Toward Contractual Rights for College Students

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Legally enforceable rights for college students have been late in coming. Twenty years ago, a student expelled from any institution of higher education in this country would have found the courts universally reluctant to hear his claims of unjust treatment and, in many cases, actively hostile to the idea of a student as litigant. The cases on record in which a student succeeded in his claims against a college or university were so few and so isolated from one another that they offered little comfort, especially in contrast with a remarkably solid common law tradition favoring institutional discretion. A student who took his school to court did so at his own risk, and often as his own counsel; he was more likely to be chastised than awarded a judgment.

The landmark decision that changed this situation was Dixon v. Alabama State Board of Education.1 Dixon applied due process principles to students at publicly supported colleges who had been dismissed for disciplinary misconduct. Although there had been virtually no preparation for Dixon, there was no subsequent rejection of its holding — acceptance was immediate and universal. Courts have continued to follow Dixon faithfully, and the due process rights of public college students with disciplinary dismissals are now firmly established. Students presently litigate the quality of the review procedures provided by their schools, and courts are willing to scrutinize those procedures as they would other claims of insufficient due process. To this extent, students have found the courts responsive.

But Dixon draws two sharp boundaries that have not yet been crossed. It applies only to public, and not to private, institutions; it applies only to disciplinary, and not to academic, dismissals. Students at private colleges dismissed or disciplined for any reason, and

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1 294 F.2d 150 (5th Cir. 1961).
students at public colleges dismissed or disciplined for academic reasons, remain in a pre-\textit{Dixon} world where judges continue to reject their claims. The two distinctions — between public and private colleges, between disciplinary and academic matters — raise two different sets of issues which should be treated separately. They have in common, however, a tendency to categorize neatly where developments in higher education have been working to blur some traditional lines of division. They also have in common the effect of an all-or-nothing jurisprudence: the student who falls on the wrong side of the line has no judicial recourse.

Such distinctions in practice have proved to be both arbitrary and artificial. If public colleges make substantial errors of judgment that deemed correction by the courts, so, too, do private colleges; if flawed procedures are used to investigate disciplinary infractions, so, too, are they used to deal with academic problems. What is needed is a more flexible judicial approach to these conflicts, one based not exclusively, as \textit{Dixon} is, on the presence of state action, but rather one based on the nature of the relationship between student and school. Even in the absence of constitutional protections, students may establish common law rights that entitle them to judicial review of institutional decisions. This paper will argue that the contractual nature of the relationship between student and school provides a practical and flexible legal theory which can be used by courts to offer judicial review to students whose rights are otherwise unprotected from institutional error and abuse.

In the early cases brought by students against their schools, courts often seem to acknowledge the student’s right to continued enrollment while finding that right subservient to the college’s exercise of discretion. The extent of that discretion is far-reaching; colleges dismissed students for such diverse failings as “contumacious” conduct\textsuperscript{2} and counseling draft resistance.\textsuperscript{3} What characterizes these early decisions is a sense of judicial discomfort with the available alternatives. On the one hand, a contract exists, assuring the student certain legal rights; on the other hand, a college has a solemn duty not just to educate but to mold the character of its students. It is the latter concern that seems generally to overwhelm the former.

The most celebrated of these cases, \textit{Anthony v. Syracuse University},\textsuperscript{4} is generally cited for the slender grounds of dismissal it up-

\textsuperscript{2} Samson v. Trustees of Columbia University, 167 N.Y.S. 202 (1917).
\textsuperscript{3} 224 App. Div. 487, 231 N.Y.S. 435 (1928).
holds. University officials had heard rumors that the other members of the plaintiff's Greek society did not consider her to be "a typical Syracuse girl" and that she had caused unspecified trouble. The court weighed this evidence against its reading of the plaintiff's contractual claim on the university:

Under ordinary circumstances and conditions a person matriculating at a university establishes a contractual relationship under which, upon compliance with all reasonable regulations as to scholastic standing, attendance, deportment, payment of tuition, and otherwise, he is entitled to pursue his selected course to completion, and receive the degree or certificate awarded for the successful completion of such course.\(^6\)

The student has signed a registration card modifying the rule of continuance in the catalogue by allowing the university to request withdrawal of any student at any time, without offering cause, "to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its founding and maintenance."\(^8\) Although the university's conduct may seem a good deal more damaging to its moral atmosphere than the student's, the court upheld the university's discretion and expressed its reluctance to disturb a university decision.\(^7\)

For private college students, the rule of *Anthony* survives, only slightly modified, today. The most often quoted formulation is that of *Connelly v. University of Vermont and State Agricultural College*:\(^9\) "a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable."\(^9\) *Connelly* has been honored more in the breach than in the observance; as one commentator notes about its standard, "I know of no case in which relief has been given on this ground."\(^10\) Although a few cases exist in which courts have granted relief to students on contract or estoppel principles,\(^11\) no

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\(^6\) *Id.* at 438.

\(^7\) *Id.*

\(^8\) For other causes supporting broad institutional discretion in student dismissals, see Barker v. Trustees of Bryn Mawr College, 278 Pa. 121 (1923) and People ex rel. O'Sullivan v. New York Law School, 68 Hun. 118, 22 N.Y.S. 663 (1893).


\(^10\) *Id.*


\(^12\) See, e.g., People ex rel. Cecil v. Bellevue Hospital Medical College, 60 Hun. 107, 14 N.Y.S. 490 (1891), which declares, "When a student matriculates under such circumstances, it is a
common law tradition for judicial review of unreasonable college decisions has emerged. The problem for courts and commentators, then, is how to offer private college students the rights currently enjoyed by public college students under Dixon.

Courts considering student claims of injustice have usually analyzed the student-school relationship under one of several theories: that the school acts in loco parentis for the student; that the school has a binding contract with the student; that the school acts as an agency of the state. Commentators have recently suggested two additional theories: that the school acts as a fiduciary for the student, and that the status of student is a common law property right. These theories have widely varying degrees of acceptance and usefulness, though to date none has offered comprehensive protection to student rights.12

The theory that the college acts in loco parentis was presented forcefully in Gott v. Berea:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of their pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.13

The idea that college authorities wielded parental power over students relied on educational circumstances that are no longer prevalent; as the age of college students and the size of college enrollments both increased, schools were left "with no means of preserving the charm of domestic intimacy or the personalism of parental affection in the administration of their rules."14 In the fact of the changing character of higher education, the theory has lost its support. Today courts admit freely that it is "no longer tenable in a university

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12 For the most detailed treatment of these theories, see, Note, Developments in the Law: Academic Freedom, 81 Harv. L. Rev. 1045, 1144-59 (1968), hereafter cited as Developments.
13 156 Ky. 376, 161 S.W. 204, 206 (1913).
community."\(^{16}\)

Under the contract theory, when a student enrolls, he and the college enter into a voluntary contract. The explicit terms of that contract are contained in the written documents regulating college activities — the bulletin, student handbook, and any other official publications provided by the administration to the students. Courts have also identified implicit terms of the contract, favoring both student and institution. One court found it "plain that it was not one of the implied terms of the agreement that the plaintiff would comport himself in such manner as not to destroy or interfere with the discipline, good order and fair name of the University which had admitted him as one of the students."\(^{16}\) Some forty-five years later, another New York court offered an equally strong statement of the implied obligation of the school to the student:

> When a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought. The university cannot take the student's money, allow him to remain and waste his time in whole or in part (because the student might regard it as a waste of time if he does not obtain the degree), and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree.\(^{17}\)

These two elaborations on contract doctrine, both frequently cited, suggest its malleability. With sufficient latitude and a strong conviction of what one court has termed the "unique" student-college relationship, judges have applied the contract theory to achieve a variety of results.\(^{18}\) It remains an accepted theory, though its usefulness is resolving student claims has often been questioned by commentators.

There is no question that a college acting as an agency of the state is compelled, under *Dixon* and subsequent decisions, to observe constitutional guidelines. Courts must, however, determine when the actions of a nominally private institution have become, by virtue of its reliance on state resources, state action. This problem is fundamental to the distinction between public and private colleges; it will be discussed later in greater detail.

The fiduciary theory of the student-college relationship, first pro-

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18. Slaughter v. Brigham Young University, 514 F.2d 622, 626 (10th Cir. 1975).
posed in a seminal article by Warren Seavey in 1957, sees the student placing his trust in the integrity of the college as fiduciary. Seavey argued that the burden of proof in a dispute should rest on the fiduciary — the college — rather than on the accused student:

The fiduciary obligation of a school to its students not only should prevent it from seeking to hide the source of its information, but demands that it afford the student every means of rehabilitation. If it has not done so, this opportunity should be given by the courts.

Enlarging on Seavey's idea, another scholar, Alvin L. Goldman, concluded that the courts should bring to such cases the same careful scrutiny applied to other fiduciary relationships; the college would have the burden of "establishing that it acted in a just and reasonable manner toward its students." No court has yet made use of the fiduciary theory; it seems to offer little doctrinal advantage over the contract theory, which also technically places the burden of proof on the college as the drafter of the contract.

A more promising recent theory argues that students at private colleges have a common law property right in their student status. Since this student status has both economic value in terms of future earning capacity and a socially recognized worth to the individual, it is analogous to membership in a private association; the common law tradition of judicial protection for members of private associations should therefore be extended to students. This theory is persuasive in viewing the student's loss of place as significant in both economic and personal terms. It has not as yet, however, influenced any court to extend due process rights to students at private institutions.

The theory that student status is a common law property right implies that the holder of such a right may contract to adjust or modify it. Although the property right theory thus provides a bridge to the contract theory of student-college relations, it is not an essential conceptual step toward the acceptance of that theory. There is ample support in the general principles of contract law and the recognition by the courts of the contractual nature of student-college relations for the development of a doctrine protecting students at private col-

leges from disciplinary dismissals without due process — the same protection afforded by Dixon.

Contract doctrine has been the subject of widely divergent views. Critics have attacked it for a variety of failings. It has been described as "an inherently poor vehicle for judicial review of private organizations, including the university," because it is designed to resolve conflicting individual interests, not "the competing interests of groups, individuals, and society." It has been denounced for its artificiality and rigidity; one commentator has termed contract theory as applied to non-profit associations a misleading "legal fiction." More broadly, it has been challenged on conceptual grounds, with the charge that the "faculty, students, and administrators at a university certainly do not view their activities in contractual terms." These objections all have in common a narrowly drawn model of a contractual transaction as one in which two parties expressly agree to a private exchange of value; the student who enrolls at a college does not fit easily within this model.

If critics of contract theory cite its rigidity, proponents are inclined to celebrate its elasticity. It has been suggested that, in the absence of state action, courts could employ contract theory to extend due process and equal protection to students at private colleges to enlarge the boundaries of judicial review, even to develop a system of private contractual law that would make court intervention unnecessary. These expansive ideas, however, have to date rarely influenced the practice of courts faced with student contract claims.

Yet the idea of a contractual relation between student and college has persisted for close to a century. Courts invariably confirm the relationship even as they read the contract to confer board discretion on the college. One of the initial strengths of the contract theory is

23 Note, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan. L. Rev. 95, 105 (1973).
24 Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1007 (1930). See also, Ryan v. Hofstra University, 67 Misc. 2d 651 (1971), which also calls the contract "a legal fiction of the ilk favored in less enlightened times" because no one anticipates "an unforeseeable disciplinary involvement." Id. at 659.
precisely this universal recognition it enjoys. Unlike theories that view student status as a property right or analogize it to membership in a private association — both plausible and persuasive ideas — the contract theory has firmly established its credentials with the courts. The problem in its use is one of interpretation, not of acceptance.

Courts have emphatically interpreted the student-college contract in favor of the institution, to a degree that, one critic has observed, "probably would shock the conscience of many collegians." The student's basic right to continue, absent adequate cause and procedure as described in college publications, has been both acknowledged and modified in a long series of decisions endorsing wide institutional discretion. If, as discussed earlier, the student's observance of vaguely defined standards of behavior may be viewed as an implied term of the contract, so too may the college's prerogative of changing the contract provisions during the student's enrollment. An early formulation of the contract theory reflects this position:

While, in a strict sense, a student contracts with an institution for only a given part of a course, usually measured by the period of an academic year, the circumstances frequently permit of the implication that the institution had obligated itself - subject, of course, to changes of plan, curriculum, and the like - to permit a student in good standing to continue the particular course for which he has entered, upon payment of the necessary fees and compliance with other reasonable requirements.

The student has a legal right to hold his school to a "shape-shifting" document, while the school retains the right to set and alter its academic, disciplinary, and procedural standards. Under this view, student and school were scarcely the conventional equal partners of commercial contract law.

The leading modern case in this area is a Fifth Circuit decision, Mahavongsanon v. Hall, in which a foreign graduate student at a state university was denied her degree after twice failing a comprehensive examination that had been added to the program requirements subsequent to her enrollment. Although the district court ordered the degree granted on the grounds that the student was denied adequate notice of the exam's range and so was deprived of a valuable property right without due process, the Fifth Circuit reversed. It

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31 Samson v. Trustees of Columbia, University, 16 N.Y.S. 202, 204 (1917).
32 529 F.2d 448 (5th Cir. 1976).
found no denial of due process. Instead, it held that implicit in the plaintiff's contract with the university was her compliance with its rules and regulations, which could be modified at will by the university "to properly exercise its educational responsibility." The claim of a binding contract in this context, the court said, was "anomalous." Implicit in the decision is the idea that the contract is binding, as written and as altered, on one party — the student — but not on the other.

Other courts have found similar ways to interpret the contract in favor of the school. When a student who failed to receive his degree sued the university for breach of contract and asked for rescission — the return of his tuition — a Florida court denied both the remedy and the validity of the claim. The contract, it found, was not to confer a degree upon the plaintiff but only to instruct him in the subjects necessary for the degree; that instruction he had received. A federal court, faced with a student claim that Howard University had imposed conditions for promotion not included in its statement of policy, carefully circumscribed its own role in such cases: "Contract interpretation is a function of the court where, as here, no extrinsic evidence is necessary to determine an agreement's meaning and/or the meaning is so clear that reasonable men could only reach one conclusion." The court rejected the plaintiff's claim that the university was limited to the options already stated in its materials; to impose such limits "would tie the hands of University officials trying to assist marginal students and maintain academic standards." Principles other than those of contract law clearly underlie these decisions; judicial deference to academic institutions has generated an approach reserved for educational contracts alone.

Although courts seem to feel that student-college contracts should be read differently from contracts governing other bargains between individuals and corporate entities, they have been unable or unwilling to articulate their tenets of interpretation. The clearest statement was made by the Tenth Circuit:

It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the

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38 Id. at 450.
36 Southern Methodist University v. Evans, 131 Tex. 333, 115 S.W.2d 622 (1938).
38 Id. at 606.
University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted.\footnote{Slaughter v. Brigham Young University, 514 F.2d 622,626 (10th Cir. 1975).}

Yet the court does not go on to specify which elements are applicable and which are not. This undifferentiated rejection of "a mechanistic application of the law of contract,"\footnote{Jansen v. Emory University, 440 F. Supp. 1060,1062 (N.D. Ga. 1977).} has been followed by the First Circuit as well, which cited both Slaughter and Giles in its decision against a student claiming that Salve Regina College had violated its own stated review procedures.\footnote{Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977), cert. den. 435 U.S. 971 (1977).}

Lyons is of particular interest because the district court and appellate court decisions represent opposite approaches to the problem of interpreting student-college contracts. The plaintiff, a nursing student, received a failing grade from an instructor who, she claimed, had promised a grade of incomplete instead. The student followed the college's academic review procedures, and the designated committee voted two to one to change the grade to incomplete. The dean, however, rejected the committee’s recommendation; as a result, the student was forced to graduate as a psychology rather than a nursing major and to readjust her vocational plans. For both courts, the focus of judicial construction was the word "recommendation," which the college had used to describe the decision submitted by committee to dean. The district court used outside evidence — memos from the dean — to support its reading that the "recommendation" was binding on the dean. Reversing the district court, the First Circuit insisted that there was no basis for imposing on the term any meaning other than its ordinary one.

Beneath this semantic disagreement, the courts split on a more fundamental issue: the role of judicial review in such contract cases. The appellate court approved the statement in Slaughter that "the student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category."\footnote{Id. at 626.} Without defining this "unique" quality, it declined to construe the ambiguous contract language against the drafter, the college. In contrast, the district court had explicitly rejected the assumption that any educational contract implicates areas protected by academic freedom:

There is no broad issue of academic freedom to be decided here . . . the court cannot refuse to decide whether an enforceable promise has been bro-
ken, simply because the contract is drawn between school and student, particularly when both parties agree that they stand in a contractual relationship. . . . The Court was surprised that counsel for the defendants raised the spectre of academic freedom in this case, and has waited in vain for some enlightenment as to where academic freedom is implicated in the slightest degree.\textsuperscript{42}

Judge Pettine went on to reject as well the related assumption that principles of contract law are inapplicable to such academic matters:

In making this finding, the Court is not, as defendants contend, arbitrarily imposing the legal technicalities of a commercial transaction upon what is essentially an academic dispute. Rather the Court is simply holding that the College, as any other promissor, must abide by procedures to which it has bound itself and its students, until such time as it sees fit to change those procedures.\textsuperscript{43}

The two Lyons opinions clarify the central issue of contract interpretation: how much latitude should a court allow itself in reading student-school contracts because of the subject matter of the contract itself?

Since the 1891 decision in \textit{People ex rel. Cecil v. Bellevue Hospital Medical College} asserted the student's contractual right to his degree, only a handful of students have persuaded courts to enforce their contractual rights. Three of those cases were decided on the basis of estoppel principles; where college officials incorrectly advised students, courts have held the colleges to the promises of their agents.\textsuperscript{44} The most interesting, though short-lived, student victory was \textit{Drucker v. New York University},\textsuperscript{45} in which a student won a tuition refund on the strength of his legitimate ignorance of university provisions for withdrawals; the case was later reversed on the grounds that the contract was indivisible, and so the student's breach disqualified him from any recovery.\textsuperscript{46}

The plaintiff transferred to another school after registration at New York University but before classes began; the university maintained that its bulletin clearly stated that no refunds would be given in cases of withdrawal or dismissal. Reviewing the entire situation,

\textsuperscript{42} Lyons v. Salve Regina College, 422 F. Supp. 1354, 1359 and n.6 (D.R.I. 1976).
\textsuperscript{43} Id. at 1363.
\textsuperscript{45} 57 Misc.2d 937, 293 N.Y.S.2d 923 (1963).
\textsuperscript{46} 59 Misc.2d 789, 300 N.Y.S.2d 749 (1969); Drucker is cited approvingly in \textit{Dubrow v. Brian-sky Ballet Center}, 68 Misc.2d 530 (1971).
including the competition among students for admission to universities, the lower court found that the university had not made sufficient efforts to inform its students of contract provisions: "Here, to charge the plaintiff with the acceptance of the contents of a Bulletin, 55 pages in length, is a fiction and contrary to today's practice and usage. . . . A mere or casual mailing of the Bulletin to the plaintiff should not satisfy the requirements necessary to make its contents binding in the form of a contractual undertaking or obligation." The court thought that the student's transfer was not a true "withdrawal." Further, it thought that the university should not be permitted to construe its own contract and make it binding, especially since it is "a quasi-public institution whose very existence is dependent upon quasi-public support"; the bulletin provisions did not constitute a good faith contract. Drucker thus touches a number of bases: how courts read contracts, how they evaluate the contractual situation and apply it to the disputed provision, what special treatment they accord to universities. It remains one of the few decisions that discusses educational contracts with an informed sense of academic realities.

The persistent discrepancy between such realities and the idealized vision of academia is nowhere more dramatically illustrated than in the peculiar case of the Trustees of Columbia University v. Jacobsen. When the university sued to recover on notes for tuition, the student, who had failed to meet the academic requirements for graduation, filed a counterclaim for deceit. "I have really only one charge against Columbia," the student defendant insisted, "that it does not teach Wisdom as it claims to do." As evidence, Jacobsen cited the college catalogues and brochures, inscriptions on campus buildings, and speeches by university officials. The court had no difficulty in interpreting the relevant texts and deciding "that wisdom is not a subject which can be taught and that no rational person would accept such a claim made by any man or institution." Jacobsen's charge was surely whimsical, but his case indicates a judicial readiness to draw lines when they are sufficiently bright. Even in less flamboyant cases, courts are equipped to distinguish between an unmanageably abstract claim like Jacobsen's and a concrete claim based firmly on the reasonable elements of student-college contracts.

47 Id. at 928
48 Id. at 931
50 Id. at 66.
51 Id.
For disciplinary dismissals at private colleges, courts can respond most appropriately and efficiently by implying a contract term requiring all colleges to use fair procedures in reaching such decisions. The approach is scarcely revolutionary. Courts already imply terms holding students to non-disruptive behavior and colleges to issuance of degrees on completion of a required course of study. An implied term guaranteeing fair and reasonable procedural protections would accomplish for private college students what Dixon has accomplished for public college students.

In the past commentators have been willing to rely on the good faith of educators at private institutions to offer their students more than the law can require. Student rights should not depend on these benign intentions alone; if it is reasonable to expect certain protections from educational institutions, then it is reasonable to imply them as part of a contract that has long been held to imply a student’s willingness to follow all college regulations and a college’s willingness to graduate a satisfactory student. Such implied terms need not depend on unrestrained judicial improvisation for their substance; the model of disciplinary due process at state universities furnishes useful and respected guidelines. In practice, these implied terms would serve as little more than shields against the arbitrary and capricious behavior that courts have acknowledged to be within their reach; they would also provide a norm against which institutional behavior could be measured.

The adoption of a contract approach to the present inequities between rights of public and private college students has a further advantage. It frees the courts from basing these student rights on the complicated question of when a nominally private college is sufficiently entangled with the state to make its treatment of students state action. In the years since Dixon, very few courts have found state action, and their reasons are not always clearly distinguished from those of courts which reject state action. The Fifth Circuit found state action for the University of Tampa because it was established by the use of surplus city buildings and other city land. Yet two other circuits have found two major universities which receive substantial government funding, Columbia and Howard, to be private institutions. The most curious state action decision, Powe v. Miles, drew a line through the student body of Alfred University.

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43 Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965).
44 407 F.2d 73 (2d Cir. 1968)
When students were suspended following a campus demonstration, the court held that participants enrolled in the state-supported College of Ceramics, a division of Alfred, were entitled to due process, while participants enrolled in the university's own liberal arts college were not. The same behavior by students who attended many of the same classes on the same campus thus received differential procedural treatment. It is clear that the state action doctrine looks away from the nature of the college decision and the nature of the student's right to the nature of the institution. This may be sound constitutional jurisprudence, but the distinctions it draws are nonetheless arbitrary and unrealistic.

One response to the anomalies of state action doctrine has been to declare that all educational institutions serve a public function, eliminating the need for case-by-case discriminations. The clearest expression of this position is J. Skelly Wright's often quoted passage in a decision granting summary judgment that was later vacated:

At the outset, one may question whether any school or college can ever be so “private” as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only “sure foundation . . . of freedom,” “without which no republic can maintain itself in strength,” institutions of learning are not things of purely private concern . . . . No one any longer doubts that education is a matter affected with the greatest public interest. And that is true whether it is offered by a public or private institution . . . . Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes?\textsuperscript{55}

The public function test has been explicitly rejected by at least one distinguished judge, Marvin Frankel, who raised the problem of aid to parochial schools as evidence that not all education can be simply pronounced to be public.\textsuperscript{56} Still, Wright's position is persuasive in its directness and clarity; it focuses attention not on the financial arrangements of the institution but on the rights of its students to continued enrollment. As another court, writing shortly after Dixon, summarized the argument, “Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in

\textsuperscript{55} Guillory v. Administrators of Tulane University, 203 F. Supp. 855, 858-859 vacated, 212 F. Supp. 674 (E.D. La. 1962); See also, Ryan v. Hofstra University, supra note 24. “The university is replete with public interest, requirement and supervision. The university is in the most real comparable sense a public trust for the rendition of education. In modern practice, there is a diminishing difference between the actual operation of universities, whether they be ‘public’ or ‘private’ in format.” Id. at 666-67.

\textsuperscript{56} 287 F. Supp. at 549, n.19.
terms of labels or fictions, but in terms of their true significance and worth.” In spite of its attractions, the public function doctrine would require a sweeping alteration of present relations between private education and government. In contrast, the contractual approach permits courts to remedy a particular ill without initiating such dramatic readjustments of far-reaching consequence.

Another response to the problem of different levels of protection for students at public and private colleges has been reliance on the good faith behavior of officials at private institutions. According to this view, once courts set guidelines for the due process rights of students at public colleges, private colleges will voluntarily meet those guidelines. Proponents of the voluntary behavior theory must make two potentially conflicting assumptions — that all students are entitled to due process but that some students have no enforceable claim to their entitlement. If the right to due process originates in the relationship of student to college, then a legal theory that depends on compulsion for some and good faith for others seems awkward and inequitable. To seek out a method of assuring the same protection for all students is not to impugn the intentions of some educators; it is merely to recognize that the absence of judicial review in the past has occasioned some violation of student rights and that human — and institutional — nature is unlikely to change that outcome in the future.

The reluctance of courts to intervene in college matters has been modified by Dixon only in regard to disciplinary dismissals. Courts remain convinced that virtually all other areas of college life are protected from judicial review by the principles of academic freedom and the traditions of academic autonomy. The customary division between disciplinary and academic issues, however, is not the unbroken line that most judges and commentators perceive. A realistic analysis of college practices suggests that some areas of college life currently viewed by the courts as academic and so outside their supervision could be included under a contract theory without violating basic principles of academic freedom. The concept of student contractual rights could thus be enlarged to contain educational promises by institutions that do not merit the special protections of academic freedom and institutional autonomy.

The theory of student-school relationship that a court adopts, and the manner in which it applies that theory, will depend in large part

88 Wright, supra at note 10.
on the court's vision of institutional and individual rights. Where the court favors institutional autonomy, it will hesitate to intervene; where the court favors student rights, it is more likely to see judicial review of college action as a reasonable restraint on an otherwise unlimited power. At one extreme, a New York court announced that "Private colleges and universities are governed on the principle of academic self-regulation, free from judicial restraints." The hostility such a position may hold toward student rights is revealed in the scathing concurring opinion to a Second Circuit decision holding that the plaintiff had in fact received due process:

If plaintiff's views were to prevail, the judiciary law should be amended to give any student who has been the subject of disciplinary action by the Dean's Office or the President's Office of any college or university a direct appeal to the Supreme Court. By such a procedure, countless hours of time of faculty, administrative officers, and lower courts would be conserved.

At the other extreme, no court has yet held that all institutional decisions impinging on student rights should be available to judicial review. There is, however, a moderate position, suggested by Judge Frank Johnson's observation that "the relationship grows out of the peculiar and sometimes the seemingly competing interests of college and sometimes the seemingly competing interests of college and student."

It is difficult, but essential, to give some shape to these peculiar and competing interests if a responsible policy toward judicial review of non-disciplinary college decisions is to be formulated. The values most often cited by courts hesitant to question college actions are the expertise of educators and the special quality of an educational institution. In the rhetoric of many courts, the two principles are intertwined. Intimidated by the "particular knowledge, experience and expertise of academicians," judges prefer to leave in their hands the procedural and administrative aspects of college life under the assumption that such functions take on a purer, less worldly aspect when they are executed on a campus rather than in a government office or a private association.

The idea of a self-regulating private academic community thus seems to draw strength from two related ideas: the traditional protection afforded academic freedom in our society and the distinctive

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60 Steir v. New York State Education Commissioner, 271 F.2d 13,21 (2d Cir. 1959).
61 Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725,729 (M.D. Ala. 1968).
quality perceived by laymen in the life of educational institutions. The two are by no means identical, or even complementary. In its most basic form, academic freedom responds to “the claim that scholars are entitled to particular immunity from ideological coercion” by protecting the community of scholars from “administrative, political, or ecclesiastical constraints on thought and expression.”

The distinction between scholastic thought and expression and administrative practice is one that courts are only gradually beginning to draw in areas not already explicitly covered by constitutional safeguards. Not every college action requires the protection of academic freedom; when the danger is not coercion of scholars but perhaps of students by scholars or administrators, then the rationale for institutional autonomy is severely weakened.

The gap between the scholarly and administrative functions of colleges has widened considerably in the last generation. As smaller liberal arts colleges have expanded or diversified or expired, university campuses with large student bodies and elaborate bureaucratic structures have developed. Academic communities in which the teacher is also the administrator are less common; critical decisions about expulsions are more likely to be made by complicated bureaucratic procedures than by familiar academics. Just as the doctrine of *in loco parentis* has been rendered obsolete by a changing educational establishment, so too may the existence of the judicial ideal of a fully integrated academic community become a matter of fact rather than a matter of law.

As the functions of scholars and administrators have changed, the interests of students have changed as well. A college education is likely to be a substantial investment, often financed by long-term indebtedness and perceived as a means of access to a secure or lucrative profession. The student’s right to his education, threatened or terminated by an institutional decision, includes more than an intellectual or moral experience; it may well be, as proponents of the student status-property right theory maintain, an economic interest of large proportions. Even minimizing the loss for an expelled student through transfer or change of academic program may entail serious financial and practical adjustments. The realities of the current educational system are more complicated and less uniform than the appealing but elusive judicial ideal would allow.

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63 *Developments*, at 1048-51.
64 *Developments*, at 1048. See also, Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 FLA. L. REV. 290 (1968), for an account of the expanding definition of academic freedom.
The principles of academic freedom are vital to the intellectual and educational life of our society; the intrusion of courts on protected areas of thought and expression in scholarship and teaching is unthinkable. But the extension of these principles, by custom and by reflex, to inappropriate areas of educational experience has a paradoxical consequence. Far from extending legitimate rights to institutions, it takes from students their rights—whether based on contract or property or any other theory—to the intellectual, economic, and personal benefits of education. Courts need to re-examine their notion of institutional autonomy and its applicability to a complex and impure educational establishment.

If we accept the notion that errors and abuses by colleges can violate the rights of students, and that judicial review of such cases need not automatically trespass on institutional autonomy, then the courts need a workable set of guidelines to determine, for each case, whose rights should be protected. Those guidelines should be more responsive to the subtleties of the academic world than the traditional distinction between disciplinary and academic matters recognized by the courts and reinforced by *Dixon*. Courts feel themselves on familiar ground when dealing with disciplinary situations in which they are called upon to consider the likelihood that specific procedures were adequate to investigate and evaluate a student's guilt. When, however, the situation is perceived as academic, courts have been quick to disclaim competence:

But in an academic dismissal, such as the present one, the fact issues are typically complex and instinct with value judgments of the kind that can best be made by persons intimately familiar with the case. Moreover, the proceeding is not so patently adversarial as a disciplinary proceeding... It is clear that this is a subject in which we should not substitute our judgment for that of persons particularly equipped to make a judgment.65

The one exception to this doctrine of judicial restraint occurs "if the student failed because of bad faith or arbitrary and capricious action by an instructor;" in such a case, "the courts will order the granting of a fair and impartial hearing."66 They have not yet felt the need to do so, and in practice academic actions by public and private colleges go unreviewed.

The range of college action included under the rubric "academic" is substantial. Courts have refused to consider numerous pleas for reinstatement. Even claims of discriminatory application of college rules are turned aside; the Fifth Circuit has noted that "we know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards. Indeed, Dixon infers the contrary." There are very few exceptions to this judicial policy, and even those rare decisions evade the crucial issue: the propriety of judicial review in academic matters. In Woody v. Burns, for example, a state university student denied the right to late registration by a faculty committee was ordered reinstated on the grounds that the committee decision was based on the student's misconduct rather than his scholastic failure; only the disciplinary committee had the power to expel for misconduct. The issue for the court was one of classification. Similarly, in Greenhill v. Bailey, where a student appealed his academic dismissal from medical school, the court found a due process violation not because the student was dismissed but because school officials also notified an association of medical schools that he was unqualified by intellect or diligence for further study. The court held "that the action by the school in denigrating Greenhill's intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty," by foreclosing other chances to study medicine. It was, however, careful to maintain the distinction between discipline and academics: "Our holding today is not an effort to blur that distinction but rather an acknowledgement that the dictates of due process, long recognizable as applicable to disciplinary expulsions (and suspensions of significant length), may apply in other cases as well, where the particular circumstances meet the criteria articulated by the Supreme Court" in the Roth and Perry decisions. Greenhill suggests a measure of judicial flexibility in

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68 Wright v. Texas Southern University, 392 F.2d 728,729 (5th Cir. 1968).
69 188 So.2d 56 (Fla. App. 1st 1966).
70 519 F.2d 5 (8th Cir. 1975).
71 Id. at 13.
72 Id. at 8.
weighing the circumstances of each case, though it deliberately avoids a direct endorsement of intervention in academic questions.

When the Eighth Circuit applied its own doctrine of flexibility to another medical student's request for due process shortly afterward, the Supreme Court reversed, with Justice Rehnquist taking equal care to indicate that academic dismissals do not require a hearing. The Rehnquist opinion for the court relied first on tradition—"prior decisions of state and federal courts, over a period of 60 years, unanimously holding that formal hearings before decision-making bodies need not be held in the case of academic dismissals,"

—but it also argued that the nature of academic dismissals should put them beyond the court's reach. The decision by medical school officials that Horowitz's clinical performance was inadequate was a judgment "by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision" and was "not readily adapted to the procedural tools of judicial or administrative decisionmaking." Finally, Rehnquist thought that "to further enlarge the judicial presence in the academic community" would "risk deterioration of many beneficial aspects of the faculty-student relationship."

Although the decision rested on the court's unanimous holding that, regardless of her legal rights, Horowitz had in fact received due process, Rehnquist's opinion solidified the flow of judicial thought against intervention in academic dismissals and isolated Greenhill as a sport of circumstance. It did not, however, go unquestioned. In his own opinion, Justice Marshall raised the crucial issue of the disciplinary-academic division, suggesting that in this case the grounds for dismissal were "conduct-related" and that in all "such cases a talismanic reliance on labels should not be a substitute for sensitive consideration of the procedures required by due process." Justice Powell, in his concurring opinion, emphasized the District Court's finding of fact that Horowitz "was dismissed for failure to meet the academic standards of the medical school" where competence in clinical courses was necessary for graduation. And Justice White felt that, "assuming a protected interest, respondent was at the minimum enti-

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79 Id. at 88.
80 Id. at 90.
81 Id.
82 Rehnquist never concedes the exception for intervention in cases of arbitrary or capricious behavior. See Horowitz, 435 U.S. at 91-92.
83 Id. at 106
84 Id. at 94
tled to be informed of the reasons for her dismissal and to an opportunity personally to state her side of the story. The justices agreed that Horowitz had what process was due her, but they splintered over the troubled question of handling academic dismissals.

It is not hard to appreciate their difficulty. As educational programs become more receptive to clinical training of various sorts, the line between conduct and scholarship becomes harder to draw. Clinical performance inevitably requires faculty evaluation of something more than straightforward academic work, and courts may well recall with nostalgia a clear-cut student challenge to a professor’s grade for a written examination. The possibilities for arbitrary and capricious decision-making seem greater when the student’s performance at issue cannot be easily dissociated from his personal and social qualities, or when those very qualities are related to his professional competence.

Beyond this definitional problem, there is a more fundamental issue that often goes unexamined. Not all student claims of academic injustice require courts to rehearse the judgments of educators on matters of professional expertise. Courts shrink, with becoming modesty, from the task of evaluating a dissertation or regrading an exam, areas reasonably outside their own domain. Yet when the student questions the way in which an academic decision was reached, courts are surely on familiar ground; the fairness of procedural method lies squarely within judicial expertise, regardless of the subject matter involved. It is even arguable whether courts may not consult expert witnesses — other educators — to determine if a challenged decision represents a reasonable exercise of professional discretion. Courts are no longer hesitant to employ such experts in other fields outside their competence; the educational establishment need not be treated as a sacred kingdom barred to all but its own initiates. When educators themselves rely frequently on standardized computer tests to evaluate their students, courts might think twice before declining to evaluate the performance of educators.

The important question for courts is when judicial review would in fact trespass on precisely those areas of academic endeavor that are

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80 Id. at 97
81 See, Academic Dismissals: A Due Process Anomaly, 58 Neb. L. Rev. 519 (1979) and Ols-son v. Board of Higher Education of New York City, supra note 44, which distinguishes between overseeing academic judgments and deciding “whether the proceedings accorded the student violated established rules and procedures of the institution.” See also Beaney, supra at note 26.
82 One commentator calls this the dismal swamp policy. Chafee, supra at note 24, at 1021, 1023.
protected by the principles of academic freedom. What an educator teaches, how he teaches it, how he encourages his students to respond to his subject matter, these are legitimately privileged areas. But administrative decisions that affect a student's right to continue in a program, or a college, or a profession need not implicate these protected values. The discrimination of substance from procedure may be a delicate operation, but it is surely one that courts are experienced in performing in the ordinary course of their decision-making. The "talismanic regard" for the academic label that Justice Marshall describes has blinded courts to the suitability of their own expertise to determine, first, which student claims actually implicate privileged areas and, second, which methods of academic decision-making are fair. Excluding these privileged areas from their reach, courts could with impunity extend due process protections to other areas of college experience.

One such area is the procedure offered by colleges for appealing and reviewing academic dismissals, failing grades, and expulsions from specific academic programs. Where a college describes its procedures in a bulletin or handbook for students, a court may hold that college to the plan it promises. Where no such description exists, or where its vagueness defies application, the court may imply a contract term guaranteeing fair and reasonable procedures to students before they may suffer a serious academic loss. Such procedural protection does not involve the court in reviewing the substantive judgments of academics or administrators; the court merely assures the student a hearing appropriate to the fair evaluation of his claim by the responsible college personnel.

Similarly, when college officials significantly alter program requirements or program offerings from catalogue descriptions, courts may hold the institutions to their promises without making substantive curricular judgments. Where injunctive relief would involve courts in designing academic programs, other remedies may be available — allowing a student to take a vital course at another institution, for example, or extending deadlines to permit completion of a program. When a student challenges the lack of such academically related services as counseling or workshop programs, courts may require colleges to provide the services promised or a reasonable substitute. These examples are not exhaustive; courts should be willing to examine student claims critically in order to determine whether judicial review will in fact touch the protected core of academic values.

The use of contract doctrine to introduce courts into new areas of student-college relations receives some support from other recent de-
 developments in contract law. The consumer movement has altered both contracting parties and courts to the obligations involved in contracts for a wide range of goods and services; a similar policy of accountability could be extended to educational contracts as well. Another area of contract law, one still emerging, is the call by family law commentators for a redefinition of marriage as a contractual relationship with terms formulated by its partners and enforced by the courts. These seemingly disparate developments have in common the seriousness with which they regard a contract, a manifestation of “the deeply ingrained power that the idea of contract has had, throughout recorded history, on the minds of men and women” and its centrality “as a basic institution of modern society.”

Educational contracts have thus far been acknowledged in name only; these related changes could encourage courts to give substance to the contractual bond so often invoked between student and school.

The consumer approach to education draws strength from the broader consumer movement and from substantial revisions in student attitudes toward education. As education costs increase, students tend to evaluate a college education as a financial investment qualitatively similar to other capital investments with predictable future consequences. The student of the eighties is less likely to sue his school for failing to teach him wisdom and more likely to sue his school for failing to qualify him for a promising career; many of the suits of the past decade have been filed by dismissed medical students. There has also been a turnabout in college and university admissions since Drucker. Where students in the sixties competed for places, schools now compete for students, with the result that students may indeed see themselves as consumers courted by dispensers of rival educational products. As informed consumers, they may read catalogues and digest their promises before reaching a decision; they are more sensitive to the possibility of misrepresentation than an earlier student generation, grateful for admission, was likely to be. The fledgling cause of action for educational malpractice at all levels reflects this new awareness of the student as a consumer of educational services.

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85 See, e.g., Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent Teaching, 73 NW. L. Rev. 641 (1978); Note, Educational Malpractice, 124 PA. L. Rev. 755
Faced with this growing consumer awareness, courts have been slow to apply accepted legal and equitable contract doctrines for the relief of aggrieved students. Yet a number of standard consumer remedies are readily applicable to the educational situation. Where catalogue provisions are ambiguous, they could be construed against the drafting party; far from impinging on academic rights of institutions, such a policy would result in clearer and more precise documents. Where colleges assign themselves sweeping prerogatives — disclaimers of any student right to question a decision or the privilege of altering any contract provision at will — courts might well invoke the unconscionability doctrine to find such measures against public policy. Surely the inequality of bargaining power between a college and each of its hundreds of thousands of students suggests that there could be contracts of adhesion. Such avenues for judicial intervention do not inevitably lead courts to act as policy makers or academicians. They serve simply to hold institutions of higher education to the promises they have voluntarily made and published. Where a student questions the content of a course or the validity of a particular grade, courts are free to draw the line between protected academic freedoms and unprotected promises of academic or disciplinary procedures.

If the consumer analogy stresses the content of the bargain, the marriage analogy stresses its form. Judicial refusal to enforce marriage contracts drafted by the partners is based on public policy objections: the profound respect accorded the marriage relationship in our culture and judicial reluctance to see that relationship altered. The marriage contract is in fact a standardized form, drafted by legislatures and upheld by courts, that reflects the values society envisions in the idealized marriage bond. To say that marriage is treated as a status rather than a contractual relationship is to say that the contract terms precede and transcend the particular parties to any single transaction. Although courts pay lip service to the contractual nature of the student-college relationship, in fact they treat that contract as if it too were independent of the specifications and expectations of the parties. Courts invoke the value to society of citizens educated by autonomous institutions; judicial intervention on behalf of students is viewed as a violation of society's paradigm of the responsible college and the immature student.

Yet both marriage and education, like other social institutions,
have undergone significant changes in the last decades. Marriage partners who anticipate a possible future dissolution of their relationship may agree on the financial terms of a divorce before the marriage itself takes place; couples with non-traditional ideas about family life and domestic arrangements may wish to embody their views in a binding document. While the contracting parties see themselves as entering into a plurality of relationships, each called marriage and each tailored to the wishes of its participants, courts retain a single vision of marriage, hallowed by tradition and slow to respond to these social currents. In a similar way, the model of higher education protected by the courts may bear little resemblance to the diversity of educational experiences currently offered. Students are increasingly older, more interested in vocational programs than in the traditional liberal arts curriculum, more likely to attend public than private institutions, less tolerant of conventional campus life. The civil rights and anti-war protests of the sixties, which generated many of the student rights cases, have given way to a calmer, more pragmatic atmosphere, but the involvement of college students with events and ideas beyond the campus has persisted. The sheltered, hermetic ideal of academic life, what Justice Rehnquist had in mind when he invoked “the many beneficial aspects of the faculty-student relationship” and “the academic environment,” has been replaced for many students by large, impersonal institutions, work-study programs, or clinical courses of study.

Courts are beginning to accept individual marriage contracts as responsible modifications of a rigid legislative norm; they have not yet acknowledged the new educational diversity that undermines the common law tradition of non-intervention. The principles of contract law remain, however, well suited to meet such changes. Courts as readers of contracts are called upon not to impose established public values but to enforce private agreements which do not violate law or public policy. Where student and college have voluntarily accepted an educational program, however unorthodox its elements, that program becomes their norm, and courts need only ask if that norm is minimally acceptable to society before holding both parties to their agreement. Society values education and its crucial academic freedoms; but society also values due process protections and the right of parties to enter into responsible contracts in the expectation of court enforcement. Educational contracts, reflecting as they do the diversity of an evolving academic community, demand from the courts a synthesis of these values. Contract enforcement need not sacrifice one value to another; a fair reading of the bargain struck between
student and college can preserve at once the constitutional and contractual rights of both parties without disturbing the values society locates in the education of its members.

A third analogy of some help in understanding the complicated nature of such bargains is the familiar model of the social contract. Under social contract theory, a citizen surrenders certain personal freedoms in return for the protections and privileges afforded by the state. He remains at liberty to alter or protest the way he is governed, but not to subvert or overthrow the state; the preservation of social order is fundamental to his relationship with the state. In a roughly parallel way, the student who enrolls at a college surrenders certain rights; he accepts the authority of the institution to judge his academic performance and restrain his social behavior in return for the benefits of an education and a college degree. Central to this view is the assumption that education has a special worth which justifies the restrictions a college may impose and that the student knowingly accepts both the worth and the restrictions as part of his agreement to enroll. Social contract theory seems to lurk behind judicial willingness to detect an implied contract term by which the student promises to obey school regulations; it also suggests a rationale for the equally common judicial assumption that the value of education suspends student rights, regardless of the written contract between student and school. In effect, the social contract analogy offers theoretical support for any fundamental public policy restrictions courts choose to read into educational contracts, restrictions binding on both citizen and state, student and college.

The task assigned the courts in adjudicating contract disputes is essentially one of sorting and balancing, a familiar judicial exercise. Like most versions of the social contract, the student-school contract involves a basic agreement: by the student to submit to the academic judgments and social order of the college, and by the school to treat all students equitably in their process toward graduation. No individual contract could modify these roles without raising serious questions of public policy. Like a marriage contract, the student-school contract allows the parties to adjust their commitments and expectations to their particular designs, without necessarily conflicting with the broader social values of education or the narrower constitutional rights of the parties. Like a consumer contract, the student-school contract involves a financial transaction of some magnitude, with the student's stake in his investment — his student status — a recognizable element of the bargain. These three analogies are not necessarily discrete: the most abstract values ascribed to education may manifest
themselves as constitutional rights of academic freedom or due process, and the clearest economic aspects of the contract may implicate as well constitutional and social values. The educational contract is a tangled network of social, constitutional, and economic values.

The reluctance of courts to intervene in educational disputes by means of contract doctrine is based on an unacknowledged assumption that these values cannot be disentangled, that it is safer to reject all suits than to risk a trespass on protected ground. Yet a realistic analysis of current higher education suggests that contracts can govern areas of academic life outside the legitimate preserve or academic freedom and institutional autonomy; enforcement of such contracts by the courts is an act of accommodation, not intrusion. Courts can continue to act as courts, not educators or policy makers, and still respect the bargain struck between student and school. Many, though not all, of these issues are procedural, an area especially adapted to judicial expertise; even some substantive issues may admit judicial review without compelling courts to usurp purely academic functions. The crucial factor is the willingness of courts to examine carefully the components of a contract claim rather than to adjudicate by assumption and tradition.

As a practical matter, the Horowitz decision and the recent line of state action decisions make it unlikely that the Supreme Court will in the near future endorse either the elimination of the disciplinary-academic distinction for due process protection or the public function theory of private education. With these avenues of judicial intervention on behalf of students closed, state courts can still extend protection to student rights by the application of basic contract principles to the agreement between student and college. Under contract doctrine, sympathetic courts can offer students some measure of protection for their rights without holding colleges to a level of performance beyond the scope of their original agreement to educate and graduate their matriculants. There is an additional challenge for the courts in the vigilance and analytic skill needed to distinguish among the disparate elements that compose such an agreement; some areas of academic life are admittedly and properly beyond judicial reach. For many students claims, however, courts are well equipped to determine if a college has in fact breached its contract in dismissing or otherwise disadvantaging a student. Far from intruding on academic freedom by reading such contracts carefully, courts would do no more than hold institutions of higher education to their voluntary promises, a practice as appropriate to the courts as it is fair to students and colleges alike.