The Goss Progeny: An Empirical Analysis

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Last year, upon the thirtieth anniversary of the Supreme Court’s decision in Goss v. Lopez, the then-general counsel of the National School Boards Association decried the expansion of Goss from a “three minute give and take” to the “paralysis” of public school discipline.¹ For example, she initially ascribed the following effect to the Goss Court: “By making student discipline a constitutional issue, by elevating it to a ‘federal issue,’ the court has left educators fumbling away through their

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daily disciplinary dealings with students wondering and working at their peril. This Article empirically examines Goss and its lower court progeny to determine whether they pose the major problem that is often ascribed to them.

I. THE Goss DECISION

On January 22, 1975, in the wake of its landmark dicta that "students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate," the Supreme Court decided what has been described as "the most significant United States Supreme Court case on student discipline." In Goss v. Lopez, the Court held that "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause." More specifically, finding the requisite property interest in the state compulsory education statute and, alternatively, the requisite liberty interest in the potentially serious reputational damage, and balancing them against the public schools' interest in "discipline and order," the majority held:

Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

2. Id. at 803. In fairness, we observe that she was then serving as the national advocate for school boards, which are the defendants in such suits; she ultimately ascribed the expansion of Goss to state laws; and she admitted to lacking the research data to support this purported causal relationship. Id.

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Although symbolically significant as a turning point for both students and teachers in terms of the modern era of education litigation, this dictum was specific to their "constitutional rights to freedom of speech or expression." Id. Nevertheless, the Goss Court cited Tinker in terms of students' constitutional rights more generally. Goss v. Lopez, 419 U.S. 565, 574 (1975). For a compilation of the Supreme Court's education-related decisions, including the vote in each one, see PERRY A. ZIRKEL ET AL., A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION (4th ed. 2001).

4. David M. Pedersen, A Homemade Switch Blade Knife and a Bent Fork: Judicial Place Setting and Student Discipline, 31 CREIGHTON L. REV. 1053, 1066 (1998). Attorney Pedersen is the former chairman of the National School Boards Association Council of School Attorneys. Id. at 1053 n.†.

5. Goss, 419 U.S. at 581. In reaching this conclusion, the Court recognized its tradition of deference to public school authorities. Id. at 578.

6. Id. at 574. Although the Supreme Court has more recently elevated the standard for the requisite deprivation of liberty, Goss reasoned that the charges of misconduct, "[i]f sustained and recorded, . . . could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." Id. at 575.

7. Id. at 580. For the third, or intersecting, factor in the equation, the Court reasoned: "The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." Id.

8. Id. at 581.
Based on this same two-step analysis of procedural due process (PDP) under the Fourteenth Amendment, the Court added various significant clarifications, including that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." The dissent, led by former school board member Lewis Powell, characterized the holding as an "unprecedented" and "unnecessary" judicial intrusion that, expressly echoing Justice Black's dissent in *Tinker*, signaled a flood of litigation and judicial oversight.

9. The Court followed the conventional two-step analysis. *Id.* at 572–80; see, e.g., Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 *HARV. L. REV.* 1106, 1106 (1981) (citing *Laurence H. Tribe, American Constitutional Law §§ 10–12, at 532–33 (1978).* The two steps are whether process is due and, if so, how much process is due. *Goss*, 419 U.S. at 577. The first is based on the nature of the interest beyond a *de minimis* level, and the second is based on the weight of the interest, including the risk of error, balanced against the institutional, or governmental, interest. *Id.* at 572–80.

10. One clarification: The Court excluded from this "countrywide" constitutional minimum "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss*, 419 U.S. at 583. In referring to this countrywide minimum, the Court appeared to imply what is otherwise generally understood—that states and local school districts may adopt policies that exceed the Court's foundational requirements.

11. *Id.* at 584.


13. *Goss*, 419 U.S. at 585, 595 (Powell, J., dissenting). Failing to see the principled limit in the majority opinion for *de minimis* denials of liberty or property, Powell issued this forewarning with regard to various typical school actions, such as grading, promotion, transfers, and exclusion from extracurricular activities: "If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed." *Id.* at 599.

14. *Id.* at 600 n.22 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting)).

15. *Id.; see also id.* at 585 ("[O]pens avenues for judicial intervention in the operation of our public schools."); *id.* at 597 (depicting the Court as entering a "new "thicket"); *id.* at 599 ("[T]he federal courts should prepare themselves for a vast new role in society.").

16. *Id.* at 585; *id.* at 599; *see also id.* at 594 (noting the decision's "indiscriminate reliance upon the judiciary... as the means of resolving many of the most routine problems arising in the classroom."); *id.* at 597 (expressing concern about "constitutionalization of the student-teacher relationship").
II. POPULAR AFTERMATH

In the immediate wake of Goss and periodically thereafter, various commentators characterized Goss and its lower court progeny as disabling school discipline. The mass media, special interest groups, and even professional publications have reinforced this conception.


19. The following observation about newspaper and magazine coverage is an understatement, and is even more of an understatement for television coverage: “That the plaintiffs in novel cases invariably were unsuccessful was less well publicized than that the cases were filed in the first place.” Henry S. Lufler, Jr., Courts and School Discipline Policies, in Student Discipline Strategies 197, 205 (Oliver C. Moles ed., 1990); see also Larry Bartlett, Legal Responsibilities of Students: Study Shows School Officials Also Win Court Decisions, 69 NASSP Bull. 39, 39 (1985). For modern examples of such coverage, see Perry A. Zirkel, Judgment Day, 83 Phi Delta Kappan 561, 561–62 (2002); Perry A. Zirkel, The Midol Case, 78 Phi Delta Kappan 803, 803–04 (1997) (discussing suspension or expulsion cases that attracted national media attention and that included a PDP claim).


21. Lufler, supra note 17, at 10, attributed this reinforcing tendency to a slowness in education law commentators’ recognition of changes in litigation patterns. Other overlapping reasons may include: (1) a preventive law orientation that blurs the line with
III. RELATED RESEARCH

A. Educators' Knowledge and Attitudes

Survey studies since the late 1970s have generally found that educators generally had low levels of knowledge of students' Fourteenth Amendment PDP rights under Goss. Due in part to misinformation and uncertainty, educators tended to perceive that the Court had constrained educators' discretion in the discipline of students.22


B. Case Law Frequency and Outcomes

The empirical research of pertinent pre-Goss case law is relatively limited. Without clearly defining their data collection procedures, Clayton and Jacobsen found 158 published court decisions concerning student rights, including thirty suspension or expulsion cases, for the period from 1960–1971.24 They found that the vast majority of the suspension and expulsion cases were during the last three years of this eleven-year period and that students won 67% of these cases.25 Similarly, demarcating his boundary as “published cases in which a student . . . challenged the content of a school board rule or regulation” and citing as his source the *World Almanac and Book of Facts*,26 Friedman found that the number of student rights cases and their winning percentage was at a relatively low level for each ten-year period from 1899–1908 to 1959–1968.27 The number of student rights cases for 1969–1978 jumped more than tenfold from the number of cases during the 1899–1908 period, and the winning percentage tripled from the 1959–1968 period to 48%, but Friedman did not disaggregate the data on each side of the date of *Goss*.28

The empirical research post-Goss is more extensive. In a study of “[a]ll reported suspension and expulsion decisions from 1965–1987,”29 Lufler found that, rather than increasing, the frequency of PDP decisions notably decreased in the wake of *Goss*.30 Moreover, he found that after

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24. Elwood M. Clayton & Gene S. Jacobsen, *An Analysis of Court Cases Concerned with Student Rights 1960–1971*, 58 NASSP BULL. 49, 50–52 (1974). They did not provide any further information as to the selection procedures or criteria, including which decisions were based on PDP.

25. Id. at 50. They did not further identify, much less define, their outcome classifications.


27. Id. at 243. The average number of student rights cases for these decades was 13.8. The success rate for the plaintiff students was 16%. Id.

28. Id.

29. Lufler, *supra* note 17, at 2. The only operational boundary that Lufler offered was that he used the “WestLaw headnote for suspension and expulsion” cases. Id. at 2 n.6. He divided the cases into two categories—procedural, which appears to correspond at least approximately to what we refer to as PDP, and substantive, which he subdivided into “five issue areas: hair and appearance, expression, drugs and alcohol, other penalties, and a residual ‘other rules’ category.” Id. at 6.

30. Specifically, his five-year totals were as follows: 1965–69 = 10; 1970–74 = 49; 1975–79 = 27; 1980–84 = 17; and 1985–89 = 20 (extrapolated from a three-year total of 12). Id. at 5.

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Goss, the majority of the conclusive outcomes\(^{31}\) remained, and indeed slightly increased, in favor of school authorities rather than students.\(^{32}\) In view of these findings, Lufler concluded that Goss "did not touch off an explosion of new procedural cases, as commentators [had] predicted."\(^{33}\)

In a subsequent study covering the latter part of the same period (from 1979 to 1987) and limited to published decisions cited in the successive Yearbooks of School Law,\(^{34}\) Lufler obtained similar results.\(^{35}\)

More recently, in a book that gave primary attention to Goss,\(^{36}\) Arum and one of his research associates, Beattie, included frequency and outcomes analyses of the 1204 court decisions concerning student discipline from 1960 to 1992.\(^{37}\) Paralleling and extending Lufler’s purely PDP findings,\(^{33}\)

31. Lufler used two outcome categories, providing only one clarification: “If the case was remanded without a final judgment, it was not counted at all.” Id. at 3.

32. Specifically, the percentage of the decisions that he reported in favor of the district defendants for the five-year periods were as follows: 1965–69 = 60%; 1970–74 = 55%; 1975–79 = 56%; 1980–84 = 59%; 1985–87 = 67% (based on first three years of this period). Id. at 5. He did not provide corresponding longitudinal outcomes data for the substantive category and its subcategories, although he found that the overall proportion in favor of district defendants for the substantive category was 61%. Id. at 9.

33. Lufler, supra note 17, at 15. He included in tandem with Goss, the Court’s decision in Wood v. Strickland, 420 U.S. 308 (1975), which is not the focus of the present study and which, contrary to Lufler’s characterization, did not “extend[] student procedural rights in school expulsion cases.” Lufler, supra note 17, at 5 n.8. The Wood decision, in which the Court clothed school officials with qualified immunity from liability in civil rights suits, arose as a result of a substantive due process violation. 420 U.S. at 310, 315.

34. This selection boundary is even less clear-cut and congruent with Goss, because it depends on the classification by the chapter authors, who varied during this period, into respective “suspension” and “expulsion” categories that included various legal bases beyond PDP, such as the substantive subcategories in Lufler’s previous study.

35. Lufler, supra note 19, at 211–12. Specifically, he found that the frequency of suspension and expulsion decisions fluctuated from 1979 to 1989 and that—again with a rather simplistic outcomes classification—the proportion in favor of districts was 75%. Id. The differences are likely attributable to the lack of congruent time periods and selection boundaries. See supra note 29 and accompanying text.

36. RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 38, 63 (2003) (portions co-authored with Irene R. Beattie). Arum’s book contains other research, but the study reported in the two chapters co-authored with Beattie are the pertinent ones for the purpose of this Article.

37. Their rather vague selection criterion was that the court decisions “directly involved individuals or organizations contesting a school’s right to discipline and control
their results for the frequency of this broader line of decisions averaged approximately eight per year for the period 1960–1968, increased precipitously to a high point of one hundred in 1970 and dropped almost as rapidly to a relatively stable average of approximately fifty per year in the seventeen-year period since Goss. The average for the up-and-down six years from 1969 to 1975, which Arum and Beattie called the “student rights contestation” period, was seventy-six cases per year. The respective annual averages for the suspension and expulsion cases were approximately eight, fifty-seven, and twenty-nine for the successive periods before, during, and after this designated contestation phase.

In a separate chapter entitled How Judges Rule, Arum and his associate provided the “predicted probability of a court decision in favor of a student litigant” for these same cases. The results, which they presented in graphical form, showed a steep increase from 36% in 1960 to the high point of 50% in 1968, then dropping to a brief plateau at 44%

students.” Id. at 16, 55–56. Their subsequent note that they used a specified LEXIS search string helps provide clarification for replication, although it did not reference whether and how they avoided the problem of double counting. Id. at 220; see infra note 61. However, various larger selection decisions are subject to question. For example, they included cases in the private-, not just public-school context, thereby triggering distinct legal bases and judicial postures. ARUM, supra note 36, at 17. Conversely, they excluded federal district court decisions based on various questionable assumptions concerning the publication and equivalence of state and federal court decisions. Id. at 49–50, 288 n.29. In any event, the extent of PDP overlap is unclear. Although they obviously included substantive as well as procedural cases, the only categories that they identified were in terms of the form of discipline (suspension, expulsion, corporal punishment, transfer, and other discipline) and the type of student misbehavior (drugs, alcohol, violence/weapons, political protest, and free expression). Id. at 55, 220.

38. Id. at 36, supra note 36, at 53.

39. Id. at 5, 60. Arum and Beattie referred to the period on each side of 1969–1975, which is bounded at each end by Tinker and Goss, as “[p]re-[c]ontestation” and “[p]ost-[c]ontestation.” Id. at 60, 67.

40. Id. at 18.

41. These extrapolated estimates are based on the proportions of suspension and expulsion cases that Arum and Beattie provided for the three periods: 95% of the 1960–1968 cases, 88% of the 1969–1975 cases, and 73% of the 1976–1992 cases. Id. at 55–56. They did not specify the percentages for the PDP cases. In any event, Goss (1975) marked the end, not the start of what they regarded as the contestation period, with, instead, Tinker (1969) being the beginning.

42. ARUM, supra note 36, at 88. They rather cryptically defined this variable as “the percentage likelihood of a pro-student outcome in a case, after controlling for how the case was unusual with regard to other factors that influenced the outcomes, such as region and type of student disciplinary infraction.” Id. at 88. Their explanation that the predicted probabilities “were derived from logistic regression estimates of the effects of several covariates on pro-student decisions” does not provide the requisite clarity, including the absence of any definition of the basic outcome categorization of “pro-student.” Id. at 292 n.4. The results reported in their tables for underived “pro-school” and derived “pro-student” decisions confound rather than resolve the matter. Id. at 217, 221. Moreover, they do not appear to fit with the derived data in the graph or with the findings of the other outcomes research reviewed herein.
from 1972 to 1977—a period punctuated by *Goss*—and steadily and less steeply declining to a low point of 35% in the final year of 1990.43

Although acknowledging that the judiciary, led by the Supreme Court, took a “decidedly pro-school turn” in the period after *Goss*,44 Arum interpreted these findings as resulting in “a historical legacy with two prominent features”45—a student perception46 and an institutional norm that both impeded discipline.47 More specifically, the purported effect was that “schools were likely to reduce their disciplinary responses to student misbehavior while at the same time students became less willing to accept school authority or discipline as legitimate.”48 The primary problem with this conclusion—possibly attributable in part to the eleven-year gap between Arum’s findings and his interpretation—is that it ignores the cumulating data in the post-contestation period.49 Although there is undoubtedly a time lag, this student and school reaction would be cyclical, causing a new generation’s organizational legacy in the direction of discipline.

43. *Id.* at 88. Arum and Beattie did not explain why the graph ended in 1990 rather than 1992, but this disparity may be merely a matter of imprecise alignment.


46. Arum specifically described this perception as a “sense of legal entitlement that . . . has produced skepticism about the legitimacy of school disciplinary practices as well as a general familiarity with resorting to legal avenues to contest such practices.” *Id.* at 6. Yet, apparently referring at least in part to his longitudinal outcomes analysis, Arum acknowledged that this sense is “not firmly grounded in accurate understanding of case and statutory law.” *Id.*

47. Arum described this institutional effect less clearly as “school forms, practices, and culture—including widespread normative taken-for-granted assumptions about the necessity of organizing school discipline in particular ways.” *Id.* at 6.

48. *Id.* at 13.

49. An additional problem is that this thesis regards *Goss* as a cause, when it may well be that it was merely a reflection and effect of a broader societal movement. See, e.g., Donal M. Sacken, *Due Process and Democracy: Participation in School Disciplinary Processes*, 23 *URB. EDUC.* 323, 326–27 (1989).
Although Arum's frequency and outcomes data were for student discipline case law more generally, in a follow-up Op-Ed piece, he connected Goss to "students beg[inning] to assert newfound legal rights when they were being disciplined for . . . now typically . . . cases that largely involve school violence, weapons, drugs, and general misbehavior." In a subsequent article, he repeated the mantra of the judicial erosion of school authority, associating Goss with the "impossibility of school discipline" and extending the connection to the tripling of the number of incarcerated youths. Moreover, he imprecisely characterized the post-Goss line of litigation as extending to "low-level punishments (e.g., in-school detention or lowering a grade). Without providing any published reference after 1992, when his reported data ended, Arum asserted that "[i]n recent years, student and parental challenges to school discipline have risen sharply, with the number of appellate cases more than doubling from 1990 to 2000." The results were even more lacking for outcomes than frequency. Without providing any figures at all, Arum implied that the decisions had been in favor of the plaintiffs rather than the schools, not only for these cases overall, but also for the PDP cases concerning low-level punishments.

In light of these rather dramatic and diffused pronouncements and the lack of more recent published data, the time is ripe for a systematic update that, taking one step at a time, is limited to a specific PDP focus. More specifically, this more refined systematic study of the direct lower court progeny of Goss addresses two questions: First, whether the Goss progeny in more recent years resurged in frequency, and second,
whether the Goss progeny in more recent years shifted outcomes back in the direction of the plaintiff-student. In addition, "systematic" study also means addressing other limitations in the previous line of research, which primarily fit in two categories: (1) lack of precise selection information, which is necessary for replication and interpretation, and (2) the lack of a systematic outcome classification, which provides sufficient differentiation of mixed and inconclusive rulings. The first category more specifically includes the lack of precise selection criteria, the mixing of other discipline decisions with those based on PDP, which was the essence of the Goss decision, and search procedures that avoid double counting, yet identify the latest pertinent published ruling for each case.

IV. METHODOLOGY

In light of the data collection shortcomings in previous studies, this study uses specific criteria and procedures for the selection of court decisions for the empirical analysis, including, but extending beyond, defining their "published" status within the twenty-year timeframe of 1986–2005.

supra note 1, at 798. Although the descending and then roughly level slope is somewhat similar to Arum and Beattie's frequency graph, citations of Goss are obviously a far cry from student discipline cases that fit within its boundaries.

57. See supra notes 24, 26, 29, 34, and 37 and accompanying text.
58. See supra notes 25, 27, 31, and 42 and accompanying text.
59. See supra notes 24, 26, 29, 34, and 37 and accompanying text.
60. See supra notes 5–11 and accompanying text.
61. Electronic databases are susceptible to double counting, but when used carefully, allow for resolving this problem. See, e.g., Perry A. Zirkel, The "Explosion" in Education Litigation: An Update, 114 EDUC. L. REP. 341, 343–44 n.20 (1997). For systematic study limited to a single issue, such as PDP in student discipline cases, the added necessary step—which this study took—was to track each case to its most recent published decision on this issue, eliminating the citations to the earlier rulings and only citing, not counting, the later rulings on other grounds.
62. See supra text accompanying notes 57, 59, and 60.
First, the study included only those decisions that arose in K-12 schools, not other contexts. Therefore, suspension and expulsion decisions that arose in private schools or post-secondary institutions were excluded.

Second, the study only included cases where at least one basis of the court’s decision was Fourteenth Amendment PDP in terms of the Goss notice/hearing rationale, or state-law PDP that expanded upon Goss’s procedural protections. Thus, for example, if the plaintiff was a special education student who raised, and the court decided, issues based on the Individuals with Disabilities Education Act (IDEA) and Fourteenth Amendment or state-law PDP, the study included the case but only considered the PDP ruling. As a result, the analysis excluded suspension or expulsion decisions where the court relied solely on other grounds, such as: (1) Fourteenth Amendment void-for-vagueness, which is only partly, and not predominantly, a matter of PDP; (2) Fourteenth Amendment Substantive Due Process; (3) First Amendment expression, or (4) the state reporters, such as state trial court decisions not available in official regional reporters. See, e.g., Mullane v. Wyalusing Area School District, 30 Pa. D. & C. 4th 179 (C.P. 1996). Nevertheless, we used multiple sources to be as exhaustive as possible within our prescribed boundaries, carefully culling out cases that did not fit. These sources included: (1) The Westlaw key numbers for student discipline, with the search terms Goss or due process; (2) the Education Law Association’s YEARBOOK OF SCHOOL LAW for each previous year in the study’s period; (3) the index references under suspension and expulsion in the leading education law texts; and (4) a LEXIS Boolean search in its education law database.

64. More specifically, the boundaries for the date of decision were January 1, 1986 to December 31, 2005.


67. For decisions based on the threshold step of whether procedural process is due, see infra notes 76–81 and accompanying text.


70. The other, and weightier, component is generally understood to be substantive due process. See, e.g., Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (concluding that the void-for-vagueness doctrine was more a matter of "arbitrary . . . enforcement," that is, substantive due process, than "actual notice," that is, procedural due process (citing Smith v. Goguen, 415 U.S. 566, 574 (1974))).


Similarly, the study did not include cases where the decision was based on a threshold issue, such as subject matter jurisdiction or separable, post-PDP proceedings.

Last, the study included only those decisions in which the court determined that school authorities had deprived the student of the requisite PDP liberty or property interest. Thus, the study did not include court decisions where the student claimed, but the court rejected, such a deprivation. Examples of such exclusions were those where: (1) the school’s action was limited to removing the student from extracurricular activities, (2) school authorities purportedly suspended or expelled the student, but the court concluded that the student had suffered no cognizable educational loss, and (3) school authorities took disciplinary action, regardless of whether or not they characterized it as a suspension or expulsion, but the court did not apply PDP based on the conclusion that the deprivation was de


minimis for Goss purposes,\textsuperscript{78} including, but not limited to, situations where school authorities transferred the student either to another school\textsuperscript{79} or, in the majority of cases,\textsuperscript{80} to an alternative education program.\textsuperscript{81}

The following empirical analyses are in terms of frequency and outcomes, both of which have particular meanings in the context of this study. "Frequency" has two applications with regard to this empirical analysis. First, it refers, per the customary meaning, to the number, or volume, of relevant cases during a given time period.\textsuperscript{82} Second, for more precision in the subsequent analysis accompanying the tabulation


\textsuperscript{79} See, e.g., Murphy v. Fort Worth Indep. Sch. Dist., 258 F. Supp. 2d 569, 573 (N.D. Tex. 2003), vacated as moot, 334 F.3d 470 (5th Cir. 2003), cf. Seamons v. Snow, 84 F.3d 1226, 1234–35 (10th Cir. 1996), rev'd on other grounds, 206 F.3d 1021, 1028 (10th Cir. 2000).

\textsuperscript{80} The exceptions were cases where the court ruled that the alternative school transfer was a de facto suspension or expulsion due to an effectively different, inferior level of education. We included these cases in our analysis. See, e.g., Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 623–24 (5th Cir. 2004).


of outcomes, the study follows the model of previous articles that counted issue rulings. More specifically, an "issue ruling" within this study's framework refers to the ultimate judgment on a PDP issue. Here, "ultimate" means the highest court ruling on said issue. In turn, PDP in this context consists of two categories: (1) "Federal rulings," that is, those in which the court either relied strictly on or applied its extrapolated interpretation of, or (2) "State Law rulings," that is, those where the court relied on state statutes or regulations that did not simply codify but expand Goss. Finally, "issue" in this analysis refers to Federal and State Law rulings for each of two disciplinary actions—removals of up to ten school days and those for more than ten


84. On the other hand, if the case had further published proceedings for issues other than PDP, its analysis is based on the last relevant ruling, even though there may have been subsequent published proceedings. See, e.g., Tun v. Fort Wayne Cmty. Sch., 326 F. Supp. 2d 932, 941–45 (N.D. Ind. 2004), rev’d on other grounds sub nom. Tun v. Whitticker, 398 F.3d 899, 904 (7th Cir. 2005). Conversely, if the case had an earlier published decision on other grounds, said earlier decision was not included in this analysis. Compare, e.g., Hamilton v. Unionville-Chadds Ford Sch. Dist., 714 A.2d 1012, 1015 (Pa. 1998) (holding that the school district gave student adequate notice of the charges that furnished the bases for student’s suspension) with Hamilton v. Union-Chadds Ford Sch. Dist., 693 A.2d 655, 656–57 (Pa. Commw. Ct. 1997) (holding that student’s expulsion was improper under the void-for-vagueness doctrine).

85. See supra note 67 and accompanying text.

86. In terms of the Court’s holding, Goss only addressed exclusions from school from one to ten days. See supra note 8 and accompanying text.

87. These court decisions used the Goss rationale and dicta for exclusions of more than ten days. See supra notes 6–7 and accompanying text.

88. In either event, these Federal rulings were based on Fourteenth Amendment PDP.

89. Conversely, the data in this study, in terms of both frequency and outcomes, classifies those rulings based on a state law that, in pertinent part, echoes the prescriptions in Goss as Federal issue rulings. See, e.g., Katchak v. Glasgow Indep. Sch. Dist., 690 F. Supp. 580 (W.D. Ky. 1988).

90. These rulings encompass the PDP framework established not only for the subcategories of up-to-ten days and more-than-ten days, but also—depending on the state—for specified periods within the ten-day subcategory. See, e.g., Wayne County Bd. of Educ. v. Tyre, 404 S.E.2d 809, 810–11 (Ga. Ct. App. 1991) (ruling on three-day suspension); Burns v. Hitchcock, 683 A.2d 1322, 1323–24 (Pa. Commw. Ct. 1996) (ruling on ten-day suspension); J.M. v. Webster County Bd. of Educ., 534 S.E.2d 50, 54–59 (W. Va. 2000) (ruling on one-year expulsion).
school days. In the few cases where the court ruled on more than one Federal or State Law claim within one of these two separate disciplinary actions, the study aggregated the claims into one ruling, except where there was a difference in outcomes.

Similarly, "outcomes" has a more precise definition that goes beyond a simple won-lost dichotomy. Specifically, following the lead of other outcomes analyses that used more sophisticated and customized classifications, this study used the following five-point scale:

- 1 = conclusive decision in favor of the student,
- 2 = inconclusive decision in favor of the student,
- 3 = inconclusive for both parties,
- 4 = inconclusive decision in favor of the school district, and
- 5 = conclusive victory in favor of the school district.

91. Where the court ruled on both disciplinary actions separately, we included each of these rulings in our tabulation. Moreover, in the relatively few cases where the court included both Federal and State Law rulings in relation to one of these disciplinary actions, we tabulated these rulings separately in the analysis.

92. See, e.g., Colquitt v. Rich Twp. High Sch. Dist. No. 227, 699 N.E.2d 1109, 1113, 1116-17 (Ill. App. Ct. 1998) (categorizing issue rulings into "5" for rejection of student’s claim of entitlement to verbatim transcript and "1" for agreement with claim that reliance on hearsay evidence violated PDP). For an example limited to a requested preliminary injunction and, thus, classified as inconclusive due to the potential for final proceedings, see Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 928 (6th Cir. 1988). In this case, where the trial court dismissed the student’s request for a preliminary injunction against a removal of more than ten days, the appellate court rejected the student’s claims of (1) lack of cross examination or at least identification of student witnesses, (2) lack of cross examination of school administrators, and (3) improper participation in board hearing by administrators who recommended expulsion, but ruled in the student’s favor on the student’s claim that the same administrators improperly provided the board with evidence not shared with the student. Id. at 920. Thus, the study recorded issue rulings of "4" and "2" for this case.


94. This category extends to (1) cases in which the student was successful and the remedy was a remand to the school board for a new hearing, or (2) successful student motions for summary judgment.

95. This category consists of (1) successful student motions for preliminary injunction, (2) unsuccessful district motions for dismissal or summary judgment, and (3) cases in which the student was successful, but the remedy was limited to a remand to the trial court.

96. This category is limited to cases in which both parties moved unsuccessfully for summary judgment.

97. This category consists of unsuccessful student motions for (1) a preliminary injunction or (2) summary judgment.

98. This category extends to successful district motions for (1) dismissal or (2) summary judgment.
V. RESULTS

Using multiple sources, the study found a total of 165 cases yielding 191 issue rulings. The outcome results for overall issue rulings were:

- 12% (n = 22)—conclusive decision in favor of the student,
- 7% (n = 13)—inconclusive decision in favor of the student,
- 0% (n = 0)—inconclusive for both parties.

99. See supra note 63.
100. The list of citations and tabular entries is available from the first author upon request.
101. Overall in this context refers to the total of Federal and State Law PDP rulings together. The outcome distributions for each of these five successive subcategories—from conclusive for students to conclusive for districts—were as follows:
- Federal: 6% (n = 8); 8% (n = 11); 0% (n = 0); 7% (n = 10); 79% (n = 110).
- State Law: 27% (n = 14); 4% (n = 2); 0% (n = 0); 6% (n = 3); 63% (n = 33).
102. For the twenty-three issue rulings conclusively in favor of the students, the predominant remedies, in the cases where the court expressly specified the relief, were remand for a new school board hearing (n = 7), expungement of the student's record (n = 4), and reinstatement (n = 3). For cases involving remand, see Colvin v. Lowndes County Sch. Dist., 114 F. Supp. 2d 504, 513 (N.D. Miss. 1999); Nichols v. DeStefano, 70 P.3d 505, 508 (Colo. Ct. App. 2002), aff'd by an equally divided court, 84 P.3d 496 (Colo. 2004); In re Expulsion of E.J.W., 632 N.W.2d 775, 783 (Minn. Ct. App. 2001); Yatron v. Hamburg Area Sch. Dist., 631 A.2d 758, 762 (Pa. Commw. Ct. 1993); Pittsburgh Bd. of Pub. Educ. v. MJN, 524 A.2d 1385, 1390 (Pa. Commw. Ct. 1987); Stone v. Prosser Consol. Sch. Dist. No. 116, 971 P.2d 125, 128 (Wash. Ct. App. 1999). For cases addressing expungement, see Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 458 (Miss. 1986); Ruef v. Jordan, 605 N.Y.S.2d 530, 531 (N.Y. App. Div. 1993); Adrovet v. Brunswick City Sch. Dist. Bd. of Educ., 735 N.E.2d 995, 999–1000 (Ohio Ct. Com. Pl. 1999); Hardesty v. River View Local Sch. Dist. Bd. of Educ., 620 N.E.2d 272, 275 (Ohio Ct. Com. Pl. 1993). For cases dealing with reinstatement, see Murphy v. Fort Worth Indep. Sch. Dist., 258 F. Supp. 2d 569, 576 (N.D. Tex. 2003), vacated as moot, 334 F.3d 470 (5th Cir. 2003); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 449, 459–60 (W.D. Pa. 2001); Doe v. Rockingham County Sch. Bd., 658 F. Supp. 403, 406, 410 (W.D. Va. 1987). Additionally, in only one of the twenty-three conclusive rulings in favor of the student did the court expressly provide for money damages, and even then only awarded a nominal amount. See Warren County Bd. of Educ., 500 So. 2d at 458 (awarding one dollar); cf. Killion, 136 F. Supp. 2d at 460 (scheduling a subsequent hearing for money damages that were presumably attributable to federal constitutional violations of free speech and vagueness, rather than PDP). Finally, the court awarded attorney's fees in only two cases. See Doe, 658 F. Supp. at 411 (awarding, presumably in full, attorney's fees and costs); Warren County Bd. of Educ., 500 So. 2d at 458 (awarding only $1,000, which was less than ample in light of litigation spanning from the state's chancery court to the state's highest courts, and which was couched as an addition to the nominal one dollar awarded as damages).
103. Because there were no inconclusive rulings for both parties, the figures for outcomes do not include an entry for classification "3."
7% (n = 13)—inconclusive decision in favor of the school district, and 74% (n = 143)—conclusive victory in favor of the school district.\textsuperscript{104}

Figure 1 displays the frequency of cases and issue rulings per five-year interval.\textsuperscript{105}

Examination of Figure 1 illustrates a consistent upward trend in both categories.

\textsuperscript{104} In one of these cases, the court went so far as requiring the student’s attorney to pay $100,000, as a sanction, for the district’s attorney’s fees. Giangrasso v. Kittatinny Reg’l High Sch. Bd. of Educ., 865 F. Supp. 1133, 1142–43 (D.N.J. 1994).

\textsuperscript{105} The juxtaposition of these two units of analysis provides a means of transitioning from the measures employed most frequently in previous research—“cases” (representing court decisions)—to the more precise measure in this study—“issue rulings” (representing PDP issue rulings).
Figure 2 divides the frequency of issue rulings into Federal and State Law subgroups.106

Figure 2 shows a steady increase for each of the successive five-year periods for the Federal rulings. In partial contrast, State Law rulings increased initially, but the three most recent five-year periods approximated an uneven plateau rather than a continuing steep upslope.

Figure 3 presents the outcome results for each of the successive five-year periods.

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106. By broadening the analysis to a discussion of PDP issue rulings, the study allows for more meticulous scrutiny by accounting for those decisions that have both a Goss and state law basis. Thus, by approaching the data in this more nuanced fashion,
Figure 3 shows that the overall trend in outcomes has rather clearly and consistently been in favor of school districts. For conclusive rulings, being those at the polar positions (that is, “1” in favor of the student, and “5” in favor of the school district), students fared slightly better in the first and most recent period, but districts won approximately 70%–75% throughout the twenty-year span.

Figures 4 and 5 are derivatives of Figure 3 and offer a means for comparing the outcomes of Federal and State Law issue rulings.

the study avoids wrongfully pigeonholing a court decision as being based solely on Fourteenth Amendment PDP or state statutes or regulations.
Figure 4, which displays the outcome results for the Federal issue rulings, reveals that the trend in favor of school districts for this subgroup is even more pronounced than in Figure 3.
Figure 5, which presents the results for issue rulings based on state statutes and regulations, evidences a more variable trend. Generally, however, students fared better in these issue rulings than those based on Fourteenth Amendment PDP, although the outcomes were, for the most part, still in favor of the districts. Most notably, students won the majority of the conclusive rulings for the most recent five-year period. However, as Figure 2 revealed, these percentages are based on comparatively lower numbers of issue rulings.

VI. DISCUSSION

Overall, the findings of this study were that: (1) the Goss progeny has generally increased during the most recent twenty years, and (2) the outcomes during this recent period have strongly favored school authorities.

A. Frequency

The tabular data for overall frequency show a steady increase in the number of court decisions during the study’s twenty-year span. This rather clear-cut pattern is only partially in line with previous studies. More specifically, Lufler found a notable decrease in the volume of PDP cases in the two five-year periods following Goss, but the extrapolated results for the 1985–1989 period, which overlaps with this study’s initial five-year period, seem to foreshadow the upturn in frequency that this study found.107 Similarly, Arum’s initial study, which was not limited to PDP cases, reported a moderately fluctuating frequency during the seventeen-year period following Goss;108 although, in a more recent article, he referred in passing to an ascending arc for the years 1990–2000.109

A more precise measure of frequency than court decisions, or cases, is the disposition specific to the PDP claim, herein referred to plurally as “rulings.”110 Figure 1 reveals a pattern for rulings parallel to the pattern for cases, with the exception of a possible leveling between the last two five-year periods. The source of this recent change is revealed in Figure 2, which disaggregates the frequency data, juxtaposing those rulings based

107. Although Lufler’s extrapolated results for the years 1985–1989 showed only a slight increase in cases from the previous five-year period, they signaled a possible reversal from the downward trend exhibited during the fifteen-year period beginning in 1975. See supra notes 29–30 and accompanying text.
108. See supra notes 38–40 and accompanying text.
109. Arum, supra note 51, at 44.
110. See supra notes 83–84 and accompanying text.
on the Fourteenth Amendment, herein referred to as “Federal,” with those based on state statutes or regulations, herein referred to as “State Law.” The Federal rulings follow a steady upward trajectory; thus, the slowed growth is not attributable to them. In contrast, the growth in State Law rulings is unsustained and, particularly during the final three five-year periods, the pattern appears to plateau; thus, the state data appear to account for the recent slowed growth in the overall volume of rulings.

Although the growth in Federal rulings is rather clear, the reason for it is not. The outcomes of the cases do not provide, at least directly, an explanation. Indeed, one would expect the increasingly school district-friendly outcomes to decelerate, rather than stimulate, legal challenges. Therefore, it is likely that students and their attorneys were largely unaware of their limited and declining odds of success. This lack of outcomes information may be attributable to the time lag between the emergence of a detectable trend and the dissemination of the resulting scholarly research.

Furthermore, it is possible that student-plaintiffs were not only ill informed, but also misinformed. That is to say, the probable lack of outcomes data, which may have curtailed plaintiffs’ lawsuits, was perhaps compounded by skewed media reports, which may have in turn heightened plaintiffs’ legal expectations. More specifically, the publicity of exceptional cases, content on special-interest websites, and articles written by academic professionals may have collectively reinforced, or even fostered, mistaken assumptions about the probability of prevailing on a disciplinary challenge.111

Finally, a contributing factor to the growth of Federal rulings may be the zero-tolerance approach, which took shape starting with the Gun Free Schools Act of 1994112 and quickly expanded to a whole host of student infractions relating to violence and drugs.113 This draconian

111. See supra notes 19–21, 51–55 and accompanying text.
approach, which typically provides for expulsions of one year or more with limited discretionary exceptions, obviously made such disciplinary actions high stakes for the expelled students and an undisputed denial of property and liberty interests under Fourteenth Amendment PDP, thus increasing the incentive for making a federal case of the matter.\footnote{An Uneasy Alliance, 178 EDUC. L. REP. 1, 2–3 (2003); Darcia Harris Bowman, Interpretations of "Zero Tolerance" Vary, EDUC. WK., Apr. 10, 2002, at 1.}

The overall pattern of State Law rulings—which, although approximating more of an uneven plateau for the three most recent five-year periods, initially paralleled the growth in Federal rulings—also lacks an obvious explanation. One might have expected greater growth in State Law than Federal rulings in light of their more favorable outcomes during the entire period.\footnote{114. This factor would also appear to contribute to State Law rulings, at least in states that provide added PDP protections, but—as discussed infra—the pattern did not follow suit for the most recent five-year period.} However, with due caution for the small number of rulings (particularly the total of only three rulings for the 1986–1990 period), this disconnect between frequency and outcomes may also be attributable in part to information and opportunity.

First, this differential pattern for State Law rulings may be based on insufficient or misleading information. More specifically, the information generally available to the parents and attorneys of suspended or expelled students about the outcomes of PDP litigation would seem to connect their prospects for successful suits to \textit{Goss} and, by extension, to claims under federal law. For example, Arum’s Washington Post Op-Ed piece asserted that \textit{Goss} created for students “newfound legal rights . . . and entitlements in cases that largely involve school violence, weapons, drugs and general misbehavior.”\footnote{115. See supra Figures 4–5.} The reader’s inference is that the appropriate avenue for disciplinary challenges is Fourteenth Amendment PDP, which was the basis for \textit{Goss}. In contrast, there is no implicit recommendation to resort to state legislation or regulations, which can offer PDP protections that go beyond those in \textit{Goss}.\footnote{116. Arum, supra note 18.} Thus, the public highlighting of \textit{Goss} in relation to students’ rights could be the basis for plaintiff attorneys’ seeming preference to rely on federal, rather than state, claims of PDP.

Second, depending on the time and location of the suit, the plaintiff attorneys may not have had the luxury of availing their clients of greater procedural protections under state statutes and regulations. More

\begin{footnotesize}
\begin{itemize}
\item See, e.g., \textsc{Minn. Stat. Ann.} § 121A.47(9) (West 2008) (giving students the right to confront and cross examine witnesses at disciplinary hearing); \textsc{22 Pa. Code} § 12.8 (2008) (requiring a formal hearing in all expulsion actions); \textsc{Ark. Code Ann.} § 6-18-507(c)(1)–(2) (2007) (providing students the right to appeal suspensions to the school board or superintendent).
\end{itemize}
\end{footnotesize}
specifically, the suspension or expulsion may have arisen in a state that either lacked a law providing stronger procedural protection or that previously had such a law but eliminated it prior to the suit. Although systematic data specific to state PDP protections for students are not available, it may well be that as the societal pendulum swung away from student rights, some states may have reduced or removed their procedural protections that went beyond Goss. Thus, in an undetermined and perhaps increasing number of states, students' attorneys may have had no choice but to base their claims exclusively on Fourteenth Amendment PDP.

Third, the significant disparity between Federal and State Law PDP outcomes may be due to the availability of certain remedies through only one avenue, not the other. For example, attorney's fees in Goss-type cases are available to prevailing plaintiffs for their federal law claims, not—in most jurisdictions—their state law claims. Although, in itself, this advantage may not prove decisive for an attorney weighing the benefits of raising a PDP claim under either federal or state law, it adds to the two foregoing factors that contribute to a federal claim.

B. Outcomes

In contrast to the steadily increasing pattern in overall frequency, the pattern for overall outcomes on an issue by issue basis is rather steady—and, for students, quite bleak. Indeed, the situation for plaintiff-students is even darker than the overall PDP outcomes indicate, given that:

118. The Education Commission of the States tracks state laws for suspension and expulsion, but the compilation is limited to the past six to seven years and lacks any systematic categorization. See, e.g., EDUCATION COMMISSION OF THE STATES, ECS STATE NOTES 2006 COLLECTION 1-4 (2006), http://ecs.org/html/educationIssues/StateNotes/2006 StateNotes.pdf (failing to show a category for discipline).


121. On the other hand, the plaintiff students won at a higher rate on a case-by-case basis if one analyzed the overall outcome to include their alternative claims, such as First Amendment expression or Fourth Amendment search and seizure, not just their PDP claims alone.
(1) these data do not include the completely adverse results for students in the cases where the court regarded the disciplinary action or effect as de minimis,

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and (2) the comparatively few conclusive rulings in favor of the student often yielded nominal remedies, including a remand to the school board for a new hearing.

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The outcomes specific to Federal rulings are even more dramatically in favor of school districts, albeit with a rather oscillating pattern for the conclusive district victories. In contrast, the outcome results for State Law rulings present a more favorable outlook for students, particularly in the final five-year period.

The clear-cut pattern for overall outcomes is in line with, and extends, the findings of previous studies, although both Lufler’s and Arum’s methodologies differ from the present study’s methodology in terms of scope

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and specificity.

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More specifically, both Lufler and Arum found that school districts won an increasing majority of cases in the fifteen-year period following Goss.

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Our findings, which focused more narrowly on PDP, were congruent with these previous studies for the overlapping period in the second half of the 1980s and seemed to

122. See supra notes 76–81 and accompanying text. Conversely, we included in our analysis cases where the court either accorded or assumed the requisite liberty or property denial. Some of these cases were extracurricular exclusions. See supra note 76 and accompanying text. The other cases pertained to in-school suspensions. See, e.g., Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987), aff’d, 853 F.2d 924 (5th Cir. 1988) (ruling that denial “would depend on the extent to which the student was deprived of instruction or the opportunity to learn.”); Orange v. County of Grundy, 950 F. Supp. 1365, 1372 (E.D. Tenn. 1996) (avoiding issue of whether plaintiffs were deprived of a property or liberty interest in light of district’s failure to dispute it).


124. In contrast with our study, Lufler’s outcomes analysis was limited to cases with conclusive rulings, see supra note 31, and Arum’s selection criteria excluded federal district court decisions, see supra note 37.

125. In contrast with our study, neither Lufler nor Arum disaggregated their data, either for frequency or outcomes, into Fourteenth Amendment PDP and state law PDP subcategories.

126. See supra notes 32, 42, 43, and accompanying text.
suggest a saturation, or ceiling, effect in the 1990s, particularly for the Federal, as compared with State Law, PDP rulings.

The primary reasons for the pattern in overall outcomes are two overlapping societal and judicial trends. More specifically, the applicable societal trend is the general shift from individual rights to collective welfare in the school context, whereas the concurrent and seemingly consequent judicial trend is increasing deference to public school authorities. The societal shift toward a collective, or governmental, interest was evident in the increasing public perception of a “war” on drugs and violence in society generally and in schools, particularly after Goss. For example, in its 1986 decision in New Jersey v. T.L.O., the Court reasoned:

Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. . . . Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures . . . .

The episodes of school fatalities, punctuated by the shootings at Columbine High School in 1999, served to accelerate the increasing institutional interest in school safety and security.


130. See Cloud, supra note 113, at 17 (“Although public schools are now among the safest places for students to be, the perception lingers that they are unsafe because of recent and highly publicized campus tragedies.”). For a direct judicial example within the Goss progeny, see Williams v. Cambridge Bd. of Educ., 370 F.3d 630, 643 (6th Cir. 2004) (“The tragic destruction at Columbine High School . . . etched devastating images of adolescent rage run amok onto the national consciousness. The realization that the perpetrators of this violence were young teenagers crystallized latent fears that a new danger had emerged from within our own communities.”). For a more recent example in the T.L.O. progeny, see D.L. v. State, 877 N.E.2d 500, 501 (Ind. Ct. App. 2007) (“in this post-Columbine world”).
The overlapping trend of increasing judicial deference toward school authorities represents a return to the judicial stance of the pre-Goss era.131 Indeed, prior to Goss, education litigation was limited, with courts traditionally tending to abstain from interfering with the discretion of school boards.132 The successive decisions in Tinker and Goss represented a relative high-water mark for the individual rights of students. However, the results and the rationales in the post-Goss case law reflect a systematic swing back to this traditional, deferential stance.133

Previous studies showed the post-Goss shift in results of student litigation more generally. More specifically, Zirkel found that school authorities won the Supreme Court student litigation that was based on secular constitutional grounds rather consistently after the brief Tinker-Goss period.134 Subsequently, Lupini and Zirkel, in an empirical analysis of the outcomes of education litigation arising in the K-12 setting, found a statistically significant shift in favor of school districts from the mid-1970s to the mid-1990s in the student, not employee or other plaintiff, cases.135 In a follow-up study, Anastasia D’Angelo and Zirkel, using wider,136 more up-to-date,137 and more representative samples than Lupini,138 and focusing exclusively on student litigation, confirmed a statistically significant shift in favor of school authorities during the two decades after Goss.139

The rationales of the Goss progeny provide further evidence of the shift in favor of school authorities in terms of both school security and judicial deference. More specifically, although the dicta in the post-

132. See, e.g., Zirkel, supra note 61, at 345.
134. Zirkel, supra note 119, at 238–39. These grounds, including but not at all limited to PDP, were distinguishable from Establishment Clause cases, which interposed the institutional interests of religion, and statutory cases, which provided less latitude for judicial discretion. Id.
135. Lupini & Zirkel, supra note 93, at 257.
137. Their second period ended in 2001, whereas the second period in Lupini & Zirkel ended in 1996. Id.
138. D’Angelo & Zirkel identified other Westlaw key-number categories that yielded additional pertinent cases. Id. at 541.
139. Id. at 550.
Goss case law addressing the societal interest in school security tend to appear within the parts of the opinion specific to other constitutional bases, they reflect the courts’ recognition of the increasing interest in collective safety and security. For example, a federal district court’s discussion of an Equal Protection claim underscored the school’s “interest in maintaining a safe school environment, particularly in light of the apprehensive climate that existed at the time due to highly publicized incidents of school violence around the country.” In a more general allusion, the Fifth Circuit prefaced a more recent expulsion case as “highlight[ing] the difficulties of school administrators charged to balance their duty to provide a safe school with the constitutional rights of individual students when violence in schools is a serious concern.” Additionally, the discussions specific to PDP more directly acknowledge judicial deference, ranging from cursory mention to more detailed specific or general application.

This overall trend in favor of school authorities is even more pronounced in the outcomes for Federal issue rulings, yet it is noticeably less evident in the results for State Law rulings. The more favorable, but still largely adverse, outcome pattern for State Law rulings is primarily attributable to the stronger procedural requirements in some state laws. More specifically, the procedures prescribed in Goss, which are the basis for Federal PDP claims, are rudimentary and flexible, therefore permitting a more interpretative judicial posture. In contrast, the procedures prescribed in certain states, which are the basis for State Law PDP claims, are

142. See, e.g., Pirschel v. Sorrell, 2 F. Supp. 2d 930, 934 (E.D. Ky. 1998) (“[W]hile students clearly are not stripped of their constitutional rights at the schoolhouse gate, decisions made by school officials in imposing discipline are afforded considerable deference.”).
144. See, e.g., D.F. v. Bd. of Educ. of Syosset Cent. Sch. Dist., 386 F. Supp. 2d 119, 131 (E.D.N.Y. 2005) (“This Court should not be a haven for complaints by students and their parents against actions taken by school officials in their extremely difficult task of educating and controlling the irresponsible behavior of their students. As is often the case, as it is here, these types of conflicts are better handled within the educational system and not in the federal trial and appellate courts.”).
145. For example, the states that cumulatively accounted for approximately half of the State Law rulings were, in order, New York, Pennsylvania, Ohio, and Minnesota.
more specific and seemingly stricter, therefore curtailing a judge’s latitude for deference. Thus, it is not surprising that judges ruled conclusively in favor of the student in only 6% of the Federal PDP rulings, as opposed to 27% in the State Law PDP rulings.

In conclusion, contrary to the position of the various commentators and the mass media, Goss is not responsible for a dramatic expansion of students’ PDP rights. Although the Goss dissent was partially correct to the extent that the lower court progeny has amounted to a rising tide, although not a flood, the results of this study disprove the dissent’s accompanying prediction of judicial activism. The primary source of any expansion of the Goss decision is not the judiciary, from the Goss Court to the federal and state courts that have interpreted its decision, but state codes, either in the form of legislation or regulation. Thus, although within her overly broad analysis Underwood was wrong about the courts, she was correct that state policy makers are ultimately responsible for choosing either to add procedural levels to Goss or to leave undisturbed its constitutional and ultimately judicially constructed minimal foundation.

146. However, the increased judicial concern with student safety has in some cases overwritten requirements of state law. See, e.g., D.F., 386 F. Supp. 2d at 126–27 (interpreting violations of New York state law requirements for advance notice and cross-examination as, in effect, harmless errors).

147. See supra note 101.

148. See supra notes 17–21 and accompanying text.


150. See supra note 15 and accompanying text.

151. See supra note 16 and accompanying text.

152. See supra note 2 and accompanying text. Like Arum, Underwood’s case law support was in the same direction as our findings. Yet, she identified the courts, in addition to state and local authorities, as “having expanded the minimal due process set forth in Goss.” Underwood, supra note 1, at 798.

153. Specifically, her ultimate conclusion was as follows: “Certainly the three minute due process is still within constitutional limits. Since control of the schools rests in the hands of state legislatures, it would be up to them [to] enact such laws in their states. I would urge them to do so.” Underwood, supra note 1, at 805–06.