PATTERNS OF LITIGATION AT INSTITUTIONS OF HIGHER EDUCATION IN TEXAS, 1878 TO 1988

Margaret J. Lam

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Margaret J. Lam
Staff Attorney and Postdoctoral Fellow
Institute for Higher Education Law and Governance
University of Houston Law Center
Houston, Texas 77004
(713) 749-2557

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Assessments
A university can sue or be sued in many different capacities and on many different legal theories and subjects—just how many is probably yet to be determined. During the past thirty years, an extraordinary growth in litigation at higher education institutions brought an assortment of suits and parties from which universities and colleges had once been isolated.\(^1\) The increase occurred simultaneously with that in other parts of society in the United States, and the overall growth prompted attempts to explain the events and to assess litigation patterns.\(^2\)

To date, explanations for the growth are plentiful and, for the most part, well-grounded and generally accepted. For example: cultural and sociological changes in the general population can produce changes in the autonomy of a campus community.\(^3\) Or, an increase or changes in federal and state laws and regulations may enable more persons to sue,\(^4\) which in turn encourages other like-situated persons to sue. Or, the media dramatizes and symbolizes the American legal system to a degree where individuals look to the courts to assuage most grievances.\(^5\)

Assessments of the current litigation status and predictions of what will happen in the future, however, are more mixed. Among persons who have monitored the progress and growth of litigation at higher education institutions, some say it is continuing,\(^6\)
others believe the number of cases have declined,7 and still others think the growth has plateaued.8 Predictions of upcoming legal issues, as well as the number of cases, are also of interest. One prediction is that "no more explosive issues remain",9 such as the first amendment issues that appeared in the 1960s and government regulation issues that appeared in the 1970s; but that investments, faculty tenure, and the effect of lower enrollment and less federal financial aid on higher education will be specific areas of legal activity in the future.10

The prevention of a lawsuit is almost always better and, generally, cheaper than defending or maintaining one. Therefore, explanations and predictions of the course of higher education litigation are useful to administrators and legal counsel in planning the use of resources and in dealing with employees, students, businesses, and citizens from without the institution. Those who make explanations and predictions, however, must rely on a record of past and current events, and the task of compiling a record that is not only comprehensive, but accurate, is difficult. A university or college, other than being designated as private, public, community college, secular, or non-secular, develops distinctive characteristics of its own. Factors, among others, include the age, location, endowment, size, curriculum, and student body of the institution. Patterns of litigation that appear in a given study, thus, may prove entirely inappropriate for one or more institutions within the study or, perhaps, for a geographical region of similar institutions that was not included.
Nevertheless, the task of trying to make an accurate record is worth undertaking. A review of the cases by issues, parties, time frames, and winners or losers may reveal areas of litigation to which all or a specific type of institution are particularly vulnerable and reveal litigation patterns from which long-range cycles of litigation can be studied and predicted.

In addition to providing information about trends in litigation, the cases can provide a rough estimate of the number of grievances that universities encountered which never reached the litigation stage. According to one study of litigation, which was not restricted to colleges and universities, lawsuits are filed in approximately ten percent of disputes in which at least $1000 are at stake.\textsuperscript{11} Merely filing a lawsuit, however, is not the same as litigating one, because numerous suits are dropped or settled before reaching court. Therefore, what at first glance may seem a small number, or even zero number, of cases in an issue or at an institution grows to an image of the myriad grievances and disputes that an institution must contemplate and address. Some grievances and disputes will become reported cases. Most will not. A study of litigation at colleges and universities, therefore, reveals only a glimpse of dispute resolution in higher education.

With these aspects of a study in higher education litigation in mind, reported Texas cases were reviewed to discover any discernible patterns. This paper presents findings for the years 1878 to 1988. The accompanying tables show the figures for those
total years and also for the two separate time frames of 1878 to 1985 and of 1986 to 1988. These time frames correspond with those of the original study on which this paper is based. The following section describes the study and provides additional background for the paper.

I. Description and Background

The study of Texas higher education litigation sought to replicate as nearly as possible one completed in Iowa for the years 1850 to 1985.\textsuperscript{12} Texas is larger in area and has a greater number of public universities than Iowa; however, the characteristics of private postsecondary institutions in the two states are similar. In the private sector, Iowa has thirty-four colleges, two junior colleges, one professional osteopathic institution and a number of business and technical schools.\textsuperscript{13} Texas has thirty-eight private senior colleges,\textsuperscript{14} the first of which opened in 1846;\textsuperscript{15} three private junior colleges, one private college of dentistry, and one private college of medicine. In addition, numerous proprietary business and technical schools exist; however, this study, as the one in Iowa, did not include a survey of those schools.\textsuperscript{16}

In the public sector, Iowa has three major universities—the first was established in 1847—and fifteen merged area community colleges.\textsuperscript{17} Texas has five times that number.\textsuperscript{18} Its ninety-eight public higher education institutions, the first of which opened in
include thirty-seven senior institutions, eight medical schools and health science centers, forty-nine public community colleges with sixty-six campuses, and four public technical institutes.

Three of the public senior universities had more than twenty-five thousand students in their respective 1987-88 preliminary headcounts. Total headcount at public senior institutions was 368,775. The headcount at public medical schools and health science centers was 10,878; at public community colleges, 321,896; and at public technical institutes, 8,686. Private senior institutions had a preliminary headcount of 79,264; private medical and dental schools had 1,411; and private junior colleges, 1,223. The total enrollment for all 141 public and private Texas institutions was 792,133.

As in the Iowa study, this study reviewed all reported cases with a higher education institution as a litigant between the years 1850-1985. The Iowa study, however, ended in June of 1985. This one included the remaining months of that year and added a separate study that extended the review of cases through December of 1987. This study also made three additional distinctions as to the parties. First, litigation in which the university party was a medical, dental, or osteopathic school or university hospital was analyzed both separately and together with public or private institutions to determine if the presence of ten health institutions in the state made a significant difference in the number of cases. Second, where the Iowa study named "external
donors" as one of four categories of parties to the suit, this study further divides that category into business parties and private citizen parties to provide a finer distinction for identifying parties from outside the institution. Last, parties were designated by gender, when appropriate, to determine if the sex of a party was a factor in the pattern of litigation.

Some suits were reported at both the district and appeals levels. For each reported case, only that of the highest court was included in the statistics of the study; however, all decisions were recorded while the data were compiled. From 1878 to 1986, 167 cases were reported. Twenty-two cases were reported from January 1986 through December 1987. One unreported opinion was found, but it was not used in the statistical analysis, since the study comprised only reported cases.

In the following major sections, the collected data is presented and discussed for primary issues litigated, litigation by time frames, litigation by economic bases of the disputes, litigation by parties and party gender, and litigation by the prevailing parties by primary issues and type of institution.

II. Primary Issues Litigated

The primary issues in the cases were divided into seven categories: tort; contract; constitutional; statutory/administrative; trusts, wills, and donations; property; and procedural. Determining the category was sometimes difficult. For example,
what might otherwise be designated as a "contract" or "tort" case by the facts, actually might be a report of a court's decision to change venue. Therefore, the winner of that decision prevailed in a procedural issue and the case was placed in the procedural category, not the category for the underlying claim of tort or contract that had motivated the plaintiff to sue.

Virtually all plaintiffs brought many issues, a large number of which were based on statutes (particularly those in the constitutional category); however, for each case, only the broad primary issue was selected. The primary issues then were frequently broken into subcategories of issues to aid the analysis. Subcategories are identified as they appear in the following sections, A through G.

The sections also identify all 189 reported cases, either as part of a subcategory or with some identifying phrase. Brief synopses of each case appear in the notes, and Table I (Appendix) shows each issue category and the number of times it was litigated for the years 1878 (the first Texas case) to 1988. The number varied from a high of eighty-one cases (constitutional) to a low of four (trusts, wills, and donations).

A. Constitutional Issues

The most frequently litigated issue by postsecondary institutions in Texas was a claim brought either under the United States Constitution or for statutorily proscribed discrimination, with a total of eighty-one claims (43%). Constitutional issue sub-categories were first amendment
violation, gender discrimination, procedural due process violation, property interest claims, race discrimination, age discrimination, handicapped discrimination, national origin discrimination, constructive dismissal, and non-categorized claims. The latter category included cases that were distinctive in some manner that kept them out of the other sub-categories.

Private institutions were parties to five cases (6% of the category). Included were one claim each for violation of the first amendment\textsuperscript{34} and procedural due process,\textsuperscript{35} discrimination against national origin,\textsuperscript{36} discrimination of religion,\textsuperscript{37} and a combined gender-religion discrimination claim.\textsuperscript{38}

Nineteen reported claims against public community colleges (24%) included ten first amendment claims,\textsuperscript{39} four property interest claims,\textsuperscript{40} two race,\textsuperscript{41} one gender,\textsuperscript{42} one procedural due process,\textsuperscript{43} and one uncategorized claim\textsuperscript{44} in which a faculty member alleged he was denied unequal pay, compared to similarly situated faculty.

Fifty-seven claims against public senior institutions (70%) included twenty first amendment,\textsuperscript{45} eight gender,\textsuperscript{46} ten procedural due process,\textsuperscript{47} four property interest,\textsuperscript{48} two handicapped,\textsuperscript{49} two age,\textsuperscript{50} two national origin,\textsuperscript{51} two race,\textsuperscript{52} one constructive dismissal,\textsuperscript{53} and six non-categorized claims.\textsuperscript{54}

B. Contract Issues

University contract litigation resulted, generally, from disagreements over construction contracts with builders or contractors, disputes over enrollment agreements with students or
parents of students, and breach of employment contracts with faculty or staff. The category had twenty-six cases (14%) for all institutions, and cases were almost equal in number between independent institutions (twelve cases) and public institutions (fourteen cases), including two community college cases. One of the latter was in the public sector, reported in 1980,55 and the other, the only private junior college case, was reported in 1938.56

Private senior colleges had twelve cases: one construction contract,57 six enrollment agreements,58 and five employment contracts.59 The public senior college cases were five construction contracts,60 one enrollment agreement,61 four employment contracts,62 and one each concerning securities,63 telecast rights64 and nonpayment.65

C. Property Issues

Ten cases (5%) were reported in the property issue category. Except for a series of trespass to try title suits, no subcategories were discernible; however, statutory/administrative issues frequently intermeshed with the property issues for both private and public institutions. As to the latter, the Texas Constitution governs the composition, investment, and use of the permanent university fund66 and numerous statutes regulate the management of university land therein,67 plus separate statutes set out the lease and management of land by individual state institutions.68 As to private institutions, municipal ordinances may govern land use.
Private senior colleges had seven property cases reported (70% of category). Four were court decisions of trespass to try title suits. A fifth case concerned a real estate lease; the sixth relied on a charter's prohibition to mortgage college property; and the seventh was a 1983 zoning conflict between a city and a church-operated college, for which the decision depended on the city ordinance definition of the words "church" and "college." Public senior colleges had three property cases (30%): a university canceled dormitory reservations to make a different use of the dormitory property; a conflict arose over a sublease; and a trespass to try title suit was brought. No property cases were reported for community colleges.

D. Procedural Issues

Courts decided procedural issues in seventeen cases (9%). In the single public community college case, the court decertified a class. In four private senior college cases (24% of the category), the procedural issues were two changes of venue motions, an error in the closing argument, and a motion to amend pleadings.

The procedural issues in the twelve public senior institution cases were: two venue decisions; two that gave the plaintiffs the right to proceed with their Title VII claims; two that dealt with discovery; two class action procedural rules; and one case each for grant of subclasses, leave to amend a complaint, plea in abatement, and a mistrial ordered to
preserve justice.87

E. Tort Issues

Twenty-two cases (12%) were in the tort category. Eight (36% of category) were in the private senior sector, twelve (55%) in the public senior sector, and two (9%) in public community colleges. The latter were a 1968 inducement claim brought by a real estate broker88 and a 1986 defamation suit.89 Most of the public institution tort cases were decided in the 1970s and 1980s. In 1969, the state legislature passed the Texas Tort Claims Act90 (the Act), which provides a limited waiver of governmental immunity from suits for damages91 and enabled more plaintiffs to file suit. Cases with public community colleges, however, have been sparse because the Act does not apply to community college districts, except as to motor vehicles.92

Six of the eight private institution cases were brought between the years 1929 and 1962 and all six were claims of negligence, three of which were against university hospitals. The first93 established that the doctrine of respondeat superior did not apply to a charitable institution of higher education. Subsequent suits that unsuccessfully sought to change the rule were claims by private citizens that concerned either injuries they received as football spectators94 or charges of negligence against university hospital personnel.95 In 1971, however, the Texas Supreme Court established that a charitable enterprise is subject to vicarious liability under the rule of respondeat superior the same as any for-profit business organization,96 and a
few years later a citizen was successful against a private college for the actions of the driver of a college-owned bus.97 The eighth tort suit, a claim for contribution or indemnity, was litigated in 1987.98

Of the twelve public senior institution cases, three were slip and fall cases99 brought by students; three were for injuries sustained in athletic contests100 (one suit was brought by a student, another by a parent, and the third, by a volunteer official); and two were defamation claims.101 Other suits dealt with an automobile accident injury,102 resignation under duress,103 negligence of a hospital employee,104 and negligence resulting in a classroom injury.105

F. Statutory/Administrative Issues

Courts heard twenty-nine cases (15%) in the statutory/administrative category; however, only three (10% of category) involved private institutions. Two of those dealt with provisions of Section 504 of the Rehabilitation Act of 1973106 and one with the Texas Open Records Act.107 Five cases (17% of category) had community colleges as parties. In four, the major statutory issue was the manner of funding the colleges;108 the fifth was a workmen's compensation case.109

Twenty-one public senior university (73% of category) cases were reported. Four bore on early legislative acts regulating leases on state university land.110 Other cases involved a board of regent's rules as legislative force in determining the reasonableness of a rule calling for academic dismissal;111 a 1939
statute that authorized mandatory student fees of one dollar;\textsuperscript{112} whether a constitutional provision was self-enacting or discretionary by the legislature;\textsuperscript{113} statutes governing a university retirement system;\textsuperscript{114} the power of a Board of Regents to promulgate rules and regulations;\textsuperscript{115} a 1969 act that authorized the selection of a site for a new university;\textsuperscript{116} the rules and regulations to which an employment contract was subject;\textsuperscript{117} two worker's compensation cases (one for attorneys fees apportionment and the other brought under the Jones Act);\textsuperscript{118} the state statute of limitations for a section 1983 civil rights claim;\textsuperscript{119} disclosure of public records under the Texas Open Records Act;\textsuperscript{120} the registration of university service marks under state statute;\textsuperscript{121} identification of state employees and the effect on the doctrine of sovereign immunity;\textsuperscript{122} and the disposition of accrued and unpaid benefits after an employee's death.\textsuperscript{123}

G. Trusts, Wills, and Donation Issues

All four cases reported in the trusts, wills and donations category (2\%) were in the private sector. Two early cases were will contests.\textsuperscript{124} In each, the colleges were residuary legatees of a testatrix and in each, the executor (and college) was the winner. In a third case in 1966, the court interpreted the trust by which a university was created.\textsuperscript{125} In 1975, a complicated donation case was reported,\textsuperscript{126} in which a university, a donor, a city, and the state all claimed title to a collection of historical documents, "The Laredo Archives."
Conclusion

Of 189 cases, constitutional issues were the most frequently litigated with eighty-one cases. Private universities litigated five; public community colleges, nineteen; and public senior institutions, fifty-seven. The issue that was the least litigated was the category, trusts, wills, and donations, in which all four cases were litigated by private senior universities. The remaining issues in descending order of frequency were the categories statutory/administrative, twenty-nine cases; contract, twenty-six; tort, twenty-two; procedural, seventeen; and property, ten.

The issue litigated most frequently by private institutions was contract with twelve cases. Property and tort cases tied for second with seven cases each at private universities and colleges. For public institutions, statutory/administrative issues were the second most frequent with twenty-six claims for both senior institutions and community colleges.

III. Litigation by Time Frames

An analysis by decade and institutional type and a second analysis by primary issues and time periods viewed the cases from different perspectives. The linear review resulted in a chronology that allowed a comparison of issues by institution types over time. The horizontal review presented the issues litigated within large time segments that showed which issues were
most likely to be litigated during a particular time frame. Part A, following, gives a broad view of litigation by decade, first by private, then by public institutions. Each section also has an analysis of trends. Table II (Appendix) shows figures for the decades since 1860 by private and public senior institutions and public community colleges. It also shows figures for the portion of cases that were litigated by medical and dental colleges and by health science centers. Part B gives the findings for primary issues and time periods.

A. Litigation by Decade and Institutional Type

Separate analyses of litigation that involved public and private institutions by decade placed the cases in the context of the social, political, and legal history of the state and nation and of each institution type. Some findings, such as the emergence of constitutionally based cases at public institutions in the fifties or the reoccurrence of contract suits at private institutions, were not surprising. What did surprise was the finding that the public or private status of institutions had no great significance at either the beginning or ending years of the study in terms of cases. Rather, the middle years seemed to mark the greatest divergence between the two types. A comparison of the decades in Iowa and Texas provided the further information that patterns of litigation in higher education in one jurisdiction may or may not reflect those in another.
1. Private Institutions

Cases in the four decades before 1900 in Texas are few, and all involved private universities. An 1878 contract suit is the first recorded case involving a Texas college—and its reported history is lively and long. The case went before the Texas Supreme Court three times over a period of fifteen years, and the lower court venue changed twice. Three times juries found for the plaintiff builder who brought the suit, but on each appeal the supreme court reversed and remanded for the trial court's error for either admitting or excluding the defendant college's evidence.

Six early private institution cases in the Iowa study also were basic contract suits; however, those involved the terms of a payment of a gift or note to the institution, a type of suit that would likely be connected with a charitable institution that relied on donations for funding. In contrast, the Texas contract case dealt with a construction contract, an agreement more likely to be common to both public and private institutional parties, since both types construct, repair, and maintain buildings. The private status of institutions explained the appearance of early contract cases in Iowa, but the status seems to have no relation to the first contract case in Texas, other than the fact that only private institutions were in operation before 1876.

Only two additional cases, both trespass to try title suits, are reported prior to 1900, and they occur more than a decade
after the contract case. The two trespass to try title suits were also common to both private and public institutions of that time, since land law in new states was "a major branch of litigation, in education as in other legal domains." In Texas, a private university generally received a grant of four leagues of land when it received a charter from the Republic of Texas. When the land was sold later, conflicts sometimes arose over title and the authority of the trustees to sell or encumber the college properties.

Placing private institutions and litigation in proper perspective in the decades prior to 1900 is difficult. Many institutions with varying names, such as "university," "college," "institute," "seminary," and "collegiate institute," were chartered by the Congress of the Republic and later by the state legislature, while others existed that never sought to be incorporated. The question arises, however, whether the Texas institutions were truly institutions of higher education. Prior to the Civil War, instruction dealt primarily with only basic curricula and young persons in Texas frequently went elsewhere for higher education. After the Civil war, most Texas private institutions floundered because of depleted endowments and high costs of new instruction in laboratories and sciences. In addition, some localities had numerous institutions that were similar and rivalry arose among them.

With that background in mind, an analysis could show that the three reported cases in the early period were a small number,
considering the large number of institutions and the resulting rivalry that might foster lawsuits. On the other hand, the number of cases can be considered large if one looks at the academic characteristics of the institutions involved as parties in comparison to the number of institutions in the state that were merely of basic instruction. Two of the three institutions in the reported cases appear to have been of a higher standard in their offerings of academic work. One, Gonzales College in the first reported case, had a four-year program that offered a degree until the Civil War disrupted its growth and the Texas Reconstruction period saw its financial decline.¹³⁶ The other institution party was a founding association of Baylor University, "one of the few institutions which were able to offer work of a genuine college standard for that day."¹³⁷ In the final analysis, it appears that even in the early years of Texas, colleges or universities that had some element of stature in their course offerings plus financial holdings in land and funds were likely to be courtroom litigants. Since few institutions in Texas met those qualifications, three reported cases, plus an unreported case,¹³⁸ comprise a significant number of cases involving private institutions of higher education in the years prior to 1900.

In the first four decades following 1900, private institutions were parties to seventeen suits, one of which was the first junior college case in Texas. That case was also the first in which an employment contract between a faculty member and a college was decided, and it was also the only private junior
In these four decades the first case with a private medical school was also reported.

Conflicts over enrollment agreements between institutions and students (or their parents) for fee payments prompted most of the litigation in that forty-year span. Terms of agreements were the basis of nine suits, six in which the courts decided contract issues and in three, procedural issues. Six of the total nine, however, involved the same military college as a party, four cases in the year 1920 alone. This large number of cases reported for a single college explains the abrupt increase in cases for the decade of the twenties and alters the impression presented by Table II that, as a general rule, private institutions were active in court at that time.

The increase that doubled the number of cases in the decade 1910 to 1920 was also not highly significant, unless one considers that two contested will cases are reported, an issue that does not appear again for specific higher education institutions in Texas, although cases do appear for bequests for general scholarships or educational purposes.

The remaining reported cases in the first four decades after 1900 were four property cases, one occurring in the first decade, one in the second decade, and two in the third. A property issue does not appear again in the cases until the 1980s when a zoning conflict arose between a city and a church-operated college.

Although private institutions had more cases than did the
public sector until the fourth decade, thereafter the public cases increased in numbers while the private cases stayed constant. The majority of cases against private institutions were a string of tort suits\textsuperscript{148} from 1943 to 1962 that were brought unsuccessfully by plaintiffs against the institutions, which consistently were found immune for the torts of their agents. Even during the 1970s, when litigation grew in the public sector in Texas, litigation remained stable among private institutions.\textsuperscript{149} Five cases in that decade were litigated, three on constitutional issues with the same university as a defendant.\textsuperscript{150}

The 1980s decade, however, may present a quite different pattern at private institutions. Litigation in the first five years alone rose to seven reported cases. Four additional cases in the years 1986 and 1987 indicate that the final tally will show that litigation at least doubled. The seven private institution cases in the years 1980 to 1985 cluster into two main areas, each with three cases: discrimination of the handicapped\textsuperscript{151} and breach of employment contract.\textsuperscript{152} A zoning suit\textsuperscript{153} also was litigated. In 1986, a court decided two religion discrimination suits\textsuperscript{154} (one was also a sex discrimination claim), and in 1987, a Texas Open Records Act case\textsuperscript{155} and a tort case\textsuperscript{156} were decided.

Looking closely at these eleven cases litigated by private senior institutions in the 1980s, three distinguishing facts emerge. First, faculty brought most of the cases, in contrast to

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private citizen or student plaintiffs in previous years. Second, recent cases have been constitutional claims. Third, a few of the more developed, better endowed nonsecular institutions are the most frequent litigants, especially the ones with large student enrollments. Beyond their renown in the state and reputation for wealth, it is risky to speculate on the funneling of cases to particular repeat defendants; however, those universities may seek a broader field of faculty applicants outside the religious denomination of the school than do smaller denominational schools, or the universities' reputations may draw more applicants from which to choose. The universities may also foster a campus culture that encourages confrontation at all levels for any number of reasons—as a quest for fairness, to maintain a particular identity or to shape one, as a goal of scholarly interaction, and the like. And it may be that outside influences and federal and state regulations affect large private institutions more than small ones, by their likelihood of having more programs and departments and, therefore, more possibilities for government assistance. The latter would place the private institutions within the scope of statutes and possible litigation from which they otherwise would be protected. 157 The large size would also result in more persons to introduce social and cultural changes on the campus.

A similar analysis was used as a hypothesis for the public sector in a study of senior institution cases reported in the years 1957-82. 158 The researcher proposed that cases initiated by
faculty and associated with academic freedom issues would more likely involve a "multiversity" or "comprehensive" than other types of public institutions. It is possible that the complexity and size of a university act as identifiers of faculty \(^{159}\) who are likely to pursue constitutional issue claims, and whether the institution is public or private is of little or no consequence as an identifier.

Regardless of the speculative rationales for the increase, the trend is an interesting one and could create a pattern of cases in the future for private universities that differs from the past ninety years in Texas among private universities.

2. Public Institutions

The first public institution case was reported March 1926. It turned on statutory and state constitutional provisions that allocated royalties from oil and gas leases on land owned by the University of Texas. \(^{160}\) A few months later a property case \(^{161}\) was decided. Later in that decade, a second statutory case \(^{162}\) established a trend of statutory and property issues, which continued through the 1940s. \(^{163}\) In 1932 a statutory issue was also the subject of the first suit with a public medical school as a party. \(^{164}\)

Even though Texas did not have an operative public university until 1876, \(^{165}\) these first Texas cases with public institution litigants were considerably later than the first Iowa
public case in 1867. In 1900 to the mid-1920s, however, the number of public institutions grew rapidly. In 1925, there were ten senior public institutions, two state junior colleges, and seven municipal junior colleges. In those years, student enrollment increased 582 percent while the state population increased 53 percent.

Increased institutional expansion and increased litigation generally are expected to accompany one another, and this hypothesis is borne out with the first cases in the public sector. The first two cases dealt with conflicts arising from the need for additional campus buildings to accommodate a growing student population at a major state university. In one, students wanting inexpensive on-campus housing created a lawsuit, while in the other, the method of financing new buildings was the issue.

In the 1940s, the number of public senior institution cases doubled from three to six, and the first public community colleges cases were reported. Most cases in the forties dealt with statutory issues; however, an employment contract issue also emerged.

The number of cases at public senior and community college stayed fairly constant in the 1950s and 1960s. The issues litigated, however, belie those seemingly stable years. In the 1950s, three of the six senior public college cases and both of the reported public community college cases were based on three constitutional issues: race discrimination, sex
discrimination,179 and the civil rights of a student arrested after refusing to leave the campus.180 The remaining three cases in that decade dealt with statutory,181 procedural,182 and contract issues.183

In the 1960s, two constitutional issue cases were decided: a sex discrimination case184 and a claim by students that they were dismissed for participating in a peaceful demonstration,185 both with senior institutions as parties. Other senior institution cases involved an employment contract,186 defamation,187 and regulatory188 issues. The two public community college cases involved an election contest189 and a claim of inducement.190

The greatest increase in the number of cases at public institutions occurred in the 1970s. Public senior college cases quintupled to a total of thirty from an average of six cases per ten-year span for the three previous decades. Community college cases were almost six times greater than the five cases reported for the two previous decades. All twelve of the reported community college cases in the 1970s and more than half of the senior college cases were litigated on constitutional issues.191 The community college constitutional issues included eight first amendment claims, three property interest claims, and one procedural due process claim. Among the claims litigated with senior colleges were seven claims based on the first amendment, one claim each based on sex discrimination, age discrimination, property interest, national origin discrimination, and due process; and four noncategorized claims.

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The first five years of the 1980s show a slight decline in the number of public senior college cases, with forty-nine cases reported. If that number were to remain constant for the remainder of the decade, the increase for the decade would be slightly more than three and a half times that of the previous ten years, and therefore, less than the increase recorded for the 1970s. The years 1986 and 1987, however, show only fifteen recorded cases. By making a projection of approximately seventy-five cases for the years 1980 through 1990, the result is an increase in cases of only about two-and-a-half times the number in the 1970s.

The number of community college cases, on the other hand, show a different trend for the 1980s. The number of cases remain about equal with the twelve reported cases of the 1970s. Six junior college cases were reported from 1980 to 1985 and three more for the years 1986 and 87. In the latter years, two cases were statutory issues and one was a defamation suit.

A review of public medical institutions shows an increase in the number of cases in the 1980s. While this type of institution had only two cases from 1970 to 1979, five cases have been reported since 1980, three during the first five years and two in the years 1986 and 87. All but two of the seven cases since 1970 were employment claims.

The issues litigated in the earliest cases by Texas public institutions resemble those by public institutions in the Iowa study even though the initial cases in each state were
litigated forty years apart. That is, state statutes and the constitution were construed for public institutions and their property and in relation to the administrative powers of boards of regents. The earliest cases differ in the two states, however, in the scope of the decisions. The Iowa study describes its earliest decisions as settling and establishing basic principles of law in disputes concerning public institutions.\textsuperscript{196} This fact may have been a factor in a seventy-year lapse in litigation from 1892 to 1962 in the public sector in that state.\textsuperscript{197} The earliest Texas decisions, in contrast, were narrow and addressed specific issues for specific institutions.\textsuperscript{198} The facts and pleadings would help fashion these early holdings; but beyond that fact, a Texas court would probably have had difficulty establishing many broad principles of law for all state institutions, because no unified system for higher education existed in the first six decades after 1900.\textsuperscript{199}

The growth of litigation in the 1970s also repeated the pattern in Iowa,\textsuperscript{200} although the Texas growth was greater.\textsuperscript{201} The Iowa study attributed that state's growth to institutional expansion.\textsuperscript{202} Texas, too, had an increase in students, as did other states;\textsuperscript{203} however, the prevalence of social, political, and constitutional concerns in Texas cases raises the question whether the size of the student body affected litigation patterns in Texas. Phenomenal growth also occurred earlier in the century in Texas higher education without a commensurate growth in court cases, albeit at a time when litigation was not as generally
prevalent throughout society. More significant, institutional growth continued into the early part of the 1980s, but without the equal growth of litigation that had occurred in the 1970s.

It is expected that the greater the number of students, the greater also the number of faculty, administration, and number of cases. As discussed previously in Section II, "Primary Issues Litigated," however, influences outside the university setting such as federal and state regulations and United States Supreme Court decisions shaped litigation patterns, particularly at the public institutions of higher education, whether community college, senior institution, or a health institution.

Conclusion

The earliest cases involving public institutions were statutory, a type that might be expected in the public sector; however, the private sector cases, which were construction and land title suits, were not distinguishable from cases that might also be litigated by public universities. In the midyears from 1920 to 1970, the number of private university suits remained stable marked primarily by tort suits, while the number of public institution cases began to grow, with constitutional issues a major litigation issue.

In the 1970s, litigation grew rapidly at public institutions and remained stable at private institutions, but the issues became more similar as constitutionally based cases appeared in the private sector. By the latter years of the 1980s, litigation
appeared to be growing at private universities while at public institutions, litigation was still growing but at a less pronounced rate than in the previous decade.

B. Primary Issues and Time Period

Four time periods were selected for comparing the volume of cases for each primary issue. They were: early (1870 to 1900), middle (1900 to 1960), recent (1960 to 1986), and latter (1986 to 1988). Table III shows the figures for each type of institution. From one period to the next, some colleges changed their name, added campuses, dissolved, and changed from municipal to state status and from private to public; however, a general statement can be made that the number of public senior and community colleges increased and the number of private institutions decreased from the first to last period.

The analysis is given in two sections. Section 1 provides a general overview. Section 2 gives a brief review of the findings for primary issues by time period and gender.

1. General Overview

In an analysis made only by reviewing the Table III figures for the first three periods, the findings shows a large increase in the public sector in the recent period and a less dramatic, but significant decrease in private institution cases, even when taking into account that the most recent time period (1960-86) has less than half the number of years of the middle period. The majority of the private senior cases in the recent time period, however, date from the year 1980, which reflects a rise in
litigation in the private sector for the 1980s decade. When further considering the factor that six of the seventeen private cases in the middle period were essentially the same enrollment case, although with moderately varying facts,207 a slight increase in private litigation emerges even for the recent years.208 For total Texas institutions for all years, constitutional, statutory, and procedural issues increased the most.209 In the public sector, senior and community colleges showed an increase in tort, contract, constitutional, statutory, and procedural issues.210 Private senior institutions showed an increase in constitutional and statutory issues.

The increase in cases can be linked to a number of changes within and without the campus environs. The rise in tort and contract issues at public institutions likely results from the erosion of sovereign immunity through legislation such as the Tort Claims Act.211 Increases in constitutional and statutory issues at both public and private institutions show the reliance of aggrieved parties on the courts to provide solutions to employment problems that once may have been settled by tradition, custom, or by moving to another campus.212 Government now regulates private institutions more heavily than in the past through federal dollars, and those institutions are sometimes subject to the same constitutional constraints as public institutions.213 Also state statutes and regulations are more pervasive, and an informed citizenry will seek to enforce or question them. The growth in procedural issues may reflect the complexity of many of the recent
cases involving institutions. Class action and multiple party suits grew in number along with the number of constitutional issues,\textsuperscript{214} and multiple claims by parties in a single case were common.

Property issues did not increase for any type of institution. This fact may result from having most institutions well-established within the state and, therefore, property issues are confined primarily to earlier years of development in a jurisdiction.\textsuperscript{215} Also, Texas has provisions\textsuperscript{216} for the acquisition, sale, and management of certain state university lands and minerals, including statutes for eminent domain. Therefore, when a court decides a case pertaining to land, statutory construction frequently controls the outcome. Table V, which shows the economic bases of the cases, provides the number for which real estate was the initiating economic object or force.

In the latter period, 1986 and 1987, almost all the cases were clustered in either the constitutional or statutory categories. These two issues are also manifested in the number of federal and state cases litigated in each time period. The first federal court cases appeared in the middle period. The earliest to be filed initially in a federal court among higher education institutions involved a public community college in 1953\textsuperscript{217}--a group of black youths sought registration in an all-white school. A few years prior, the U.S. Supreme Court in 1950 had reversed the state appellate decision in the first federal case in the study, \textit{Sweatt v. Painter},\textsuperscript{218} which was also the first race issue case.
Only one additional suit, also a race issue, was reported as a federal court case in the middle period. 219

In the recent period, seventy-one federal cases (58%) out of a total of 121 were reported. In the latter period, ten out of the twenty-two cases reported (45%) were federal cases. Most of the federal cases had public institutions as parties, but eight had private institutions as a litigant. This large number of federal cases reflects the importance of United States constitutional issues in higher education law in Texas, particularly in the recent and latter periods. 220

2. Primary Issues and Time Period by Gender

A party's gender in a given time period for types of claims also provides clues to litigation patterns. Table IV shows the evolution of claims by males and females through the early, middle, recent, and latter years in private and public institutions. Business parties, parties represented by both sexes in class action or multi-party suits, or parties whose gender was unknown are classified as mixed gender parties. No attempt was made to compile statistics for female and male populations among faculty, students, or private citizens for any time period or for types of institutions, yet the data provide a glimpse of the frequency and types of claims by gender.

Males were parties more frequently than females in all time periods except for the latter period at private institutions (one case each). Although female litigants significantly increased the percentage of female parties from the middle to the recent time
period at both private and public institutions, the number of male parties at public institutions was approximately double that of females. And at private institutions, although the number of male parties dropped, the number of male litigants was twice that of females during the recent period.

During the middle years, female parties at public and private institutions had the same number of cases (three) and also the same percentage of cases (14%) for the time span. In the recent time period, the percentage of female cases between types of institutions remained about equal (27% and 26%), although the numbers alone were considerably higher for public institution cases. There were twenty-nine female litigants at public institutions compared to only four female litigants at private institutions.

The percentages of cases with male and mixed gender parties were also similar between the types of institutions for the recent time period. Males were litigants to approximately one-half the cases at both private (53%) and public (50%) institutions and mixed gender parties were litigants to one-fifth (20%) of the private institution cases and approximately one-fourth (24%) of the public institution cases.

In 1986-87, females and mixed gender parties increased their percentages as litigants at both private and public institutions, while the males' percentages declined, but males still slightly outnumbered the other parties at public institutions, by case count (eight cases for males compared to
five cases each for female and mixed gender parties). At private institutions in those years, one male and one female were litigants and two were business parties.

The most frequently litigated primary issue by all parties by gender was the constitutional issue category. Males most frequently litigated first amendment issues. Males most frequently litigated sex discrimination issues, so much so that the increase in female litigation appears to result primarily from that issue. Of the total forty-three female cases at all institutions, the basis for thirteen or almost one-third, was sex discrimination.  

At private institutions alone, contract issues were the most frequently litigated by males. Tort issues were the most frequently litigated by females.

IV. Economic Bases of Disputes

Litigation is frequently framed in terms of "costs," a word which implies dollars and cents, but which also describes the expense of a party's emotions and time. The latter costs cannot be calculated from the court opinions; however, economic bases for disputes may be estimated from the facts with at least some degree of accuracy. Some reported cases appeared to have more than one economic basis, but nine economic categories were determined. They included donations, employment, student status, function funding, personal injury, construction contract, realty,
payment of debt, and non-categorized. Table V shows figures for the categories by type of institution.

Twenty-two cases were determined to have non-economic bases. This figure would possibly be greater or smaller if the parties were questioned about their motives; however, an objective reading of the opinions provided that number. Cases in this group included both private and public institutions, and all the issues were in the constitutional category: race discrimination, the choice of hairstyle or beards, recognition of a student organization for homosexual students, and the like. Although each case could conceivably be placed in one of the economic categories, the nature of the liberty and equal rights issues as represented in the opinions more properly removed them from a strict economic category.

Of the cases with economic bases, one-third (63 cases) were based on faculty and staff employment. The underlying legal theories were varied—contract, tort, or discrimination, for example; however, the economic bases were related to the workplace: reinstatement, promotion, getting hired, back pay, equal pay, or working conditions and accommodations. Only five of the sixty-three cases were decided before 1972.227 That year, Title VII of the Civil Rights Act of 1964228 (Title VII) and the Equal Pay Act of 1963229 (Equal Pay Act) were amended to cover higher education institutions. Those changes allowed litigation in academic institutions across the United States, which has continued through the 1980s.230 In Texas, twenty-seven
employment cases were decided between the years 1980 and 1985 and eleven more in 1986 and 1987, but not all were under Title VII or the Equal Pay Act. Employment contract issues, issues brought by handicapped faculty members, and constructive dismissal were among other employment claims in those five years.

In addition to the federal statutes, the tight academic job market may stimulate litigation by faculty. Rather than relocate to another campus, which an aggrieved faculty person could do with some ease in the past, the employment option may be reduced to a confrontation in court.231 Also, as the numbers of cases grow, faculty may be encouraged by visible or perceived signs of success of others in suits with similar facts as their own. In the latter case, settlements, rather than litigation, may increase in employment suits. On the other hand, a university may have as many reasons to defend a particular employment lawsuit as a faculty member has to initiate one. A university may want to establish a principle and avoid future litigation, or the university may be in litigation because of earlier inaction.232 Therefore, what may be an economic decision for a non-institutional party to a suit may not be a financial one for the university.233

Student status was the second economic basis most litigated, with public universities as the party to all but one. In the private institution case, a former student alleged that the university induced him to take music courses by promising him a successful career as a musician.234 Students in the public
institution cases desired, for the most part, to remain in a university after expulsion. It is presumed that they wanted to pursue education for its economic value in career preparation, but the desire to clear a reputation or to meet a family's expectations might be equally as strong a factor. Other situations in which student suits were clearly financially motivated involved tuition refunds,\textsuperscript{235} compulsory student services fees,\textsuperscript{236} and residency requirements for enrollment at state universities.\textsuperscript{237}

Donation and function-funding cases are few in Texas,\textsuperscript{238} but they presented situations in which parties had significant amounts to win or lose. Bequests were sizable in the two will contests reported and for the private universities that were legatees, the bequests promised considerable economic support.\textsuperscript{239} Ownership of historical documents was the issue in a third donation case.\textsuperscript{240} Because endowments and gifts are relied on heavily by private institutions and pursued by public institutions as well, the dearth of cases in Texas is difficult to explain. Statutes in Texas govern the receipt of some specific donations at state institutions. For example, a donation to the University of Texas System for professorships and scholarships\textsuperscript{241} is held in trust under any written provisions of the donor, as long as it is not inconsistent with management of the system or its institution. The statute also has a cy pres provision for a donor's failure to transmit title or if the use is no longer practical. Most of the statutes for separate public institutions are general and brief in
the authorization to accept gifts.

In the six function-funding cases, the institution could be required to collect, expend, or redistribute considerable sums. In one, female athletes claimed discrimination in the funding of female intercollegiate sports. In four, the raising of funds for community college districts by assessing taxes, issuing bonds, and creating tax districts was the conflict; and in the sixth, the court decided that the receipt of medicaid and medicare funds by a private university's medical center constituted federal financial assistance.

Realty and construction contract cases also have potential for determining the disposition of substantial sums of money. Land in Texas has long been a prized commodity. In the early years of the Republic and State, land was desired for wealth in surface acreage, and in later years, the subsurface was equally desired. Litigation in the formative years of the universities reflect that interest. In more recent years, the regulation of land use has become an issue as cities, businesses, and private citizens weigh personal and economic interests in controlling environments.

Building contractors and construction firms are parties to suits in various arenas, so a category for construction contracts is not unusual, considering the numerous campuses within the state. Three of the seven reported cases were decided in the 1980s. In two, the conflict arose over construction delays and in the third, the university sought to recover money paid to a
contractor to repair a water-damaged gym floor.\textsuperscript{250} Budgets for many buildings may be tightened with the economy for a time;\textsuperscript{251} however, plans for new buildings, particularly for research facilities,\textsuperscript{252} continue, so this economic basis for litigation remains viable.

Personal injury suits are also common outside the university setting. In the past, public universities were immune by virtue of their governmental status and private universities, by charitable immunity; but the distinction has faded considerably in a number of jurisdictions in recent years.\textsuperscript{253} The change has been notable in state universities in Texas, but not yet at private universities, at least not in terms of reported cases. Passage of the Texas Tort Claims Act (the Act)\textsuperscript{254} eroded the state universities' former immunity from suit without permission by the state, but the university still has protection in "substantive immunity."\textsuperscript{255} That is, the Act does not apply to the exercise of discretion in the performance of duties,\textsuperscript{256} and it is unlikely that the volume will grow significantly without further liberalization of the Act. Community colleges are protected even further, since the Act does not apply to community college districts, "except as to motor vehicles."\textsuperscript{257} Private institutions are not subject to the Act,\textsuperscript{258} and few tort cases have been reported\textsuperscript{259} since the string of tort suits in the years 1929 to 1962,\textsuperscript{260} but the opportunity exists for an increase similar to that at public institutions.
Payment of debts was the economic basis for fourteen cases and the most frequent category for private senior institutions (nine cases); however, seven of those were early enrollment agreement cases in which a military college sought to collect tuition payments after the students voluntarily left the school. More recent cases have concerned such matters as assignments of insurance policies to hospitals for payment of medical bills, a contribution claim, a claim for payment of carpet installation, and an application for garnishment of a faculty member's retirement proceeds.

The non-categorized economic cases included a student's suit to protest his ineligibility to play football, the location of a new college, a suit for a larger amount of attorney's fees in a workmen's compensation case, ownership rights to football telecasts, registration by a university of its service marks to collect royalties, and a suit to compel credit for prior service to the retirement system. Also, courts interpreted a trust to determine if blacks could be admitted to the university; decided whether a real estate broker should receive a commission for a land sale, held a community college immune from a defamation claim, and determined that a university could restrict the hand-distribution of a student publication.

Conclusion

All except twenty-two cases had an economic basis. Employment was the leading basis for total institutions and was the primary basis at public senior and community colleges. Almost
all employment cases were decided after 1972, a result of the amendment of Title VII and the Equal Pay Act to include employees at higher education institutions in that year. A tight academic job market is also a likely reason for the large number of cases. Payment of a debt was the most frequent economic basis at private institutions for all years, but most of the cases were litigated in the 1920s. Other frequent bases were student status and construction contracts at public institutions, and personal injury and realty at both public and private institutions.

V. Parties

Parties to the suits were placed in the following categories to determine litigation patterns: faculty, students, businesses, and private citizens. Table VI-A gives the volume of cases for each category, according to the primary issue litigated and by type of institution. Table VI-B shows primary issues and parties by gender for private institutions, public institutions, and public community colleges, respectively.

Faculty and students, as expected, were the most frequent parties. Faculty, at public and private institutions combined, were parties to sixty-seven cases; students were parties to fifty-eight. Private citizens and businesses were the next most numerous parties with, respectively, thirty-seven and twenty-seven cases.
For individual types of institutions, students were parties to slightly more cases than faculty at public and private senior colleges. At community colleges, however, faculty parties were more than twice the number of student parties. Since student population is about equal at public senior and community colleges, the fact that community college students are less litigious may result from the commuter student environment at community colleges. Because students are more likely to be part-time and may be on campus only a few hours each week, they may consider their presence as merely waystops in contrast to students at a four-year, more residential-type campus where students have likely invested a greater portion of their time, and possibly, money. Or the underlying rationale for enrolling at community colleges may be different for some students. Subject matter and training may not be the key factor, whereas the process of studying, gaining self-confidence, and self-discovery may be the primary focus, particularly for women and minorities.

The following subsections, A-D, discuss the findings for each type of party and by gender.

A. Faculty and Staff

For faculty and staff at public senior institutions, constitutional issues were the most frequently litigated (55%), with statutory and contract issues second (15%) and third (12%). Staff members alone, however, were involved with statutory issues, first (54% of the cases brought by staff) and constitutional and contract issues, second (36%), and third
(27%). Staff personnel are not subject to tenure and look to the terms of employee contracts, collective bargaining agreements, or state workplace statutes, when applicable, for raising personal grievances. Faculty work under a more fluid system, on the other hand, with less accountability and hierarchy as a general rule. Therefore, faculty are likely to view their grievances as violations of fundamental rights requiring remedies under the United States Constitution.

At private institutions, faculty most frequently litigated employee contract suits (55%), followed by suits with constitutional (22%) and procedural and statutory issues (11% each). Constitutional issues, for the most part, are barred in the private sector, unless there is state action, so contract provisions have controlled most disputes between the employees and private universities.

Constitutional issues were so prevalent among community college faculty, that ranking the issues beyond first place was unnecessary. First amendment and property interest claims were the most pursued. All but two cases, however, were concentrated in the 1970s, shortly following the United States Supreme Court decision in Perry v. Sindermann, a landmark case set in Texas, which may have prompted other community college faculty to bring property interest suits. In the 1980s, community college faculty have added a sex discrimination case and an employment suit for discrimination in compensation as compared to similarly situated faculty.
Faculty/Staff Parties and Gender

At private institutions, the cases of two female and seven male faculty members were reported. At public senior colleges, cases with eighteen males, nine females, and three mixed gender groups of faculty members were reported. Of parties who were staff members at public senior colleges, three were female, ten were male, and one was a mixed gender group. Community college parties among faculty were six males, six females, and one mixed group; and among the staff, one female.

B. Students

Issues litigated in cases with student parties paralleled those with faculty parties in their frequency: constitutional issues (63%) ranked first at public senior and community colleges, and contract issues (50%) ranked first at private senior colleges. Tort issues ranked second (18%) at public senior colleges for student parties. The tort cases involved accidents alleged caused by the university's negligence in providing either a safe environment or equipment or by either the negligence or maliciousness of the personnel. Three cases were slip and fall incidents; 288 two involved sport contests; 289 one accident occurred in the classroom; 290 and one claim was for defamation. 291 At private institutions, tort issues ranked fourth (8%) among students, behind second-place procedural (25%) and third-place constitutional (17%) issues.

At senior colleges in both the public and private sectors, students were parties to suits during the 1980s; however, the
last recorded case for a community college student was in 1978.292 All five of the community college cases in the seventies involved student demonstrations293 or dress and hair regulations,294 issues which have also disappeared from public and private senior institutions.

**Student Parties and Gender**

By gender, among the twelve cases with student parties at private institutions, only one was brought by a female. The remaining eleven cases involved four males and the parents of seven male students.295 At public senior colleges, eleven female, twenty-one male, seven mixed gender groups, and the parent of one male student were parties.296

**C. Businesses**

Business parties litigated more often with public senior colleges than with other institutions, with a total of sixteen cases. Construction contracts (44%) were the primary issue, and are discussed in the economic bases section.297

At private senior institutions, property issues (4%) were the most litigated with businesses with three cases of a total of eight. The remaining business party cases at private institutions were scattered in contract, statutory, donations, and tort categories. Two recent cases, one property and one procedural, showed an interesting trend at private universities in that the business party was a government unit. In the property case, the government/business party was a city;298 in the statutory issue case, the party was the United States.299
D. Private Citizens

Private citizens were the third most numerous party for all institutions, with thirty-six cases. No contract suits were litigated, but the other five categories rank: first, tort (30%), followed by constitutional (22%), statutory (19%), property (19%), donations (8%), and procedural (2%). At private institutions, tort suits were the most frequently litigated. At public institutions, constitutional issues were the most common. The latter fact results from private citizens seeking court injunctions in the years 1950 to 1960 for a university or community college to refrain from refusing to admit them as students for reasons of race or sex.

Five of the six tort suits brought by private citizens at private universities appear an aberration, considering the courts' persistence in preserving immunity for charitable institutions; however, they appear for two decades until 1949 when reported cases halted until the early 1970s. In the meantime, the decision in Howle v. Camp Amon Carter, which overruled charitable immunity, appears to have had little impact on the number of tort suits at private universities.

Private Citizen Parties and Gender

At private senior colleges, private citizens were parties to fourteen cases. Five citizens were male; five were female; and four were gender-mixed parties. At public senior colleges, the private citizen parties were seven males, six females, and four mixed groups for a total of seventeen cases. In six community
college cases, two males and four mixed groups of private citizens were parties.

Conclusion

Student parties were the most numerous non-institution party at senior institutions, both public and private, but at community colleges, faculty parties more than doubled the number that were students. The commuter-status of the students or their reasons for choosing to attend a two-year college, possibly to gain study skills or self-confidence, may cause them to be less litigious than students at four-year constitutions. Student parties, however, have decreased at all institutions in recent years, while the number of faculty parties rose.

At private institutions, faculty and students brought contract suits most often. Private citizens litigated tort suits most frequently at private institutions; however, only two have occurred since 1949.

At public institutions, students and faculty most frequently litigated constitutional issues. Private citizens also litigated constitutional issues most frequently, a result of their seeking injunctions to compel colleges to admit them without regard to their race or sex. Staff members, however, litigated statutory issues first, and contract and constitutional issues, second and third. Staff personnel are not subject to tenure and look to grounds other than constitutional to assuage their grievances.

Male parties have been more numerous than female, but at
community colleges, the number of male and female faculty parties have been equal in the reported cases in the latter years.

VI. Prevailing Parties

Prospective litigants must weigh risks and stakes to decide whether to drop, settle, or pursue a claim. A review of prior similar case histories by types of parties can reveal patterns that may help a party to calculate the chances of winning.

Beginning with 1972, a fairly significant number of cases in Texas, eleven percent, were split decisions. The court decided one or more issues for each party and, therefore, neither party completely won or lost. Because of the multiple statutes and charges presented by some plaintiffs, particularly those with constitutional and discrimination claims, it is not surprising that each side prevailed on at least one. No split decisions were reported for private institutions, possibly a result of their having litigated fewer constitutional issues than public institutions.

In the following Part A of this section, the findings that relate to prevailing non-institutional and institutional parties are discussed. Primary issues are discussed in Part B.

A. Prevailing Non-institutional and Institutional Parties

Table VII gives findings for the number of times an institution won when opposing a specific type of party. The bottom half of Table VII repeats similar figures, but from the
perspective of the non-institutional party as the winner.

Institutions prevailed on the merits in a majority of cases against each type of party, except for business parties. Business parties prevailed against institutions in fifty-nine percent of the cases. Two (8%) of the total twenty-seven cases litigated with businesses were split decisions. A wide variety of business operations were represented as litigants, but construction companies and related businesses were the most numerous. They were also highly successful with four wins,\textsuperscript{305} two losses,\textsuperscript{306} and two split decisions, one of which divided liability equally\textsuperscript{307} and the other which declared the university in breach of contract, but not liable for exemplary damages.\textsuperscript{308}

Private institutions won fifty percent of their eight cases with business parties, but have won only one (25%) of the four cases that were reported in the 1980s. A government unit was the business party in two,\textsuperscript{309} a fact which reveals a weakened demarcation line between public and private institutions in business affairs with local, state, and federal governments.\textsuperscript{310} Private institutions as a group, however, were the only type to consistently win either a majority, or at least fifty percent of all cases, regardless of the type of party.

Public community colleges were the only type to win less than a majority of all cases against total non-institutional parties, ten (40%) of the twenty-five cases. The low percentage of wins came from the high number of split decisions with faculty parties, five (36%) out of fourteen cases. Faculty parties and
the opposing community colleges each won four (28%). Also, community colleges were unsuccessful against their three business parties, a construction company,\textsuperscript{311} the State of Texas,\textsuperscript{312} and a city.\textsuperscript{313}

Faculty parties at public senior institutions fared worse than those at community colleges or private institutions. Private institution faculty won forty-four percent of their cases. Public institution faculty won twenty-five percent; another twenty-three percent were split decisions. Four of the total forty-four public senior faculty cases, however, were procedural and did not reach the merits. When only merit cases are analyzed, faculty at public senior institutions fared even worse. Of the thirty-one cases decided on the merits, faculty won only five and split eight decisions.\textsuperscript{314} Part B, following, analyzes faculty parties further by primary issues.\textsuperscript{315}

In Texas, students at all institutions combined won twenty-one of fifty-eight cases (36%), slightly more than the number of faculty wins. The percentage won by students against the three types of institutions varied from thirty-seven percent (public institutions) to forty-two percent (private institutions).\textsuperscript{316}

Private citizens also prevailed in approximately an equal number of cases at each type of institution, from thirty-three to forty-one percent. No split suits with private citizens were reported.
2. Primary Issues and Institutional and Non-institutional Winners

This portion of the study analyzed findings by institution type and primary issues. Table VIII gives findings for the number of times an institution won when litigating a particular issue. The lower half of the table repeats similar figures, but from the perspective of the non-institutional party as the winner.

(1) Procedural Issues

Non-institutional winners were most successful when procedural matters were the primary issue. The decisions in the cases in this category affirmed or disaffirmed certain rights and pretrial and trial maneuvers by the parties, but did not address procedural due process or the substantive issues of the case. Among the issues covered were jurisdictional requirements, discovery rules, venue, conflict of laws between state and federal rules of civil procedure, and various motions to amend pleadings or to certify or decertify a class of plaintiffs. Sixteen procedural issues were litigated and non-institutional parties won ten (59%) and split 3 (18%). Thirteen of the cases were reported in the years since 1960, indicating the increased role that procedural issues assume in case strategy and in court time.

Eight (47%) of the procedural issue cases were claims based on some form of discrimination and were brought under a federal statute. The non-institutional litigants were three faculty

50
members, two staff personnel, one student, and the U.S. government. Three of those cases were split decisions. In one, the plaintiff and defendant had filed an agreed motion to decertify class because the plaintiff's claim of race discrimination tentatively was settled. In the other, the court dismissed the plaintiff's fifth amendment claim, but granted leave to amend to request appropriate equitable remedy, and in the third, the judge dismissed the suit and gave the plaintiff sixty days to confirm retention of her attorney, secure new counsel, or proceed pro se.

Five (29%) discrimination/procedural issue cases were won by non-institutional parties opposing public institutions. Three were related to class certification rules. Two affirmed that the plaintiffs met jurisdictional requirements to proceed with Title VII claims, and one provided the plaintiff fifteen days to amend the pleading in his claim that the university failed to accommodate his handicap. In two decisions that were not based on discrimination claims, certification of a subclass was granted in a claim by students seeking loan refunds and a plaintiff lost a decision on the discovery rule as it applies in a tort claim.

One study of faculty discrimination litigation points out that distinctions between procedural/jurisdictional and merit decisions are not precise, because if a plaintiff wins on a procedural/jurisdiction issue, the defense may be induced to settle. That study also gives nationwide findings that
generally comport with the findings for Texas non-institutional parties. Faculty parties, nationwide, prevailed in procedural/jurisdictional decisions more frequently than in those that were decided on the merits.\footnote{326} The researchers offer the persuasive conclusion that courts remain reluctant to intrude on an institution's personnel process, but in "the mainstream of civil rights law," faculty are more successful.\footnote{327} That conclusion was further advanced in the Texas findings, as shown in the constitutional issue section following; however, two cases reported in 1986 and 1987 provide a different view of Fifth Circuit opinions, discussed below in Constitutional Issues.\footnote{328}

(2) Constitutional Issues

Twenty-one faculty at public senior institutions were parties to suits in the constitutional issue category,\footnote{329} three of which were discrimination suits. Of the latter, plaintiffs lost two and split one. Eight first amendment claims by faculty resulted in five losses and three split decisions. Faculty also lost three of four property interest claims litigated and of three of five procedural due process claims, lost two and split two. The property interest win was the result of a denial of summary judgment to the defendant university in 1987.\footnote{330} The only suit clearly won by a faculty party against a public senior institution was a 1980 state court case. The appeals court ordered a Board of Regents to reinstate the plaintiff, who had been dismissed from the faculty following a reported misuse of funds while in an administrative position that the faculty member also had held.\footnote{331}
Although the overall pattern of faculty losses at public senior institution appears grim, it was modified to a small degree in 1986 and 1987. In addition to the property interest case in the preceding paragraph in favor of the faculty party at the trial court level, the Fifth Circuit Court of Appeals turned around a lower court summary judgment for a university in a procedural due process and first amendment case. The court vacated and remanded the decision, stating that although no procedural violation had occurred in a law professor's discharge, questions arose on whether he was terminated on the basis of free speech. The court stated that while it was mindful of the U.S. Supreme Court's admonishment that a federal court is generally not an appropriate forum to review personnel decisions, judicial restraint did "not require slavish deference to a university's arbitrary deprivation of a vested property right." And in 1986, in a case brought by a staff person on age discrimination and general due process grounds, a Fifth Circuit interlocutory appeal court stated that no procedural rights were violated, but that the staff person might "be able to plead a cognizable § 1983 claim alleging a Substantive Due Process under the First and Fourteenth Amendments." This opinion was particularly interesting because the appeal was brought by a defendant university official who had been denied a summary judgment motion on grounds that he did not have qualified immunity and that the plaintiff's pleading was sufficient to meet the test of Elliott v. Perez. The court reversed the district courts' finding of the
latter and remanded with an order dismissing a procedural due
process complaint, but stated the record indicated that the
plaintiff might claim that the official and the university
retaliated against the plaintiff for a whistleblowing
incident.337

At community colleges and private senior institutions,
constitutional issues had a slightly better chance of being won by
faculty. Eight cases at community colleges reached the merits.
Faculty won three, lost three and split two. The cases in favor
of faculty occurred in the years 1967 to 1979. All were first
amendment claims. An untenured instructor alleged that her
nonrenewal was a result of work in a local teachers
organization;338 a male teacher refused to shave his beard and was
discharged;339 and an instructor was dismissed when he refused to
execute a non-subversive loyalty oath.340 In at least the latter
two cases, most courts would likely have found for the plaintiffs.
Of the remaining five cases, the community college parties won
two property interest cases in 1974341 and a sex discrimination
suit in 1982.342 Two split decisions involved an educators
organization343 and a claim by a faculty member of unequal
compensation compared to similarly situated faculty.344 No
constitutional issue cases with community college parties were
reported for the years 1986 and 1987.

At private senior institutions only two faculty party cases
have been reported in the constitutional category. The plaintiff
won a 1986 case. A medical school professor at a private
institution won his claim of discrimination of his Jewish religion after he was denied rotation service to Saudi Arabia as a surgical team member. In that same year, a female faculty member lost her claims of sex and religion discrimination. She had been given a terminal contract after being renewed as an untenured assistant professor for three years.

(3) Statutory and Administrative Claims

In litigating statutory and administrative claims, community colleges and private senior institution have been successful, but public senior institutions have been less so, particularly in the latter years, 1986-87. In two of three private senior cases, the institutions were beyond the reach of the statutes' intended scope. Community college wins were clustered in tax funding cases brought by private citizens. Community college districts, however, also tested tax or bond statutes twice and lost twice, once in 1987.

Public senior institutions have faced a far wider range of statutory claims and types of parties than either community colleges or private institutions. In addition, many reported cases whose primary issues were in other categories, such as tort and property, were brought under various state legislative acts, and claims in the constitutional category were brought under the authority of federal and state statutes. Faculty, students, businesses, and private citizens have all sought assistance from the courts to either enforce a statute against the university or to strike or construe a statute that is unfavorable to the
plaintiff.

No clear pattern of prevailing parties emerges for public senior institutions, except as to time frame. In the early years, the institutions won consistently. Although the cases were diverse, the use of land and its resources by private citizens primarily were litigated and the institutions won under state constitutional and statutory provisions that governed the properties in question. From 1960 to 1988, however, plaintiffs had almost equal wins with the institutions. Institutions were slightly more successful when a staff party brought a suit under a statute (2 out of 4 cases, 2 split), but slightly less so when the party was a business (2 losses out of 3 cases). None of the statutes, whether represented by the litigating parties or win-loss record, appear to fall in any discernible pattern. In 1986 and 1987, for example, the three reported statutory cases were brought by two staff personnel (the parents, in one case) and the former wife of a faculty member. An unpaid benefits award, and the disposition of retirement funds were the issues.

Statutes will probably continue to be litigated heavily at public senior institutions, and possibly more so at private universities as new acts are passed by the state and federal legislatures in response to real or perceived difficulties in higher education. For example, twenty-four institutions were under sanctions of National College Athletic Association in 1987 across the United States. Six of the institutions were public
and private senior institutions in Texas. In 1987, the Texas legislature passed an act\textsuperscript{354} to remedy violations of collegiate athletic association rules. The act adopted rules of each national college athletic association and provided that a person who violates a rule may be liable for damages in an action brought by a university or association.\textsuperscript{355} Other statutes in other areas will likely follow as various problems or needs surface.

(4) Contract Issues

Contract issues were another category in which private senior institutions were successful for the most part, while public senior institutions were not. Again, an analysis by time frame provides the most telling statistics. Private institutions litigated the bulk of their contract issues in the first ninety years. Public institution litigated most cases from 1960 to 1988 and in those years, prevailed in only two out of ten cases (two were split). Furthermore, a public senior institution has not prevailed outright in a contract case since a construction contract was litigated in 1970.\textsuperscript{356} In 1985, however, a summary judgment against a university was vacated because the trial court's judgment did not leave a basis for merit review by the court of appeals.\textsuperscript{357} And in 1987 the Texas Supreme Court reversed and remanded a summary judgment decision for the plaintiff business because the appeals court used the standard of review erroneously by applying all reasonable inferences in favor of the successful movant, the plaintiff.\textsuperscript{358}

Parties in the faculty category at public institutions were
litigants to two employment contract issues, with one win and one loss. Of those, a university prevailed in its age requirement for faculty retirement because it was rational for the university to have a young and vigorous faculty,\textsuperscript{359} and a research assistant, hired on contract, won a breach of contract case.\textsuperscript{360} Only one student brought a contract issue suit at a public institution. She prevailed on her claim that the catalog under which she was admitted was a contract.\textsuperscript{361}

Private institutions, in contrast to public institutions, won three out of four contract issue cases in the years 1960 to 1988. In each the basic issue was whether an employment contract held by a faculty member had been breached by the institution. In two, the plaintiffs argued that the institution's bylaws conflicted with the terms of their contracts. In one of those the court answered that the contract was a clear expression of the institution's intent to hire;\textsuperscript{362} and in the other, that the institution's governing board had final authority on reappointments and that provisions of the bylaws did not restrict the board's power.\textsuperscript{363} In the third case won by a private institution, a private medical college defended as a federal employee its actions in the discharge of a nontenured faculty person.\textsuperscript{364}

The faculty win was a 1982 case. A tenured faculty member, who was dismissed, following an arbitration decision, for insubordination from a private university, won the right to pursue his breach of contract claim in court.\textsuperscript{365}
(5) Other Issues

Issues of property and of trusts, wills, and donations were almost non-existent in reported cases over the last fifty years. The latter never had significant impact on higher education litigation in Texas and property issues, at least momentarily, have faded from the general scene. As years pass and surrounding neighborhoods change, property issues may resurface if conflicts arise with property owners on the campus fringes over matters of campus development and expansion.

Tort issues have had more effect in recent years. Claimants under the Texas Torts Claim Act366 have had a high success rate in establishing their claims against public senior institutions whenever the claims have involved a physical injury, without regard to the type of party making the claim or the setting in which the injury took place.367 Their success lessens, however, if the injuries result from situations that might meet the discretionary act test under the statute.368 Claimants are least successful when litigating non-physical injuries, such as claims of defamation and duress.369 Tort suits will continue to be a factor in litigation. Plaintiffs appear to make full use of the enabling statute at state institutions, but whether or not tort suits become more prevalent at private universities is a question yet to be answered.
Conclusions

Among types of institutions, private senior institutions were the most successful against all types of parties; public community colleges, the least successful. Public senior institutions prevailed in a majority of cases against each type of party, except for business parties, notably construction companies.

At public institutions, faculty parties have been particularly unsuccessful; however, three cases in 1986 and 1987 indicate that courts, especially the fifth circuit, now may be less reticent to review personnel decisions than in the past.

At private institutions, cases are still far fewer in numbers than at public institutions, but constitutional and statutory claims have become noticeable. The plaintiffs have raised discrimination issues on sex, religion, and handicap grounds, but the universities have prevailed in the majority of cases by being beyond the scope of the statutes under which the cases were brought.

Assessment

General Observations of Patterns and Predictions

Almost as many questions were raised as were answered by the study's findings; however, some general observations about litigation trends in Texas may be made. In the public sector, litigation appears to have reached a sustained level of activity, primarily the result of fewer reported cases with student parties
at community colleges. In the private sector, however, litigation appears to be growing, the result of a small, yet significant, increase in faculty parties. Faculty, staff, and businesses will be the main litigants at all types of universities, and it appears that students will remain active as litigants mostly at public senior institutions, primarily as student groups rather than as individuals. The legal issues will continue to be diverse, but federal and state statutes and regulations will likely be prominent among them.

The presence of many medical schools, university hospitals, and health science centers within the state did not raise the level of reported cases by an appreciable amount for public senior institutions, but it did account for a proportional large share of litigation with private senior institutions. The growth at private institutions, however, was in litigation by faculty involving the economic basis of employment, which was also the primary economic basis for litigation by faculty at other institutions. Therefore, no new patterns emerged merely by the fact that a segment of a university was also a medical facility.

If litigation with faculty and staff is to be lessened, the impetus for the change must derive from both administrators and faculty. Each group has much to gain by forming new governance systems or improving old ones that will encourage differences of opinion while keeping to a minimum the opportunities for differences to escalate into disputes. University morale and productivity will be enhanced and the dollar and emotional costs
to individuals and the institution will be lowered. Ultimately, the community, state, and taxpayers who fund the courts will realize the benefits, also.

Otherwise, faculty and staff will continue to sue, even though figures have shown a resounding success by universities in litigating discrimination cases, whether brought on constitutional claims or under federal and state statutes. Previously, if the plaintiffs won on a procedural issue, which they have had a greater chance of doing in federal court, they hoped to gain leverage for a settlement. Now, as the Honore, Yates, Brown, and Abrams cases show, the prospect of winning a decision on the merits may be enhanced. The Fifth circuit by breaking the heretofore tradition of noninterference in academic personnel matters, lately has shown a modest movement toward venturing into decisions on substantive issues. Courts' willingness to go beyond strictly procedural issues could spur more litigation by faculty and staff and drive the dollar and emotional costs even higher if changes in working relationships with faculty and staff are ignored.

If litigation with businesses is to be lessened or to become more successful for institutions, particularly in the public sector, training and experience in contract law is necessary for university counsel. Counsels and administrators must be as knowledgeable in the practices of the businesses with whom they deal as others at the bargaining table and must increase their skill in negotiating and drafting agreements and in overseeing
the obligations of the parties. If university counsel and administration fail to take this step, they are likely to face a number of lawsuits equal to the expected growth in outside contractual relationships in campus operations, services, and construction, and with proprietary entities that deal with science and technology.

Student litigation in Texas will probably remain low unless some new "explosive" issue impacts the campus, such as rights of handicapped persons. For the most part, institutions have adopted at least the minimum procedural due process rights of students and have closed one cause of action frequently used by students. Also certain first amendment rights for student groups, such as the right to associate on campus has been settled in recent years, including issues raised by gay students at state universities. Enrollment figures, moreover, appear to have no effect on litigation, since student cases have declined while enrollment continues to increase in all sectors.

While the issue of government regulation per se may no longer be explosive, federal and state legislation is possibly the major external force for litigation. Case decisions other than statutory based ones, including U.S. Supreme Court cases, have left a mark on Texas higher education, of course; but they pale in comparison with the many cases intertwined with statutes and regulations that ultimately were placed in the categories of tort, property, procedural and constitutional issues. And the reaction to legislation by potential plaintiffs is often swift.
Certainly, no lag time accumulated in Texas between the amendment of Title VII or the Equal Pay Act in 1972 to include higher education employees and subsequent litigation among faculty and staff. Although private institutions generally are outside the scope of state and federal legislation, they nevertheless may be subject to general statutes enacted by a state legislature. University personnel cannot be seers into the minds of legislators, but they can stay abreast of proposed legislation and take steps to minimize the effects if it is enacted.

Questions arose surrounding the large number of male versus female litigants, except at community colleges in latter years, and the large number of sex discrimination claims brought by female employees. Questions also arose concerning repeat litigation at several large private institutions and the lack of litigation involving donors and of tort suits at private institutions. Answers to the reasons for a lack of suits might give clues to stopping others. Answers to all questions must wait for further research or for events to occur that will make the questions obsolete.

The Research

Research by jurisdiction is effective in delineating patterns of litigation for comparison with other jurisdictions, but a strict replication of studies may have little merit unless the institutions and histories of the states are highly similar. Although strict replication of the Iowa study would have been workable in the use of categories and time frames, the end result
would have told little about Texas patterns and the findings would have been flawed. Decisions on whether or not to collect data on specific categories of parties or gender are made properly before beginning, but other categories should be selected in the most general of terms until after the cases are briefed. For comparison with other jurisdictions, only the most recent years should be considered seriously for analysis and, at least for the present decade, by division of private and public senior institution and by private and public community colleges. The lessening of differences between the public and private sectors is still too new to consider them other than as quite separate entities.

As is the case in any research design, the greater the refinement and distinction in categories, subcategories, parties, time frames, and issues, the more lucid will be the data. Paradoxically, however, the more lucid the data, the less easy the analysis. By magnifying details, the researcher gains the insight that far more is at work in shaping the patterns, including the researcher's judgment calls, than can be recorded on charts or reduced to statistics. It is with this insight that a chronological review, either by year or decade, becomes one of the most valuable tools for understanding the course of litigation within a single jurisdiction. Experience in comparing the Texas and Iowa data shows that early organizational years depend on area size, population, natural resources, wealth, and political history of a jurisdiction as well as general education
history. While the primary issues in the cases are central to the study's focus and will probably be repeated in other jurisdictions, a chronological review provides depth and dimension to all the rest.

Here, research into sociological, political, and educational history must not be stunted, and researchers must anticipate ambiguities and contradictions. This study collected data and history by beginning with the most recent cases and working backwards year by year, an approach that had several rewards. First, since the bulk of cases for almost any jurisdiction will be in the most recent decades, the gathering task grows lighter through the years. Second, the research of recent cases gives a foundation of current law and events that make gradations more vivid when they occur. Last, the cases cited as precedent give an anticipatory sense to what previously occurred and provide a check on the researcher's thoroughness in gathering lists of cases from digests and other secondary sources.

A study of litigation may be even more valuable if completed for a single institution. Categories could then include the number of claims dropped or settled, and a longitudinal study would add a history of the individual institution—its founding, changes and personalities in leadership, position in the community, enrollment growth or decline, departments and programs, its own special regulations, and its processes for dispute resolution. The result would no doubt give a reasonably clear picture of an institution's strengths and weaknesses. Even
when an institution has been imminently successful against plaintiffs, however, the goal should be to determine whether the success was cost effective and whether the mission of the institution has been furthered as a disseminator of education in pursuing that success. Even winning in court exacts a high economic and psychological cost.

Conclusion

After a review of almost two hundred cases to which a Texas higher education institution was a party, a perplexing sense persists that few of the original complaints should have ended up in court. Even after accounting for the complexities of university decision-making and individual motives for pursuing claims, the import of the cases does not produce an overall attractive picture of institutions of higher education in Texas. The perception is one of institutions that have not met effectively the responsibility of governing and managing areas that are basic to the mission of education, primarily employment practices with faculty and staff. Also perceived is a lack of penetration into the core of a party's complaint and a lack of evenhandedness at the first levels of supervision or administration in handling it. Hindsight, of course, is an expertise shared by all. The value of the findings of research of litigation patterns will be demonstrated only if university personnel turn hindsight into foresight and take steps to correct the areas where they have failed and continue and strengthen the
areas in which they are successful at preventing litigation. Patterns of litigation may not only be discovered; they also may be changed.
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* The first row of figures next to each issue is for the years from 1878 to 1986. The second row of figures is for the years 1986 and 1987.

† This figure includes the one reported private community college case.
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### TABLE IV

**PRIMARY ISSUE AND TIME PERIOD BY GENDER 1870 TO 1988**

**PUBLIC INSTITUTIONS**

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<th>1900 TO 1960</th>
<th>1960 TO 1986</th>
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Mixed gender

Figures include community college cases (28 public out of a total 146; 1 private out of a total 73).
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* The first row of figures next to each economic basis is for the years from 1878 to 1986.
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* The figure below the column heading denotes the total number of cases for all types of institutions.

The first figure in the column denotes the number of cases by the type of party for the issue by institution.

The numbers in parenthesis denote the total number of cases for the type of party for all issues.
### Table 15.2

**Primary Issues and Parties by Gender 1876 to 1987**

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*The first row of figures next to each type of institution is for the years from 1876 to 1986.*

*The second row of figures is for the years 1986 and 1987.*

*Fixed Gender*
The table below shows the number of cases won by the party, by the party. The numbers in parentheses denote the number of cases won by the party. The total number of cases for the type of party by the institution type named in the column heading.

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Note: The figures for 1976-1978 are not included in the table.
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<td>1978-1987</td>
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**Note:** The first row denotes the number of cases won. The second row of figures next to each issue for the years from 1978 to 1986.

**Primary Issues—Non-Institutional Phases/1978 to 1996**

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<th>Year</th>
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**Note:** The first row denotes the number of cases won. The second row of figures next to each issue for the years from 1978 to 1986.
NOTES


4. La Noue, supra note 2, at 20-23; Helms, supra note 3, at 108-09.

5. Marks, supra note 2, at 10-13, 19-118.

6. Ann H. Franke, counsel to the American Association of University Professors said that a consensus characterized litigation brought by faculty as a growing phenomenon. Shipp,
The Litigious Groves of Academe, N.Y. Times, Nov. 8, 1987, §12 (Education Life), at 62.

7. Richard T. Ingram, executive vice president, Association of Governing Boards, says the number of lawsuits may have declined. Id.


9. Id. at 27, quoting John Beach, president of the National Association of College and University Attorneys.

10. Id.
13. Id. at 100.

14. The term, independent, is also used frequently in Texas to refer to private institutions of higher education.

15. Baylor University was chartered by the Republic of Texas in 1845. Various histories give different accounts of the first universities. Southwestern University is a successor to Chappell Hill College which in turn was a successor to Rutersville University, established in 1840; but Baylor has been established continuously. For a list of todays institutions, see Texas Higher Education Coordinating Board, Institutions of Higher Education in Texas, 1987-88 (1988) [hereinafter Institutions].

16. The Texas Proprietary School Act, Tex. Educ. Code Ann. § 32.01-33.11 (Vernon 1987) governs the certification and
regulation of proprietary schools in Texas. Proprietary schools do not award a baccalaureate or higher degree or offer educational programs for which credits are transferable to junior or senior institutions that are supported by local or State taxes.

17. Helms, supra note 2, at 100.

18. This larger number of Texas public institutions versus private is disproportionate not only to Iowa institutions, but to the number of institutions in the United States, as well. According to a 1984 report, public institutions constituted less than half (46%) of all postsecondary institutions in the country at that time. Holbrook & Hearn, Origins of Academic Freedom Litigation, 10 Rev. Higher Educ. 47, 54 (1986) citing C. Ottinger, 1984-85 Fact Book on Higher Education, Table 110 (1984). If senior institution alone, however, are used for calculating proportions, Texas is within the national norm. Fifty-one percent of the senior institutions in Texas are private; 49% are public.

19. In 1839, Congress of the Republic of the Texas passed an act that called for the immediate survey of land for two universities and set aside fifty leagues as an endowment; however, the provisions of the act were not accomplished. After Texas became a state, heated debates arose over the location and policies for establishing the universities in the state legislature. Some groups favored private institutions, while others opposed any university at all. In 1858, an act finally
established the University of Texas, but almost twenty years passed before the university progressed further.

Texas A&M University, originally designated a branch of the University of Texas, opened in October 1876 after authorization by the legislative in 1871. Ten years later, the University of Texas was established, and it opened in 1883 for academic studies and law. The medical school opened in Galveston in 1887. Also about this time, the Sam Houston Normal Institute was founded in Huntsville in 1879 for training teachers; however, until 1911, normal schools were under control of the state board of education and were neither colleges nor universities. F. Eby, The Development of Education in Texas, 284-289, 297 (1925). Also see 1988-1989 Texas Almanac and State Industrial Guide (1988).

20. For a list of all institutions, see Institutions, supra note 15.


23. The University of Texas at Austin had 47,743; Texas A & M University, 37,400; and the University of Houston, 28,907. Institutions, supra note 15.

24. The most recent enrollment figures in the Iowa study were for 1980. Enrollment was 139,573 for total institutions.

25. As stated in the introduction, the text of this paper incorporates the findings from 1878 to 1988. The two time periods are separated for proper comparison with the Iowa study as needed.

26. Institutions that provide education in health-related fields have a large clientele of private citizens in an area that is perceived as attracting considerable litigation, by virtue of possible economic incentives if a physical disability occurs. Since the number of Texas university medical and health centers was equal to almost one-sixth of the total Iowa universities and colleges, separating the institutions for at least some initial analyses seemed appropriate.

27. Other categories in the Iowa study were faculty, students, and alumni/donors.

28. Reporters used were West's Southwest Reporter, West's Education Reporter, Texas Reports, and reporters in the Federal Reporter System. Cases were gathered by using West's Federal, Texas, Decennial, and Education digests. Topics researched were colleges and universities, constitutional and statutory issues, corporations, charities, contracts, trusts, and wills. In addition, case names and citations were found in Texas Education
Code Annotated (Vernon 1987) and in the court opinions of other Texas cases.

29. Sixty-five reported cases were the basis of the Iowa study. In Iowa, a 70-year lapse in litigation in the public sector occurred from 1892 to 1962. A 27-year lapse in the private sector occurred from 1887 to 1914.

30. Carleton v. Rogers, 1 Posey 587 (1880). The founders of a trust established a nonsectarian female institute in Bonham, but a purchaser of the institute set out to make it a coed Cambellite institution. The founders prevailed in their suit to maintain the trust's terms.


32. In the Iowa study, property and procedural issues were combined in a single category. The number of cases in Texas was sufficient for two distinct categories, so division was made to aid a more thorough analysis. For proper comparison with the Iowa study, however, the Texas property and procedural issues must be added together.

The trusts, wills, and donations category in this study was named "probate" in the Iowa study. Other categories are identical.

33. The nature of the issues that the statutory-based claims address make the constitutional category more appropriate than the statutory/administrative category or another separate category. The plaintiffs almost always coupled their authority
to bring suit under statutes with claims of first amendment, due process, or equal protection violations. Once a claimant passed the jurisdictional threshold under the statute, the case became more nearly that of one brought solely under a constitutional claim.

34. Story v. Tate, 382 F. Supp 1078 (N.D. Tex. 1971). (Southern Methodist University). The university objected to having a Student Mobilization Committee program on campus during a ceremony to open a new law library.

35. Southern Methodist University v. Smith, 515 S.W.2d 63 (1974). A football player alleged he was denied due process by the university's failure to provide a hearing after the NCAA ruled he was ineligible to play.

36. Gonzales v. Southern Methodist University, 536 F.2d 1071 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977). A female alleged the university discriminated on the ground of her national origin by denying her admission to its law school.

37. Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986). A monetary recovery was awarded to an anesthesiologist who was denied rotation service to Saudi Arabia as a member of a cardiovascular surgical team on the basis of his Jewish religion, where he was otherwise qualified.

38. Merrill v. Southern Methodist University, 806 F.2d 600 (5th Cir. 1986). Faculty member alleged sex discrimination on the basis of salary and work conditions, and she alleged religion discrimination because she received poor evaluations of her
published articles, which appeared primarily in religion-oriented publications.

39. Gilmore v. James, 274 F. Supp. 75 (N.D. Tex. 1967), aff'd, 88 S.Ct. 695 (1967); (tuba instructor dismissed for refusing to execute a non-subversive loyalty oath); Calbillo v. San Jacinto Junior College, 446 F.2d 887 (5th Cir. 1971); Lansdale v Tyler Junior College, 470 F.2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1972); Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir.), opinion clarified, 522 F.2d 204 (5th Cir. 1975); (Hair and dress code violations); Hughes v. Board of Trustees, Tarrant Co. Junior College District, 408 S.W.2d 289 (Tex. App.--Ft. Worth 1972, writ ref'd n.r.e.); (College granted a temporary injunction to halt disruptive student gatherings); Haynes v. Dallas Co. Junior College District, 386 F. Supp. 208 (N.D. Tex. 1974) (Students denied an injunction to prevent their suspension following a protest meeting); Lewis v Spencer, 490 F.2d 93 (5th Cir. 1974); (Faculty member refused to teach in another department and alleged that her subsequent discharge was in retaliation for her activities in a local faculty association); Bradford v. Tarrant Co. Junior College, 492F.2d 133 (5th Cir. 1974), (Nontenured faculty alleged her dismissal resulted from her questions to the college president in a meeting); Goss v. San Jacinto Junior College, 588 F.2d 96, reh'g granted, 593 F.2d 23, modified, 595 F.2d 1119 (1979) (Untenured instructor awarded compensatory damages for her discharge following her involvement in a local teacher
association and Board of Regents election); Professional Association of College Educators, TSTA/NEA v. El Paso Community College District, 730 F.2d 258 (5th Cir.), cert. denied, 105 S.Ct. 248 (1984) (Faculty association denied injunctive relief from interference in its activities by college and administrators [awarded as to college president];

40. Perry v. Sindermann, 403 U.S. 917 (1972) (Plaintiff must be given hearing and opportunity to claim a property interest based on the institution policies. Refer also to note 287 infra.); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973) (Nontenured faculty awarded one year's salary, but no reinstatement, for her lost property interest); Johnson v. Harvey, 382 F. Supp. 1043 (E.D. Tex.), aff'd 516 F.2d 893 (5th Cir. 1974) (An auto mechanics instructor did not have property interest, and his discharge for failure to provide proper security for tools did not create a stigma); Johnson v. San Jacinto College, 498 F. Supp. 555 (S.D. Tex. 1980) (Registrar entitled to damages for college's failure to provide procedural and substantive due process after the Board of Trustees investigated a morals charge against him).

41. Wichita Falls Junior College District v. Battle, 347 U.S. 974 (1953); Whitmire v. Stillwell, 227 F.2d 187 (5th Cir. 1955) (Texarkana Junior College). Black students sought to be admitted to all-white colleges.

42. Elias v. El Paso Co. Community College District, 556 F. Supp. 248 (W.D. Tex. 1982). A female instructor alleged sex discrimination when a male was named Dean of Curriculum and
Instruction, a position for which she was one of four interviewees.

43. Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S.D.Tex. 1978). A group of Iranian students became disruptive after a meeting with a dean to discuss complaints about the students' actions. The court held that proper due process in the manner of notice and hearing was provided.

44. Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983), cert. denied, 104 S. Ct. 708 (1984). A male faculty member alleged he was denied additional compensation for a doctorate in a field other than his teaching field while similarly situated faculty received additional compensation.

45. Wright v. Texas Southern University 392 F.2d 728 (5th Cir. 1968) (Students said they were dismissed for participating in a peaceful demonstration); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970) (An instructor claimed college terminated his employment in retaliation for his meeting with students to discuss their grievances against the college); Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1972), cert denied, 412 U.S. 932 (1973) (Teaching assistant sued for infringement of free speech when her offer of a second contract was rescinded, following reports of her conduct and use of obscene language at a campus rock concert); Bayless v. Martine, 430 F.2d 873 (5th Cir. 1971) (Students sued when they were expelled for continuing to hold Viet Nam Moratorium programs at time and place other than one scheduled by the university); The
Channing Club v. The Board of Regents of Texas Tech University, 317 F. Supp. 688 (N.D. Tex. 1970) (Student club won its suit against university for banning club's tabloid when other publications with essentially same language were sold or distributed at the same location); Markwell v. Culwell, 515 F.2d 1258 (5th Cir. 1975) (Nontenured chemistry teacher failed to establish that he was fired because of his outspokenness on departmental policies); New Left Education Project v. Board of Regents, University of Texas System, 472 F.2d 218, vacated, 414 U.S. 807, (1973) (University brought suit to stop a student group from distributing a publication that violated regulations pertaining to commercial solicitation); Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978) (University was held to have restricted Iranian students' right to expression by approving a permit to demonstrate peaceably on the condition that demonstrators not wear masks); Allaire v. Rogers, 658 F.2d 1055, cert. denied, 456 U.S. 928 (1981) (Eight tenured faculty claimed salary increases were denied because of their political activities; three appealed the lower court's decision for the defendant university; one won on appeal); United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553 (5th Cir. 1982) (Board of Regents acts were held not malicious, but violated professor's right to make statements about misuse of research funds); Barnstone v. University of Houston, 487 F. Supp. 1347 (S.D. Tex. 1980) (A university-owned television station, by not airing the documentary, "The Death of a Princess" would cause irreparable
harm to plaintiff by her not sharing views with friends following the program); Gay Student Services v. Texas A & M University, 937 F.2d 1317 (5th Cir. 1984), cert. denied, 449 U.S. 1034 (1985) (University infringed students' rights when it refused to officially recognize a homosexual student group); Mitcham v. The Board of Regents, University of Texas Systems, 670 S.W.2d 371 (Tex. App.--Texarkana 1984, no writ) (Students' free speech was not infringed when the editor of The Daily Texan ordered them to stop distributing handbills that had a reproduction of The Daily Texan masthead); Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985) (Graduate student who was an assistant instructor failed to establish that her duties were reduced because of her political opinions); Daly v. Sprague, 742 F.2d 896 (5th Cir. 1984) (The court held that the state has the duty and power to regulate professional actions where tenured professor was not permitted to communicate with patients when his wife's illness made fulltime activity impossible); Student Services for Lesbian/Gays and Friends v. Texas Tech University, 635 F. Supp. 776 (N.D. Tex. 1986) (Students' suit for monetary damages dismissed after homosexual student association was duly recognized by university); Terrell v. University of Texas System Police, 792 F.2d 1360 (1986) (Discharged policeman's secret notes, used by his superior following a department investigation, was not speech that was made as a private citizen and, therefore, not protected); Singh v. Lamar University, 635 F. Supp. 737 (E.D. Tex. 1986) (University awarded summary judgment in nontenured
faculty member's claim that his union membership resulted in denial of tenure); Texas Review Society v. Cunningham, 659 F. Supp. 1239 (W.D. Tex. 1987) (University regulation that forbade hand distribution of materials with commercial ads did not infringe student first amendment rights since alternative distribution methods were available); Honore v. Douglas, 823 F.2d 565 (5th Cir. 1987) (Genuine issue of fact arose on whether vocalness of law professor against Dean led to professor's need to obtain tenure where before it had been automatic. Refer also to notes 332-34 infra.).

46. Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App.--Waco 1958), _cert. denied_, 359 U.S. 230 (1959) and Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.--Waco), _cert. dismissed and appeal denied_, 364 U.S. 517 (1960) (In each, females unsuccessfully brought suits to enroll in all-male Texas A&M University); Green v. Board of Regents of Texas Tech University, 335 F. Supp. 249 (N.D. Tex. 1971), _aff'd_, 474 F.2d 594 (5th Cir. 1973) (Decision not to promote associate professor who had taught at university for more than 20 years was held to be entirely unrelated to sex of the applicant); Zentgraff v. Texas A&M University, 492 F. Supp. 265 (S. D. Tex. 1980) (Female students' claim that university excluded women from cadet corps organization on the basis of sex was dismissed on grounds of sovereign immunity); Cooper v. University of Texas at Dallas, 482 F. Supp. 187 (N.D. Tex. 1979), _aff'd_, 648 F.2d 1039 (5th Cir. 1981) (Female claimed the university discriminated on the basis of her sex when six
males were hired after she submitted an employment application); LeCompte v. University of Houston, 535 F. Supp. 317 (S. D. Tex. 1982) (A claim for back pay was barred by eleventh amendment in a suit by female who was denied tenure and given a one-year terminal contract); Lyford v. Schilling, 750 F.2d 1341 (5th Cir. 1985) (Female sued after she was ranked third by a hiring committee behind two men); Bennett v. West Texas State University, 799 F.2d 155 (5th Cir. 1986) (University won a summary judgment in a suit brought by female student athletes against university for sex discrimination in its intercollegiate athletic program).

47. Smith v. Board of Regents, State Senior Colleges, 426 F.2d 492 (5th Cir. 1970) (Faculty member's resignation was deemed voluntary when he was denied a hearing after submitting the resignation, which he said was by intimidation); Martine v. Board of Regents, State Senior Colleges of Texas, 607 S.W.2d 638 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.) (Faculty member who administrated student insurance program was discharged following a state audit report of misuse of insurance and reinstated by the court); Jones v. Texas Tech University, 656 F.2d 1137 (5th Cir. 1981) (Student plaintiff had waived rights in a prior consent judgment, but his due process claim concerning his disciplinary proceedings for possession of marijuana on campus was found not devoid of merit); Clay v. Texas Women's University, 728 F.2d 714 (5th Cir. 1984) (Female student was barred by eleventh amendment in her claim for monetary and
injunctive relief for an extension to complete a Ph.D. degree); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. App.--Houston [1st Dist.] 1984, no writ) (Student expelled for a second cheating offense received basic elements of due process when his counsel, a law student, was not allowed to speak at the expulsion hearing); Haug v. Franklin, 690 S.W.2d 646 (Tex. App.--Austin 1985, no writ) (University's administrative hearings met minimum requirements of due process where university withheld diploma from student, who had graduated from law school and was licensed, for failure to pay traffic tickets); Levitt v. The University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985) (Tenured professor, dismissed on complaints by female students of sexual advances by him, unsuccessfully charged irregular procedures and bias of some hearing members); Bagg v. The University of Texas Medical Branch at Galveston, 726 S.W.2d 582 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.) (Employee's claim that his discharge was retaliation in part, for representing a fellow employee in a grievance hearing was improperly dismissed); Brown v. Texas A&M University, 804 F.2d 327 (5th Cir. 1986) (Plaintiff did not meet requirements for procedural due process violation, but could replead to allege that a substantive due process violation occurred after he notified his superiors of a possible mishandling of funds. Refer also to note infra.).

48. Kaprelian v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975) (Lower court's finding for plaintiff was reversed
and remanded for improper determination of liberty interest); Hillis v. Stephen F. Austin State University, 665 F.2d 547 (5th Cir.), cert. denied, 457 U.S. 1106 (1982) (Lower court's finding for plaintiff reversed on basis of no property right); La Verne v. University of Texas, 611 F. Supp. 66 (S.D. Tex. 1985) (Faculty member who was coordinator of joint health program at two institutions, with tenure at one, did not have a property right in her nontenured position at the other); Yates v. Board of Regents of Lamar University System, 654 F. Supp. 979 (E.D. Tex. 1987) (Female truck driving instructor who resigned on being assigned to other duties showed genuine issue of fact existed as to property interest claim in a hearing on defendant's summary judgment motion).

49. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), cert. granted, 101 S. Ct. 352 (1980), vacated, 101 S.Ct. 1830 (1981); (A deaf graduate student, who claimed the university failed to provide him with a sign interpreter, graduated before appeal); Ferris v. The University of Texas at Austin, 558 F. Supp. 536 (N.D. Tex. 1983) (Handicapped students failed in their suit to compel university to provide shuttlebus transportation for students in wheelchairs).

50. Texas Woman's University v. Chayklintaste, 530 S.W.2d 927 (Tex. 1975) (University's rationale for requiring students aged 22 years and under to live in a dormitory unless certain requirements were met did not violate equal protection); E. E. O. C. v. University of Texas Health Science Center at San Antonio,
710 F.2d 1091 (5th Cir. 1983) (An age restriction for police officer applicants was a bona fide occupational qualification).

51. Ramos v. Texas Tech University, 566 F.2d 573 (5th Cir. 1978) (Mexican-American student failed to establish ethnic discrimination after she was denied admission to a master's degree program); Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981) (University prevailed in tenured professor's claim that as a native of India he was discriminated against in salary, grants, and summer employment).

52. Sweatt v. Painter, 339 U.S. 629 (1950) (Plaintiff sought admission to all-white law school (Refer to note 178 infra and accompanying text)); Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983) (A class action suit by black and female employees alleged the university channeled plaintiffs to lower paying jobs and discriminated in retirement, pay, and termination issues).

53. Kline v. North Texas State University, 782 F.2d 1229 (5th Cir. 1986). A faculty member alleged constructive dismissal on the basis that the administration failed to supervise and discipline the faculty.

54. Morris v. Nowotny, 323 S.W.2d 301 (Tex. Civ. App.--Austin), cert. denied, 361 U.S. 889 (1959) (The University of Texas) (Student arrested and committed to ninety days in a state mental hospital); Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973) (A student claimed a right to a legal education); Paine v. Board of Regents of The University of Texas, 355 F. Supp. 199
(W.D. Tex. 1972), aff'd, 474 F.2d 1397 (5th Cir. 1973) (Student claimed denial of equal protection in discipline of students convicted of differing crimes); Weaver v. Kelton, 357 F. Supp. 1106 (E.D. Tex. 1973) (New Texas resident alleged infringement to equal access to education); Stevenson v. Board of Regents, 393 F. Supp. 812 (W.D. Tex. 1975) (Former graduate student alleged that his appearing in television commercials led to his denial to a Ph.D. program); Thomas v. Sams, 734 F.2d 185 (5th Cir.), cert. denied, City of Prairie View Texas v. Thomas, 105 S. Ct. 3476 (1984) (University president alleged an unconstitutional and improper arrest after he authorized action to stop use of a city sewer line on the campus).

55. North Harris Co. Junior College District v. Fleetwood Construction Co., 604 S.W.2d 247 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.) (A contractor brought suit for damages when complications arose with a second contractor who was also awarded work.

56. Randolph Junior College v. Isaacks, 113 S.W.2d 628 (Tex. Civ. App.--Eastland 1938, no writ). The faculty member prevailed on breach of an oral contract by the college for a salary increase. The professor was a member of the Board of Trustees that authorized the increase, and the college argued that he should not have voted to raise his own salary.

57. Gonzales v. McHugh, 21 Tex. 256 (1858), 26 Tex. 677 (1863), 39 Tex. 677 (1873). In 1852, the Gonzales College Association contracted with a builder to construct a college
building in Gonzales County. A year later, the building was incomplete and the association declared the contract forfeited under its terms. The builder moved his family into the building until he was evicted in 1854. The builder then filed suit for the amount not recovered from the association.

58. Roach v. Burgess, 62 S.W. 803 (Tex. Civ. App.--1901, no writ); Peacock Military College v. Vidor, 1455 S.W. 672 (Tex. Civ. App.--San Antonio 1912, no writ); Peacock Military College v. Pierce, 220 S.W. 191 (Tex. Civ. App.--San Antonio 1920, no writ); Peacock Military College v. Hughes, 225 S.W. 221 (1920); Rogers v. Council, 266 S.W. 207 (Tex. Civ. App.--San Antonio 1924, no writ); and Southern Methodist University v. Evans, 131 Tex. 333 115 S.W.2d 622 (1938). In the first five cases, the contract issues were whether the college was entitled to full tuition after a student withdrew because of illness, alleged abusive treatment, or for other personal reasons. In Evans, a student claimed the university breached a contract by promising him a career as a musician if he studied piano.

59. Weary v. Baylor University Hospital, 360 S.W.2d 895 (Tex. Civ. App.--Waco 1962, writ ref'd n.r.e.) (A neurosurgeon sued the hospital when his staff appointment was not renewed after seventeen years of reappointments); Clutts v. Southern Methodist University, 626 S.W.2d 334 (Tex. App.--Tyler 1981, writ ref'd n.r.e.) (According to the court, the faculty members contract was a clear expression of the university's intent to hire him without tenure); Manes v. Dallas Baptist College, 638
S.W.2d 143 (Tex. App.--Dallas 1982, writ ref'd n.r.e.) (An
arbitration decision by the Board of Trustees was held not to
preclude judicial determination); Claus v. Gyorkey, 674 F.2d 427
(5th Cir. 1982) (The university was found not to have
misrepresented to an Austrian physician a nontenured position,
which was conditioned on continued employment at a veteran's
hospital); Randolph Junior College, supra note 56.

60. Goetz v. Board of Regents of State Teachers Colleges of
Texas, 453 S.W.2d 290 (Tex. 1970), cert. denied, 400 U.S. 807
(1970) (Mistake in contractor's bid); The University of Texas
Eastland 1975, writ ref'd n.r.e.) (University objected to
subcontractor's nonaffiliation with local unions); Board of
Regents of University of Texas v. S & G. Construction Co, 529
S.W.2d 90 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.)
(Delay in completing construction); Board of Regents of North
Texas State University v. Denton Construction Company, 652 S.W.2d
588 (Tex. App.--Ft. Worth 1983, no writ) (Delay in construction);
Tarleton State University v. K. A. Sparks Contractors, 695 S.W.2d
362 (Tex. App.--Waco 1985, no writ) (Responsibility for damage to
newly constructed gym floor).

61. The University of Texas Health Science Center at
Houston, School of Nursing v. Babb, 646 S.W.2d 502 (Tex. App.--
Houston [1st Dist.] 1982, no writ). A student was granted an
injunction to complete her degree in accord with the catalog
requirements under which she was first admitted.
62. Fakiezias v. The University of Houston, 565 S.W.2d 299 (Tex. Civ. App.--Houston [1st Dist] 1978, writ ref'd n.r.e.), appeal dismissed, 440 U.S. 952 (1979); State v. Morgan, 170 S.W.2d 652 (Tex. Comm'n App. 1943, opinion adopted); Texas Technological College v. Fry, 288 S.W.2d 799 (Tex. Civ. App.--Amarillo 1956, no writ); Pan Am College v. Rojas, 392 S.W.2d 707 (Tex. Civ. App.--Corpus Christi 1965, no writ). In Fakiezias a professor sued for breach of contract when he was forced to retire at age 65, rather than the age-70 limit in effect when he was hired. In Morgan, sovereign immunity barred an employee, injured by a spray pump, from pursuing his claim for breach of an oral and implied contract to provide a safe working environment. In Fry, a university herdsman won his suit for breach of employment contract after he was dismissed without cause prior to the contract date. In Rojas, an astrophysical research assistant won his breach of contract suit when he was fired following a conflict with the director of grant funds.

63. Bache Halsey Stuart Shields, Inc. v. The University of Houston, 638 S.W.2d 920 (Tex. App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.). The university directed an investment company to sell securities below the repurchase agreement price. The appeals court decided that the university breached the contract and must reimburse the company for damages it incurred.

64. The University of Texas at Austin v. The National Collegiate Athletic Association, 685 S.W.2d 409 (Tex. App.--Austin 1985, writ ref'd n.r.e.) The university sought a
declaration of its rights to contract with television networks for the sale of telecasting and cablecasting rights to its football games. Refer also to note 357 infra and accompanying text.

65. University of Texas Health Science Center at Houston v. Big Train Carpet of El Campo, 739 S.W.2d 792 (Tex. 1987). A carpet supplier sued the university for nonpayment, and the university counterclaimed usury in regard to the interest charges imposed by the supplier. Refer also to note 358 infra and accompanying text.


69. Trustees of Union Baptist Association v. Huhn, 26 S.W. 755 (Tex. Civ. App.--1894, writ ref'd); Collier v. Myers, 37 S.W. 183 (Tex. Civ. App.--1896, no writ); Murphy v. Luttrell, 120 S.W. 905 (Tex. Civ. App.--1909, writ ref'd); Rutherford v. Watson, 52 S.W.22d 85 (Tex. Civ. App.--Ft. Worth 1932, writ ref'd). In Huhn, the Board of Trustees of Baylor University had sold property when the university was moved from Independence to Waco, and the founding association wanted to recover title. In Collier, the property of Central College was sold to pay off a debt. In Murphy, an 1843 land survey by Dekalb College authorized in 1839, was held superior to an 1872 survey by the
holder of a headright certificate, which had authorized title and survey in 1838. In Rutherford, the court enjoined a sheriff's sale of what was allegedly Thorp Springs Christian College property, because the trustees had sold the land to another party and moved the college.

70. Ingram v. Texas Christian University, 196 S.W. 608 (Tex. Civ. App.--Ft. Worth 1917, writ ref'd). The lease of space in an office building to house the School of Medicine was determined not to be an ultra vires act by the trustees.

71. R.B. Spencer & Co. v. Thorp Springs Christian College, 41 S.W.2d 482 (Tex. Civ. App.--Ft. Worth 1931, writ dism'd). In Spencer, the college president executed a lien on the college property in violation of the college charter, and the plaintiff was precluded from recovering his money from the college.

72. Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). The church opened a college on its property and violated an ordinance that restricted operation of a college in the locality.

73. Splawn v. Woodard, 287 S.W. 677 (Tex. Civ. App.--Austin 1926, no writ). Some students at the University of Texas sought an injunction to halt the university's renovation of a 35-year-old dormitory into a classroom and office building. The students obtained temporary injunction, but on appeal the court held that the university regents had full discriminatory power over campus buildings. The students were not lessees of the property, but had room reservations terminable at will of either party.
74. Francis v. Crowley, 50 S.W.2d 462 (Tex. Civ. App.--El Paso 1932, writ ref'd n.r.e.). The plaintiff had a grasslease on university land, and the conflict concerned whether a subsequent sublease was valid.

75. Walsh v. University of Texas, 169 S.W.2d 993 (Tex. Civ. App.--El Paso 1942, writ ref'd n.r.e.). The plaintiff's claim to title to two tracts of land held by the University of Texas was dismissed because the state did not consent to the suit.

76. Sessum v. Houston Community College, 94 F.R.D. 316 (1982). The parties had tentatively settled a racial discrimination claim and the court decertified the class on the parties' agreed motion.


80. The University of Texas v. Booker, 282 S.W.2d 740 (Tex. Civ. App.--Texarkana 1955, no writ); American Securities Life
Insurance Co. v. M. D. Anderson Hospital and Tumor Institute, 408 S.W.2d 155 (Tex. Civ. App.--Houston 1966, writ dism'd). Both suits were claims to set aside insurance assignments to university hospitals.


83. Donavan v. University of El Paso, 643 F.2d 1201 (5th Cir. 1981) (The U.S. Department of Labor sought to enjoin the university from maintaining disparate pay scales between male and female employees, and the court held that the university's argument to have a class certified under Fed. R. Proc. 23 was incorrect under FLSA enforcement procedures); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated and
remanded, 459 U.S. 809, aff'd in relevant part on remand, 695 F.2d 132 (1983) (In this class sex discrimination suit, the appeals court vacated its former judgment, under Fed. R. Civ. P. 23(a), approving certification of a subclass of women employees in the academic division, and vacated, under Fed. R. Civ. P. 52(a), its independent determination that the subclass members were victims of sex discrimination).

84. Sembach v. McMahon College, 94 F.R.D. 260 (1982). Two students filed a class action for students with federal loans in effect at the time of the college's closure. This court granted a subclass of students who had withdrawn from college and did not receive a proportionate tuition refund.

85. Moreno v. Texas Southern University, 573 F. Supp. 73 (S.D. Tex. 1983). The court granted leave to law student to amend to request equitable remedy, rather than money damages, for actions of the university and law school during his academic suspension.

86. York v. Alley, 25 S.W.2d 193 (Tex. Civ. App.—El Paso 1930, writ ref'd). A portion of University of Texas land was surveyed to determine ownership. The defendant county surveyor's plea in abatement was sustained to implead the Board of Regents and the state as parties.

87. Vance v. Texas A&M University System, 117 F.R.D. 93 (Tex. 1987). A white female dance instructor charged race and sex discrimination when she was denied extension of probationary tenure. A mistrial occurred because the plaintiff's trial
counsel was unprepared.

88. Dealey v. Dallas Co. Junior College District, 434 S.W.2d 724 (Tex.Civ. App.--Waco 1968, writ ref'd n.r.e.). A realtor claimed the trustees induced a corporation to breach a contract with the broker to assemble data on a college site and then closed the sale on the land without the broker.

89. Freeman v. Del Mar College, 716 S.W.2d 729 (Tex. App.--Corpus Christi 1986, no writ). A political candidate who had earned a police training certificate at the college filed suit after the college erroneously informed a newspaper that the candidate had never enrolled for a course.


91. Id. at § 101.025.

92. Id. at § 191.051

93. Baylor University v. Boyd, 18 S.W.2d 700 (Tex. Civ. App.--Dallas 1929, no writ). The jury found that the hospital was not negligent in hiring an orderly whose actions caused a permanent injury to the plaintiff's wrist.

94. Clayton v. Southern Methodist University, 176 S.W.2d 749 (Tex. 1943) (Plaintiff's wife was injured when a temporary football bleacher collapsed); Scott v. Wm. M. Rice Institute, 178 S.W.2d 156 (Tex. Civ. App.--Galveston 1944, writ ref'd n.r.e.) (Plaintiff's minor daughter was injured when she caught her shoe heel in the football stadium's planking).

95. Brown v. Shannon West Texas Memorial Hospital, 222
S.W.2d 248 (Tex. Civ. App.—Austin 1949, writ ref'd n.r.e.) (Baylor University) (Blood donor injured after donating blood that was drawn with a university-furnished collecting unit); Jones v. Baylor Hospital, 284 S.W.2d 929 (Tex. Civ. App.—Dallas 1955, no writ) (Female alleged negligence by a hospital employee); Yost v. Texas Christian University, 362 S.W.2d 338 (Tex. Civ. App.—Ft. Worth 1962, no writ) (A student alleged negligence by a university infirmary nurse).

96. Howle v. Camp Amon Carter, 470 S.W.2d 629 (Tex. 1971). A young camper lost the sight in one eye when he was struck accidentally by another campers's fishing line. The court reversed the lower courts' decision for the camp.


98. Texas Distributors v. Texas College, 31 Tex. Sup. Ct. J. 156 (Dec. 19, 1987). The Texas Supreme Court determined that the private senior institution was barred from recovering contribution or indemnity from another defendant after the university settled a wrongful death action with the parents of student who died in a dormitory fire.

99. The University of Texas at Arlington v. Akers, 607 S.W.2d 283 (Tex. App.—Ft. Worth 1980, writ ref'd n.r.e.) (Student slipped on parking lot ice); Rawlings v. Angelo State
University, 648 S.W.2d 430 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (Student tripped over waterhose stretched across a campus walk); Prairie View A&M University v. Thomas, 684 S.W.2d 169 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (Student fell into a campus excavation and was burned by steam pipes).

100. Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976) (An injured varsity football player claimed the university was negligent in failing to furnish, and refusing to permit player to wear, proper equipment); Brown v. Prairie View A&M University, 630 S.W.2d 405 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) (Student athlete died of sickle cell crisis after he collapsed during football practice. His mother brought suit); Smith v. The University of Texas, 664 S.W.2d 180 (Tex. App.--Austin 1984, no writ) (A volunteer track official was injured by a shotput thrown by a participant at an NCAA championship event).

101. Morris v. Rousos, 397 S.W.2d 504 (Tex. Civ. App.--Austin 1965, writ ref'd n.r.e.), cert. denied, 385 U.S. 869 (1966); Boyne v. Harrison, 647 S.W.2d 82 (Tex. App.--Austin 1983, writ dism'd w.o.j.). In Morris, a student claimed a university psychiatrist maliciously placed a false diagnosis in the student's file, which was open to prospective employers. Refer also to note 84 for another suit involving the same plaintiff. In Boyne, a dental school dean sued when he was fired for alleged fiscal mismanagement.
102. The University of Texas at El Paso v. Nava, 701 S.W.2d 71 (Tex. App.--El Paso 1985, no writ). On appeal, the issue was whether the plaintiff's money award had been determined properly. The court affirmed that total damages as found by the jury, rather than the limited liability under the Tort Claims Act, controlled the comparative negligence award.

103. Van Arsdel v. Texas A&M University, 628 F.2d 344 (5th Cir. 1980). A tenured associate professor had the choice either to resign or face possible dismissal after charges of sexual harassment were made by a department employer. The court determined that the option did not comprise duress.

104. Mokry v. University of Texas Health Science Center, 529 S.W.2d 802 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.). An employee lost a man's surgically-removed eye down a drain while preparing it for pathological examination.

105. Christilles v. Southwest Texas State University, 639 S.W.2d 38 (Tex. App.--Austin 1982, writ ref'd n.r.e.). A faculty play director who instructed a student to use a breakable glass, rather than a theatrical one, in rehearsal was held to have used professional, not governmental, discretion.

106. 29 U.S.C. § 794 (1983). Miller v. Abilene Christian University of Dallas, 517 F. Supp. 437 (N.D. Tex. 1981) (A faculty member who alleged his employment was terminated because of his physical handicap was denied standing); United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984) (Receipt of medicaid and medicare payments subjected the hospital
to the coverage of the Rehabilitation Act).

107. A.H. Belo Corp. v. Southern Methodist University, No. 05-86-0097 9-CV (1987). A newspaper sought access under the Texas Open Records Act to information at various private universities, regarding the amounts received and expended by their athletic departments. The court held that the monies were not public funds and the athletic departments and universities were not governmental bodies as defined by the Act. The statute is located at Tex. Rev. Civ. Stat. Ann. Art. 6252-17a (Vernon 1971 & Supp. 1988) [hereinafter Open Records].

108. Sawyer v. Board of Regents of Clarendon Junior College, 393 S.W.2d 391 (Tex. Civ. App.--Amarillo 1965, no writ) (Irregularities in an election to levy ad valorem taxes did not void election in suit by resident taxpayers); Williams v. White, 223 S.W.2d 278 (Tex. Civ. App.--San Antonio 1949, writ ref'd) (Statute that authorized collection of taxes was valid in a suit brought by taxpayer); San Antonio Union Junior College District v. Daniel, 206 S.W.2d 995 (Tex. 1947) (College district not authorized to issue refunding bonds); The City of El Paso v. El Paso Community College District, 729 S.W.2d 296 (Tex. 1987). In El Paso, the city sought a declaratory judgment that a state financing act and its enabling State Constitutional amendment were valid. The City had created a tax increment district in its central business area under the Act, and the college district argued that the city would be using ad valorem taxes for noneducational purposes. The Act was deemed constitutional.
109. Panola Junior College v. The Estate of Thompson, 727 S.W.2d 677 (Tex. App.--Texarkana 1987, writ ref'd n.r.e.). The jury determined that a faculty member's injury was compensable under the Workmen's Compensation Act.

110. State v. Hatcher, 115 Tex. 882, 281 S.W. 192 (1926) (The Texas Supreme Court declared that royalties be placed in the university permanent fund); Theisen v. Robison, 117 Tex. 489, 8 S.W.2d 646 (1928) (University of Texas intervened in a suit to compel granting of oil and gas leases under a legislative act. The university argued unsuccessfully that the leases diverted money from the permanent university fund); Becton v. Dublin, 163 S.W.2d 907 (Tex. Civ. App.--El Paso 1942, writ ref'd w.o.m.) (Plaintiff sued when his grazing lease on University of Texas land expired and the Board of Regents leased to a new party, rather than giving first right to plaintiff); Giles v. McKanna, 200 S.W.2d 709 (Tex. Civ. App.--Austin 1947, writ ref'd n.r.e.) (Plaintiff sued when University of Texas cancelled his gas lease for nonproduction, although the Land Commissioner had accepted payments).

111. Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932). A student at Galveston School of Medicine of the University of Texas alleged that he was dismissed for academic reasons contrary to a state statute. The School of Medicine prevailed.

112. Rainey v. Malone, 141 S.W.2d 713 (Tex. Civ. App.--Austin 1940, no writ). The fee was collected to support the University of Texas Student Union.
113. Givens v. Woodward, 207 S.W.2d 713 (Tex. Civ. App.--Austin 1947, writ dism'd w.o.j.). Black citizens asserted that the provision was self-enacting and that an 1882 election that established the University of Texas in Austin also established the branch in that locale. The court decided that the provision was to be enacted at the legislature's discretion.

114. Farrar v. Board of Trustees of Employees Retirement System of Texas, 150 Tex. 572, 243 S.W.2d 688 (1951) (Two plaintiffs brought a class action suit to credit prior service under a joint retirement law); Dyer v. Investors Life Insurance Co. of North America, 728 S.W.2d 478 (Tex. App.--Ft. Worth 1987, writ ref'd n.r.e.) (The former wife of a faculty member applied for a writ of garnishment for proceeds of his retirement plan that she was awarded in a divorce decree. The University of Texas System intervened in the suit, which ended with the decision that a participant must die, retire, or terminate employment in higher education institutions before funds can be withdrawn).


116. Calvert v. Hull, 475 S.W.2d 907 (Tex. 1972). The Board of Regents of University of Texas Systems selected a site for the University of Texas of the Permian Basin. Plaintiffs argued that the site was dangerous and was not clear of debt as called for in
the statute. The Texas Supreme Court held for the defendants.


119. 42 U. S. C. § 1983. Braden v. Texas A&M University System, 636 F.2d 90 (5th Cir. 1981). A former employee filed suit 3 1/2 years after his discharge. The suit was dismissed because the analogous state statute for limitations is that for torts (two years).

120. Open Records Act, supra note 107. Hubert v. Harte-Hanks Texas Newspapers 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The plaintiff newspaper was granted a writ of mandamus to compel Texas A&M University System to release the
names and qualifications of candidates for university president pursuant to the Act.

121. Texas A&M University System v. University Book Stores, 683 S.W.2d 140 (Tex. App.--Waco 1984, writ ref'd n.r.e.). To avoid paying royalties, retail book stores and a designer sued to cancel seven service marks registered by the university. The trial court ordered the marks cancelled, but the appeals court remanded the case to be dismissed on sovereign immunity grounds.

122. Perry v. Texas A&I University, 737 S.W.2d 106 (Tex. Civ. App.--Corpus Christi 1987, no writ). A counselor sought damages when her position was eliminated and the president refused to implement grievance procedures. Her claim, brought under an employee indemnification state statute, barred any constitutional claims. Sovereign immunity was affirmed for the university, but reversed as to the university president who did not meet the burden of pleading official immunity.

123. Simmons v. The University of Texas System, 706 S.W.2d 752 (Tex. App.--Austin 1986, no writ). Simmons had appealed an Industrial Accident Board award, but died of causes other than his injury while the suit was pending. His parents stepped in as substitute plaintiffs, and defendants won a summary judgment decision. On appeal, the court remanded, saying that an action for accrued, unpaid benefits survived the employee's death.

124. McKnight v. Cage, 163 S.W. 854 (Tex. Civ. App.--Dallas 1916, ref'd) (John Tarleton College, which became part of the state system in 1917); Lightfoot v. Poindexter, 199 S.W. 1152

125. Coffee v. William Marsh Rice University, 408 S.W.2d 269 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.). The university initiated the suit to determine whether the trustees could accept students without regard to race and whether tuition could be charged without violating the trust. The court determined that the trust's terms were no longer appropriate and that the university had authority to disregard them.

126. Wilcox v. St. Mary's University of San Antonio, 531 S.W.2d 589 (Tex. 1975). The state, city of Laredo, and the university settled with title of the documents to the state and custody with the university. The university then brought proceedings to determine whether the donor had made an irrevocable gift. The Texas Supreme Court determined that an issue of fact existed whether the university asserted ownership within the statutory limit and remanded the case.

127. The year 1860 was used to compare with the Iowa study.

128. As discussed in the private institution section, infra note 139, only one private junior college case was reported. It is included among statistics for private senior colleges.

129. Gonzales v. McHugh, 39 Tex. 677 (1873), 26 Tex. 677 (1863), 21 Tex. 256 (1878) Refer to note 57 supra.

130. Helms, supra note 2, at 102.

131. David Tyack, Thomas James and Aaron Benavot, Law and the
Shaping of Public Education, 1785-1954, 37, 1987. The United States Congress was generous in granting land to new states for public education, and state and federal courts were involved in school lands after 1847 when the Federal Commissioner of Public Lands issued instructions on how the land should be managed. Id.

132. The first charters were issued to incorporate the trustees of Independence Academy, the University of San Augustine, and Washington College on June 5, 1837; however the chartering acts do not mention land grants. 1 H. Gammel, Laws of Texas 1295-97 (1898). The chartering act for DeKalb College on Jan. 6, 1839 makes the grant. 2 H. Gammel Laws of Texas 145 (1898).

133. Trustees of Union Baptist Association v. Huhn, 26 S.W. 755 (Tex. Civ. App.--1894, writ ref'd); Collier v. Myers, 37 S.W. 183 (Tex. Civ. App.--1896, no writ); Trustees of both universities were held to have acted within their powers. Refer to note 69 supra.

134. Frederick Eby, The Development of Education in Texas, 94, 140-47 (1925) [hereinafter Eby]. From statehood in 1845 to the beginning of the Civil War, the legislature chartered 117 private institutions and 9 educational associations; but how many were active is unknown. Chartered were 40 academies, 30 colleges, 27 institutes, 7 universities, 5 schools, 3 high schools, 2 seminaries, 1 collegiate institute, 1 orphan asylum, and 1 medical college. Id. at 126.

135. Id. at 140-142, 152-53. In 1859 Marshall, Texas,
population 1411, had a university, a boarding and day school, two academies, a collegiate institute, and a female institute. Texas institutions advertised broadly for students, and generally, those that stayed active had an outstanding personality as leader. *Id.* at 152-53.

136. The coed college, in the City of Gonzales, stressed Mathematics, Greek, Latin, and philosophy. Tuition was $20 per five-month session, and the college received support from citizens and buildings from the city. Enrollment peaked at 276 students in 1859-80, with 20% of the students in the college; the remainder were in a preparatory school. In 1874 the college was sold to the city and the buildings later became a part of the public school system. *1 Handbook of Texas* 707 (W. Webb ed. 1952). Refer also to note 57 *supra*.

137. Eby, *supra* note 134, at 135. Baylor, established to prepare an educated ministry, opened in May 1846, with 24 pupils.


139. Randolph Junior College v. Isaacks, 113 S.W.2d 628 (Tex Civ. App.—Eastland 1938, no writ). The faculty member prevailed. Refer to note 56 *supra*. Because of the sparsity of private junior college cases, this lone case was placed with private senior institutions for analysis.


141. Peacock Military College v. Vidor, 145 S.W. 672 (Tex.

Three additional enrollment agreement cases were: Roach v. Burgess, 62 S.W. 803 (Tex. Civ. App.--1901, no writ) (Oak Cliff College for Young Ladies) (tuition payment); Texas Military College v. Taylor, 275 S.W. 1089 Tex. Civ. App.--Beaumont 1925, no writ) (procedural issue); and Southern Methodist University v. Evans, 131 Tex. 333 115 S.W.2d 622 (1938) (Refer to note 58 supra and accompanying text).


143. The two reported cases in this study were listed under the heading, Charities, in West's Texas Digest.


146. R.B. Spencer & Co. v. Thorp Springs Christian College,
41 S.W.2d 482 (Tex. Civ. App.--Ft. Worth 1931, writ dism'd). (Refer to note 71); Rutherford v.. Watson, 52 S.W.2d 85 (Tex. Civ. App.--Ft. Worth 1932, writ ref'd) (Refer to note 69).

147. Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). The college lost. Refer to note 72 supra.

148. Clayton v. Southern Methodist University, 176 S.W.2d 749 (Tex. 1943) (Bleacher collapsed); Scott v. Wm. M. Rice Institute, 178 S.W.2d 156 (Tex. Civ. App.--Galveston 1944, writ ref'd n.r.e.) (Young female caught heel in stadium's planking); Brown v. Shannon West Texas Memorial Hospital, 222 S.W.2d 248 (Tex. Civ. App.--Austin 1949, writ ref'd n.r.e.) (Blood donor injured); Jones v. Baylor Hospital, 284 S.W.2d 929 (Tex. Civ. App.--Dallas 1955, no writ) (Negligence of hospital employee alleged).

149. In the 1970s in Iowa, litigation grew in both the public and private sectors. Helms, supra note 2, at 103.

150. Story v. Tate, 382 F. upp. 1978 N.D. Tex. 1971) (Southern Methodist University) (Time, place, and manner of a student meeting was the issue); Southern Methodist University v. Smith, 515 S.W.2d 63 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.) (Ineligibility to play football prompted athlete to sue on ground of due process); and Gonzales v. Southern Methodist University, 536 F.2d 1971 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977) (Discrimination on the ground of national origin was basis for female's suit).
151. Guertin v. Hackerman, 496 F. Supp. 593 (S.D. Tex. 1980) (Rice University); Miller v. Abilene Christian University of Dallas, 517 F. Supp. 437 (N.D. Tex. 1981) and United States v. Baylor University Medical Center, 736 F. 2d 1039 (5th Cir. 1984); Refer to note 79 supra, for Guertin; note 106 supra for Miller and Baylor.

152. Clutts v. Southern Methodist University, 626 S.W.2d 334 (Tex. App.--Tyler 1981, ref'd n.r.e.); Claus v. Gyorkey, 674 F.2d 427 (5th Cir. 1982); and Manes v. Dallas Baptist College, 638 S.W.2d 143 (Tex. App.--Dallas 1982, writ ref'd n.r.e.). Refer to note 59 supra.

153. Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Refer to note 72 supra.

154. Merrill v. Southern Methodist University, 806 F.2d 600 (5th Cir. 1986); Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (5th Cir. 1984). Refer to notes 37, 38 supra.


157. For example, Section 504 of the Rehabilitation Act of 1973.

158. Holbrook & Hearn, Origins of Academic Freedom 10 Rev. Higher Education 47 (1986). Among twenty-five cases in the study, only one was a private institution and its category was
unreported. Of the twenty-four public institution parties, eight were multiversities, thirteen were comprehensives, one was a public college, and two were community colleges. Id. at 49 & 54.


160. State v. Hatcher, 115 Tex. 882, 281 S.W. 192 (1926). The State treasurer wanted to use the royalties to erect campus buildings, as approved by a 1925 state legislative act. The Texas Supreme Court declared the act unconstitutional and issued a mandamus that compelled the royalties to be placed in the university permanent fund created by the state constitution.

161. Splawn v. Woodard, 287 S.W. 677 (1926). Students got a temporary injunction to stop the university's renovation of their dormitory into a classroom, but on appeal, the higher court held that the university regents had full discriminatory power over campus buildings. The students were not lessees of the property, but had room reservations terminable at will of either party.

162. Theisen v. Robison, 117 Tex. 489, 8 S.W. 2d 646 (1928). An individual sought a mandamus to compel Land Commissioner Robison to give him exclusive oil and gas leases on University of Texas land, as permitted by a 1917 legislative act. The commissioner refused under a later act of 1925. The university
intervened on grounds that both acts were unconstitutional and diverted money from the permanent University Fund. The Texas Supreme Court held that the 1925 act was effective and that no unconstitutional diversion occurred, because royalties and proceeds of any sale by the state went to the permanent fund.

163. Cases are discussed by issue in Section II supra notes 68-75 and 106-123.

164. Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932). Refer to note 111 supra.

165. See supra note 19 for a history of early state institutions.

166. Iowa had six additional public institution cases before 1900, but then had none for the following 70 years. Private institutions in that state provided the litigation for those years. Helms, supra note 2 at 101, Table 1.

167. Private institutions still outnumbered public institutions in Texas. There were 16 private senior colleges and 20 junior colleges.

The private senior colleges were: Abilene Christian College, Abilene; Austin College, Sherman; Baylor College for Women, Belton; Baylor University, Waco; Incarnate Word College, San Antonio; Daniel Baker College, Brownwood; Howard Payne College, Brownwood; Our Lady of the Lake, San Antonio; Rice Institute, Houston; Simmons College, Abilene; Southern Methodist University, Dallas; Texas Christian University, Fort Worth; Texas Presbyterian College, Milford; Texas Woman's College, Fort Worth;
Trinity University, Waxahachie; and Southwestern University, Georgetown. Eby, supra note 134, at 301-302.

Independent junior colleges were: Burleson College, Greenville; Carr-Burdett College, Sherman; Cisco Christian College, Cisco; Clarendon College, Clarendon; College of Marshall, Marshall; Decatur Baptist College, Decatur; Jacksonville Baptist College, Jacksonville; Kidd-Key College, Sherman; Lon Morris College, Jacksonville; McMurry College, Abilene; Meridian Junior College, Meridian; Rusk Junior College, Rusk; St. Edwards College, Austin; Texas Military College, Terrell; Thorp Springs Christian College, Thorp Springs; Wayland Baptist College, Plainview; Weatherford College, Weatherford; Wesley College, Greenville; Westminster College, Tehuacana; and Westmoorland College, San Antonio. Id. at 302.

168. University of Texas, Austin; Agricultural and Mechanical College of Texas, College Station; College of Industrial Arts, Denton; North Texas State Teachers College, Denton; East Texas State Teachers College, Commerce; Sam Houston State Teachers College, Huntsville; Southwest Texas State Teachers College, San Marcos; West Texas State Teachers College, Canyon; Stephen F. Austin State Teachers College, Nacogdoches; and Sul Ross State Teachers College, Alpine; Eby, supra note 134, at 299.


171. Eby, supra note 39, at 312. In the United States overall during these two decades, student enrollment increased 370 percent, and the national population increased 39 percent. Id.

172. Helms, supra note 2, at 103.

173. Splawn, 287 S.W. 677. Refer to note 161 supra.


175. The community college cases were San Antonio Union Junior College District v. Daniel, 206 S.W.2d 995 (Tex. 1947) and Williams v. White, 223 S.W.2d 278 (Tex. Civ. App.--San Antonio 1949, writ ref'd). Both were statutory cases that dealt with bond and tax funding.

176. A discussion of cases by issue is in Section II.


178. Sweatt v. Painter, 340 U.S. 846 (1950); Wichita Falls Junior College District v. Battle, 347 F.2d 632 (1953); Whitmire v. Stillwell 227 F.2d 187 (5th Cir. 1955) (Texarkana Junior College). In Sweatt, the plaintiff was denied admission to the University of Texas School of Law, because of his race when no
law school for blacks existed in Texas. In 1946, a Texas district court gave the state six months to provide equal facilities and on appeal, the court held that a new, hastily established law school for blacks was substantially equivalent to those existing for white students. The U.S. Supreme Court reversed the decision on the ground that the equal protection clause required the plaintiff to be admitted to the University of Texas.

In *Wichita Falls* and *Whitmire*, black residents of the Junior College districts sought and won their suits to be admitted to the all-white colleges.

179. Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App.--Waco 1958), cert. denied and appeal dismissed, 359 U.S. 230 (1959). In *Bristol*, females brought a class action suit to compel the Board of Directors of all-male Texas A&M to admit them as students. The appeals court reversed the mandamus ordered by the district court saying that coeducational colleges were available to the plaintiffs in Texas and that the Board had power to continue its all-male policy. The same court also found for the defendant in a similar sex discrimination suit, Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.--Waco 1960, writ ref'd n.r.e.), cert. dismissed and appeal denied. 364 U.S. 517 (1960).


181. Farrar v. Board of Trustees of Employees Retirement System of Texas, 150 Tex. 572, 243 S.W.2d 688 (1951). Refer to
note 114 supra.


185. Wright v. Texas Southern University, 392 F.2d 728 (5th Cir.1968). The suit was dismissed on a showing by the university that the students were dismissed for scholastic reasons.


188. Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App.--Amarillo 1966, mand. overr.). A student was suspended for driving while intoxicated.


190. Dealey v. Dallas Co. Junior College District, 434
S.W.2d 724 (Tex. Civ. App.--Waco 1968, writ ref'd n.r.e.). A realtor claimed the trustees induced a third party to breach a contract.

191. Cases by constitutional issues are in the notes to Section II, supra notes 34-55 and accompanying text.


194. The non-employment claim cases were Mokry v. University of Texas Health Science Center, 529 S.W.2d 802 (Tex. Civ App.--Dallas 1975, writ ref'd. n.r.e.) and the University of Texas Health Science Center at Houston v. Big Train Carpet of El Campo, 739 S.W.2d 792 (Tex. 1987). Mokry was a tort suit; Big Train Carpet was a contract case. Refer to notes 65 and 104 supra.

195. Helms, supra note 2, at 102.

196. Id.

197. The Iowa study lists the factors of stabilized
in institutional growth, organizational maturity, and the judicial
doctrines of academic abstention, in loco parentis, and rights-
privilege distinction. Id.

198. Supra notes 160, 161 and accompanying text.

199. In 1921 the legislature created a special citizens
committee to study coordination of higher education; however, no
 provision was made for expenses, so the committee was not
 successful other than instigating a survey of the elementary and
 secondary school system. Eby, supra note 134, at 315. Not until
 1949 was there further major legislation to coordinate higher
 education. A central agency was created to coordinate
 vocational-technical programs in that year. In 1965, the Texas
 Higher Education Board was established, preceded ten years
 earlier by the Texas Commission on Higher Education. Tolo,
 Higher Education in Texas: The Role of State Government in
 Student Aid, Program Development, and Institutional Funding 10

200. Helms, supra note 2, at 102. The number of public
cases in Iowa increased from five in the 1960s to nine in the
1970s. Junior colleges in Iowa had their first five cases in the
years 1970 to 1979.

201. Texas cases increased to thirty cases from an average
of six in previous decades.

202. Helms supra note 2, at 103.

203. In 1965, Texas had a student fall headcount for public
and private senior and junior institutions of less than 300,000.
In the fall of 1977, the enrollment exceeded 715,000. Figures for public institutions in 1977 were 323,514 at senior institutions and 309,547 at Junior Colleges. Tolo, supra note 199.

204. See supra notes 171 and text.

205. The time periods approximate those in the Iowa study, which did not have a latter time period, and they were selected to provide a means of comparison between the states. The selected years, however, are a less-than-satisfactory match for the history of cases in Texas for public institutions. Because the first public case in Texas was reported in 1928, a more appropriate division for all Texas cases would be: early (1870-1929), middle (1930-1969), and recent (1970-1989).

The Iowa study did not include community colleges in its comparison of time periods, because that type of institution is new to the state. Helms, supra note 2, at 113.

206. In the mid-1920s, public institutions numbered 19 and private institutions numbered 36. Supra notes 167-169 and accompanying text. In the mid-1950s, approximately 50 public senior and medical institutions, 32 municipal (3 were senior institutions), and 80 private institutions were in Texas. By the early 1980s the numbers were approximately public senior, 50; private, 45; and public community colleges, 45.

207. Supra note 45, and text.

208. That analysis comports with the Iowa study for its analyses by both decade and time period for the private sector.
Contract and probate issues stayed constant, but statutory, procedural, and tort cases rose. Helms, supra note 2, at 113-114.

209. In the Iowa study, constitutional issues increased in the years 1960 to mid-1985 in the public sector, as did statutory issues for both public and private sectors. Helms, supra note 2, at 113-114.

210. The Iowa study reported statutory issues as the fastest growing area of litigation among community colleges. Id. at 114.

211. Community colleges are subject only to suits involving motor vehicles under the statute. Tort Act, supra note 90, at §101.051.

212. La Noue, supra note 2, at 22.


214. The number grew from three in the 1950s to 12 by 1985.

215. Refer to notes 131 & 132 supra.

216. Provisions are in scattered sections of Title 3 of the Texas Education code.


220. Iowa institutions litigated approximately 10% of its cases in federal court (6 of the 55 cases reported). For the same time frame (1870-1985), Texas litigated 44% in federal court (74 of the 167 reported).

221. Refer to note 45 supra for all first amendment constitutional cases.

222. Refer to notes 42, 46, 81, 83 & 87 supra.

223. Refer to notes 56-59 supra for private institution contract cases.

224. Refer to notes 93-98 supra for private institution tort cases.

225. One study spoke of litigation as an "investment process" for clients, lawyers, and society and said that an investment which may be profitable to one investor may not be profitable to others in the same suit. The question, therefore, becomes one of gains and comparable benefits to the litigation participants along with the realization that taxpayers subsidize the court costs. Trubek, supra note 2, at Part A, s-7.

226. The Iowa study had six categories: donations, employment, student status, state mandated, function funding, and other. Helms, supra note 2, at 111.

Hospital, 360 S.W.2d 895 (Tex. Civ. App.--Waco 1967, writ ref'd n.r.e.); Gilmore v. James, 274 F. Supp. 75 (N.D. Tex.), aff'd, 88 S. Ct. 695 (1967). The first four cases were based on employment contract. In the last, an instructor was dismissed for refusing to affirm a loyalty oath.


230. La Noue, supra note 2. In the seventies, federal courts decided 145 academic discrimination cases among faculty. Nation-wide, thirty-four cases a year have been heard in the eighties. Id. at 23.

231. Id. at 22.

232. "... litigation decisions are not always made on the basis of financial consideration, especially in academe." Id. at 228.

233. Id.

234. Southern Methodist University v. Evans, 131 Tex. 333, 111 S.W.2d 622 (1938). Refer to note 58 supra.


238. In Iowa, donation suits were the economic basis most
frequently litigated; however, only six of seventeen donation cases in that state have been decided since 1960. Helms, supra note 2, at 41.

239. McKnight v. Cage, 183 S.W. 854 (Tex. Civ. App.---Dallas 1916, writ ref'd); Lightfoot v. Poindexter, 199 S.W. 1152 (Tex., Civ. App.---Austin 1917, writ ref'd). In McKnight, a bequest of money was left to erect a building. A legacy of more than $250,000 was contested in Lightfoot. Refer also to note 124 supra.

240. Wilcox v. St. Mary's University of San Antonio, 531 S.W.2d 589 (Tex. 1975). Refer to note 126 supra.


242. Bennett v. West Texas University, 799 F.2d 155 (5th Cir. 1986).


244. United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984). Refer to note 106 supra.

245. Many Texas counties contain large areas of the land grants made to the University of Texas by the Texas Constitutions of 1866 and 1875. George Braden, Constitution of

246. Supra notes 131-132 and accompanying text. A body of cases deals with the survey of public lands set aside for public schools and for higher education. An 1885 state survey of the lands was later determined to have been merely office work by the surveyor; nothing had been done in the field. As a result, vacancies in the areas were litigated past 1940. Theisen v. Stanolind Oil & Gas Co. 210 S.W.2d 417 (Tex. Civ. App.--El Paso 1946, writ ref'd n.r.e.).

247. A recent zoning issue case is Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.).

248. In one survey of industry, a sample of forty-nine construction firms reported approximately thirty-seven percent had had some sort of dispute, not necessarily litigation, with another nongovernmental organization in a twelve-month period. Trubek, supra, note 2, at I-92.

250. Tarleton State University v. R. A. Sparks Contractor, 695 S.W.2d 362 (Tex. App.--Waco 1985, no writ).

251. The Texas Higher Education Coordinating Board proposed in October 1987 to limit new construction and general space projects to those that are clearly essential. To meet the test, a state institution would be required to certify a recent assessment of its needs and present a report of its campus planning process to the Board or the Campus Planning Committee prior to a request for final Board action. New Policy May Limit Construction, CB Rep., Oct.-Nov. 1987, at 1, col.2.

252. In July 1987, the Texas Higher Education Coordinating Board approved a $22.5 million science and research center to be constructed at the University of Houston. Also in 1987, the Texas legislature approved a $60 million research program to stimulate research at state higher education institutions. New Legislation gives Texas Chance to Promote Research, CB Rep., Oct.-Nov. 1987, at 8, col.1.

253. Kaplin, supra note 1, at 279-96.

254. Tort Act, supra note 90.


256. Tort Act, supra note 90, at § 101.056.

257 Tort Act, supra note 90, at § 101.051.


259. Kerby v. Abilene Christian College, 470 S.W.2d 311

260. See supra notes 93, and accompanying text.

261. Refer to note 141 supra for the cases.


264. The University of Texas Health Science Center at Houston v. Big Train Carpet of El Campo, 739 S.W.2d 792 (Tex. 1987). Refer to note 65 supra.


266. Southern Methodist University v. Smith, 515 S.W.2d 63 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.).


269. University of Texas at Austin v. The National Collegiate Athletic Association, 685 S.W.2d 409 (Tex. App.--Austin 1985, writ ref'd n.r.e.).

270. Texas A & M University v. University Book Stores, 683
S.W.2d 140 (Tex. App.--Waco 1984, writ ref'd n.r.e.).

271. Farrar v. Board of Trustees of Employees Retirement System of Texas, 150 Tex. 572, 243 S.W.2d 688 (1951).

272. Coffee v William Marsh Rice University, 408 S.W.2d 269 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.). Refer to note 125 supra.


276. The term, faculty, includes administrative and staff personnel. The text makes distinctions when appropriate. Nine cases had employees other than faculty persons as parties. See infra notes 280-81.

277. A student was a person, or the parent of a person, who was enrolled in a regular course of study at the time the cause of action arose.

278. The Iowa study had a category for external entities; it did not have separate categories for businesses or private citizens.

279. The 1987 preliminary fall headcount, based on twelfth class day reports, was 368,775 for senior public institutions and 321,896 for community colleges. Institutions, supra note 15.

281. Table V does not distinguish between faculty, staff, and administrative parties. Statutory issue cases with staff parties were: Braden v. Texas A & M University System, 636 F 2d 90 (5th Cir. 1981); University of Texas System v. Melchior, 696 S.W.2d 406 (Tex. Civ. App.--Houston [14th Dist.] 1985, no writ); Lyons v. Texas A & M University, 545 S.W.2d 56 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.); Farrar v. Board of Trustees, 150 Tex. 572 243 S.W.2d 688 (1951); Perry v. Texas A&I University, 737 S.W.2d 106 (Tex. Civ. App.--Corpus Christi 1987, no writ); Simmons v. The University of Texas System, 706 S.W.2d 752 (Tex. App.--Austin 1986, no writ).


The Constitutional issue cases were a race and sex discrimination suit brought by service and clerical employees, Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983); two procedural due process cases, Brown v. Texas
A&M University, 804 F.2d 327 (5th Cir. 1986) and Bagg v. The University of Texas Medical Branch at Galveston, 726 S.W.2d 582 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.); and a first amendment issue, Terrell v. University of Texas System Police, 792 F.2d 1360 (1986), cert. denied, 107 S. Ct. 948 (1987).

283. LaNoue, supra note 2, at 21.

284. One case was brought by a staff member. Weary v. Baylor University Hospital, 260 S.W.2d 895 (Tex. Civ. App.--Waco 1962, writ ref'd n.r.e.).

285. 408 U.S. 593 (1972). A junior college professor did not receive a hearing when his one year contract was not renewed after ten years of continued renewals. The U.S. Supreme Court affirmed the court of appeals decision that the plaintiff must be given a hearing in light of "the policies and practices of the institution." 430 F.2d 939, 943 (1970).


288. Supra, note 99.

289. Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976); Brown v. Prairie View A & M University, 630 S.W.2d 405 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

290. Christilles v. Southwest Texas State University, 639 S.W.2d 38 (Tex. App.--Austin 1982, writ ref'd n.r.e.).


295. The parents were either plaintiffs or defendants in enrollment agreement cases. Supra, note 58 and accompanying text.

296. The mother of a deceased football player brought suit. Brown v. Prairie View A & M University, 630 S.W.2d 405 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

297. Refer to notes 225-275 supra and accompanying text.

298. Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Refer to note 72 supra.

299. United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984). Refer to note 106 supra.
300. See supra, notes 93-98 for tort suits at private universities.


303. 470 SW2d 629 (Tex. 1971). Refer to note 96 supra and accompanying text.

304. The Iowa study did not report any split decisions.


306. Goetz v. Board of Regents of State Teachers Colleges of Texas, 453 S.W.2d 290 (Tex. 1970), cert. denied, 400 U.S. 807
(1970); Gonzales v. McHugh, 39 Tex 677 (1873). Refer to notes 57, 60 supra. For Goetz refer also to note 354 infra and accompanying text.


309. Fountain Gate Ministries v. The City of Plano, 654 S.W.2d 841 (Tex. App.--Dallas 1983, writ ref'd n.r.e.); United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984). The government parties prevailed in both.


313. The City of El Paso v. El Paso Community College District, 729 S.W.2d (Tex. 1987). The city created a new tax district and used the taxes for purposes other than education.

314. This finding does not appear on any Table. In the Iowa study, faculty and staff parties were the most successful among non-institutional litigants; however, the study reported that
community college data skewed the faculty results because faculty were particularly successful in suits against those institutions. Helms, supra note 2, at 117-18.

315. See notes 323-342 infra and accompanying text.

316. Figures in the Iowa study were only for senior institutions, but the percentage of cases won by students for both the public and private sectors were in the same percentage range (43%) as Texas. One difference: in Iowa, public university students prevailed most frequently. In Texas, students at private universities prevailed more often, but only by a small amount. Helms, supra note 2, at 117.


324. Sanford v. Texas A & M University, 680 S.W.2d 650 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

325. La Noue supra note 2, at 49 n.8.

326. Id. at 30-31. Of 156 procedural/jurisdictional decisions in federal courts between 1971 and 1984, 58 were in favor of the plaintiff, 77 for the defendant, and 21 were split decisions. Out of 160 merit decisions, plaintiffs won 34; defendants, 120; and six were split. Id.

327. Id.

328. Refer to notes 331-343 infra and accompanying text.

329. Four staff parties also were reported. Refer to note 282 supra.


331. Martine v. Board of Regents, State Senior Colleges of Texas, 607 S.W.2d 638 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). The faculty member handled funds in a student insurance program as Dean of Students. A state audit reported misuse of funds, and he was dismissed. The appeals court, on appeal after remand, affirmed that the faculty member be reinstated as a teacher.

Also, one of three appellants received a favorable decision
in a first amendment case. Allaire v. Rogers, 658 F.2d 1055 (5th Cir.), cert. denied, 456 U.S. 928 (1981). Eight tenured faculty had filed suit, claiming a denial of full salary increase occurred because of their political activities.

332. Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987). A professor of law began teaching at a time when tenure was automatic after 7 years. The professor taught for 4 years and then had an authorized 3-year leave. On his return he was told he must seek tenure the following year. He alleged that his disagreements with the Dean's actions were the basis for his dismissal.

333. Bishop v. Wood, 426 U.S. 341, 349 (1976). In Bishop, a city policeman was discharged without a hearing, after being told privately the reasons for his dismissal. The Court said that failure to provide a pretermination hearing did not deprive the claimant of a property or liberty interest.

334. Honore, supra note 331, at 569.

335. Brown v. Texas A&M University, 804 F.2d 327 (5th Cir. 1986). Brown, an accountant, informed his supervisor of a possible irregularity in the handling of funds by a faculty member. He alleged that shortly thereafter his employment relationship changed and he left under protest. The court said that Brown may properly be able to allege that he was attempting to express a matter of "vital public concern." Id. at 337.

336. 751 F.2d 1472 (5th Cir. 1985). In this Louisiana civil rights case, three defendants moved to dismiss based on
346. Merrill v. Southern Methodist University, 806 F.2d 600 (5th Cir. 1986).


349. For all statutory issue cases, see supra notes 208-227 and text.

350. Simmons v. The University of Texas System, 706 S.W.2d 752 (Tex. App.--Austin 1986, no writ). Refer to note 123 supra.


immunity from suit as public officials. The court held that § 1983 actions that raise qualified immunity issues must meet heightened pleading standards and the pleadings must state specific facts with sufficient particularity. Id. at 1479.

337. Brown, 804 F.2d at 337.

338. Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir.), reh'g granted, 593 F.2d 23, modified, 595 F.2d 1119 (5th Cir. 1979).

339. Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir.), opinion clarified, 522 F.2d 204 (5th Cir. 1975).

340. Gilmore v. James, 274 F. Supp. 75 (N.D. Tex.), aff'd, 88 S. Ct. 695 (1967). Other non-institutional parties to the case were a student and a professor, each from a public senior institution.

341. Bradford v. Tarrant County Junior College District, 492 F.2d 133 (5th Cir. 1974); Lewis v. Spencer, 369 F. Supp. 1219, aff'd, 490 F.2d 93 (5th Cir. 1974).


345. Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986).
(Vernon 1986). Generally, the person must know or should have
known a rule was violated and that the violation is a
contributory factor to disciplinary action taken by the national
college association against the institution or a student at the
institutions.

355. Id. at § 131.0003

356. Goetz v. Board of Regents of State Teachers College of
Texas, 453 S.W.2d 290 (Tex. 1970), cert. denied, 400 U.S. 807
(1970). The Texas Supreme Court affirmed the trial court's
decision that additional sums could not legally be paid by the
defendant after the contractor made a mistake in the bidding,
because extrinsic negotiations were ineffective under the parol
evidence rule. The appeals court had decided that additional
payment was part of the original contract.

357. The University of Texas at Austin v. The National
Collegiate Athletic Association, 685 S.W.2d 409 (Tex. App.--
Austin 1985, writ ref'd n.r.e.).

358. University of Texas Health Science Center at Houston v.
Big Train Carpet of El Campo, 739 S.W.2d 792 (Tex. 1987).

359. Fazekias v. The University of Houston, 565 S.W.2d 299
(Tex. Civ. App.--Houston [1st Dist.] 1978, writ ref'd n.r.e.),

360. Pan Am College V. Rojas, 392 S.W.2d 707 (Tex. Civ. App.--
Corpus Christi 1965, no writ).

361. The University of Texas Health Science Center at
Houston, School of Nursing v. Babb, 646 S.W.2d 502 (Tex. App.--
Houston [1st Dist.] 1982, no writ).

362. Clutts v. Southern Methodist University, 626 S.W.2d 334 (Tex. App.--Tyler 1981, writ ref'd n.r.e.).

363. Weary v. Baylor University Hospital, 360 S.W.2d 895 (Tex. Civ. App.--Waco 1962, writ ref'd n.r.e.).

364. Claus v. Gyorkey, 674 F.2d 427 (5th Cir. 1982). Baylor College of Medicine moved the case from state to federal court on grounds that its actions in terminating a nontenured faculty person, whose position was conditioned on employment at a veteran's hospital, was in the capacity of a federal employee. The court granted the medical college summary judgment on the basis of absolute immunity for a federal employee whose actions bear a reasonable relation to the scope of the employee's authority.

365. Manes v. Dallas Baptist College, 638 S.W.2d 143 (Tex. App.--Dallas 1982, writ ref'd n.r.e.). The employment contract called for arbitration by members of the Board of Trustees. On appeal, the court reversed the trial court's decision that arbitration was the final relief available and said the Board's decision did not preclude a judicial one.

366. Tort Act, supra note 90.

367. For example, Christilles v. Southwest Texas State University, 639 S.W.2d 38 (Tex. App.--Austin 1982, writ ref'd n.r.e.) (Student injured by shattered glass in a play rehearsal was acting under the director's professional discretion); Smith v. The University of Texas, 664 S.W.2d 180 (Tex. App.--Austin
1984, no writ) (An injured volunteer track official established a claim against the university).

368. Tort Act, supra note 90, at § 14 (7). An example is Arlington v. Akers, 607 S.W.2d 283 (Civ. App.--Ft. Worth 1980, writ ref'd n.r.e.) (University was not liable for student's injury from fall on ice on campus, because the decision to keep the university open was a discretionary act of government).
