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Constitutional Law--The Children's Crusade for Constitutional Recognition

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STUDENT NOTES

CONSTITUTIONAL LAW—THE CHILDREN’S CRUSADE FOR CONSTITUTIONAL RECOGNITION

Except perhaps for the decade of the Great Depression, no era in American history produced a more significant period of social change and reordering than the 1960’s. Central to this cultural transformation were the demands of college and university students that the Constitution find room beneath its protective umbrella for the expression and recognition of students’ rights. This vast and often volatile political movement led to an examination, by all elements of society, of the American involvement in the Vietnam conflict and to passage in 1971 of the twenty-sixth amendment to the Constitution. By the early 1970’s the desire by students to be constitutionally acknowledged spread to the public school systems of the United States.

During February and March of 1971 the Columbus, Ohio Public School System was rocked by widespread student unrest and rebellion. On February 26th alone, over seventy-five students were suspended from Columbus’ Central High School. Under applicable Ohio law, the students received suspensions of up to ten days.

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2 Ratified on June 30, 1971, only three months after passage by Congress, U.S. Const. amend. XXVI, § 1 provides: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.”
4 Lopez v. Williams, 372 F. Supp. 1279, 1282 (S.D. Ohio 1973). The only evidence submitted as to the number of students suspended was the testimony of Dwight Lopez. The court repeatedly remarked that the school board was extremely lax in defending its position that the suspensions were valid exercises of discipline.
5 Ohio Rev. Code Ann. § 3313.66 (1972) provides in pertinent part: The superintendent of schools . . . or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent . . . or principal shall within twenty-four hours after the time of
Dwight Lopez and eight other suspended students filed a class action against the Columbus Board of Education and various administrators under 42 U.S.C. § 1983. The students asserted that their right to a public education had been terminated without a prior hearing, and as such, constituted a violation of the procedural due process guarantees of the fourteenth amendment. The complaint asked the United States District Court for the Southern District of Ohio to declare the suspension statute unconstitutional, enjoin any further suspensions without a hearing, and compel the school board to expunge all reference to the suspensions from the students' records. The court granted relief and the administrators appealed directly to the United States Supreme Court. Mr. Justice White, writing for a majority of five, affirmed, finding that students have constitutionally significant property and liberty interests in a public education and that the due process clause is broad enough to extend protection to these interests. Henceforth, absent emergency conditions, public school students may not be suspended without first being given notification of the charges against them and an opportunity to defend themselves.

Prior to the 1960's, remarkably few cases concerning students' rights reached the courts. Constitutional litigation in the realm of public education was discouraged by a judicial belief that atten-
dance at a public school was a state-created privilege, the granting of which could be conditioned upon the waiver of generally protected liberties. The theory was that as the Constitution made no reference to a "right to learn," the states should be left free to establish and supervise public education. A denial of this privilege by suspension or expulsion was, therefore, thought not to infringe upon a right of life, liberty, or property within the boundaries of the due process clause. Public education was found, almost without exception, to be a sacrosanct area, immune from judicial intervention.

The first significant challenge to the "immunity" of academic administrators was the "landmark" decision of Dixon v. Alabama State Board of Education. Dixon dealt with the right of students at a tax-supported public college to engage in a peaceful demon-
stration on school property. By reinstating students expelled for violating an anti-demonstration rule, the court repudiated the privilege theory. The Dixon court found that students have a "right to remain at a public institution . . . in which they were students in good standing," because the damage of expulsion is likely to be great and "education is vital and, indeed, basic to civilized society." The Dixon court concluded that, prior to any removal from college, a student must be afforded at least the minimum due process safeguards required by the fourteenth amendment.

Relying on the Dixon rationale throughout the 1960's, courts generally recognized that college and university students were entitled to first amendment protection. Hammond v. South Carolina State College held that a university policy requiring prior administrative approval of all campus demonstrations was an unconstitutional restraint of freedom of speech and the right to petition for redress of grievances. The regulation challenged in Hammond had been used to ban student protests over allegedly discriminatory policies promulgated by the college. In ruling that the restraint on demonstrations violated the first amendment, the court also implied that a dismissal from any school, to be constitutionally permissible, would have to be grounded on a more rational basis than the principle that one who owes his existence to the state should not be allowed to criticize it. From this and subsequent litigation brought about by increased student reaction to the Vietnam conflict, a general rule emerged that educational disciplinary policies were justified only if the institution could show that

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17 The students received no prior notice that they were to be suspended. The notices of suspension were mailed to the students and contained no indication as to why the action was taken. Nor at any time were the plaintiffs provided with an opportunity to appear before the board.
18 294 F.2d at 157.
19 Id.
20 Id. at 158-59.
21 See, e.g., Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (N.D. Ala. 1967) (school newspaper may criticize state legislature); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962) (guest speakers need not comport with the administration's views as to what a worthwhile opinion might be).
the policies were "appropriate and necessary to the maintenance of order and propriety considering the accepted norms of social behavior in the community" and the announced educational goals of the school.

While Dixon was persuasive in the context of the college campus, it was generally considered less applicable to pre-college students in the public schools. Although a few courts were sympathetic to the demands of secondary school students for constitutional recognition, the majority refrained from interfering with the decisions of state and local boards of education. The logic of the majority position was at times very strained. By the late 1960's, the courts had recognized that, even though college students had volunteered for the state supported privilege of education, they were entitled to the rudiments of due process prior to a termination of this privilege. It seems unclear then, why high school and elementary school students, by and large compelled by statute to attend, should receive less in the manner of a fundamentally fair procedure to determine whether or not a violation of school policy had occurred. This criticism finds support in the Supreme Court's statement in Brown v. Board of Education, that "education is perhaps the most important function of state and local governments . . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education."

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E.g., W. VA CODE ANN. § 18-8-1 (1971 Replacement Volume): "Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday." W. VA CODE ANN. § 18-8-2 (1971 Replacement Volume): "Any person who . . . . shall fail to cause a child or children in his legal or actual charge to attend school as hereinbefore provided, shall be guilty of a misdemeanor . . . . ."


Id. at 493.
The ancient doctrine of *in loco parentis* has been the chief obstacle in the students' battle for protection from questionable educational policies.  

*In loco parentis* essentially means that the authority of a parent is impliedly delegated to the teacher during school hours.  

At the core of the doctrine of *in loco parentis* is society's belief as to what the first twelve years of education are supposed to accomplish. It has traditionally been thought that students in colleges and universities are beyond the stage of memorization and emulation, and upon entering adulthood, have reached the age of critical analysis and experimentation. Thus, a more liberal, less regimented climate is thought to be conducive to independent thinking and the development of theoretical skills. The public school system, on the other hand, has usually been viewed as serving the function of transmitting rather than discovering knowledge.  

Since less experimentation is necessary, so is less freedom for the student.

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22 1 W. BLACKSTONE, COMMENTARIES *453:

[The father] may also delegate part of his parental authority during his life, to the tutor or school master 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 purpose for which he is employed.

Although Blackstone's definition may be read as permitting the parent to decide whether or not to place the teacher *in loco parentis*, most interpretations have considered the sacrifice of parental authority to the school as mandatory.

West Virginia is one of the few states that has codified *in loco parentis*. W. VA. CODE ANN. § 18A-5-1 (1971 Replacement Volume):

The teacher shall stand in the place of the parent or guardian in exercising authority over the school, and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes, except that where transportation of pupils is provided, the driver in charge of the school bus or other mode or transportation shall exercise such authority and control over the children while they are in transit to and from the school.


24 Most courts invoking *in loco parentis* purport to balance the harm the student may incur by virtue of the discipline, the interest of the parent in seeing that his child is fairly dealt with, and the necessity of maintaining an intellectually stimulating atmosphere within the school. In Goss v. Lopez, 95 S. Ct. 729, 736 (1975), the Court recognized that a suspension could "seriously damage the stu-
A typical judicial use of *in loco parentis* is found in the leading case on public school students' fourth amendment rights, *People v. Overton.* A high school student was suspected by the police of possession of marijuana. A warrant was issued for his arrest and three detectives served the warrant on the vice-principal of defendant's school. The vice-principal unlocked Overton's locker with a master key and the officers found marijuana in a jacket pocket. Although the warrant was found defective, the New York court convicted the student of possession of narcotics. The court rationalized that not only could the vice-principal legitimately consent to the search, but that if reasonable suspicion is present to believe that an offense is being committed on school property, school officials have a *duty* to investigate. The court, in effect, held that the Constitution should not bar investigation of suspected illegalities by conscientious educators.

Even given the fact that parents may constitutionally grant permission to police to search their children's possessions, if we...
can *arguendo* assume that students have a right to privacy,\(^3\) *Overton* seems to seriously threaten the fourth amendment's ban on unreasonable searches and seizures.\(^4\) First, since the vice-principal was acting at the behest of the police, it seem incongruous that he should be considered a private citizen as is mandated by *in loco parentis*.\(^5\) And second, it is doubtful that should a parent find his child in possession of drugs he would feel compelled to turn the child over to the police—the standard called for by *Overton*.

The theory that the school stands *in loco parentis* might be acceptable if the courts were to require that a school professing to act in the place of a parent act as a wise and intelligent one. The primary virtue of *in loco parentis* is that it emphasizes the necessity of the school taking an active role in the rearing of the child. But too often, the theory has been used to give the school the authority to act as a parent without also insisting that the school take on the accompanying responsibilities.\(^6\)

Although certain writers have declared that *in loco parentis* is no longer implemented by the courts in student rights cases,\(^7\) this judgment may be slightly premature. The magic words *in loco parentis* need not be used to invoke the theory. The United States Supreme Court has traditionally employed a hands-off policy when dealing with the public schools in cases not involving equal protection questions.\(^8\) But since *in loco parentis* demands a hands-
off policy, can it not be said that the Supreme Court condones the continued application of this much criticized doctrine? Certainly factors other than in loco parentis are considered by the Court when dealing with educational issues of a state or local nature. But each justification for federal judicial hesitancy to deal with these issues, whether it be that education is traditionally a local function,\(^4\) or that educators are better able to educate than courts,\(^5\) seems to imply deference to in loco parentis.

The Court, however, has been much less inclined to refrain from entering the fray when it finds conflicts in the public school system which "directly and sharply implicate basic constitutional values."\(^6\) These basic values have previously been found only in cases involving first amendment freedoms. Beginning with West Virginia State Board of Education v. Barnette\(^7\) and most recently in Tinker v. Des Moines Independent Community School District,\(^8\) the Supreme Court has recognized that school children are capable of formulating and expressing spiritual and intellectual beliefs of constitutional significance.

_Barnette_ dealt with a regulation adopted by the State Board of Education making mandatory a flag salute and a recitation of the Pledge of Allegiance for all school students, public as well as private, in West Virginia.\(^9\) Failure to perform this daily ritual was

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\(^3\) Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
\(^4\) 319 U.S. 624 (1943).
\(^6\) Only three years prior to _Barnette_, the court had ruled in Minersville School District v. Gobitis, 310 U.S. 586 (1940), that the states may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 310 U.S. at 604. The West Virginia Legislature incorporated this holding in W. Va. Code Ann. § 1734 [18-2-9] (1943). On January 9, 1942, the West Virginia Board of Education adopted a resolution strikingly similar to the Supreme Court's _Gobitis_ holding. _Barnette_ overruled _Gobitis_.

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large, public education in our Nation is committed to the control of state and local authorities." 393 U.S. at 104. Exceptions to the general rule have been more common when states have sought to regulate the conduct of teachers. See, e.g., Keyishian v. Board of Regents, 385 U.S. 569 (1967)(membership alone in a "subversive" organization is insufficient as a cause for disqualification for public employment); Whitehill v. Elkins, 389 U.S. 54 (1967)(requirement that teachers swear that they were not attempting to overthrow the government is "vague"); Shelton v. Tucker, 364 U.S. 479 (1960)(freedom of association renders impermissible state rule requiring listing of membership in all organizations).
considered insubordination, with the possibility of criminal penalties being meted out for both the abstaining child and his parents. Jehovah's Witnesses refused to comply and, stating that the regulation directly infringed upon their religious beliefs, sought an injunction to restrain the continued enforcement of the regulation to all who objected. The Supreme Court held that compulsion was not a permissible means of enforcing national unity and that:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. (Emphasis added).

*Barnette* was subsequently used to remove compulsory Bible reading and prayers from the public schools.

*Tinker* presented the Court with the opportunity to state the limits of freedom of speech within the confines of the public schools. Students chose to publicize their displeasure with the hostilities in Vietnam by wearing black armbands to school. The students were suspended with re-instatement conditioned upon their agreeing to never repeat the demonstration. The Court recognized that freedom of speech is not absolute—that when faced with an imminent danger to a legitimate interest a state may lawfully restrict the freedom. It also noted that states have comprehensive authority to establish and enforce disciplinary regulations in the schools. It asserted, however, that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution.”

*Tinker* adopted a balancing approach, weighing the school's

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51 319 U.S. at 640.
52 Id. at 637.
55 393 U.S. at 508, citing Terminiello v. Chicago, 337 U.S. 1 (1949).
56 393 U.S. at 507.
57 Id. at 511.
duty to maintain reasonable order against the right of the student to exercise his first amendment freedoms in such a way as not to interfere with the rights of his teachers and classmates. To constitutionally restrict a student's freedom of expression, the school must demonstrate that the student's conduct "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." Although the language of Tinker seems imperative for all student rights cases, the lower courts have tended to limit its application to first amendment problems.

To erase the conflict in the lower courts as to the extent of non-speech freedoms in the public schools, the Supreme Court granted certiorari to Goss v. Lopez. Goss is very likely the most significant decision concerning public education since Brown v. Board of Education. Just how far Goss will be extended is conjectural, but coupled with its' companion case, Wood v. Strickland, Goss could

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58 Id. at 509.
59 Id. at 505, 513, citing as the proper rule, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). The Supreme Court has not chosen to stand on the student's side in all cases alleging an abridgement of first amendment liberties. The Court has repeatedly declined to consider challenges to hair-length policies, Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), cert. denied, 409 U.S. 989 (1972); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). It is difficult to distinguish hair length as a means of protest from the wearing of a black armband. The only basis for differentiation is, perhaps, that historically people have chosen to demonstrate their political beliefs through the use of armbands, placards and posters rather than by altering their physical appearance. A strong argument may be made that, if anything, hair-length protests should be more protected than other forms of symbolic speech. See, e.g., Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

61 95 S. Ct. 729 (1975). For a comprehensive listing of lower court decisions on due process as applied in the public schools, see 95 S. Ct. at 737 n.8.
63 95 S. Ct. 992 (1975). Public high school students were expelled from school for violating a school regulation prohibiting the use of intoxicating beverages at a school sponsored function. The complaint asked for compensatory and punitive damages under 42 U.S.C. § 1983 on the grounds that the school had denied the students their constitutional rights to due process under color of state law. The Court held that, while on the basis of common-law tradition and public policy, a
totally alter the declaration and enforcement of internal school policies. In *Goss*, the Court found that by creating a system of free public education and compelling students to attend, Ohio had conferred upon students a constitutionally significant property right. This property right gives students a "legitimate claim of entitlement" to enjoy their education without arbitrary interference from the state.66

The School Board argued that the students did not present a legitimate claim since, by virtue of the court's decision in *San Antonio Independent School District v. Rodriguez*, a free public education is not a "fundamental right." The fundamental right theory, however, is concerned only with the equal protection clause and not with the more variable guarantees of due process.68 Thus,

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66 Ohio REV. CODE ANN. § 3313.48 (1972) directs local authorities to provide a free education to all residents between the ages of six and twenty-one.

67 Ohio REV. CODE ANN. § 3321.04 (1972) compels attendance at school for a minimum of thirty-two weeks per year.

68 95 S. Ct. at 735.

411 U.S. 1 (1973). In *Rodriguez*, parents of students argued that education bears such a close relationship to the effective exercise of freedom of speech and to the intelligent utilization of the right to vote, that by implication it must also be a "fundamental right." A determination of the right as fundamental would have the effect of forcing states to provide an equal education to all students or demonstrate a "compelling" reason why they could not do so. The "equality" demanded in *Rodriguez* went far beyond that sought in *Brown v. Board of Education*, 347 U.S. 483 (1954). In effect, the plaintiffs in *Rodriguez* sought to have the system of financing public education by property taxation outlawed. As in most states, Texas' schools are significantly better financed in "rich" neighborhoods than in poor. Perhaps realizing the consequences of mandating totally equal education in the states, the Court held that:

[We have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice . . . . These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

411 U.S. at 36.

* Board of Regents v. Roth, 408 U.S. 564 (1972).
while states supposedly need not educate their citizens, if they exercise their discretion to do so, they must obey the Constitution. The possibility that a grant from the states may be conditioned upon the relinquishment of a basic freedom has consistently been ruled constitutionally impermissible.69

The Court also recognized that a peremptory suspension could have major repercussions later in the student's life.70 Since all school boards maintain comprehensive records of students during their academic careers, and these records are often open for public perusal, chances for higher education or employment could be seriously diminished if the suspensions were to come to light. Hence, the student's reputation, protected by the liberty aspect of the due process clause, demands that suspensions be based upon more than a unilateral determination of guilt.71

The School Board argued that even if students could claim a right to an education, the ten day suspensions did not constitute a "severe detriment or grievous loss" necessary to trigger the application of due process standards.72 The Court had previously found, though, that to determine whether due process is applicable "we must look not to the 'weight' but to the nature of the interest at stake."73 Therefore, as long as the property deprivation is not de

69 Mr. Justice Holmes once remarked that while "the petitioner may have a constitutional right to talk politics ... he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For the current and more libertarian view that privileges cannot be conditioned upon waivers of constitutional rights, see, e.g., Shelton v. Tucker, 364 U.S. 479 (1960); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926). See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

70 95 S. Ct. at 736.

71 Id., wherein the Court, citing in part Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), stated "'Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [due process] clause must be satisfied."

72 Confusion reigns as to what complainants must allege to justify due process standards. Certain cases, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), have stated that a severe or grievous loss must be shown. Other cases, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), have said that the property deprivation must only be greater than de minimus to call for due process. Mr. Justice Powell noted the irregularity of the application of the two standards in his dissent. 95 S. Ct. at 743.

73 95 S. Ct. at 737, citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).
minimus, its gravity is irrelevant in determining whether the standards of due process apply. Noting that a suspension "is a serious event in the life of the suspended student," the Court ruled that due process must be afforded the student whenever a suspension is to be given for more than a trivial period.

Mr. Justice Powell dissented, finding that the students had shown no material decline in their academic achievement as a result of the suspensions, and that a ten day suspension amounting to less than 5% of the school year hardly involved the possibility of serious damage. Powell also criticized the majority's "misreading" of previous cases upon which Goss was based. In defining property interests, the Supreme Court looks first to state statutes or rules entitling the citizen to certain benefits. If the aggrieved party can point to a statute conferring upon him a grant from the state to which he is entitled, the Court has consistently held that this benefit may not be revoked without the rudiments of due process. Thus, while a non-tenured university professor may not be entitled to a hearing when dismissed, a public school student, by virtue of a state requiring his presence in school, must be afforded the procedural protections of the fourteenth amendment. However, in the past the Court has also stated that the dimensions of any property interest are defined by the creating statute. Powell would thus have ruled that, as the benefit of the education was qualified by the power to suspend, the students could not complain if the school actively enforced a statute upon which the property interest was conditioned.

The Court stopped short of mandating a full-dress trial to accompany all suspensions. Recognizing that a public school is

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11 95 S. Ct. at 737.
12 Id. The Court ruled only on suspensions of up to ten days. Just how long a suspension must be to pass the stage of trivial was not discussed. Mr. Justice Powell, in dissent, noted that even a suspension for one day might not be termed trivial by the Court's ruling. 95 S. Ct. at 744.
13 95 S. Ct. at 743.
14 Board of Regents v. Roth, 408 U.S. 564 (1972).
16 Board of Regents v. Roth, 408 U.S. 564 (1972).
17 Id. at 577.
18 95 S. Ct. at 742.
19 Id. at 740.
certainly not a courtroom, *Goss* requires only oral or written notice of the grounds in support of the suspension. 3 If the student denies the charges, he must be given an explanation of the damaging evidence and an opportunity to explain his side of the story. Preliminary notice and hearing may be waived by school officials if an offending student's conduct endangers persons or property or threatens to disrupt the academic process. In these instances, the proper procedures should follow as soon after the suspension as practicable. 4

As the Court pointed out, *Goss* provides little more than what most school officials already furnish their students to insure enlightened and fair-minded disciplinary procedures. 5 The full impact of *Goss*, however, cuts much deeper than merely requiring notice and hearing. The Court ruled only on suspensions of ten days or less. In circumstances involving longer suspensions, permanent expulsions, or short term suspensions involving "unusual situations," the Court intimated that more in the manner of procedural due process may be required. 6 Thus, as Mr. Justice Powell points out, the Court has entered a "thicket." 7

The term "unusual situations" has the same indefinable qualities as the infamous "special circumstances" rule of *Betts v. Brady*. 88 As *Betts* was judicially unworkable, so may be *Goss*. Pow-

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3 Id.
4 Id. By basing its decision on lower court holdings, the Supreme Court could have required more than it did. For example, in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972), students were found entitled to the right to examine adverse evidence, cross-examine witnesses, present evidence, and have the proceedings before an impartial tribunal, in addition to notice and hearing.
5 95 S. Ct. at 740.
6 Id. at 741.
7 Id. at 747.
8 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Betts* held that in felony cases, states only need to provide assistance of counsel to indigents in those cases involving special circumstances. *Betts* was much criticized. As one writer commented:
The cases decided by the Court under the [*Betts*] formula are distinguished neither by the consistency of their results nor by the cogency of their argument... The rule, therefore, seems vulnerable to fundamental criticism, and so long as it persists, the law of the subject will remain in a state of unstable equilibrium.
9 Allen, *The Supreme Court, Federalism, And State Systems of Criminal Justice*, 8 DePauW L. Rev. 213, 230-31 (1959). After years of frustration in determining which factual situations constituted special circumstances, the Court erased the inconsis-
ell enumerated certain non-disciplinary determinations which could affect a student's future opportunities just as significantly as a suspension. Among these are the grading systems used in schools, the calculation of passing or failing, the qualifications for promotion, and the system whereby students are classified into groups according to estimated academic achievement. As any one of the above administrative decisions may directly impinge upon the student's property and liberty interests, school officials may be called upon in court to defend these everyday decisions, previously made without fear of reprisal for errors in discretion.

Powell's fears may, however, not be justified. Although these decisions will affect the student's education, they seem to involve factors in which the courts would not want to embroil themselves. Given that Goss was narrowly affirmed by a majority of five, a great expansion of student protection would seem doubtful in the near future. Also, while it may be argued that any adverse reaction by the school to student performance or conduct could bring about harmful consequences, it may also be true that the factors Powell mentions are not within the scope of the due process clause. San Antonio Independent School District v. Rodriguez held that while states should strive for equality in education, perfect equality is not mandated because education was found not to be a fundamental right. Rodriguez legitimized discrepancies in the quality of education received by students because, although certain students received "less expensive educations" than others, the state tendencies in Gideon.

The difficulty with terms like "unusual situations" or "special circumstances" is that they leave the determination and enforcement of what factors constitute these tests up to the discretion of local judges and administrators. Thus, no single constitutional standard can be enforced, appellate courts must sift through innumerable cases to decide if a special circumstance was overlooked, and broad rules are reduced to confusing exceptions. The wisest policy would seem to be that once a right is found to be constitutionally important, the procedures to implement this right should also be mandated for all cases. E.g., Miranda v. Arizona, 384 U.S. 436 (1966).

95 S. Ct. at 747-48.

10 "Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device." 95 S. Ct. at 739.

made sure that all students received some sort of an education.\textsuperscript{92} While student classification is anathema to some educators,\textsuperscript{93} it is an extensively used practice and meets the Rodriguez standard of giving an education to all students—albeit a different and perhaps less equal education than that given to their peers.\textsuperscript{94} It would seem to follow, then, that the classification of students into, for example, “vocational,” “remedial,” or “college-bound” groups does not present a due process argument, but rather one governed by the equal protection clause. Thus, if the decision can be supported by standardized testing or other reliable data, these procedures should not be ruled impermissible.

The process of evaluating a student’s work by awarding a grade for a specific level of achievement also seems unlikely to present the type of situations in which a Goss hearing will be required. This would seem to be true regardless of whether the grade is used to determine passing or failing, scholastic advancement, or even the termination of the student’s right to pursue an education. Goss requires a hearing because even if the school official with the power to suspend was a witness to the student’s impropriety, an explanation by the student of previously unknown facts could alter the school’s decision as to whether or not to suspend.\textsuperscript{95} Generally, a hearing is a necessity only in those instances in which a factual dispute needs to be settled before the state can take final action.\textsuperscript{96} Hence, it follows that if there are no facts in dispute, a hearing to merely announce a result is extraneous and constitutionally unnecessary. The giving of a grade is, in a sense, a hearing in itself. Students realize from the beginning of their academic careers that they are graded and that the grades are recorded, compiled and utilized to determine membership in clubs, societies, and more significantly, entrance to institutions of higher learning. This knowledge can favorably be compared to the notice requirements of the due process clause. The hearing following this notice would be the factors that go into making up the final

\textsuperscript{92} Id. at 28-29.
\textsuperscript{93} See generally, D. Fader, The Naked Children (1971); J. Holt, How Children Fail (1964); C. Silberman, Crisis in the Classroom (1970).
\textsuperscript{94} See, Note, Equal Protection and Intelligence Classifications, 26 Stan. L. Rev. 647 (1974).
\textsuperscript{95} 95 S. Ct. at 739.
grade such as testing or written assignments. If the school maintains a constant grading scale, then all that need be done is to apply the evaluation scale to the student's work to determine the final grade. Theoretically, the application of the scale should be a ministerial rather than a discretionary decision. For example, a student scoring seventy-five per cent on a test should receive the same grade regardless of who applies the scale. Since this is a ministerial decision it is doubtful that the awarding of grades creates a situation requiring a due process adjudication.97

Problems could arise, though, if, even after the tests and papers are graded, a discretionary choice remains, that is, if the teacher could consider factors other than those announced in reaching the final grade. Again, however, a hearing seems to be unnecessary. The courts do not and need not require perfection in administrative decisions.98 Thus, the burden will be on the student to declare and prove an arbitrary application of the facts to the grading scale. Whether or not this ultimate decision will require a hearing will probably depend on whether the student can allege some sort of special circumstance. Seemingly, though, in recogni-

97 An analogy can be drawn to instances in which states revoke drivers' licenses after the driver has accumulated a sufficient level of penalty points, e.g., Stauffer v. Weedlun, 188 Neb. 105, 195 N.W. 2d 218 (1972), appeal dismissed, 409 U.S. 972 (1972). In Stauffer, the Nebraska court distinguished Bell v. Burson, 402 U.S. 535 (1971). Bell held that states could not revoke licenses on the grounds of lack of financial responsibility if they require fault as a prerequisite because Georgia required fault as a prerequisite to having to post a security bond. Fault, of course, is a factual problem that can only be decided in an adversary hearing. Stauffer held that Nebraska's Department of Motor Vehicles need not conduct a hearing prior to license revocation when the only question to be answered was the number of penalty points received by the driver:

In a very real sense the Director acts only ministerially. The result—the revocation—flows from the operation of the statute upon the already judicially determined facts, that is, the series of convictions of traffic offenses. Of these the motorist already has knowledge. Of their effect point-wise he is charged by law with knowledge just as with any other case of knowledge of the law. These circumstances do, in our opinion, make the procedures applicable to revocation of a driver's license for an accumulation of points for traffic offense conviction clearly distinguishable from revocation under the financial responsibility law as in Bell v. Burson . . . .

188 Neb. at 112, 195 N.W.2d at 223.

tion of the academic and judicial burden that would accumulate if every failing grade required court approval, it seems unlikely that the grading process will be found to require adversarial hearings.

Goss is aimed solely at disciplinary removals from school and not at student classification or the determination of the quality of education the student is to receive. While arguments will certainly be made in an attempt to expand Goss, the Goss holding will most likely be limited to disciplinary decisions.

An "unusual situation" justifying trial-like procedures in suspension cases could involve complex factual situations, fellow-students as the sole adverse witnesses or staunch denials of all charges by the supposed offender. While these examples will pose difficult determinations, of greater judicial significance will be those instances in which disciplinary decisions are challenged as being offensive to the constitutional rights of the students. Wood v. Strickland held that school board members may be liable under 42 U.S.C. § 1983 for any invasion of a student's constitutional rights. The key question left unanswered by Goss and Wood is perhaps the most important: exactly what are the constitutional rights of public school students?

The lower courts are in complete disarray over this question. Save possibly for certain first amendment guarantees, there is no unanimous stand on either side of any question involving student's rights. Students would seem to be damaged most significantly by violations of either their fourth or eighth amendment freedoms.

95 S. Ct. 992 (1975).
100 See notes 47 to 60 and accompanying text infra.
101 U.S. Const. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

People v. Overton 24 N.Y.2d 522, 249 N.E.2d 366. 301 N.Y.S.2d 479 (1969), is an example of what courts have generally done with students' fourth amendment rights. See notes 35 to 40 and accompanying text supra. See generally, Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L. Rev. 739 (1974).

The problem of unconstitutional searches in public schools is significant in that not only may they lead to disciplinary sanction, but they often entail criminal
In each instance when these freedoms have been adjudicated, the courts have weighed the students' interest against the necessity of maintaining order and discipline in the schools, and in all but a few cases, students have lost. Few courts will be willing to grant proceedings. To the West Virginia courts, fourth amendment questions may prove to be an unusually important problem. As a response to Goss v. Lopez, 95 S. Ct. 729 (1975), the West Virginia Board of Education, on July 11, 1975, published a handbook entitled "Rights and Responsibilities of Public School Students in West Virginia." This pamphlet sets forth the full spectrum of what the student may expect from his teachers and principals during his academic career. On the whole, the book grants students full constitutional protection and should pass judicial scrutiny. However, the handbook maintains that at times school officials are empowered to conduct warrantless searches without the consent of the student. West Virginia Board of Education, Rights and Responsibilities of Public School Students in West Virginia, § VIII, at 12 (1975).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), held that students are "persons" under the first amendment. See note 57 and accompanying text infra. It would seem reasonable that "persons" under the first amendment could be found to be "people" under the fourth amendment. Hence, the searches permitted by the Board of Education seem susceptible to judicial review.

U.S. Const. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

On October 20, 1975, the United States Supreme Court affirmed, without opinion, Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), in effect holding that corporal punishment is not violative of the eighth amendment. Baker v. Owen, 96 S. Ct. 210 (1975). Baker argued that as "the custody, care and nurture of the child reside first in the parents," Prince v. Massachusetts 321 U.S. 158, 166 (1944), the right to determine disciplinary methods for school students is primarily an issue for parents. As such, it is a fundamental right, and the state must therefore show a compelling interest in order to punish students against the wishes of their parents. 395 F. Supp. at 298-99.

The district court disagreed. The state need not demonstrate a compelling justification to paddle students, since parental rights are not implicitly guaranteed by the Constitution. Thus, the school need provide only a "legitimate state end" to punish students, 395 F. Supp. at 299-300. "So long as the force used is reasonable . . . school officials are free to employ corporal punishment . . . until in the exercise of their own professional judgment, or in response to concerted pressure from opposing parents, they decide that its harm outweighs its utility." 395 F. Supp. at 301.

But as the court noted, in light of Goss v. Lopez, corporal punishment may not be inflicted unless the student has been afforded prior notice and hearing. 395 F. Supp. at 302.

See also, Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974), wherein 42 U.S.C. § 1983 was found to be a proper vehicle to challenge the excessive use of corporal punishment.

For fourth amendment decisions concerned with public school students,
students all the rights of adults, but Goss and Wood at least suggest that students in our public schools are citizens under the Constitution and, as citizens, deserve recognition of their freedom to learn in an atmosphere less burdened by restrictive and constitutionally suspect policies.

While the initial impact of Goss v. Lopez will not greatly overburden the public school systems, its recognition of "unusual situations" may have repercussions as resounding as the death of "separate but equal" in Brown v. Board of Education. Brown recognized the significance of the equal protection clause in public education. Goss, in finding the due process clause applicable to the public schools, has completed a full circle around the fourteenth amendment. Goss will not be the end, but rather the beginning of the children's crusade for full constitutional recognition.

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