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Constitutional Law - Due Process - Suspended Students Guaranteed Notice and Opportunity to Be Heard

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CONSTITUTIONAL LAW—DUE PROCESS—SUSPENDED STUDENTS GUARANTEED NOTICE AND OPPORTUNITY TO BE HEARD

Nine Columbus, Ohio, high school students were suspended[1] for up to 10 days without a hearing pursuant to an Ohio statute.[2] These students subsequently brought a class action against the Columbus Board of Education and various administrators of the Columbus Public School System seeking a declaration that the Ohio statute was unconstitutional[3] and also an injunction ordering school officials to remove all record of the suspensions from the students' files. A three-judge district court[4] found that the Ohio statute violated the due process clause of the fourteenth amendment and ordered the suspensions expunged from the students' files.[5] On appeal, in a 5-4 decision the Supreme Court affirmed, *holding* that students faced with 10-day suspensions could not be deprived of their right to an education without notice and opportunity to be heard. *Goss v. Lopez*, 95 S. Ct. 729 (1975).

Historically, the educational setting has been protected from constitutional challenges, that protection being predicated on one of three theories. The first theory, *loco parentis*,[6] applies in all educational settings—elementary, secondary and college-level public schools, and private schools. Under this theory, a parent delegates his authority over the child to the school, thus enabling instructors and administrators to discipline students in whatever manner they

1. All nine students attended school within the Columbus, Ohio Public School System and were suspended in conjunction with a generally disruptive atmosphere present during February and March, 1971. Goss v. Lopez, 95 S. Ct. 729, 733-34 (1975).

2. OHIO REV. CODE ANN. § 3313.66 (1972) provides:
> The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester.

3. The asserted unconstitutionality was based on two grounds: 1) suspension without due process safeguards of notice and prior hearing violates the fourteenth amendment because it denies students an education, a public right, without due process of law; 2) the statute and accompanying regulations were vague and overbroad. Lopez v. Williams, 372 F. Supp. 1279, 1281 (S.D. Ohio 1973), *aff'd sub nom.* Goss v. Lopez, 95 S. Ct. 729 (1975).

4. Lopez v. Williams, 372 F. Supp. 1279, (S.D. Ohio 1973), *aff'd sub nom.* Goss v. Lopez, 95 S. Ct. 729 (1975).

5. The district court found no merit in the vagueness and overbreadth argument. *Id.* at 1303. The students have not appealed this part of the court's decision. Goss v. Lopez, 95 S. Ct. 733 n.3 (1975).

6. One who stands *in loco parentis* stands in the place of the parent. BLACK'S LAW DICTIONARY 986 (4th ed. rev. 1968).

deem necessary.[7] A second theory, maintained primarily in private schools and universities, is based on contract.[8] Under this theory, students often submit to waiver clauses contained in school bulletins and registration blanks, thereby surrendering some, if not all, of their constitutional rights.[9] The last theory advanced as rationale for minimal court intervention is that education is a revocable privilege that a student enjoys, rather than an absolute right that he or she may demand.[10]

In 1957 Professor Seavey wrote a blistering response to the present courts' policy of nonintervention.[11] Likening the school-student relationship to a fiduciary relationship,[12] he stated that the school is under a duty to fully explain the nature of any waiver clauses[13] and to disclose all charges and accompanying evidence against the student pending dismissal.[14] He further opined that:

> [I]t is shocking that the officials of a state educational institution, which can function properly only if our freedoms

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7. *See* RESTATEMENT (SECOND) OF TORTS § 152 (1965): "One who is charged only with the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only in so far as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor." This disciplinary privilege is limited in the private school setting to only as much of the parent's privilege as the parent chooses to delegate. No such limitation is placed upon the university or public school. *Id.* § 153.

8. The school allows a student to continue his studies and receive a degree in return for the student's reliance in money and time, conditioned upon the student's compliance with reasonable regulations. Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1369 n.30 (1963).

9. *Id.* at 1369. The following language as printed in college catalogs and on registration cards was held valid and binding upon the student:

> Attendance at the University is a privilege and not a right. In order to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its founding and maintenance, the University reserves the right and the student concedes to the University the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given. Anthony v. Syracuse Univ., 224 App. Div. 487, 489, 231 N.Y. Supp. 435, 438 (1928).

10. Board of Trustees v. Waugh, 105 Miss. 623, 633-34, 62 So. 827, 830-31 (1913) *aff'd*, 237 U.S. 589 (1915).

11. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406 (1957).

12. *Id.* at 1407 n.3.

> A fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students. One of the duties of the fiduciary is to make full disclosure of all relevant facts in any transaction between them. *See* RESTATEMENT, AGENCY § 390 (1933); RESTATEMENT, TRUSTS § 170 (1935). The dismissal of a student comes within this rule. *Id.* n.3.

13. Criticizing the validity of the waiver clause upheld in Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928), Seavey stated: "Bearing in mind that a university and its instructors are subject to fiduciary duties in dealing with their students, a university should at least be under a duty to explain to the student the sweeping nature of his waiver." Seavey, *supra* note 11, at 1409.

14. Seavey also criticized the dictum in Vermillion v. State *ex rel* Engelhardt, 78 Neb 107, 112-13, 110 N.W. 736, 738 (1907) by stating:

> The school committee could suspend a public-school student without a hearing, [and] the student could obtain mandamus ordering his reinstatement by proving that the action of the school was arbitrary, an impossible task without knowledge of the evidence against him.

Seavey, *supra* note 11, at 1408 (footnotes omitted).

> are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[15]

Prior to *Goss*, the Supreme Court had not formulated indentifiable standards for dealing with educational institutions. While remaining relatively inactive regarding the due process clause,[16] it occasionally acted to protect free speech.[17]

Recognizing the importance of education,[18] the Court has tried to maintain a balance between student rights and school authority. This resulted in a tipping of the scales in 1968 when the Court stated, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[19] The final pre-*Goss* statement concerning education came in *San Antonio Independent School District vs. Rodriguez*[20] where the court explained that education per se was not a constitutionally protected right.[21]

While the Supreme Court remained inactive, the lower federal courts took the front. *Dixon v. Alabama State Board of Education*[22] in 1961 was the first decision to hold that due process guarantees must be afforded to the student faced with expulsion.[23] This decision opened the floodgates; during the late sixties and early seventies, students rushed to the courts. Within that period, the courts universally granted procedural protection in the case of expulsion,[24] but remained well-divided concerning lesser penalties, particularly suspensions of 10 days or less.[25] The Fifth Circuit was blessed with the bulk of the load; highly exemplary of the nationwide trend,

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15. Seavey, *supra* note 11, at 1407.

16. Early cases asserted a conditional, rather than an absolute, right to attend a university. Waugh v. Bd. of Trustees, 237 U.S. 589 (1915) (a university regulation banning fraternities and their members from campus was held valid); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (student's right to attend university conditioned upon attendance at military classes).

17. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (free speech infringed when Jehovah's Witnesses were required to salute American flag); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (wearing armbands is type of symbolic act within free speech clause of first amendment). he The court in Tinker stated, "It can hardly be argued that either students or teachers shed their constitutional rights of speech or expression at the schoolhouse gate." *Id.* at 506.

18. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) where the court stated: "Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* at 493.

19. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

20. 411 U.S. 1 (1973).

21. *Id.* at 35.

22. 294 F.2d 150 (5th Cir. 1961) (Black students were expelled for sit-in participation).

23. *Id.* at 158-59. *Dixon* required: 1) notice of the charges; 2) fair hearing before expulsion (nature of hearing varying with the circumstances); 3) right to be heard in one's own defense. *Id.*

24. 95 S. Ct. at 737 n.8.

25. *Id.* at 737-38 n.8.

it, too, wavered from one position to the other when faced with short-term suspensions.[26] No logical line could be drawn; courts consistently differed as to what point on the suspension-expulsion scale that a deprivation of education became trivial.[27]

While the lower courts explored the advantages and disadvantages of judicial interposition of due process guarantees, rarely did these courts explore the actual basis for that clause's application. One might sum up the state of the law approaching *Goss* by quoting Charles Allan Wright,

> Although the underlying assumption of these opinions is that the student's important interests should not be arbitrarily denied by the state, the cases are less than lucid in reconciling the application of due process clause with the actual words of the amendment.[28]

Almost as if it was directly responding to Wright's criticism, the majority in *Goss* specificially applied due process clause language to the facts of the case. First, considering whether education may be termed a property interest, the Court pointed out that protected property interests are normally not created by the Constitution. " 'Rather they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits."[29] These property interests might otherwise be termed government largess;[30] those of most recent

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26. *Compare* Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973) (indefinite suspensions), *cert. denied* 414 U.S. 1032 (1973); Black Students of North Fort Myers Jr.-Sr. High School v. Williams, 470 F.2d 957 (5th Cir. 1972) (10-day suspension); Pervis v. LaMargue Indep. School Dist., 466 F.2d 1054 (5th Cir. 1972) (long suspensions); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 n.4 (5th Cir. 1972) (three-day suspension); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (the addition of a 30-day suspension to a 10-day suspension where the Fifth Circuit held the due process clause applicable) *with* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973) (all suspensions no matter how short); Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973) (suspensions of not more than a few days); Dunn v. Tyler Indep. School Dist., 460 F.2d 137 (5th Cir. 1972) (three-day suspension) where the Fifth Circuit held the due process clause inapplicable.

27. *See, e.g.*, Farrel v. Joel, 437 F.2d 160 (2nd Cir. 1971). The court stated: "Expulsion would be at one extreme. Near the end of the other might be a penalty of staying after school for one hour for 'unexcused tardiness to class or study hall' . . . . Of course, as one approaches the center of the two extremes of major and minor discipline, the line becomes shadowy, but the difficulty of drawing it does not eliminate the distinction between the two." *Id.* at 162.

28. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1135 (1968).

29. 95 S. Ct. at 735. Board of Regents v. Roth, 408 U.S. 564 (1972) first articulated this dimension theory. It further explained that to have a property interest in a benefit, one must have more than an abstract need or desire for it and more than a unilateral expectation of it. "He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

30. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich states three threshold questions: 1) when may the government revoke these governmentally-created interests; 2) when may the individual claim the entitlement as a matter of right; 3) what procedural protection must be afforded the individual before the benefit may be revoked *Id.* at 739.

Disagreeing with total government control over governmentally-created benefits, Reich further states: "Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. Like property, such largess could be governed by a

vintage are statutory entitlements.[31]

In *Goss* education was given a property interest status when Ohio statutorily extended that right to school children.[32] On that basis the court found that "Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[33]

The majority's discussion of the liberty interest was somewhat limited. The essence of their argument is that an injury to one's good name, honor and reputation is a deprivation of liberty that may not occur absent fundamentally fair procedures to determine whether that deprivation is warranted.[34] The students in *Goss* were suspended for misconduct. The Court stated that "[i]f sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[35]

The majority bypassed the problems that had confronted the lower courts regarding lesser suspensions.[36] In so doing the Court stated that as long as a deprivation is not *de minimis*,[37] the gravity of that deprivation is irrelevant.[38]

> [I]n determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." . . . [T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.[39]

Having determined that due process applies to suspension of 10 days or less, the Court turned to what process was due. Because discipline must be maintained in the nation's schools, the Court naturally felt hesitant in imposing rigorous standards upon a loosely-

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system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspnsion and revocation." *Id.* at 785.

31. *E.g.*, Wolff v. McDonald, 418 U.S 539 (1974) (a prisoner who has accumulated good-time credits under state law is entitled to procedural protection prior to official cancellation of those credits); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process applies to governmental decisions to revoke parole) Connel v. Higginbotham, 403 U.S. 207 (1971) (a substitute teacher must have a hearing or inquiry prior to summary dismissal for failure to sign a loyalty oath); Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural due process protections are afforded welfare recipients who have statutory rights to welfare).

32. OHIO REV. CODE ANN. §§ 3313.48-.64 (1972) provides for free education of all school age youths.

33. 95 S. Ct. at 736.

34. *Id.*

35. *Id.*

36. *See* cases cited notes 26, 27 and accompanying text *supra*.

37. 95 S. Ct. at 737. *But see* Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (serious damage); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (grievous loss); Bell v Burson, 402 U.S. 535, 539 (1971) (important interests); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (significant property interest); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (grievous loss).

38. 95 S. Ct. at 737.

39. *Id.*

structured system.[40] Therefore, they imposed no more than the bare minimum—notice and opportunity to be heard.[41] This requires

> that the student 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.[42]

Imposition of more stringent standards such as presence of counsel and confrontation of witnesses was not required.[43]

Writing for the dissent, Justice Powell disagreed with the majority on three basic issues: 1) the scope of governmentally-created property interests; 2) the *de minimis* standard; 3) judicial intervention in schools generally.[44]

Although the dissent agreed with the majority that appellee school children did possess a right of free public education, it disagreed with the extent of that right. Justice Powell argued that the right of education was not extended to Ohio school children free of discipline. "The Ohio statute that creates the right to a 'free' education also explicitly authorizes a principal to suspend a student for up to 10 days."[45] Therefore, the very same legislation that established a right to education also defined the dimensions within which that right may be exercised.[46]

Secondly, the dissent stated that a *de minimis* standard has rarely been used—more often due process protection has been ex-

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40. *Id.* at 739. The court further stated: "The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. . . . The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern. . . ." *Id.*

41. *Id.* at 738.

42. *Id.* at 740.
Further clarifying their holding the majority stated:

> There need be no delay between the time "notice" is given and the time of the hearing. . . . [A]s a general rule notice and hearing should precede removal of the student from school. . . . Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. . . .

43. *Id.*

44. 95 S. Ct. at 742 (1975) (Powell, J., dissenting.)

45. *Id.* at 742.

46. *Id. But see* Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring in part and concurring in the result in part) (dismissed government employee is provided procedural protection against arbitrary dismissal by 5 U.S.C. § 7501 and accompanying regulations, rather than the due process clause of the fifth amendment) where Justice Powell stated:

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that

tended only when individuals suffer "serious" or "grievous" loss.[47]

Lastly and most importantly, Justice Powell views the present decision as a mandate for increased school intervention. Many similar routine school decisions identical in principle with those in *Goss* have now been placed within the court's discretion. "In [his] view, the constitutionalizing of routine classroom decisions . . . represents a significant and unwise extension of the Due Process Clause. . . ."[48]

The *Goss* decision represents a coincidence of two transitional phases within the Court. The first phase began during the initial stages of the welfare state. The government created a new form of wealth;[49] therefore, the Court was forced to define the dimensions of that wealth.[50] The second phase began in the late sixties when student rebellion became the norm.[51] The Court was again forced to create limits, this time concerning student rights.

Because of this intersection of phases, the subsequent rationale used in *Goss* does not fully explain the outcome. Beliefs regarding school intervention were intertwined with property interest considerations. Therefore, the 5-4 split of the Court does not represent a hardened majority or minority.

Due process, although an amorphous concept, cannot be brushed aside, no matter how controversial the issue or difficult the application. The majority in *Goss* handles this problem adequately by imposing procedural guarantees while still maintaining the integrity of the American school system.

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whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee.

Id. at 166-67.

47. 95 S. Ct. at 743-44 (1975). *See also* cases cited note 37 and accompanying text *supra*.
48. 95 S. Ct. at 747 (1975).
49. *See* Reich, *supra* note 31.
50. Board of Regents v. Roth, 408 U.S. 564 (1972).
51. *See* Wright, *supra* note 28.