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The Supreme Court and the Decline of Students' Constitutional Rights: A Selective Analysis

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Comment

The Supreme Court and the Decline of Students' Constitutional Rights: A Selective Analysis*

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> That [the public schools] are educating the young for citizenship is reason for the scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[1]

I. INTRODUCTION

The task of balancing the rights and freedoms of the individual against the need for order is a difficult one in any society that chooses to assume the status of being civilized. Yet, as delicate as such a balancing function may be in society in general, it is even more difficult to perform in the environment of the public schools. On one hand, the concern for the rights of the individual students in the school system is compelling, as illustrated by the statement of Mr. Justice Jackson quoted above. On the other hand, because of the dual functions of education and socialization that the primary and secondary schools of this nation are designed to serve, there is an extreme need for a somewhat greater degree of discipline and control than is present in everday society. Given the problems that are prevalent in today's pub-

* To my six weeks in the Black Tower, and other remembrances of prejurisprudential sanity. May I someday return.

1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

lic schools,[2] the balancing of these interests has become more crucial and more difficult.

The United States Supreme Court has undertaken this task on a number of occasions. The Court has rendered decisions delineating students' rights of free speech and expression,[3] freedom from cruel and unusual punishment,[4] procedural due process,[5] and freedom from unreasonable searches and seizures.[6] These decisions have not always been consistent, not only with each other, but also with cases decided at the same time in other contexts. Without a doubt, much of the inconsistency can be attributed to a changing perception of the vitality of individual rights in general, and the conditions within the public school system.

The purpose of this Article is to scrutinize these decisions with regard to their internal reasoning and their impact as policy. In addition, there will be an examination of what this author believes to be the most recent area of students' rights the Court has begun to develop: those protected by the free exercise clause of the first amendment. This examination will be made in light of the school prayer decisions[7] and the other students' rights cases studied herein.

II. FREEDOM OF SPEECH AND EXPRESSION

The seminal case in the area of the first amendment freedoms of speech and expression in the context of public schools is *West Virginia State Board of Education v. Burnette*.[8] In that case, a group of Jehovah's Witness public school students challenged the constitutionality of a West Viriginia school board regulation requiring students to

2. In recent years, schools across the country have been beset with disciplinary problems, most notably an increase in violent behavior and drug use. *See generally* 1 NAT'L INST. EDUC., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, VIOLENT SCHOOLS - SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS (1978).

3. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (first amendment protects student protests that do not materially and substantially interfere with discipline); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (first amendment prohibits states from making salute of the flag compulsory.)

4. Ingraham v. Wright, 430 U.S. 651 (1977) (eighth amendment prohibition of cruel and unusual punishment does not apply in public schools).

5. *Id.* (due process not violated by failure to give notice and hearing before corporal punishment is administered); Goss v. Lopez, 419 U.S. 565 (1975) (due process requires at least informal notice and hearing before suspension from school of 10 days or less).

6. New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (fourth amendment does not require probable cause standard in searching students, but only one of reasonableness).

7. Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

8. 319 U.S. 624 (1943).

salute the flag. Failure to comply with the statute was an act of "insubordination" and was to be dealt with accordingly.[9]

The students brought suit requesting injunctive relief to restrain enforcement of the regulations against Jehovah's Witnesses. They alleged that saluting the flag was a violation of their religious beliefs, and that being compelled to do so was an infringement of their first amendment right to free exercise of religion.[10] The board of education, relying on the Supreme Court's decision in *Minersville School District v. Gobitis*,[11] argued that the compulsory flag salute law did not violate the students' constitutional rights.[12]

The Court, in rendering a decision that the compulsory flag salute was unconstitutional, relied upon the broader grounds of freedom of speech and expression. Stating that censorship or supression of opinion required a showing of a clear and present danger of unlawful conduct,[13] it reasoned that compelling an involuntary affirmation would require even more urgent and immediate grounds.[14] The Court found no such grounds in the board's articulated interest in fostering the attainment of national unity.[15]

Addressing its recent decision in *Gobitis* that had reached the opposite result, the Court stated that the Jehovah's Witnesses in that case had simply asked for exemption, based on religious grounds, from an exercise of state power that everyone had presumed to be legitimate.[16] However, in spite of the fact that this assumption was present in *Burnette*,[17] the Court nevertheless held that the entire compulsory flag-saluting practice was illegitimate. In so doing, the Court established clearly, for the first time,[18] that students did have constitutional

9. *Id.* at 626. The act of insubordination was dealt with by expulsion, and readmission was denied until compliance. In the interim, the child was considered unlawfully absent, and his parents were subject to prosecution for violation of the compulsory attendance law. *Id.* at 629.

10. *Id.* at 629. The students also alleged infringement of freedom of speech, due process, and equal protection, but the result demanded was merely restraint against application to Jehovah's Witnesses. *Id.* at 629-30. Thus it can be inferred that the religious claim was the basis of their action.

11. 310 U.S. 586 (1940).

12. The regulation requiring the salute of the flag took much of its language from the *Gobitis* opinion. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 n.2 (1943).

13. *Id.* at 633.

14. *Id.*

15. *Id.* at 640.

16. *Id.* at 635 n.16.

17. "[The arguments in this case assume] that power exists in the State to impose the flag salute discipline on school children in general." *Id.* at 635.

18. While other cases had dealt indirectly with the state's power to regulate public schools, they had primarily been concerned with the rights of *parents* as against the state. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

protections within the confines of the public school.

The Court's next occasion to adjudicate the free speech and expression of rights of students came in *Tinker v. Des Moines Independent Community School District*.[19] In *Tinker*, a small group of public school students had decided to don black armbands as a symbol of protest against the Vietnam War. Prior to the beginning of this protest, the principals of the Des Moines schools met and adopted a policy against the wearing of the armbands.[20] If a student wore one to school, he would first be asked to remove it. If he refused, he would be suspended until he returned without it.[21]

The students wore their armbands to school, refused to remove them, and were suspended. They did not return to school until after the planned period of protest was over.[22] Thereafter, they filed a suit requesting injunctive relief on the basis that the school policy had violated the students' rights of free speech and expression. The district court, stating that the action of the school authorities was reasonable in order to maintain discipline, dismissed the complaint.[23] The Eighth Circuit Court of Appeals, *en banc*, was equally divided, and therefore affirmed.[24]

The Supreme Court determined initially that the wearing of the armbands was "symbolic speech" and should be accorded first amendment protection.[25] The Court stated that, in fact, the wearing of the armbands, though symbolic in nature, was closely akin to pure speech and therefore merited comprehensive protection. Because of this, while the school officials may have been reasonable in predicting a disturbance as a result of the armbands, their wearing could not be prohibited simply because of "fear or apprehension of disturbance."[26]

The Court rejected the reasonableness standard of the district court and instead asked whether the conduct would " 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' "[27] Applying this standard, the Court stated that nothing in the record indicated that fear or anticipation of that type of disruption,[28] and focused its analysis on what appeared to

19. 393 U.S. 503 (1969).
20. The wearing of armbands was to commence on Dec. 16, 1965. The principals met and adopted the policy prohibiting such conduct on Dec. 14, 1985. *Id.* at 504.
21. *Id.*
22. The plan was to wear the armbands from Dec. 16 to Dec. 31. *Id.*
23. Tinker v. Des Moines Indep. Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).
24. Tinker v. Des Moines Indep. Community School Dist., 383 F.2d 988 (8th Cir. 1967).
25. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969).
26. *Id.* at 508.
27. *Id.* at 509, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).
28. It is worth noting that the testimony of school authorities at trial indicated that the regulation was directed against the principle of the demonstration itself.

be a single-minded penchant of school officials to quash debate on the Vietnam War. Citing the fact that other efforts to discuss the war had been silenced,[29] and that the only political symbol that had been prohibited was a black armband, the Court stated that "state-operated schools may not be enclaves of totalitarianism,"[30] and that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[31]

Tinker, while a positive decision to the extent that it guarantees broad free speech protections to public school students, leaves a number of questions unanswered. Of these, two are most disturbing. The first is whether a public school is a public forum — that is, whether a school could prohibit all forms of political speech. The second is whether the "material and substantial disruption" that *Tinker* states may form the basis for prohibition of conduct must be inherent in the conduct itself, or merely be a likely result thereof.

With respect to the public forum issue, it is important to note that the Court in *Tinker* emphasized the close relationship between the free market of ideas guaranteed by the first amendment and the educational function of the public schools.[32] In addition, while the Court did focus on the fact that the ban on the armbands was discrimination, it did so in order to demonstrate that the aim of the ban was to foreclose discussion of the Vietnam War,[33] and probably not for the purpose of implying that a ban on all political expression would be unconstitutional.

Further, the fact that many schools open their facilities to political and other organizations for meetings[34] lends further credence to their status as a public forum of some degree.[35] Finally, it is important to consider the standard set forth in *Tinker* itself. Application of the

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School authorities felt that the public school was an inappropriate forum for political discussion and stated that if students did not like the way our elected officials ran things, the appropriate remedy was the ballot box. *Id.* at 509 n.3. This was an interesting proposal: in 1965, the year of the protest, public school students who could vote were very rare, since the required age was 21.

29. The Court noted that one student who had wished to write an article on the Vietnam War and have it published in the school paper was "dissuaded" from so doing by school officials. *Id.* at 510 n.5.
30. *Id.* at 511. The school permitted the wearing of national campaign buttons, and even the Iron Cross, traditionally a symbol of Nazism. *Id.* at 510.
31. *Id.* at 511.
32. *Id.* at 512-13.
33. *See supra* notes 28-30 and accompanying text.
34. *Cf.* Widmar v. Vincent, 454 U.S. 263 (1981) (opening university campus to meetings creates public forum; state may not discriminate against religious groups).
35. A number of commentators have applied the label "educational public forum" to allow the nature of the standard of content regulation (material and substantial disturbance) to comport with traditional, content-neutral public forum analysis. *See, e.g.*, Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE

"materially and substantially" disruptive test in the public schools seems to imply that some type of protected public forum exists there.[36]

The second unanswered question is somewhat more puzzling. Who must cause the "material and substantial" disruption of the school function: the protesters, or those who witness and react to the conduct? Clearly, if the protest itself is of such a nature as to cause the disruption, then it will not be protected. In this respect, the armbands in *Tinker* may have merited greater protection than actual speech.[37]

Fundamentally, the inquiry must be whether *Tinker* states that to be prohibited, the conduct must *be* disruptive or must *cause* disruption. For example, if a high school student wears a "Hinckley should have used a .44" button to school,[38] will he or she be protected if the school's chapter of Teenage Republicans begins to beat him or her during the middle of a civics lecture? Certainly, the student's conduct was not, in and of itself, disruptive, but arguably it was the cause of the disruption. *Tinker* is susceptible to both readings,[39] and it is likely that today's Court, with its attitude toward constitutional liberties, would opt for the more restrictive, "causation" reading. Given today's politically intolerant social climate,[40] such a likelihood greatly erodes *Tinker's* value as precedent.

Barnette and *Tinker* provide a useful foundation on which to build students' first amendment rights. While both are well-reasoned decisions, *Tinker*, because of its delineation of a standard, has far greater

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L.J., 931, 944; Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV., 278, 294 (1970).

36. Consider also this language from *Tinker*: "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969).

37. *Cf.* Nahmod, *supra* note 35, at 291-92 (comparing the less disruptive nature of the wearing of armbands to the reading aloud of the contents of a student newspaper). Certainly, wearing a black armband to math class would be less disruptive (and consequently more protected) than chanting "L.B.J. is a baby killer" during the same class. Of course, time, place, and manner restrictions may come into play in that situation.

38. This hypothetical in no way reflects this author's attitude toward the President of the United States.

39. *Compare* "no showing . . . *that forbidden conduct* would materially and substantially interfere . . .", Tinker v. Des. Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (emphasis added), *with* "prohibition of expression [not constitutionally permissible] . . . without evidence that it is *necessary to avoid* material and substantial interference . . . ." *Id.* at 511 (emphasis added).

40. *See, e.g.*, Lincoln Journal, Apr. 6, 1985, at 1, col. 4. The article reports the exploits of a gang of high school students from affluent families in the Fort Worth, Tex. area. Politically, the gang was oriented toward Nazism. One of its chief mottos, which it painted throughout the neighborhood, was "Democrats, communists and niggers shall perish under the wrath of . . . the future Aryan Lords." *Id.* at 7, col. 2.

potential applicability as precedent. Unfortunately, whether *Tinker* will be useful protection to student expression on controversial subjects or merely a group of hollow words that will protect only speech on subjects that engender no response depends upon its subsequent reading by today's Supreme Court.

III. PROCEDURAL DUE PROCESS

The Supreme Court's first adjudication of the procedural due process rights of public school students was in *Goss v. Lopez*.[41] In *Goss*, a suit was brought by nine Ohio public high school students who had been suspended during a period of student unrest in February and March, 1971.[42] The students challenged the constitutionality of the statute and regulations pursuant to which they were suspended, on the ground that they afforded them no hearing prior to suspension or within a reasonable time thereafter.[43] A three-judge district court found the procedure unconstitutional and set forth a number of mimimum procedures that were constitutionally due to the students.[44]

The Supreme Court agreed with the district court that the Ohio statute and regulations did not comport with procedural due process. While noting at the outset that there is no constitutional right to education at public expense, it stated that protected interests in property are not normally found in the Constitution, but in state law. Citing *Board of Regents v. Roth*,[45] the Court held that in choosing to extend free public education to all residents between five and twenty-one years of age, Ohio had created an entitlement to education. This entitlement, under *Roth*, could form the basis for a property interest.[46] Having chosen to extend this "right" to an education to a generally defined class, Ohio could not withdraw the right without the use of

41. 419 U.S. 565 (1975).

42. The suspensions were for a variety of conduct, including participation in disruptive demonstrations, physical attacks on police officers and school personnel, and damage to school property. *Id.* at 569-70.

43. *Id.* at 571.

44. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973). The district court stated that immediate removal of a student was permissible if that student endangered fellow students, teachers, or school officials, disrupted the academic atmosphere of the school, or damaged school property. In addition, the district court required notice of suspension proceedings to the student's parents within 24 hours of the decision to conduct them, and required a hearing with the student in attendance within 72 hours of removal. *See* Goss v. Lopez, 419 U.S. 565, 572 (1975).

45. 408 U.S. 564 (1972).

46. *Roth* clearly held that for procedural due process to apply to a given case, there must be an infringement of either a property or a liberty interest. *Id.* at 571-72. It also made clear that the concepts are to be construed liberally. *Id.* Prior to *Roth*, the Court had relied on a distinction between rights (which were protected) and privileges (which were not). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in the Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

fundamentally fair procedures.[47]

The Court also found a constitutionally cognizable liberty interest present in *Goss*. Noting that suspensions such as those at issue in this case would become a part of a student's record, it stated that liberty includes protection of a "person's good name, reputation, honor, or integrity."[48] Recognizing that these suspensions could seriously interfere with future prospects for higher education and employment, the Court held that the suspensions implicated a liberty interest protected by the due process clause.[49]

Having determined that a protected interest was implicated in the case, the court next turned to the administration argument that suspensions of less than ten days were a *de minimis* infringement of those interests. This was refuted by reference to prior case law, since, under *Roth*, the inquiry as to whether any due process protection was necessary involved the *nature* rather than the *weight* of the interest involved.[50] Additionally, the Court felt that, in fact, a suspension of up to ten days was not a *de minimis* infringement of a student's rights.[51]

Since procedural due process was at issue in *Goss*, the Court's next inquiry was what process was due. Citing the doctrine that the most fundamental requirement of due process was the opportunity to be heard, the Court held that, at the very minimum, students facing suspension "must be given *some* kind of notice and afforded *some* kind of hearing."[52] The Court went on to state that there was no requirement that the hearing be formal, and said that even an informal conference between the student and the disciplinarian would satsify due process, so long as the student was told of the charges against her and had an

47. Goss v. Lopez, 419 U.S. 565, 574 (1975).
48. *Id.*
49. Goss v. Lopez, 419 U.S. 565, 574-75 (1975). It is not clear that such an analysis comports with that employed by the Court in *Roth*, since that case held that the refusal to renew an instructor's one-year contract was not sufficiently damaging to his reputation and future employment prospects to give rise to an infringement of a liberty interest. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). One commentator has suggested that the recording of the suspensions and the reasons for them in student files is sufficient to distinguish the cases. Note, *Due Process—Students May Not Be Suspended Without Prior Notice of the Charges and An Opportunity for A Hearing (Goss v. Lopez, U.S. 1975)*, 6 SETON HALL 568, 579-80 (1975). Such a distinction seems to grasp at straws. Also, it subsequently has been held that damage to reputation, without a nexus to more, such as employment, does not implicate due process. *See* Paul v. Davis, 424 U.S. 693 (1976).
50. *Id.* at 575-76 (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)). The dissent appears to reject the two-step analysis set forth by *Roth*, wherein the nature of the interest determines whether due process applies, and the weight of the interest is considered in balancing the type of process which is due. *See* Goss v. Lopez, 419 U.S. 565, 586-88 (1975) (Powell, J., dissenting).
51. Goss v. Lopez, 419 U.S. 565, 576 (1975).
52. *Id.* at 579 (emphasis in original).

opportunity to give her side of the story.[53] In addition, while stating that ideally the hearing would occur prior to removal, since, by its nature, it could occur immediately following the misconduct, the Court left open the possibility of post-suspension hearings in certain circumstances.[54]

While *Goss* is a laudable decision in the sense that it establishes students' rights to procedural due process in the schools, it may be that the procedures guaranteed by the decision are inadequate.[55] Both the majority and the dissent agreed that the procedures mandated by *Goss* were less than a fair-minded school principal would impose on himself in order to avoid unfair suspensions.[56] In addition, the Court did not require that any notice be given to parents, but only to the accused student.[57]

Goss also left significant questions unaswered. Of primary importance is what process is due for longer suspensions or expulsions. While the Court did indicate that such factual situations would give rise to more stringent procedural safeguards,[58] and there is generally accepted federal case law on the subject,[59] the issue is not decided. One important question would be at what point, in terms of length of suspension, the additional safeguards apply.[60]

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53. *Id.* at 581-84.
54. *Id.* at 582-83. The Court stated that if the student's presence posed a continuing danger to persons or property, or an ongoing threat of disrupting the academic process, he may be immediately removed, with the hearing to follow as soon as possible. *Id.* One commentator has criticized the disruption ground, stating that, if applied too broadly, it could "render *Goss* of little practical consequence." Comment, *Student Rights and Due Process: Procedural Requirements of Goss v. Lopez*, 46 MISS. L.J. 1041, 1065 (1975). Yet, such a standard seems to comport with the disruption standard in *Tinker*, a violation of which would, in all probability, lead to a suspension.
55. Comment, *supra* note 54, at 1063-66. The commentator points out that a uniform rule of procedural due process for short suspensions flies in the face of the flexibility inherent in the standard. *Id.* at 1065. In addition, it may be that different students have differing levels of interest in suspensions of the same length. *But see* Goss v. Lopez, 419 U.S. 565, 584 (1975).
56. *Compare* Goss v. Lopez, 419 U.S. 565, 583 (1975), *with id.* at 596 n.15 (Powell, J., dissenting).
57. The Court's failure to do so in *Goss* may be understandable, since Ohio required such notice by statute. *Id.* at 596.
58. *Id.* at 584.
59. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (hearing prior to expulsion from state college requires "rudiments of adversary proceeding"), *cert. denied*, 368 U.S. 930 (1961). *Dixon* has been extended to secondary schools. *See, e.g.*, Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).
60. *See* Comment, *supra* note 54, at 1065. At least the Court should be commended for rendering a decision on the facts before it. Ten years later, today's Court, with virtually the same personnel, could take a lesson. *Cf.* New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

Another question that was unanswered at the time of *Goss* was the breadth of students' procedural due process protection. The answer to that question was, however, made clear just two years later when the Court virtually ignored the teachings of *Goss* in *Ingraham v. Wright*.[61]

In *Ingraham*, the Court was faced with the issue of what process was due students prior to the infliction of corporal punishment.[62] The petitioners based their action on two paddling incidents that took place at their junior high school in Dade County, Florida, during 1970. A Florida statute authorized corporal punishment by negative inference,[63] and many of the schools in Dade County had approved its use.[64] The regulation that permitted the punishment contained explicit directions as to its use, including the nature of the instrument to be used.[65]

The students challenged this punishment as being violative of procedural due process because of the lack of a hearing prior to the administration of the punishment. The record below indicated that there were irregularities in the administration of the punishments in general,[66] and that the particular punishments administered in this case were excessive.[67] In spite of this, the district court found no constitutional basis for relief, holding that no liberty interest was implicated by the beatings.[68] The court of appeals, in a hearing before a three-judge panel, reversed,[69] but that judgment was vacated upon a rehearing *en banc*, and the judgment of the district court was affirmed.[70]

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61. 430 U.S. 651 (1977).
62. *Ingraham* also raised the issue of whether the eighth amendment's prohibition of cruel and unusual punishment applied to excessive corporal punishment in the public schools. For an analysis of that issue, see *infra* notes 87-114 and accompanying text.
63. The statute in effect in 1970 proscribed punishment that was "degrading or unduly severe" or was inflicted without prior consultation with the official in charge of the school. FLA. STAT. ANN. § 232.27 (West 1961).
64. The record did not indicate how many schools actually employed corporal punishment, but it did state that 231 of 237 schools had been authorized by the Dade County School Board to use it. Ingraham v. Wright, 430 U.S. 651, 655 n.5 (1977).
65. That instrument was a flat wooden paddle, which was less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment consisted of one to five blows with the paddle. *Id.* at 656.
66. It appears that, contrary to the requirements of the Florida statute, teachers frequently adminstered the punishment on their own authority, without first consulting the principle or other officials in charge of the school. *Id.* at 657 n.8.
67. Ingraham testified that he was subjected to 20 blows with a paddle and suffered a hematoma, which required medical attention and kept him out of school for several days. *Id.* at 657. Andrews, also a petitioner, testified he was struck on his arms, one blow depriving him of the full use of his arm for a week. *Id.* Other students also testified as to the severity of other beatings. *Id.* at n.11.
68. The opinion of the district court was unreported.
69. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).
70. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).

In addressing the procedural due process issue, the Court disagreed with the holding of the court of appeals and found a constitutionally protected liberty interest implicated in the administration of corporal punishment.[71] Accordingly, the question became what process was due. On this question, the Court stated that the analysis required consideration of the private interest affected, the risk of an erroneous deprivation of that interest, the probable value, if any, of additional procedural safeguards, and the state interest, including fiscal and administrative burdens.[72] After performing this analysis, the Court concluded that the state law remedies provided by Florida were sufficient to protect the students' interests, and that no additional procedures were required.[73]

In so doing, the Court relied on a number of factors which, upon closer analysis, do not support its conclusion. The major mistake made by the Court was its reliance on Florida law to provide an adequate vindication of students' liberty interest. While Florida law did provide a remedy for *excessive* corporal punishment, no action would lie for *erroneous* corporal punishment.[74] Also, any remedy that would deter[75] erroneous punishment would nevertheless be inadequate simply because it would be compensatory rather than preventive.[76] Because of these inadequacies, the Court was clearly incorrect in stating that the state law safeguards were adequate and that little would be gained by adding additional safeguards.

Secondly, the Court suggested that risk of erroneous deprivation of the liberty interest was insubstantial because of the absence of Florida cases involving suits for excessive corporal punishment. This dearth of suits, according to the Court, made it clear that excessive corporal punishment is exceedingly rare.[77] Aside from the fact that the incidence of suits for *excessive* punishment is only tangentially relevant to the issue of *erroneous* deprivation of a liberty interest, such convoluted reasoning by the Court overlooked direct testimony in the rec-

71. Ingraham v. Wright, 430 U.S 651, 673-74 (1977).
72. *Id.* at 675, *citing* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
73. Ingraham v. Wright, 430 U.S. 651, 675-83 (1977).
74. *Id.* at 693 (White, J., dissenting). *See also* Note, *Ingraham v. Wright: No Process Due Public Schoolchild Prior to Final Deprivation of Liberty*, 39 U. PITT. L. REV. 770, 784-85 (1978).
75. Assuming the Court was not ignorant of the fact that Florida law provided no remedy for erroneous corporal punishment, its reasoning must suppose that the existence of an action for excessive punishment would cause officials to be more cautious in administering punishment. *See* Note, *supra* note 74, at 785.
76. Ingraham v. Wright, 430 U.S. 651, 695-96 (1977) (White, J., dissenting). Justice White observed: "The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding." *Id.* at 695 (White, J., dissenting).
77. *Id.* at 677 n.45. This lack of reported decisions may be better explained by other factors having nothing to do with the frequency of excessive corporal punishment. *See* Note, *supra* note 74, at 785-86.

ord as to excessiveness of punishment.[78]

Finally, the Court made use of an irrelevant analogy to fourth amendment search and seizure law in order, presumably to demonstrate that the infringement at issue in *Ingraham* was not severe enough to warrant constitutional protection.[79] The Court analogized the situation of a student faced with corporal punishment to that of a suspect being arrested on probable cause.[80] In both cases, according to the Court, there is a determination of fact without an advance hearing. Because of the arrest practice, the reasoning follows, there is no reason to supply additional procedural safeguards to protect the interest of the student.[81]

The use of this analogy epitomizes the judicial straw-grasping that pervades the *Ingraham* opinion. The reasoning contains three inherent flaws. First, the fourth amendment occupies a unique position in constitutional law, and its peculiarities should not be extended beyond their intended context.[82] Second, the state is not free to continue the deprivation of liberty caused by a warrantless arrest without procedures to ascertain whether probable cause in fact existed.[83] Finally, while incorrect incarceration for a relatively brief time as the result of an erroneous arrest would be unpleasant, it does not involve a liberty deprivation of the magnitude of that at issue in *Ingraham*.[84]

In the final analysis, *Ingraham* effectively limited *Goss* to its facts, if it did not overrule it completely. It must be noted that both cases were five-to-four decisions, with the *Goss* dissenters[85] picking up Mr. Justice Stewart to form the *Ingraham* majority. The anamoly created by the two decisions can best be illustrated by a statement of the black-letter law that they create. To remove a child from school for one day, you must tell him what he has done, but if you can surprise him with a paddle, you are doing nothing unconstitutional.[86]

78. *See supra* notes 67-68 and accompanying text.
79. The Court's analogy does not seem to fit into any of the *Eldrige* balancing factors, *supra* note 72 and accompanying text. Therefore, one must assume that it is simply the ribbon that ties the entire package together.
80. Ingraham v. Wright, 430 U.S. 651, 679 (1977).
81. *Id.* at 680.
82. In fact, Mr. Justice Powell, the author of *Ingraham* pointed out the unique nature of the fourth amendment in Gerstein v. Pugh, 420 U.S. 103 (1975). Speaking for the Court, he rejected the argument that the procedures outlines in *Goss* should apply to a warrantless arrest, stating that such procedures were "inopposite and irrelevant in the . . . criminal justice system." *Id.* at 125 n.27.
83. *Id.* at 114, 125. Note that no such remedy as to the *correctness* of the corporal punishment exists at *any* stage under Florida law. *See supra* notes 74-77 and accompanying text.
84. The beatings were severe, *see supra* notes 67-68 and accompanying text, and physical injury is "irreparable." Ingraham v. Wright, 430 U.S. 651, 695 (1977) (White, J., dissenting).
85. Chief Justice Burger, Justices Powell, Blackmun, and Rehnquist.
86. At least according to this Court.

IV. EIGHTH AMENDMENT — CRUEL AND UNUSUAL PUNISHMENT

The petitioners in *Ingraham* also claimed that the punishment inflicted in that case violated the eighth amendment's prohibition of cruel and unusual punishment.[87] The Court rejected that claim with a broad statement that the eighth amendment was intended to apply only to criminal proceedings and punishments.[88] This decision was based on three factors: the history of the eighth amendment,[89] prior decisions of the Court,[90] and a policy argument that contrasted prisons and schools.[91] A closer scrutiny of these three bases for the decision leads to the conclusion that the failure to apply the eighth amendment was erroneous.[92]

The Court's analysis of the history of the adoption of the eighth amendment is, at best, inconclusive.[93] In fact, the only point that is made clear in the cursory historical analysis is that somewhere between the drafting of the English predecessor of the eighth amendment and the language that is included in the Constitution, specific language limiting the protections of the amendment to criminal cases was deleted.[94] The only history supportive of the Court's position is that which the Court itself baldly asserts.[95]

The precedential leg of the *Ingraham* tripod is equally devoid of substance and does not support the Court's position. The Court cited four cases,[96] which are summarily discussed within the same paragraph, for the proposition that "[i]n the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment applicable."[97] But the cases cited by the Court do not support such a proposition. The Court's only reference to the eighth amendment in *Fong Yue Ting*, the case on which it primarily relies, was in the context of its conclusion that

87. For a discussion of the facts of *Ingraham*, see *supra* notes 62-70 and accompanying text.
88. Ingraham v. Wright, 430 U.S. 651, 664 (1977).
89. *Id.* at 664-66.
90. *Id.* at 666-68.
91. *Id.* at 668-71.
92. For an excellent analysis of these factors in greater detail than can be given here, see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV., 75, 76-89 (1978).
93. Ingraham v. Wright, 430 U.S. 651, 685 (1977) (White, J., dissenting).
94. *Id.* at 665.
95. The Court asserted that "[t]he subject [to] which [the American version] was intended to apply - the criminal process - was the same." *Id.* at 666.
96. Uphaus v. Wyman, 360 U.S. 72 (1959); Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 149 U.S. 698 (1893).
97. Ingraham v. Wright, 430 U.S. 651, 667-68 (1977).

aliens have *no* constitutional rights in deportation proceedings.[98]

The other cases relied upon afford even less support. *Mahler v. Eby*,[99] and *Bugajewitz v. Adams*,[100] are deportation cases stating that deportation is not punishment but is an exercise of sovereign power over aliens. Finally, *Uphaus v. Wyman*,[101] is at best an ambiguous case, one that appears to stand for the proposition that civil contempt was not cruel and unusual, not that it was not punishment.[102]

Finally, the Court turned to a policy-based analysis of the differences between the penal and educational systems of this country that justify the application of the eighth amendment to the former, but not the latter. Within this analysis, the Court focused on three factors: the child's freedom to leave school, the constant presence of teachers and other students, and the supervision of the school by the community.[103] The Court argues that this open environment of the school, as contrasted with the closed environment of the prison, makes application of the eighth amendment unnecessary.

The factors relied upon by the Court have little relevance. The opinion of the Court notes that some children (in fact many) are not permitted to leave school during the day,[104] but it is unlikely that a student could exercise the option (assuming she had one) to leave immediately prior to the infliction of corporal punishment.[105] Further, the freedom to hobble home at the end of the day cannot be at all relevant to the issue of corporal punishment inflicted during school.

Secondly, it is not clear that the presence of others in the school in any way ameliorates the potential severity of corporal punishment, or is relevant to the Court's "school-prison" dichotomy. At the outset, it should be noted that prisoners and other guards may be present during prison beatings, yet that fact is not relied upon as an effective de-

98. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). ("[T]he provisions of the Constitution, securing the right of trial by jury and prohibiting unreasonable searches and seizures . . . have no application.)"

99. 264 U.S. 32 (1924).

100. 228 U.S. 585 (1913).

101. 360 U.S. 72 (1959).

102. For a discussion of the precedent relied on in *Ingraham*, see *generally* Rosenberg, *supra* note 92, at 80-85. One reason for the dearth of applicable precedent on the issue of the eighth amendment in non-criminal cases may be that "punishments . . . are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process." Ingraham v. Wright, 430 U.S. 651, 686 (1977) (White, J., dissenting).

103. *Id.* at 670.

104. Mr. Justice Powell asserts that only the very young are not permitted to leave school during the day, without citing any authority. *Id.*

105. Actually, the facts in *Ingraham* state that when the petitioner tried to resist the beating, he was held down by three school officials. *See* Rosenberg, *supra* note 92, at 86 n.63.

terrent to their severity.[106] Also, there is no reason why the actual beating in the school could not take place in secret.[107] In addition, even if there are other students present when the beatings are administered, it is unlikely that they could in any way control the actions of the school official.[108]

The final factor relied upon by the Court is community supervision of the schools. While this is arguably a more effective safeguard than the others upon which the Court relies, it is still not adequate. The Court overlooks the fact that many states restrict public access to school grounds.[109] In addition, the level of scrutiny for schools with respect to corporal punishment may be considerably less than that afforded to prisons.[110] Finally, beaten students are likely to be a minority that will engender little, if any, public response.[111]

In the final analysis, *Ingraham* is a decision that reaches a palpably incorrect result. The holding of *Ingraham* is that "corporal punishment in the public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment."[112] To extend greater constitutional protection to a convicted criminal than to a child at school is an unjustifiable anamoly.[113] While the rectification of this anomaly is not irretrievably foreclosed by *Ingraham*,[114] constitutional protection of students from excessive or erroneous corporal punishment is made highly unlikely by the decision.

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106. Ironically, the presence of others in the prison context may provide more of a safeguard than in the school context; since the reasonable corporal punishment available to teachers is not generally available to jailers, illegal beatings might be more easily recognized. *Id.* at 87.

107. *Id.*

108. *See Note, supra* note 74, at 784-85.

109. *See, e.g.*, ARK. STAT. ANN. § 80-1915 (1980); COLO. REV. STAT. § 18-9-112(d) (Cum. Supp. 1984); DEL. CODE ANN. tit. 11, § 1320 (1979); ILL. ANN. STAT. ch. 122, § 24-25 (Smith-Hurd Supp. 1985).

110. Prisons are often subjected to direct legislative, judicial, or executive supervision and inspection. Rosenberg, *supra* note 92, at 87-88.

111. *Id.* at 88.

112. Ingraham v. Wright, 430 U.S. 651, 692 (1977) (White, J., dissenting).

113. This should not be interpreted as a disparagement of the eighth amendment rights of prisoners.

114. The petition for certiorari also raised a substantive due process claim, which the Court expressly declined to consider. *Id.* at 659 n.12, 679 n.47. Presumably, such a claim would have raised two issues: the infringement of parental rights that results from the administration of corporal punishment without parental approval; and the student's own right to physical autonomy. The former issue seems to have been settled by the Court's summary affirmance in Baker v. Owen, 423 U.S. 907, *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975); however, the latter issue does raise some interesting questions. *See generally* Rosenberg, *supra* note 92, at 100-09.

V. FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE

One of the Court's most recent journeys into the public school was *New Jersey v. T.L.O.*[115] In *T.L.O.*, the Court seized upon an opportunity to issue a broad pronouncement of public school students' fourth amendment rights.[116] In spite of some glowing rhetoric about the privacy rights of public school students, *T.L.O.* essentially held that students abandon the bulk of their fourth amendment protections at the schoolhouse door.

The facts of *T.L.O.* are a commonplace occurrence in any public school, at least in terms of the suspected violation that gave rise to the search. T.L.O., a student at Piscataway High School in Piscataway, New Jersey, was discovered smoking in the lavatory. She was taken to the office of the Vice Principal Theodore Choplick, who questioned her about the smoking incident. While a companion of T.L.O. admitted to smoking, T.L.O. denied having done so.[117]

Mr. Choplick then demanded T.L.O.'s purse. Opening the purse, he found a pack of cigarettes, which he removed. In so doing, he discovered a package of cigarette rolling papers which, "[i]n his experience," were associated with the use of marijuana.[118] Spurred by this discovery, Choplick proceeded to examine thoroughly the contents of T.L.O.'s purse. The search revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.[119]

Choplick turned the seized items over to the police, and after T.L.O. was taken to the police station, she confessed to having sold marijuana at the school. The state brought delinquency charges, during which T.L.O. moved to suppress the evidence on the ground that the search was unlawful. The juvenile court denied the motion, using a standard of reasonableness that it felt should apply to school searches.[120] Having denied the motion, the juvenile court found T.L.O. delinquent, and sentenced her to a year's probation.

On appeal, the appellate division affirmed the trial court's finding on the fourth amendment issue, but vacated the judgement on other

115. 105 S. Ct. 733 (1985).

116. The original issue for which certiorari was granted in *T.L.O.* was whether the exclusionary rule was applicable to searches conducted by school officials, and only subsequently did the Court decide to formulate "the proper standard" for all public school searches. *Id.* at 759 (Stevens, J., concurring and dissenting). Interestingly enough, the *T.L.O.* majority, in a rather curious exercise of judicial restraint, expressly declined to decide the exclusionary rule issue. *Id.* at 739 n.3.

117. *Id.* at 737.

118. *Id.* One may inquire as to the source of that experience.

119. *Id.*

120. State *ex rel. T.L.O.*, 178 N.J. Super. 329, 341, 428 A.2d 1327, 1333 (1980).

grounds, and remanded the cause for a new hearing.[121] T.L.O. appealed the fourth amendment issue and the New Jersey Supreme Court, applying the reasonableness standard employed by both the juvenile court and the appellate division, determined that the search by Choplick had indeed violated the fourth amendment and suppressed the fruits of that search.[122]

The Court began its resolution of the issue by first holding that the fourth amendment was applicable to searches conducted by school authorities.[123] The Court based this holding on two propositions: first, that school officials are agents of the state; and second, that prior cases had established that school officials were subject to constitutional restraints.[124]

However, the Court went on to state that holding the fourth amendment applicable to "searches conducted by school authorities is only to begin the inquiry into the standards governing such searches."[125] In making that inquiry, the Court began by adopting a contextual balancing approach, stating that reasonableness depends upon the context of the search and can best be determined by weighing the need to search against the invasion caused by the search.[126]

In balancing these factors, the Court recognized that the student had some legitimate expectation of privacy, but also declared that the state had a strong interest in maintaining a sound educational environment. Because of the strength of the state's interest, the Court held first that no warrant was necessary to permit a school official to search a student.[127]

The Court next declared that the "school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search."[128] The Court proceeded to balance away the probable cause requirement and adopt a standard of "reasonableness." The reasonableness standard involves two inquiries: first, whether the search was justified at its inception; and second, whether the search as conducted was reasonably related to the circumstances that justified it in the first place.[129] Applying that standard to the facts of *T.L.O.*, the Court concluded that both prongs of the test were satisfied, and that

121. State *ex rel.* T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (1982) (remanded to determine whether T.L.O. had knowingly and voluntarily waived fifth amendment rights before confessing).
122. State *ex rel.* T.L.O., 94 N.J. 331, 463 A.2d 934 (1983).
123. New Jersey v. T.L.O., 105 S. Ct. 733, 739 (1985).
124. *Id.* at 740-41, *citing* Goss v. Lopez, 419 U.S. 565 (1975). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).
125. New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985).
126. *Id.* at 741.
127. *Id.* at 742-43.
128. *Id.* at 743.
129. *Id.* at 743-44.

the fruits of Choplick's search should not have been suppressed.[130]

The Court's opinion in *T.L.O.* has three major conceptual flaws in its reasoning. First, the Court balances away probable cause as a prerequisite to a full-scale search, an unprecedented decision in fourth amendment law. Second, the abrogation of the probable cause standard was unnecessary since the standard is flexible and may be tailored to the context of a particular search. Third, the Court's promulgation of a broad standard for *all* school searches does not adequately reflect the potential variances in the state's interest, depending upon the purpose of the search. In short, the Court has virtually destroyed the vitality of the fourth amendment in the public schools, and has done so unnecessarily.

Recently, the Court has resorted to balancing tests much more frequently in deciding fourth amendment cases.[131] While such an approach may have merit, it is not clear that the Court has employed the balancing tests neutrally, but may instead use them as a guise for "an unanalyzed exercise of judicial will."[132] Whatever the merits of balancing in the abstract, it is clear that the balancing done in *T.L.O.* is improper. This is not so much due to the nature of the balancing, but its extent. Never before had the Court sanctioned a full-scale search on the basis of a standard of less than probable cause.[133] While the Court has, at times, abrogated the probable cause standard, it has done so only in the context of a "minimally intrusive" search.[134]

This unprecedented departure from the generally accepted standard of probable cause is distressing, not only because it tramples upon the plain language of the fourth amendment, but also because it

130. *Id.* at 745. The Court stated that there were two searches: the search for cigarettes, and the search for marijuana. The search for cigarettes was reasonable because even though, as the New Jersey Supreme Court noted, possession of cigarettes was not, in and of itself, a violation of school rules, the possession of the cigarettes was relevant to the smoking violation. *Id.* at 745-46. The Court proceeded to "totempole" the searches by stating that since the reasonable cigarette search yielded the discovery of the rolling papers, and the rolling papers were "reasonably" linked to marijuana, the full-scale search of T.L.O.'s purse was thus justified, making the entire incident reasonable. *Id.* at 745-47. At the same time, the Court characterized the New Jersey Supreme Court's notion of "reasonableness" as "somewhat crabbed." *Id.* at 745.

131. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984); Hudson v. Palmer, 104 S. Ct. 3194 (1984).

132. New Jersey v. T.L.O., 105 S. Ct. 733, 758 (1985) (Brennan, J., concurring and dissenting).

133. *Id.* at 752-53 (Brennan, J., concurring and dissenting).

134. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968). In addition, the Court places some reliance on administrative search cases, *e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967). But *Camara* held that the probable cause standards themselves may have to be modified, and if so only because of the less intrusive nature of administrative searches. *Id.* at 537.

is unnecessary. In *Illinois v. Gates*,[135] the Court characterized the probable cause standard as one of easy application, being dependent upon the "totality-of-the-circumstances."[136] Yet, in spite of the Court's characterization of the standard as "practical," "fluid," and "flexible,"[137] one of its major reasons for adopting the reasonableness standard in *T.L.O.* was its perception of the difficulties that would be encountered by school officials in ascertaining probable cause.[138] Given the fact that the *Gates* standard is flexible and could be readily adapted to the context of the public school, such fears seem unfounded.[139] If anything, the reasonableness standard enunciated by the Court will engender more difficulties and confusion for school officials.[140]

Finally, the Court's pronouncement of a broad standard for all school search cases does not take into account the varying interest that a state may have in precipitating a given search. The facts of *T.L.O.* demonstrate this problem. While the Court is articulating the school officials' interest in terms of drug use and violent crime,[141] the violation that T.L.O. was accused of was smoking cigarettes in the lavatory, hardly a novel or serious threat to the order of a school system. The standard set forth in *T.L.O.* would accord the same interest to the state in conducting a search for sunglasses (in violation of a dress code) as it would to a search for a deadly weapon.[142] Such an anomolous result is endemic to the overreaching approach that the Court used in rendering the *T.L.O.* decision.[143]

T.L.O. does afford students some protection from unreasonable searches and seizures. But, in using a diluted and over-broad standard, it opens the door to increased litigation and uncertainty among school officials and students alike.[144] In addition, the amorphous nature of the reasonableness standard could lead to searches that may be based upon unfounded rumor or arbitrary objective signs, such as the style of a student's hair or clothing, those persons a student associates with, or even race. These searches could be subsequently justified, and in certain jurisdictions, some of them may be upheld on rather flimsy grounds.[145] Such a result is neither necessary nor sound policy.

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135. 462 U.S. 213 (1983).
136. *Id.* at 238.
137. *Id.* at 232, 238, 239.
138. New Jersey v. T.L.O., 105 S. Ct. 733, 744 (1985).
139. *Id.* at 756 (Brennan, J., concurring and dissenting).
140. *Id.* at 756-57 (Brennan, J., concurring and dissenting).
141. *Id.* at 742.
142. *Id.* at 762-63 (Stevens, J., concurring and dissenting).
143. *See supra* note 116. *See also* New Jersey v. T.L.O., 105 S. Ct. 733, 759-62 (1985) (Stevens, J., concurring and dissenting).
144. *Id.* at 756-57 (Brennan, J., concurring and dissenting).
145. *Cf.* R.C.M. v. State, 660 S.W.2d 552 (Tex. Ct. App. 1983), in which the court used the in loco parentis doctrine to hold the fourth amendment inapplicable to school

In essence, *T.L.O.* represents the convergence of a decline in the protection of students' rights and a continuing erosion of the fourth amendment protection against unreasonable searches and seizures. The latter trend has recently become alarming.[146] The decline of student's rights arguably was a seed planted in the minimal protections afforded by *Goss*, which sprouted in *Ingraham* and came into full bloom in *T.L.O.* Such a trend with respect to the rights of students is distressing since "[t]he schoolroom is the first opportunity most citizens have to experience the power of government,"[147] and *T.L.O.* allows that power to be wielded beyond proper limits.

VI. FREE EXERCISE RIGHTS

Recently, the United States Supreme Court held unconstitutional an Alabama statute that provided for a moment of silence for meditation or voluntary prayer.[148] Although the statute was invalidated because it violated the establishment clause of the first amendment, the decision implicated the issue of free exercise rights of public school students as well. Specifically, *Wallace* represented an opportunity for the Court to venture into the doctrine of accommodation of the religious beliefs of public school students. In rendering its decision, the Court delineated, albeit indirectly, the permissible scope of such accommodation.

A number of commentators have advanced theories of what accommodation is and how it should be achieved.[149] Basically, the argument for accommodation begins with the premise that children carry their free exercise rights with them into the public school. From this, it follows that some means of enjoying those rights should be provided. However, in providing that opportunity, the state must select a means that will neither violate the establishment clause not impinge upon the free exercise rights of other students. The means currently in vogue are state laws providing for a moment of silence at some point

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officials. Any court with such a view of contemporary reality might be able to reach the conclusion that a student wearing a marijuana leaf beltbuckle or T-shirt could reasonably be searched for drugs.

146. Mr. Justice Stevens notes that the Court, since the October Term, 1982, has granted prosecutors relief from suppression orders with "distressing regularity," and frequently has relied on grounds not advanced by the parties to do so, as it did in *T.L.O.* New Jersey v. T.L.O., 105 S. Ct. 733, 761 (1985) (Stevens, J., concurring and dissenting). A review of the cases shows that in 18 of 23 the Court has refused to suppress evidence. *Id.* at 761 n.12 (citations omitted).

147. *Id.* at 767 (Stevens, J., concurring and dissenting).

148. Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

149. *See, e.g.*, Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1 (1984); Buchanan, *Accomodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981).

during the school day,[150] similar to the statute challenged in *Wallace*.

The statute in *Wallace* was one of three passed by the Alabama Legislature regarding prayer in the public schools.[151] One statute authorized a moment of silence "for meditation,"[152] and its constitutionality was conceded by both sides.[153] Another called for teachers to lead "willing students" in a prescribed prayer to "Almighty God."[154] The court of appeals had held that provision unconstitutional,[155] and that part of the decision had been affirmed previously by the Supreme Court.[156] The statute directly at issue in *Wallace* provided for a moment of silence "for meditation or voluntary prayer,"[157] and had been enacted subsequent to the statute providing a moment of silence "for meditation."[158]

The plaintiffs in *Wallace* challenged the statute as a violation of the establishment clause. The district court found that the provision's sole purpose was an effort by the State of Alabama to encourage religious activity; however, it upheld the statute because it was of the opinion that Alabama could establish a religion if it so chose.[159] The Eleventh Circuit agreed with the district court's finding as to the purpose of the law, but reversed its landmark interpretation of the establishment clause.[160] This judgement was affirmed by the Court.[161]

In reaching its decision, the Court applied its traditional (and somewhat maligned) establishment clause test, initially set forth in *Lemon v. Kurtzman*.[162] The Court placed primary reliance on the secular legislative purpose criterion of the test, finding that the only purpose for the enactment of the statute was a religious one.[163] This determination was based on statements in the legislative history and a

150. Twenty-five states currently have statutes that permit the or require public school teachers to observe a moment of silence in their classrooms. Wallace v. Jaffree, 105 S. Ct. 2479, 2497-98 (1985). For a comparison of some of these provisions, see Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. REV. 364, 407-08 (1983).
151. Wallace v. Jaffree, 105 S. Ct. 2479, 2483 (1985).
152. ALA. CODE § 16-1-20.2 (Supp. 1984).
153. Wallace v. Jaffree, 105 S. Ct. 2479, 2482 (1985).
154. ALA. CODE § 16-1-20 (Supp. 1984).
155. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).
156. Wallace v. Jaffree, 104 S. Ct. 1704 (1984).
157. ALA. CODE § 16-1-20.1 (Supp. 1984).
158. Section 16-1-20 was enacted in 1978, while § 16-1-20.1 was enacted in 1981. Wallace v. Jaffree, 105 S. Ct. 2479, 2481 (1985).
159. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983).
160. Jaffree v. Wallace, 705 F.2d 1526, 1535-36 (11th Cir. 1983).
161. Wallace v. Jaffree, 105 S. Ct. 2479, 2493 (1985).
162. 403 U.S. 602 (1971). That test provides three criteria. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must neither inhibit nor advance religion. Third, the statute must not create an excessive government entanglement with religion. *Id.* at 612-13.
163. Wallace v. Jaffree, 105 S. Ct. 2479, 2490 (1985).

comparison of the statute with Alabama's earlier moment-of-silence statute.[164]

The Court rested much of its decision on a statement by the law's sponsor that the purpose of the statute was to return voluntary prayer to the public schools.[165] The sponsor reiterated this purpose in his trial testimony, and the state presented no evidence of a secular purpose, choosing instead to rely on an accommodation argument.[166] This history, combined with the fact that Alabama already had a moment-of-silence statute,[167] led the Court to conclude that the statute had either a religious purpose or none at all.[168]

At first blush, the decision in *Wallace* would seem nothing more than a demonstration of judicial hairsplitting. Viewed in its simplest, black-letter form, the case apparently holds that moment-of-silence statutes for meditation are permissible, while those for voluntary prayer are not; by using the proper legal incantation, a legislature can enact a statute that will encourage prayer in the schools. However, the essence of *Wallace* is the notion that the state must maintain a position of neutrality toward religion, and that any effort to accommodate majoritarian religious beliefs must be made in a neutral manner. This reasoning is in tune with the Court's previous decisions on the issue of school prayer and leaves the free exercise rights of students intact.

Prior to *Wallace*, the Court had rendered two major decisions on prayer in public schools. In *Engel v. Vitale*,[169] the Court struck down a prayer that had been drafted by the New York State Board of Regents for recitation in that state's public schools. The Court stated, "New York's state prayer program officially establishes the religious beliefs embodied in the Regent's prayer."[170] Accordingly, the practice clearly violated the establishment clause.

The second major school prayer decision was *Abington School District v. Schempp*.[171] That case involved a practice of Bible reading and recitation of the Lord's Prayer at the outset of each school day. Stating that such a program was a "breach of [the] neutrality" required by the establishment clause,[172] the Court struck down the practice as

164. *Id.* at 2490-92.
165. *Id.* at 2490.
166. *Id.* at 2490-91.
167. ALA. CODE § 16-1-20 (Supp. 1984). The Court notes that the only textual difference of any significance between § 16-1-20 and § 16-1-20.1 was the insertion of the words "or voluntary prayer" in the latter provision. Wallace v. Jaffree, 105 S. Ct. 2479, 2491 (1985).
168. Wallace v. Jaffree, 105 S. Ct. 2479, 2492 (1985).
169. 370 U.S. 421 (1962).
170. *Id.* at 430.
171. 374 U.S. 203 (1963).
172. *Id.* at 225.

unconstitutional.

Two basic teachings can be gathered from *Engel* and *Schempp*. First, organized prayer in public schools, even if it is not *fully* compulsory,[173] still involves "indirect coercive pressure upon religious minorities."[174] Second, the conduct of such exercises is "in direct violation of the rights"[175] of such minorities. In light of these two principles, the fate of the religiously motivated moment of silence in *Wallace* is not surprising, but is, in fact, a proper and principled decision.

Yet, *Wallace* does not signal the demise of accommodation theory. In her concurring opinion, Justice O'Connor took great pains to point out that the decision was based on the factual findings of religious purpose and that moment-of-silence statutes were not per se unconstitutional.[176] This conclusion was based on two premises. First, a moment of silence is not inherently religious. Second, students who participate in a moment of silence need not compromise their beliefs.[177] This reasoning would leave some life in accommodation theory, assuming the purpose for the moment-of-silence law was ostensibly secular.

There are two major flaws in Justice O'Connor's analysis, and by definition, the entire theory of accommodation. First, a moment of silence, although not inherently religious, does seem to remove the state from a position of neutrality toward religion. Second, the practice of *organized*, voluntary silent prayer does constitute an infringement on the rights of religious minorities. Both of these factors implicate the second part of the *Lemon* test: the inquiry into whether the effect of the statute is to advance or inhibit religion.

First, the demarcation of any given time period during the school day as one during which prayers may be said, albeit silently,[178] plainly removes the state from a position of neutrality towards religion.[179] It

173. The practices at issue in both *Engel* and *Schempp* were not compulsory in the sense that there were provisions allowing students to *not* participate. In *Schempp*, students were permitted to "absent themselves upon parental request." *Id.* at 224-25. In *Engel*, no parental request was required; the students could either remain silent or leave the room. Engel v. Vitale, 370 U.S. 421, 430 (1962).

174. Engel v. Vitale, 370 U.S. 421, 431 (1962).

175. Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963).

176. Wallace v. Jaffree, 105 S. Ct. 2479, 2498 (1985) (O'Connor, J., concurring).

177. *Id.* at 2498-99 (O'Connor, J., concurring).

178. Perhaps the provision of a moment of silence for meditation alleviates some of the concern with neutrality, but such a question may be rendered moot by the conduct of a particular teacher. Evidence in *Wallace* indicated that teachers led students in organized *spoken* prayer under the moment-of-silence statute. Wallace v. Jaffree, 105 S. Ct. 2479, 2484 n.23 (1985).

179. In addition, the state may be in the position of preferring those religions that either believe in prayer, believe in individual prayer, or believe in unspoken prayer to those that do not. While such a point cuts more toward the issue of infringement of minority rights, it is relevant to note that the *best* characterization that can be placed upon voluntary silent prayer is its preference of religion over non-religion. Such a position is unconstitutional. *See infra* note 180.

places the state in the position of advocating *some* form of religion over none at all.[180] While the observance of a moment of silence may not place any direct pressure upon the student to pray, it seems clear that there is, inherent in the situation, "indirect coercive pressure"[181] to engage in prayer.

In addition, the practice of a moment of silence for voluntary prayer clearly infringes the rights of religious minorities. Although the infringement may be substantially lessened in the absence of a suggestion of prayer, it is still beyond that which is constitutionally permissible. While a nonpraying student is not readily identifiable by his praying peers, it is not difficult to conceive of students whose beliefs might require them to leave the classroom during the silent prayer. The consequences of such a withdrawal are documented.[182] In addition, the demonstrated potential for teacher abuse[183] of a moment-of-silence provision further threatens religious minorities.

In essence, the practice of observing a moment of silence places the state in the position of encouraging (at least implicitly) some form of religious activity. Inherent in the concept of any organized moment of silence are indirect coercive pressure and infringement of the rights of religious minorities. These factors tend to implicate the "effect" inquiry of the *Lemon* test, in that a moment of silence advances the religion of the majority through indirect coercive pressure and inhibits minority religions by placing their adherents in difficult situations.[184] Further, the degree of supervision required to curb potential abuses of a moment-of-silence statute would make the implementation of one which was, in fact, religiously neutral extremely difficult.[185]

But what of the free exercise rights of public school students? The theme of this Article has been to suggest that students should enjoy their constitutional rights to the utmost extent possible in the some-

180. This is an impermissible position: "[t]he individual freedom of conscience protected by the first amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 105 S. Ct. 2479, 2488 (1985) (footnote omitted).

181. *See supra* note 174 and accompanying text. *See also supra* note 178 for an example of more direct coercive pressure.

182. See, *e.g.*, Nat'l Law J., Apr. 1, 1985, at 8, col. 1, for a report on a decision of a West Virginia federal district court that struck down that state's constitutional provision for silent prayer. The court noted that one of the primary factors behind its decision was testimony from Jewish students who were persecuted by their Christian classmates for not participating in the moment of prayer.

183. *See supra* note 178.

184. *See supra* note 182.

185. In her concurrence, Justice O'Connor states that the fundamental inquiry into the purpose of a moment-of-silence statute is whether the state has conveyed a message of endorsement of religion, a message that "seem[s] inescapable if the teacher exhorts children to use the designated time to pray." Wallace v. Jaffree, 105 S. Ct. 2479, 2499 (1985) (O'Connor, J., concurring). Given the abuse of the Alabama statute, *supra* note 178, it is difficult to understand how the fine line between accommodation and endorsement could be preserved.

what restrictive environment of the schoolhouse. Certainly, free exercise rights are equally as important as those of due process, free expression, and freedom from unreasonable search and seizure.

Contrary to popular belief, the free exercise rights of students are generally intact. Nothing in *Engel* or *Schempp* prohibited *voluntary* prayer in public schools, and, as Justice O'Connor noted in *Wallace*, "[n]othing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day."[186] In fact, resort to a novel theory such as accommodation, fraught with all of its difficulties, is utterly unnecessary to protect the free exercise rights of students. They can be adequately protected through existing principles of law.

The underlying flaw in the accommodation theory is that a daily ritualistic moment of silence is not truly voluntary. Voluntary, spontaneous prayer can be protected by use of the standard set forth in *Tinker*. Thus, a student's prayer, or any other religious exercise, would be protected unless it involved a "material and substantial interference" with the school environment.[187]

The application of the *Tinker* standard to religious exercise in public school accomplishes the nominal goal[188] of accommodation theorists; it protects *truly* voluntary silent prayer. In so doing, it protects the free exercise rights of the same majority of students that moment-of-silence statutes seek to protect.[189] But it does so with one great advantage, that being the absence of indirect coercion and state involvement. This distinguishing feature avoids the establishment clause violations inherent in the moment-of-silence statute.[190]

Conceptually, the application of the *Tinker* standard to the free

186. *Id.* at 2479, 2496.

187. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 511 (1969).

188. I would argue that the *true* motivation behind accommodation theory as currently formulated is to place the state in a position of advocating religious exercise. This is due primarily to the accommodationist obsession with some type of organized prayer.

189. Admittedly, application of the *Tinker* standard will not accord the same protection to all students. Certain religious practices may be so disruptive as to be impermissible within the confines of the classroom. But those practices receive no greater protection from moment-of-silence statute than under the *Tinker* standard. Moreover, the absence of state direction and indirect coercion from the *Tinker* model serves to protect the rights of religious minorities to a far greater degree than would a daily ritual of silence.

190. Based on the information in note 189, *supra*, one might believe that there was an establishment of those religions whose worship practices fit within the confines of the *Tinker* standard. Such an argument overlooks two important factors. First, use of the *Tinker* standard precludes acts of religious worship because of a substantial governmental interest, unrelated to the suppression of free religious expression: the maintenance of an orderly educational environment. *Cf.* United States v. O'Brien, 391 U.S. 367 (1968). Second, since there is no affirmative state

exercise rights of students makes a great deal of sense. There is precedent for the application of free speech principles to religious practices.[191] In addition, since the *Tinker* standard is, in reality, content-neutral,[192] its use comports with existing first amendment law[193] and affords a maximum amount of religious freedom.

Placing the free exercise rights of students on an equal footing with their rights of free expression would result in consistent, easily applied law.[194] It would eliminate the disadvantages and establishment clause violations that inhere in moment-of-silence statutes.[195] And it would protect truly voluntary religious practices. Use of such a standard provides the optimal means of vindicating the religious rights of all students, affording the vast majority an opportunity to engage in the religious practices they choose, while at the same time protecting the minority from even the most subtle state coercion.

VII. CONCLUSION

The scope of students' constitutional rights is one of the most important issues in law today. Yet, the rights of students are often neglected, forgotten, or overlooked completely.[196] Such a state of affairs is extremely distressing, since our constitutional values represent the embodiment of the most fundamental beliefs of our Founding Fathers. In order that our young people may share in some of "our most cher-

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action encouraging religious practice, it is difficult to perceive any establishment clause violation.

191. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (applying public forum doctrine to allow religious groups to meet on campuses of state universities).

192. Although some have suggested that the *Tinker* standard does regulate content, *see* Horning, *supra* note 35, at 944, it seems that the prohibition of material and substantial disruption is more akin to time, place, and manner restrictions. Of course, it is possible that the standard could be applied by school officials in a discriminatory manner, but the same criticism can be made of any content-neutral standard of speech (or religious) protection.

193. *See* United States v. O'Brien, 391 U.S. 367 (1968) (upholding regulation of speech if it furthers substantial government interest, unrelated to the suppression of free expression).

194. For those lawmakers who are concerned with statutorily "informing" students of their prayer rights, there would seem to be no objection to a statute based on the *Tinker* standard.

195. Arguably, moment-of-silence statutes do nothing more than create a forum, similar to that created for free speech by student government. But the important difference between the two situations is the establishment clause. No constitutional provision restrains the state in creating a free speech forum, but the establishment clause substantially restricts the state's ability to create a religious forum.

196. As I have discussed this Article with my colleagues, the most frequent response has been "that's easy, students have no rights."

ished ideals,"[197] it is necessary that they be exposed to them at an early age, so they may fully appreciate their utility. As a part of the development of this appreciation, the students should be given the broadest possible protection for those rights within the context of the school environment.

Decisions of an earlier time, such as *Tinker*, *Barnette*, and, to a certain extent *Goss*, reinforce these cherished values and ideals. In particular, *Tinker* and *Barnette* represent the accordance of the maximum possible protection to students with regard to one of the most fundamental freedoms of our society, that of expression. But more recent decisions, such as *Ingraham* and *T.L.O.*, display a misguided reverence for authoritarianism[198] and a Machiavellian view toward the goal of "education." Little consideration is given to the fact that one of the paramount functions of our educational system should be to cultivate individuality, the basis for the founding of this country. Arguably, *Wallace* may represent a continuation of that trend, unless it stands for the principle that the state may take no action to promote religious activity, thereby subtly coercing students into a nauseating religious homogeneity.

The authoritarian trend of the Court in the most recent students' rights cases certainly is not unique to that particular area of constitutional law,[199] but its application in that area may hold the greatest potential damage. The seeds of intolerance already have been planted in our nation's schools.[200] One fears to contemplate what the future will hold for a nation that has been educated on the underlying premise that the government has nearly unlimited authority over its citizens, and that its constitutional guarantees are merely idle platitudes that can be balanced away. When determining the rights of students, such potential impact should be the primary focus of consideration, lest it become a historical afterthought, incapable of remedy.

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197. New Jersey v. T.L.O., 105 S. Ct. 733, 767 (1985) (Stevens, J., concurring and dissenting).
198. *See generally* Rosenberg, *supra* note 92.
199. *See, e.g., supra* note 146.
200. *See supra* note 40.