Volume 20 | Issue 4 Article 6

1975

Constitutional Law - Procedural Due Process - State Statute Authorizing Suspension of Public Secondary School Students for Up to 10 Days without a Prior Hearing Held Violative of Fourteenth Amendment Due Process of Law

James J. Rohn

CONSTITUTIONAL LAW — PROCEDURAL DUE PROCESS — STATE STATUTE AUTHORIZING SUSPENSION OF PUBLIC SECONDARY SCHOOL STUDENTS FOR UP TO 10 DAYS WITHOUT A PRIOR HEARING HELD VIOLATIVE OF FOURTEENTH AMENDMENT DUE PROCESS OF LAW.

Goss v. Lopez (U.S. 1975)

Nine junior and senior public high school students[1] brought an action under the Civil Rights Act of 1871,[2] seeking a declaration that an Ohio statute denied them due process of law[3] in that they were temporarily suspended from their respective schools without a hearing, either prior to suspension or within a reasonable time thereafter.[4] The statute authorized an Ohio public school principal to summarily suspend pupils for up to 10 days for misconduct and required written notice to parents within 24 hours thereafter, accompanied by reasons for the action.[5] The United States District Court for the Southern District of Ohio[6] held the statute unconstitutional due to its failure to provide for a hearing "prior to suspension or within a reasonable time thereafter,"[7] and ordered plaintiffs' suspensions expunged from their school records.[8] The United States Supreme Court affirmed, *holding* that, since Ohio had extended the right to a public

---

1. Goss v. Lopez, 419 U.S. 565, 568 (1975). The plaintiffs brought a class action on behalf of all Columbus, Ohio, public school students suspended during or subsequent to February, 1971. *Id.* at 569 n.3.

2. 42 U.S.C. § 1983 (1970). This section provides in pertinent part:

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

Id.

3. The fourteenth amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV.

4. 419 U.S. at 568–69. The plaintiffs also sought to enjoin future suspensions by school officials and to have past suspensions expunged from students' records. *Id.*

5. OHIO REV. CODE ANN. § 3313.66 (Page 1972). This section provides in pertinent part:

> [T]he principal of a public school may suspend a pupil from school for not more than ten days. . . . Such . . . principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child . . . in writing of such . . . suspension including the reasons therefor.

Id. This section also provides for expulsion, but in that case, unlike a suspension proceeding, the pupil or parents have an opportunity to be heard on appeal to the local Board of Education. *Id. See* 419 U.S. at 567.

6. A three-judge court was convened pursuant to 28 U.S.C. § 2281 (1970).

7. Lopez v. Williams, 372 F. Supp. 1279, 1302 (S.D. Ohio 1973) (footnote omitted). The district court permitted school administrators "to adopt regulations providing for fair procedures which are consonant with the educational goals of their schools and reflective of the characteristics of their school and locality." *Id.* At the same time, those procedures minimally required "notice and hearing prior to suspension, except in emergency situations . . . ." *Id.* at 1301.

8. *Id.* at 1302.

education to students generally, it would be an arbitrary deprivation of property and liberty to take away that right by a 10-day suspension unless there were compliance with due process requirements. The Court further determined that due process requires that the student receive oral or written notice of the charges[9] and if the student denies the charges, an explanation of the evidence which gave rise to the suspension, and an opportunity for the student to present his or her version of the facts. *Goss v. Lopez,* 419 U.S. 565 (1975).

Traditionally, public school administrators have been accorded wide discretion in disciplining students.[10] The historical basis for this discretion is the common law doctrine of *in loco parentis,*[11] whereby a school is deemed to assume the position of a parent in relation to its students. The basic rationale underlying this discretion is that if due process is not required when a parent disciplines an unruly child, then the action of a school official, when acting as a parent, should not be so circumscribed.[12] Other reasons advanced in support of this theory include the necessity of maintaining efficient school systems and of protecting the health, safety, morals and general welfare of the entire student population.[13]

In the last decade, however, courts have seriously questioned this presumed authority, and have struck down an assortment of rules and regulations which were held to impinge the due process rights of students.[14]

---

9. *See* note 47 *infra.*

10. *See* 58 A.L.R.2d 903 (1958) for a compilation of cases concerning the denial of rights to students in disciplinary actions.

11. This doctrine was originally set out as follows:

> [A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. BLACKSTONE, COMMENTARIES *453 (1897). *See generally* Buss, *Procedural Due Process For School Discipline: Probing The Constitutional Outline,* 119 U. PA. L. REV. 545, 559–62 (1971); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. PA. L. REV. 373, 377–84 (1969); Note, *Balancing* In Loco Parentis *and the Constitution: Defining the Limits of Authority Over Florida's Public High School Students,* 26 U. FLA. L. REV. 271 (1974).

12. Buss, *supra* note 11, at 559–60.

13. *See* Goldstein, *supra* note 11, at 377–87, for a discussion of the traditional reasons given for the wide discretion permitted school authorities in the discipline field.

14. *See* notes 18–28 and accompanying text *infra.* The courts, in particular, have begun to scrutinize regulations in the areas of hair length and search and seizure of students' lockers and persons. In justifying dress and grooming codes, school authorities generally argue that to regulate the length of hair is a means of promoting discipline, an academic atmosphere, and good citizenship. The students, on the other hand, argue that the length of one's hair involves personal freedom and discretion. The Supreme Court has not yet addressed this question, declining to review hair length decisions of the lower federal courts. *See, e.g.,* Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir.), *cert. denied,* 404 U.S. 979 (1971); Stevenson v. Board of Educ., 426 F.2d 1154 (9th Cir.), *cert. denied,* 400 U.S. 957 (1970); Ferrell

The leading case dealing with students' rights in general is *Tinker v. Des Moines Community School District,*[15] in which the United States Supreme Court held that school authorities were prohibited by the first and fourteenth amendments to the Constitution from suspending students for wearing black arm bands to protest the Government's policy in Southeast Asia.[16] The Court noted: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[17]

---

v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

Five circuit courts of appeal have held hair regulations valid on the basis that no constitutional right exists to wear one's hair at a certain length. *See* Zeller v. Donegal School Dist., 517 F.2d 600 (3d Cir. 1975); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972) (any such claim must be dismissed for failure to state a claim upon which relief can be granted); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972); King v. Saddleback Jr. College School Dist., 445 F.2d 932 (9th Cir.), *cert denied,* 404 U.S. 979 (1971); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971). Four circuits recognize such a right, but such recognition has been based upon varying theories. *See* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (deprivation of liberty); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) (deprivation of liberty); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (right to privacy and equal protection since regulations applied only to male students); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (deprivation of liberty); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969) (freedom of expression); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970) (equal protection). *See generally* Note, *A Dilemma in Public High Schools; School Board Authority v. The Constitutional Rights of Students to Wear Long Hair,* 33 LA. L. REV. 697 (1973); Note, *Constitutional Law — High School Authorities and the Long-Haired Student: In Quest of an Appropriate Analytical Framework,* 47 TUL. L. REV. 407 (1973).

Generally, students have not been afforded fourth amendment warrant protection by the courts. First, the courts have held that, since the school officials are acting in a private capacity, there is no state action. *See In re* Donaldson, 269 Cal. App. 2d 509, 511, 75 Cal. Rptr. 220, 221 (1969) (search of student locker by vice-principal); People v. Stewart, 63 Misc. 2d 601, 604, 313 N.Y.S.2d 253, 256–57 (Crim. Ct. 1970). Second, state action does not exist because the searching authority is acting *in loco parentis. See In re* Fred C., 26 Cal. App. 3d 320, 324–25, 102 Cal. Rptr. 682, 684–85 (1972) (police officer who acted at request of vice-principal acts as an agent and therefore no state action); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970). Finally, students' voluntary consent has been recognized as a basis for holding that no warrant is required. *See* State v. Stein, 203 Kan. 638, 640, 456 P.2d 1, 3 (1969), *cert. denied,* 397 U.S. 947 (1970). *See generally* Buss, *The Fourth Amendment and Searches of Students in Public Schools,* 59 IOWA L. REV. 739 (1974), in which the author suggests that searches should only be allowed pursuant to a warrant, subject to the established exceptions. *Id.* at 790–91. *But see* Valente, *Student Discipline in Public Schools Under the Constitution,* 17 VILL. L. REV. 1028, 1041–45 (1972), for a suggestion that, because of the increasing use of drugs and crime in schools, the theory of *in loco parentis* may retain its vitality at least in the student search and seizure area.

15. 393 U.S. 503 (1969).

16. *Id.* at 513–14. The Court stated that expression of opinions would be protected as long as it did not "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

17. 393 U.S. at 506. The Court went on to state:

> In our system, state-operated schools may not be enclaves of totalitarianism. *School officials do not possess absolute authority over their students.* Students in school as well as out of school are "persons" under our Constitution. They are

As to the specific constitutional right to some form of hearing prior to or immediately following suspension or expulsion from school, the Court of Appeals for the Fifth Circuit in *Dixon v. Alabama State Board of Education,*[18] paved the way for the recognition of such a right. In *Dixon,* six students were expelled from a tax-supported college for alleged misconduct involving a sit-in demonstration at a publicly owned lunch grill.[19] The court held that, in order for a student to be expelled from school, minimum requirements of due process[20] must be complied with, including notice and an opportunity for the student to present to the school authorities a defense against the charges.[21] Since *Dixon,* the lower federal courts have uniformly determined that due process is required where a student is expelled by a publicly supported educational institution, at either the college[22] or high school levels.[23]

---

possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Id. at 511 (emphasis added). Although the *Tinker* opinion appears on its face to be susceptible to broad application, it should be noted that the case involved what the Court termed "First Amendment rights akin to 'pure speech,'" and not grooming codes, or disruptive behavior. *Id.* at 507–08.

For an excellent discussion of *Tinker* and its implications, *see* Valente, *supra* note 14, at 1028–51, wherein the author suggests that *Tinker* does not require "the same vigorous limitations in all areas of education management as were imposed with respect to free speech activities." *Id.* at 1050. *But see* Goldstein, *Reflections On Developing Trends in the Law of Student Rights,* 118 U. PA. L. REV. 612 (1970), in which it is stated that the import of *Tinker* is to put the burden on a school administrator to justify a regulation, not by conjecture, but by some basis in reality. *Id.* at 617. *See also* Buss, *supra* note 11, at 554–56; Denno, *Mary Beth Tinker Takes the Constitution to School,* 38 FORDHAM L. REV. 35 (1969); Haskell, *Student Expression in the Public Schools:* Tinker *Distinguished,* 59 GEO. L.J. 37 (1970).

18. 394 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

19. 294 F.2d at 152 n.3.

20. In finding that expulsion amounted to a deprivation of fourteenth amendment rights, the Court noted that education is basic to a civilized society and, without it, young people would be deprived of an adequate livelihood and the fullest enjoyment of life itself. *Id.* at 157.

21. *Id.* at 159.

22. *See* Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972) (West Point cadet separated from the Academy and placed on active duty due to excess demerits must be given prior hearing); Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970) (hearing required prior to two-term suspension); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (hearing required before separation from merchant marine academy). Due process must also be complied with if the school's action is defined as an interim suspension pending expulsion. *See* Buck v. Carter, 308 F. Supp. 1246, 1248–49 (W.D. Wis. 1970); Striklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed,* 420 F.2d 1257 (7th Cir. 1970). *See* notes 73–75 and accompanying text *infra,* for a discussion of the different procedural elements which may be due in a long-term suspension or expulsion proceeding at the college level. *See generally* Van Alstyne, *Procedural Due Process and State University Students,* 10 U.C.L.A.L. REV. 368 (1963); Wright, *The Constitution on the Campus,* 22 VAND. L. REV. 1027, 1059–82 (1969).

23. *See* Fielder v. Board of Educ., 346 F. Supp. 722, 729 (D. Neb. 1972) (no hearing given until 30 days after expulsion); DeJesus v. Penberthy, 344 F. Supp. 70, 74 (D. Conn. 1972) (expulsion without prior hearing for hitting fellow student); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969) (expulsion without prior

In contrast to the unanimity of decision with regard to expulsion, the lower federal courts, prior to *Goss,* had been sharply divided on whether due process is required when a school acts to suspend a student.[24] Several courts[25] have held that substantial procedural protection is required,[26] ranging from notice and a *Dixon*-type hearing[27] to a more complete hearing including rights to confrontation, cross-examination, and counsel.[28] Other courts, although finding that due process was necessary, required such minimal procedures as to afford the student little or no protection.[29] Only one court has determined that suspension proceedings did not raise due process issues.[30] Against the background of conflicting lower court opinions, Justice White, writing for the majority in *Goss,*[31] stated that, where there was a conflict between the school authorities' desire to be free from notice and hearing requirements in maintaining discipline, and the students' rights to be free from arbitrary exclusion from public school, the latter was entitled to greater weight.[32] Thus, the Supreme Court held

---

hearing for possession of obscene literature). *See* notes 73–75 and accompanying text *infra* for a discussion of what process is due in expulsion proceedings at the high school level.

24. 419 U.S. at 576–78 n.8.

25. *E.g.,* Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied,* 414 U.S. 1032 (1973); Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972).

26. The cases generally focused on the harm that can result to the student if wrongfully or mistakenly removed from school. *See, e.g.,* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 (5th Cir. 1972).

27. *See* text accompanying note 18 *supra. See also* Tate v. Board of Educ., 453 F.2d 975, 979 (8th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 603 (D.N.H. 1973), *vacated and remanded,* 502 F.2d 1159 (1st Cir. 1974).

28. *See* Mills v. Board of Educ., 348 F. Supp. 866, 882–83 (D.D.C. 1972).

29. *See, e.g.,* Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309 (C.D. Cal. 1970), *rev'd on other grounds,* 452 F.2d 673 (9th Cir. 1971) (school principal's uncontested affidavit sufficient for due process purposes); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) (informal discussion with parents sufficient). The courts in these cases were typically concerned with the problem, in the face of a due process hearing, of maintaining "the discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards . . . ." *Id.* at 523.

30. Hernandez v. School Dist. Number One, 315 F. Supp. 289 (D. Colo. 1970) Other courts have held that due process does not apply to "brief" suspensions. *E.g.,* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973) (six-day to six-week suspensions too brief to require prior hearing).

For discussions of the disciplinary aspects of our high school systems, *see* Buss, *supra* note 11, at 589–641; Hudgins, *The Discipline of Secondary School Students and Procedural Due Process: A Standard,* 7 WAKE FOR. L. REV. 32 (1970); Valente, *supra* note 14; *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045, 1134–43 (1968) [hereinafter cited as *Developments*]; Note, *Constitutional Rights of High School Students,* 23 DRAKE L. REV. 403, 409–14 (1974); Comment, *The Procedural Rights of Public School Children in Suspension-Placement Proceedings,* 41 TEMP. L.Q. 349 (1968); Note, *supra* note 11.

31. The opinion of the Court was joined by Justices Douglas, Brennan, Stewart, and Marshall. 419 U.S. at 566.

32. 419 U.S. 580–81.

that the protections of the due process clause extend to all suspensions of 10 days or less.[33]

The Court began its analysis by positing that the fourteenth amendment forbids state deprivation of a person's life, liberty, or property without due process of law, and that in this case two of those protected rights, property and liberty, had been transgressed. With regard to the deprivation of property, the Court stated that most property interests, such as the rights of state employees,[34] welfare recipients,[35] and parolees,[36] are created by state statutes and regulations.[37] In this case, the State of Ohio had undertaken to provide a free education to all residents who were between 6 and 21 years of age.[38] Therefore, in Justice White's words: "Having chosen to extend the right to an education to [the students'] class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the mis-

---

33. *Id.* at 581. As to the specific procedures required, the Court stated:

> [T]he student [must] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Id.

34. *Id.* at 573, *citing* Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring), *and id.* at 171 (White, J., concurring and dissenting) (statutory removal procedures for nonprobationary federal employees held valid), *and* Connell v. Higginbotham, 403 U.S. 207 (1971); *and* Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952) (dismissal of teachers for failure to take loyalty oath held invalid).

35. 419 U.S. at 573, *citing* Goldberg v. Kelly, 397 U.S. 254 (1970). The Court in *Goldberg* stated that in order to terminate welfare assistance rudimentary due process must be complied with, including an opportunity to confront and cross-examine adverse witnesses and to retain an attorney if so desired. 397 U.S. at 267–71.

36. 419 U.S. at 573, *citing* Morrissey v. Brewer, 408 U.S. 471 (1972) (hearing required before parole revocation). Recently, the Court in Wolff v. McDonnell, 418 U.S. 539 (1974), distinguished the *Morrissey* facts from a situation involving cancellation of prison good-time credits. The majority in *Wolff* stated that because of the need for security in the prisons, a *Goldberg*-type hearing would not be required, but only written notice of the violation and reasons for the disciplinary action. The Court further stated that confrontation and cross-examination need not be allowed, and the right to present one's own witnesses is within the discretion of prison officials. *Id.* at 563–72. *See* note 35 *supra.*

37. 419 U.S. at 572–73, *citing* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). It should be noted that in *Roth*, a nontenured college teacher was found to have no property interest in reemployment following the expiration of his one-year contract. *Id.* at 578.

38. *See* OHIO REV. CODE ANN. § 3313.64 (Page 1972). However, in addition to affording a right of free education, the same statute permitted school principals to suspend students for up to 2 of the compulsory 32 weeks attendance per year, with each of the schools authorized to structure its own rules with respect to expulsion or suspension. *Id.* § 3321.04. *See* note 5 and accompanying text *supra.* These sections form the basis of a key distinction between the majority and dissenting opinions in *Goss* in that on its face, the students' property interest or expectation was limited to only 30 weeks. *See* notes 53–56 and accompanying text *infra.* Justice White interpreted this suspension section as merely procedural, concluding that the due process clause, and not the statute, controls what procedures are due. 419 U.S. at 573–74. *But see* Arnett v. Kennedy, 416 U.S. 134 (1974), in which Justice Rehnquist, in a plurality opinion, suggested that a statute which established property rights could also establish the law/process standards by which those property rights could be terminated. *Id.* at 155.

conduct has occurred."[39] In other words, the State may delegate to schools the authority to proscribe certain defined conduct, but such a proscription must operate within the parameters of due process.

With regard to the deprivation of liberty, the Court noted that " '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the [school official] is doing to him,' "[40] there must be compliance with the minimum requirements of the due process clause. Specifically, it was noted that suspensions for up to 10 days could affect students' liberty in various ways, including damaging their relations with fellow students and teachers, diminishing their opportunity for potential employment, and putting a blot on their high school transcripts which could result in possible rejection from undergraduate institutions.[41]

After noting that a de minimis loss will not result in an unconstitutional deprivation of property, the Court stated that a 10-day suspension is not so slight a loss as to be imposed without due process.[42] The Court concluded that, because of the important role that education performs in our society and the deleterious effect a suspension has on a student's life, the loss of the property or liberty right was not so insubstantial as to permit its deprivation by the state through summary procedures.[43]

Having determined that the suspension procedures in question violated both the liberty and property aspects of the due process clause, the Court noted the delicate balancing process which it had to undertake in deciding what process was constitutionally mandated. No doubt, control of the day-to-day function of the nation's school systems must be vested in state and local authorities. However, the Court recognized that the school systems do not operate in a vacuum; therefore minimum due process must be met, and that minimum necessitates an adjudication " 'preceded by notice and opportunity for hearing appropriate to the nature of the case.' "[44] The Court observed that a determination of the exact timing and nature of the notice and hearing required, depended upon the opposing interests involved.[45] Obviously, the interests to be considered include the right of a student not to be arbitrarily or mistakenly excluded from public school on the one hand, and the state's interest in maintaining order and discipline in its schools on the other.[46] It is submitted that the Court's opinion satisfied both of these competing interests without severly impairing either

39. 419 U.S. at 574.

40. *Id.*, *quoting* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

41. 419 U.S. at 575. For an expanded discussion of stigmatizing effects that a suspension may have on a student's future life, *see* Buss, *supra* note 11, at 548–49, 575–77; Van Alstyne, *supra* note 22, at 375; *Developments*, *supra* note 30, at 1137.

42. 419 U.S. at 576.

43. *Id.*

44. *Id.* at 579, *quoting* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

45. 419 U.S. at 579–80, *citing* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

46. 419 U.S. at 580.

one. This was accomplished by requiring notice prior to suspension,[47] and if the charge is denied, an explanation of the charge and an opportunity for the student to present his side of the story.[48] In effect, these requirements are nothing more and are probably "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[49] The Court concluded that to further formalize the hearing requirements in connection with short suspensions, might overwhelm administrative facilities, and thus "cost more than it would save in educational effectiveness."[50]

Mr. Justice Powell dissented,[51] and sharply questioned both the majority's reasoning and conclusions. He stated at the outset:

> The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline. . . . It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.[52]

Justice Powell initiated his attack on this new constitutional right by noting that, in the past, the Court had made clear that property interests existed by virtue of state law and that the dimensions of those rights are defined by that same law.[53] In the instant case, the Ohio statute that conferred the right to free education also authorized principals to suspend students for up to 10 days.[54] Therefore, Justice Powell viewed the statute as having established the interest in a free education qualified by a condition that disciplinary measures such as suspension and expulsion might

47. The Court quite correctly pointed out that, under certain circumstances, subsequent notice might be deemed sufficient, such as when a student poses danger to persons or property or substantially disrupts the academic atmosphere. *Id.* at 582.

48. *Id.* In connection with short suspensions, the Court stopped short of demanding that the student be afforded an opportunity to confront and cross-examine adverse witnesses, to call the student's own witnesses or to secure counsel. *Id. See* Mills v. Board of Educ., 348 F. Supp. 866, 882–83 (D.D.C. 1972), which was the only lower federal court decision to directly require the above-mentioned procedural elements and to the extent *Mills* is in conflict with *Goss,* it is now overruled, with possibly one exception. Justice White, at the conclusion of the majority opinion, noted that in an unusual situation involving a short suspension more formal procedures than those commanded by *Goss* might be required. 419 U.S. at 584. It is difficult to predict what would constitute such an unusual situation, but possibilities include where the next short suspension would push the student over the maximum demerit line, resulting in expulsion, or would cause the student to miss an examination where no makeup is available. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 n.4. The *Goss* Court also left open the question of whether longer suspensions or expulsions might require more formal procedures. *See* notes 70–77 and accompanying text *infra.*

49. 419 U.S. at 583.

50. *Id.*

51. *Id.* at 584–600 (Powell, J., dissenting). Justice Powell was joined in his dissenting opinion by Chief Justice Berger and Justices Blackmun and Rehnquist. *Id.*

52. *Id.* at 585.

53. *Id.* at 586.

54. *See* note 5 *supra.*

be imposed by a school principal. It is submitted, however, that the hearing requirements imposed by *Goss,* in no way infringe upon this qualification. The *Goss* procedures do not encroach upon a principal's authority to impose sanctions, nor do they read into Ohio law a requirement that suspensions may only be imposed for cause or some specific type of misconduct.[55] The hearing procedures merely prescribe the manner in which a principal may carry out disciplinary measures.[56]

Next, Justice Powell argued that, even if it were assumed that the students' rights involved rose to the level of property or liberty, the due process clause would still not apply. He reasoned that, because the deprivation had involved only routine disciplinary measures, it had "not assumed constitutional dimensions."[57] Specifically concerning the loss of a property right, Justice Powell denied that the test is based on a de minimis standard;[58] rather, it must be ascertained whether or not a *grievous* loss had been suffered.[59] He concluded that since an Ohio student could be suspended for only 5 percent of the normal school year, such a suspension would in no way inflict a grievous educational injury upon students.[60] Addressing the liberty aspect, Justice Powell concluded that a brief suspension did not sufficiently injure a student's reputation so as to require constitutional protection.[61]

---

55. 419 U.S. at 587 n.4 (Powell, J., dissenting). *See* note 38 *supra.*

56. *See* Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring), where Justice Powell took issue with the plurality's suggestion that the hearing procedures set forth by the granting statute would necessarily satisfy constitutional attack. Justice Powell stated that once a state confers the property right, then in order to take it away, statutory procedures must comply with constitutional standards. *Id.* at 166–67.

57. 419 U.S. at 587.

58. *Id.* at 588 n.5. Justice Powell claimed that the de minimis rationale had only been utilized when the competing parties claimed an interest in the same property and not where it pertained to a property interest conferred by the state. *See* Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972) (summary seizure of goods or chattels under a writ of replevin); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (prejudgment garnishment of wages). Justice Powell did not indicate why the test should change depending on the source of the right.

59. 419 U.S. at 588. *See* Morrissey v. Brewer, 408 U.S. 471, 481–82 (1972).

60. 419 U.S. at 589.

61. *Id.* at 589, 598–99 n.19 and 748 n.19. Justice Powell compared the instant case to the Court's earlier decision in Board of Regents v. Roth, 408 U.S. 564 (1972), in which the Court found that a failure to renew the contract of a nontenured teacher did not sufficiently damage the teacher's reputation so as to be a deprivation of liberty. *Id.* at 573. It is submitted, however, that the nonrenewal of a contract and student suspensions are distinguishable. The latter, on its face, necessarily implies some wrongdoing on a student's part, whereas in the renewal situation legitimate explanations readily come to mind, *e.g.,* lack of funds, staff cutbacks, etc. Obviously, though, what is one man's deprivation is another's approbation. In Justice Powell's words:

> For the average, normal child — the vast majority — suspension for a few days is simply *not* a detriment; it is a commonplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

419 U.S. at 598–99 n.19 (emphasis by the Court). *Compare* this view *with* note 41 and accompanying text *supra.*

Justice Powell then focused upon the policy reasons that traditionally have been advanced to support the notion that students shed most of their constitutional rights at the schoolhouse gate.[62] The broadest reason, of course, has been that school authorities must be given a free hand, unconstrained by the requirements of due process, in order to maintain the smooth functioning of the educational system.[63] The dissent maintained that, unlike the majority of due process cases where conflicting interests are involved, the interests in *Goss* were substantially congruent; *e.g.*, disciplinary functions benefit all of the students, the school authorities, and the public in general.[64] Furthermore, Justice Powell stated that because of the declining role of the family and church in shaping the character of our nation's children, the schools must accept more responsibility in training the youth of America to be good citizens, and that discipline is an integral part of that training.[65] Since this training has been carried on for years in a nonadversary manner by teachers who act as "educator, adviser, friend and, at times, parent-substitute,"[66] Justice Powell felt that any judicially imposed procedure could only lead to a formalization and stultification of that relationship. Finally, the dissent concluded that the procedures which Ohio law provided adequately safeguarded the students against possible mistaken suspensions.[67]

It is readily apparent that the Supreme Court is sharply divided on the question of what are the constitutional parameters regarding the rights of students. There is, on the one hand, a great deference to the exercise of school administrative authority and, on the other, a belief in the prin-

62. Prior to *Goss*, the Supreme Court had recognized freedom of expression as the only right constitutionally protected within the schoolhouse and even in *Tinker*, Justice Stewart noted that first amendment rights of children are not "co-extensive with those of adults." 393 U.S. at 515 (Stewart, J., concurring).

63. 419 U.S. at 589–90, *citing* Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969).

64. 419 U.S. at 591. Justice Powell observed that at least 10 percent of all junior and senior high school students were suspended one or more times in the 1972–73 school year. He thus implied that to give hearings to each student would leave school authorities little time to perform their normal duties. *Id.* at 592 n.10. It is submitted that the type of hearing required by *Goss* would be neither time-consuming nor oppressive for a school administrator, as it merely requires an explanation for the proposed action about to be taken. In addition, a majority of the largest school systems in the country feel that both their state law and local rules already comply with the mandate of *Goss*. *See* N.Y. Times, Jan. 27, 1975, at 17, cols. 1–8.

65. 419 U.S. at 593. *But see* Buss, *supra* note 14, at 792, where the author suggests that in order for students to understand and respect justice, justice must be applied equally to them.

66. 419 U.S. at 594 (footnote omitted). Justice Powell pointed to other due process cases where the interests involved were directly in conflict. *Id.* at 594 n.13, *citing* Morrissey v. Brewer, 408 U.S. 471 (1972) (parole officer and parolee); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare administrator and recipient); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (debtor and creditor). Admittedly, the relationship between teacher or school administrator and pupil is not quite as adverse as the examples cited in the dissent, but it is submitted that when a teacher or administrator threatens a student with suspension or expulsion, the relationship immediately *becomes* adverse.

67. 419 U.S. at 593. *See* note 5 and accompanying text *supra*.

ciple of individual rights, including those of students.[68] Since the bare majority of the Court accepted the latter proposition in the context of a suspension for 10 days or less, it is important to consider the impact of *Goss* in two areas: what process may be due for longer suspensions or expulsions; and whether due process requirements will be held applicable to other spheres of educational decisionmaking, such as grading, exclusion from extracurricular activities, and reassignment from a normal to a special classroom.[69]

First, in dealing with suspension longer than 10 days and with expulsions, lower federal court decisions must be looked to for guidance, since the Supreme Court has expressly left the question open.[70] Some courts have limited the nature of the hearing to the same procedural requirement mandated by *Goss,* namely, notice prior to expulsion, explanation of the charges, and opportunity for the student to be heard.[71] Other courts, however, have indicated that because of the harsh consequences which exclusion from the educational process imposes, something more than what is now required by *Goss*[72] would be necessary. Those additional safeguards include the right to present testimony and witnesses in a student's own defense,[73] a right to confrontation and cross-examination,[74] and in some cases, even the right to counsel.[75] At first glance, such requirements may appear to be unduly oppressive upon the educational system. Yet when the serious effect an expulsion may have on a student's opportunities for future education and employment,[76] are considered it is obvious that expulsion may result in a greater loss to the student than would result from a brief suspension. It is submitted, therefore, that, as the

---

68. *See* N.Y. Times, Jan. 27, 1975, at 24, col. 2.

69. *See* 419 U.S. at 597 (Powell, J., dissenting).

70. *See* note 48 *supra. See* Wood v. Strickland, 420 U.S. 308, 323, 327 (1975). However, the Court has intimated that due process is required in school expulsions. *Id.* at 323 n.15.

71. *See, e.g.,* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); Buck v. Carter, 308 F. Supp. 1246, 1248–50 (W.D. Wis. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1392–93 (E.D. Mich. 1969).

72. *See* text accompanying notes 47 & 48 *supra.*

73. *See* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972).

74. *See* Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972); DeJesus v. Penberthy, 344 F. Supp. 70, 75–76 (D. Conn. 1972) (cross-examination permitted unless it inhibits the search for truth).

75. *See* Sullivan v. Houston Indep. School Dist., 475 F.2d 1071, 1074 (5th Cir.), *cert. denied,* 414 U.S. 1032 (1973); Mills v. Board of Educ., 348 F. Supp. 866, 882–83 (D.D.C. 1972); Fielder v. Board of Educ., 346 F. Supp. 722, 724 n.1 (D. Neb. 1972). Nearly all commentators agree that most or all of the above-mentioned procedures should be utilized in expulsion proceedings. *See* Buss, *supra* note 11, at 589–631 (hearings at the high school and college level); Hudgins, *supra* note 30, at 46–47 (hearings at the high school level); Van Alstyne, *supra* note 22, at 385–87 (hearings at the collegel level); Wright, *supra* note 22, at 1059–82 (hearings at the college level); *Developments, supra* note 30, at 1134–43.

76. *See* note 41 and accompanying text *supra.*

deprivation to be suffered by the student becomes more severe, more formal procedural safeguards than those required by *Goss* must be employed.[77]

Second, as to the extension of the *Goss* rationale into other spheres of school decisions, Justice Powell indicated that it was "apparent" that the Court will, in the future, require due process procedures to be complied with in contexts other than suspensions and expulsions.[78] He opined, however, that such a requirement would be unduly burdensome on the American public school system, and that the Court should have specified whether or not a rational distinction existed between disciplinary procedures and these other types of decisions.[79] The silence of the *Goss* majority on this issue may signify that their rationale in *Goss* may be applied to nondisciplinary decisions. It is submitted that such an extension of *Goss* is justifiable particularly in those situations where the balance of interests involved shifts more in favor of the student. For example, a student may suffer a greater deprivation from the loss of potential scholarship money as a result of an exclusion from interscholastic athletics[80] than from the loss of school time through suspension; or a student may be forever barred from a "normal" existence if he is mistakenly placed in a special education class.[81] Also, whatever interest the state may have had in disciplinary proceedings — usually the maintenance of order and the safety of teachers and pupils[82] — is diminished or completely disappears when the nature of the action to be taken does not involve the order of the school.

Finally, it is submitted that wide-ranging adoption of *Goss*-type procedures may result from the Court's recent decision in *Wood v. Strick-*

---

77. It appears from Justice Powell's dissent that he views long-term suspension and expulsion proceedings in the same light as short-term suspensions. He noted that expulsion was and is a traditional and routine method used to maintain discipline in the schools. 419 U.S. at 585 n.2, 593.

78. *Id.* at 599.

79. *Id.* at 597. *See* Wood v. Strickland, 420 U.S. 308, 329 n.3 (1975) (Powell, J., concurring in part and dissenting in part).

80. In Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970), the court stated that "the Constitution does not stop at the public school doors like a puppy waiting for his master, but instead it follows the student through the corridors, into the classroom, and *onto the athletic field.*" *Id.* at 417 (emphasis added). One author suggested that the withdrawal of the privileges of playing basketball could seriously hinder a talented athlete's prospect for entering college and obtaining gainful employment. *See* Buss, *supra* note 11, at 584–85. With regard to hearing requirements for failing grades that might lead to expulsion, *see Developments, supra* note 30, at 1137. *But see* Wright, *supra* note 22, at 1069.

81. For example, Pennsylvania has consented to allow a full due process hearing, when requested by the parents, whenever the child is to be reassigned from a normal to a special classroom. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree). The procedural elements to which Pennsylvania consented include notice, hearing, access to all records of the school district, right to cross-examination, and right to be represented by counsel. *Id.* at 303–06. *See also* Mills v. Board of Educ., 348 F. Supp. 866, 880–83 (D.D.C. 1972); Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554 (1973).

82. *See* text accompanying note 46 *supra.*