The Judicialization of American Education

J.C. Blokhuis, University of Waterloo and Randall Curren, University of Rochester

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Summary

Judicialization is the term most commonly used to describe the supervening authority of the courts in virtually every sphere of public life in liberal democratic states. In the United States, where judicialization is most advanced, political and administrative decisions by agencies and officials at every level of government are subject to constitutional scrutiny, and thus to the oversight and substituted decision-making authority of unelected members of the federal judiciary.

The judicialization of American education is associated with the judicial review of administrative decisions by public school officials in lawsuits filed in the federal courts by or on behalf of students alleging due process and other Constitutional rights violations. So defined, the judicialization of American education has been facilitated by a number of legal and social developments in the Civil Rights Era, including the ascription of limited Constitutional rights to minors in public schools, the expansion of government agency liability, and the ensuing proliferation of lawsuits under Section 1983.

Judicialization has been criticized for subjecting routine administrative decisions to complex and costly procedural regimentation, for distorting social relations by subjecting them to legal oversight, and for flooding the courts with frivolous lawsuits. The causes and outcomes of the judicialization of American education present a complex and mixed picture, however. The U.S. Office of Economic Opportunity's Legal Services Program has played a central role in judicialization by providing legal resources to confront racial injustice in the punishment of students and in school funding.

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Subjects: Educational Theories and Philosophies

Judicialization is the term most commonly used to describe "the infusion of judicial decision-making and of court-like procedures into political arenas where they did not previously reside" (Vallinder, 1995, p. 13; cited by Miller, 2004, p. 590 at FN 11) and "shifts in the balance of power between law and politics favoring judicial institutions over representative and accountable institutions" (Miller, 2004, p. 590). For sociolegal scholars and critical theorists, the term juridification is used interchangeably with judicialization to describe the "process in which human conflicts are torn through formalization out of their living context

and distorted by being subjected to legal processes" or "the materialization of formal law [and] large numbers of legal control interventions in areas classically regarded as self-regulating in the world of industry and labor" (Habermas, 1986, p. 203; cited by Miller, 2004, p. 593 at FN 26). By some accounts an inevitable consequence of an expanding welfare state (Miller, 2004, p. 593; Yudof, 1981, p. 893), judicialization has become a global phenomenon (Ferejohn, 2002, p. 41) tantamount to juristocracy (Hirschl, 2006, p. 751) or judicial supremacy (Barkow, 2002, p. 237).

In the United States, "the peculiar home of the expansion of judicial power" (Shapiro, 1995, p. 43), judicialization describes the extent to which political and administrative decisions by agencies and officials at every level of government are subject to constitutional scrutiny, and thus to the oversight and substituted decision-making authority of unelected members of the federal judiciary. Judicial review is the *sine qua non* of judicialization in all its forms (Miller, 2004, p. 591; citing Eisgruber, 2001; see also Snowiss, 1990; Issacharoff et al., 2002).

In this article, we identify four closely related forms or categories of judicialization in the United States, each with implications for the judicialization of American education: the judicialization of politics, the judicialization of social relations, the judicialization of administrative processes, and judicialization through rights jurisprudence. We then define the judicialization of American education as a phenomenon associated with the judicial review of administrative decisions by public school officials in lawsuits filed in the federal courts by or on behalf of students alleging due process and other federal statutory and constitutional rights violations. This phenomenon has been attributed to a series of legal developments in the Civil Rights Era, including the ascription of limited constitutional rights to minors in public schools and other custodial contexts; the influence of rights-supportive lawyers, law schools, interest groups, and mythologies; the expansion of government agency liability under Section 1983 (42 U.S.C. § 1983 *<https://www.law.cornell.edu/uscode/text/42/1983>*); and the rise of nondiscretionary punishments and zero tolerance policies. As a result of the judicialization of American education, public school officials in the United States, unlike their counterparts in other jurisdictions, "regularly face lawsuits over discipline policies, personnel decisions, holiday celebrations, and more" (West & Dunn, 2009, p. 3).

The Judicialization of Politics

Historically, American federal courts distinguished political questions from legal questions. Under the political question doctrine, controversies on which the Constitution offered no clear guidance were considered *non-justiciable*. The courts deferred to the democratically elected branches of government for the resolution of political matters. In *Baker v. Carr*, 369 U.S. 186 (1962), a deeply divided Supreme Court reformulated the political question doctrine and found redistricting to be a justiciable issue. Justice Felix Frankfurter dissented strenuously, believing the Court had violated the separation of powers principle in venturing into the political realm. The Supreme Court would later apply its decision in *Baker* to congressional and state electoral districts.

Some constitutional scholars share Justice Frankfurter's concern that judicial review of political questions and controversies "conflicts with the requirements of democracy and opens judicial review to the charges of judicial supremacy and invasion of the legislative

sphere” (Snowiss, 1990, p. 9). Others question the competence of federal appointees to second-guess policymakers. “While the Supreme Court’s independence from the electorate is ideal to preserve individual rights against majority sentiment,” notes Rachel E. Barkow (2002, p. 24), “that same detachment renders the Court a poor factfinder and policymaker as compared to Congress and the Executive.” Many agree that the demise of the political question doctrine facilitated the judicialization of politics in the United States. The federal courts now routinely resolve “some of the most pertinent moral dilemmas and political controversies a democratic polity can contemplate” (Hirschl, 2002, p. 192, 2006, p. 751), including electoral disputes, from *Bush v. Gore*, 531 U.S. 98 (2000), in which the Supreme Court settled a recount dispute in Florida, effectively deciding the 2000 presidential election in favor of George W. Bush; to *Texas v. Pennsylvania*, 592 U.S. __ (2020), in which the Attorney General of Texas, joined by Donald Trump and 18 Republican state attorneys, unsuccessfully sought to challenge how four states won by Joseph R. Biden had administered the 2020 presidential election.

The adjudication of presidential prerogatives is illustrated by Trump-era cases concerning immigration and higher education. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court overturned lower court injunctions that had prevented a travel ban on persons from a list of predominantly Muslim countries from coming into effect. Hawaii and other states unsuccessfully argued that the executive order instituting the ban was *ultra vires* (not within the powers of the office of the presidency) and that it violated the First Amendment. In *Department of Homeland Security v. Regents of the University of California*, 2020 U.S. LEXIS 3254 (2020), the Supreme Court reversed an order by the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program. Many DACA beneficiaries attended the University of California, which successfully argued that the rescission of DACA was arbitrary and capricious, in violation of its students’ due process rights under the Fifth Amendment and the Administrative Procedure Act, 60 Stat. *<https://en.wikipedia.org/wiki/United_States_Statutes_at_Large>* 237 *<http://legislink.org/us/stat-60-237>* (1946).

Some scholars attribute the judicialization of politics to the federal judiciary (Stewart, 1975, p. 1669) or to the Supreme Court itself, arguing that judicial activism has exacerbated a problem that began with *Marbury v. Madison*, 5 U.S. 137 (1803), a watershed case in which the Supreme Court affirmed its authority to strike down laws and policies inconsistent with the Constitution. “It is hardly surprising that the Court has opted for the course that aggrandizes its own power” (Barkow, 2002, p. 242). The Supreme Court struck down 127 federal laws over the course of its first two centuries of constitutional scrutiny and 33 during the 19-year tenure of William Rehnquist as Chief Justice (Raskin, 2003, p. 5; quoted by Miller, 2004, p. 659). Under John Roberts, who became Chief Justice in 2005, “the Supreme Court has overturned its own precedents and struck down federal laws at a much lower rate than it did under Chief Justices Earl Warren, Warren Burger or William Rehnquist” (Adler, 2020).

Others attribute the judicialization of politics to Congress: “It might well be that the legislature, like other sectors of society, has succumbed to the paralysis of political will made possible by the judicial alternative,” writes Loren Smith (1985, p. 455). “By transferring [their] decision-making authority to the courts, legislatures grant priority to their short-term interests (to garner electoral support by avoiding tough and often unpopular decisions) at the expense of political accountability and responsibility,” says Ran Hirschl (2002, p. 214). Some scholars have attributed the judicialization of politics in general and the judicialization of

American education in particular to the creation of private rights of action in federal legislation in the late 1960s and early 1970s, which allowed individuals dissatisfied with the performance of state agencies and officials (including school districts) to file suit. “Private rights of action in turn facilitated the adoption of new regulations by outsourcing their enforcement to the [federal] courts,” note West and Dunn (2009, p. 5).

The Judicialization of Social Relations

The judicialization of social relations includes “the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making forums and processes” and “the popularization of legal jargon . . . in virtually every aspect of modern life” (Hirschl, 2006, p. 723). Examples of institutional contexts within which formal rules and procedures can replace informal or discretionary processes are legion. Informal decision-making and dispute resolution within an intact domestic partnership may be formalized through a separation or divorce agreement subject to judicial review and enforcement. Informal policymaking and disciplinary procedures in a small parochial college in which a handful of faculty and administrators profess a common faith or purpose may be formalized through unionization and the ratification of a collective bargaining agreement subject to judicial review and enforcement (see Yudof, 1981, p. 897).

The judicialization of social relations may explain why public officials tend to behave as if every administrative decision or policy will give rise to lawsuits alleging constitutional rights violations. West and Dunn (2009, p. 3) cite a national survey in which 82% of teachers and 77% of principals in American public schools claim to be practicing “defensive teaching” to avoid litigation. Students in American public schools, for their part, “have developed a sense of legal entitlement . . . [a] skepticism about the legitimacy of school disciplinary practices [and] a general familiarity with resorting to legal avenues to contest such practices” (Arum, 2003, p. 6). By some accounts, fears of litigation by public school officials may have more to do with public relations campaigns by companies that sell liability insurance than actual experience with litigation (Zirkel, 2006).

The judicialization of social relations “is inextricable from law’s capture of social relationships and popular culture and its expropriation of social conflicts,” writes Hirschl (2006, p. 723). “It stems from the increasing complexity and contingency of modern societies, or from the creation and expansion of the modern welfare state with its numerous regulatory agencies” in a manner consistent with the rise of formal and rational legal systems described by Max Weber and the evolving division of legal labor described by Emile Durkheim (Hirschl, 2006, p. 724). “Controlled by the judiciary and the administration, the school changes imperceptibly into a welfare institution that organizes and distributes schooling as a social benefit” (Habermas, 1986, p. 219; quoted by Miller, 2004, p. 594 at FN 32).

The Judicialization of Administrative Processes

Historically, American administrative law was concerned primarily with ensuring that the actions of administrative agents and agencies were *intra vires*. According to Richard B. Stewart (1975, p. 1673), this promoted formal justice by “ensuring that administrative deprivations of individual liberty or property interests have been authorized by a government

to which affected individuals had consented." The judicialization of administrative processes refers to the widespread adoption of "trial-like" procedures for overseeing routine administrative decisions and to "over-proceduralization and excessive complexity in the process of making public policy decisions" (Smith, 1985, p. 428), transforming administrative law into "a surrogate political process to ensure the fair representation of a wide range of affected interests" (Stewart, 1975, p. 1670). Some have described this type of judicialization in terms of sustaining the appearance of accountability, a reflection of "legal and judicial dogma that fundamental fairness to participants can only be achieved through the use of hearings with guaranteed procedural steps" (Smith, 1985, p. 641). Others have described the judicialization of administrative processes as a form of "procedural correctness" permitting stricter discipline or repression, provided due process formalities are observed (Yudof, 1981, p. 898).

By the early 1970s, public trust in government reached new lows in the wake of the McCarthy era, the Vietnam conflict, and Watergate. By some accounts, widespread disaffection with government gave rise to a "due process explosion" as the Supreme Court recognized new categories of property and liberty interests and extended due process requirements from one area of government to another (Friendly, 1975, p. 1269; Stewart, 1975, p. 1682). By 1975, the judicialization of administrative processes would include the public schools in which, according to a Gallup poll in 1980, only 28% of Americans felt a "great deal" of confidence (Yudof, 1981, p. 895).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court found that because welfare benefits are a statutory entitlement, recipients have a corresponding property interest. Accordingly, due process requires notice and opportunity to confront and cross-examine adverse witnesses, to present oral arguments, and to obtain counsel before benefits may be withdrawn, even for a brief interval. Similar due process rights were later ascribed to food stamp recipients in *Atkins v. Parker*, 472 U.S. 115 (1985). In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court held that due process did not require a hearing after a state college declined to renew the contract of an untenured faculty member. The same year, in *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court held that an untenured faculty member was entitled to a hearing to determine whether nonrenewal of his 1-year contract would violate due process requirements.

In *Goss v. Lopez*, 419 U.S. 565 (1975), a case involving nine students suspended for 10 days for destroying school property and disrupting the learning environment, the Supreme Court found that students have both a property interest in receiving the public education guaranteed by statute and a liberty interest in their reputation and future employment prospects. Because a 10-day suspension is not a *de minimus* deprivation of those interests, due process required notice and a hearing.

"Since *Goldberg v. Kelly*, we have embraced an increasingly abstract conception of due process," writes Loren Smith (1985, p. 459). In his view, this attitude led to "an excessive focus on the process rather than the substance of governmental decisions" (1985, p. 429). Other critics have cautioned that requiring formal hearings and judicial review in institutional contexts would add exponentially to the cost of delivering government services and programs (Friendly, 1975, p. 1276; citing Buss, 1971).

In *Gorman v. University of Rhode Island*, 387 F.2d 7 (1st Cir. 1988), a suspended student unsuccessfully claimed the university violated his due process rights. The First Circuit (including Stephen G. Breyer, later appointed to the Supreme Court) cautioned that "it is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counterproductive." *Gorman* was cited affirmatively by the First Circuit, including retired Supreme Court Justice David H. Souter, in *Haidak v. University of Massachusetts–Amherst*, 933 F.3d 56 (1st Cir. 2019), when a student suspended and subsequently expelled for assaulting a fellow student while intoxicated unsuccessfully claimed due process rights violations. In *Collins v. Putt*, No. 19-1169 (2d Cir. 2020), a student filed a Section 1983 suit against his instructor at Charter Oak State College for removing a post he had made in a class discussion forum disparaging an assigned video as "excruciatingly awkward" and "ridiculous." The Second Circuit denied the student's free speech and due process claims and affirmed that the instructor's actions were reasonably related to legitimate pedagogical concerns.

Judicialization Through Rights Jurisprudence

Because it often involves rights claimants challenging public policies and institutional practices on the basis of novel constitutional interpretations or claims, judicialization through rights jurisprudence has been described as "judicialization from below" (Hirschl, 2006, p. 725). According to Marcella David (1999, p. 131 at FN 212; cited by Barkow, 2002, p. 266), "one way of explaining the Supreme Court's increasingly active review of federal and state voting practices over time . . . is to recall the backdrop of the American civil rights movement and the quest for racial equality."

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court unanimously interpreted the term "liberty" in the Due Process Clause broadly, noting that it "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." The same day, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court unanimously overruled the "separate but equal" doctrine enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896) and found race-based segregation in public schools contrary to the Equal Protection Clause of the Fourteenth Amendment. The following year, in *Brown II*, 349 U.S. 294 (1955), the Court ordered states to desegregate "with all deliberate speed." The appellants in *Brown* were represented by Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People (NAACP).

The subsequent explosion in litigation involving public schools and school districts (Zirkel, 1997, p. 341) in the late 1960s and early 1970s is closely associated with judicialization through rights jurisprudence. Like the *Brown* case itself, much of the litigation in this period "did not emerge spontaneously from grassroots student and parental efforts, but required a supportive legal infrastructure" (Arum, 2003, p. 18), including the Office of Economic Opportunity (OEO) and its Legal Services offices (established in 1965), offices of the Legal Service Corporation (established in 1974), and other public interest law firms using court challenges to advance the constitutional rights and interests of children. Of course, there was also an explosion in litigation in this period funded by conservative religious groups seeking to advance the religious freedoms and due process rights of parents, notably including *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and subsequent challenges to compulsory schooling laws.

Critics have observed that it was not the Supreme Court but Congress that integrated American public schools. “It was only subsequent federal legislation such as the 1964 Civil Rights Act, plus administrative intervention, local political pressure, and further court challenges that reduced school segregation significantly,” notes Richard Arum (2003, p. 27). Nevertheless, the Supreme Court came to be seen by civil rights groups as “the political savior for the disenfranchised, without seeming to pay much of a price in terms of its legitimacy” (Barkow, 2002, p. 266; citing Bickel, 1986).

In the wake of *Brown* in 1954 and the passage of the Civil Rights Act 10 years later, activists viewed the suspension of African American and other minority students from public schools as a “rearguard attempt of school officials to perpetuate dual school systems, a problem calling for the exercise of judicial remedial powers just as surely as the breakup of *de jure* segregation mandated by *Brown*” (Wilkinson, 1975, p. 31). Much like *Brown*, *Goss* made its way to the Supreme Court through the efforts of the Center for Law and Education at Cambridge, the OEO Legal Services office in Cleveland, and numerous organizations submitting *amicus curiae* briefs, including the American Civil Liberties Union (ACLU) and the NAACP (Arum, 2003, p. 19). “If in *Brown* the racial question was very much on the surface, in *Goss* it lay not very far below,” writes J. Harvie Wilkinson III (1975, p 30). In his view, “a hearing, however abbreviated, may help relieve racial tensions by enhancing the appearance of evenhanded discipline by reducing the number of arbitrary or mistaken suspensions of minority students . . .” (Wilkinson, 1975, p. 32).

As West and Dunn (2009, pp. 5–6) note, “the creation of the Legal Services Program within the Office of Economic Opportunity marked a shift in federal policy away from subsidizing legal advice for the poor and [instead] filing test cases intended to alter policy nationwide.” Litigation initiated and supported by Legal Services and various civil rights groups in this period challenged school funding inequities on equal protection grounds. In the *Serrano v. Priest* trilogy, 5 Cal.3d 584 (1971) (Serrano I), 18 Cal.3d 728 (1976) (Serrano II), and 20 Cal. 3d 25 (1977) (Serrano III), legal challenges based on the California constitution ultimately led to legislative reform of the local property tax-based school funding systems.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the plaintiffs argued that public education was a fundamental right and that wealth-based discrimination should trigger strict scrutiny in the same way that race-based discrimination would, given that students from minority communities were most disadvantaged under the local property tax-based school funding system in Texas. The Supreme Court rejected these claims, finding that relative—as opposed to absolute—deprivations of educational rights arising from local property tax-based funding systems did not violate the Fourteenth Amendment.

In *Plyler v. Doe*, 457 U.S. 202 (1982), the total exclusion of undocumented children from the public education system in Texas was challenged under the Equal Protection Clause. The Supreme Court did not apply strict scrutiny but nonetheless found the absolute deprivation of educational rights in the circumstances violated the Fourteenth Amendment. In *Papasan v. Allain*, 478 U.S. 265 (1986), the Court announced that neither *Rodriguez* nor *Plyler* “definitively settled the questions whether a minimally adequate education was a fundamental right” and whether a statute alleged to infringe that right should be accorded heightened judicial scrutiny.

In *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Supreme Court considered whether a statutorily authorized busing fee could result in a complete deprivation of education for children whose families were too poor to pay. The plaintiffs urged the Court to apply strict scrutiny (denied in *Rodriguez*) or mid-level scrutiny (applied in *Plyler*). The Court applied the rational basis test and concluded that "the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right."

In *Gary B. v. Whitmer*, 2020 U.S. App. LEXIS 18312 (June 10, 2020), Michigan settled a long-running suit before a decision favorable to the plaintiffs could be overturned by the Supreme Court. Supported by the ACLU and other civil rights groups, a group of students enrolled in public and charter schools in Detroit successfully argued that they had been denied a fundamental right to literacy under the Due Process Clause and that they had suffered disparate treatment on the basis of race under the Equal Protection Clause. In the four states comprising the Sixth Circuit, a basic minimum education for literacy was briefly recognized as a fundamental right under the Fourteenth Amendment until the court granted *en banc* review on its own motion, automatically vacating its earlier decision (Blokhuis et al., 2021, p. 380; Paulson, 2020).

The Judicialization of American Education

Like their counterparts throughout the common law world, American public school officials continue to be subject to civil suits for negligence and a variety of intentional torts (including battery, false imprisonment, invasion of privacy, and defamation). Despite their frequency, civil suits are matters over which state courts have jurisdiction. They do not involve federal questions, including federal constitutional claims. Thus they are not a factor in the judicialization of American education. Section 1983 suits against public school officials in conjunction with the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act and its companion statute, the Americans with Disabilities Act (ADA), are relatively rare (*see* Zirkel, 2019; Zirkel et al., 2007).

The judicialization of American education is a phenomenon associated with (a) the judicial review of administrative decisions by public school officials (b) in lawsuits filed in the federal courts (c) by or on behalf of students (d) alleging due process and other federal statutory and constitutional rights violations. So defined, the judicialization of American education is associated with a number of legal and social developments in the Civil Rights Era, as follows.

The Ascription of Limited Constitutional Rights to Minors in Custodial Contexts

At common law, parents have long been presumed to act in the best interests of their children as they exercise day-to-day care and control. Historically, teachers and other school officials stood *in loco parentis*, allowing them to maintain order, investigate misconduct, and punish students as they saw fit, provided their decisions were reasonable in the circumstances. Parents and persons standing *in loco parentis* could invoke a disciplinary privilege if charged with assault or abuse.

Until the Civil Rights Era, public school officials were viewed more as parental delegates than as agents of the state. They exercised the same sort of discretionary or substituted decision-making authority of parents over the children in their charge or custody. Apart from the ruling in *Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the Supreme Court prohibited public school officials from punishing students for refusing to recite the Pledge of Allegiance on First Amendment grounds, the decisions of public school officials were rarely subject to judicial review (Blokhuis et al., 2021, p. 222).

This changed in the 1960s. In *Kent v. United States*, 383 U.S. 541 (1966), a 16-year-old was taken into custody and questioned for 24 hours before confessing to criminal charges. The Juvenile Court of the District of Columbia waived its jurisdiction without a hearing or investigation, allowing Kent to be tried as an adult. The Supreme Court overturned Kent's conviction and remanded the case, holding that the Juvenile Court had violated his due process rights in waiving its jurisdiction.

In *In re Gault*, 387 U.S. 1 (1967), a 15-year-old was taken into custody after a neighbor alleged he had made a lewd phone call. The Juvenile Court declared him a delinquent and sent him to an industrial school until he turned 21. The Supreme Court reviewed the due process rights of adults under the Fifth Amendment, including the right to receive notice of charges, the right to counsel, the right to confront one's accuser, the right against self-incrimination, and the right to cross-examine witnesses and found that for juveniles, "departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), three students were suspended for wearing black armbands to protest the Vietnam War. The Supreme Court ascribed limited First Amendment protections to students engaging in nondisruptive speech or expressive conduct. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students," noted the Court. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Six years later, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that due process requires notice and a hearing for students suspended from public schools for 10 days or fewer.

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a student facing drug charges challenged the constitutionality of the search of her purse by a school official yielding drug paraphernalia. The Supreme Court upheld the reasonableness of the search under the Fourth Amendment, holding that public school officials must have a reasonable suspicion that a student has violated the law or a school rule. The Court described the pre-Civil Rights Era conceptualization of public school officials as parental delegates standing *in loco parentis* as being "in tension with contemporary reality and the teachings of this Court," adding, "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."

Public school districts routinely publish codes of conduct to comply with state and federal laws, to facilitate enforcement, and to avoid judicial scrutiny. But even formal rules may violate due process principles associated with natural justice, including the requirement that rules be clear and narrowly tailored. Statutes and school rules must clearly inform students what they may and may not do (Blokhuis et al., 2021, p. 223).

Conservative members of the Supreme Court have occasionally lamented the judicialization of American education insofar as it is linked to the demise of the *in loco parentis* doctrine and the ascription of limited constitutional rights to students in public schools.

In *Vernonia v. Acton*, 515 U.S. 646 (1995), a case involving a seventh grader who challenged a school policy mandating random drug tests for all interscholastic athletes, Justice Antonin Scalia acknowledged that, "in *T.L.O.*, we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints." However, he insisted that "*T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."

In *Morse v. Frederick*, 551 U.S. 393 (2007), a case involving an 18-year-old student suspended for unfurling a banner reading "BONG HiTS 4 JESUS" on a city sidewalk during an Olympic torch parade, Justice Clarence Thomas explicitly linked the judicialization of American education to the demise of *in loco parentis* in his concurring opinion:

> Parents decide whether to send their children to public schools. If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process. In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. . . . Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

Rights-Supportive Lawyers, Law Firms, Interest Groups, and Mythologies

The ascription of due process rights to minors in custodial contexts by the Supreme Court in *Gault* created a need for lawyers to work in the previously nonexistent field of children's rights (Guggenheim, 2005, p. ix), representing children in juvenile court proceedings and, a few years later, in the explosion of lawsuits after *Goss*. Thousands of law school graduates took up the call, creating the "support structure for legal mobilization—a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies, and legal aid schemes" (Hirschl, 2006, p. 725) that facilitated the judicialization of American education. For Martin Shapiro (1995, p. 43; cited by Miller, 2004, p. 653), "growth in the number and size of large law firms" in the United States helps to explain the "litigation explosion" associated with judicialization generally.

“Much of the institutional impetus that supported and instigated challenges to school disciplinary practices in U.S. courts emerged neither spontaneously from private citizens nor indirectly through the efforts of nonprofit public interest firms, such as the Children’s Defense Fund,” writes Arum (2003, p. 8), adding:

> Instead, legal challenges to local public school disciplinary practices occurred in large part because of federal funding and support for legal activism during this period. Specifically, the major institutional actor advancing legal challenges to public school disciplinary practices was the Legal Services Program established by the Office of Economic Opportunity (OEO). The OEO was established in 1965 with a mandate that was interpreted to include promoting law reform as part of the War on Poverty under President Johnson. While about forty percent of the initial OEO legal funding went to support existing local legal service organizations that provided basic legal services for the poor, more than half of federal funding went toward creating new legal service organizations that stressed law reform.

Arum notes that “in 1967, the OEO Legal Services Program received $27 million in federal funding and employed nearly 1200 lawyers; by 1972, the program received $71.5 million and employed over 2000 lawyers” (2003, p. 9). Perry Zirkel (1997) has documented a steady increase in state and federal litigation involving schools in this period, from 2,452 cases in the 1950s, to 3,413 cases in the 1960s, to 6,788 in the 1970s.

“Legal mobilization from below is aided by the commonly held belief that judicially affirmed rights are self-implementing forces of social change removed from the constraints of political power,” cautions Hirschl (2006, p. 725), citing the “myth of rights” enunciated by sociolegal scholar Stuart Scheingold. In *The Politics of Rights*, Scheingold (2004, p. 4) assesses “the part that lawyers and litigation can play in altering the course of public policy,” based primarily on the work of Judith Shklar (1964, p. 1), who defined legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” Accordingly, for Scheingold (2004, p. 17), the “myth of rights” rests on a belief that “the political order in America actually functions in a manner consistent with the patterns of rights and obligations specified in the Constitution.”

According to Scheingold (2004, p. 5), public interest lawyers are most deeply invested in the “myth of rights” because the legalistic approach exaggerates their role and their assumption “that litigation can evoke a declaration of rights from the courts; that it can, further, be used to assure the realization of these rights; and finally, that realization is tantamount to meaningful change.” Scheingold (2004, p. 148) ultimately repudiates the “myth of rights” associated with adversarial legalism because it encourages “rights talk” and the concomitant impoverishment of political discourse (see Glendon, 1991). As Oliver Wendell Holmes put it in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), rights “tend to declare themselves absolute to their logical extreme” (Fuller, 1964, p. 29; cited by Scheingold, 2004, p. 110; see also Blokhuis, 2014; Hirschl, 2006, p. 726).

Nevertheless, “youth advocates in the late 1960s and early 1970s embraced a political-legal strategy that had been successfully developed by the Civil Rights Movement . . . utiliz[ing] court challenges to advance the social interests of children,” notes Arum (2003, p. 6). The judicial opinions in these court cases “led to a dramatic expansion of the applicability of the

Bill of Rights to individuals challenging state and local institutions, including public schools, and advanced ‘a view of democracy as one in which individuals can effectively claim rights against the state’” (Arum, 2003, p. 7; quoting Schudson, 1998, p. 249), inspiring lawyers and legal scholars to embrace the “myth of rights” (see Newman, 2013; Rebell, 2018) while expanding the judicialization of American education.

Government Agency Liability Under Federal Statutory Tort Suits

The judicialization of American education has been facilitated by federal legislation allowing individuals to sue government agents and agencies, including school districts and public school officials, for monetary damages for alleged violations of their rights under the Constitution and federal civil rights statutes. The Civil Rights Act of 1871, 42 U.S.C. § 1983, known as Section 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Enacted in the aftermath of the Civil War, this provision of federal law lay dormant until the 1960s. In *Monroe v. Pape*, 365 U.S. 167 (1961), six African American children and their parents sued the City of Chicago and the 13 police officers who had ransacked their home in the middle of the night. The Supreme Court held that Section 1983 could not be used against municipal governments or their agents.

In *Wood v. Strickland*, 420 U.S. 308 (1975), a case argued on the same day as *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that public school officials could be liable under Section 1983 for knowingly violating the constitutional rights of students, including their due process rights (Friendly, 1975, pp. 1274–1275).

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court overruled *Monroe*, holding that municipal governments could be liable under Section 1983. Jane Monell successfully challenged the compulsory maternity leave policies of both the Department of Social Services and the Board of Education of the City of New York. Ultimately, the suit was settled for $11 million in back pay and damages for municipal employees forced to take maternity leave (Epp, 2010, p. 70).

Monell and *Wood* opened the floodgates to Section 1983 claims against previously immune public school districts and school officials, vaulting Section 1983 from obscurity to a leading role in the judicialization of American education. However, public school officials often receive qualified immunity from liability in Section 1983 suits if they are found to have acted in good faith and did not violate a clearly established statutory or constitutional right.

Damages awarded under Section 1983 are based on actual losses sustained by plaintiffs, not the importance of the violated right. Although punitive damages against school districts are not permitted in Section 1983 suits, plaintiffs can nonetheless receive large awards. In

addition, under the Civil Rights Attorney's Fees Award Act of 1976, federal judges could award fees to the "prevailing parties" in civil rights suits (Melnick, 2009, p. 39). "Thus attorneys working in such areas as religion, free speech, desegregation, and school discipline, who previously donated their services or relied on charitable contributions, could reasonably expect an independent source of funding," note West and Dunn (2009, p. 6), adding, "modern education litigation pays—sometimes literally."

Section 1983 suits are now routinely filed on behalf of students suspended or expelled from public schools, by some accounts clogging the federal courts with groundless and frivolous requests for judicial review. Federal justices have occasionally lamented the role of Section 1983 suits in the judicialization of American education. For example, in *Smith v. Severn*, 129 F. 3d 419 (7th Cir. 1997), Cheryl Smith filed a Section 1983 suit on behalf of her son, Brandon, who had been suspended for 3 days for disrupting a school assembly. Brandon had engaged in an unauthorized lip sync performance, using a chain saw and a live boa constrictor to simulate sexual violence. Smith claimed the principal violated her son's due process and equal protection rights. For a unanimous court, Justice Michael Kanne wrote:

> This litigation, based on the wholly unremarkable disciplinary action of a modest suspension which was preceded by entirely appropriate constitutional safeguards, has now required the extensive work of a magistrate judge, a district judge, and three court of appeals judges—not to mention the labors of the lawyers involved. Something has gone badly wrong when the scarce judicial resources of the federal courts are brought to bear on a case which has so little merit as this one. This is the type of case that trivializes the work of the courts and the Constitution we seek to interpret. Moreover, these cases divert judicial energy from litigants who have serious and valid claims.

Nondiscretionary Punishments and Zero Tolerance Policies

Justin Driver (2018, pp. 149–150) has argued that legislatures, not the Supreme Court, are primarily responsible for the judicialization of American education:

> The formalization of disciplinary hearings is not primarily attributable to [*Goss*] or any other judicial decisions handed down from the Supreme Court or elsewhere. [*Goss*] merely established a constitutional floor for disciplinary procedures, below which localities could not fall. . . . The elevated procedures that suspended students receive today were produced not by some out-of-control Supreme Court but by government actors at the state and local level.

Federal and state statutes play a significant role in shaping the disciplinary landscape of public schools. Many states require school districts to adopt zero tolerance policies requiring that students be excluded from school if they bring weapons or drugs onto school property or if they engage in bullying, gang-related activity, harassment, fighting or violence. Zero tolerance policies require that students be punished even when they unintentionally compromise school safety. Moreover, zero tolerance policies do not allow school officials to exercise discretion to modify statutory punishments in light of the circumstances, including the age, disciplinary history, and intent of particular students (Blokhuis et al., 2021, p. 262).

Both the Fifth Amendment and the Fourteenth Amendment include clauses stating that no person shall "be deprived of life, liberty, or property, without due process of law." Although the concept has never been fully defined, procedural due process entails even-handedness and a right to be heard. The Fourth Amendment provides limited rights to students in public schools to be free from the unreasonable search or seizure of their persons and their property. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Supreme Court affirmed that the Fourteenth Amendment offers students in public schools a right "to obtain judicial relief for . . . unjustified intrusions on [their] personal security," including invasions of privacy, unreasonable detention, and the use of unreasonable or excessive force by school officials.

Due process challenges to the exclusion of students for violating zero tolerance policies have generally been unsuccessful because the federal courts apply the rational basis test. If an impugned rule or policy is found to be rationally related to the school's educational mission, it will pass constitutional muster. Thus, for example, in *Vann v. Stewart*, 445 F. Supp. 2d 882 (E.D. Tenn. 2006), a 10th-grade student unsuccessfully challenged on due process grounds his 1-year suspension for bringing a pocket knife to school and threatening a former girlfriend with it. The district court rejected these claims:

> [We] cannot conclude that the punishment imposed by school officials in this case bore no rational relationship to plaintiff's offense. State authorities have expressed a legitimate interest in maintaining "safe and secure learning environments." In an effort to comply with state law adopted pursuant to that interest, local officials adopted a zero tolerance policy that includes a one-year suspension for violations. [The student] admits that he possessed a pocketknife in violation of the local policy and that he was aware he could receive a one-year suspension.

"Students have challenged zero tolerance as a violation of due process, but even in [extreme] cases . . . lower courts consistently conclude that the Constitution provides no meaningful check on these policies," notes Derek W. Black (2015, p. 826). "[They] have been so consistently emphatic in their position that scholars and advocates have all but conceded the constitutionality of zero tolerance."

Faced with a case in which a high school student who had used social media to threaten to "take out" certain classmates in a school shooting unsuccessfully challenged his expulsion on due process grounds, the Ninth Circuit wrote in *Wynar v. Douglas County School District*, 728 F.3d 1062 (9th Cir. 2013) that because public school officials are agents of the state, they "face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights." Many of the Section 1983 suits filed annually against school districts and public school officials in the United States concern the conflict between the constitutional rights of students and the common law and statutory duties of public school officials to maintain safe and orderly school environments (Blokhuis et al., 2021, p. 246).

Many states have also authorized school districts to employ police officers to assist with maintaining order and discipline as school resource officers. Because the actions of these resource officers have given rise to Section 1983 suits, they have contributed to the judicialization of American education. In *A.M.* ex rel. *F.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 2151 (2017), the parent of a 13-year-old student arrested by a

school resource officer for burping in class filed a successful Section 1983 suit. A majority on the Tenth Circuit agreed that school officials had violated the student's constitutional rights. Justice Neil Gorsuch, later appointed to the Supreme Court, objected both to the ruling and to the expanded role of the federal judiciary in public school discipline:

> If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen-year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded.

In *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006), a case involving a school resource officer who handcuffed "a compliant, nine-year-old girl for the sole purpose of punishing her," the Eleventh Circuit found "an obvious violation" of the Fourth Amendment. Because public school officials and school resource officers may claim qualified immunity from liability in Section 1983 suits so long as their conduct has not violated any clearly established constitutional right of which a reasonable person ought to have known, the courts have granted qualified immunity in cases involving administrative conduct not previously subject to judicial scrutiny. In *J.W. v. Birmingham Board of Education*, 904 F.3d 1248 (11th Cir. 2018), students argued that school officials had violated their Fourth Amendment rights by failing to offer any decontamination assistance after pepper spraying them. The Eleventh Circuit concluded that school officials were entitled to qualified immunity because the constitutionality of the use of pepper spray was not clearly established. In *Muscette v. Gionfriddo*, 910 F.3d 65 (2d Cir. 2018), the Second Circuit came to a similar conclusion in a case involving a school resource officer who used a taser to subdue a deaf student (Blokhuis et al., 2021, pp. 215–217).

Conclusion

The origins and outcomes of the judicialization of American education present a complex and mixed picture. Although the recognition of children's independent welfare interests and due process rights in education has played a role, this type of judicialization is neither a simple correlate of the modern welfare state nor an entirely unfortunate "process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes" (Habermas, 1986, p. 203). The distinctive nature and scope of the judicialization of American education are in no small measure products of the country's long history of systemic racism. They also reflect the role of civil rights litigation and the OEO's Legal Services Program in confronting racial injustice in the provision of public education. In this context, it would be unfair to condemn the ascription of circumscribed due process rights to minors and federal legislation allowing individuals to sue government agents and agencies for violations of their rights under federal law, as "distorting" human conflicts by

tearing them from “their living context.” Law may be a blunt instrument in the pursuit of justice, but these legal developments would not have been necessary if the conflicts—borne of persistent violent opposition to equal citizenship—had been resolved by other means.

As instruments of justice, litigation and the creation of procedural safeguards are costly in time and resources, and their efficacy is limited. The courts alone cannot bring about desirable social change, and neither can legislatures. What is more efficacious and economical is highly distributed self-governance based on consensual norms, including norms of informal conflict resolution, but it is hard to imagine such governance existing in a society that does not already embrace the integrated just school communities (Curren, 2020) envisioned by leaders of the Civil Rights Movement.

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