 22, 102 N.E. at 1097.

\textsuperscript{27} Cf. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir.) (student-university relationship does not exactly parallel commercial relationship), \textit{cert. denied}, 423 U.S. 898 (1975); Anthony v. Syracuse Univ., 224 App. Div. 487, 491, 231 N.Y.S. 435, 440 (4th Dep't 1928) (university has broad discretion to determine if student is detriment to academic or moral atmosphere).

\textsuperscript{28} See, \textit{e.g.}, Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978). Although the \textit{Horowitz} Court held that adequate notice had been given prior to dismissal, \textit{id.} at 85, the opinion nevertheless discussed the "distinct differences" between disciplinary decisions and other academic actions, \textit{id.} at 87.

\textsuperscript{29} \textit{Compare} Hillis v. Stephen F. Austin State Univ., 486 F. Supp. 663, 667-68 (E.D. Tex. 1980) (university failed to meet its burden of proving that professor would have been rehired absent controversial actions), \textit{rev'd}, 665 F.2d 547 (5th Cir.), \textit{cert. denied}, 457 U.S. 1106 (1982) \textit{with Hillis}, 665 F.2d at 551 (court of appeals found that the district court was "clearly erroneous" in factual findings since clear preponderance of evidence shows that professor would not have been renewed in any event), \textit{rev'd} 486 F. Supp. 663 (E.D. Tex. 1980).

\textsuperscript{30} See, \textit{e.g.}, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969); Sweezy v. New Hampshire, 354 U.S. 250 (1957); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). In perhaps the most important statement of an individual's right to academic freedom, the Supreme Court held that students do not "shed their constitutional rights . . . at the schoolhouse gate." \textit{Tinker}, 393 U.S. at 506.


\textsuperscript{32} See, \textit{e.g.}, Hillis v. Stephen F. Austin State Univ., 664 F.2d 547, 552-53 (5th Cir.),
the cases seldom specify academic freedom as the decisive issue.\textsuperscript{33} Justice Frankfurter’s list, however, is less useful to the individual defendant than it is to the institutional defendant. Only rights pertaining to the method of teaching and the material to be taught are plainly relevant to the individual, while all four are useful to universities as institutions.

Individual academic freedom is a curious defense in section 1983 jurisprudence. The doctrine of academic freedom has developed in a different context; namely, when the individual faculty member has been a plaintiff asserting a violation of academic freedom rights by the university. As developed by the Supreme Court, individual academic freedom protects professors and officials from retaliation for off-the-job activities.\textsuperscript{34} Individual academic freedom also has been invoked as an affirmative defense in a Title VII\textsuperscript{35} sex discrimination case.\textsuperscript{36}

Academic freedom, or academic discretion, as it is often called, is most powerful as a defense when used by universities rather than by individuals. In \textit{Hillis v. Stephen F. Austin State University},\textsuperscript{37} for example, the Fifth Circuit Court of Appeals decided in favor of the university on three of Justice Frankfurter’s academic freedom rights.\textsuperscript{38} In \textit{Hillis}, a dismissed, untenured professor al-
ledged that his dismissal violated his academic freedom. The court upheld all three academic freedom rights.

The doctrines of academic abstention and academic freedom can be overcome if a plaintiff shows that the challenged action was arbitrary or capricious, or made in bad faith with malice. This requirement stems from the unconscionability standard of common-law contract cases, and has survived as the standard that plaintiffs must meet in modern-day section 1983 cases. This extra burden upon plaintiffs, however, seems to conflict with recent Supreme Court pronouncements on section 1983 outside the university context. In addition, state-of-mind issues should be irrele-

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39 See 665 F.2d at 552. The professor in Hillis was dismissed because he failed to follow administrative procedures, id. at 551, refused to obey orders concerning class enrollment and grading policies, id. at 550-51, and treated university staff abusively, id. at 551-52.

40 See id. at 550-53. In Hillis, dismissal of the professor related to the right of the university to decide who may teach. Id. at 551-52. Because the dismissal was based partly on Hillis' refusal to give a "B" grade to a student as ordered by a superior, the dismissal involved the right of the school to decide how classes would be taught. See id. at 552-53. Finally, because the dismissal was based partially on the professor's refusal to take a student into his class as ordered by his superiors, the school was exercising its right to decide who may be taught. See id. at 550-51. Although the university apparently did not use Justice Frankfurter's terms of "who will teach, how subjects will be taught, and who will be taught," the actions for which the university sought protection fit within the meaning of those terms.

41 See id. at 549, 552-53. The court held that the professor's claim of academic freedom lacked merit, id. at 549, because he showed no evidence of any "censorship of the content or method of his teaching" that violated his first amendment rights, id. at 553.

42 See, e.g., LaTemple v. Wamsley, 549 F.2d 185, 188 (10th Cir. 1977) (employment decisions by academic authorities are not reviewable on merits in absence of fraud or bad faith); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (dismissed student must show arbitrary or bad faith conduct on part of university); Lehmann v. Board of Trustees, 89 Wash. 2d 874, 879, 576 P.2d 397, 400 (1978) (decision of board of trustees upheld because it was not done arbitrarily or capriciously). The burden of proving bad faith does not exist in § 1983 actions against non-academic defendants. See Gomez v. Toledo, 446 U.S. 635, 640-41 (1980) (plaintiff is not required to allege that defendant public official acted in bad faith to sustain his claim, but burden is on defendant to plead good faith as an affirmative defense).


44 See Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975). In Gaspar, a dismissed student challenged her academic dismissal by asserting a § 1983 claim that alleged denial of her property right in continued education. Id. at 846. Affirming the exercise of academic discretion by the university, the court held that although the student did indeed have a property interest in a public education, the student is required to show that the action was made arbitrarily or in bad faith. Id. at 850.

vant to a section 1983 plaintiff's prima facie case.\textsuperscript{46}

A third special defense of educational entities is "educational purpose," which stems primarily from Moore v. Student Affairs Committee.\textsuperscript{47} Although the defense had existed previously, Moore gave it substance. In denying a suspended student's request for reinstatement, the Moore court held that university disciplinary rules should be presumed constitutional if they are related to a clear interest of the university.\textsuperscript{48} That interest came to be called educational purpose.\textsuperscript{49}

Educational purpose has been expanded greatly in subsequent section 1983 cases and has proved valuable in upholding university regulations related to education. For instance, several courts have held that compulsory student fees do not violate student rights against compelled expression, finding that the interest of a school in broadening the educational experience is a valid educational purpose.\textsuperscript{50} The overexpansion of the educational purpose doctrine is best exemplified in the dormitory cases. In Bynes v. Toll,\textsuperscript{51} for example, the Second Circuit upheld a rule prohibiting children from living in married-student dormitories at the State University of New York at Stony Brook, deferring to the university's assertion

\textsuperscript{46} See supra note 11 and accompanying text.
\textsuperscript{47} 284 F. Supp. 725 (M.D. Ala. 1968).
\textsuperscript{48} See id. at 731. The student in Moore was indefinitely suspended after a warrantless search of his dormitory room by school officials revealed a quantity of marijuana. Id. at 727. The district court denied the student's request for reinstatement, id. at 731, noting that the search was a "reasonable exercise of the college's supervisory duty," id. at 729. The court found the university to have an "affirmative obligation to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process" that outweighed the student's constitutional right to be free from unreasonable searches and seizures. Id. The court then reasoned that because the action by university officials was essential to obtaining the purposes of discipline and educational atmosphere, such activity or regulation was to be "presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the fourth amendment rights of student." Id.
\textsuperscript{49} Id. at 728-30.
\textsuperscript{50} See Veed v. Schwartzkopf, 353 F. Supp. 149, 152-53 (D. Neb.), aff'd mem., 478 F.2d 1407 (8th Cir. 1973), cert. denied, 414 U.S. 1135 (1974); Larson v. Board of Regents, 189 Neb. 688, 204 N.W.2d 568, 570 (1973). Both Veed and Larson involved challenges to the imposition by the University of Nebraska of mandatory fees on students to support a newspaper, a speaker's program, and a student association. See Veed, 353 F. Supp. at 150; Larson, 189 Neb. at 698, 204 N.W.2d at 570. In each case, the court held that because the fees were not used to support only one political view, they did not violate the students' constitutional rights. Veed, 353 F. Supp. at 152-53; Larson, 189 Neb. at 698, 204 N.W.2d at 570.
\textsuperscript{51} 512 F.2d 252 (2d Cir. 1975).
of maintaining safety and quiet study as educational purposes. For similar reasons of educational purpose, the Eighth and Third Circuits, respectively, have upheld school rules requiring adult students to live in university housing and forbidding door-to-door salespeople from university housing. It is suggested that these divergent results—that in New York, children may be precluded from dormitories, while in South Dakota, adults must live there—illustrate the ad hoc nature of the educational purpose doctrine.

Although the judicial tendency to grant great deference to universities has its roots in the three doctrines discussed thus far, it is often expressed in flowery language that suggests more than mere deference to university defendants. Justice Powell has provided the best recent example of judicial identification with academia. Dissenting in *Mississippi University for Women v. Hogan,* in which the Court entertained a challenge to the women-only admissions policy of a nursing school, Justice Powell rhapsodized about the beneficial effects of single-sex higher education. His discussion of the Ivy League men's schools and the Seven Sisters women's colleges was nostalgic and poetic.

The tendency of highly educated judges to identify with academia and to project back to their own youth and education is perhaps natural. It has been argued, however, that this tendency has produced illogical reasoning and inconsistent results. In *Hogan,* for example, Justice Powell would have upheld the admissions policy even though it represented state-imposed sex discrimina-

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52 Id. at 256-57. It is submitted that the *Bynes* court might just as easily have taken judicial notice that university housing in the 1970's was seldom quiet, and rarely used as a place for quiet study, thereby determining that children would not be a disruption to dormitory life.

53 See *Prostrollo v. University of S.D.,* 507 F.2d 775, 778-79 (8th Cir. 1974), cert. denied, 421 U.S. 952 (1975). The court chronicled a list of twenty-seven advantages and eighteen disadvantages to required on-campus housing, id. at 778 n.4, and, virtually declaring that “academia knows best,” concluded that rational educational purposes were promoted by the regulation, even though the primary purpose of the regulation was to insure enough boarders to pay the revenue bonds for dormitory construction, id. at 778-79. The court further held that the regulation did not violate the students' right of privacy, as the classification was neither made on a “suspect” basis, id. at 781, nor violative of any “fundamental rights,” id. at 781-82.


56 Id. at 737, 744 (Powell, J., dissenting).

57 See *Ray,* supra note 17, at 179.
The romanticizing of university life, moreover, is inaccurate, since the "ivory tower" has been replaced by a large, imposing bureaucracy, differing from other bureaucracies only by its specific purpose.\(^{59}\)

The net effect of favoring universities over other section 1983 defendants is difficult to estimate, but undoubtedly it has led to plaintiffs' rights occasionally going unvindicated.\(^{60}\) It has resulted in confusion and slipshod analysis in cases in which traditional section 1983 analysis conflicts with educational analysis.\(^{61}\) That the application of special rules to academic parties favors those parties is only part of the problem, however. *Sui generis* treatment results in *sui generis* decisionmaking. The judicial treatment of universities under section 1983 apparently derives from notions about the historical development of universities. Colleges and universities were originally independent communities outside the laws of the land.\(^{62}\) As such, they were sovereign in their realm and, like the king, could do no wrong.\(^{63}\) Today there are no kings, universities are usually affiliated with government rather than separated from government, and hosts of federal and state civil rights laws are applicable to universities. Nevertheless, in the eyes of the courts, universities almost always do no wrong.

\(^{58}\) See 458 U.S. at 738, 744 (Powell, J., dissenting).


\(^{60}\) See, e.g., Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), aff'd in part, rev'd in part, 512 F.2d 109 (9th Cir. 1978). In *Starsky*, the court ordered a discharged professor reinstated. Id. at 928. The university asserted that it had the right to discharge for unpopular behavior; the court held that the school did in fact have such a right. See id. at 916. In the case, however, the charges of the university were found to be unsubstantiated. See id. It is necessary to cite *Starsky*, a case in which the plaintiff both won and lost, since the special status rules for universities apparently often operate to prevent § 1983 cases from being filed.

\(^{61}\) See, e.g., Gaspar v. Bruton, 513 F.2d 843, 845, 851 (10th Cir. 1975). See generally H. Edwards, *Higher Education and the Unholy Crusade Against Governmental Regulation* 25-41 (1980). In *Gaspar*, the Tenth Circuit held that due process was not violated even when student dismissals were expressly left to the sole discretion of the faculty. *Gaspar*, 513 F.2d at 845, 851.


II. Types of Actions Against Universities

Anything that can be redressed under section 1983 is conceivably the subject of an action against a university defendant. Just as universities have fallen into special defense categories, they have found themselves defendants most often in three types of actions. Universities are probably sued most often for alleged violations of employees’ constitutional or statutory rights in promotion, tenure, and continued employment, with race discrimination frequently being charged. Recently, the use of section 1983 has been supplemented, and sometimes supplanted, by sex discrimination claims under Title VII of the Civil Rights Act of 1964. Following the reasoning in Board of Regents v. Roth, plaintiffs in section 1983 employment cases typically assert the loss of a property interest in their jobs and a curtailment of a future liberty interest. Many claims further assert that the university decisionmaking procedure was deficient as a matter of due process.

“Disciplinary” cases form a second type of section 1983 case in which universities are commonly defendants. Such cases include those in which dormitory rooms are searched, or students are forbidden to engage in specified activities, or outsiders challenge university regulations. Dormitory residence, demonstration, liter-
ature distribution, rioting, and sports eligibility cases share similar reasoning. Rather than being disciplinary cases, however, they appear to be "conduct" cases, since the university is attempting to regulate conduct.

The final major classification of university cases includes those that involve challenges to clearly academic decisions: grading, academic dismissals, teaching assignments, and scholarship standards.

Universities, of course, may become defendants in section 1983 suits that stem from other actions, but are so seldom sued outside these three areas that extensive discussion is unwarranted. The academic cases normally feature property interest claims by plaintiffs, while conduct cases assert liberty interests. Procedural irregularity is asserted in nearly every section 1983 case with an academic defendant. These three categories have no clear-cut boundaries, and as a consequence plaintiffs may assert violations of academic, employment, and procedural rights. The majority of university section 1983 cases, however, fall conveniently into one of the three types of actions described. It is critical to examine them individually to see how each is affected by the "educational immunity" doctrines discussed in Section I.

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75 See Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152-54 (M.D. Pa. 1978). In Ross, a dismissed graduate student on fellowship asserted an academic property interest in continuing as a student, id. at 152, an employment property interest in the fellowship, id. at 154, and a liberty interest in both, id. The student also asserted procedural irregularity throughout the dismissal. Id. at 152-54; accord Board of Regents v. Roth, 408 U.S. 564, 569 (1972) (dismissed teacher alleged that failure of university to give notice of reasons for termination and a hearing thereon violated procedural due process); Stevens v. Hunt, 646 F.2d 1168, 1169 (6th Cir. 1981) (former medical students alleged that academic dismissal constituted violation of due process).
A. Employment Decisions

The bulk of cases concerning section 1983 challenges to employment decisions are relatively recent, following the decision in Board of Regents v. Roth and subsequent Supreme Court cases. The gravamen of a typical employment case is the allegation by an employee that the university has deprived the employee of an employment opportunity to which the employee assumed entitlement. Most common are cases in which a professor has been dismissed, or denied tenure, which is tantamount to dismissal. The employee can be expected to maintain that the objective qualifications for retention of employment or granting of tenure have been met, and that the failure of the institution to recognize that fact amounts to a denial of a property right in employment. In addition, the plaintiff will usually assail the procedures by which the university reached its employment decision.

It is clear that the employment specifications and procedures of a university do create entitlements to property and expectations of procedural regularity. Nearly all universities publish detailed

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See 408 U.S. 564 (1972). The Roth court held that a dismissed teacher was not entitled to a hearing prior to termination since it could not be shown that the termination deprived him of a liberty or property interest in continued employment. Id. at 575-78. Courts in subsequent cases have relied on Roth in reviewing employment discrimination. See, e.g., Bishop v. Wood, 426 U.S. 341, 348 (1976); Clark v. Whiting, 607 F.2d 634, 639, 641-42 (4th Cir. 1979). In Bishop, the Court held that the state had not deprived a police officer of any liberty or property interest in dismissing him. 426 U.S. at 347-48. Similarly, in Clark, the court, relying on Roth and Bishop, held that a faculty member has neither a property nor a liberty right to a promotion. 607 F.2d at 639, 641-42. See generally Henderson & Isenberg, supra note 63, at 478-80 (discussing liberty and property rights involved in academic dismissals and evaluations).

77 For a survey of the academic employment cases, see Matheson, Judicial Enforcement of Academic Tenure: An Examination, 50 Wash. L. Rev. 597 (1975).

78 Announced standards for obtaining and retaining tenure at American universities are remarkably similar. See H. Edwards & V. Nordin, supra note 13, at 218-27. The announced standards of one university were directly challenged in Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), where the court noted that "[a] teacher's competence and qualifications . . . are by their very nature matters calling for highly subjective determinations," id. at 639.

71 The claim that procedural due process was denied in reaching an employment decision stems from the decisions in Board of Regents v. Roth, 408 U.S. 564, 569 (1972) and Perry v. Sindermann, 408 U.S. 593, 595 (1972). To discharge an employee with an entitlement in employment, the university must show that it has provided a constitutionally adequate procedure for denying the employment interest. See J. Nowak, R. Rotunda & J. Young, Constitutional Law 551-52 (1983).

criteria for promotion and tenure, accompanied by equally detailed institutional procedures specifying the method for making employment decisions. This appears to favor section 1983 plaintiffs, for failure by a governmental entity to follow its own criteria or procedures can be fatal when defending a section 1983 suit. The courts, however, have made it clear that defendant universities will not be held to their promises. Mere allegations of adherence to university performance criteria and procedures will normally be accepted in court.

Universities are in some ways treated like administrative agencies. They have what amounts to primary jurisdiction over all matters, and the burden is on a challenging plaintiff to show that any decision was not within their discretion. Even in cases in which the plaintiff has shown the likelihood that "impermissible" factors weighed in the decision, the plaintiff has had difficulty recovering against a university. In *Mt. Healthy City School District v. Doyle*, for example, the Supreme Court held that if a public school teacher would have been fired regardless of extracurricular first amendment activities, the firing of that teacher was not ac-
It is suggested that, when a university acts with mixed motives, the court should determine which purpose, the permissible or the impermissible, resulted in the firing.

Clark v. Whiting represents one of the fullest expositions of judicial deference to university defendants. In Clark, the plaintiff was an associate professor who believed he deserved a promotion to full professor. As with most schools, the university used a three-factor assessment in making promotions, examining the employee's teaching, scholarly work, and service to the university community. The evidence indicated that Clark, as compared to other faculty members, did not adequately meet the expectations of the university. It was clear that the university followed its published procedures and even made additional hearings available to Clark. Thus, an objective assessment of the evidence was enough to justify dismissal of the case. The court continued, however, asserting that the federal courts were almost never a proper forum for such disputes.

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85 See id. at 285-87; accord Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 551 (5th Cir. 1982), cert. denied, 457 U.S. 1106 (1982). The Mt. Healthy Court attempted to find a standard that "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." 429 U.S. at 287.

87 607 F.2d 634 (4th Cir. 1979).

88 Id. at 636-37. The plaintiff unsuccessfully alleged that the failure of the university to apply the same standards in evaluating his scholarly contributions as were used in reviewing promotion decisions of other faculty members violated equal protection of the law. Id. at 640. The plaintiff also contended, again unsuccessfully, that he was entitled to a complete hearing, including the right to confront and cross-examine all witnesses heard by the school board. Id. at 642.

89 Id. at 636-37.

90 Id. at 637-38.

91 Id. at 637. Although the university school board had voluntarily granted the plaintiff hearings, it was alleged that these hearings did not meet the requirements of a trial-type hearing. Id. at 637, 642. Reasoning that the plaintiff had neither a property nor a liberty entitlement to any pretermination hearing, the court viewed the hearings that were granted as an act of "courtesy" on the part of the school board. Id. at 642. Such an act of courtesy, reasoned the court, does not "ripen[] automatically into an act of right generating all the requirements of a trial-type due process hearing, as the plaintiff would assert." Id.

92 Id. at 644-45.

93 Id. at 639-41. In support of its holding, the Clark court relied on Bishop v. Wood, 426 U.S. 341 (1976), in which the Court refused to reinstate a discharged policeman, admonishing that the "instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare." Id. at 349 n.14. The Clark court also cited Board of Curators v. Horowitz, 435 U.S. 78, 86 n.3, 90 (1978), as implying that faculty members possess no due process rights to hearings and procedures to appeal academic dismissals. 607 F.2d at 643.
but it is dangerous dictum, implying that the agreed-upon standards and procedures that apply between university and professor are meaningless. Such reasoning is contrary to the common understanding that governments, including universities, may by law or regulation provide more rights or procedures than are required by the Federal Constitution or statutes. Furthermore, the focus of section 1983 actions is on the removal or alteration by the state of interests in either liberty or property, whether created by the state or by the federal government.

The one instance in which courts have scrutinized university procedures to assure that they were followed is when universities reduce the number of faculty members because either revenue fell short or a legislative body cut the budget. These are called "re-trenching" cases. To justify wholesale reductions in faculty force, universities have been compelled to show that reductions were made either on a strictly neutral basis or on the basis of compelling financial need. The courts have not allowed hard times to be used as a pretext for firing an unpopular professor. In contrast to other section 1983 cases, retrenching cases are marked by a close analysis of budget, staffing, and curriculum. Perhaps the distinction results from the emphasis on numerical, rather than academic, evidence, but this does not explain the willingness of courts to look into academic issues in such cases. A better explanation might be that courts more readily see the potential for biased decisionmak-

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98 See Scheuer v. Creighton Univ., 199 Neb. 618, 630, 260 N.W.2d 595, 601 (1977); see also Browzin v. Catholic Univ., 527 F. 2d 843, 846-48 (D.C. Cir. 1975) (university required to make every effort to find professor, fired because of financial exigency, another suitable position).
ing in times of financial crisis, when university politics is at its most political. In section 1983 employment cases outside the retrenching context, courts have shown a tendency to defer to university defendants. The primary method of deferral has been the use of academic abstention, as shown in the Clark case discussed above. Notions of academic freedom, especially the "who will teach" and "what will be taught" aspects also flavor most opinions involving university employment. It should be noted, however, that, although plaintiffs in section 1983 employment cases have had difficulties, suits brought under other civil rights provisions have proved more successful. The comparative clarity of the statutory language and legislative intent in these statutes may explain this greater success. Still, even in cases involving race or sex discrimination prohibited by statute, the courts have been more deferential to academic defendants than to other defendants.

B. Academic Actions

University defendants have always enjoyed almost blanket immunity from section 1983 actions challenging purely academic decisions. The bulk of these decisions concerns grading and student dismissals, although occasionally a faculty member may

101 See, e.g., Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). In Roth, the Court left decision whether to rehire a non-tenured teacher for another year to the unfettered discretion of University officials. See id. at 578; accord Mittelstaedt v. Board of Trustees, 487 F. Supp. 960, 965 (E.D. Ark. 1980) (mandatory retirement age for teachers); Carr v. Board of Trustees, 465 F. Supp. 886, 886-97 (N.D. Ohio 1979) (dismissal of professor on basis of his publication record), aff'd mem., 663 F.2d 1070 (6th Cir. 1981); infra notes 102-104 and accompanying text.
102 See supra notes 86-92 and accompanying text.
105 See H. EDWARDS, supra note 61, at 27-31, 39-42.
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contest a teaching assignment.\textsuperscript{107} The most prominent case in the academic area is \textit{Board of Curators v. Horowitz},\textsuperscript{108} in which a medical student who performed well in the classroom setting was dismissed, based upon poor clinical performance, when graduation was imminent.\textsuperscript{109} The \textit{Horowitz} Court held that the student’s procedural due process rights had not been violated because she had been “fully informed . . . of the faculty’s dissatisfaction.”\textsuperscript{110} The Court assumed that the student had a valid liberty interest in continued education,\textsuperscript{111} but held that the school provided process beyond the requirements of the Constitution.\textsuperscript{112} Relying on state and lower federal court decisions, the Court averred that students possess no clear procedural due process rights in academic dismissals.\textsuperscript{113}

The unspoken but implicit force behind \textit{Horowitz} and a host of similar cases is the doctrine of academic freedom.\textsuperscript{114} “Who will be taught” presupposes the power of universities to set minimum standards for admissions and continued enrollment. “What will be taught” presupposes that the university, and its faculty, have the authority to determine whether a student has learned what has been taught.

Universities usually issue rules and regulations pertaining to academic performance, and provide procedures for students to appeal academic decisions. Unquestionably, the university makes the ultimate academic decision, but a student will nevertheless have a

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\textsuperscript{107} See, e.g., Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 549-50 (5th Cir.) (right of professor to teach and grade courses), cert. denied, 457 U.S. 1106 (1982); Aubuchon v. Olson, 467 F. Supp. 568, 572 (E.D. Mo. 1979) (academic dismissal of student).

\textsuperscript{108} 435 U.S. 78 (1977).

\textsuperscript{109} Id. at 79.

\textsuperscript{110} Id. at 85.

\textsuperscript{111} Id. at 84-85.

\textsuperscript{112} Id. at 85. In \textit{Horowitz}, the respondent’s performance, just as the performance of other students at the school, was evaluated periodically by a council composed of both faculty and students. \textit{Id.} at 80. The council recommended, subject to the dean’s approval, that the respondent advance to her final year of school “on a probationary basis.” \textit{Id.} at 81. Subsequent evaluations by the council led to a further recommendation that the respondent be dismissed unless her performance improved radically. \textit{Id.} Appealing the decision, the respondent worked with several physicians whose cumulative evaluation indicated that her performance had not improved. \textit{Id.} Meeting again, the council suggested that the school dismiss the respondent, and thereafter the dean informed her of his approval of the council’s recommendation. \textit{Id.} at 81-82.

\textsuperscript{113} Id. at 87-91.

\textsuperscript{114} Justice Powell is considered to have initiated the concept of institutional academic freedom with his comments on the subject in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).
\end{footnotes}
cause of action under section 1983 should the university fail to follow its own standards or procedures. Written standards and procedures are precisely the types of guarantees that create interests protectable under section 1983.\textsuperscript{115} The statement in \textit{Horowitz} that students possess no due process rights in academic decisionmaking is unfortunate, and seems to have influenced other cases.\textsuperscript{116} It is suggested that courts should be more sensitive to rights created by state and local entities.

Academic freedom defenses have been applied comparably in academic libel suits.\textsuperscript{117} The academic privilege applies in these cases if the opinion is based on academic principles. Personal ill will and arbitrary conclusions, however, are not protected.\textsuperscript{118}

Challenges to academic actions present one of the greatest potentials for complicating section 1983 jurisprudence. Ill will or arbitrariness is the only standard for relief in purely academic cases. The existence of rights violations cannot be presumed absent, as \textit{Horowitz} appears to permit. It is conceivable that an academic decision—for example, a failing grade—could be used as a cover for sexual harassment of a student by a professor. Yet sexual harassment cannot be excused under section 1983 merely because an academic reason is proffered in explanation. Nevertheless, \textit{Horowitz} seems to condone such a result, which is a compelling reason for limiting that case to its facts. Ill will, bad faith, or arbitrariness is an uncertain standard, since such a standard requires the use of


controversial “state of mind” evidence.\textsuperscript{119}

As Justice Marshall noted in a separate opinion in \textit{Horowitz}, there are few university actions that are purely academic.\textsuperscript{120} Elements of conduct and impermissible motivation will appear frequently in section 1983 cases with academic defendants. The mere assertion that an action is academic should not constitute a complete defense. To fulfill its role as watchdog of citizens’ rights, the judiciary should actively scrutinize asserted justifications in section 1983 actions, especially in academic cases, in which bad faith decisionmaking may be easily concealed.\textsuperscript{121} The courts should not second guess academic decisions, but neither should they grant academia a presumption enjoyed by no other defendants.

Academic decisions necessarily are highly discretionary. In that sense, they are not substantially different from many other decisions made by state and local government officials. A section 1983 plaintiff has a difficult case when challenging a routine decision of a city or county planning agency, but that case becomes much easier when evidence shows that the plaintiff was harmed by the impermissible purpose of the agency in making the decision.\textsuperscript{122} In most non-property cases, the nature of the right denied sets the level of inquiry a court will undertake. Such a variable approach has worked in other institutional contexts,\textsuperscript{123} and should likewise be applied to section 1983 cases with academic defendants.

C. \textit{Conduct Decisions}

The clearest judicial reasoning in university cases under section 1983 is found in those disputes that involve conduct. The reasons for this are clear. First, disciplinary actions are the types of issues with which courts frequently deal. Judges are in their partic-


\textsuperscript{121} The informal nature of university decisionmaking requires that surface assertions be closely scrutinized. In one case, the proffered academic reason for a teacher’s discharge was found to bear no relationship to academic objectives. See \textit{Hander v. San Jacinto Junior College}, 519 F.2d 273, 276-77 (5th Cir. 1975).

\textsuperscript{122} See, e.g., \textit{Vance v. Universal Amusement Co.}, 445 U.S. 308, 316-17 (1980) (nuisance statute must adhere to narrowly drawn procedures); \textit{Fountain v. Metropolitan Atl. Rapid Transit Auth.}, 678 F.2d 1038, 1043-45 (11th Cir. 1982) (property taken by eminent domain must be used for public purpose).

\textsuperscript{123} See \textit{J. NOWAK, R. ROTUNDA, & J. YOUNG, supra} note 79, at 551-52.
ular area of expertise when reviewing "punishments" of students for what amounts to "convictions" for violating university "laws" and regulations. Second, conduct issues are seldom also academic issues, which tend to be asserted only secondarily in conduct challenges under section 1983. When academic assertions by university defendants are considered, it is normally under the rubric of educational purpose rather than academic freedom or academic abstention.124 Third, conduct cases often raise claims of peculiarly egregious denials of rights—for example, denials of first amendment rights, subjections to unreasonable searches and seizures, and denials of due process.125 When these rights are abridged, judges are alert to assure that students' rights do not stop at the "schoolhouse gate."126

Conduct cases may arise under section 1983 whenever a university seeks to prohibit or regulate certain behavior. The distinction between prohibition and regulation has proved decisive.127 Universities have recognized that there are due process responsibilities in traditional disciplinary actions for violations of university prohibitions.128 Most universities have adopted clear, written standards defining prohibited activities, along with detailed procedures for adjudicating violations of such standards.129 These universities recognize the discretion granted them by the courts in academic actions, but few have specific standards concerning academic discipline.130

127 See, e.g., Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969) (blanket prohibition of free speech rights is impermissible, but school may regulate by less restrictive means to maintain order), cert. denied, 398 U.S. 965 (1970); W. MILLINGTON, THE LAW AND THE COLLEGE STUDENT 258-59 (1929) (distinguishing prior restraint of speech from post-publication punishment through regulation).
128 See Golden, Procedural Due Process for Students at Public Colleges and Universities, 11 J.L. & Educ. 337, 344 (1982). After the landmark case of Goss v. Lopez, 419 U.S. 565 (1975), in which the Supreme Court held that a student's right to a public education is a property interest that cannot be taken away for misconduct without adherence to due process, Id. at 574, public colleges and universities have provided predismissal hearings when dismissal was based on disciplinary reasons, Golden, supra, at 344. Of the 58 schools surveyed by Golden, each had some form of hearing for disciplinary dismissals, and most had some form of dismissal procedure for academic deficiency cases. Id. at 344-45.
130 See id. at 388-99.
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Few courts, however, have recognized that time, place, and manner regulations are also conduct decisions. In *Spartacus Youth League v. Board of Trustees*, the court balanced the interest of the university in maintaining the peace necessary to its educational mission against the interest of those who sought to use university facilities to sell literature without complying with the regulation requiring advance written permission. The court refused to accept the asserted educational purpose of preventing disruption of the academic atmosphere of the student center, finding that the student center was used by thousands of students daily, often for exactly the type of activity in which the group sought to engage. The court further held that the regulations were overbroad and vague, and advised the school to set standards in future regulations and to provide a procedural review mechanism. The *Spartacus* court required the university to meet standards like those in traditional disciplinary cases, having separated the university action into conduct and academic issues and deciding that the conduct issue was more important.

Few courts have taken the *Spartacus* approach. In the dormitory cases discussed earlier, the courts failed to consider the conduct issues raised by the students. Rather, the courts accepted assertions of educational purpose as sufficient to uphold rules requiring and denying dormitory residence. Considered as conduct regulation rather than academic regulation, these decisions would be difficult to sustain. The schools were allowed to engage in conduct regulation without any inquiry by the courts into the relationship between the regulation and the schools' educational purpose. Bona fide academic justifications should be required in such cases.

University conduct regulation has been influenced by the de-

131 But see Shamloo v. Mississippi State Bd. of Trustees, 620 F.2d 516, 521 (5th Cir. 1980) (recognizing that time, place, and manner restrictions are conduct decisions and, therefore, must be consistent with constitutional safeguards).
133 See id. at 799-80.
134 See id. at 800-01. The *Spartacus* court stated that since the university permitted the distribution of printed matter by certain individuals, it could not limit this privilege to a select few. Id.
135 Id. at 802.
136 See supra notes 51-53 and accompanying text.
cline of the doctrine of in loco parentis over the past twenty years. The result has been a limitation confined to traditional disciplinary matters.\textsuperscript{138} If a university charges a student with possession of marijuana, for example, a full panoply of rights may be asserted under section 1983.\textsuperscript{139} If a university attempts to control a student's life style or activities, however, the student's rights are less certain. Cases such as Spartacus and Widmar v. Vincent\textsuperscript{140} offer an approach to plaintiffs in these non-disciplinary conduct cases. In Spartacus and Widmar, students and outsiders successfully argued that a university, since it is uniquely the marketplace of ideas, was a place in which they were entitled to exercise their first amendment rights of academic freedom.\textsuperscript{141} Although these cases add vaporous ideas to the already amorphous reasoning in academic freedom cases, they bring renewed vigor to the notion that the university is a laboratory of ideas.

In conduct cases, the courts have shown a sensitivity to rights that is missing in employment and academic cases. Pure disciplinary actions have drawn judges into taking a hard look at the justifications offered by a university, often leading to rejection of those justifications as pretext. In non-disciplinary cases, however, the courts seem confused over whether to apply the various doctrines that have historically protected universities. The standards should be the same for both types of conduct cases; academic defendants should be required to demonstrate academic justifications for conduct actions. The courts should assure that the justifications are tied to the educational mission of the university, and that regula-

\textsuperscript{138} See Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968). The death of in loco parentis does not mean that a university may not enact regulations to prevent disruptive conduct or to engage in disciplinary action when such conduct occurs. See id. However, a public institution may not enact disciplinary measures for the sake of discipline. Breen v. Kahl, 419 F.2d 1034, 1038 (7th Cir. 1969) (regulation forbidding male students from growing their hair long is invalid absent evidence that long hair promotes disruptive behavior), cert. denied, 398 U.S. 937 (1970).

\textsuperscript{139} See Morale v. Grigel, 422 F. Supp. 988, 991 (D.N.H. 1976). In Morale, a student at a state technical school brought a § 1983 action against the school authorities for busing his suspension on the alleged illegal seizure of marijuana from his dormitory room, id., since a university official may be held liable for damages under § 1983 if he either knew or reasonably should have known that his actions constituted a violation of a student's constitutional rights, Wood v. Strickland, 420 U.S. 308, 322 (1975). Nevertheless, outside of search and seizure and first amendment violations, students rarely succeed in § 1983 actions.

\textsuperscript{140} 454 U.S. 263 (1981).

\textsuperscript{141} See id. at 277 (university cannot enforce a content-based exclusion of students' religious speech); Spartacus, 502 F. Supp. at 801 (university regulation prohibiting sale of political literature by non-students unconstitutionally infringed upon first amendment rights).
tions based on those justifications are clearly related to achievement of the institutional mission. This is required of other section 1983 defendants,\textsuperscript{142} and should not be too much to expect from institutions that so pervasively affect their students and employees.\textsuperscript{143}

D. Mixed Actions

Almost all section 1983 actions brought against university defendants will offer a combination of issues. Invariably, the university can be expected to raise academic issues as a defense. The courts must be careful to assess and divide the issues in mixed-issue cases. In \textit{Board of Curators v. Horowitz},\textsuperscript{144} for example, the evidence clearly showed that the plaintiff lacked the temperament to be a good doctor.\textsuperscript{145} Such a decision was at least partly based on the student's conduct, for her performance in clinical classes was the reason for dismissal.\textsuperscript{146} The Court, however, did not recognize the dismissal as a conduct dismissal.\textsuperscript{147} A professional school should perhaps be permitted to exercise a greater degree of discretion, since professional schools normally produce graduates who will work in service careers such as law, medicine, and social work. A student who proves utterly unable to provide the service demanded by the profession may be a fine academic student, as Horowitz was, but at the same time a poor professional school student. The Court failed to make this distinction between the type of decision a medical school must make and the type that a community junior college must make. It is understandable that the level of discretion will enlarge as students enter graduate and professional programs, for such programs are often heavily clinical or decidedly esoteric. In such programs, the judgment of faculty mem-

\textsuperscript{143} The academic community includes millions of students and thousands of faculty members; moreover, universities are tied directly or indirectly to virtually all other portions of society. D. Box, \textit{supra} note 59, at 61-66.
\textsuperscript{144} 435 U.S. 78 (1978).
\textsuperscript{145} Id. at 80-82; see \textit{supra} notes 108-113 and accompanying text.
\textsuperscript{146} \textit{Horowitz}, 435 U.S. at 85. The \textit{Horowitz} Court accepted the finding that Ms. Horowitz had been discharged for poor performance in her clinical studies. \textit{Id.}
\textsuperscript{147} Id. at 89-90. In \textit{Horowitz}, the Court distinguished the plaintiff's discharge for academic reasons from disciplinary action based on improper conduct. \textit{See id.} Whereas disciplinary actions involve investigative techniques and subjective evaluations of student conduct, academic dismissals involve expert evaluation of educational competence not readily adaptable to the judicial process. \textit{Id.}
bers is necessarily relied upon.

Ironically, six years prior to the Horowitz decision, the Supreme Court, in Healy v. James,\textsuperscript{148} provided an excellent example of how to separate issues. In Healy, a college denied recognition to a student organization with radical political views.\textsuperscript{149} In an opinion by Justice Powell, the Court considered the right of the college to determine what it will do as an institution, but denied the university's asserted right not to recognize a student organization on the basis of undifferentiated apprehension of disturbance.\textsuperscript{150} The Court nevertheless noted the right of a college to control conduct that disrupts academic activities.\textsuperscript{151} It is apparently critical that Healy was posed as a first amendment case by the student plaintiffs, for the nature of the asserted right appears to have influenced the Court's analysis. As noted earlier, students have had greater success against universities when asserting a violation of their first and fourth amendment rights.\textsuperscript{152}

It is unfortunate that, except for these isolated cases involving fundamental rights, the courts have tended to allow denials of students' rights to go unvindicated. In mixed-issue cases, this occurs most frequently when the university defendant is able to show an academic, rather than a purely social justification for its actions. In section 1983 cases involving other defendants, the existence of a permissible alternative basis for a decision is often a good defense,\textsuperscript{153} although it must be shown that the alternative basis is also sufficient.\textsuperscript{154} In mixed-issue university cases, however, since the alternative basis typically will be described in academic terms, courts have accepted the alternatives without adequate analysis.

E. \textit{Altered State Actions}

One result of granting a special status to university defendants and applying that status as a defense in select classes of claims, ostensibly at least, is that numerous abridgments of students'
rights have not been redressed. This assertion cannot be proved; the instances in which students have sought the advice of counsel merely to be informed that the university holds most of the cards are not reported.

A second regrettable result is that universities apparently are lulled into employing imprecise standards and procedures. That disciplinary codes are tighter than academic or faculty codes shows that courts can convince universities to adhere to fourteenth amendment standards. Claims that procedural due process has been denied in disciplinary actions have declined in recent years. Good, clear codes are certainly one of the reasons. Universities, though, have apparently been encouraged by the “discretion” the courts have granted them in employment, academic, and non-disciplinary matters. Those codes that do exist are loose, not specific, and are designed to allow a great deal of discretion. Although discretion is required by the institution, it cannot be allowed to mask illegalities. Curiously, although standards are imprecise in non-disciplinary codes, procedures are often exact, providing plaintiffs a precise way to challenge an imprecise decision.

Because one of the apparent lessons from the disciplinary cases is that universities and officials benefit from being required to draw better guidelines and regulations, it is suggested that there is no reason to assume that either side will benefit any less if similar clarity is required in non-disciplinary actions.

III. Doctrinal Bases for University Special Status

It is probably sufficient for section 1983 purposes to recognize that the courts have given universities special treatment, and that those “special” defenses have been categorized as academic abstention, academic freedom, and educational purpose. The foundations of the three categories, however, are important in understanding how and when the special defenses are applied. The reasons for the development of these three categories have a direct bearing on how

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155 See Golden, supra note 128, at 344.
156 See id.
158 See id. at 801-04. The regulations in Spartacus specified which officials to see and what steps to take in order to get permission to distribute literature. Id. at 801. However, the regulations failed to specify what factors would be considered in making a determination. Id. at 802.
section 1983 should be applied to university defendants, if at all. Complete application of section 1983 to university defendants is considered in Section V.

A. Academic Abstention

As discussed earlier, academic abstention in this country has developed from cases in which students sued institutions on common-law contract grounds. A variety of contract claims have been denied by the courts, including allegations that students were the victims of contracts of adhesion, that the agreement between student and school was in part unconscionable, and that the school simply failed to perform as promised. The usual argument offered by the courts is that the student-university relationship is unique, and that, although contract law may apply to some extent, the terms of any such contract are too vague to allow judges to "intrude" in the university community. In effect, the courts have held that, if there is a contract, it is a unilateral one in which the university is free to set and change terms as it wishes.

Students and universities continuously enter into contracts. A syllabus in a class, for example, may be a "promise" to enrolling students that material listed in the syllabus will be covered. Absent a good academic reason, the professor who covers something beyond the syllabus has breached that promise. Other elements of contract law may be applicable to academic standards. In Ross v. Pennsylvania State University, the court treated a specified minimum grade point average standard as a contract provision. Thus, the school was not permitted to dismiss the plaintiff-student, whose grade point average was only marginally above the minimum, solely on academic grounds. This contract provision also was treated as having created an entitlement in the student for section 1983 purposes. There can be no doubt, therefore, that

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159 See supra notes 19-21 and accompanying text.
160 See Ray, supra note 18, at 186-88.
162 See id; see also Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976).
163 See Nordin, supra note 43, at 158-63.
165 See id. at 153.
166 See id. at 152-53.
167 See id. at 152. The court recognized that policies of a university, such as the minimum grade-point average standard, may create an expectation of graduation for a student.
governmental universities can create binding entitlements through their contracts.

The argument that student-university contracts are too vague to be enforced in court may have influenced judges who have found themselves peculiarly unsuited to decide academic issues. Whatever the status of student rights under common-law contract principles, or modern contract law, should be irrelevant today under section 1983. The decline of the *in loco parentis* doctrine, the recognition that eighteen-year-old students have full constitutional rights,\(^{168}\) the umbrella of civil rights statutes creating enforceable interests,\(^{169}\) and the recognition by a growing number of courts that typical contract principles may apply to universities\(^{170}\) should demonstrate that academic abstention, as an outgrowth of contract law, is inappropriate in section 1983 litigation.

B. *Academic Freedom*

Academic freedom and academic abstention often seem to overlap; nevertheless, they may be distinguished by their origins: academic abstention stems from common-law contract principles, while academic freedom has developed almost entirely as a matter of federal constitutional law. While abstention operates as a true defense, and may be overcome by showings of arbitrariness or ill will,\(^ {171}\) academic freedom is treated as a constitutional right when asserted by plaintiffs, and as a constitutional privilege when asserted by defendants.\(^ {172}\)

Academic freedom jurisprudence grew out of attempts to coerce loyalty oaths and to prevent the teaching of materials thought

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\(^{171}\) See Ray, *supra* note 17, at 180.

\(^{172}\) Compare Mt Healthy City School Dist. v. Doyle, 429 U.S. 274, 279 (1977) (teacher claimed that discharge violated right of academic freedom) with Dinnan v. Board of Regents, 661 F.2d 426, 427-30 (5th Cir. 1981) (professor claimed academic freedom privilege as defense to subpoena).
to be subversive. The key cases, therefore, are the first amendment cases of the 1940's, 1950's, and 1960's, with the seminal case being Sweezy v. New Hampshire. In Sweezy, a citizen of New Hampshire was convicted of contempt for refusing to answer questions concerning a lecture he gave on socialism. The Supreme Court reversed the contempt conviction, stating that academic freedom was a protected first amendment right. The Court expounded eloquently on the need for free inquiry in a university, but ultimately decided the case on narrower grounds. Justice Frankfurter's concurring opinion considered which academic freedom rights were protected under the first amendment, culminating in his famous list of the four "rights" of academic freedom.

Historically, the course of academic freedom remained relatively smooth as long as the disputes were direct and clear. When government, either separately or in the form of a government university, attempted to squelch faculty members' rights to teach or participate in expressive activities off the job, the Supreme Court was prepared to support the academic freedom rights of the faculty member. Academic freedom came to represent the four rights propounded by Justice Frankfurter in Sweezy. In addition to this protection afforded faculty members, the Court developed an equally protective attitude toward the university itself.

The ease of pigeonholing academic freedom into four coordinate rights, however, has obscured subsequent academic freedom.

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173 See, e.g., Whitehill v. Elkins, 389 U.S. 54, 55-56 (1967) (challenge to Maryland teachers oath requiring one to certify that he was not engaged in attempt to overthrow government); Keyishian v. Board of Regents, 385 U.S. 589, 591-92 (1967) (challenge to New York statute requiring faculty member to take oath certifying that he was not member of Communist Party); Sweezy v. New Hampshire, 354 U.S. 234, 243-45 (1957) (college professor convicted of contempt for refusing to answer questions concerning his political affiliations and lecture he delivered on socialism).
175 Id. at 243-45.
176 See id. at 250-51.
177 Id. at 255. The conviction was reversed on the ground that the petitioner had been denied due process of law under the fourteenth amendment. Id. The Court found no evidence that the state legislature desired the attorney general to obtain the type of information he had attempted to elicit from the petitioner. See id. at 254. The lack of legislative authorization was regarded by the Court as a lack of authority on the attorney general's part. See id. Notwithstanding the interference with the petitioner's constitutional rights, the Court found that the contempt power was not exercised in accordance with due process requirements. Id. at 254-55.
178 See id. at 263 (Frankfurter, J., concurring).
180 See id. at 610.
analysis. When an asserted right or privilege is said to belong within academic freedom, the courts have looked to see if it fits into any of the four categories. 181 As a result, the actual nature of academic freedom has been overlooked because of an emphasis on matters of form. Another result of pigeonholing is the development of two strands of academic freedom cases. The first consists of individual academic freedom cases, such as *Sweezy*, which are relatively simple cases of "what will be taught" and "who will teach."

182 The other strand is made up of institutional academic freedom cases, such as an academic dismissal case. 183 These cases are more complex, often concerning all four academic freedom rights.

Categorization is a painfully reticent approach to academic freedom. To confine it to its university origins seems mistaken, for academic freedom is best understood as freedom of intellectual inquiry, as Chief Justice Warren defined the interest in *Sweezy*.

184 Such a definition helps make sense of some recent developments. Today, section 1983 cases often present a student or faculty member asserting academic freedom rights against a university asserting its academic freedom privilege. Princeton University explicitly asserted an institutional academic freedom privilege in a recent case in which the university attempted to prohibit outsiders from entering university grounds.

185 The argument offered by Princeton was based largely on dicta from Justice Powell's opinion in *Regents of the University of California v. Bakke*, which extolled the function of universities in society and discussed their need to exercise discretionary authority.

Recent Supreme Court opinions have raised conflicting academic freedom issues. In *Board of Education v. Pico*, students challenged the removal of books from a combined junior/senior

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182 See *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring); *Developments in the Law*, supra note 10, at 1048-54.


184 354 U.S. at 250. In *Sweezy*, Chief Justice Warren recognized that "[t]eachers and students must always remain free to inquire, to study, and to evaluate." *Id.*


high school library. The students alleged that the school board had engaged in politically motivated censorship designed to limit their freedom of inquiry. The school board asserted that it was simply engaging in its institutional function of deciding what will be offered in the schools. Thus, both the students and the board essentially argued academic freedom. A plurality opinion held that the students had rights in such books, but remanded for proceedings to determine if those rights had been infringed impermissibly. Of the seven justices writing opinions, only Justice Blackmun, who concurred in the judgment, correctly recognized that the case pitted two constitutional claims against each other. Justice Blackmun implicitly recognized that constitutional rights must be balanced, even in section 1983 cases, which is particularly important because most section 1983 actions assert deprivations of constitutional magnitude.

This balancing approach to academic freedom as an institutional defense is illustrated in Keddie v. Pennsylvania State University, which involved claims by a dismissed untenured professor. In addition to asserting that university procedures were deficient, the professor asserted a violation of his academic freedom rights. The university contended that it had acted within its own academic freedom rights in dismissing Keddie. The court expressly balanced the two asserted rights. Since the university had meticulously followed its own procedures, had independently

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188 Id. at 858-59. The school board characterized the removed books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." Id. at 857.
189 Id. at 874.
190 Id. at 869.
191 Id.
192 Id. at 876 (Blackmun, J., concurring). Justice Blackmun analyzed the case in light of the host of individual and institutional academic freedom cases. See id. at 876-77 (Blackmun, J., concurring). Justice Blackmun would have held for the students because of the improper political motivation of the school board:

School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present.

... In my view, however, removing the same treatise because it is "anti-American" raises a far more difficult issue.

Id. at 880 (Blackmun, J., concurring).
194 Id. at 1267.
195 Id. at 1267.
196 Id. at 1269-70.
197 Id. at 1270-71.
insisted on assuring that Keddie's political activities not be considered, and had vested the primary decision in a disinterested faculty committee, the court found that the decision of the university was protected under the rubric of academic freedom.  

Both Pico and Keddie were first amendment cases, in which, arguably, all parties were aware of the rights involved. Indeed, courts have always been more amenable to section 1983 actions based on the first amendment. The thornier question concerns whether the courts will balance the parties' rights in other instances. Recently, in Mississippi University for Women v. Hogan, the Supreme Court addressed an equal protection challenge to a women-only admissions policy. The Court held that the policy violated both the fourteenth amendment and section 1681(a) of title 20 of the United States Code, which forbids sex discrimination in government-assisted universities. The Court, in an opinion by Justice O'Connor, eschewed analysis of academic freedom and educational purpose, holding that the policy did not serve an affirmative action purpose, nor was it sufficiently related to the achievement of a permissible objective. The opinion did not consider whether there were academic reasons for a single-sex policy; only the dissenters raised the academic issue. The Hogan case may have gone further than necessary in its refusal to treat universities as sui generis, for the academic arguments should have been ad-

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198 Id. at 1269-70. Once the court found that the committee had not used any constitutionally impermissible criteria in evaluating the plaintiff's performance and that the denial of tenure had a rational basis, the court refused to review the substantive tenure decision any further. Id. at 1270. The court explained that it would not substitute its evaluation of the plaintiff's qualifications for a tenured position for the evaluation of the university. Id.

199 See, e.g., Lindsay v. Board of Regents, 607 F.2d 672, 673 (5th Cir. 1979) (action of state university professor in distributing questionnaires to faculty members is speech protected by first amendment); Gay Students Org. v. Bonner, 509 F.2d 652, 663 (1st Cir. 1974) (organization of gay students has first amendment right to associate on state university campus); Gieringer v. Center School Dist., 477 F.2d 1164, 1166-67 (8th Cir.) (teacher's report to teachers association concerning position of the school district on increased salaries is constitutionally protected activity and cannot serve as grounds for dismissal), cert. denied, 414 U.S. 832 (1973). But see Adamian v. Lombardi, 603 F.2d 1224, 1228 (9th Cir. 1979) (state university professor not entitled to first amendment protection when his actions at student protest created danger of violence), cert. denied, 446 U.S. 938 (1980).


203 See id. at 734 (Burger, J., dissenting); id. (Blackmun, J., dissenting); id. at 735 (Powell, J., dissenting).
Nevertheless, the case does show that universities can be treated like other defendants.

The academic freedom right is best understood as an individual right to free intellectual inquiry. That the individual right is of primary concern is evident from cases in which faculty members, alleging that their academic freedom was infringed, have prevailed against the academic freedom rights asserted by universities. The institutional academic freedom right, although amorphous, is at best a derivative right. The university obtains academic freedom to structure the inquiry; that is, to set the terms for intellectual activity. As Keddie suggested, the university is bound by its own terms, and may not set terms that are unconscionable or unconstitutional. The institutional right should not be absolute. Whenever a constitutional claim is based on the fourteenth amendment, the university’s asserted privilege of academic freedom must be balanced against the asserted rights of the individual. The uneven development of academic freedom has resulted in a situation in which the rights of the academic institution are “more equal” than the rights of the individual. Such a result is inconsistent with the purpose of section 1983.

C. Educational Purpose

Of the three special academic defenses, the roots of educational purpose are easiest to trace. First appearing in 1968, the defense lacks the venerable attraction of academic abstention. Since it was developed in section 1983 cases, it has not suffered from the “transplantation shock” that academic freedom has. Educational purpose has developed into a genuine affirmative defense for section 1983 defendants. In the typical dormitory search case, for example, a court may find that a search without a warrant violated a student’s rights. Nevertheless, if the defendant can show a genuine educational purpose behind its actions or regulations, it

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206 Moore v. Student Affairs Comm., 284 F. Supp. 725, 728 (M.D. Ala. 1968). In Moore, the court found that the school, in searching a student’s dormitory room, had a legitimate “educational purpose” that outweighed the student’s fourth-amendment rights. Id. at 728-30.
may prevail. To succeed in this defense, a university must demonstrate that the educational purpose is an independently sufficient purpose.

Case law, however, has done little to explain what is meant by educational purpose. Almost anything remotely related to the educational mission of the institution may be raised as a defense. This demonstrates that some courts, while employing educational purpose language, are actually engaging in academic abstention analysis. True educational purpose analysis requires that the university show that the action or regulation clearly relates to educational matters, that it in fact promotes an educational objective, and that it is reasonable as applied in the circumstances of the case. So applied, educational purpose properly recognizes the unique function of the university and its officials. Deference would be granted to university decisions, but only so long as those decisions in fact derive from the function of the university itself. As with other section 1983 defenses, the burden of proof regarding the validity of an educational purpose should be borne by the defendant university.

It is not surprising that the educational purpose defense arose in student disciplinary cases, since those cases presented the types of university-community issues most suited to judicial decision-making. Educational purpose has not yet expanded beyond cases involving discipline. Full application of section 1983 to universities, professors, and officials is discussed more fully in Section V.

D. The Supreme Court and Higher Education

The Supreme Court has sent the lower courts a series of mixed signals on the subject of higher education. On the one hand, the Court has been an outspoken champion of academic freedom rights for students, faculty, and institutions, insisting that, except

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when academic decisions are challenged, universities must operate with procedural regularity. On the other hand, the Court has emphasized that although universities may have only limited rights to regulate student conduct, university conduct regulation will likely be less closely scrutinized than that of other entities. The Court has recognized that educational officials have at least some protection under the educational purpose defense, but has failed to provide an adequate explanation. Several members of the Court have favored the doctrine of academic abstention, yet others are apparently willing to look into motivations. The Court has held that a university can create a property interest in employment that will be protected under section 1983, but has limited the chances that a fired employee will keep that interest intact. Although usually passive when reviewing university section 1983 cases based on academic grounds, the Court on occasion will take a more active approach, apparently depending upon the nature of the claim.

The closest the Supreme Court has come to discussing universities and officials as section 1983 defendants per se is found in Wood v. Strickland and Scheuer v. Rhodes. Wood involved a public school board that expelled students for violating a school
regulation prohibiting alcohol at school functions.\textsuperscript{226} \textit{Scheuer} was an action against various state and university officials by the estates of three students who died in a shooting incident on campus.\textsuperscript{226} In both cases, the Supreme Court held that the school officials were entitled to a qualified immunity.\textsuperscript{227} The Court has decided only one case, however, in which section 1983 itself was the major issue in a university case. In \textit{Patsy v. Board of Regents},\textsuperscript{228} the Court held that the plaintiff was not required to exhaust state administrative remedies before suing under section 1983.\textsuperscript{229}

\textit{Patsy} can be expected to have only a nominal effect on university actions. Further, neither \textit{Wood} nor \textit{Scheuer} has been used in detailing the basis of decision in other university cases. That is unfortunate, for while the results in those cases can be defended, the analyses are ad hoc, inconsistent, and therefore not helpful for lower courts. In subsequent sections, it will be shown how consistent application of section 1983 would likely have reached the same or similar results, albeit for slightly different reasons. The major virtue of applying section 1983 reasoning consistently would be the development of a coherent and cohesive body of law concerning universities and their officials. Until this is accomplished, university defendants will apparently enjoy more-than-equal protection of the law.

IV. A Section 1983 Summary: Function and Structure

The history and background of section 1983 have been dealt with extensively in judicial opinions\textsuperscript{230} and scholarly commen-

\textsuperscript{226} See 420 U.S. at 308.
\textsuperscript{227} See 416 U.S. at 234. The \textit{Scheuer} case arose out of the deaths by gunfire of four students at Kent State University. \textit{Id.}
\textsuperscript{228} See \textit{Wood}, 420 U.S. at 321; \textit{Scheuer}, 416 U.S. at 243.
\textsuperscript{229} Id. at 516.
\textsuperscript{230} The “revival” of § 1983 stems from the Supreme Court’s analysis of the statute in \textit{Monroe v. Pape}, 365 U.S. 167 (1961). \textit{Monroe}, so to speak, let the § 1983 cat out of the bag, but kept it on a leash. During each term since \textit{Monroe} the Court has faced some type of § 1983 case. The Court has occasionally lengthened the leash, \textit{e.g.}, \textit{Monell v. Department of Social Servs.}, 436 U.S. 658, 690 (municipalities liable under § 1983), but has also occasionally shortened the leash, \textit{e.g.}, \textit{Allen v. McCurry}, 449 U.S. 90, 96 (1980) (state court decision on issues outside § 1983 binding in subsequent trial), while mostly attempting to decide just what kind of cat it was dealing with, \textit{e.g.}, \textit{Carey v. Piphus}, 435 U.S. 247, 256-57 (1978) (punitive damages not allowed in § 1983 actions). To some extent, the Supreme Court § 1983 decisions are premised on the Court’s interpretation of the legislative purpose.
Although the Congress that passed the statute apparently was concerned primarily with assuring that recently freed blacks would have a legal remedy if denied their rights under the Constitution and federal law, the Act was written in very broad language that has resulted in its being used as a general remedy for almost any violation of rights or entitlements under state and federal laws. Since the early 1960's, section 1983 has become one of the most often invoked federal statutory provisions.

To clarify just what rights are protected under section 1983, the Supreme Court has undertaken to define the parameters of section 1983 actions in a continuing series of cases. The Court's section 1983 jurisprudence can be frustrating, as the Court appears alternately to expand and restrict the umbrella of rights protected under section 1983. Nevertheless, the general rules of section 1983, at least as they are likely to apply to actions involving universities, are relatively clear.

A. Interests Protected

Because section 1983 was passed to enforce the fourteenth amendment, it is fundamental that the statute guards against abridgments of life, liberty, and property without due process of law. These interests have been dealt with separately in a variety of cases.

The first interest, life, has been applied to universities infre-
quently. In *Scheuer v. Rhodes*, the Court entertained a suit premised on an asserted deprivation of life without due process of law. However, beyond the particularly egregious factual situation in *Scheuer*, it is safe to assume that the interest in life is likely to be implicated most often, perhaps exclusively, in the criminal law context.

The liberty interest is one frequently asserted by plaintiffs in actions against universities. The Supreme Court's pronouncements on this interest clearly establish that actions taken by a university that stigmatize the victim can adversely affect the liberty interests of that victim. In *Board of Regents v. Roth*, the Court expressly stated that a university dismissal of a faculty member could infringe a future liberty interest in potential employment. In *Board of Curators v. Horowitz*, a dismissed student asserted—and the Court accepted for the purpose of deciding the case—a liberty interest in pursuing her medical career. It was apparent, however, that the Court considered this interest of dubious merit without proof that the student was deprived of some other constitutionally protected interest.

The primary liberty interests asserted against universities have come in first amendment and "lifestyle" cases. The Supreme Court has consistently held that first amendment rights are within the liberty protected by the fourteenth amendment. Indeed, liberty interests are often defined by reference to the Constitution

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239 408 U.S. 564 (1972).
241 408 U.S. at 573.
242 *Id.* at 573 (dictum); accord *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (acknowledging liberty rights in tenure). The Roth Court noted that when a dismissal or failure to rehire might damage one’s reputation in the community, liberty rights are at stake. 408 U.S. at 573.
244 *Id.* at 82. The student asserted that her dismissal from medical school substantially impaired her ability to continue her medical education or gain employment in a related field, thereby abridging her constitutional liberty interest. *Id.* The Court held that, even assuming a liberty interest for purposes of the case, the student was afforded sufficient due process protection. *Id.* at 84-85.
245 See *Id.* at 82-84 (citing *Bishop v. Wood*, 426 U.S. 341, 348 (1976)).
246 See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 79, at 376.
itself, as opposed to property interests, which rely on external evidence for their existence.

Property interests claimed in university section 1983 cases have included claims of entitlement to continued employment, to continued status as a student, to passing grades, and to faculty promotions. Property interests such as these are created under the terms of other "law" rather than by reference to the Constitution itself. In Perry v. Sindermann, the Court held that an agreement, formal or informal, between faculty and university, could result in an enforceable employment property interest. Courts applying Perry have often found instances in which university defendants have created property interests.

Procedural propriety perhaps takes precedence over all the other interests protected by section 1983. The Supreme Court has

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248 See Board of Regents v. Roth, 408 U.S. 564, 577 (1972). "Property interests . . . are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as state laws—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id.; see Simon, Liberty and Property in The Supreme Court: A Defense of Roth and Perry, 71 CALIF. L. REV. 146, 156 (1983).
253 408 U.S. 593 (1972).
254 Id. at 601-03.
255 See, e.g., Russell v. Harrison, 736 F.2d 283, 286-87 (5th Cir. 1984) (university employees dismissed during term of contract had property interest in employment); Montgomery v. Boshears, 698 F.2d 739, 742 (5th Cir. 1983) (nontenured university librarian had no property interest absent evidence of "de facto" tenure); Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1109 (7th Cir. 1979) (dismissed professor failed to show right to continued employment and therefore failed to show property interest); Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977) (teacher dismissed during term of contract has recognizable property interest); Hostrop v. Board of Junior College Dist. No. 515, 525 F.2d 569, 574 (7th Cir. 1975) (college president discharged before end of contract had property interest in employment), cert. denied, 423 U.S. 962 (1976).
indicated repeatedly that procedural regularity is a right in and of itself.\footnote{See, e.g., Goldberg v. Kelly, 397 U.S. 254, 269 (1970). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 79, at 476-77.} A typical claim is premised on an allegation that a deprivation of liberty or property was accomplished by a denial of appropriate procedures. For colleges and universities, this has meant that, when taking actions that may affect liberty or property interests, particular attention must be given to internal procedures. The failure of a governmental entity to follow its own decisionmaking procedures can raise an inference of impropriety in a section 1983 action.\footnote{See C. ANTEAU, supra note 9, §§ 68, 68.01.}

A final “right” encompasses those freedoms protected by “substantive due process.” The Supreme Court, although loath to invoke substantive due process to prevent abuses by government, continues on occasion to employ it.\footnote{See, e.g., Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639 (1974); Roe v. Wade, 410 U.S. 113, 163 (1973).} Substantive due process rights defined in the Court’s cases are generally rights relating to a plaintiff’s lifestyle.\footnote{See supra notes 13-53 and accompanying text.}

Although university students and faculty members enjoy the rights defined by the Court in its section 1983 and fourteenth amendment cases, the special defenses peculiar to universities have been employed to limit the scope of these rights.\footnote{See supra notes 108-113 and accompanying text.} The liberty interest, although very strong in first amendment cases, has been restricted in cases such as Prostrollo\footnote{See Prostrollo v. University of S.D., 507 F.2d 775, 781 (8th Cir. 1974), cert. denied, 421 U.S. 952 (1975); see supra note 52 and accompanying text.} and Horowitz.\footnote{See Board of Curators v. Horowitz, 435 U.S. 78, 90-91 (1978); see supra notes 108-113 and accompanying text.} The property interest has similarly been limited. Often, the external terms under which a property interest has been created appear to be strictly construed against the plaintiff. In some cases, courts have...
denied the existence of a property interest that was plainly intended by the university and the plaintiff.263 The most significant limitations have occurred in cases concerning due process in the university setting. *Horowitz* may have established that students are entitled to no due process following academic decisions;264 moreover, the result may influence lower courts to extend *Horowitz* to cases involving faculty.265 The procedures required in conduct cases typically are stricter, but the courts usually have allowed schools to set those procedures themselves,266 inquiring only superficially into the sufficiency of those procedures.267 However, a university's failure to follow its own standards and procedures can be harmful in section 1983 cases.268

B. *Creating Interests*

The Constitution, along with the judicial decisions interpret-
ing it, establishes primary rights under section 1983. Legislative bodies also have the power to create rights and interests enforceable under section 1983. A section 1983 plaintiff bears the burden of demonstrating that a constitution, case, or statute somehow confers the right or interest alleged to be infringed.

Of direct concern to universities is the legal effect of internally created rules and regulations. It is clear that internal statements of rights can and do create enforceable interests. It is less clear whether a governmental body has total discretion in making its internal policies. In Perry v. Sindermann, for example, the defendant university had not committed any official tenure policy to writing. The Court found that a system equivalent to a tenure policy existed on the basis of custom and usage. An important lesson from this case is that university policies and agreements must be analyzed closely in conjunction with an assessment of what the university actually does. The application of contract law analysis to the creation of interests in academia may be helpful in determining if enforceable section 1983 rights have been created. Although contract law has not been applied to the entire student-university relationship, it has been applied to many aspects of it.

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273 408 U.S. 593 (1972).
274 Id. at 600.
275 Id. at 602. The Court noted that proof of a property interest under an unwritten tenure system would not entitle a professor to reinstatement, but "would oblig[e] college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." Id. at 603.
276 See, e.g., Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) (student handbook constituted contract between student and university, mandating right to hearing prior to expulsion as provided therein); Vanlaarhoven v. Newman, 564 F. Supp. 145, 150 (D.R.I. 1983) (published regulations by which university was to determine residency status constituted contract between it and student, making applicable statute of limitations that of contract); Perretti v. State, 464 F. Supp. 784, 786-87 (D. Mont. 1979) (implied contract between student and school that opportunity would be given to complete training and receive diploma), rev'd on other grounds, 661 F.2d 756 (9th Cir. 1981).
A contract right enforceable by law may double as a section 1983 right, especially in the university context, where the institution itself is normally the forum of first resort.  

Interests in the university setting may also be created by statute. In many states, legislatures have insisted that universities maintain an open-admissions policy. In such states, any student with a high school diploma is entitled to enroll in a state university. Once admitted, however, students have no interest in maintaining student status. At state universities that have independent status under state constitutions, the constitutional provisions relating to the university may also create student and faculty interests. A state constitution itself may create interests that are not recognized under the federal Constitution. Since the student-faculty-university relationship is necessarily a fluid one, the issue of who is authorized to create interests on behalf of the university, and of how those interests are created, may be critical in certain cases. For example, if a professor, as part of a syllabus, notes that completion of specified additional work will raise students' grades, has the professor created an enforceable interest? The authority of high-level university officials—administrative and quasi-administrative officials such as presidents, deans, and program chairpersons—to create interests is apparently not questioned. Notably, those officials usually are required to follow specific guidelines before creating such an interest. Typically, a professor is not.

In universities, therefore, liberty, property, and procedural interests may be created in a variety of ways. In an institution that requires great flexibility, it is not surprising that often those interests can be created in an informal, almost offhand, manner. Al-

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278 See Beckman, Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status, 7 J.L. & Educ. 177, 190 (1978). In some instances, independent constitutional status can result in fewer rights for students and faculty. See, e.g., Board of Regents v. Baker, 638 P.2d 464, 468 (Oka. 1981) (regents not required to comply with legislative enactment increasing salaries of state employees).


though promises by a university to its employees and students may not necessarily create a legal entitlement, such promises do create an expectation. When courts confine themselves to only objective, written evidence of university promises, full adjudication of university cases is rendered impossible. It is in the nature of things that universities will attempt to secure their discretion by not writing promises. Students and faculty members should perhaps know better, and demand written evidence of rights, but often they do not. Students in particular may be uneasy about pressing a dean or professor for a written commitment. To adjudicate properly, judges should be prepared to take hard looks at the customs, traditions, practices, and procedures of the institutions, and at the decisionmaking patterns established by university officials. Only then will it be possible to determine whether an interest was created.

C. Burdens of Proof

A vast amount of literature exists concerning who bears the burdens of proof and production in section 1983 cases. The basic rules, however, are rather simple. The plaintiff must show that a legal entitlement has been denied or abridged by a person acting under color of law, and that the denial has occurred without appropriate due process. In general, specific intent on the part of a defendant is not a necessary element of proof, although bad "intent" may be required before a plaintiff can win a case alleging violations of a specific constitutional right. The plaintiff is not required to exhaust state or federal administrative remedies before filing suit under section 1983, although on occasion exhaustion of an administrative or statutory procedure that is capable of providing a complete remedy may be required. If the plaintiff estab-

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285 See Nahmod, supra note 119, at 29-32 (under a fourteenth-amendment analysis, the defendant's state of mind may be relevant to defeat the defense of qualified immunity).
lishes a prima facie case, the defendant has the burden of proving that the challenged conduct was legal, either because no legal entitlement was involved, or because the plaintiff was denied an entitlement in full accordance with the principles of procedural due process.

As previously indicated, a plaintiff's case may be more difficult against a university because the rights and procedures created within a university are less formal than are the rights and procedures established in other governmental entities. This has led to a large number of cases in which the procedures are so indefinite that plaintiffs have been unable to prove either an entitlement or a denial of due process. After \textit{Patsy v. Board of Regents}, it is difficult to imagine that any court will consider internal university administrative procedures so "complete" as to require plaintiffs to exhaust such procedures.

The advantages to university defendants under section 1983 are obvious. Because in many ways they control the creation of entitlements, universities are in a superior position to assure that legally enforceable rights are created only as the university wishes. Since the university also has the right to create its own procedures—except perhaps in disciplinary cases—it is clear that the university will be able to mold procedures to its purposes. The authority to create entitlements and procedures is largely unilateral, as a matter of both section 1983 law and contract law. In either area of law, the employee or student typically will be in an extremely weak bargaining position. Educators may accept onerous

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\textsuperscript{290} See \textit{supra} note 281 and accompanying text.


\textsuperscript{292} 457 U.S. 496 (1982); \textit{see supra} notes 228-229 and accompanying text.

\textsuperscript{293} 457 U.S. at 516. Although the Court concluded that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983," \textit{id.} (emphasis added), it is suggested that the Court's holding is equally applicable to internal university administrative procedures.


\textsuperscript{295} \textit{See}, e.g., \textit{Board of Regents v. Roth}, 408 U.S. 564, 566-67 (1972); \textit{Watson v. University of S. Ala. College of Medicine}, 463 F. Supp. 720, 726-27 (S.D. Ala. 1979); \textit{Poynter v. Drevdahl}, 359 F. Supp. 1137, 1142 (W.D. Mich. 1972). In the student-university context, since the contract that binds the parties is taken from documents printed by the university, \textit{see supra} note 276, it is only on the university's terms that any entitlements or procedures are created, except for the minimum procedural requirements necessary for due process.
conditions to stay at the school they prefer, and students may do likewise. It can hardly be contended that such agreements are fair or entered into freely. That the university has the chance to set the terms under which it might subsequently be sued gives the university a considerable advantage. The special defenses for academic defendants make this advantage virtually insurmountable.

One burden borne by the university or official in section 1983 litigation has been almost totally overlooked by the courts. Under section 1983, the defendant bears the burden of raising the affirmative defense of immunity. With the protections of academic abstention, academic freedom, and educational purpose, academic defendants have seldom been forced to rely on a typical immunity defense.

D. Section 1983 Immunity Defenses

The Supreme Court has developed three types of immunity defenses for section 1983 defendants: sovereign immunity, absolute immunity, and qualified immunity. Sovereign immunity defenses stem from the prohibition in the eleventh amendment of lawsuits against the states as states. Although direct suit for damages is normally prohibited by sovereign immunity, when the remedy sought is injunctive or declaratory, section 1983 is available. Sovereign immunity is not absolute, and can be either waived by a state or modified by Congress under its authority to legislate in advancement of the fourteenth amendment.

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298 See U.S. CONST. amend. XI. The eleventh amendment states: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. Id.; see Florida Dept. of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam).
300 See Florida Dept. of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam); Alabama v. Pugh, 438 U.S. 781, 782 (1978). Only if a state expressly consents to a suit in federal court or, by language used in a statute, obviously implies such consent, will a waiver of sovereign immunity under the eleventh amendment be found. Florida Dept. of Health, 450 U.S. at 150. Neither participation by a state in a federal program, nor an agreement by a state to obey federal law, constitutes a waiver of immunity. Id.
301 See Fitzpatrick v. Bitzer, 427 U.S. 445, 446 (1976); Note, Civil Rights Suits Against
In university cases, sovereign immunity arises when the institution is either directly operated or closely controlled by the state, but only to the extent that the university can be considered an arm of the state itself.\textsuperscript{302} Universities have been considered arms of the state if the legislature controls appropriations and expenditures, if the governing board of the university is appointed by the state, or even if the university was simply created by a legislative action.\textsuperscript{303} A "state arm" university may be liable under section 1983 if it has expressly waived its sovereign immunity; however, the plaintiff has the burden of proving that the immunity has been waived.\textsuperscript{304}

Constitutionally independent universities are normally not protected by the doctrine of sovereign immunity, since by definition the state has no direct control.\textsuperscript{305} Similarly, private universities that have been found to engage in state action are not eligible for a sovereign immunity defense. As a result, many cases have required courts to draw careful distinctions between state universities and universities neither established nor operated by the state.\textsuperscript{306}

Sovereign immunity, of course, arises only when a plaintiff seeks money damages rather than injunctive relief.\textsuperscript{307} Attorney's fees may be available when injunctive relief is sought, making litigation worth the candle.\textsuperscript{308} The courts have been unpredictable in granting relief, and the damages potentially available in a case, despite an assertion of sovereign immunity, appear to depend upon


\textsuperscript{304} Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).


\textsuperscript{306} See, e.g., Hander v. San Jacinto Junior College, 519 F.2d 273, 279 (5th Cir. 1975) (junior college established by local initiative, not arm of state); see also Skehan v. Board of Trustees, 538 F.2d 53, 62 (3d Cir. 1976) (prior state adjudication on sovereign immunity issue accepted as binding on federal court).

\textsuperscript{307} Compare Edelman v. Jordan, 415 U.S. 651, 663 (1974) (private action for money damages against state is barred by eleventh amendment) with Ex parte Young, 209 U.S. 123, 148 (1908) (injunctive relief against state not barred by eleventh amendment).

\textsuperscript{308} Nahmod, supra note 119, § 1.18.
the nature of the violation and who committed it.309

Absolute immunities are apparently irrelevant to university section 1983 cases, although possible applications can be hypothesized. The Supreme Court has recognized a defense of absolute immunity when an official’s actions stem from and conform to a constitutionally required function.310 Legislators, judges, prosecutors, and quasi-judicial administrative officials, for example, have been granted an absolute immunity, apparently rooted in common law, for actions within the scope of their official function.311 Although a number of opinions have described school officials as quasi-judicial or adjudicative, thus far none has used this characterization to support a holding of absolute immunity for academic defendants under section 1983.312

Except for the preclusion of money damage awards against states in the eleventh amendment, there is no such thing as entity immunity under section 1983. A governmental entity will be liable for deprivations that resulted from the application or enforcement of the official policy of the entity.313 The Supreme Court has not held governmental entities liable in respondeat superior, but such an entity can potentially be held liable for the actions of its employees even in the absence of an official policy.314 Supervisory officials cannot claim the status of the entity, and may be held liable for the actions of supervised employees.315 Such supervisory officials are entitled to no more than a qualified immunity defense.316

309 See Carey v. Piphus, 435 U.S. 247, 258-59 (1978) (compensation in § 1983 suits should be “tailored” to particular interest at stake). The courts have granted a variety of relief to plaintiffs, including, inter alia, compensatory damages, reinstatement, back pay, attorney’s fees, and punitive damages. See, e.g., United Carolina Bank v. Board of Regents, 665 F.2d 553, 555 (6th Cir. 1982) (back pay, attorney’s fees, and an insurance policy); Paxman v. Campbell, 612 F.2d 848, 861 (4th Cir. 1980) (reinstatement and back pay); Aumiller v. University of Del., 434 F. Supp. 1273, 1312 (D. Del. 1977) (reinstatement, back pay, and punitive damages).
312 See, e.g., Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (school officials deemed quasi-judicial, but case decided on burden of proof grounds).
316 See Butz v. Economou, 438 U.S. 478, 505-08 (1978). Only when administrative offi-
Qualified immunity, in its most recent formulation, provides that an official defending a section 1983 suit will be immune as long as the challenged action was taken pursuant to the official's understanding that the action was lawful.\textsuperscript{317} In \textit{Harlow v. Fitzgerald},\textsuperscript{318} the Supreme Court held that officials “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\textsuperscript{319} The Court termed its test an “objective” one;\textsuperscript{320} formerly, the immunity defense included a “subjective” element as well, which involved the question of malicious intention.\textsuperscript{321} The Court in \textit{Harlow} rejected the subjective test, noting that because judges had been considering the subjective test a factual issue for jury consideration, the test allowed too many insubstantial cases to proceed to trial.\textsuperscript{322} The \textit{Harlow} holding should apply to both federal and state officials, although only federal officials were involved in the case.\textsuperscript{323}

It had been well established that officials were not expected to be predictors of legal developments; an official could not be held to know of a right not yet enunciated.\textsuperscript{324} Yet, with the \textit{Harlow} decision, it appears that the deprivation of any possible right, of which a reasonable man would know, could serve as the basis of a cause of action.\textsuperscript{325} The easy answer to this problem for officials, especially


\textsuperscript{318} 457 U.S. 800 (1982).

\textsuperscript{319} \textit{Id.} at 818.

\textsuperscript{320} See \textit{id.} at 818-19.


\textsuperscript{322} 457 U.S. at 818.

\textsuperscript{323} \textit{Id.} at 818 n.30. “We have found previously, however, that ‘it would be untenable to draw a distinction for purposes of immunity between law suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.’” \textit{Id.} (quoting \textit{Butz v. Economou}, 438 U.S. 478, 504 (1978)).

\textsuperscript{324} See, e.g., \textit{Williams v. Anderson}, 562 F.2d 1081, 1101 (8th Cir. 1977) (officials are not expected to be aware of constitutional developments prior to their announcement). \textit{But cf. Aumiller v. University of Del.}, 434 F. Supp. 1273, 1307 (D. Del. 1977) (mere uncertainty about state of law not a defense; officials must make attempts to be aware of rights).

\textsuperscript{325} See \textit{Harlow}, 457 U.S. at 818-19. The \textit{Harlow} Court succinctly reasoned that, since a
university officials, might be to ask counsel for advice on what rights may be affected by certain actions. The official who acts on the advice of counsel, though, must show that it was reasonable to rely on that advice.\textsuperscript{326} If the advice is inconclusive, or if the official has reason to doubt the advice of counsel, that reliance may subsequently be found unreasonable.\textsuperscript{327}

Rejection of the subjective test may pose some peculiar difficulties to plaintiffs in university section 1983 cases. By emphasizing intent or ill will, this test paralleled the common-law standard for overcoming the doctrine of academic abstention. Analogies to the common-law test have arguably been helpful to section 1983 plaintiffs.\textsuperscript{326}

\textit{Harlow} also suggests that the immunity claimed by a defendant is to be gauged by the official's function.\textsuperscript{329} The more discretionary authority an official wields, the more likely that any given action will be deemed immune to challenge under section 1983.\textsuperscript{330} Functional analysis is especially important in considering possible qualified immunity of university officials, for these officials have broad discretionary authority and make a broad range of discretionary decisions. As previously noted, however, few courts have directly considered the defense of qualified immunity in the context of academic defendants.\textsuperscript{331} In one academic case decided in 1969, \textit{Kletschka v. Driver},\textsuperscript{332} the court made an official’s qualified immunity burden clear: “official immunity cannot be sustained until the court has knowledge of the exact nature of the defendants’ actions and the precise scope of their official duties.”\textsuperscript{333} This stan-

\textsuperscript{327} See id.
\textsuperscript{328} See Harlow, 457 U.S. at 807-09.
\textsuperscript{329} See id.
\textsuperscript{331} See supra note 312 and accompanying text; see also Wood v. Strickland, 420 U.S. 308, 315 (1975) (although courts agree that there should be good faith immunity, few have articulated a concrete standard).
\textsuperscript{332} 411 F.2d 436 (2d Cir. 1969).
\textsuperscript{333} Id. at 449. After evaluating the defendants’ official duties and actions, the court can determine whether the governmental interest in the forthright performance of these duties mandates that an immunity be granted to the defendant officials. Id.
standard seems as good today as it was when Kletschka was decided—perhaps better. It calls for exactly the type of searching inquiry that has largely been avoided in academic cases. It is time that university section 1983 defendants are expected to work within the same immunity tests as are other defendants.

V. "IMMUNIZING" UNIVERSITIES

To assess the effects of treating academic defendants as other section 1983 defendants are treated, it is necessary to consider the types of officials the university has, the nature of the duties performed by those officials, the legal status of the actions challenged under section 1983, the role of procedure in academia, and the methods of university decisionmaking. To complete the immunity analysis, the role of sovereign immunity must also be assessed. The application of the immunity doctrine to university defendants proceeds from the standards pronounced in Harlow, but necessarily includes analysis of other cases consistent with Harlow.

A. Officials and Duties

A distinction between "ministerial" and "discretionary" officials has often resulted in different degrees of immunity protection, with discretionary officials in general enjoying greater protection.\(^{334}\) Few university officials who are likely section 1983 defendants can be considered ministerial officials. Even officials who have a large amount of routine and prescribed work are vested with discretion. A registrar or admissions official, for example, may be ministerial when simply processing forms and performing prescribed procedures, but when applying discretion concerning admission of a particular student or assessment of an academic deficiency, the same official may act with considerable discretion, entitling that official to a fuller immunity. The examples of registrars and admissions officers show the need to examine the actual description of an official's position. The categorization by the university of an official's duties may be only the initial determinant of the appropriate level of immunity.

The vast majority of university officials are vested with discretionary authority. The courts have consistently recognized that

university presidents and deans, for example, are vested with broad discretion, as they must be to fulfill their defined functions. University faculty and administrative officials “run” the school in the broadest sense, determining the general parameters of operation. A typical university professor will be more concerned with budgets and management than would an employee at a comparable level in an industrial corporation. Similarly, while the decisions of top-level, non-academic administrators are concerned with policy generally, the decisions of deans and department chairmen include matters of policy and application of such policy to particular programs.

Although the decisionmaking structure of a university may be unique, the function and scope of duties of university officials should be readily ascertainable by reference to job descriptions, which most universities maintain. Custom, pattern, and practice should also be a relevant consideration, but, in the absence of clear evidence that an official has previously taken actions outside the authorized scope, a court should be ready to find that immunity does not apply. An example of such an action would be a dean’s proclivity for promising students a “second chance” in disciplinary matters, even though that alternative is authorized by neither the rules and regulations, nor the dean’s job description. If a student subsequently claims that the dean reneged and can prove the promise and a right to such he will have alleged a colorable section 1983 action. If the dean can prove that he neither knew nor

336 See NLRB v. Yeshiva University, 444 U.S. 672, 686 (1980). The faculty of a typical university exercises complete authority in academic matters, to the extent that their decisions can be considered managerial. Id. The faculty and administration of a university in effect jointly govern the institution, under a system of “shared authority.” See Ripps, The Professor as Manager in the Academic Enterprise, 29 CLEV. ST. L. REV. 17, 19 (1980). In the areas of curriculum, admissions, and general operations of a university, the faculty, by initiating discussions and making recommendations, impact on most of the major policy decisions of a university. See J. Corson, Governance of Colleges and Universities 98-99 (1960).
337 See Ripps, supra note 336, at 19-21.
338 See J. Corson, supra note 336, at 76-78. The deans of a university usually have the responsibility of filling vacancies and making promotions of faculty members. Id. at 77-78. As a result, they influence the policies of various departments. Id. Department chairmen, on the other hand, have a decisive influence on the budgeting and staffing of their departments, and as such play a major role in articulating and formulating the policies of a university. Id. at 88; see also Ripps, supra note 336, at 21 (since many university administrators are active or former professors, they share common goals and interests with faculty).
339 See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). If a plaintiff can prove that the
should have known that he was violating the student's rights, the dean has a qualified immunity defense.\textsuperscript{440} Such an analysis seems compelled, even in universities, after Harlow, and is clearly anticipated by Kletschka v. Driver.\textsuperscript{341} This vigorous immunity analysis is preferable to having judges throw up their hands at the prospect of making decisions for which they are "ill-suited," thereby abstaining from deciding the case.

Applying the immunity doctrine to professors may be slightly more complicated, requiring a more thorough factual inquiry, but will operate just the same as with top-level, non-academic administrators. The faculty is the primary supplier of the only product of a university—education—and its major services—advice, criticism, and evaluation. Since the professor's job description can be expected to be less specific than that of an administrator, it is important to fill in the gaps. Typically, both a job description and a teaching contract will provide that the faculty member is expected to teach only a certain number of courses in specific subject areas.\textsuperscript{342} The faculty member may or may not be bound to follow university or departmental course descriptions in presenting a course. Within the general terms of the job description and contract, a professor normally is free to pursue teaching and research as that professor deems appropriate. A student cannot assert a valid section 1983 claim so long as the professor covers the subjects promised and evaluates students as promised. Under the doctrine of academic freedom, the terms of subjects, methods, and grading, in the absence of agreement otherwise, are a professor's academic prerogative; this freedom is often guaranteed in the employment contract itself.\textsuperscript{343}

Academic freedom, therefore, defines the terms of a faculty member's immunity under section 1983 by guaranteeing academic discretionary authority as part of the job description. If a professor makes a decision on the basis of academic discretion, the immunity official knew or should have known that the action he took within the scope of his official duties would violate the constitutional rights of the plaintiff, or that the official took the action intentionally to deprive the plaintiff of his constitutional rights, or cause some other injury, the qualified immunity would not be available to the defendant official. \textit{Id.}

\textsuperscript{440} See \textit{id.}.

\textsuperscript{341} 411 F.2d 436 (2d Cir. 1969); \textit{see supra} notes 332-333 and accompanying text.

\textsuperscript{342} See \textit{Finkin, Regulation by Agreement: The Case of Private Higher Education, 65 Iowa L. Rev. 1119, 1124-25 (1980).}

\textsuperscript{343} See \textit{Note, The Role of Academic Freedom in Defining the Faculty Employment Contract, 31 Case W. Res. L. Rev. 608, 618 n.59, 623 (1981).}
doctrine should apply to protect that decision. A professor’s ostensibly academic decision should not be immune, however, when it is made outside the scope of academic discretion. For example, suppose a professor seeks sexual favors from a student, is rejected, and subsequently fails the student. If the professor failed the student because of the rejection, the decision to fail cannot be protected by the immunity doctrine. First, the sexually discriminatory motivation removes the decision from the scope of the professor’s discretionary duties. Second, the professor can be assumed to know that the action violated the student’s legal rights, for it would be hard to believe that the “reasonable” professor could be ignorant of one’s right to be free from gender-based discrimination.

Concededly, application of the immunity doctrine in the university context would change the actual results in only a few reported section 1983 decisions. The medical college’s academic dismissal of a student would be upheld if Board of Curators v. Horowitz were reheard on immunity grounds. The refusal to promote a professor would remain upheld in Clark v. Whiting, because the officials that were vested with the discretion to decide on promotion acted within the scope of their authority and did not violate, constructively or otherwise, any legal right.

Rules requiring freshman and sophomores to live in dormitories might be upheld because top-level university officials in the scope of their duties determine such to be educationally beneficial. The no-children-in-dormitories rule, however, would require considerable evidence to prove that university officials had an academic motiva-

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344 See Harlow v. Fitzgerald, 457 U.S. 800, 806, 815 (1982); Wood v. Strickland, 420 U.S. 308, 321-22 (1975). Presumably, the basis for the immunity would be the same as the test used for a dean or administrator. See supra note 339 and accompanying text.
347 435 U.S. 78 (1978); see supra notes 108-113 and accompanying text.
348 In Horowitz, the officials clearly were acting within their discretion, see 435 U.S. at 80-82, and did not violate any of the student’s constitutional rights, see id. at 85. Thus, under the qualified immunity analysis of Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982), the defendants would prevail.
349 607 F.2d 634 (4th Cir. 1979).
350 See, id.; see supra notes 86-92 and accompanying text.
352 See Bynes v. Toll, 512 F.2d 252, 253 (2d Cir. 1975); supra notes 51-52 and accompanying text.
tion in promulgating the rule. The officials, of course, would remain subject to the requirement that a given rule must be clearly related to an educational purpose; that is, a purpose within the scope of the administrators’ discretion.353

To the extent that courts must consider the course of a defendant’s actions to determine the scope of his immunity, it remains necessary to engage in examinations of subjective matters. In the case of a professor guilty of sex discrimination, for example, the entire course of events is essential to showing that the professor was outside the scope of duties in failing the student because, on its face, the professor’s job description includes the discretion to fail students. The student must introduce evidence to prove that an impermissible factor entered into the professor’s consideration. Mere allegations concerning an official’s function and scope, therefore, cannot be allowed to defeat section 1983 plaintiffs, particularly in the informal context of the university.

B. *Actions and Procedure*

For qualified official immunity to apply, an official must show that the challenged action is within the scope of that official’s discretion.354 Procedures that specify who is authorized to participate in making certain types of decisions and how those decisions are to be reached are the best evidence that an action was within the scope of official discretion. At present, most universities have detailed disciplinary procedures that are readily available as immunity evidence in a section 1983 action. The same universities are less specific, however, with respect to procedures in academic actions. The adoption of clear procedures and the creation of a specific reviewing body can be a great advantage to university defendants under the section 1983 immunity doctrine. Adherence to university procedures by a duly authorized person or persons raises

353 See, e.g., Brooks v. Auburn Univ., 296 F. Supp. 188, 194 (M.D. Ala.) (universities entitled to regulate time, place, and manner of speech to be given by guest lecturer to preclude interference with other school activities), aff’d, 412 F.2d 1171 (5th Cir. 1969); Webb v. State Univ., 125 F. Supp. 910, 912 (N.D.N.Y. 1954) (upholding decision by trustees to ban national fraternities from campus because they are detrimental to academic atmosphere), appeal dismissed, 348 U.S. 867 (1954); Texas Woman’s Univ. v. Chayklintaste, 530 S.W.2d 927, 929 (Tex. 1975) (court found that campus residence hall life added to students’ intellectual and emotional development and deemed parietal rule valid because it was instituted to serve educational purpose); see also Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. Fla. L. Rev. 290, 301-02 (1968) (expressing same view as Brooks).

354 See supra notes 318-330 & 344-346 and accompanying text.
a presumption of regularity that, if not rebutted, would bar a plaintiff's cause of action.\textsuperscript{355}

The doctrines of academic abstention, academic freedom, and educational purpose can easily be accommodated by the immunity analysis. Each of the three defenses is concerned with discretionary acts done within the course of duty, at least as they have been applied to university defendants. Educational purpose, for example, should not be a defense in itself. Certain officials are vested with the authority to decide what rules, regulations, and actions serve the educational purpose or mission of the institution. Similarly, academic abstention and academic freedom should not be defenses in themselves. For each, the question should be whether the official is vested with discretion to make academic evaluations and decisions. Under Harlow v. Fitzgerald,\textsuperscript{356} any of the three traditional approaches may be incorporated at the pleading stage to challenge a plaintiff's section 1983 claim.\textsuperscript{357} Absent at least some evidence of actions outside the scope of an official's discretion that would warrant taking the case to the jury, the insubstantial section 1983 actions would be dismissed at the pleading stage.

Rather than relying on the principles of academic independence, university defendants would be better served if they could show that the internal procedures and normal operations of the university serve to immunize a decision under section 1983. Rather than make claims that the academic community should not be dissected in court, academic defendants should open their doors to show that their operations result in legal and predictable decision-making. Under current practice, university defendants always run the risk of facing a judge who does not believe in academic abstention or has little concern for academic freedom arguments. The protections that would exist under qualified immunity should prove more predictable, should be easier to apply from case to case, and should continue to provide a significant measure of freedom from judicial second-guessing.

\textsuperscript{355} See Clark v. Whiting, 607 F.2d 634, 638 (4th Cir. 1979). A claim of procedural regularity would in all likelihood shift the burden to the plaintiff to show that the procedures were not properly applied. See id.

\textsuperscript{356} 457 U.S. 300 (1982).

\textsuperscript{357} See id. at 818 (judge may make preliminary conclusions of law). The three academic defenses will go to establishing the function and extent of discretion of the official; the judge must then determine if, given the function and discretion, the defendant "should have known" the law. Id.
C. University Governance

It is often argued that, in universities, authority to make decisions is shared, and this is often true. Typically, authority on employment decisions is shared among faculty committees, department chairmen, and deans. In general, however, top-level administrators are the only officials authorized to set broad, university-wide policy. Similarly, faculty members alone have the authority to grade students and present course materials. The so-called "shared authority" model has clouded judicial judgment in non-section 1983 cases in the past and has unnecessarily complicated some section 1983 cases. These results are anomalous, since the model of shared governance springs from medieval roots and has little relevance to the modern university.

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358 See, e.g., Ripps, supra note 336, at 18-23.
361 University governance is ideally one of "shared authority" between the administration and the faculty. University of N.H. Chapter of Am. Ass'n of Univ. Professors v. Haselton, 397 F. Supp. 107, 110 (D.N.H. 1975). In 1966, the American Association of University Professors (AAUP), the American Council on Education, and the Association of the Governing Board of Universities and Colleges described their approach to "shared authority" in Statements on Government of Colleges and Universities, reprinted in Academic Freedom and Tenure (L. Joughlin ed. 1969), Policy Documents and Reports of the AAUP (1969), and AAUP Bulletin, Winter 1966 [hereinafter cited as Statement]. The Statement advocates that all university decisions should be the product of a combined effort among trustees, administration, and faculty. See Finkin, Collective Bargaining and University Government, 1971 Wis. L. Rev. 125, 125. As for the faculty role in a university, the Statement asserts that the faculty should participate significantly in decisions of "general educational policy, long range planning, allocation of physical resources, budgeting and the selection of key administrative officers." See id. at 126.
363 See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672, 689 (1980) (5-4 decision based on concepts of university governance); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (existence of multiple officials influenced court in finding duties to be quasi-judicial).
364 See Baldridge, Shared Governance: A Fable About the Lost Magic Kingdom, ACADEME 13 (Jan.-Feb. 1982); Nordin, supra note 43, at 142-49.
In a university section 1983 case, a court should examine the challenged action to determine if it was in fact taken on the basis of shared or sole authority. The immune deliberations of a faculty tenure committee cannot be used to immunize a higher official's decision to deny tenure for impermissible reasons. Similarly, a committee that intends to deny legal rights should not be allowed to hide behind an immune academic decision by a higher official. If the authority is shared, but illegality is confined to one participant, it appears inevitable that the illegality will cloud the entire decision. However, the decision should nevertheless be upheld if the valid reasons are independently sufficient.365

D. Sovereign Irrelevancy

The concerns that prompted adoption of the eleventh amendment are simply inapplicable to colleges and universities, yet the doctrine of sovereign immunity has protected state universities in section 1983 suits.366 Because the eleventh amendment protects acts of states as states, the pertinent issue is whether the state acts as the state when it operates or controls a university.367 The Supreme Court has held that civil rights actions may be maintained

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367 See, e.g., Hanshaw v. Delaware Technical & Community College, 405 F. Supp. 292, 300 (D. Del. 1975). The factors considered in determining whether a state university is an "arm of the state" include: whether state law defines the relationship between the state and university, whether judgment will be paid from the state treasury if the plaintiff prevails over the university, whether the university is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has autonomy over its operations, whether its property is immune from state taxation, whether it has the power to sue and be sued and to enter into contracts, and whether the state has immunized itself from responsibility for the operations of the school. Id. Compare Jacobs v. College of William & Mary, 495 F. Supp. 183, 189-90 (E.D. Va.) (college held to be an arm of state and therefore immune to suit under eleventh amendment), cert. denied, 454 U.S. 1033 (1980) and Bailey v. Ohio State Univ., 487 F. Supp. 601, 603 (S.D. Ohio 1980) (state university was state instrumentality and fell within eleventh amendment immunity) with Gordenstein v. University of Del., 381 F. Supp. 718, 720-23 (D. Del. 1974) (university not arm of state and thus not protected by eleventh amendment) and Samuel v. University of Pittsburgh, 375 F. Supp. 1119, 1128 (W.D. Pa.) (defense of sovereign immunity unavailable when university is found to be functioning autonomously), appeal dismissed, 506 F.2d 355 (3d Cir. 1974).
against governmental entities that violate rights. In another context, the Court has held that there is a difference of constitutional magnitude when the government acts in a proprietary, rather than a governmental, fashion. A university is more proprietary than governmental in character. Only local-level elementary and secondary education has been held to be peculiarly governmental in nature. The difference is that a state is under no obligation to operate a university.

Universities are often referred to as "academic communities," and an independent community is precisely what a university is for section 1983 purposes. Even when the purse strings are controlled by the state, universities operate with great freedom. The ways in which universities resemble communities include the maintenance of "municipal" police, the passage of local "ordinances," the maintenance of "municipal" judicial systems, the provision of "public housing," and the limitation of the benefits of "citizenship." Universities are more like municipalities than they are like the state itself, and it would be more logical to treat them accordingly.

The nature of the academic community as a legal entity under section 1983 has seldom been addressed, for sovereign immunity normally prevents such consideration in the absence of a clear waiver. In Gay Student Services v. Texas A & M University, however, the Fifth Circuit held that the university had the same legal status under section 1983 as a municipality has under Monell

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372 See, e.g., Ill. Const. art. X, § 1 (education provided only through secondary level); N.J. Const. art. VII, § IV, par. 1 (education provided only to persons under 18 years of age). The Supreme Court has held that the right to an education is not a fundamental right and therefore not protected by the United States Constitution. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28-39 (1973).
374 612 F.2d 160 (5th Cir.), cert. denied, 449 U.S. 1034 (1980).
v. Department of Social Services,\textsuperscript{376} which held there was no municipal immunity under section 1983.\textsuperscript{376} The Fifth Circuit's decision is more consistent with the recent development of the immunity doctrine, and it is suggested that such an approach should be adopted by other courts.

CONCLUSION

The major argument advanced throughout the previous five sections is that academia has been treated as \textit{sui generis} when it has been the defendant in actions brought under section 1983. This special treatment has resulted in a hodgepodge of defenses unknown in section 1983 jurisprudence generally. Application of uniform section 1983 principles to academic defendants would offer benefits to both plaintiffs and defendants, and there is certainly no exemption for universities intended under the statute. The major benefit would be that, for the first time, consistent grounds of decision would be applied in all section 1983 cases involving universities. Presumptions arising from traditional approaches in academic cases would no longer defeat plaintiffs at either the pleading stage or at trial. The doctrine of qualified immunity, however, would be available to benefit defendants by assuring that insubstantial suits would be stopped before full trial. In addition, the immunity analysis would be more predictable, since it is based on a functional analysis that considers the authorized scope of an official's discretionary acts to determine the appropriate level of immunity. The courts, too, would benefit in deciding cases; vague notions about the academic community would no longer need to be looked to in deciding section 1983 cases with academic defendants. Thus, the lack of clear precedent in university section 1983 cases that has exacerbated the tendency of courts to adhere to "old notions" would be circumvented.

For universities, faculty, and students, consistent application of section 1983 standards would result in more specific descriptions of the duties of officials and more detailed procedures specifying how decisions are to be made. Defendants would benefit because

\begin{footnotesize}
\begin{enumerate}
\item[376] 436 U.S. 658 (1978); see Gay Student Services, 612 F.2d at 163-64.
\item[376] 436 U.S. at 690-91. The holding in \textit{Monell} was limited to situations in which "action pursuant to official municipal policy of some nature caused a constitutional tort." Id. at 691. Although created by state law, municipalities are not thereby entitled to share in the immunity of the state.
\end{enumerate}
\end{footnotesize}
descriptions and procedures show the proper authorization of decisions. Plaintiffs would benefit because descriptions and procedures aid in preventing rights from being violated in the first instance.