A NEEDED GLOSS TO *GOSS*: FURNISHING GREATER PROCEDURAL PROTECTIONS FOR STUDENTS PRIOR TO SCHOOL REMOVAL

MICHAELA SHUCHMAN[∞]

ABSTRACT

Fifty years ago, the Supreme Court held in Goss v. Lopez *that students have cognizable property and liberty interests in their education. However, when students are accused of breaking school rules, that interest can be stripped away with merely "some kind of notice and some kind of hearing." This vague and minimally protective language has led to the deprivation of due process for millions of school children each year, with disproportionate impact on Black and Brown students and students with disabilities. And although some states and local school districts have chosen to build upon the* Goss *threshold, the increasing prevalence of charter schools threatens to continue to deprive some of the most vulnerable students of greater protection.*

Today, we have a strong empirical understanding that exclusionary discipline harms students in both the short- and long-term. In the short term, suspended students are denied not only a meaningful education, but also — as schools have increasingly come to serve as key components of the social safety net — access to nutrition and healthcare. In the long term, suspended students are exponentially more likely to fall behind, drop out of school, and be drawn into the notorious "school-to-prison pipeline." And yet, the Court has never returned to the question of how much process students are due before suffering these significant harms.

This article argues that it is long past time for the Court to revisit the Goss *standard. Given the increased array of property interests and better-understood liberty interests that are threatened when a student is suspended, this article posits that the* Mathews v. Eldridge *balancing test, which has never been applied by the Court in the context of student discipline, now leads to a different result than it would have in 1975. Further, given the federal courts' recent track record of declining to expand due process protections, this article examines how state courts, state legislatures, and state constitutions can continue to fill the gaps left by* Goss *and ensure that students' educational rights are protected.*

∞ Skadden Fellow at Legal Services NYC, Bronx – Education Unit. J.D., 2023, New York University School of Law. B.A., 2016, Swarthmore College. I am deeply grateful to Professor Helen Hershkoff for her thoughtful edits and guidance while writing this article, Professor Dennis Parker for his feedback on the paper that started it all, and Professor Kenji Yoshino for his mentorship and encouragement to deal with words that have weight in the world. Finally, all my love and gratitude to my (newly minted) husband, Arijeet Sensharma, for inspiring me to write this article, supporting its development through edit after edit, and being my champion every step of the way.

INTRODUCTION

Every state constitution in the United States mandates the establishment of a public education system.[1] All children, in turn, are required to attend school for the greater part of their childhoods.[2] But when students are accused of disobeying school rules, they may be removed from their classroom for anywhere from a few minutes to several months — if not permanently. While students are barred from attending class, they are deprived of the education they are purportedly entitled to.[3] And yet, many students removed from class are not given any meaningful opportunity to challenge that deprivation. The lack of clear and guaranteed procedures for challenging school exclusion deprives students of due process, camouflages racial biases against Black and Brown children, and exacerbates discrimination against students with disabilities. This is even more concerning in light of the well-documented findings that school removal greatly increases a child's likelihood of falling behind, dropping out, and being pulled into the criminal-carceral system.[4]

Fifty years ago, *Goss v. Lopez* — the only Supreme Court case directly addressing exclusionary school discipline — created a floor of procedural protections for students. However, the Court required only that students be "given some kind of notice and afforded some kind of hearing" before being suspended, reasoning that the administrative burdens of requiring greater procedural protections outweighed the risk of harm posed to students.[5] Since then, understandings of the property and liberty interests at stake when a student is removed from school have dramatically evolved as studies have revealed the significant impact of removal on a student's future and the disproportionate consequences for Black and Brown children and children with disabilities.[6] However, neither the Supreme Court nor Congress have updated the federal standard to account for these developments. Though many states have expanded the procedural rights afforded to students above the *Goss* floor, the number and severity of suspensions have increased in recent decades with over 3.5 million students suspended each school year, double

1. *See* EMILY PARKER, EDUC. COMM'N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/F4F8-SSD5].

2. *Table 5.1: Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/8NA9-67HT].

3. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest . . . .").

4. *See infra* Part II.A.2.

5. *Goss*, 419 U.S. at 579–81.

6. *See infra* Part I.B.1. Throughout this article, when the phrase "school removal" is used, it is referring both to short- and long-term suspensions, as well as permanent expulsions from school.

the amount of suspensions when *Goss* was decided.[7] Furthermore, charter schools — schools that are publicly funded but independently run — are educating an increasing proportion of United States children and are increasingly the choice parents, especially low-income parents, turn to when they feel public schools are not able to adequately serve their children.[8] Given that the legal landscape around when and whether charter schools are beholden to federal, state, and district policies is in flux, with many schools arguing that such regulations do not apply to them, millions of the most at-risk students may increasingly be deprived necessary due process protections of their educational rights.

The American public school today can no longer be considered simply a site of education; it has become a central institution for providing essential goods and services, including federally subsidized food and healthcare, to indigent children.[9] When students are removed from school, they are deprived not only of their vested right to an education, but also their access to food and healthcare. Many students removed from their home schools are then placed in alternative schools — schools designed for students who are deemed unable (or undeserving) to learn in their prior educational setting — where there is oftentimes no access to meaningful educational opportunities, let alone any additional services.[10] When students receive the benefit of an education, the governmental impingement on a student's liberty seven hours a day, five days a week, ten months of the year seems justified. However, when a student is confined to a school that provides them no meaningful benefit, students are effectively confined in state custody with no legitimate justification, raising further due process concerns related to the deprivation of their liberty.[11]

This article argues that the due process protections provided to students before they are removed from school must be substantially enhanced to account for the increased scope of property interests now implicated by school removal — including not only the right to education but also basic needs such as nutritional assistance and healthcare. Moreover, the due process standard must reflect the liberty and dignity interests implicated by removal, influenced by contemporary understandings of adolescence and the impact of a lost education. Fifty years later, given these shifting property and liberty interests, it is time to revisit *Goss* and reconsider — under the procedural due process balancing test set forth in *Mathews v. Eldridge* — what process is due to students before the imposition of exclusionary discipline. While guaranteeing greater procedure to prevent erroneous school removal may seem like a relatively minor intervention, bolstering students' rights

7. *See Statement from U.S. Secretary of Education Arne Duncan on School Discipline and Civil Rights*, SPACES4LEARNING (Oct. 30, 2015), https://spaces4learning.com/Articles/2015/10/30/School-Discipline-Civil-Rights.aspx [https://perma.cc/CBY9-G7T3].

8. *See infra* Part I.B.2.

9. *See generally* Sherry Maria Tanious, *Schoolhouse Property*, 131 YALE L.J. 1641 (2022).

10. *See infra* Part II.A.2.

11. *See generally* Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1, 41–42 (2020).

to uninterrupted access to a protective and nourishing educational environment will have downstream impacts far beyond the schoolhouse walls.[12]

Part I of this article explores the holding of *Goss v. Lopez*, its impact (or lack thereof), and shortcomings in legal protections of the right to education. Part II presents the case for reevaluating the *Goss* standard through the application of the *Mathews* balancing test and proposes a new standard. Part III explores how state constitutions may furnish powerful tools to fill the gaps in students' due process protections where federal constitutional law falls short.

I.
DUE PROCESS PROTECTIONS FOR STUDENTS

A. Goss v. Lopez *and its Overestimated Threat to School Autonomy*

Six years after proclaiming in 1969 that students do not "shed their constitutional rights . . . at the schoolhouse gate" in the context of the First Amendment,[13] the Supreme Court turned to addressing students' protections under the Fourteenth Amendment's Due Process Clause. In *Goss v. Lopez*, the Court held that where a state constitution entitles students to a public education, "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause."[14] That is, if a state chooses to establish an educational system for its young people, it cannot then strip away that right without some amount of process. To determine how much process, the Court weighed "the property interest in education benefits temporarily denied" and "the liberty interest in reputation" against the school's interest in "discipline and order," while acknowledging that the "risk of error is not at all trivial" in the school discipline context.[15] The Court determined that for suspensions of ten days or less, "due process requires that the student be given oral or written notice of the charges against him and, if he denies

12. *See generally* Chris J. Kirkman, Heather McNees, Jaimie Stickl, Justin H. Banner & Kimberly K. Hewitt, *Crossing the Suspension Bridge: Navigating the Road from School Suspension to College Success – How Some Students Have Overcome the Negative Implications of School Suspension to Bridge the Road to College*, 2 J. OF ORG. & EDUC. LEADERSHIP 1 (2016); Miner P. Marchbanks III, Jamilla J. Blake, Eric A. Booth, Dottie Carmichael, Allison L. Seibert & Tony Fabelo, *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 59 (Daniel J. Losen ed., 2015); Seth J. Prins, Ruth T. Schefner, Sandhya Kajeepeta, Natalie Levy, Precious Esie & Pia M. Mauro, *Longitudinal Relationships Among Exclusionary School Discipline, Adolescent Substance Use, and Adult Arrest: Public Health Implications of the School-to-Prison Pipeline*, 251 DRUG & ALCOHOL DEPENDENCE 1 (2023); Camila Cribb Fabersunne, Seung Yeon Lee, Danielle McBride, Ali Zahir, Angela Gallegos-Castillo, Kaja Z. LeWinn & Meghan D. Morris, *Exclusionary School Discipline and School Achievement for Middle and High School Students, by Race and Ethnicity*, JAMA NETWORK OPEN (2023).

13. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

14. *Goss*, 419 U.S. at 581.

15. *Id.* at 576, 580. The Court found that states had bestowed a property interest when they included the right to an education in their state constitutions and a liberty interest attached to a student's reputation, both of which interests were harmed by removal from school. *Id.* at 574–75.

them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[16] The Court boiled this down to entitling students to "some kind of notice" and "some kind of hearing."[17]

At the time of the 5-4 decision in *Goss*, advocates for more local control over school policy and procedure feared *Goss* would take autonomy away from teachers, dismantle school discipline, and create an unsustainable and volatile learning environment.[18] The Court had, in the preceding few years, proclaimed in back-to-back terms that "local control [of education] is not only vital to continued public support of the schools, but is of overriding importance from an educational standpoint as well."[19] Justice Powell, a former school board member, felt so passionately that the *Goss* ruling was misguided that he read his dissenting opinion aloud in court.[20] He interpreted the majority opinion to stand for excessive judicial oversight and illegitimate judicial intrusion into the relationship between teacher and student, which he characterized as "rarely adversary in nature."[21] He found the encroachment unjustified because a suspension "leave[s] no scars; affect[s] no reputation; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday."[22] Justice Powell warned that "[f]ew rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process."[23] His fears never materialized, but nonetheless inspired a broader fear that courts would soon control many aspects of schools.[24] He warned: "One can only

16. *Id.* at 581.

17. *Id.* at 579. The Court did not elaborate on what amount of procedure is required for suspensions longer than ten days, other than noting they likely require "more formal procedures." *Id.* at 584.

18. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 145 (2018).

19. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) (quoting Wright v. Council of City of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting)).

20. *See* DRIVER, *supra* note 18, at 145.

21. *Goss*, 419 U.S. at 594 (Powell, J., dissenting).

22. *Id.* at 599 n.19 (Powell, J., dissenting).

23. *Id.* at 591 (Powell, J., dissenting).

24. *See, e.g.*, David Schimmel & Richard Williams, *Does Due Process Interfere with School Discipline?*, 68 HIGH SCH. J. 47, 48 (1985) (citing statement that decisions like *Goss* "deprive school administrators of the tools they need to control school violence" (quoting Robert Pear, *Reagan Expected to Present Plan to Fight Crime in Public Schools*, N.Y. TIMES, Jan. 1, 1984, at A1)); David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 477 (1981) ("Contrary to the *Tinker* Court's conclusion, . . . courts should apply only a limited standard of review to local school administration action: the minimum rationality standard currently used to review government activity that does not implicate fundamental rights."); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1679 (1986) (noting that there is a "legitimate concern that the courts, as well as federal and state legislatures and agencies, will 'overlegalize' the schools and make it difficult for them to perform their educational mission"). *See generally* Brannon Heath, *Constitutional Law:* Goss v. Lopez*: Much Ado about Nothing or the Tempest*, 7 LOY. U. CHI. L. J. 193 (1976) (discussing the fears articulated by the *Goss* dissent).

speculate as to the extent to which public education will be disrupted by giving every school child the power to contest *in court* any decision made by his teacher which arguably infringes the state-conferred right to education."[25] Indeed, his view of school discipline would find its place in the majority opinion of *Ingraham v. Wright* two years later, upholding corporal punishment as a mode of school discipline.[26] His false predictions led *Goss* to become what legal scholar Justin Driver calls one of the "more fundamentally misunderstood" cases because commentators falsely assumed that the opinion required elaborate protections while, in fact, it only imposed two modest requirements: basic notice and an opportunity to be heard.[27]

Justice White, writing for the majority in *Goss*, made sure to clarify that the procedures put in place were "rudimentary" and were created to expose only "unfair or mistaken findings of misconduct."[28] The Court did not intend the required procedures to substantively impact the ability of schools to make their own decisions regarding the punishment of their students.[29] The National School Boards Association even issued a press release after the decision saying that *Goss* would not require much change given that "most schools already follow this course."[30] Norval Goss, the named defendant who worked for the school district, said afterwards: "Technically, we're supposed to have lost, but personally I am satisfied."[31] Meanwhile, advocates for expanded due process protections, while acknowledging that *Goss* was a step forward on its face, hoped that the decision would be just the first step towards "more substantial due process," including a right to appeal and a right to written notice.[32] The practical impact of *Goss* on school administration was minimal. Fifty years later, the landscape of federal constitutional

25. *Goss*, 419 U.S. at 600 n.22 (Powell, J., dissenting).

26. 430 U.S. 651, 678 (1977) (finding that corporal punishment in school does not violate the Eighth Amendment and noting that "a disciplinary paddling neither threatens seriously to violate any substantive rights nor condemns the child 'to suffer grievous loss of any kind'" (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

27. *See* DRIVER, *supra* note 18, at 148.

28. *Goss*, 419 U.S. at 579, 581.

29. *See id.* at 583.

30. DRIVER, *supra* note 18, at 146 (quoting M. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WISC. L. REV. 891, 902 (1981)).

31. Robert Reinhold, *The Supreme Court and the Rights of Pupils*, N.Y. TIMES (Jan. 27, 1975), https://www.nytimes.com/1975/01/27/archives/the-supreme-court-and-rights-of-pupils-a-challenge-posed-to-powers.html [https://perma.cc/YC8D-PVKQ].

32. DRIVER, *supra* note 18, at 147 (quoting Dolores Barclay, *Ruling on Suspended Pupils Rights Hit*, L.A. TIMES, Apr. 16, 1975, at C10).

protections for the due process rights of students facing school removal remains largely unchanged.[33]

B. Doctrinal Failures and Challenges

1. The Sparseness of Procedural Requirements

Students have not materially benefitted from the *Goss v. Lopez* decision. Since 1975, students have rarely been able to successfully challenge their schools' disciplinary decisions in court. Several studies have attempted to trace the incidence and success rate of due process claims challenging suspension procedures pre- and post-*Goss*. One study found that in cases from 1960-1971, pre-*Goss*, students won their suspension appeals 67% of the time.[34] Post-*Goss* through 1987, both the frequency of due process claims and the success rate of such claims decreased.[35] *Goss*'s new — albeit minimal — requirements may have given a veneer of legitimacy to school suspensions that had previously been lacking, making it more difficult to bring challenges, let alone win them. Another study found that between 1990 and 2000, the volume of *Goss* claims generally ticked back upward, but the outcomes still strongly favored school authorities.[36] In the few cases where students won, they generally only received nominal remedies such as a remand to the school board for a new hearing.[37] Even worse, in cases involving a long suspension or an expulsion, students typically remain out of school during the early administrative stages of appeal, and thus suffer irreparable harm even if they

33. *See* Elizabeth J. Upton, *"Some Kind of Notice" Is No Kind of Standard: The Need for Judicial Intervention and Clarity in Due Process Protections for Public School Students*, 86 GEO. WASH. L. REV. 655, 675–76 (2018) (emphasizing that "although legislative responses to inadequate process would be beneficial, neither Congress nor the states have demonstrated the desire or capability to solve" the issue of due process protections for students, preferring to leave educational policymaking to local governments); Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 643 (2007) (highlighting the disinterest states have exhibited in regulating the use of exclusionary discipline and the due process protections for students in local school districts).

34. *See* Elwood M. Clayton & Gene S. Jacobsen, *An Analysis of Court Cases Concerned with Student Rights 1960-1971*, 58 NASSP BULL. 49, 50–52 (1974).

35. Youssef Chouhoud & Perry A. Zirkel, *The* Goss *Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 358–59 (2008).

36. *Id.* at 374.

37. *See id.* at 377–78.

ultimately "win."[38] While the ability of students to bring due process claims may have slightly increased the number of cases reaching courts, the low success rate for students in these cases leaves schools with little added incentive to respect and enhance students' rights.[39] School administrations can, for the most part, rest assured that so long as a surface-level inquiry suggests that required procedures were followed, courts will not dig further.

a. The Development of Societal and Judicial Trends

The low success rate of students bringing claims under *Goss* can be traced to both societal and judicial trends, and their intersection. Societally, in 1994, Congress passed the Gun-Free Schools Act, which required all schools to expel students who brought a firearm to school.[40] By 1999, 94% of the nation's schools had adopted "zero-tolerance" policies — which favor mandatory and severe punishment regardless of individual circumstances — that expanded far beyond

38. While a student may be entitled to injunctive relief once their case reaches a state or federal court, *see, e.g.*, K.J. *ex rel.* Johnson v. Jackson, 127 F.4th 1239, 1252–53 (9th Cir. 2025) (finding that the appellant could have sought injunctive relief because the student was still suspended when he filed the complaint, and thus faced "the 'continuing, present adverse effects' of his '[p]ast exposure to illegal conduct,'" namely the allegedly unconstitutional suspension (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974))), the passage of time before a student's case reaches the courts often renders any claim for injunctive relief moot, *see, e.g.*, Matos *ex rel.* Matos v. Clinton Sch. Dist., 367 F.3d 68, 74 (1st Cir. 2004) (finding that "the passage of time . . . ha[s] minimized any need for a preliminary injunction"). For example, in New York City, a student must first appeal the decision of the Regional Superintendent to the Chancellor, who must issue a written decision within fifteen working days following the completed filing of the appeal record. N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-443: STUDENTS DISCIPLINE PROCEDURES 53 (2004). Only students with disabilities are entitled to interim relief during this time. *Id.* If the student's appeal is denied by the Chancellor, they then can file an appeal with the Commissioner and wait twenty working days for a decision. 8 N.Y.C.R.R. § 275.11(a). Only once the student has received this decision can they seek redress in court where injunctive relief may be available — at the very least nearly two months of school later. *See* Appeal of Elisa Cuardrado and James Cuardrado, Dec. No. 14,529 (Jan. 17, 2001), https://www.counsel.nysed.gov/Decisions/volume40/d14529 [https://perma.cc/9JJ8-PFWU] (finding that school districts may impose reasonable exhaustion requirements).

39. *See* DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE 76 (2016). Not only are the number of cases and success rates low, but very few decisions are published – only 0.0000004% over a decade – leading to a dearth of guidance for schools, advocates, and other courts. *Id.*

40. 20 U.S.C. § 7961 (1994).

firearms, embracing this federally-modeled harsher stance on school discipline.[41] Some schools even administered yearlong suspensions for vaguely defined infractions such as "willful disobedience."[42] The pervasiveness of zero-tolerance policies led to a shared understanding by school districts and courts that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."[43]

Judicially, *Goss* stood as a highwater mark of court involvement in schools. Only a few years after the *Goss* decision, the Court began retreating toward the judicial restraint it had favored prior to the 1960s: In 1977, the Court held in *Ingraham v. Wright* that neither the Eighth Amendment nor the Fourteenth Amendment's Due Process Clause applied to restrict corporal punishment in schools.[44] Justice Powell, now in the majority, continued to push his idealized image of schools, noting that "the schoolchild has little need for the protection of the Eighth Amendment."[45] He suggested that a student who is excessively paddled, as Ingraham was, should seek redress through the tort system, rather than through due process protections.[46] Since then, federal courts have continued to adopt a hands-off approach. The Supreme Court denied certiorari from a Fourth Circuit decision

41. *See* DRIVER, *supra* note 18, at 158. *See generally* Stephanie D. Stahl, *The Evolution of Zero-Tolerance Policies*, 4 CRISSCROSS 1 (2016). Though the term "zero-tolerance" originated in the policing of drug crimes in 1986, it had begun to be applied to schools by the beginning of the 1990s. *Id.* at 5. As the U.S. Customs Service moved away from the policy, school districts, empowered by the Gun-Free Schools Act of 1994 (which required schools to expel a student for at least a year if they bring a weapon to school), passed their own zero-tolerance rules relating to weapons, drugs, gang-related activity, and fighting. *Id.* at 9–13. This approach gained even more momentum after the Columbine shooting in 1999, through what *Time Magazine* termed "the Columbine Effect," and acts such as swearing, truancy, insubordination, and dress code violations were added to the list of offenses that were dealt with through zero-tolerance policies. *Id.*

42. *See* DRIVER, *supra* note 18, at 158–59.

43. New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985) (holding that the standard for searching students in a school environment should be the lower standard of reasonableness, not probable cause); *see* DRIVER, *supra* note 18, at 161. Courts have generally held that schools do not need to adhere to *Goss* when there is an imminent threat of violence. *See, e.g.*, Craig v. Selma City Sch. Bd., 801 F. Supp. 585, 591–93 (S.D. Ala. 1992) (finding that no hearing was required because students were engaged in a physical altercation in the principal's office, with principal present, and there was a threat of continued violence).

44. *Ingraham*, 430 U.S. at 651.

45. *Id.* at 670.

46. *See id.* at 661. It is difficult to reconcile *Goss* with *Ingraham*, decided by the same nine justices only twenty-seven months apart, because they seem to pull in opposite directions regarding what procedural protections students are entitled to before punishment. Justin Driver suggests two possible explanations, both based in judicial minimalism: the Court's interest in maintaining the status quo and its interest in avoiding line-drawing. *See* DRIVER, *supra* note 18, at 181. First, he notes that while many schools had already adopted due process procedures for suspensions at the time *Goss* and *Ingraham* were decided, all but two states still allowed corporal punishment. *Id.* The Court felt more comfortable solidifying the former than changing the latter because they did not want to interfere with a majority of schools' operations. *Id.* Driver also notes that in *Ingraham*, the Court would have had to do some line drawing as to how much corporal punishment was too much, whereas in *Goss*, the procedural requirements were so vague and minimal that school districts could make their own judgments as to their implementation. *Id.* at 181–82.

upholding the four-month suspension of a student who had been caught with a knife he had taken from a friend who had attempted to die by suicide.[47] The Fourth Circuit, in its opinion, noted that "federal courts are not properly called upon to judge the wisdom of a zero-tolerance policy."[48]

When students successfully appeal suspension decisions through challenging either procedural violations or the substantive elements of a decision, their success is usually attributable to state statutory requirements rather than federal constitutional protections. Lower federal courts have followed the Supreme Court's path of deference to school administrators,[49] with one study finding that courts rule in favor of the student in 6% of federal cases, but in 27% of state cases.[50] In a study conducted by the National Center for Education Statistics ten years after *Goss*, the majority of school districts provided protections greater than the *Goss* requirements, including some questioning of witnesses and the ability to appeal suspensions.[51] In 2000, two-thirds of states had laws that expanded due process protections for students above the *Goss* threshold.[52] When procedural requirements become more concrete and stringent, it becomes more difficult for judges to simply defer to schools, because the claims before them require a more thorough case-by-case analysis to ensure all requirements have been met.[53]

b. The Peculiarities and Limitations of Local Control

In New York City, for example, when public school students are accused of committing an infraction that may warrant a Superintendent's Suspension — a

47. Ratner v. Loudoun Cnty. Pub. Schs., 16 F. App'x 140 (4th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002).

48. *Id.* at 140. The court found that its inquiry was "limited to whether Ratner's complaint alleges sufficient facts which if proved would show that the implementation of the school's policy in this case failed to comport with the United States Constitution." The court found it did not. *Id.* at 141–42.

49. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004) (electing to prioritize the "difficulties of school administrators charged to balance their duty to provide a safe school [over] the constitutional rights of individual students when violence in schools is a serious concern").

50. *See* Chouhoud & Zirkel, *supra* note 35, at 382. This is likely because of the stronger procedural requirements afforded by some state laws. While *Goss*'s procedures are rudimentary, the procedures of certain states which are the basis for state law procedural due process claims are oftentimes stricter and thus leave less room for deference. *See id.* at 381–82.

51. Henry S. Lufler, Jr., *Courts and School Discipline Policies*, *in* STUDENT DISCIPLINE STRATEGIES: RESEARCH AND PRACTICE 197, 207 (Oliver C. Moles ed., 1990).

52. Perry A. Zirkel & Mark N. Covelle, *State Laws for Student Suspension Procedures: The Other Progeny of* Goss v. Lopez, 46 SAN DIEGO L. REV. 343, 349–50 (2000). Forty-five states have passed substantive statutory limitations on the use of exclusionary discipline related to age, length of removal, and type of infraction. EDUC. COMM'N OF THE STATES, SCHOOL DISCIPLINE POLICIES: WHAT LIMITATIONS ARE PLACED ON THE USE OF SUSPENSION AND/OR EXPULSION? 1 (2021), https://reports.ecs.org/comparisons/school-discipline-policies-03 [https://perma.cc/5H5Y-MZFB].

53. *See* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 887–88 (2015).

period of suspension greater than five school days — a series of procedural requirements must be met. First, the principal must investigate the situation.[54] The principal is required to question those affected by the student's actions and other witnesses, obtain signed written statements, question the accused student, inform them as to what they are being accused of, and provide them with an opportunity to explain their version of the story and prepare a written statement.[55] Then, if the principal confirms that a Superintendent's Suspension is warranted, the school must give immediate written notice to the student's parent within twenty-four hours, which must include a description of the incident, information about an alternative learning site where the student must report, and notice of a suspension hearing that will be scheduled within five school days of the date of the suspension.[56] At the hearing, which is presided over by an impartial hearing officer employed by the New York City Department of Education, the student may be represented by an advisor or counsel, view the school's evidence presented by a school official, cross examine the school's witnesses, present their own evidence and witnesses, and share mitigating factors that may lessen the suspension time.[57] If the student disagrees with the final decision made by the hearing officer and approved by the superintendent, a student may appeal the decision to the Chancellor of the New York City Department of Education and, after that, to the New York State Board of Education.[58]

However, when local and state government actors are the primary source of enhanced procedural protections around suspensions, students are left subject to the whims and biases of local officials, a problem even more pronounced in districts that do not strengthen protections in the first instance.[59] While New York City's protections for students rise well above the baseline that *Goss* set and New York State built upon, many states have added only minimal protections, leaving each district with wide discretion to institute its own procedures, or provide no additional procedures at all. Five states — Alabama, Alaska, Iowa, Mississippi, and Pennsylvania — have never passed *any* uniform state laws to provide due process protections for their students facing school removal; unsurprisingly, their suspension rates exceed the national average.[60] Some states require only "some

54. N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-443: STUDENTS DISCIPLINE PROCEDURES (2004).

55. *Id.* at 28.

56. *Id.* at 30.

57. *Id.* at 31–32.

58. *Id.* at 31, 52; N.Y. EDUC. L. §§ 310–11.

59. *See* DRIVER, *supra* note 18, at 150; *see also* John M. Malutinok, *Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases*, 38 CHILD. LEGAL RTS. J. 112, 118–25 (2018).

60. *See* EDUC. COMM'N OF THE STATES, *supra* note 52; Mike Tafelski, *Alabama Students Don't Have Due Process, but They Should*, AL.COM (Feb. 18, 2021), https://www.al.com/opinion/2021/02/alabama-students-dont-have-due-process-but-they-should.html [https://perma.cc/3RFM-WQKM].

evidence"[61] or "substantial evidence"[62] to find that a student has committed the alleged violation in a student disciplinary hearing, while others have no state-imposed standard of proof whatsoever, leaving the choice up to individual school districts.[63] In Alabama, a 2023 bill that would have created a uniform system of procedural due process requirements before students are removed from public schools was rejected by the state legislature.[64] The statute would have required all Alabama districts to provide a fair trial and notice for students facing suspensions of more than eleven days, and would have largely prohibited suspensions and expulsions for students in elementary school and for truancy or tardiness violations.[65] During debates, a Republican state congressman who spoke out against the bill's perceived leniency on discipline said: "We took the Bible out of the classroom, and we took the paddle out of the classroom, and then we wonder why we are where we are."[66] The patchwork quilt of state procedural protections leaves students subject to the whims of such legislators, a status quo that further illustrates the need for federal safeguards.

c. The Impact of Bias

Moreover, in all states, the rudimentary guidelines constraining school removal allow implicit and explicit biases to factor into school discipline. The named plaintiff in *Goss*, Dwight Lopez, was a Black teenager who had been suspended for allegedly participating in a demonstration at his high school following the shooting of two Black students by a white student.[67] The NAACP Legal Defense and Educational Fund and the Southern Christian Leadership Conference jointly filed an amicus brief in *Goss* focused on the disproportionately high rates

61. *See, e.g.*, Brands v. Sheldon Cmty. Sch., 671 F. Supp. 627, 632 (N.D. Iowa 1987) (finding that so long as a decision rests upon "some evidence," due process may be satisfied).

62. *See, e.g.*, Brown v. Metro. Sch. Dist. of Lawrence Twp., 945 F. Supp. 1202, 1208 (S.D. Ind. 1996) (finding that so long as there was substantial evidence to uphold an expulsion, Indiana's Pupil Discipline law was not violated); Carey *ex rel.* Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990) (noting that a student must not be punished except on the basis of substantial evidence); KAN. CODE ANN. § 72-8903(a)(8); MISS. CODE ANN. § 37-9-71; N.H. CODE ANN. § 317.04(h)(1); N.C. CODE ANN. § 115C-390.8(d).

63. *See, e.g.*, ARK. CODE ANN. § 6-18-501; MO. CODE ANN. § 171.011; N.D. CODE ANN. § 15.1-19. OK. CODE ANN. § 210:10-1-20(c).

64. *See* Brandon Moseley, *Senate Rejects Due Process for Student Discipline Bill*, ALA. TODAY (May 17, 2023), https://altoday.com/archives/51487-senate-rejects-due-process-for-student-discipline-bill [https://perma.cc/SC56-TC4N].

65. *See* Rebecca Griesbach, *Bill to Address Alabama School Discipline, Curb Student Suspension Stalls*, AL.COM (March 31, 2022), https://www.al.com/educationlab/2022/03/bill-to-address-alabama-school-discipline-curb-student-suspensions-stalls.html [https://perma.cc/R3SV-A7BW].

66. *Id.*

67. *See* Cara McClellan, *Challenging Legacy Discrimination: The Persistence of School Push-out as Racial Subordination*, 105 BOSTON U. L. REV. 641, 672 (2025). In her article, McClellan highlights the origin of exclusionary school discipline as a response to federal desegregation efforts, meant to keep Black students out of newly desegregated schools.

at which Black students were suspended.[68] That disparity still exists today.[69] Data from a 2021 United States Department of Education report showed that Black students in New York City public schools — comprising the largest school district in the country — missed more than twice as many days due to suspension as white students.[70] This disparity is even more pronounced with respect to Black students with disabilities. In a Task Force Report published by the New York State Education Department in 2022, Black male students with disabilities were found to be more than two times more likely to be suspended than their white peers with disabilities, and almost ten times more likely to be suspended than white students without disabilities.[71] During the 2017-18 school year, almost 90% of all long-term suspensions across the state were issued to Black and Latinx students, even though these students comprised only 67% of the public school system population.[72] Research suggests that when given the opportunity to choose among several disciplinary options for a minor offense, teachers and administrators will opt to issue more severe punishments for Black students than they do for white students being punished for the same offense.[73] These disparities begin as early as

68. DRIVER, *supra* note 18, at 157 (citing Brief of the National Association for the Advancement of Colored People & the Southern Christian Leadership Conference, Amici Curiae in Support of the Decision Below at 10–16, *Goss*, 419 U.S. 565, 1974 WL 185916 (1975)).

69. *See* JACQUELINE M. NOWICKI, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018), https://www.gao.gov/assets/700/690828.pdf [https://perma.cc/8P7R-YB4F]. *See generally* Erik J. Girvan, *Towards a Problem-Solving Approach to Addressing Racial Disparities in School Discipline Under Anti-Discrimination Law*, 50 U. MEM. L. REV. 995, 1011 (2020) (explaining that school disciplinarians may "anticipate more inappropriate behavior from black students than white students, view black students as older and more culpable than similarly aged white students, or more quickly conclude that black students are troublemakers"); DANIEL J. LOSEN, UCLA CTR. FOR C.R. REMEDIES, DISABLING PUNISHMENT: THE NEED FOR REMEDIES TO THE DISPARATE LOSS OF INSTRUCTION EXPERIENCED BY BLACK STUDENTS WITH DISABILITIES 2–4 (2018).

70. *See* Crystal Cranmore, *Push to Reform NYC School Suspensions over Racial Disparities*, ABC7NY.COM (Oct. 7, 2021), https://abc7ny.com/suspensions-new-york-city-public-schools-reform/11094378 [https://perma.cc/7EX9-B88W].

71. SAFE SCHOOLS TASK FORCE REPORT: RECOMMENDATIONS FOR REDUCING DISPARITIES IN AND REFORMING SCHOOL DISCIPLINE IN NEW YORK STATE (2022), https://www.regents.nysed.gov/sites/regents/files/P-12%20-%20Recommendations%20for%20ATT%20-%20Recommendations%20for%20Reducing%20Disparities%20in%20and%20Reforming%20School%20Discipline%20in%20New%20York%20State.pdf [https://perma.cc/NAC7-MJDF].

72. *See* LINDSEY FOSTER, N.Y.U. STEINHARDT, DISPROPORTIONALITY AND PUNISHMENT: A CRE APPROACH TO SCHOOL DISCIPLINE (2019), https://steinhardt.nyu.edu/metrocenter/perspectives/disproportionality-and-punishment-cre-approach-school-discipline-2019 [https://perma.cc/8JSB-E3L3].

73. *See* Thomas Rudd, *Racial Disproportionality in School Discipline: Implicit Bias Is Heavily Implicated*, KIRWAN INST. STUDY RACE & ETHNICITY (Feb. 5, 2014), https://aasb.org/wp-content/uploads/racial-disproportionality-schools-02.pdf [https://perma.cc/FR4S-7XS7].

preschool.[74] It is not surprising that a system built on such broad discretion is vulnerable to bias, and while procedure alone cannot fix bias, a stronger framework of legal protections could meaningfully mitigate its impact.

Given the intentionally rudimentary and generic procedural requirements that *Goss* provided, the decision itself never significantly improved the procedural protections in place for students facing school removal. Legal scholar Derek Black has argued that *Goss*, for the most part, merely encouraged schools to "routinize process to produce the favored result."[75] It is not difficult for schools to fulfill the requirement of "some kind of notice and some kind of hearing,"[76] but it *is* difficult for students to prove that these vague requirements have not been met.[77] Furthermore, the reach of *Goss* stops at ten-day suspensions. Outside of the notice and hearing generalities, *Goss* leaves full discretion to school districts to decide what procedures apply to suspensions longer than ten days, merely noting that "more formal procedures" may be required.[78] The Court did not address whether being sent to an alternative school might implicate a property interest.[79] And it did not address in-school suspensions, where a student is removed from a learning classroom and placed somewhere else in the school building. Lower courts have interpreted *Goss*'s omission of discussion about other school privileges — such as taking specific classes,[80] participating in extracurricular[81] and athletic activities,[82]

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74. *See* U.S. DEP'T OF EDUC., OFF. C.R., 2020-2021 CIVIL RIGHTS DATA COLLECTION: STUDENT DISCIPLINE AND SCHOOL CLIMATE IN U.S. PUBLIC SCHOOLS (2023), https://www.ed.gov/media/document/crdc-discipline-school-climate-reportpdf-21409.pdf [https://perma.cc/A8PP-DSEU]. While Black preschoolers accounted for 17% of enrollment, they accounted for 31% of all out-of-school suspensions. *Id.* at 5.

75. *See* Black, *supra* note 53, at 846; *see also* J. Harvie Wilkinson III, Goss v. Lopez*: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 72 (1975).

76. *Goss*, 419 U.S. at 579.

77. *See, e.g.*, Dietchweiler *ex rel.* Dietchweiler v. Lucas, 827 F.3d 622, 628 (7th Cir. 2016) (finding that the student had an adequate opportunity to be heard despite not having any kind of hearing); C.B. v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996) (finding that "once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands").

78. *Goss*, 419 U.S. at 584; *see, e.g.*, Newsome v. Batavia Loc. Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988) (finding that a student's due process rights were not violated when the school denied him the opportunity to cross-examine his student accusers and school administrators at his hearing for a greater-than-ten-day suspension); Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985) (holding that, in connection with a hearing for an offense punishable by a semester-long suspension, the student did not have the right to cross-examine witnesses).

79. *See infra* Part II.A.1. *See generally* ALLAN POROWSKI, ROSEMARIE O'CONNER & JIA LISA LUO, U.S. DEP'T OF EDUC., HOW DO STATES DEFINE ALTERNATIVE EDUCATION? 1, 8 (2014).

80. *See, e.g.*, Casey v. Newport Sch. Comm., 13 F. Supp. 2d 242, 246 (D.R.I. 1998) (holding that a five-week suspension from a single class, when the student received adequate alternative instruction, did not constitute a due process violation in the absence of any state law provision to the contrary).

81. *See, e.g.*, Angstadt v. Midd-West Sch. Dist., 377 F.3d 338, 344 (3d Cir. 2004) (finding no constitutionally protected property interest in "participation in extracurricular activities").

82. *See, e.g.*, Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) ("It is well-established that students do not have a general constitutional right to participate in extracurricular athletics.").

and attending school rites of passage such as graduation[83] — as implying that these are *not*, in fact, property interests deserving of due process protection. *Goss*'s minimalism means that courts will rarely, if ever, require more process than what a given school district or state elects to provide. The flexible standard that the *Goss* Court purported to impose has little meaning if individual circumstances are very rarely even considered.[84] Less than ten years after *Goss* was decided, one scholar summarized the opinion as "remarkable not for its innovation, but for the fact that it was so long in coming, so vigorously contested en route, so narrowly affirmed when it finally came, and so parsimonious in the rights it recognized upon arrival."[85] The Court's parsimony in this area remains the status quo fifty years later.

2. The Growth of Charter Schools and the State Actor Question

Even the minimal protections afforded by *Goss* are, of course, predicated on the ability of students and their parents to hold schools accountable through constitutional litigation. The rise of charter schools over the last twenty years has dramatically changed the education landscape, but their legal status in many contexts remains uncertain. Since the start of the charter school movement in the early 1990s, charter school enrollment has grown substantially, more than doubling between 2009 and 2019, with the estimated enrollment now over 3.7 million students, over 7% of all students in schools.[86] Over half of all public schools in Washington, D.C. are charter schools.[87] Although most are labeled in official documents as *public* charter schools, courts and commentators have debated fiercely whether they should be considered state actors for purposes of claims brought under 42 U.S.C. § 1983, which allows individuals to recover damages for constitutional violations committed by state officials.[88] The main confusion lies in the balance between the autonomy that charter schools enjoy in creating their own rules and regulations and the oversight they are still subject to by the state, which has the power to revoke their charters and thereby shut them down

83. *See, e.g.*, Kirby v. Loyalsock Twp. Sch. Dist., 837 F. Supp. 2d 467, 476–77 (M.D. Pa. 2011) (holding that a student did not have a constitutional interest in attending senior year extracurricular activities).

84. *See* Black, *supra* note 53, at 858.

85. Leon Letwin, *After* Goss v. Lopez*: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 637 (1977).

86. *See Fast Facts: Charter Schools*, NAT'L CTR. FOR EDUC. STAT, https://nces.ed.gov/fastfacts/display.asp?id=30 [https://perma.cc/6ETD-7JAR].

87. *Table 216.90. Public Elementary and Secondary Charter Schools and Enrollment, and Charter Schools and Enrollment as a Percentage of Total Public Schools and Total Enrollment in Public Schools, by State: Selected School Years, 2000-01 Through 2021-22*, NAT'L CTR. FOR EDUC. STAT, https://nces.ed.gov/programs/digest/d22/tables/dt22_216.90.asp [https://perma.cc/F7SB-NQS8].

88. *See, e.g.*, Bruce Baker, *Charter Schools Are... [Public? Private? Neither? Both?]*, SCH. FIN. 101 (May 2, 2012), https://schoolfinance101.com/2012/05/02/charter-schools-are-public-private-neither-both [https://perma.cc/X2DY-RW2G].

entirely.[89] Though individual charter schools may present their own ideas for curriculum and policy, the state is empowered — and indeed required — to evaluate and choose from these ideas before a school is chartered and throughout its existence.[90] Charter school disciplinary policies can be more harsh and unforgiving than those of public schools, and charter schools are usually not required to adhere to the discipline regulations enacted by their local public school district. [91] Accordingly, and particularly considering the rate at which charter school enrollment is growing, the answer to the question of whether charter schools are regarded as state actors will have an outsized impact on the future of students' due process rights.

When the first charter schools opened, most courts assumed they were state actors for purposes of § 1983, and thus subject to the same constitutional constraints as public schools.[92] Charter school advocates disagreed, arguing that they were private actors and therefore not subject to suit under § 1983.[93] While some courts interpret the statutory language of "*public* charter school" literally, and therefore assume as a matter of law that charter schools are state actors,[94] most courts employ the three tests that the Supreme Court has set forth to analyze whether a private entity is so related to the state that it may be sued under § 1983, asking: Is the charter school 1) performing a function that is traditionally and

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89. *See generally* Preston C. Green III, Bruce D. Baker & Joseph Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

90. *See* Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 847–48 (2023). Black draws a distinction between this kind of monitoring and the "detached relationship" the state has with private schools, even those with voucher programs. *Id.* at 848. Charter schools are usually authorized for a period of five years or less and must meet the goals in their contracts to be reauthorized, with courts giving deference to the authorizers' decisions on renewal. *See* Michael A. Naclerio, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1162–63 (2017).

91. *See* Green III, Baker & Oluwole, *supra* note 89, at 335. In San Diego, charter schools had a suspension rate twice that of public schools. In Newark, the suspension rate for charter schools was over triple the rate of public schools. In Washington, D.C., only 3 students were expelled from the city's 45,000-student public school system while 227 were expelled from the city's 35,000-student charter school system. *Id.* In the 2012-2013 school year, Chicago charter schools expelled 61 students per 10,000 students enrolled, while public schools expelled 5. Kerrin Wolf, Mary Kate Kalinich & Susan L. DeJarnatt, *Charting School Discipline*, 48 URB. LAW. 1, 20 (2016). One Boston charter school was found to have suspended nearly 60% of its student population for the same school year. *Id.*

92. *See* Green III, Baker & Oluwole, *supra* note 89, at 335–36 (analyzing the conflicting legal positions charters have taken regarding their status to suit their immediate needs); *see also, e.g.*, Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968 (S.D. Ohio 2002); Irene B. v. Phila. Acad. Charter Sch., No. 02-CV-1716, 2003 WL 24052009, at *1 (E.D. Pa. Jan. 29, 2003); Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch., No. 04-CV-663, 2006 WL 2466868, at *5 (W.D.N.Y. Aug. 24, 2006); Scaggs v. N.Y. State Dep't of Educ. No. 06-CV-0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007); Jordan v. Northern Kane Educ. Corp., No. 08-CV-4477, 2009 WL 509744, at *1, *3 (N.D. Ill. Mar. 2, 2009).

93. *See, e.g.*, Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814 (9th Cir. 2010).

94. *See* Green III, Baker & Oluwole, *supra* note 89, at 333–34.

exclusively the province of the state;[95] 2) employing a governmental mechanism to achieve a result that has the force of law;[96] or 3) so entwined with the state such that the two are dependent upon one another?[97] Satisfying any one of these tests is sufficient to establish state action. These tests are fact-specific, and thus the location, parties, and nature of the alleged violation matter.

Two Supreme Court cases to date have explicitly addressed the state actor status of publicly funded, but not traditionally public, schools — a category that includes charter schools. In *Rendell-Baker v. Kohn*, decided in 1983, the Court held that a private school for students who struggled to finish high school in a traditional school environment, although funded and regulated by the state, was not acting as a state actor when it fired an employee; the Court found the public function theory (option one above) inapplicable, but left open the possibility that a future fact pattern could fall under the entwinement theory (option three).[98] In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, decided in 2001, the Court indeed found, under the entwinement theory, that a non-profit association was engaged in state action and therefore liable under § 1983 when it enforced a rule against one of its member schools.[99] The Court distinguished the two cases by finding that the school in *Rendell-Baker* was a "mere public buyer of contract services," while the association in *Brentwood Academy* "exercises the authority of the predominantly public schools to charge for admission to their games . . . [,] enjoy[ing] the schools' moneymaking capacity as its own."[100] In *Brentwood Academy*, the Court laid out its own flexible, fact-based approach to consider whether there was a sufficiently "close nexus between the State and the challenged action" to give rise to state action.[101] Factors to consider included:

Whether the state exercises its "coercive power" or "significant encouragement";

Whether the private actor is a "willful participant in joint activity with the state";

Whether the entity is controlled by the state or an agency thereof;

Whether the entity has been "delegated a public function by the state";

Whether the actor is "entwined with governmental policies"; and

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95. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 508–09 (1946) (holding that a privately owned company town that is open for use by the public may not infringe upon individuals' constitutional rights).

96. *See* Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948) (holding that judicial enforcement of a racially restrictive covenant constitutes state action, violating the Fourteenth Amendment).

97. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961) (finding state action with respect to a private entity enjoying a mutually beneficial relationship with the state such that it is an integral part of public service).

98. 457 U.S. 830, 841–42 (1982).

99. 531 U.S. 288, 289 (2001).

100. *Id.* at 299.

101. *Id.* at 295.

Whether the government is "entwined in the entity's management or control."[102]

The ensuing confusion among lower courts in determining whether charter schools are state actors has mostly stemmed from state-specific guidelines on discrete aspects of school administration. In 2010, the Ninth Circuit in *Caviness v. Horizon Community Learning Center* found that charter schools could be state actors for some purposes and not for others.[103] In that case, a charter school was found not to be a state actor for purposes of an employment claim by a teacher.[104] By contrast, in the same year, the Tenth Circuit in *Brammer-Hoelter v. Twin Peaks Charter Academy* permitted a teacher to bring a First Amendment § 1983 claim against a charter school.[105] Indeed, the *Brammer-Hoelter* court did not even question whether the charter school was subject to § 1983 suits in the first instance.[106] The First Circuit, meanwhile, undertook a fact-specific inquiry in *Logiodice v. Trustees of Maine Central Institute* to find no cognizable state action where a student was expelled from a Maine private school that received funding from the public school district.[107] While the court was concerned with the "threat of wrongful expulsion from the local school of last resort,"[108] the unique schooling system that Maine employed — in which high school education had never been the exclusive province of the government — both counseled against a finding of state action yet also cabined the applicability of the holding.[109]

Derek Black argues that these fact-specific inquiries generally "rest on a presumed context inapplicable to charter [schools], in which the state and the private actor are completely separate entities."[110] He posits that applying the *Brentwood* factors is unnecessary for charter school cases because the answer is categorically the same in every context.[111] Charter schools are, by definition, the result of a state choosing by statute to delegate its core and constitutionally-required function of educating its children. Since charter schools are "not simply regulated by statute" but indeed "*created* by statute," Black argues they clearly fall under the umbrella of state action.[112] While the type of school at issue in *Logiodice* may require further inquiry given the unique context of Maine's education system, a charter school like the one in *Brammer-Hoelter* should not. Charter schools are generally

102. *Id.* at 296.

103. 590 F.3d 806, 814 (9th Cir. 2010).

104. *Id.* at 816.

105. 602 F.3d 1175, 1188 (10th Cir. 2010).

106. *Id.*

107. 296 F.3d 22, 24–29 (1st Cir. 2002).

108. *Id.* at 29.

109. *Id.* at 27; *see* Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools State Actors*, 2004 U. CHI. LEGAL F. 525, 540 (2004); Brief in Opp. to Cert., Charter Day Sch. Inc. v. Peltier, 143 S. Ct. 2657, 2022 WL 17645977 (Dec. 7, 2022).

110. *See* Black, *supra* note 90, at 844.

111. *See id.* at 844–46.

112. *Id.* at 847 (emphasis added).

categorized as public schools under state constitutions and statutory schemes,[113] which further counsels towards at least a rebuttable presumption of state action. Black posits that the volume of cases debating this idea is attributable more to the persistence of charter schools continuing to push their non-state-actor theories than any actual legal ambiguity.

In 2022, the Fourth Circuit in *Peltier v. Charter Day School* held that a charter school in North Carolina was a state actor and was thus bound by the Equal Protection Clause because

> (1) North Carolina is required under its constitution to provide free, universal elementary and secondary schooling to the state's residents; (2) North Carolina has fulfilled this duty in part by creating and funding the public charter school system; and (3) North Carolina has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools.[114]

Since the state had explicitly delegated its constitutional duty to the charter school, it would be "undermining fundamental principles of federalism" for the court to disregard the state's judgment and find the school not to be a state actor.[115] In other words, North Carolina could not "delegate its educational responsibility to a charter school operator that is insulated from . . . constitutional accountability" to get out of its own constitutional obligations.[116] The court found that this decision was not inconsistent with *Caviness* because each state's legal structure calls for a unique constitutional analysis.[117] The Supreme Court denied certiorari in 2023, leaving the Fourth Circuit decision in place but declining to provide any further

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113. *See, e.g.*, Wilson v. State Bd. of Educ., 89 Cal. Rptr. 2d 745, 751–54 (Cal. App. 1999) (finding that the public school system in California is a "system of schools, which the constitution requires the Legislature to provide," and therefore that "charter schools *are* public schools"); Coleman v. Utah State Charter Sch. Bd., 673 F. App'x 822, 830 (10th Cir. 2016) (acknowledging that "charter schools are public schools using public funds to educate school children"); New York Charter Sch. Ass'n v. Smith, 15 N.Y.3d 403, 409 (2010) (noting that "the Legislature created charter schools as 'independent and autonomous *public* school[s]'"); Reach Acad. for Boys & Girls, Inc. v. Delaware Dep't of Educ., 8 F. Supp. 3d 574, 578 (D. Del. 2014) (acknowledging that Delaware charter schools are public schools); Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1228 (Fla. 2009) (finding that "charter schools are nonsectarian public schools"); Yarbrough v. E. Wake First Charter Sch., 108 F. Supp. 3d 331, 337 (E.D.N.C. 2015) (noting that "by statute, charter schools are public schools"); Richardson Indep. Sch. Dist. v. Michael Z., 561 F. Supp. 2d 589, 599 n.12 (N.D. Tex. 2007) (noting that charter schools are public schools); Aspira, Inc. of Pa. v. Sch. Dist. of Phila., No. 19-CV-4415, 2021 WL 3511294, at *6 (E.D. Pa. Aug. 10, 2021) (noting that charter schools are public schools).

114. Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 122 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).

115. *Id.* at 121.

116. *Id.* at 122 (finding that Charter Day School, which receives 95% of its funding from the government, could not enact discriminatory dress codes).

117. *Id.* at 121.

guidance on the state actor status of charter schools.[118]

Some charter school advocates have argued that removal from a charter school is not equivalent to removal from a public school because the student retains other free educational options. This argument is simplistic and unpersuasive for several reasons. First, some states consider suspension or expulsion from a charter school as equivalent to suspension or expulsion from public school, and thus removal from a charter school prevents a student from simply starting over in public school.[119] Second, that student has lost the ability to pursue educational opportunities outside of a public school system that has perhaps failed them.[120] And third, if a primary argument for the existence of charter schools is more freedom for experimentation in small settings such that successful new policies and practices can eventually be scaled up for implementation in public schools, such policies and practices necessarily must comply with the requirements of due process.[121] Research conducted by Advocates for Children of New York in 2015 indicated that out of 164 charter school discipline policies reviewed, 107 allowed a student to be suspended or expelled for *any* infraction in the discipline policy (including truancy and vaguely defined terms such as "unacceptable behavior"), and 133 did not indicate any right to receive written notice of a suspension, despite the fact that written notice is mandated by New York law.[122]

Uncertainty regarding the state actor status of charter schools also contributes to charter school "pushout" of students with disabilities. This practice, whether intentional or unintentional, artificially boosts charter schools' student

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118. *Peltier*, 143 S. Ct. 2657.

119. *See, e.g.*, DEL. CODE ANN. tit . 14, § 4130 (2025) (mandating that prior to enrolling any transfer student, a district must contact the student's prior school in the state to determine if that student is currently serving an expulsion and, if so, that the student may not begin at the new school until the entirety of the expulsion has been served); WIS. STAT. § 120.13 (f)(3) (2025) (instructing that no district is required to enroll a student during that student's expulsion from a charter school if the student could have been expelled from the public school for the same reason and that if the student enrolls in the public school during his or her expulsion, the charter school must provide the school district with detailed information regarding the expulsion); *Charter School FAQ Section 4*, CAL. DEP'T OF EDUC. (June 11, 2025), https://www.cde.ca.gov/sp/ch/qandasec4rev.asp?utm_source=chatgpt.com#must-a-school-district-statutorily-take-a-student-that-has-been-expelled-from-a-charter-school [https://perma.cc/PC3N-GBD7] (describing how a school district may treat an expelled charter school student in the same way it would treat an expelled district student).

120. *See* Countryman, *supra* note 109, at 527.

121. *See* Wolf, Kalinich & DeJarnatt, *supra* note 91, at 7–8; Paul Hill, *Charter Schools Advance Innovation – But Often Not in the Ways You'd Expect*, CRPE (2019), https://crpe.org/charter-schools-advance-innovation-but-often-not-in-the-ways-youd-expect [https://perma.cc/G5TP-GR4N].

122. *See* Wolf, Kalinich & DeJarnatt, *supra* note 91, at 7–8 (citing ADVOCATES FOR CHILDREN OF N.Y., CIVIL RIGHTS SUSPENDED: AN ANALYSIS OF NEW YORK CITY CHARTER SCHOOL DISCIPLINE POLICIES (2015), http://www.advocatesforchildren.org/sites/default/files/library/civil_rights_suspended.pdf [https://perma.cc/W7A7-DLGA]).

achievement statistics.[123] Charter schools, like public schools, are subject to the requirements of the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act of 1973.[124] The IDEA requires publicly-funded schools to provide a free appropriate public education ("FAPE") to all students.[125] The IDEA also requires that if a student with a disability receives a disciplinary change in school placement for greater than ten school days, the school must conduct a Manifestation Determination Review ("MDR") to determine whether the child's disability or the school's failure to implement the student's Individualized Education Program ("IEP") was substantially related to the behavior in question.[126] If the answer to either question is yes, the student — with limited exceptions — must be immediately reinstated to their home classroom. Nevertheless, studies have suggested that students with disabilities in public schools are disciplined at higher rates than their peers without disabilities, and that charter schools suspend children with disabilities at nearly twice the rate of their peers without disabilities.[127] If charter schools are not considered state actors, little stands in the way of charter schools continuing to force out children with disabilities, thereby leaving them with fewer educational opportunities than their peers — an outcome that would fly in the face of the very purpose of the IDEA.

More broadly, if the United States continues to move in the direction that school choice advocates promote, embracing market-based approaches such as

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123. *See, e.g.*, Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have 'Got to Go,'* N.Y. TIMES (Oct. 29, 2015), https://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html [https://perma.cc/ET4B-P8DR]; *Success Academy Fined $2.4 Million for Discrimination Against Disabled Students*, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC. (Mar. 16, 2021), https://ncspe.tc.columbia.edu/current-events/content/107-success-academy-fined-24-million-for-discrimination-against-disabled-stude.php [https://perma.cc/NG6H-36GF]. Students with disabilities in charter schools are suspended twice as often as their nondisabled peers. *See* LAUREN MORANDO RHIM & SHAINI KOTHARI, NAT'L CTR. FOR SPECIAL EDUC., KEY TRENDS IN SPECIAL EDUCATION IN CHARTER SCHOOLS 16 (2018).

124. 20 U.S.C. § 1401; *see* Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 313–16 (1997).

125. 20 U.S.C. § 1412(a)(1)(A); *see* Maryrose Robson, *Charters' Disregard for Disability: An Examination of Problems and Solutions Surrounding Student Discipline*, 29 B. U. PUB. INT. L. J. 353, 357 (2020).

126. 20 U.S.C. § 1415(k).

127. *See, e.g.*, Robson, *supra* note 125, at 356–57, 360–61; *see also* Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. MAG. (2017), https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools [https://perma.cc/42GX-25M4]; DANIEL J. LOSEN, MICHEL A. KEITH II, CHERI L. HODSON & TIA E. MARTINEZ, CTR. FOR CIVIL RIGHTS AND REMEDIES, CHARTER SCHOOLS, CIVIL RIGHTS, AND SCHOOL DISCIPLINE: A COMPREHENSIVE REVIEW 6 (2016), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/charter-schools-civil-rights-and-school-discipline-a-comprehensive-review/losen-et-al-charter-school-discipline-review-2016.pdf [https://perma.cc/36W3-287Q] (finding that 235 charter schools studied in the 2011-2012 school year suspended more than 50% of their enrolled students with disabilities).

charter schools as the primary vehicles for providing educational opportunities for marginalized students, it is likely that quality education, *particularly* for marginalized students, will come to be seen as a private good to be fought over.[128] This will inevitably result in an even more inequitable distribution of educational resources that further disadvantages poor students, Black and Brown students, and students with disabilities.[129] Constitutional protections, it should go without saying, are necessary to protect those students most in need.

II.
THE CASE FOR REINVIGORATING *GOSS*

A. Applying Mathews v. Eldridge *to Suspension Hearings*

In 1976, a year after *Goss*, the Supreme Court held in *Mathews v. Eldridge* that a flexible and circumstance-specific balancing test applies when determining what process is due when state action threatens a cognizable property or liberty interest.[130] *Mathews* requires courts to weigh "the private interest that will be affected by the official action[,] . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[131] Weighing these factors in the context of terminating disability benefits, the *Mathews* Court held that a hearing after the termination of benefits, but before that termination became final, satisfied due process.[132] Six years earlier, the Court had held in *Goldberg v. Kelly* that a hearing prior to the termination of welfare benefits was required.[133] There, the Court noted that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings," there must be an impartial decisionmaker and an opportunity to present arguments and evidence and to confront and cross-examine witnesses.[134] Both decisions required a hearing; they just disagreed on the timing. In *Goldberg*, the fact that the determination relied on a fact-specific inquiry and could cause serious injury weighed in favor of the process occurring before any loss.[135] Meanwhile, the *Goss* Court found that "[t]o impose in each [short-term suspension] even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting

128. *See* Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J. L. & POL'Y 189, 231–32 (2016).

129. *See id.*

130. 424 U.S. 319, 334 (1976).

131. *Id.* at 335.

132. *Id.* at 349.

133. 397 U.S. 254, 264–66 (1970).

134. *Id.* at 267–69, 271.

135. *Id.* at 270 (quoting Greene v. McElroy, 360 U.S. 474, 496–97 (1959)).

resources, cost more than it would save in educational effectiveness."[136] The private interest and risk of erroneous deprivation were deemed outweighed by a school's interest in effectiveness and safety when it came to anything more than basic protections. Though *Goss* explicitly compared a student losing educational days to a welfare recipient being denied benefits — as in *Goldberg* — or a state employee being discharged without cause, these other scenarios are afforded a great deal more procedure than school removal.[137]

The Court has understood the main purpose of the Due Process Clause to be ensuring accurate decision-making and thereby restraining arbitrary government action.[138] In 1975, Judge Friendly outlined eleven elements of a fair hearing that would meet due process requirements;[139] under *Goss*, a suspension only requires three: notice, an opportunity to be heard, and an opportunity to be confronted with the evidence against oneself.[140] It seems inconsistent for there to be so little protection before school exclusion, as compared to other rights that implicate due process, when *Goss* itself — speaking on the matter even without the benefit of modern understandings of the impact of lost education time — voiced concern that the actions leading up to suspension were "not always as they seem to be."[141] This may in part be attributable to the fact that *Goss* was decided before *Mathews*, and thus exclusionary discipline has never been explicitly subjected by the Supreme Court to the modern procedural due process balancing test.

Moreover, the interests at stake in school suspension decisions — comprising the "private interest" element of *Mathews* balancing — have also grown enormously in scope since the time *Goss* was decided fifty years ago. This shift alone calls for revisiting *Goss* and undertaking the balancing inquiry anew. It is not enough to call for "some kind of notice" and "some kind of hearing" when that allows for vast differences in due process rights across state lines such that a student in New York is entitled to a full hearing while a student one state away in Pennsylvania is removed indefinitely after a quick meeting in the hallway.[142] Students' property interest in schooling today is comprised of not only education, but also food and healthcare, and the liberty interest that is implicated when a student is removed from school has a far greater impact than was previously

136. *Goss*, 419 U.S. at 583.

137. *Id.* at 573.

138. *See generally* Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 76 (1976).

139. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–1304 (1975). They are: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against oneself; (6) the right to have decisions based only on the evidence presented; (7) the right to counsel; (8) the making of a record; (9) a statement of reasons for the decision; (10) public attendance; and (11) judicial review. *See id.*

140. *See* Tanious, *supra* note 9, at 1707.

141. *Goss*, 419 U.S. at 584.

142. *See supra* Part I.B.2.

understood.[143] More procedural protections are needed to prevent the erroneous deprivation of these interests.

1. Greater Physical Property Interests

Today, schooling implicates more property interests for students than it did when *Goss* was decided. Not only do students receive the state-provided education they are entitled to, but they also receive both federal and state statutory entitlements to nutrition and healthcare on school property.[144] Unlike some other constitutional guarantees, procedural due process rights are flexible and therefore can be affected by substantive changes in society and law.[145] A comprehensive fifty-state survey of state laws and regulations conducted in 2021 found that states today often require schools to provide students with access to federal nutrition-assistance programs or state equivalents as well as preventive healthcare, which significantly ratchets up the magnitude of loss inflicted when a student is excluded from school.[146] The author of this study, Sherry Maria Tanious, argues that given these new state-given property interests, more due process should be required when a student is removed today than was called for fifty years ago.[147] While the school serves primarily as the physical location of the conveyance of these food and healthcare benefits provided by other government agencies, rather than as the main purveyor as it is for education, *all* of these benefits are lost when a student is removed from school.

Unlike other supplemental educational programs, such as extracurricular and athletic activities, which have not been found to give rise to property interests,[148] food and healthcare are statutory entitlements that have been created by state law.[149] In the 2019-2020 school year, over 50% of United States public school students, totaling over twenty-six million, received free or reduced price meals at school.[150] While many property interests are derived from federal law, the state is the government entity that bestows these interests upon students when the state commits to a federal plan. For example, the National School Lunch Program ("NSLP") and School Breakfast Program ("SBP") provide free and reduced-price

143. *See infra* Parts II.A.1, II.A.3.

144. *See* Tanious, *supra* note 9, at 1694, 1702–03.

145. *See, e.g.*, Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

146. *See* Tanious, *supra* note 9, at 1648.

147. *See id.* at 1648–49.

148. *See supra* Part I.B.1.c.

149. *See* Tanious, *supra* note 9, at 1685.

150. *Table 204.10. Number and Percentage of Public School Students Eligible for Free or Reduced-Price Lunch, by State: Selected Years, 2000-01 Through 2019-20*, NAT'L CTR. FOR EDUC. STAT, https://nces.ed.gov/programs/digest/d21/tables/dt21_204.10.asp [https://perma.cc/8H2G-QZ6K]; *School Meal Statistics*, SCH. NUTRITION ASSN., https://schoolnutrition.org/about-school-meals/school-meal-statistics/#participation [https://perma.cc/YD8E-92HX] (noting that in order to qualify for reduced price meals, costing $0.30 for breakfast and $0.40 for lunch, children must come from families with incomes between 130% and 185% of the poverty level).

meals to all eligible students at participating schools, and then reimburse states for the meals served.[151] Ninety-five percent of public schools participate in the National School Lunch Program[152] and thirty-one states currently provide additional reimbursements to schools beyond those provided through the federal meal programs.[153] Most states also have enacted laws or regulations that require some form of healthcare to be offered in schools.[154] A School Health Policies and Practices Study conducted by the Centers for Disease Control and Prevention in 2016 found that 81.7% of school districts require schools to follow national, state, or district health education standards,[155] 90.1% of schools have health services staff, such as school nurses,[156] and 79.5% of schools have counseling, psychological, or social services in the building.[157]

A state, in its conferral of these entitlements, demonstrates an understanding that students cannot properly learn without their nutritional and health needs being met, and that schools bear some responsibility for meeting these needs.[158] The provision of meals at school has become a "critical component of the safety net" which greatly improves food security for students and their families.[159] It also

151. *See* Timothy D. Lytton, *An Educational Approach to School Food: Using Nutrition Standards to Promote Healthy Dietary Habits*, 2010 UTAH L. REV. 1189, 1195 n.34 (2010). Under the School Meals Initiative, the United States Department of Agriculture ("USDA") requires states to conduct reviews of school food services participating in NSLP and SBP to determine whether they are in compliance with USDA standards. *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4098–99 (Jan. 26, 2012) (to be codified at 7 C.F.R pts. 210, 220).

152. FOOD RSCH. & ACTION CTR., FACT SHEET: NATIONAL SCHOOL LUNCH PROGRAM (2022), https://frac.org/wp-content/uploads/cnnslp.pdf [https://perma.cc/9MKE-9L92].

153. Tanious, *supra* note 9, app. B at A-5–84.

154. *See id.* at 1684.

155. CTRS. DISEASE CONTROL & PREVENTION (CDC), SCHOOL HEALTH POLICIES AND PRACTICES STUDY: RESULTS FROM THE SCHOOL HEALTH POLICIES AND PRACTICES STUDY 69 tbl. 7.1 (2016), https://files.eric.ed.gov/fulltext/ED656024.pdf [https://perma.cc/U8L3-VXX2].

156. *Id.* at 63 tbl. 5.19.

157. *Id.* at 76 tbl. 7.4.

158. *See* Tanious, *supra* note 9, at 1705. Students who eat school breakfast have been shown to receive 17.5% higher scores on standardized math tests and attend school 1.5 days more per year. *See School Meal Statistics*, *supra* note 150.

159. *See* ERICA KENNEY, SHEILA FLEISCHHACKER, JANE DAI, REBECCAS S. MOZAFFARIAN, KATIE WILSON, JEREMY WEST, YE SHEN, CAROLINE G. JUNN & SARA N. BLEICH, DURHAM NC: HEALTHY EATING RSCH., RECOGNIZING AND SUPPORTING SCHOOL MEAL PROGRAMS AS A CRITICAL NUTRITION SAFETY NET: LESSONS FROM COVID-19, at 1 (2022), https://healthyeatingresearch.org/wp-content/uploads/2022/01/HER-School-Meal-Safety-Net_final.pdf [https://perma.cc/7662-PWUQ]; *see also* Bo Kauffmann, *Free School Lunches: Essential Support for Young Minds*, BIGGER TABLE (Dec. 20, 2024), https://biggertable.blue/p/free-school-lunches-essential-support-for-young-minds [https://perma.cc/C2LY-P5BP] ("School lunches lifted 1.2 million people, including 722,000 children, above the poverty line in 2017.").

leads to improved attendance, behavior, and academic performance.[160] In fact, high-poverty school districts that participated in the Community Eligibility Provision of the Healthy, Hunger-Free Kids Act, enabling all students to receive school meals at no charge, saw out-of-school suspension rates fall by up to 25%.[161] Schools have become the "centerpiece of child-welfare programs,"[162] and when students are suspended, many miss out on their only secure meals of the day as well as critical health services.[163] Due process is "sensitive to the facts and circumstances that a specific deprivation presents,"[164] and having been given greater property interests by the state, students should enjoy correspondingly more formal procedures before any deprivation can occur.

2. Greater Understandings of the Effects of a Lost Education

At the time *Goss* was decided, the future losses that flow from a suspension were not as well understood as they are today.[165] Suspensions are not merely exclusions from school for a few days; they greatly increase the chance that students will never complete their education,[166] which in turn affects students' likelihood of obtaining gainful employment as well as being drawn into future criminal

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160. *See* FOOD RSCH. & ACTION CTR., BREAKFAST FOR LEARNING 1–2 (2011), https://frac.org/wp-content/uploads/breakfastforlearning-1.pdf [https://perma.cc/SN2M-AJQG] (finding that the provision of school breakfast was associated with increased attendance and academic achievement, and fewer disciplinary incidents).

161. *See* Nora E. Gordon & Krista J. Ruffini, *School Nutrition and Student Discipline: Effects of Schoolwide Free Meals* 29 (NBER, Working Paper No. 24986, 2018), https://www.nber.org/system/files/working_papers/w24986/w24986.pdf [https://perma.cc/ZAD4-DVRS].

162. *See* Tanious, *supra* note 9, at 1649.

163. *Cf.* U.S. DEP'T OF AGRICULTURE, PROHIBITION AGAINST DENYING MEALS AND MILK TO CHILDREN AS A DISCIPLINARY ACTION (2021), https://www.fns.usda.gov/cn/prohibition-against-denying-meals-and-milk-children-disciplinary-action [https://perma.cc/ZM7G-CCC2]. (noting that while withholding meals and milk to children as a disciplinary action is prohibited, disciplinary action that *indirectly* results in the loss of meals is allowable); *see* Tanious, *supra* note 9, at 1682.

164. *See* Tanious, *supra* note 9, at 1645–46 (quoting Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1119 (2019)).

165. *See* Alan H. Levine, *Section 2 – Plaintiff's and Defendant's Views – Reflections on* Goss v. Lopez, 4 J. L. & EDUC. 579, 580 (1975) (noting that several organizations of school administrators had filed a brief in support of the school district in *Goss* arguing that suspensions were "a part of education" and that "being deprived of schooling for ten days is good for them"). Justice Powell's dissent exemplifies the Court's failure to understand the impact of a suspension. He wrote: "[I]t is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day . . . ." *Goss*, 419 U.S. at 600 (Powell, J., dissenting).

166. *See* LAMA HASSOUN AYOUB, ELISE JENSEN, TALIA SANDWICK, DANA KRALSTEIN, JOSEPHINE WONSUN HAHN & ELISE WHITE, CTR. FOR CT. INNOVATION, SCHOOL DISCIPLINE, SAFETY, AND CLIMATE: A COMPREHENSIVE STUDY IN NEW YORK CITY ix (2019), https://www.innovatingjustice.org/wp-content/uploads/2019/10/report_schoolsafety_10252019.pdf [https://perma.cc/Q3X6-XZJP]; Robert Balfanz, Vaughan Byrnes & Joanna Fox, *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. APPLIED RSCH. ON CHILD. 2, 13 (2014).

activity and incarceration.[167] With a single suspension, it immediately becomes less likely that a student will be able to fully embrace their potential and the benefits of an education.[168] It would be easy to assume that missing school is categorically incomparable to losing housing or welfare benefits or becoming incarcerated. However, as a 2014 Dear Colleague letter from the Department of Education laid out, exclusionary discipline leads to "serious educational, economic, and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems."[169] Suspended students are nearly three times as likely as their non-suspended peers to come in contact with the juvenile justice system in the year following a disciplinary incident, and for students suspended over eleven times, the likelihood of future incarceration jumps to nearly 50%.[170] While these statistics could be attributable to any number of exogenous factors, a study in 2019 found that even just being at a school with higher-than-average suspension rates results in a 15% greater likelihood of dropping out and a 20% greater likelihood of being incarcerated in the future.[171] These statistics include *all* students at more punitive schools, not just those who are actually suspended. School suspensions have almost the same predictive value with respect to future incarceration as early exposure to the criminal legal system.[172] Even in-school suspensions correlate with a student's likelihood of later committing a crime.[173] The nexus between

167. *See generally A Look at School Discipline*, N.Y.C.L.U. (Aug. 29, 2007), https://www.nyclu.org/report/look-school-discipline#_ftn3 [https://perma.cc/GW9R-QA3W]; ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), https://www.ojp.gov/ncjrs/virtual-library/abstracts/education-lockdown-schoolhouse-jailhouse-track [https://perma.cc/HS7B-Y96W]; Malutinok, *supra* note 59, at 117; Kerrin C. Wolf & Aaron Kupchik, *School Suspensions and Adverse Experiences in Adulthood*, 34 JUST. Q. 407 (2017); TONY FABELO, MICHAEL D. THOMPSON, MARTHA PLOTKIN, DOTTIE CARMICHAEL, MINER P. MARCHBANKS III & ERIC A. BOOTH, JUST. CTR. COUNCIL OF STATE GOV'TS, BREAKING SCHOOLS' RULES: A STATEMENT STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT xi (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf [https://perma.cc/4VMC-VNNF].

168. *See* Balfanz, Byrne & Fox, *supra* note 166, at 13.

169. Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Off. of C.R., *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html [https://perma.cc/FKF6-47CQ].

170. FABELO, THOMPSON, PLOTKIN, CARMICHAEL, MARCHBANKS III & BOOTH, *supra* note 167.

171. Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime* (NBER, Working Paper No. 26257, at 6, 2019), https://www.nber.org/papers/w26257 [https://perma.cc/3AHA-MJYR].

172. *See id.*; Andrew Bacher-Hicks, Stephen B. Billing & David J. Deming, *Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrests*, EDUC. NEXT, https://www.educationnext.org/proving-school-to-prison-pipeline-stricter-middle-schools-raise-risk-of-adult-arrests (last updated July 27, 2021) [https://perma.cc/4LEG-UJYD].

173. *See* Alison Evans Cuellar & Sara Markowitz, *School Suspension and the School-to-Prison Pipeline*, 43 INT'L REV. L. & ECON. 98 tbl.5 (2015).

educational loss and other losses whose seriousness is more widely recognized by courts is stronger and closer than was understood at the time of *Goss*. When students are suspended, their entire futures — not only their current educations — are jeopardized.

When students are suspended or expelled from public school, many states have systems that place them in an alternative educational setting for a set period.[174] These alternative schools — public elementary and secondary schools that educate students whose needs "typically cannot be met in a regular school" by providing them with "nontraditional education" — have been found to be inadequate substitutes for the regular classroom and often effectively deprive students of a meaningful learning experience.[175] Students are usually placed involuntarily in alternative schools following a suspension or expulsion, as an alternative to suspension or expulsion, or through a 45-day transfer pursuant to the IDEA.[176] *Goss* stressed that suspensions implicate not only students' property interests in their education, but also the liberty interests bound up in their reputations.[177] These interests are equally threatened when a student is transferred to an alternative school. These school placements are almost always meant to be temporary, and the transient nature of the student population makes it difficult to have any coherent or consistent curriculum, let alone anything that mirrors what the student would learn at their home school.[178] The original purpose behind these schools was to create an "alternative" method for educating students who struggled in a more traditional classroom.[179] Ideally, these schools would implement smaller classroom sizes; employ teachers, social workers, and counselors specifically trained to work with students with learning and behavioral disabilities; apply research-based methods in the classroom to support students through challenging times; and emphasize the goal of returning students to their original school once feasible. In reality, these schools tend to have no clear standards,[180] limited

174. *See* EDUC. COMM'N OF THE STATES: SCHOOL DISCIPLINE POLICIES (2021), https://reports.ecs.org/comparisons/school-discipline-policies-05 [https://perma.cc/4652-7S3P].

175. *See* Miranda Johnson & James Naughton, *Just Another School?: The Need to Strengthen Legal Protections for Students Facing Disciplinary Transfers*, 33 NOTRE DAME J. L. ETHICS & PUB. POL'Y 69, 70 (2019) (citing INST. OF EDUC. SCI., NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2010-2011 (2012)).

176. *See id.* at 81.

177. *Goss*, 419 U.S. at 574.

178. *See* Alex Zimmerman, *'It's basically jail': Inside NYC's Suspension Centers, Where There's Bullying, Boredom — and Sometimes Support*, CHALKBEAT (Apr. 18, 2019, 8:42 PM), https://www.chalkbeat.org/newyork/2019/4/18/21107994/it-s-basically-jail-inside-nyc-s-suspension-centers-where-there-s-bullying-boredom-and-sometimes-sup [https://perma.cc/6FFJ-Q843].

179. *See generally* Ashton Tuck Scott, Goss v. Lopez *as a Vehicle to Examine Due Process Protection Issues with Alternative Schools*, 63 WM. & MARY L. REV. 2091, 2097 (2022).

180. *See* Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 900–01 (2017).

curricular options,[181] fewer extracurricular opportunities for students to engage in,[182] insufficient counseling services,[183] and increased risks of danger and disruption resulting from many students with behavioral difficulties being placed together in one setting.[184] Students at alternative schools are often not able to keep up with the work from their home school and so find themselves even further behind when they return,[185] significantly decreasing their chances of graduating from high school.[186]

However, courts have not found that a student's transfer to these schools raises due process concerns, absent a particularized showing that the education received at the alternative school is "significantly different from or inferior to that received at [the student's] regular public school"[187] or "so inferior as to amount to an expulsion."[188] Judges have found anything less severe to be a legally permissible punishment for school infractions.[189] Finally, it is especially difficult to determine the impact that alternative schools have on educational outcomes

181. *See* Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 223 (1996).

182. *See* Fedders, *supra* note 180, at 913.

183. *See* POROWSKI, O'CONNER & LUO, *supra* note 79, at 8 (2014).

184. *See* Shannon Chaffers, *The Legacy of Zero-Tolerance: Part 1: How Schools Respond to Students who Carry Guns*, AMSTERDAM NEWS (Apr. 17, 2025), https://amsterdamnews.com/news/2025/04/17/how-schools-respond-to-students-who-carry-guns [https://perma.cc/JV25-PBZ5].

185. *See* Zimmerman, *supra* note 178 (describing students' struggles to accumulate credits to graduate while at alternative schools); Tillman, *supra* note 181, at 223.

186. *See* India Geronimo, *Deconstructing the Marginalization of "Underclass" Students: Disciplinary Alternative Education*, 42 U. TOL. L. REV. 429, 455 (2011); Scott, *supra* note 179, at 2109. Most alternative schools graduate fewer than 67% of their students in four years. *See* Johnson & Naughton, *supra* note 175, at 75 (citing JENNIFER L. DEPAOLI, ROBERT BALFANZ, JOHN BRIDGELAND, MATTHEW ATWELL & ERIN S. INGRAM, EVERYONE GRADUATES CTR., SCH. OF EDUC. AT JOHNS HOPKINS UNIV., BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN RAISING HIGH SCHOOL GRADUATION RATES 31 (2017)).

187. Buchanan v. City of Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1996).

188. Marner *ex rel.* Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318, 1324 (M.D. Ala. 2002).

189. *See* Langley v. Monroe Cnty. Sch. Dist., 264 F. App'x 366, 368 (5th Cir. 2008) (holding that "a student's transfer to an alternative school for disciplinary reasons implicates no constitutionally-protected property interest"). Some courts have even explicitly approved of the de facto punishment that alternative schools impose in their withholding of meaningful educational instruction and services. *See, e.g.*, C.S.C. v. Knox Cnty. Bd. Of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304, at *14 (Tenn. Ct. App. 2006) (holding that because "[a]lternative education students have broken the rules of their respective schools . . . [,] they are not entitled to receive the same instruction and services that are provided to students who have continued to follow the rules"). *But see* Patrick v. Success Acad. Charter Sch., Inc., 354 F. Supp. 3d 185 (E.D.N.Y. 2018) (holding that the assignment to an alternative education program was a sufficient deprivation of the student's educational property interest to implicate the Fourteenth Amendment).

because many of them are not required to disclose their test scores.[190] Without these scores or documentation of other measurable outcomes, it is difficult to quantitatively assess how any particular student's academic outcomes might be different had they not been placed in an alternative school.

Qualitatively, even students who receive some semblance of a meaningful education at an alternative school suffer reputational and dignitary harms as a result of their placement.[191] The placing together of students labeled by their home schools as "bad kids" can be a self-fulfilling prophecy as a group of students — all of whom need support — are forced to work alongside one another in an environment that is not equipped to support even one of them. Then, when their time in the alternative school is done, the students return to their home school perhaps even more hardened, and thus perceived all the more by their peers and school personnel as "deviant."[192] That only increases the likelihood that these students will be more closely monitored, act out again, and start the cycle anew.[193] The consequences that flow from exclusionary discipline cannot be reduced to a few days out of school; the impacts run far deeper and have implications that can ripple for the rest of a student's life. These more recent understandings of the impacts of suspension on the lives of young people should be reconsidered under the *Mathews* balancing test and give rise to greater due process protection given the magnitude of "private interests" at stake in exclusionary discipline.

3. Greater Threat to Student Liberty

The liberty interests threatened by exclusionary discipline, as with the property interests, are far greater and better understood than they were at the time of *Goss*, for two reasons. First, it seems almost too obvious to mention that school attendance requirements inherently constrain children's liberty. Originalists interpret the Due Process Clause to mean that if individuals are held against their will without justification, their liberty interests are violated.[194] That prompts the question: What level of justification must there be for a particular kind of confinement? When it comes to school children, we clearly have recognized legitimate reasons to confine students to the schoolhouse every weekday: learning core subjects, socializing with peers, becoming democratic citizens, and so on. But when "public schools, like prisons, function as a site of social control that relies upon

190. In many states, including North Carolina, New York, and Mississippi, alternative school grades and test scores are not publicly available in the way that regular public schools' data are. *See* Fedders, *supra* note 180, at 917–18 (citation omitted). In Georgia, the lack of data from alternative schools led to an audit which concluded that the schools were "improperly unaccountable for student performance." *Id.*

191. *See* Scott, *supra* note 179, at 2109.

192. *See* Wolf & Kupchik, *supra* note 167, at 413 (describing how "once a person is publicly labeled as deviant, he or she often has difficulty shedding that label and may come to embrace that label as part of his or her self-identity, engaging in . . . 'secondary deviance'").

193. *Id.*

194. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 723–25 (2015) (Thomas, J., dissenting).

confinement and force while failing to fulfill their pedagogic purpose," children's liberty interests seem to be endangered without any legitimate reason for their confinement.[195] In such circumstances, compulsory school attendance appears to at best take on questionable constitutional status. When a student is excluded from their educational environment as punishment yet still constrained through required attendance at an alternative school with no meaningful educational benefit, as discussed above, there exists a cognizable liberty deprivation that counsels in favor of greater procedural protection under *Mathews.* When a student is denied the opportunity to take advantage of what typical schools have to offer, the usual rationales for confinement fall away.

Second, our greater understanding — and the Supreme Court's growing recognition — of the developmental needs of children bolsters the magnitude of the substantive liberty interests threatened by exclusionary discipline. In a relatively recent line of cases including *Roper v. Simmons*,[196] *Graham v. Florida*,[197] *J.D.B. v. North Carolina*,[198] and *Miller v. Alabama*,[199] the Court has brought a new perspective to the youth justice landscape through its decisions acknowledging that "age is 'far more than a chronological fact'"[200] in determining whether a given state action is appropriate. The first of these cases to be decided, *Roper*, suggested that with the benefit of more information regarding the psychosocial development of adolescents' brains, legal standards needed to be reevaluated to satisfy the Eighth Amendment's prohibition against cruel and unusual punishment.[201] The three differences between minors and adults that Justice Kennedy laid out in his majority opinion apply in discussions of school discipline as well: (1) a "lack of maturity" and an "underdeveloped sense of responsibility" that "result in impetuous and ill-considered actions and decisions"; (2) a heightened susceptibility to peer pressure that renders young people more deserving of

195. *See* Hershkoff & Yaffe, *supra* note 11, at 3 (citation omitted).

196. 543 U.S. 551 (2005) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause makes the death penalty unconstitutional for individuals who were minors at the time of their offense).

197. 560 U.S. 48 (2010) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause prevents a juvenile offender from being sentenced to life in prison without the possibility of parole for a non-homicidal crime).

198. 564 U.S. 261 (2011) (holding that courts should consider the age of a juvenile suspect for purposes of deciding whether they were in custody for *Miranda* purposes).

199. 567 U.S. 460 (2012) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits mandatory sentences of life in prison without the possibility of parole for juvenile homicide offenders).

200. *J.D.B.*, 564 U.S. at 272 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

201. *See* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMPLE L. REV. 929, 936, 944 (2009). Magnetic Resonance Imaging ("MRI") technology has supported the psychological studies demonstrating that there are significant differences between adolescent and adult brain functioning. *See id.* at 936–37.

forgiveness; and (3) a greater possibility of rehabilitation due to a less developed character.[202]

The Court has seemed to signal that it is moving in the direction of "age matters" reasonableness jurisprudence in the school context as well.[203] In *Safford Unified School District #1 v. Redding*, the Court held that administrators violated a 13-year-old student's Fourth Amendment rights when they required her to strip down to her underwear to check for pills.[204] While the Court concluded that under the facts presented, there was enough suspicion to justify a search, it found that the level of search was nonetheless too intrusive, perhaps influenced by Justice Ginsburg's remark that the other justices "have never been a 13-year-old girl."[205] The Court found that the search was "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[206] While the question the Court sought to answer was whether the Fourth Amendment protected the student from a strip search, recognition and consideration of her age impacted the result.

The Supreme Court has recognized in multiple contexts the need for greater protections for youth, and while the Court may not be hospitable to "pure" substantive due process claims — those that seek heightened protection of unenumerated fundamental rights — going forward, substantive due process interests nonetheless can tip the scales in favor of granting greater *procedural* due process protections under *Mathews*. When a substantive due process claim is brought with respect to an unenumerated right, the question is ordinarily whether the government's action is rationally related to a legitimate state interest.[207] Substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[208] The Supreme Court first addressed substantive due process claims raised by students during the same term as *Goss*. In *Wood v. Strickland* — a case involving the expulsion of two high school girls for spiking the punch at a school event with a negligible amount of alcohol — the Court found that "it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."[209] While finding that "public high school students do have substantive and procedural rights while at school," the Court stressed that "the system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators . . . and § 1983 was not intended to be a vehicle

202. *Id.* at 942–43 (quoting *Roper*, 543 U.S. at 569–70).

203. *See* Jessica Feierman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J. L. & SOC'Y 301, 311 (2012).

204. 557 U.S. 364, 379 (2009).

205. *See* Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES (June 3, 2009), http://www.nytimes.com/2009/06/04/us/politics/04women.html [https://perma.cc/SDW3-WVP6].

206. 557 U.S. at 379 (quoting *T.L.O.*, 469 U.S. at 342).

207. *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

208. Daniels v. Williams, 474 U.S. 327, 331 (1986).

209. 420 U.S. 308, 326 (1975).

for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."[210]

The judiciary's hesitancy to inquire into the rationale underlying a suspension for fear of judicial interference defeats almost all of *Goss*'s original purpose of protecting students' rights.[211] As much as some judges may try, it is impossible to separate the procedure that leads to exclusion from the substantive facts underlying it. However, courts do have the ability to both reasonably defer to school districts *and* protect students' rights, and a few have. In *Seal v. Morgan*, the Sixth Circuit held that a school's refusal to consider whether a student had knowledge of a knife's presence, hiding behind a zero-tolerance policy, was a violation of "its obligation, legal and moral" because "[c]onsistency is not a substitute for rationality."[212] The court found that "in the context of school discipline, a substantive due process claim will succeed . . . when there is 'no rational relationship between the punishment and the offense.'"[213] A school policy that did not require scienter, the court found, had no rational basis.[214] A District Court in New Mexico similarly held there was a substantial likelihood that a student's substantive due process rights were violated when no findings were presented showing that the student knew he was breaking a school rule.[215] By examining whether the disciplinary hearing had considered motivation and knowledge, these courts were able to both protect the students' procedural and substantive rights while still leaving the school districts with substantial discretion in the design of their policies. However, it is exceedingly difficult for a student to prove outright that a school's punishment was not rationally related to a legitimate government interest.[216]

When courts search for justifications for the deprivation of property or liberty, substantive concerns should factor into, and even guide, the procedural inquiry. Jessica Feierman of the Juvenile Law Center argues that the Court's willingness in *Safford* "to consider the perspective of a student in school, the impact of compulsory attendance rules, school discipline policies, and the unique authority of teachers and administrators" opens up the possibility of expanding the Court's

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210. *Id.*

211. *See supra* note 48 and accompanying text; *see also* BLACK, *supra* note 39, at 68–73.

212. 229 F.3d 567, 581 (6th Cir. 2000).

213. *Id.* at 575.

214. *Id.* at 576.

215. Butler v. Rio Rancho Pub. Sch. Dist., No. 01-CV-466, 2001 WL 37125019, at *4–5 (D.N.M. May 10, 2001), *order clarified*, No. 01-CV-466, 2001 WL 34065019 (D.N.M. Nov. 29, 2001).

216. *See, e.g.*, Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735, 740–41 (S.D. Tex. 2001) (finding that while clear findings of fact from the Superintendent may have been helpful, it was not irrational to find the student knew, even if he had forgotten, of a machete's presence, and that "it is not the business of a federal court 'to set aside decisions of school administrators which the Court may view as lacking in a basis in wisdom or compassion'" (quoting *Wood*, 420 U.S. at 326)); Piekosz-Murphy v. Bd. of Educ. of Cmty. High Sch. Dist. No. 230, 858 F. Supp. 2d 952, 961 (N.D. Ill. 2012) (holding that the court would defer to the school's classification of alcohol-related offenses, even if that classification may be fairly characterized as an abuse of discretion).

understanding of adolescent development to apply to new aspects of the school experience.[217] Deeper understanding and judicial recognition of the liberty and property interests in being subjected to age-appropriate treatment should bolster procedural protections for students, while also calling into question the substantive justifiability of the underlying policies. Furthermore, it is worth noting that not only can the Due Process Clause directly protect students from intrusions by the state, but it can also — even if somewhat aspirationally — become a source of empowerment for young people. When procedure is used to mitigate inherent power imbalances between students and school officials, students can feel empowered to advocate for themselves and engage with their own education as autonomous individuals with rights deserving of protection.

B. A New Standard

More procedural protections must be guaranteed to students in the school disciplinary process. *Goss* itself, quoting *Brown v. Board of Education*, recited that "'education is perhaps the most important function of state and local governments,' and the total exclusion from the educational process . . . is a serious event in the life of the suspended child."[218] While judicial restraint in the education context has been supported by the rationales of keeping the judiciary out of areas in which it lacks specialized knowledge and allowing educators to experiment to find the best solutions, it is clear (and has been clear for decades) that suspensions are not improving the educational outcomes of either the disciplined students or their peers.[219] Courts have a responsibility to step in when a lack of constitutional procedural protections is harming students nationwide. During the Obama and Biden administrations, guidance from the Department of Education and various task forces recommended moving away from zero-tolerance policies and towards alternative disciplinary methods aligned with childhood development and those that provide more support services in moments of crisis.[220] When courts disengage from an area that is many children's first conscious interaction with their constitutional rights and the law, they miss an opportunity to invest in and engage a new generation of citizens. If they did engage, such a generation, in turn, would be more likely to protect and uphold democratic values, respect constitutional and human rights, and move the country further towards its ideals.

Considering the new understandings of the property and liberty interests at stake when a student is removed from school, as discussed above, applying the

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217. *See* Feierman, *supra* note 203, at 313. *See generally* Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence*, 46 LOY. L.A. L. REV. 933 (2013).

218. *Goss*, 419 U.S. at 576.

219. *See supra* Part II.A.2.

220. *See, e.g.*, EMILY MORGAN, NINA SALOMON, MARTHA PLOTKIN & REBECCA COHEN, THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM, JUST. CTR.: THE COUNCIL OF STATE GOV'TS (2014); SAFE SCHOOLS TASK FORCE REPORT, *supra* note 71.

Mathews test to this context — which the Supreme Court has never done — suggests that *Goss* should be reconsidered and a new standard should be put in place. On one side of the balancing test is students' weighty property and liberty interests at stake in school removal, which are dramatically greater than was understood when *Goss* was decided. On the other side of the balancing test is the schools' and states' interests in avoiding onerous hearing processes that would disturb the schools' primary purpose as institutions of learning and ask educators to take on legal roles outside of their job description. This side is by no means insignificant; teachers frequently having to leave class and administrators putting aside their duties running a school to prepare for and attend hearings could indeed harm other students and the school as a whole. However, the school's coextensive interest in fostering a safe and productive learning environment and investing in its students' futures means it also *shares* an interest with its students in a fair and accurate disciplinary response. And while classroom order and a fair hearing may seem in tension with one another at times, they can be reconciled: the more students feel that their voices are heard and they are valued as contributing members of a community, the more they will trust and believe in the legitimacy of the rules and procedures in place. If students believe that those in charge are committed to protecting them from erroneous punishment, schools are likely to function with less disruption. The final prong of the *Mathews* test, then, involves considering the risk of erroneous deprivation, which the *Goss* Court highlighted as a particular concern in school discipline cases, noting that the disciplinary process is too often *not* a "totally accurate, unerring process, never mistaken and never unfair."[221]

Weighing these considerations together, more procedure is needed than what *Goss* mandated in 1975. While the specific contours of that protection may depend on case-specific circumstances, this article proposes that at minimum, *Mathews* requires that a student facing exclusionary discipline be entitled to 1) a clear, explicit notice of the allegations and evidence against them, and the rationale for suspension, within twenty-four hours of removal; 2) separation of at least one day between that notice and the hearing, such that the student can reflect, speak with their parents, guardians, and potentially counsel, and prepare their response to the allegations they face; 3) an unbiased adjudicator mediating the hearing, since many teachers and school administrators are biased in favor of their institutions; 4) the ability to swiftly appeal a decision the student believes is erroneous; and 5) a meeting with school administration post-hearing and suspension to discuss restorative pathways forward. The first two requirements are already included in many states' procedural protections, the third and fourth are becoming more common as more states formalize their procedures,[222] and the fifth — likely unique in

221. *Goss*, 419 U.S. at 579.

222. *See, e.g.*, Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102 (E.D. Wis. 2001); L.Q.A. *ex rel.* Arrington v. Eberhart, 920 F. Supp. 1208 (M.D. Ala. 1996), *aff'd sub nom.* L.Q.A. v. Eberhart, 111 F.3d 897 (11th Cir. 1997); REPRESENTING STUDENTS IN SCHOOL TRIBUNALS IN GEORGIA, GA. APPLESEED, INC. (2020); KAN. STATE ANN. § 72-8901-04.

due process doctrine — incorporates values of restorative justice by asking students to take responsibility for their actions and asking schools to provide the support students need to succeed in the future. Through implementation of these five requirements, which would not greatly increase the burden on school districts and administrators — as seen in states and school districts that have enacted these measures — the accuracy of hearings will improve, students will feel more respected by the process, and, hopefully, the number of suspensions will decrease over time. These mechanisms would ensure that students are better protected against the harms of removal; in a broader sense, they would communicate to students, teachers, and administrators the value of being in school and reflect the irreparable losses caused by exclusionary discipline.

III.
STATE CONSTITUTIONAL ALTERNATIVES

Regardless of whether the Federal Constitution functions to effectively protect and promote Due Process rights, state constitutions often offer more protection and alternate routes to redress where federal protections are limited or stripped. Given the uncertainty over the status of the Due Process Clause as a mechanism through which students' rights might be expanded, it is important for advocates to explore state protections, particularly where many states already require greater protections for students through interpretations of their state constitutional due process and right-to-education clauses. State constitutions may offer some degree of protection to fill the gaps in due process protections for students discussed in Part I.B, furnishing both more expansive constitutional safeguards and more expansive notions of state action, and thereby ensuring that charter schools are also subject to constitutional constraints in their disciplinary policies.

A. Stronger Constitutional Safeguards

Unlike the Federal Constitution, state constitutions are "a source of positive law, not merely a set of limitations on government."[223] Justice Brennan famously wrote in 1977 that state constitutions should be interpreted by state courts to afford greater constitutional rights than the Federal Constitution.[224] Given that the Supreme Court has refused to acknowledge a federal constitutional right to education,[225] and repeatedly emphasized that educational decisions are best left to state rather than federal control,[226] it is perhaps most natural for state law to govern the

223. Brown v. State, 89 N.Y.2d 172, 187 (1996).

224. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491–92 (1977).

225. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

226. *Id.* at 42 (observing that "persistent and difficult questions of educational policy" are "an area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels").

level of protection afforded to students.[227] All fifty states' legislatures and courts have shown some degree of willingness to do this through mandating the establishment of a state education system, grounded in state constitutions, and deciding education cases accordingly.[228] When a state's constitution requires the state to commit itself to certain public policies, state courts must in turn work to hold the state to those commitments.[229] It is the courts' role to determine whether a state constitutional provision "is 'of peculiar State or local concern,' or whether the State citizenry has 'distinctive attitudes' toward the right."[230] If so, it is distinctly the state courts' role to enforce the provision. In this context, that means state courts must do what it takes to make sure students actually enjoy and are able to take advantage of their right to education. And, as Justice Brennan noted, "state courts can breathe new life into the federal due process clause by interpreting their common law, statutes, and constitutions to guarantee a 'property' and 'liberty' that even the federal courts must protect."[231] After all, "state law determines what constitutes property for due process purposes."[232]

In 2003, the New York Court of Appeals explicitly acknowledged the role of state courts, specifically in protecting the state constitutional right to an education, in the context of school funding. The court in *Campaign for Fiscal Equity, Inc. v. State* found that state courts are "well suited to interpret and safeguard constitutional rights," including the Education Article of the New York Constitution.[233] The court further held that the distribution of educational funds should be equitable and noted that "inputs should be calibrated to student need and hence that state aid should increase where need is high and local ability to pay is low."[234] New York courts have continued to follow that directive in adjudicating whether education has fallen below the constitutional standard.[235] Similarly, a state court in Pennsylvania recently interpreted the Education Clause in the Pennsylvania Constitution to require that all students "receive a meaningful opportunity to succeed academically, socially, and civically, which requires that all students have access

227. *See generally* Mai Linh Spencer, *Suppress or Suspend: New York's Exclusionary Rule in School Disciplinary Proceedings*, 72 N.Y.U. L. REV. 1494, 1496 (1997) (arguing that New York's exclusionary rule should be applied in school settings as a form of "new federalism").

228. *See* PARKER, *supra* note 1.

229. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1145 (1999).

230. People v. Alvarez, 70 N.Y.2d 375, 379 (1987).

231. Brennan, *supra* note 224, at 503.

232. Seal v. Morgan, 229 F.3d 567, 574 (6th Cir. 2000).

233. 100 N.Y.2d 893, 931 (2003).

234. *Id.* at 929.

235. *See, e.g.*, Maisto v. State, 196 A.D.3d 104 (3d Dept. 2021) (finding that the State violated the education article by depriving certain districts of adequate inputs to serve at-risk students); Hussein v. State, 19 N.Y.3d 899 (2012) (affirming that courts may hear claims regarding the unconstitutionality of state education funding); Aristy-Farer v. State, 29 N.Y.3d 501 (2017) (holding that specific districts adequately demonstrated deficient inputs and outputs causally linked to inadequate state funding).

to a comprehensive, effective, and contemporary system of public education."[236] The court found that the right to public education was a fundamental right "explicitly and/or implicitly derived from the Pennsylvania Constitution," and therefore applied strict scrutiny in its determination as to whether there had been an equal protection violation in the distribution of funds to school districts.[237] Significantly, the court found that regardless of which level of scrutiny applied, there would be no rational basis for the disparities found between low-wealth and high-wealth school districts, and that the current method of funding violated the Education Clause by failing to provide all students with a meaningful opportunity to succeed.[238] The limited success of school funding cases in New York, Pennsylvania, and elsewhere is beyond the scope of this article, but the mere fact that courts seem inclined to take these claims seriously may indicate their willingness to become involved in constitutional questions related to education in a way that federal courts are not.[239]

B. Ensuring Application of Safeguards to Charter Schools

If charter schools continue to grow in prevalence, and to the extent they continue with any success to press the argument that they are not state actors for purposes of federal constitutional litigation, state constitutions could serve as critical mechanisms for ensuring that they are nonetheless subject to due process limitations in their disciplinary policies. For example, New York's Due Process Clause has been interpreted to afford more protection than its federal counterpart, but most courts have still held that state involvement is required for the Clause to be applicable. However, they apply a more flexible standard in evaluating what constitutes state action.[240] The Court of Appeals has made sure to note that the New York Constitution has historically "safeguarded any threat to individual libert[y], irrespective of from what quarter that peril arose."[241] As opposed to the Due Process Clause of the Fourteenth Amendment, which begins "no state shall . . . ,"[242] § 6 of the New York Constitution states that "[no] person shall be deprived of life, liberty or property without due process of law."[243] This language creates a more

236. William Penn Sch. Dist. v. Pa. Dep't of Educ., 294 A.3d 537, 909 (Pa. Cmwlth. 2023).

237. *Id.* at 947.

238. *Id.*

239. *See* BLACK, *supra* note 39, at 165–79.

240. *See* Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 160 (1978) (noting that the "absence of any express State action language . . . provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision").

241. *Id.*

242. U.S. CONST. amend. XIV.

243. N.Y. CONST. § 6.

flexible and inclusive standard for state involvement under the New York Constitution.[244]

The New York Constitution appears to be more closely aligned with the Federal Constitution in its restriction of the legislature's ability to delegate the execution and administration of laws. Under both constitutional regimes, the legislature is vested with an authority to legislate that may not be abdicated to any other body, save for the powers of execution and administration (provided that they are adequately defined and circumscribed).[245] The discretion granted in such delegations may not be unfettered,[246] but neither must it be a "precise or specific formula."[247] Even if the delegation of power itself does not have clear standards, so long as adequate standards or parameters can be found elsewhere, the delegation is not unconstitutional.[248] Still, state courts generally have invalidated delegations of power to an agency more often than have federal courts.[249]

Putting these two facets of the New York Constitution together, charter schools in New York could be caught between a rock and a hard place. If they try to assert that they are closely related to the State such that they have broad authority to undertake decision-making in their operations, they render themselves more likely to be considered a state actor. If, on the other hand, they try to argue that they are independent and therefore not state actors, the constitutionality of their very existence could be called into question through non-delegation principles. Legal scholar Gillian Metzger argues that when attenuation of state involvement results in a lack of adequate constraints, the privatization of education runs the risk of violating the anti-delegation principle.[250] This concern played out in, of all things, a case about audits. In *New York Charter School Association, Inc. v. DiNapoli*, charter schools sued the State challenging the legislature's 2005 statutory delegation to the Comptroller of the duty to audit charter schools, in addition to their ordinary duties of auditing State public schools.[251] The Court of Appeals

244. The leading case in New York discussing the state action requirement is *Sharrock*, *supra* note 240. In *Sharrock*, the New York Court of Appeals invalidated a state statute because it violated state constitutional due process, while acknowledging that the same statute might be valid under the Federal Constitution. *See* 45 N.Y.2d at 159–63. The court found that the statute at issue was a delegation of a governmental function that had been exclusively vested in the state, and that the state therefore had a duty to provide due process protection. *See id.* This stands in contrast to the Supreme Court's decision in *Flagg Brothers v. Brooks*, 436 U.S. 149, 162 (1978), in which a similar lien provision was held to be constitutional under the Due Process Clause.

245. *See* City of Rochester v. Monroe Cnty., 81 Misc.2d 462, 462 (N.Y. Sup. Ct. 1974); *see also* Gundy v. United States, 588 U.S. 128, 135 (2019).

246. *See City of Rochester*, 81 Misc.2d at 464.

247. *See* Levine v. Whalen, 39 N.Y.2d 510, 515 (1976).

248. *See* LaValle v. Hayden, 182 Misc.2d 409, 417–18 (N.Y. Sup. Ct. 1999), *aff'd*, 98 N.Y.2d 155 (2002).

249. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 31 (1965).

250. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1496 (2003).

251. *See* 13 N.Y.3d 120, 127 (2009).

rejected the argument that audits of charter schools were "incidental" to public school audits, and held that the delegation thus exceeded the legislature's authority under the New York Constitution.[252] Given the seemingly more lenient state action requirement of the New York Due Process Clause, this double bind could further curtail charter schools' attempts to avoid liability under the New York Constitution. For all these reasons, as the New York landscape illustrates, state constitutions could provide additional safeguards against charter schools being able to claim exemption from due process limitations in their disciplinary policies.

CONCLUSION

Over 3.5 million students are suspended from school each year.[253] These students are stripped of access to educational opportunities and subjected to punishment that can amount to a "life sentence to second-rate citizenship."[254] And exclusionary discipline practices have rarely been found to deter misbehavior, enhance school safety, or produce stronger academic performance by the students being disciplined or their peers.[255] Indeed, studies have shown a negative correlation between exclusionary disciplinary practices and outcome metrics, including academic achievement, for *all* students.[256] Still, the number of suspensions and expulsions has doubled in the last two decades.[257]

It is worth noting that schools across the country have, in the face of the negative effects of zero-tolerance and other similar policies, been turning to alternatives to suspension such as positive behavioral interventions and supports

252. *Id.* at 133.

253. *See supra* note 7.

254. *See* Boykins v. Fairfield Bd. of Ed., 492 F.2d 697, 706 (5th Cir. 1974) (Godbold, J., dissenting in part) (quoting Lee v. Macon Cnty. Bd. of Ed., 490 F.2d 458, 460 (5th Cir. 1974)).

255. *See generally* RUSSEL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE, IND. EDUC. POL'Y CTR. 13 (2000); Amity L. Noltemeyer, Rose Marie Ward & Caven Mcloughlin, *Relationship Between School Suspension and Student Outcomes: A Meta-Analysis,* 44 SCHOOL PSYCHOLOGY REV. 224 (2015); CAMILA CRIBB FABERSUNNE, SEUNG YEON LEE, DANNIELLE MCBRIDE, ALI ZAHIR, ANGELA GALLEGOS-CASTILLO, KAJA Z. LEWINN & MEGHAN D. MORRIS, EXCLUSIONARY SCHOOL DISCIPLINE AND SCHOOL ACHIEVEMENT FOR MIDDLE AND HIGH SCHOOL STUDENTS, BY RACE AND ETHNICITY, JAMA NETWORK OPEN (2023); Ayoub, Jensen, Sandwick, Kralstein, Hahn & White, *supra* note 166.

256. *See* Johanna Lacoe & Matthew P. Steinberg, *Do Suspensions Affect Student Outcomes?*, 41 EDUC. EVALUATION & POL'Y ANALYSIS 34, 35–36 (2019).

257. *See* DRIVER, *supra* note 18, at 152.

("PBIS")[258] and restorative justice practices.[259] These changes have produced positive results in school environments, decreasing the need for disciplinary action generally.[260] In order to encourage these processes to continue to be developed and implemented, procedural protections surrounding exclusionary discipline must become more robust. It is time for *Goss*'s protections to be revisited and expanded, harmonizing them with state requirements and the protections afforded to safeguard other property and liberty interests, and allowing them to actually realize their intended goal — protecting students.

258. *See generally What is PBIS?*, CTR. ON PBIS, https://www.pbis.org/pbis/what-is-pbis [https://perma.cc/2UXP-B94K].

259. *See, e.g.*, CTR. FOR CT. INNOVATION, RESTORATIVE JUSTICE IN SCHOOLS: A WHOLE-SCHOOL IMPLEMENTATION PROCESS (2020), https://www.innovatingjustice.org/wp-content/uploads/2021/04/Guide_RJ_Implementation_04052021.pdf [https://perma.cc/U7S3-KQUE]; JANE SUNDIUS & MOLLY FARNETH, OPEN SOC'Y INST.-BALT., ON THE PATH TO SUCCESS: POLICIES AND PRACTICES FOR GETTING EVERY CHILD TO SCHOOL EVERY DAY (2008), https://www.opensocietyfoundations.org/uploads/4a1a9543-1e9a-4fea-b8ec-a65a6126d9f0/whitepaper3_20080919.pdf [https://perma.cc/88ZJ-ELYA].

260. *See generally* LAUREN RICH, NICHOLAS MADER & AIDA PACHECO-APPLEGATE, CHAPIN HALL AT U. CHI., RESTORATIVE JUSTICE PROGRAMMING AND STUDENT BEHAVIORAL AND DISCIPLINARY OUTCOMES (2017), https://www.chapinhall.org/wp-content/uploads/CPS_Report_-_403_SOW_41_Umoja_Restorative_Justice_2.22.18.pdf [https://perma.cc/38CP-55YE].