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# Constitutional Law—Procedural Due Process: Temporary Suspension in Public Schools

# PROCEDURAL DUE PROCESS: TEMPORARY SUSPENSIONS IN PUBLIC SCHOOLS

The courts have recognized that students are entitled to due process protection when threatened with expulsion from school.[1] The Supreme Court of the United States recently extended the minimum due process safeguards of notice and hearing to students threatened with short suspensions.[2] The Court found that the students had property and liberty interests in public education[3] and were entitled to protection from arbitrary disciplinary action.[4]

*Goss v. Lopez*[5] arose out of a period of racial confrontation and student unrest in 1971.[6] School administrators suspended students[7] involved in incidents that varied in severity from assaulting a police officer[8] to simply being present at a demonstration.[9] Nine students

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1. Since Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), it has been recognized that students at tax-supported educational institutions may not be expelled without prior notice and hearing. *See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Fielder v. Board of Educ., 346 F. Supp. 722, 729 (D. Neb. 1972). *See also* General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968) (en banc).

2. Goss v. Lopez, 419 U.S. 565 (1975), *aff'g sub nom.* Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

*Goss* is one of several challenges to short suspensions. *See, e.g.*, Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); Graham v. Knutzen, 351 F. Supp. 642 (D. Neb. 1972); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Black Students of N. Ft. Myers Jr.-Sr. High School v. Williams, 335 F. Supp. 820 (M.D. Fla.), *aff'd*, 470 F.2d 957 (5th Cir. 1972).

3. 419 U.S. at 574.

4. *Id.* at 574.

5. 419 U.S. 565 (1975).

6. *Id.* at 569.

7. State law authorizes school administrators to suspend pupils for not more than 10 days. OHIO REV. CODE ANN. § 3313.66 (Page 1972).

8. Plaintiff Rudolph Sutton physically attacked a police officer who was attempting to remove another student from the school auditorium. Both students were immediately suspended. 419 U.S. at 570.

9. Plaintiff Dwight Lopez testified that he had been an innocent bystander to a disturbance in the lunchroom. *Id.* at 570. Plaintiff Betty Crome testified to being present at a demonstration at a high school other than the one she was attending, when she was

brought a class action seeking declaratory and injunctive relief.[10] The district court declared the state statute, which permitted student suspension without a hearing,[11] unconstitutional and ordered the removal of references to past suspensions from the students' records.[12] The Supreme Court affirmed, holding suspensions from public school without prior notice or hearing violative of the due process clause of the fourteenth amendment.[13] There was, however, substantial disagreement among the justices over the propriety of the Court's expansion of procedural protection and of increasing judicial intervention in public education.[14]

The due process clause of the fourteenth amendment protects the individual against arbitrary, capricious and unreasonable action by the government.[15] Due process of law is so ingrained in our national tradition that exceptions to the requirement of prior notice and the opportunity to be heard[16] are allowed only in emergency situations.[17] But procedural due process extends only to the deprivation of those interests within the fourteenth amendment's protection of life, liberty and property.[18] The Supreme Court has accorded such protection to many peripheral property[19] and liberty[20] interests. The Court no longer

arrested with other students and then released without charge. She was notified that she had been suspended before the start of school the next day. *Id.* at 570-71.

10. The students filed the action against the Columbus Board of Education and the administrators of the Columbus Public School System under 42 U.S.C. § 1983 (1970). 419 U.S. at 568. *See* Monroe v. Pape, 365 U.S. 167 (1961) (§ 1983 is applicable to those who carry the badge of state authority and represent in some capacity state action, whether in accordance with their authority or its misuse).

11. OHIO REV. CODE ANN. § 3313.66 (Page 1972).

12. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

13. 419 U.S. at 566.

14. *Id.* at 584 (Powell, J., dissenting). The Chief Justice and Justices Blackmun and Rehnquist joined in the dissent.

15. "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

16. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

17. The Court has held that in rare and extraordinary situations deprivation of a protected interest need not be preceded by the opportunity for some kind of hearing. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamins).

18. U.S. CONST. amend. XIV, § 1.

19. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (de facto tenure policy sufficient property interest to entitle claimant to due process protection); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (attendance at state university).

20. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (revocation of parole

uses the right-privilege distinction[21] to determine whether the fourteenth amendment is applicable, but now applies a statutory entitlement test.[22]

In the landmark case *Dixon v. Alabama State Board of Education*[23] the U.S. Court of Appeals for the Fifth Circuit held the due process clause applicable to disciplinary decisions made by tax-supported educational institutions.[24] The majority of subsequent challenges to disciplinary action have involved public colleges and universities,[25] but in 1969 the Supreme Court in *Tinker v. Des Moines Independent Community School District*[26] extended due process protection to public school children.[27] While acknowledging the broad interest of the state in the operation of its school system through local boards of education,[28] the

status). *Compare* Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970) (female student's long hair within protected liberty interest) *and* Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970) (male student's long hair within protected property interest), *with* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) (court assumed hair style was within liberty interest but upheld school regulation under the facts of the case).

21. Formerly state deprivation of significant forms of state largesse was not restricted by the due process clause. The theoretical justification was that such deprivation resulted not in the infringement of a right but in the mere loss of a privilege. *See, e.g.*, Hamilton v. Regents of Univ. of Calif., 293 U.S. 245, 261-62 (1934) (state university education is a privilege; conditional enrollment upheld); Bailey v. Richardson, 182 F.2d 46, *aff'd by an equally divided court*, 341 U.S. 918 (1951) (public employment is a privilege).

22. If an individual is qualified to receive certain benefits under state law, then that individual has a legitimate claim of entitlement to those benefits. Termination of such benefits involves state deprivation of the recipient's property interest in the continued receipt of the benefits and is protected by due process. *See, e.g.*, Connell v. Higginbotham, 403 U.S. 207 (1971) (public employment as a statutory entitlement); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits as a statutory entitlement); Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 867, 57 Cal. Rptr. 463 (Dist. Ct. App. 1967) (state university education considered a government benefit comparable to public employment). *See generally* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7 (1969); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

23. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *See* note 1 *supra*.

24. 294 F.2d at 154.

25. *See, e.g.*, Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

26. 393 U.S. 503 (1969) (summary suspension of public secondary school students for wearing black armbands as an unconstitutional restriction of freedom of expression).

27. "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.* at 511.

28. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (education is largely a matter of local control). *See also* Goldstein, *The Scope & Sources of School Board Authority to Regulate Student Conduct & Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 375-76 (1969) (recommending that questions of scope of school board authority should be resolved on nonconstitutional basis if possible).

court stated that such control must be exercised consistently with constitutional safeguards, including due process of law.[29]

There are two distinct stages in due process analysis which, although often telescoped together, are separate and sequential: (1) whether due process is applicable at all, and (2) if applicable, what procedures are required in the particular situation.[30] In *Goss* the threshold question was the primary issue: whether the students had a protected interest which warranted procedural protection.

Protected interests are normally not created by the Constitution but are created and defined by an independent source such as state statutes or regulations entitling citizens to certain government benefits.[31] In *Goss* state law specified both free public education and compulsory attendance.[32] On the basis of these state laws, the Court concluded that

29. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). The Court has repeatedly stated that control of conduct within public schools must be consistent with constitutional safeguards. This sensitivity is particularly acute when first amendment freedoms are implicated. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

30. Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1510-11 (1974). For an example of a two-step analysis see Arnett v. Kennedy, 416 U.S. 134, 206-08 (1974) (Marshall, J., dissenting).

A conventional interest-balancing approach would consider factors such as the nature of the interest adversely affected, the manner in which that interest is affected, reasons for doing so, available alternatives to action taken, protection implicit in the office of the state officer whose conduct is challenged, and the balance between the interest achieved and the interest injured. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). The Court must consider the risk and harm of mistaken deprivations as well as the possible effect of requiring greater procedural formality on the government action and program in evaluating whether the existing procedure is fundamentally fair.

31. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A person must have more than an abstract need or desire or subjective expectation of benefit to have a protected property interest; he must have a legitimate claim of entitlement. *See* note 22 *supra*. *See generally* Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1087-90 (1973).

32. OHIO CONST. art. VI, § 2 (1851); OHIO REV. CODE ANN. §§ 3313.48, 3313.64, 3321.01 (Page 1972). Section 33 establishes a statewide, state-supported system of education. This is an independent source that secures a specific government benefit and supports the student's legitimate claim of entitlement to public education. The *Goss* dissent argued that the same state statute that creates the right to a public education also defines its dimensions by expressly authorizing short disciplinary suspensions in another section, *id.* § 3313.66. Such a qualified right to public education should, however, merit some procedural protection. For an example of procedural protection of a qualified right see Wolff v. McDonald, 418 U.S. 539 (1974) (cancellation of good-time credits) and Morrissey v. Brewer, 408 U.S. 471 (1972) (cancellation of parole status).

For most children the one state-conferred benefit that has the greatest significance and

the students were entitled to a public education as a property right,[33] and the state could not withdraw that right for misconduct absent fundamentally fair procedures.[34]

The Court also found that the students possessed a liberty interest in keeping their school records free of any unwarranted references to disciplinary suspensions.[35] Since the school suspensions were not de minimis deprivations,[36] the relatively mild character of the punishment was irrelevant to the question of whether the due process clause was applicable.[37] Total exclusion from school for more than a trivial period

value is the right to attend the public schools without charge. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Cook v. Edwards, 341 F. Supp. 307, 310-11 (D.N.H. 1972) ("No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens."); *cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S.1, 29-30 (1973).

33. 419 U.S. at 574. Although the district court held education to be a liberty rather than a property interest under state law, 372 F. Supp. 1279, 1299 n.16, the Supreme Court found public education to be primarily a property interest. 419 U.S. at 573.

34. Once the state has conferred a benefit that amounts to a property or liberty interest, any deprivation must meet the minimum standards of procedural due process. This is true even when discharge procedures are provided by the statute which creates the specific statutory entitlement. Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring), 171 (White, J., concurring and dissenting), 206 (Marshall, J., dissenting) (nonprobationary government employee should be afforded evidentiary hearing prior to dismissal for cause).

35. 419 U.S. at 574-75. The Court found that the student's integrity and good standing within the school were threatened by the disciplinary action and that suspensions based upon charges of misconduct, when made part of a student's record, could seriously interfere with later opportunities for higher education and future employment. *See, e.g.*, Hatter v. Los Angeles City High School Dist., 452 F.2d 673, 674 (9th Cir. 1971) (possible prejudice to college admissions and future employment); Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328, 1338 (S.D. Tex. 1969) (consideration of possible collateral consequences from suspensions).

36. The degree of procedural due process depends on the extent to which an individual will suffer grievous loss. Some form of notice and hearing is required before the deprivation of any protected interest that is not de minimis. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 85-86 (1972). The severity of the deprivation may not be considered in the initial determination of whether due process requirements apply. If applicable, the degree of severity controls the procedural formality required. The distinction between determining whether due process is applicable and "what process is due" is not always clear. *See* 419 U.S. at 576. The dissent argued that short suspensions are far from the serious damage standard necessary for claims under the due process clause, and that discipline in the form of suspensions is an essential part of education and good citizenship. *Id.* at 586 (Powell, J., dissenting).

37 The dissent viewed suspensions as the traditional means used to maintain discipline in public schools and as a routine, almost daily occurrence, the imposition and adjustment of which is best done informally and at the discretion of the school administrators. The character of the discipline and the nature of public education led the dissent to believe that the control and discipline of the public schools should be left to its traditional guardians, the state legislature and educational authorities. 419 U.S. at 586 (Powell, J., dissenting).

could be considered a serious disruption in the life of a school child.[38]

School administrators have traditionally been allowed broad discretionary powers in the daily administration of public schools[39] and generally oppose procedural formalities in disciplinary hearings, fearing the introduction of an adversary atmosphere into the educational process.[40] The Court recognized the need for immediate, effective administrative action[41] and the impracticality of complicated hearing proce-

38. *Id.* at 576. Traditionally suspensions have been regarded as a relatively mild form of discipline that did not warrant notice or hearing. The most serious sanction, expulsion, would merit greater procedural consideration than short suspensions. *See, e.g.*, Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973); Linwood v. Peoria Bd. of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); Dunn v. Tyler Independent School Dist., 460 F.2d 137 (5th Cir. 1972).

Recently it has been recognized that it is almost impossible to evaluate exclusions from school for varying periods of time as major or minor punishments. A suspension of even one hour can be critical to an individual student if that hour encompassed a final exam with no provision for making up the exam period. Shanley v. Northeast Independent School Dist., 462 F.2d 960, 967 n.4 (5th Cir. 1972); Breen v. Kahl, 296 F. Supp. 702, 704 (W.D. Wis. 1969), *cert. denied*, 398 U.S. 937 (1970) (denial of access to public high school to senior student as irreparable injury). *See generally* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 392 (1969); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 571-85 (1971); Flygare, *Short-Term Student Suspensions & the Requirements of Due Process*, 3 J.L. & EDUC. 529, 529-30 (1974).

39. *E.g.*, Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) (interest of state in maintaining an effective and efficient school system is of paramount importance; that which so interferes or hinders state in providing best education possible for its people must be eliminated or circumscribed as needed). *Compare* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (right to wear freedom buttons not denied because no evidence that conduct interfered with educational process), *with* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (right to wear freedom buttons denied where evidence demonstrated that such conduct interfered with efficient operation of school).

40. The primary interest of the school is in the integrity of the educational process. The conditions necessary for education include the best use of resources available, the maintenance of teacher and administrator morale, and the welfare of the entire student body. Schools prefer limiting the procedural complexity of disciplinary hearings, which take time and money and detract from the cooperative relationship between the student and the administration. The individual student, however, has much to lose if he is subject to the school's arbitrary discipline: reputation, earning capacity if forced to withdraw, psychological and social damage. *See* Abbott, *supra* note 38, at 382; Buss, *supra* note 38, at 573-77. The dissent adopted the conventional view of the essential congruence of the interests of the state in its schools and pupils: the state's interest in an orderly school is not incompatible with the individual interest of the student in obtaining an education, but in fact is crucial to the learning environment of all students. 419 U.S. at 586-96 (Powell, J., dissenting). The reality of public education, if not adversary in orientation, often reflects the tension that exists between the desires of the student and the administrator in the educational system.

41. 419 U.S. at 580.

dures,[42] but concluded that the student's interest in public education and the prevention of possible injustice required procedural protection.[43]

Before suspensions of up to ten days a student must now be given oral or written notice of the charges against him and, if he denies them, an explanation of such charges and the evidence supporting them, with the opportunity to present his version of the incident.[44] The Court specified that the notice and hearing should generally precede removal from school, since the hearing should immediately follow the misconduct.[45] But when prior notice and hearing are not possible, the Court indicated that the necessary notice and hearing could then follow any disciplinary action.[46]

The right to a prior hearing in the school context is qualified by important practical considerations. The bare right to an informal hearing is of little practical significance in guaranteeing fundamental fairness when that decision remains substantially one-sided and within the absolute discretion of the school officials.[47] Prior discussion of the facts could easily become a mere formality instead of the intended meaningful communication between the administrator and the student.

*Goss* requires only the minimum procedural safeguards of notice and prior hearing before suspension may be imposed.[48] In light of the importance of education to the student and the possibility of injustice

42. *Id.*

43. *Id.* The short suspension as an education or disciplinary tool is often abused, administered arbitrarily, and applied racially disproportionately. *See generally* DEP'T OF HEW, THE SYSTEMATIC EXCLUSION OF CHILDREN FROM SCHOOL 15 (J. Regal ed. 1971); OFFICE FOR CIVIL RIGHTS OF DEP'T OF HEW, NATIONAL SURVEY OF PUBLIC ELEMENTARY & SECONDARY SCHOOLS (1973); TASK FORCE ON CHILDREN OUT OF SCHOOL, THE WAY WE GO TO SCHOOL (1971).

44. 419 U.S. at 581.

45. *Id.* at 581-82.

46. *Id.* at 582. Summary suspension may be necessary when a student's presence poses a continuing danger to persons or property or threatens to disrupt the academic process. *Id.*

47. *Goss* required only oral or written notice, an explanation of the charges and evidence, and the opportunity to the student to present his own version of the facts. The abstract requirement of notice and informal hearing is in practice an uncertain standard, so amorphous as to be almost meaningless in terms of establishing definite administrative guidelines. Nolte, *School Boards*, AM. SCHOOL BD. J. 33 (April 1975).

The requirement of an adequate hearing represents only the minimum degree of interference with school administration. The disciplinary decision remains within administrative discretion. *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059-60 (1969); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1151 (1968).

48. 419 U.S. at 582-83.

and harm imposed as a result of summary discipline, the student arguably should be afforded additional safeguards.[49] The rudimentary hearing requirement alone may be ineffective without the right to the assistance of counsel, especially in light of the inexperience of the student and the probable unfamiliarity of the parents with the disciplinary process.[50] The Court explicitly warned that more severe disciplinary sanctions, such as expulsions and long suspensions, would warrant greater procedural protection, including the right to secure counsel, to cross-examine witnesses, and to administrative or judicial review.[51]

The importance of *Goss* is not limited to the formality or informality of the procedures required to satisfy due process, but includes the fact that due process protection was found applicable to any exclusion from public school.[52] *Goss* extends the mandate of *Dixon v. Alabama State Board of Education* from due process protection of state college stu-

49. These additional procedures, while not absolute constitutional requirements, could be required to satisfy the due process standard of fairness, depending upon the facts of a particular case. The additional procedures could include: the right to counsel, the right to an impartial tribunal, the right to develop a record, and the right to judicial review. *See generally* Abbott, *supra* note 38, at 396-400; Buss, *supra* note 38, at 600-36.

50. There are strong parallels between school discipline and the juvenile justice system: desire on the part of administrators to avoid adversary judicial procedures, need for flexibility and discretion in administration, the common aim of protecting and providing for the best interest of the minor. Recent cases have, however, significantly expanded the procedural safeguards in juvenile proceedings. *E.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967). *See generally* Gyory, *The Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201 (1971).

51. 419 U.S. at 582-83.

52. *Id.* at 581. Since 1961 the courts have become more involved and more critical of the disciplinary procedures of public schools. In general, this increased judicial intervention reflects a certain skepticism about the effectiveness of education that involves not just the courts but parents, students and educators as well. This new critical sensitivity to education as a system within an administrative framework in addition to existing judicial involvement in matters of racial discrimination has contributed to the development of student rights. *See generally* Beaney, *Students, Higher Education, & the Law*, 45 DENVER L.J. 511 (1968); Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970).

The development of procedural protection for students is best illustrated by the evolving case law: Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (notice and hearing required before expulsion of public university student); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (notice and hearing required before long suspensions from state college); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (notice and hearing required before additional 30-day suspension from public high school); Givens v. Poe, 436 F. Supp. 202 (W.D.N.C. 1972) (all suspensions require notice and hearing; this court was particularly concerned with the abuse of consecutive short suspensions that in effect exclude the student from school for long periods without any kind of hearing).

dents facing expulsion to public high school students facing temporary suspensions. To the dissent, however, *Goss* represented an unnecessary expansion of procedural due process[53] and a dangerous departure from the traditional limited role of the judiciary in the supervision of public education: "[the Court's] indiscriminate reliance upon the judiciary and the adversary process as the means of resolving many of the most routine problems arising in the classroom" is an "unprecedented intrusion into the process of elementary and secondary education [by the federal courts]."[54]

A certain tension remains between what the Constitution seems to demand of school authorities, what the courts are willing to actively enforce, and what the administrators are willing to implement in the daily operation of public schools.[55] Despite the protections of *Goss*, it remains possible for a student to be temporarily deprived of a public education for relatively minor offenses.[56]

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53. 419 U.S. at 588-96 (Powell, J., dissenting). The dissent asserted that the Court's "constitutionalization of routine classroom decisions" disregards the basic structure of Ohio law, represents an inappropriate extension of due process protection, ignores the special need for discipline and order in public schools, misapprehends the reality of the teacher-pupil relationship, and refuses to recognize those traditional differences between the rights and duties of adults and those of children. In addition, the dissent stated that the Court's notice and hearing requirements do not provide significantly more protection than that already available under the statute. *Id.*

54. *Id.* at 594, 597-99 (Powell, J., dissenting). The dissent was apprehensive that the Court's recognition of the protected interest in education will result in judicial review of purely educational, discretionary decisions which are beyond the expertise of judges. The dissent warned that the Court must distinguish "between the discretionary decision to suspend and the type of discretionary decisions [which relate to grading, promotion, tracking etc.] or the federal courts should prepare themselves for a vast new role in society." *Id.* An example of such a new role would be the capacity of federal judges, in certain circumstances, to become, in effect, school administrators.

55. Before *Goss* courts had varied on the length of the suspension necessary for the application of procedural due process protection. *Compare* Black Students of N. Ft. Myers Jr.-Sr. High School v. Williams, 317 F. Supp. 1211 (M.D. Fla. 1970), *aff'd*, 470 F.2d 957 (5th Cir. 1972) (10-day suspension), *with* Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972) (all suspensions). *Compare* Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972) (possible due process problems in connection with suspensions of even a few hours), *with* Hernandez v. School Dist. No. 1, 315 F. Supp. 289 (D. Colo. 1970) (due process inapplicable to 25-day suspension). *Compare* Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973) (initial deprivation of due process cured by subsequent adequate hearing), *with* Pervis v. LaMarque Independent School Dist., 328 F. Supp. 638 (S.D. Tex. 1971), *rev'd*, 466 F.2d 1054 (5th Cir. 1972) (initial deprivation of due process is not curable by subsequent adequate hearing).

56. Substantive reform of school codes is essential. *See* Wright, *supra* note 47, at 1060. Exclusions for disciplinary reasons are not usually considered by courts to be in any way

In principle *Goss* can be expanded to provide due process protection for non-exclusionary forms of disciplinary action, such as corporal punishment,[57] withdrawal of school privileges and activities,[58] and intra-district disciplinary transfers.[59] *Goss* may also provide the basis for judicial intervention into purely academic areas, traditionally within the absolute discretion of teachers and administrators.[60] The recognition of public education as a protected property right may stimulate a

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inconsistent with compulsory attendance laws. *See, e.g.*, Betts v. Board of Educ., 466 F.2d 629, 634 (7th Cir. 1972); Linwood v. Board of Educ., 463 F.2d 763, 767 n.5 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217, 1226 (E.D. Mich. 1970). *See generally* Cole, *Expulsion and Long-Term Suspension: Is It Legal?*, 4 J.L. & EDUC. 325 (1975) (questions exclusion from school for discipline problems and the difficulty of developing procedures for readmittance).

Several cases have recently considered the problem of exclusion from school of mentally retarded and behavior problem children and imposed strict procedural safeguards to prevent or minimize such exclusion. *See, e.g.*, Dunlap v. Charlotte-Mecklenburg Bd. of Educ., 367 F. Supp. 666 (W.D.N.C. 1973), *vacated*, 417 U.S. 963 (1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

57. *See* Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975) (required procedural protection of student before corporal punishment administered). It is unsettled whether the eighth amendment (which prohibits cruel and unusual punishment) is applicable to the corporal punishment of school students. *Compare* Gonyaw v. Gray, 361 F. Supp. 366, 368 (D. Vt. 1973) (inapplicable), *with* Ingraham v. Wright, 498 F.2d 248, 259 n.20 (5th Cir. 1974) *and* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (applicable).

58. *E.g.*, Scott v. Alabama State Bd. of Educ., 300 F. Supp. 163 (M.D. Ala. 1969) (suspensions plus withholding of campus jobs and opportunity to participate in practice-teaching program open to other students); Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485, 492 (M.D. Tenn. 1968) (suspension of basketball team from interscholastic competition with possible serious effect on future education and employment of talented player).

59. *See generally* Kirp, *Schools as Sorters: The Constitutional & Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

60. Those academic administrative decisions which consider grading and testing, admissions or graduation criteria, or curriculum have been traditionally beyond the scope of review by the courts. *See, e.g.*, Wright v. Texas S. Univ., 392 F.2d 728 (5th Cir. 1968) (no deprivation of constitutional right to deny admission to university student who is scholastically ineligible for readmission); Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965) (dismissal of medical student for scholastic deficiency); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489 (1968) (dismissal of medical student for poor grades as matter of discretion, not ordinarily open to judicial review); Wong v. University of Calif., 15 Cal. App. 3d 823, 93 Cal. Rptr. 502 (Dist. Ct. App. 1971) (medical school admission). *But see* Greenhill v. Bailey, 378 F. Supp. 632 (S.D. Iowa 1974), *rev'd*, 519 F.2d 5 (8th Cir. 1975) (judicial review of medical grades and evaluation; damaging general evaluation of intellectual capability of medical student with poor grades); Woody v. Burns, 188 So. 2d 56 (Fla. Ct. App. 1966) (disciplinary action reversed when based upon refusal to take course required by dean).

reexamination of more controversial aspects of public education, including in-school grouping or tracking[61] and de facto racial[62] and economic discrimination.[63]

*Marilyn J. Tanaka*

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61. *See* Kirp, *supra* note 59. If due process protection extends to short suspensions from school, the classification of students on the basis of testing (tracking or ability grouping) could also be challenged on due process grounds. Tracking arguably involves a greater deprivation of education than does a short suspension. Tracking is a long-duration decision which affects the student significantly, is typically very visible, involves the imposition of "stigma," is open to misclassification mistakes, and is usually not a matter open to questioning or challenge by the parents or student. While suspension is temporary, though psychologically serious, tracking, which is no less psychologically damaging, can result in a prolonged period of inferior education. *See generally* Sorgen, *Testing and Tracking in Public Schools*, 24 HASTINGS L.J. 1129 (1973).

62. *E.g.*, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Calif. 1972); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (invalidation of tracking system; racial discrimination).

63. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).