10-1977

Board of Curators of the University of Missouri v. Horowitz

Lewis F. Powell Jr.

Grant
or
Grant +
Reverse
Summarily

CA 8 held that a state University can't "dismiss" ("flunk out") a student w/out a D/P hearing.

Here, even if such a hearing is required, Resp was given the substance of full notice & hearing.

Pet's decision is a severe intrusion on academic freedom, ~~from judicial interference~~.

PRELIMINARY MEMORANDUM

January 21, 1977 Conference
List 1, Sheet 2

No. 76-695

BD. OF CURATORS OF UNIVERSITY OF MISSOURI	Cert to CA 8 (Heaney, Ross, Stephenson)
v.	
HOROWITZ	Federal/Civil — Timely

Please see back. -Dave

1. SUMMARY: Resp was dismissed from medical school. CA 8 agreed with her contention that she was entitled to a prior notice and hearing. Petr challenges this conclusion where the reasons for dismissal are not released.

2. FACTS: Resp was admitted with advanced standing during the first year of operation of the University of Missouri-Kansas

City (UMKC) School of Medicine in 1971. The curriculum at UMKC is designed to train students to become practicing physicians, and therefore require that its students become proficient in clinical skills. Resp's academic performance apparently was good, but her clinical work left the school highly dissatisfied. In 1972 the faculty members in Pediatrics criticized her "expertise in coming to the fundamentals of the clinical program," her lack of patient rapport, her erratic attendance, and her poor personal hygiene. Resp's docent (faculty "advisor") brought these criticisms to her attention. By letter dated July 5, 1972, the Dean told resp that although she was being advanced to Year VI, she was on probation, and specified the perceived deficiencies.

In December of 1972, a Council on Evaluation reconsidered resp's status and recommended that she not be allowed to graduate on schedule. This was approved by the Coordinating Committee and the Dean, who wrote resp telling her that she was to be continued on probation, would not graduate in spring, and if she did not make the necessary improvements, would be terminated after May. She was told that she could request a set of oral and practical examinations as an "appeal" of the decision not to graduate her in the spring of 1973. Resp initiated such a request, which resulted in an examination of her by 7 faculty members who had not had extensive prior contact with her. Two of them recommended that she graduate on schedule; the other five favored continued probation

or outright dismissal. The decision not to allow her to graduate in June of 1973 was thereafter affirmed. In May, the Council on Evaluation considered resp's case again, concluded that she had not made sufficient progress in her deficient areas, and it was decided she should be dropped.

Petr filed this suit under § 1983, alleging, insofar as is now relevant, a denial of due process in that the school failed to provide her with a notice of the charges and a hearing prior to her dismissal. The DC dismissed her suit, and CA 8 reversed, holding

> "The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged. The dismissal was effected without the hearing required by the fourteenth amendment." (A-8)

what?

CA 8 distinguished Bishop v. Wood, and Board of Regents v. Roth, reading those as cases "in which a damaging stigma was not proved or was inadequately alleged." E. banc was denied by a 5-3 vote.

3. CONTENTIONS: Petr contends, relying on Bishop v. Wood and Roth, that a simple dismissal from school for deficiencies in academic performance */ does not amount to a deprivation of liberty

*/ I think the characterization of the reasons for the dismissal as "adademic performance" is only a partially accurate summary; it would seem better, as resp asserts, to characterize her dismissal as based in part on academic shortcomings, and in part on non-academic personal shortcomings. But, where the only claim found by CA 8 is one of due process due to a stigmatizing dismissal, this distinction is largely irrelevant, where the reasons for the dismissal are not made public. CA 8's opinion was based on the stigmatizing effects of a dismissal, not on any asserted right not to be dismissed but for academic reasons.

requiring due process protections. Petr contends that the essence of such a protected deprivation is the release of stigmatizing information coupled with future lost opportunities. Here, since the school did not release its reasons for dismissing resp, a notice and a hearing were not required.

4. DISCUSSION: Petr appears correct about the thrust of the decision in Roth and in Bishop v. Wood. Roth, for example, stated that

> "Mere proof. . .that his record of non-retention in one job, taken alone, might make him somewhat less attractive to some other employer would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" 408 U.S. at 575 n.13.

Bishop v. Wood stated that "[t]he same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." 44 U.S.L.W. at 4822. These cases may not be entirely on all fours, as here the conclusion was that the termination itself was highly stigmatizing, virtually foreclosing any future schooling. The non-renewal, in Roth, may not have been quite as stigmatizing, but the language of Roth, quoted supra, certainly suggests this is but a matter of degree, not of kind. The "bright line," if indeed there is one, seems to call for release of the stigmatizing information which led to the dismissal before the "liberty" interest is implicated. See the circulating draft

per curiam in Codd v. Velger, No. 75-812, at 4. On the other hand, this Court has not decided whether the fact that a person will "have no practical alternative but to consent to the release of such information if they wished to be seriously considered" for other openings, Codd v. Velger, at 3, is tantamount to dissemination of the stigmatizing information.

In any case, I am not sure that the school did not do enough for resp here. She was given plenty of warning about what was coming. I am not at all sure that state schools should have to jump through more hoops before they can dismiss someone.

I agree.

There is a response.

1/10/77
CMS

Jackson

CA 8 opn in petn appx.

JAN 24 197

Court CA - 8 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 76-695

Submitted ....., 19... Announced ....., 19...

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,
Petitioners

vs.

CHARLOTTE HOROWITZ

11/17/76 - Cert.

Byron applies
case was wrongly
decided but doesn't
~~don't~~ want to
hear it.

(I don't think
Codd reaches this
+ I'll probably
stay with my
grant)

Grant
(But after
discussion
agreed to
hold for
Codd v. Velger)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.			✓										
Stewart, J.					Hold for Codd v. Velger								
Brennan, J.			✓										
Burger, Ch. J.			✓		or Reverse Summarily								

Linda

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 75-812 -- Codd v. Velger

Two cases have been held for Codd v. Velger, No. 75-812, decided February 22, 1977. Both cases present issues not resolved by our decision in Codd.

In University of Missouri v. Horowitz, No. 76-695, the CA 8 ruled that the dismissal of a student from medical school, even absent any publicization of reasons therefor, was sufficiently stigmatizing to entitle the student to a Roth hearing. The apparent reasons for the dismissal are non-specific in nature, apparently relating to clinical performance, patient rapport, erratic attendance, and poor personal hygiene, and the analysis of Codd requiring allegation of falsehood does not appear to be dispositive. I believe that Roth, John's opinion last Term in Bishop v. Wood, and his separate concurrence in Codd, are dispositive, however, in holding that some publication of reasons is an essential prerequisite to a deprivation of liberty by stigmatization. See Roth, 408 U.S. at 575, n.13; Bishop, 426 U.S. at 348-349. My first choice would therefore be to summarily reverse; my second would be to grant plaino.

Deny

CA8 held D/P hearing necessary before a med. student can be dismissed from school

Deny

In School Bd. of Brooklyn v. Huntley, No. 76-104, the CA 2 ordered a Roth hearing for an acting principal who was removed on grounds of poor performance, whence a letter stating the reasons for removal was read at a Parent's Association meeting at which supporters of petitioner

If we grant Horowitz I'd hold this.

Horowitz is imp. because it applies generally to a "flunking-out" of any state school

Otherwise, I'm inclined to Deny.

demanded to hear the charges against him. The reasons for dismissal again are such that the holding of Codd does not seem pertinent. On the merits this seems a tougher case than Horowitz, presenting the questions 1) whether there was sufficient publicization of the reasons, and 2) if so whether, in light of the fact that respondent has already taken another job as a teacher, there was sufficient injury to reputation to amount to constitutional stigmatization. I will vote to grant.

Sincerely,

WHR/ssc.

76-695 University of Missouri v. Horowitz, heretofore held for No. 75-812 - Codd v. Velger.

Grant

In University of Missouri v. Horowitz, No. 76-695, the CA 8 ruled that the dismissal of a student from medical school, even absent any publicization of reasons therefor, was sufficiently stigmatizing to entitle the student to a Roth hearing. The apparent reasons for the dismissal are non-specific in nature, apparently relating to clinical performance, patient rapport, erratic attendance, and poor personal hygiene, and the analysis of Codd requiring allegation of falsehood does not appear to be dispositive. I believe that Roth, John's opinion last Term in Bishop v. Wood, and his separate concurrence in Codd, are dispositive, however, in holding that some publication of reasons is an essential prerequisite to a deprivation of liberty by stigmatization. See Roth, 408 U.S. at 575, n.13; Bishop, 426 U.S. at 348-349. My first choice would therefore be to summarily reverse; my second would be to grant plaino.

Heretofore held for decision in No. 75-812 - Codd v. Velger

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19...

Submitted ....., 19... *Announced* ....., 19...

MAR 8 1977

No. 76-695

BD. OF CURATORS OF UNIVERSITY OF MISSOURI

vs.

HOROWITZ

Grant & ~~Vac~~ Reverse

(Rehnquist will write P.C.)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.		✓											
Rehnquist, J.		✓	& R										
Powell, J.		✓											
Blackmun, J.		✓	& R										
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓	& R										
Brennan, J.			✓										
Burger, Ch. J.		✓	& R										

(Might join a Reverse
My first vote was to Grant

MAR 2 5 1977

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 76-695

BD. OF CURATORS OF UNIVERSITY OF MISSOURI

vs.

HOROWITZ

RELIST for Mr. Justice Rehnquist - Heretofore held for decision in 75-812 - Codd v. Velger

Relist for Rehnquist to write P.C.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

APR 1 1977

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 76-695

BD. OF CURATORS OF UNIVERSITY OF MISSOURI

vs.

HOROWITZ

Heretofore held for decision in No. 75-812 - Codd v. Velger
RELIST for Mr. Justice Rehnquist.

Relisted for Rehnquist to write

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

Heretofore held for 75-812 - Codd v. Velger

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 76-695

BD. OF CURATORS OF UNIVERSITY OF MO.

vs.

HOROWITZ

RELIST for Mr. Justice Rehnquist

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.		✓		G				✓					
Rehnquist, J.		✓		G	Brief both issues								
Powell, J.		✓			"			"		"			
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓			G			✓					
Brennan, J.			✓										
Burger, Ch. J.		✓			G			✓					

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 5 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. *v.* CHARLOTTE HOROWITZ

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-695. Decided April —, 1977

PER CURIAM.

Respondent, Charlotte Horowitz, was dismissed as a student at the University of Missouri/Kansas City Medical School during what would have been her final year of study. She brought the present action under 42 U. S. C. § 1983 against the school and certain of its officials, alleging that the dismissal was constitutionally required to be preceded by a hearing at which she would be allowed to appear and present evidence in her own behalf. After a full trial, the United States District Court for the Western District of Missouri entered judgment against respondent, explicitly finding that she was "afforded full procedural due process" by the Medical School. On appeal to the United States Court of Appeals for the Eighth Circuit, that judgment was reversed. 538 F. 2d 1317. The court held that the stigma attaching to her dismissal amounted to a deprivation of liberty, so that she was constitutionally entitled to prior notice and opportunity to be heard on the reasons for her dismissal. A motion for rehearing en banc was denied by a vote of five-to-three. Because we think that the Court of Appeals wrongly concluded that respondent had been deprived of any protected liberty interest, we vacate and remand for further proceedings.

The opinions of the Court of Appeals and the District Court indicate that there is little disagreement as to the factual background of this case. Respondent was admitted with advanced standing to the Medical School in the fall of 1971. Faculty dissatisfaction with her performance was called to her attention in the first year of her study, and she was advanced

to her second and final year on a probationary basis. In the middle of the final year, after further review of her progress by the faculty, it was concluded that she should not be considered for graduation in June of that year. Respondent elected to "request a set of oral and practical examinations as an 'appeal'" of that decision. Of the seven doctors who administered these examinations, two recommended that she be graduated on schedule, and the other five recommended that she should not graduate on schedule. Two of the latter recommended that she be immediately dropped from the school. Opinion of the District Court, Petition, at A–24, A–25. Following these recommendations, school authorities first decided that she should not be allowed to graduate on schedule, and then after further deliberations notified her that she was being dismissed from school.

Tests by seven doctors – 5 negative

The decision of the Court of Appeals rests on its finding that Horowitz' dismissal deprived her of liberty because it substantially impaired her opportunities to continue her medical education or to return to employment in a medically related field. In *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), this Court stated that a constitutional liberty interest might be infringed in some cases where a State declines to reemploy a teacher even though the teacher had no tenure-type property interest in his job:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'
>
> ° ° ° ° °
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a

stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities." *Id.*, at 573. (Citations omitted.)

Last Term in *Bishop* v. *Wood*, 426 U. S. 341 (1976), the Court elaborated upon the type of situation in which an employment termination might infringe a protected liberty interest. In upholding the dismissal of a policeman without a hearing, the Court rejected the theory that the mere fact of dismissal, absent some publicization of reasons for the action, could amount to a stigma infringing one's liberty:

"In *Board of Regents* v. *Roth*, 408 U. S. 564, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far 'to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains as free as before to seek another.' *Id.*, at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

"In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.*, at 348. (Footnotes omitted.)

The constitutional protection against stigmatization is surely no greater in the case of a student's dismissal from a public institution than in the case of a job termination. Assuming that the latter standard applies, see *Roth, supra; Paul* v. *Davis*, 424 U. S. 693 (1976), a critical element in any

complaint seeking to establish that removal from a graduate school program resulted in a deprivation of liberty would be an assertion that information or allegations harmful to reputation were in some way publicized. There is nothing in respondent's complaint, or in the opinions below, to suggest that there has been any sort of publicization by the Medical School in the present case.

Nor under *Roth* or *Bishop* can it be said that dismissal of respondent from a state medical school under these circumstances "imposed on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities." *Roth, supra,* at 573. The refusal of a state operated law or medical school to graduate a student will necessarily "foreclose" that student from practicing law or medicine if the State requires graduation from a professional school as a condition for a license to practice the profession. But if *Roth* and *Bishop* were extended in such a manner, every refusal of an educational institution to graduate a student on schedule would deprive that student of a liberty interest implicating the Fourteenth Amendment procedural due process.

The District Court here held that respondent had been accorded such process, but we think that neither of the courts below need have reached that issue with respect to respondent's liberty claims. Missouri did not, by virtue of the fact that respondent was dismissed from medical school, bar her from all other public employment or public education. The fact that her failure to graduate cost her a job opportunity conditioned upon receipt of a degree does not even rise to the level of the claim rejected in *Bishop*, where it was alleged that dismissal would make the employee less attractive to other employers. Here respondent was dismissed, not from a position of employment comparable to that which she might have obtained after graduation, but from her place as a student in the Medical School. We think it follows *a fortiori* from the above quoted language in *Bishop* that denial of an academic degree as such, although it pre-

vents the student from obtaining jobs which are conditioned upon the obtaining of such a degree, implicates no Fourteenth Amendment liberty interest.

We accordingly reverse the holding of the court below insofar as it holds that a constitutional interest in liberty has been infringed. This determination does not entirely dispose of the case, however, since there appear in the complaint unresolved contentions which could be read to allege that respondent's dismissal amounted to a deprivation of a contractual property interest analogous to that of a tenured public employee.

Whatever may be the merits of the contention that a student in a public institution, in the absence of statutes or regulations such as those involved in *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975), could have a Fourteenth Amendment property interest in obtaining a degree, respondent's claim would necessarily depend on questions of state law not discussed by either the Court of Appeals or the District Court. See *Bishop, supra*, at 343–347; *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593, 599–603 (1972); *Roth, supra*, at 576–578. We think it should be first addressed by them, and we therefore vacate the judgment of the District Court and of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

Denial of a degree implicates no 14th A liberty interest

Property interest remanded to State

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 5 1977

Recirculated: _____

1st DRAFT

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The opinions of the Court of Appeals and the District Court indicate that there is little disagreement as to the factual background of this case. Respondent was admitted with advanced standing to the Medical School in the fall of 1971. Faculty dissatisfaction with her performance was called to her attention in the first year of her study, and she was advanced

Perhaps this opinion reaches the right result, but it amounts to a highly significant and restrictive interpretation of certain language in [illegible]th, quoted at the top of p. 3. Before the Court takes such a step, it seems to me there should be full briefing and argument. In any event, if it is still desirable to dispose of the case summarily, perhaps that should be done on the basis that [illegible] got all the process due. I recommend you vote to grant. —Dave

(I have attached the pool memo and vote sheets, as well as CA8's opinion.)

to her second and final year on a probationary basis. In the middle of the final year, after further review of her progress by the faculty, it was concluded that she should not be considered for graduation in June of that year. Respondent elected to "request a set of oral and practical examinations as an 'appeal'" of that decision. Of the seven doctors who administered these examinations, two recommended that she be graduated on schedule, and the other five recommended that she should not graduate on schedule. Two of the latter recommended that she be immediately dropped from the school. Opinion of the District Court, Petition, at A–24, A–25. Following these recommendations, school authorities first decided that she should not be allowed to graduate on schedule, and then after further deliberations notified her that she was being dismissed from school.

The decision of the Court of Appeals rests on its finding that Horowitz' dismissal deprived her of liberty because it substantially impaired her opportunities to continue her medical education or to return to employment in a medically related field. In *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), this Court stated that a constitutional liberty interest might be infringed in some cases where a State declines to reemploy a teacher even though the teacher had no tenure-type property interest in his job:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'
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stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities." *Id.*, at 573. (Citations omitted.)

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> "In *Board of Regents* v. *Roth*, 408 U. S. 564, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far 'to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains as free as before to seek another.' *Id.*, at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.
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> "In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.*, at 348. (Footnotes omitted.)

The constitutional protection against stigmatization is surely no greater in the case of a student's dismissal from a public institution than in the case of a job termination. Assuming that the latter standard applies, see *Roth, supra; Paul* v. *Davis*, 424 U. S. 693 (1976), a critical element in any

complaint seeking to establish that removal from a graduate school program resulted in a deprivation of liberty would be an assertion that information or allegations harmful to reputation were in some way publicized. There is nothing in respondent's complaint, or in the opinions below, to suggest that there has been any sort of publicization by the Medical School in the present case.

Nor under *Roth* or *Bishop* can it be said that dismissal of respondent from a state medical school under these circumstances "imposed on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities." *Roth, supra,* at 573. The refusal of a state operated law or medical school to graduate a student will necessarily "foreclose" that student from practicing law or medicine if the State requires graduation from a professional school as a condition for a license to practice the profession. But if *Roth* and *Bishop* were extended in such a manner, every refusal of an educational institution to graduate a student on schedule would deprive that student of a liberty interest implicating the Fourteenth Amendment procedural due process.

The District Court here held that respondent had been accorded such process, but we think that neither of the courts below need have reached that issue with respect to respondent's liberty claims. Missouri did not, by virtue of the fact that respondent was dismissed from medical school, bar her from all other public employment or public education. The fact that her failure to graduate cost her a job opportunity conditioned upon receipt of a degree does not even rise to the level of the claim rejected in *Bishop,* where it was alleged that dismissal would make the employee less attractive to other employers. Here respondent was dismissed, not from a position of employment comparable to that which she might have obtained after graduation, but from her place as a student in the Medical School. We think it follows *a fortiori* from the above quoted language in *Bishop* that denial of an academic degree as such, although it pre-

?

I can't agree that this follows a fortiori. A degree is the sine qua non for employment as a doctor.

vents the student from obtaining jobs which are conditioned upon the obtaining of such a degree, implicates no Fourteenth Amendment liberty interest.

We accordingly reverse the holding of the court below insofar as it holds that a constitutional interest in liberty has been infringed. This determination does not entirely dispose of the case, however, since there appear in the complaint unresolved contentions which could be read to allege that respondent's dismissal amounted to a deprivation of a contractual property interest analogous to that of a tenured public employee.

Whatever may be the merits of the contention that a student in a public institution, in the absence of statutes or regulations such as those involved in *Goss* v. *Lopez,* 419 U. S. 565, 573–574 (1975), could have a Fourteenth Amendment property interest in obtaining a degree, respondent's claim would necessarily depend on questions of state law not discussed by either the Court of Appeals or the District Court. See *Bishop, supra,* at 343–347; *Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593, 599–603 (1972); *Roth, supra,* at 576–578. We think it should be first addressed by them, and we therefore vacate the judgment of the District Court and of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

port for the District Court's conclusion that the jury also felt that the Union had violated its duty. The selection of these two verdict forms supports only the conclusion that the jury was confused as to what its responsibilities under the law were and, thus, returned inconsistent verdicts.

This conclusion is supported by several factors. First, the instructions given did not unambiguously state that the jury must find initially that the Union violated its duty of fair representation before it considers the employer's liability. Second, the jury's question to the court asking whether it could find for one defendant and not the other indicates that the jury was uncertain as to the applicable law. Although the District Court's affirmative response is theoretically correct, in that the jury could find only against the Union and not against Safeway, the answer could also lead the jury to believe that it could legally find for the Union but against Safeway. Finally, the verdict forms themselves did not set forth the requirement that the Union be initially found liable.

In the face of these inconsistent verdicts, the present judgment cannot stand and a new trial is necessary. *See Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5th Cir. 1975); *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970).

I would reverse and remand for that purpose.

Charlotte HOROWITZ, Appellant,

v.

BOARD OF CURATORS OF the UNIVERSITY OF MISSOURI et al., Appellees.

No. 75-1949.

United States Court of Appeals, Eighth Circuit.

Submitted June 15, 1976.

Decided July 16, 1976.

Rehearing and Rehearing En Banc Denied Sept. 27, 1976.
See 542 F.2d 1335.

A medical student brought a civil rights action challenging her dismissal from a school of medicine. The United States District Court for the Western District of Missouri, William G. Juergens,* Senior District Judge, entered judgment for the university's board of curators, and the medical student appealed. The Court of Appeals, Ross, Circuit Judge, held that where the student's dismissal resulted in her being stigmatized in such a way that she would be unable to continue her medical education and her chances of returning to employment in a medically related field would be severely damaged, due process required that she be accorded a hearing before dismissal.

Reversed and remanded.

Colleges and Universities ⇐9
Constitutional Law ⇐275(1)

Where dismissal of medical student from medical school resulted in her being stigmatized in such manner that she would be unable to continue her medical education and severely damaged her chances of returning to employment in medically related field, dismissal violated student's due process rights when it was unaccompanied by hearing. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

* Hon. William G. Juergens, Sr. Judge of the District Court of the Eastern Dist. of Illinois, sitting by designation.

Arthur A. Benson, II, Kansas City, Mo., for appellant.

Marvin E. Wright, Columbia, Mo., for appellee, Jackson A. Wright, James S. Newberry and Richard S. Paden, Columbia, Mo., and Fred Wilkins, Kansas City, Mo., on brief.

Before HEANEY, ROSS and STEPHENSON, Circuit Judges.

ROSS, Circuit Judge.

Charlotte Horowitz has brought this action under 42 U.S.C. § 1983 challenging her dismissal from the University of Missouri-Kansas City (UMKC) School of Medicine in July 1973. The defendants are the governing body of the institution and certain officials of the medical school. The case was tried without a jury and judgment was for the defendants, from which Horowitz now appeals. We reverse the district court judgment.

The facts are not seriously in dispute. The UMKC Medical School admitted its first students in August 1971; Horowitz was admitted at that time as an advanced standing student. She has a Bachelor's degree in chemistry from Barnard College and a Master's in psychology from Columbia University. She studied pharmacology at Duke for one year, taking the same curriculum as the first year medical students there. She began as a sophomore at the Women's Medical College of Pennsylvania but withdrew in good standing because of illness her first semester. She also did graduate study and worked in the field of psychopharmacology at the National Institute of Health in Bethesda, Maryland for five years. She scored above the 99th percentile on the Graduate Record Examination in Verbal Aptitude, Quantitative Aptitude, Advanced Psychology and Advanced Chemistry. Her scores on the Medical College Admissions Test were also extremely high, with scores in the 99th percentile in the General Information and Science categories. She received excellent recommendations from those with whom she had worked at the National Institute of Health and educators.

The UMKC Medical School's curriculum is intended to educate its students to become competent practicing physicians. Therefore, the school considers that a student must become proficient in clinical skills in order to earn an M.D. degree. Both Horowitz and the University knew at the time of her entrance, however, that she intended to become a psychiatrist and teach or do research.

The policies and regulations of the school do not state the requirements of graduation in terms of a certain number of courses which must be completed. During the last two years of medical education at UMKC a student is required to pursue studies in rotational units which deal with various areas of medicine: e. g. Pathology-Anatomy, Psychiatry, Obstetrics-Gynecology. These units generally included clinical responsibilities as well as academic study. Horowitz received credit for all these rotations except Emergency Room, her last rotation, which was not completed until after it was determined she would not graduate.[1] Her academic (as opposed to practical) performance certainly gave no cause for complaint. She scored first in the school on Part I of the National Board Examination for medical students and second on Part II. She ranked fourth in her class in quarterly exams given in February 1973, and second in the May 1973 exams. In the latter examination she was either first or second in 14 of the 30 categories.

Although she received credit in all rotational units except Emergency Room and her docent, the faculty member who had the closest contact with her, regarded her performance as outstanding throughout her

1. The University draws a distinction between receiving credit and satisfactorily completing a course, and contends that Horowitz did not satisfactorily complete courses besides Emergency Room. It does not appear that this distinction was communicated to Horowitz or the other students, however.

first year,[2] other faculty members felt her clinical performance was deficient. This first came to light in the spring of 1972 when faculty members in the Pediatrics course criticized her lack of patient rapport and "expertise in coming to the fundamentals of the clinical problem," erratic attendance, and poor personal hygiene. These criticisms were brought to Horowitz's attention by her docent, although she was not shown her formal course evaluations.

Toward the end of her first year at the school, Horowitz's record was reviewed by the Council on Evaluation, a body of students and faculty, which recommended to the Dean that she not be advanced to Year VI, the final year of the medical school. However, in a letter dated July 5, 1972, which confirmed an earlier conversation, the Dean told Horowitz that she was being advanced to Year VI, but was on probation. The letter pointed out her deficiencies as follows:

> Your acquisition of information is good. Your relationship with others has not been good and represents a major deficiency. You need to improve your relationship with others rapidly and substantially. This involves keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance, including hand washing and grooming; participating appropriately in the activities of the School; and directing criticisms and suggestions maturely to your Docent and to the faculty member who is in charge of a curriculum block as you may have criticisms and suggestions.

The letter also stated that noncompliance with certain standards of conduct "is incompatible with continued progress and graduation." After she was placed on probation, Horowitz was counseled frequently by her docent, the Dean and other faculty members until her ultimate dismissal.

In November of 1972 the University's Provost for the Health Sciences promulgated changes in the procedures for deciding questions of students' academic standing. The Council on Evaluation thereafter made recommendations to the Coordinating Committee, which consisted of faculty members. The Coordinating Committee had veto power over the Council's recommendations, and the Dean had veto power over recommendations of the Coordinating Committee. Provision was made for students' personal appearances before the Council upon its request if that body felt it had inadequate information. It was also provided that a student could be given additional practical and oral examinations if the Council needed to resolve questions of competence as a physician. On December 26, 1972, the Council on Evaluation reconsidered Horowitz's status and recommended that she not be allowed to graduate on schedule in June 1973. This recommendation was accepted by the Coordinating Committee. The Dean approved this recommendation and on February 7, 1973, he wrote a letter to Horowitz reviewing a conference with her, held January 26. The Dean's letter stated that she had not made sufficient progress as outlined in the July 5 letter and was being continued on probation. She was informed that she would not be able to graduate as scheduled and that she would have to improve markedly in the areas of clinical competence, peer and patient relations, personal hygiene and ability to accept criticism. If she did not make the improvement considered necessary by the Council on Evaluation, she would not be able to continue at the medical school after May. She was told that she could request a set of oral and practical examinations as an "appeal" of the decision not to graduate her in the spring of 1973. Horowitz initiated such a request.

Since no such proceeding had ever been requested and no procedures had been set

2. The docent's role was compared by UMKC to that of an ombudsman. During a student's academic career he or she would have more frequent and closer contact with the docent than any other faculty member. Horowitz's docent testified that he would have recommended that she be allowed to graduate in the spring of 1973, and be given a residency, and in fact he had so recommended in June 1972.

up, the school had to create a procedure to be followed in Horowitz's case. It was arranged that she would be examined by seven experienced physicians on the faculty, none of whom had appreciable previous contact with Horowitz. They would evaluate her clinical abilities in the areas of pediatrics, pathology and anatomy, general medicine, and obstetrics and gynecology. The Dean informed the seven physicians by letter and a meeting that they were to make one of three recommendations: a) graduation on schedule; b) continued probation and reassessment of her status in May 1973; c) dismissal from the medical school. The option of recommending additional study after May 1973 without dismissal was not given to them. A majority opinion of the seven doctors was to be determined and submitted to the Council on Evaluation. The examinations were conducted and the doctors submitted their reports. Two recommended that Horowitz graduate on schedule, two recommended that she continue on probation, and two recommended that she be dropped from school. One believed she was not qualified to graduate at that time, but expressed no further opinion. Although there was no clear majority opinion the panel was not called together as the procedures contemplated. Their written individual recommendations were submitted to the Council on Evaluation.

On May 1, 1973, after considering the panel's reports, the Council reaffirmed its opinion that Horowitz should not be allowed to graduate in June, and the Coordinating Committee accepted this recommendation. The Dean also approved, and on May 7 this decision was communicated to Ms. Horowitz. At that time she was told that a decision would be made soon on whether she would be allowed to remain in school. Horowitz wrote a letter to the Dean requesting that she be allowed to remain in school for a short time to correct her deficiencies, but this letter was not answered.

On May 28, 1973, the Council on Evaluation met again to reconsider Horowitz's status in light of her performance in courses taken that spring, and it was decided that she should be dropped from the school. On June 4 the Coordinating Committee accepted this recommendation and Horowitz was notified by the Dean that she was no longer in school on July 3. Horowitz sought reversal of this decision from the Provost for the Health Sciences, who denied her request.

Horowitz was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean, for a hearing during the dismissal procedure, nor was she informed of the time or place of any of their meetings. Neither was she given copies of the formal evaluations or other evidence which the Council and the Committee considered.

The evidence reveals that Horowitz rejected suggestions by the medical school faculty that she alter her professional plans and seek a Ph.D. rather than a medical degree because a Ph.D. would not allow her to conduct the experimentation in psychopharmacology that was her goal. It was stipulated that she was offered employment at the University of North Carolina, conditional upon her obtaining the degree of Doctor of Medicine, and she testified that she had accepted that offer in November 1972. It was also uncontroverted that Horowitz's dismissal from medical school will make it difficult or impossible for her to obtain employment in a medically related field or to enter another medical school.[3]

3. Dr. Cohen, who had 30 years of experience in hiring M.D.'s, Ph.D.'s and others for medical research in various institutions testified:

> Yes, I would be very much concerned about an individual who was dismissed from a medical school, or, for that matter, from any graduate school. This to me is a very serious matter and I would have to look very carefully into that person's background, record and so forth. And if there were two individuals that, say, that person or someone else were applying and otherwise would have equal qualifications, roughly, I would lean heavily to the other person who was not dismissed from a graduate school.
>
> * * * * * *
>
> Yes, I think it would be a significant black mark against that person's name, I think it would stigmatize that individual, I that that person would probably be—well, would have

The district court, in holding for defendants, relied on "the immunity accorded [educational authorities] in academic matters . . .", absent a showing of bad faith or arbitrary and capricious action. We are cognizant that some decisions recognize a distinction between expulsions for misconduct and academic failure. *See, e. g., Brookins v. Bonnell*, 362 F.Supp. 379, 382 (E.D. Pa.1973). We express no opinion on the validity of that distinction under other circumstances. However, our decision in *Greenhill v. Bailey*, 519 F.2d 5, 8–9 (8th Cir. 1975) acknowledges "that the dictates of due process, long recognized as applicable to disciplinary expulsions . . . may apply in other cases as well, where the particular circumstances meet the criteria articulated by the Supreme Court in *Board of Regents v. Roth*, [408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)], and *Perry v. Sindermann*, [408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)]." In *Board of Regents v. Roth, supra*, 408 U.S. at 573, 92 S.Ct. 2707, the Court recognized that action of the state which "imposed . . . a stigma or other disability that foreclosed . . . freedom to take advantage of other employment opportunities" was a deprivation of liberty which could not be accomplished without notice and a hearing. In *Greenhill, supra*, 519 F.2d at 8, we found such stigmatization where a medical student's expulsion for academic failure on the basis of lack of intellectual ability or inadequate preparation effectively foreclosed him from pursuing a medical education, because of the inherent suggestion that he was unfit to study medicine.

The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged. The dismissal was effected without the hearing required by the fourteenth amendment.[4]

We reverse and remand to the district court with instructions to order defendants to provide Horowitz with a hearing before the decision making body or bodies, at which she shall have an opportunity to rebut the evidence being relied upon for her dismissal and accorded all other procedural due process rights.[5]

great difficulty to get into another medical school, if at all.

Transcript at 25–26. We note that UMKC's own application forms require that a student fully explain the reasons they were required to leave "any college, graduate or professional school . . . because of deficiencies in either conduct or scholarship." Plaintiff's Exhibit 10. We believe the evidence in this case makes it factually distinguishable from those in which a damaging stigma was not proved or was inadequately alleged. *E. g. Bishop v. Wood*, —— U.S. ——, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573–574, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

4. The parties agree that the appeal procedure, involving tests administered by the panel of seven doctors, related only to the decision not to graduate Horowitz, and not to the decision to expel her. Nevertheless, we doubt that this procedure would satisfy the requirement of due process, since the panel itself was only an examining board without any power except the power to make recommendations to another body which also had only that same power.

5. Because of our disposition of this case we do not reach the substantive due process ground advanced by Horowitz.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 6, 1977

Re: No. 76-695, Board of Curators v. Horowitz

Dear Bill,

I agree with the Per Curiam you circulated on April 5.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: APR 1 - 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. *v.* CHARLOTTE HOROWITZ

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-695. Decided April —, 1977

MR. JUSTICE MARSHALL, dissenting.

The Court's opinion is based on the assumption that respondent's expulsion from medical school foreclosed her opportunity to practice medicine only because her failure to graduate means that she cannot obtain a state license to practice. *Ante,* at 4. Were this the case, today's decision would follow directly from the Court's prior holding that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Board of Regents* v. *Roth,* 408 U. S. 564, 575 (1972). I would not agree with that conclusion, see *id.,* at 587 (MARSHALL, J., dissenting), but at least it would represent no further diminution of the protections afforded by the Fourteenth Amendment.

It is plain, however, that petitioners have not left Ms. Horowitz "as free as before." The Court of Appeals found that it was "uncontroverted" that respondent's expulsion "will make it difficult or impossible for her to obtain employment in a medically related field or to enter another medical school." 538 F. 2d, at 1320.* Thus, petitioners' action has,

*As the Court of Appeals held, the record evidence supporting this conclusion distinguishes the present case from the cases on which the Court relies. Thus, in *Roth* the Court explicitly noted that the record did not support the District Court's "assumption" that nonretention would hurt Roth's prospects for future employment. 408 U. S., at 574 n. 13. Similarly, in *Bishop* v. *Wood,* 426 U. S. 341 (1976), there was "nothing involved except one job with one city." *Bishop* v. *Wood,* 377 F. Supp. 501, 504 (WDNC 1973). See also *Codd* v. *Velger,* — U. S. —,

in effect, permanently barred respondent from employment in one of "the common occupations of the community." *Truax* v. *Raich*, 239 U. S. 33, 41 (1915). Until today, I had thought it clear that such an action constitutes a deprivation of liberty. Cf. *ibid.*

I respectfully dissent.

— n. 11 (STEVENS, J., dissenting) (no deprivation of liberty shown by fact that one employer considered information in file a bar to employment).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 11, 1977

Re: No. 76-695 - Board of Curators v. Horowitz

Dear Bill:

Please join me in your per curiam.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

April 12, 1977

No. 76-695 Board of Curators of the University of Missouri v. Horowitz

Dear Bill:

My vote at Conference was to grant this case and I am still inclined to think it should be argued and briefed if we are going to decide whether there is a liberty or property interest implicated when a pupil "flunks out" of a state college.

My tentative view is that no such interest exists. There can hardly be a right to graduate or to any opportunity to graduate not afforded all other students. But nevertheless I have reservations as to whether an issue of this general interest and importance should be decided without full briefing and argument.

I could dispose of this case on the narrower ground that even if we assume, arguendo, a liberty or property interest, Ms. Horowitz received all of the "process" that was due her. She had repeated notice of her deficiencies and abundant opportunities to correct them. She also was afforded a special examination by a board of seven, five of whom recommended that she not graduate.

I would not take the case, however, simply to consider the adequacy of the "process". If the Conference votes to grant, we should request the parties also to address the substantive issue.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 12, 1977

RE: No. 76-695 Board of Curators of the University of Missouri v. Horowitz

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1977

RE: 76-695 - Board of Curators of the University of Missouri v. Charlotte Horowitz

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 13, 1977

Re: 76-695 - Board of Curators of the University of Missouri v. Horowitz

Dear Bill:

If this case is decided summarily, I propose to file the enclosed brief concurring opinion.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

Justice Stevens apparently agrees with our alternative approach: that we have got all the process that was her due. If 3 more could be persuaded the purpose of the case this way then I think a slightly expanded version of this statement would be necessary, and could serve as the p.c. opinion. -Dave

76-695 - Board of Curators of the University of Missouri et al. v. Charlotte Horowitz

MR. JUSTICE STEVENS, concurring.

The findings of the District Court do not directly address the question whether respondent's dismissal has effectively barred her from employment in the medical profession. I do not believe either the Court of Appeals or this Court should decide such an issue in the first instance. I am persuaded, however, that Judge Juergens correctly concluded that petitioners gave respondent adequate notice, an adequate opportunity to be heard, and an adequate opportunity to correct the shortcomings that led to her dismissal. I therefore agree that the judgment of the Court of Appeals should be reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 13, 1977

Re: 76-695 - Board of Curators of the University of Missouri v. Horowitz

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Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

76-695 - Board of Curators of the University of Missouri et al. v. Charlotte Horowitz

MR. JUSTICE STEVENS, concurring.

The findings of the District Court do not directly address the question whether respondent's dismissal has effectively barred her from employment in the medical profession. I do not believe either the Court of Appeals or this Court should decide such an issue in the first instance. I am persuaded, however, that Judge Juergens correctly concluded that petitioners gave respondent adequate notice, an adequate opportunity to be heard, and an adequate opportunity to correct the shortcomings that led to her dismissal. I therefore agree that the judgment of the Court of Appeals should be reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 76-695 Board of Curators of the University of Missouri v. Horowitz

In light of all the writing I want to record myself (although I've already joined Thurgood's dissent) as willing to dispose of this case on Lewis and John's grounds, namely that the respondent received ample process.

W.J.B.Jr.

rc/ss 10/13/77 Reversed. From memo. We could reverse by assuming a protected cont. right (probably a property right in expectation of graduating) & conclude that Resp. received all process that was due. She had notice (over a year ahead) and full opportunity to be heard. A committee of seven gave her a special clinical exam.

BENCH MEMO

TO: Mr. Justice Powell DATE: October 13, 1977

FROM: Bob Comfort

No. 76-695 Board of Curators v. Horowitz

There are at least six different approaches the Court could take to reverse in this case. A seventh approach - CA8's - leads to affirmance. The neatest and narrowest reversal route appears to be one not addressed by the parties or the courts below: refusing to consider Respondent's claim to a due process hearing before the Coordinating Comittee, on the ground that she never requested any such hearing. Because there is so much ferment among the Justices in this area of the law, the narrowest possible opinion may be desirable.

I.

Broad Academic Exemption

The University's front-line position seems to be a request that the Court recognize a broad exemption from the constraints of due process for academic decisions. The University argues that courts traditionally have refrained from interfering with school officials' decisions to dismiss a student for academic, as opposed to disciplinary reasons. They can cite only two court of appeals cases on this point, however, and neither supports their broad position, Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Gaspar v. Bruton, 512 F.2d 843 (10th Cir. 1975). Gaspar, relying on Goss v. Lopez, 419 U.S. 565 (1975), explicitly found a propery right in attending a state vocational school, so long as

enrollment fees were paid. The court went on to find that plaintiff got more process than was due. Similarly, the Mahavongsanan court appears to have assumed that some process was due; it also concluded that plaintiff was accorded enough.

There appears to be no authority for the proposition that no liberty or property interests can ever be implicated by academic dismissal from a state school. A rule to that effect would have to be created for this case. It might be a difficult rule to defend, given that academic dismissals conceivably could jeopardize employment and other "liberty" interests in the same way that disciplinary dismissal can. Also, while no one has the right to attend or graduate from most state institutions of higher education, once a student is admitted he might be said to have an "expectancy" that he will be graduated unless he fails to meet certain requirements. A similar expectancy was recognized as "property" in Perry v. Sinderman, 408 U.S. 593 (1972) (nontenured professor's "expectancy" of rehiring by reason of a de facto tenure policy). Accord, Arnett v. Kennedy, 416 U.S. 134, 164-231 (1974)(concurring opinion of Powell, J.; concurring and dissenting opinion of White, J.; dissenting opinions of Douglas and Marshall, JJ.)

Of course, the "expectancy" rationale of Perry may have been weakened by Bishop v. Wood, 426 U.S. 341 (1976), in which the Court seemed more willing to hold that a substantive entitlement could be strictly limited by procedural conditions

attached to it. To the extent that the Court is unwilling to recognize any expectancy beyond the explicit procedural limitations set forth by the state - e.g., report cards and a failure notice - a student would have no right to any process other than those procedures.

This position could be developed consistently with Bishop and Meachum v. Fano, 427 U.S. 215 (1976). It is not one that I should like to see pushed very far, though, since it tends to reduce the Due Process Clause to triviality. Your concurrence in Arnett seems to state a principle of due process closer to what the Framers must have thought they were declaring. On the basis of the Arnett concurrence, I think an "expectancy" amounting to "property" could be found in certain circumstances in the educational field. The next question would concern the appropriate amount of process, which certainly ought not to be very great. Note that Respondent has not made such a property claim in this case. She goes off strictly on "liberty" - reputation plus employment. For that reason, it may not be necessary to announce any broad rule precluding the establishment of an "expectancy" in state higher education.

II

"Liberty" as Injury to Reputation Plus Foreclosure From Employment

The University's second line of defense - and Justice Rehnquist's position - assumes that there may be dismissals that could infringe a liberty interest, but insists that no

such infringement occurred here. This position gives a very narrow reading to Roth and to Bishop v. Wood.

In Roth the Court refused to find any liberty interest infringed, in part because there was "no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in the state. 408 U.S. at 573. In Bishop v. Wood, the Court appeared to assume that the stigma imposed by the policeman's dismissal could harm his attempts to gain future employment, but held that since the city had not publicized the dismissal it was not the city's responsibility.

From these two cases, the University and Justice Rehnquist draw the conclusion that there has been no foreclosure or stigma imposed by the University. All the University has done is to flunk Respondent out. The University itself did not deny her the job she had been promised at the University of North Carolina; North Carolina foreclosed her from the job because she failed to get an M.D. degree. Similarly, the University did not foreclose her from obtaining a license to practice medicine anywhere by virtue of any stigmatizing information it published. If other medical schools choose to ask whether she was ever dismissed from a medical school and exclude her on that basis, that is their action, not the University's.

This view can be drawn out of Roth and Bishop. In both cases, it could be assumed that the employer's dismissal would make it harder for the employee to find another job, at least if prospective employers wished to know the circumstances of his departure from previous employment. Yet in neither was that possibility considered "foreclosure." That could be interpreted as a rule that "foreclosure" requires post-firing action by the employer, affirmative "blackballing" steps to prevent future hiring. Here, other medical schools remain free to accept Respondent if they wish.

Respondent insists that this blinks reality. The court below noted uncontroverted testimony that Respondent's "dismissal from medical school will make it difficult or impossible for her to obtain employment in a medically related field or to enter another medical school." App. at 53-54. Thus, this case is not clearly controlled by Bishop or Roth, where there was no evidence that plaintiff's dismissal definitely would limit other employment opportunities. According to what I can glean from the file, it was this point that prevented you from joining Justice Rehnquist's summary reversal. It is precisely the question that the Court found itself unable to decide when it reversed in Codd v. Velger, 429 U.S. 624 (1977). A decision to extend Roth-Bishop here in order to protect academic discretion could cause unforeseen problems in other contexts. Because there are narrower grounds available for the protection of academic discretion

such an extension may be unnecessary.

III

More Than Enough Process Provided

The Court could assume arguendo that liberty or property rights are implicated, and proceed to detail the amount of process that is due. Turning to the test elaborated in Mathews v. Eldridge, 424 U.S. 319 (1976), the Court would first assess the private interest at stake. A student's sole interest in an academic dismissal is that he be dismissed on the basis of a fair appraisal of his academic performance. Because of the importance of academic degrees to various career opportunities, this may be a significant interest.

The second Eldridge factor is the fairness and reliability of existing procedures. It is here that the judicial inclination toward disinvolvement in academic affairs becomes truly relevant. Once the school establishes a minimum achievement level for advancement, tabulating the grades to see if the student makes a cut-off is a ministerial act. Concerns about fairness arise only at the level of grading, the teacher-student evaluation. It is precisely this sort of "fact-finding" that courts are incompetent to review. Requiring a due process hearing to allow a student to challenge the fairness of academic evaluations is a meaningless act, since a court would be unequipped to determine whether the reasons given were sound or not:

> "Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals." (cites omitted).

Mahavongsanan, supra, at 450.

> "The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and the efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals."

Connelly v. University of Vermont, 244 F.Supp. 156 (D. Vt. 1965). Accord Keys v. Sawyer, 353 F. Supp. 936, 939 (S.D. Tex. 1973). Because of this, periodic notification of the student as to how he is doing - i.e., report cards - and perhaps an academic warning that failure is imminent unless improvement is made would seem sufficient to safeguard a student's academic interest, at least to the extent that they can be protected by procedures.

In light of this fact, the third Eldridge factor - the governmental interest in avoiding the burden of more procedures - takes on significance. The government has a clear interest in avoiding the provision of futile procedures.

Respondent's reply to this line of argument could be that she is entitled to a hearing so that she can demonstrate that she really is not being dismissed for academic reasons at all, but because of personal animosity, sexual bias, and

religious prejudice. Some courts have recognized the right to a hearing to prevent dismissals for such improper reasons. Brookins v. Bonnell, 362 F.Supp. 379 (E.D. Pa. 1973); see Connelly, supra.

I think that this position may misapprehend the purpose of a due process hearing, however. See Roth, 408 U.S. at 573 (purpose of hearing is to refute the charge). Such a hearing is not designed to test whether additional, impermissible motives may have contributed to the imposition of loss. The hearing instead is designed to allow a challenge to the factfinding upon which the imposition of loss was based, to ensure that the critical facts - here, academic, incompetence - did occur. But we have already noted that in the academic context, courts will be unable to judge the strength of those facts. Hence, a court could be faced with a case in which the teachers and school say a student was unfit academically, and the student has shown that all his professors hated him because he was Jewish and alleges that they graded him down because of it. If I am right in concluding that the court could not second-guess the academic evaluation, then what is made out is a possible violation of equal protection, not due process. The plaintiff would have to hire a lawyer and attempt to prove, through discovery, that he was dismissed because he was Jewish. Challenging the soundness of the academic evaluation before the school in a due process hearing will not likely contribute to that inquiry. If a "charge" of academic

unfitness is made out because the student scored straight 60's on all exams, the inquiry ends. It is exactly that charge that a court cannot evaluate.

By way of analogy, in Goldberg v. Kelly, 397 U.S. 254 (1970), welfare recipients were entitled to hearings to challenge their reclassification on the basis of findings as to need. (The timing of the hearing is irrelevant to the present discussion.) If the administrative decisionmaker had satisfactory grounds for his decision as to need, the task of a court reviewing for due process violations would be at an end. In the academic sphere, the court must accept the decisionmaker's academic evaluation, since the court cannot make one of its own. Hence, no due process goal is served by requiring a hearing. If a teacher is so ingenuous as to say in the hearing, "He scored 100% on the exam, but I flunked him because he's a Jew; Jews simply don't make good doctors," there would not even be the facade of an academic dismissal. Due process would not really be the issue; equal protection would.

Respondent tries to avoid the reach of the courts' inability to evaluate academic "factfinding" by characterizing her dismissal as disciplinary. She claims that the school dropped her because she was late to class, sloppy, and unpleasant - disciplinary features. But in the school's view these are all part of the ability to perform as a practicing physician - an academic judgment. (See attached pages of the Medical School's description of its program, which emphasizes

practical and clinical aspects.) Morover, the ultimate decision rested on the "purely academic evaluations" by the special committee of seven who tested her in each area of clinical competence and found her deficient. Thus, factual inquiries into whether Respondent really was habitually late are beside the point.

The Court could derive from its Eldridge analysis a rule, e.g., the only process in the case of a student threatened with academic dismissal is notice, perhaps in some reasonable time frame, e.g., enough forewarning to permit improvement. Under such a minimal process rule, Respondent clearly received more process than was due.

IV

Whatever Amount Is Minimum, This Exceeded It

The Court could refrain from announcing a definite rule as to the constitutional minima in the academic due process area, but conclude that whatever it is, this exceeds it. She got plenty of process, including a special exam made up for her benefit.

Starting from the beginning and observing Respondent's truculence toward those who, on the record, were seeking to help her, it seems as though she was determined to get expelled. Further, she misrepresents the record in order to minimize the degree to which the school went out of its way to help her. For that reason, I'll review the events in some detail. On July 5, 1972, the Dean sent her a letter

summarizing the points covered in a discussion he had had with Horowitz a few days earlier. He warned her that she was on academic probation and explained that a doctor must have not only knowledge, but also "high standards of personal conduct. The absence of either is incompatible with combined progress and graduation." App. 181. Thus, Respondent's hint (at Resp. Br. 9) that she was without notice that her deficiencies might lead to dismissal is somewhat disingenuous.

In the fall of 1972, there were more meetings. She was advised that her clinical performance still was a cause of concern. On December 26, 1972, the Council on Evaluation - a faculty-student body charged with evaluating academic performance - met to consider whether Respondent had made the improvements required by the Dean's letter in July. The Council recommended that Respondent be continued on probation and not permitted to graduate the following June. The final sentence of the recommendation again brings home the imminent possibility of dismissal: "The student may choose to remain at the UMKC School of Medicine until June 1, 1973, but may not continue beyond that date unless there is radical improvement in the following areas: clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism." App. 18. Respondent was informed of these conclusions at a meeting with her docent, the Dean, and the Council chairman in January 1973. The conclusions were repeated in a letter of February 7, 1973. App. 182-183.

In that letter, once again, Respondent was warned that she had to make the necessary improvements "or you will not be able to continue in the Medical School after May of this year." Hence, there clearly was notice of the "charges" against Respondent and the possible outcome of dismissal. This letter also offered Respondent the option of the special clinical exam by the seven doctors.

She took that option, and the Dean arranged for the exam. He informed Respondent that each doctor would prepare "a careful written statement of his recommendations and the reasons for his recommendations. The recommendations of your examining panel will then go to the Council on Evaluation. That Council will make its recommendations to the Coordinating Committee." App. 186-187. Contrary to Respondent's assertions, then, she had no particular expectancy of a special tabulation system, a binding majority vote of the panel, or a full panel discussion of her performance. Resp. Br. 44-45. She was entitled to, and got, evaluation by each of the doctors, on which the Council acted.

Two of the doctors recommended that she be dismissed. App. 195-196, 201-204. One recommended that she not be graduated and that dismissal be considered at the end of May. App. 199-200. One declared that she was not qualified to graduate, but refused to given an opinion about other alternatives. App. 194. One recommended another year of probation, App. 207. One found her qualifications below

par, but recommended giving her a degree since her failures may have been the school's fault for admitting her in the first place. App. 191. Finally, one doctor thought that she was competent and ought to graduate. App. 199. These recommendations were kept confidential and submitted to the Council on Evaluation.

On May 1, the Council met and recommended that Respondent not be graduated. On May 7, the Coordinating Committee - a faculty body with review power over the Council - met and sustained the Council's recommendation. The Council on Evaluation met again on May 14 and resolved that unless Respondent's final semester clinical evaluations showed dramatic improvement, she would be dismissed. App. 20-21.

On May 18, the Dean sent Respondent another letter. It summarized the discussion Respondent had had with the Dean, her docent, and the Council chairman on May 7. She was told that the Council had concluded on the basis of her special exam that she could not graduate. The letter also advised her that "the Council on Evaluation will be considering the extent to which you have improved your performance during this academic year." App. 188. The clear import of that statement is that if her last-semester evaluations did not show improvement, she would be dismissed.

The May 25, 1973 report on Respondent's final clinical rotation gave her an "unsatisfactory" in 9 out of 10

10 categories. On May 28, the Council met and decided on dismissal. The Coordinating Committee accepted that recommendation on June 4, and on July 3, the Dean told Respondent of the decision. App. 21-22, 189.

A year's warning

Considering this sequence of events, it is obvious that Respondent had practically a year's notice of the "charges" and the possible outcome. She had frequent meetings with the Dean and the chairman of the Council and was able to present her views to them. She was offered a special exam conducted by doctors who had had no previous contact with her, as a check on the information received through other channels. The only procedure not accorded her was a hearing before the Council on the Committee. Not only would that seems superfluous in light of her contact with the Dean, her docent, and the Council chairman, but the record shows that she never requested any such hearing, App. 17, 95, even though she knew they would be meeting to discuss her future. Since a hearing likely would not have developed any "facts" - i.e., non-academic judgments - a court would be qualified to assess anyway, it could be said that Respondent got far more procedural protection that what was strictly due.

Respondent also claims that the school violated its own procedures by failing to call her before the Council on Evaluation. In December 1972, the Provost had circulated a memorandum relating to evaluation of students. It provided that the Council should look to three sources: evaluations

(by clinical teachers), quarterly exams, and docent recommendations. If the Council could not glean enough information from those sources, it was supposed to call the student for an interview. (This memo is part of the record, but is not in the Appendix.) Respondent alleges that the Council did find itself forced to look to outside information - the special exam results. Hence, she says it had a duty to call her.

First, she never asked to be called. Second, the Council apparently thought it had plenty of information (all negative). It acted in December, telling Respondent she could not graduate in May. It made the special exam available at Respondent's option, as a form of appeal procedure. Since it had enough data, it did not have to seek an interview, even under the Provost's plan.

Whatever the minimum amount of process due, Respondent can be held to have received more, unless that minimum includes a hearing.

Rose received more process due

V.

Respondent Had Several "Hearings" Before the Ultimate Decisionmaker

The absurdity of Respondent's claim becomes manifest when one examines the structure of authority in the medical school. The Council on Education, a combined student-faculty body, evaluated each student's progress and made recommendations to the Coordinating Committee, which consisted entirely of faculty members. The Coordinating Committee's

decisons were then reviewed by the Dean, who had the ultimate authority with respect to advancement and graduation. App. 51. By her own admission, Respondent met several times with the Dean to discuss her problems. Thus, she was entirely free to present whatever arguments or evidence she chose to the ultimate decisionmaker. Moreover, her docent and the chairman of the Council on Evaluation were present at those meetings. She was free to present whatever arguments or rebuttal evidence she wished in response to their reports of the Council and Committee recommendations. In view of these facts, I find puzzling CA8's statement that she "was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean for a hearing during the dismissal procedure. . . ." App. 53 (emphasis added.) I suppose they must mean "hearing" in the sense of a trial-type procedure, with complete confrontation, cross-examination, etc. It is not clear how those trial-type procedures would aid in clarifying academic judgments.

CA8's error

The University did not raise this issue. It disturbs me a bit that the University has not pressed what appear to be the two narrowest grounds for reversal (this one and the one discussed in Part VI). Still, I don't think that I overlooked any facts that would block the Court's access to either of those routes.

VI

Respondent's Failure to Request a Hearing

Even assuming arguendo that a state school must provide a trial-type hearing before dismissing a student, Respondent here never asked for one. Although the school's academic plan did not provide for hearings, it did not prohibit them, either. And there is some evidence that if a student had ever asked to be present, that request might have been honored. (This implication comes from the testimony of Respondent's witness). App. 95. It is not apparent why a state agency should have to summon a student or employee before it for a hearing, if the student or employee himself does not seek one.

Respondent is no fool. She had counsel at least as early as the July 1973 meeting at which the Dean told her of her dismissal. App. 128. If she had thought that a hearing would have improved her chances, she would have asked for one.

It is true that in Mathews v. Eldridge, supra, Eldridge's failure to request a pretermination hearing was held not to bar his suit. But the reason given there was that the Secretary had established an elaborate set of procedures already, and there was no reason to believe he would have honored a hearing request from an isolated recipient. 424 U.S. at 329-330. In this case, there is no reason to indulge such a presumption. The school demonstrated its flexibility

by creating an entirely new procedure - the special exam - for Respondent. Moreover, the Provost's memorandum indicated that a student's appearance before the Council could occur. Finally, there were no elaborate or fixed procedures of any kind suggesting that a hearing request would be futile.

Codd v. Velger, supra, suggests that the Court will not force state agencies to hold hearings for their inherent therapeutic effect; the injured party must plead some harm. It is difficult to see why Respondent should be permitted to claim that she was harmed by the lack of a hearing, when she apparently never felt one was necessary to stave off the harm. Perhaps litigation would have been avoided entirely if she had requested one.

The University does not raise this issue, either. Given the messiness of this area of the law, the Court might do well not to let the parties push it to a broad decision.

VII

The seventh approach to this case is, of course, that of CA8. It has been criticized in the course of considering the other approaches. not for me

R.C.

ss

search to the above mentioned knowledge and its importance to the advancement of knowledge.

d. A specific profile for his further education based upon his fund of information, his capacity for learning, and a general understanding of his role as a professional.

4. Although made individual by student capability and interest, the student generally will get from thirty to fifty percent of his total experience directly in the care system under the supervision of a docent. This will be accomplished by a twelve-week experience each year on the twenty-bed general medicine service plus a continuing, year round, four-year, responsibility for outpatient follow-up visits. During these four years of the program, the student will maintain outpatient responsibility for the patients first met during his twelve-week, yearly general medicine service. He will schedule these patients, and maintain office hours as needed to give professional service to his "practice." Specifically, he will continue to follow his practice over a four-year period, forty-eight weeks a year, with appropriate supervision.
5. The evaluation of factual information acquired by students will be done on a challenge examination system. The student will be allowed to progress to more advanced responsibility on an individual basis in accord with his ability to perform both factually and clinically.
6. Experience in the specialties as such, both in basic science and clinical fields, will be required but the selection of fields will be by the student as developed through the counseling of the docent. Family practice and community health activities will be considered as specialties.
7. Standards for factual requirements will be worked out by teams of inter-discipline and inter-university groups.

8. The curriculum will relate heavily to the community hospitals, neighborhood health centers, the main campus of the University of Missouri-Kansas City, et cetera.
9. We consider first-class residencies as an integral part of a first-class medical school. We recognize the continuity of medical education and that the medical student and resident are separated only by time and experience. A key factor in the open medical school concept is a coordinated medical residency, shared and directed by all participating hospitals. In making these comments about a residency in medicine we do not discount the major role of all fields of practice; we but indicate our conviction that the basic discipline of a department of medicine is the education and care core of Medicine.
10. In addition to the classical or customary short term courses of continuing medical education, we plan "in residence" longer-term experience for practicing physicians. The value of these men to the overall teaching program should be considerable, returning as they will be from practice. Further, the visiting teacher program will be a major resource of teaching talent and will be designed so the community's continuing education programs are coordinated with the medical school curriculum, and the planned curriculum of the undergraduate student will utilize the visit of these nationally-known teachers, whose efforts are usually confined to the postgraduate programs.
11. A cadre of education professionals (not necessarily physicians) will be included and will function as staff to the dean's office and to the Councils (infra vide).

B. Information Resources

1. This program will draw heavily upon organized research at the regional, national, and University-wide level in information sciences, "teaching

D. To develop a model of university-community cooperation, where each component provides those programs of special concern and interest to it.

E. To provide the student with a relevant clinician or basic science model with which he can identify and to which he can aspire and from whom he can receive personal guidance in the shaping of his educational program.

IV. Operating Conditions

In light of the assumptions and goals stated above, the medical school program has been designed to meet the following operating conditions:

A. Students, Faculty, Curriculum

1. Students will be grouped in sections of twelve with three students from each medical school class in the group.
2. The docents will have the primary responsibility for the application or fitting of the curriculum to the individual student. The actual planning of the curriculum and the majority of the teaching will be carried out by the general faculty.
3. The student's base for operations will be in the medical school setting containing his office, those of his fellow students, and the docent team. He will constantly operate out of this area, but it will remain his base of operations. In this setting he will develop:
   a. A perspective of the health care system from the patient's point of view as a member of the community.
   b. An understanding of the sources of knowledge necessary for application to the needs of the patient. This knowledge may be drawn from University departments, clinical disciplines, and a variety of information resources.
   c. A true appreciation of the relationship of re-

(or other health science careers) during the initial trial years and students will be actively encouraged to transfer in from other pre-medical education backgrounds. If possible, however, the six-year program will offer a double degree upon completion: a Bachelor's and a Doctorate.

2. Medical school curriculum will be forty-eight weeks each year for three years; thirty-six weeks for a fourth year.
3. Basic trunk of the four year medical school curriculum will be the general medical service, under guidance of a docent team. This general medical experience will be based on twelve week service of daily ward rounds, each year, with the same docent team. During the remainder of each year the student will continue to maintain outpatient responsibility for the patients met during the twelve week general medical service. He will schedule these appointments and maintain "office hours" as needed to give professional advice to his "practice" and to see the family complex surrounding the patient. (Figure 3) His "practice" will be under the continuing supervision of the docent staff.
4. This patient experience will serve as the *case history data base* for the individual student. Extensions from this case history base will provide the guidelines for the student's needed information in the basic sciences and sub-specialties, and approximately seventy-five percent of his time will be devoted to acquiring this basic information, over a four-year period. The docent bears the responsibility of completing the basic science base of the student's medical education. This base knowledge, begun in high school, added to in years one and two, will of course, not be taught solely by the docents, but by members of his team and by any faculty resource as de-

fined by the Council on Curriculum. This instruction will be not only in the quarter of time assigned to general medicine but throughout the other quarters.

5. Throughout the four years, the student will have approximately twenty-five percent of his time available for continuing his liberal arts education. An equal amount of experience in the specialties of medicine will be electively available under docent counsel. Community health activity will be considered a specialty.
6. Where possible, learning will be accomplished in the student-docent area; the teaching will come to the student. Liberal arts credit experience will be arranged when possible as small group seminars, in the student-docent area. However, it is appreciated that the student will have classroom experience on the main University campus throughout the four medical years, year three, four, five, and six.
7. Each twelve-student docent unit will be composed of an equal mixture of students from each of the classes. Thus the twelve-man team will have three students from each year sharing the twelve-week general medical experience, throughout the four years.
8. A docent team consists of the docent, associate docents, visiting docent, outpatient physicians, residents, related nursing, pharmacy, and ancillary personnel, related research and clinical laboratories, approximately twenty inpatient beds, and outpatient facilities for general medicine patients, and four teams, twelve each, of students and their personal offices, discussion room, and laboratory. Figures 4 through 7, plus their legends, develop in detail the docent concept.
9. A student will have his own office, open to him twenty-four hours a day for the full four years. It

76-695 BOARD OF CURATORS v. HORWITZ Argued 11/7/77

Reverse 1. Assume - w/out deciding - a protected const. right: a property right in expectation of graduation

2. Resp. received all process that was due.

Wide discretion must be allowed universities as to whether graduation requirements are met, and only minimal D/P (eg Goss v Lopez as illustrative - altho I would require something more here), is required

Wright (WV Pedr. University)

Clinical competency means ability of a physician to function in the patient setting. More than book knowledge.

Determination of clinical competency is a subjective judgment

The seven doctors ~~faculty members~~ who interviewed Rusk had not taught her. They were practicing doctors who had had teaching experience. They functioned separately - not as a body. See Br. 5-6.

Benson

Under questioning by P.S., Benson agreed that he had asserted only a liberty interest — freedom of access to employment. This ~~Ruth~~ has been denied Resp. as she cannot be admitted to another med school.

But Benson now also relies on prop. right — expectation of graduation.

J. White said this is purely a procedural D/P case. He asked Benson whether he would have a case if Reik had had a full hearing at the University prior to dismissal. Benson said, in effect, that then her only claim would be that decision to dismiss ~~was~~ was arbitrary capricious or in bad faith. Any student dismissed may have a fed Ct review on these grounds.

Benson (cont.)

Does not insist on right to ~~counsel~~ counsel. Only to notice with reasons & opp. to be heard.

John asked whether oral notice (hundreds of these) or supplement.

→ Negro weakness was that Resp. had no opportunity to appear before the body that made final decision — the "Coordinating Committee."

John ~~noted~~ asked whether there is a const. difference between appearing before a "recommending" body or group (e.g. 7 doctors here) & appearing before the person or body making final decision. (John referred to bar discipline cases — e.g. N.Y. — ~~where~~ that have held no such difference exists.)

Wright (Rebuttal)

Byron asked about this

No Nev. statute providing expressly for review of a University decision to dismiss.

(what about state court enforcement of 1983?)

Reverse 9 – 0

76-693 BOARD OF CURATORS v. HOROWITZ Conf. 11/9/77

The Chief Justice Reverse

Facts are important. CA 8 held Resp was entitled to procedural D/P.

No const. interest ~~is~~ not to

Mr. Justice Brennan Reverse

There were liberty & prop interests but she has all procedure to which she was entitled.

Mr. Justice Stewart Reverse

On this record, there was no protected interest.

State law will determine whether there is a protected interest. Goss v Lopez

Cited foster families

Mr. Justice White Reverse

There was protected interest – but enough D/P

Mr. Justice Marshall Reverse

Mr. Justice Blackmun Reverse

No prop. interest, hence no need for D/P.

Mr. Justice Powell Reverse

I'd assume a protected interest (probably prop. int.) & hold that she received D/P.

Mr. Justice Rehnquist Reverse

No protected interest.

(See Bell's P.C. he drafted last spring)

If we ~~~~ say there ~~is~~ no prop. interest, cts will be swamped with 1983 suits by students who fail course, receive failing grades)

Mr. Justice Stevens Reverse

Unwise to address the prop. or liberty interest. (Think there probably a prop. interest).

Should dispose of case on ground that D/P was provided.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1978

No. 76-695, Bd. of Curators Univ. of Mo.
v. Horowitz

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

rdc 1/19/78

MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob

RE: Justice Rehnquist's Draft in Board of Curators v. Horowitz, No. 76-695

This is the case of the woman who daims to have been dismissed from medical school because she is ugly.

On my first reading of the draft, I was somewhat distressed at Justice Rehnquist's failure to emphasize the fact that Horowitz repeatedly met with the Dean -- her ultimate decisionmaker -- over the course of her second year. I had the impression that the opinion deliberately omitted mention of these meetings so that it could reach the broader ground of distinguishing between academic and disciplinary dismissals. My original feeling was that it was unnecessary to draw that distinction (and rather cavalierly to dismiss Horowitz's contention that her dismissal actually was disciplinary, see footnote 6), since no matter how her dismissal was characterized, it could be said that she received many Goss-type hearings in front of her ultimate decisionmaker.

Further reflection, however, suggests that perhaps Justice Rehnquist was forced into this approach by the permanent nature of the dismissal here, which might require more procedural protections than those contemplated by Goss, if the dismissal were

characterized as disciplinary. (For example, the more serious result might entail the right of cross-examination, etc., in a disciplinary hearing.) Thus, the academic distinction probably had to be drawn. It seems well drawn to me, see esp. p.11.

I still think that some mention of the repeated informal hearings she got with the Dean would be helpful. In particular, it might help support the final conclusion (p. 13) that there is no need for a remand on the question whether the dismissal was arbitrary and capricious.

Also, I think the discussion beginning with the first full paragraph on p. 5 and running over to p. 6 is dictum that may have unwanted repercussions. It suggests that there could be no liberty interest infringed by a dismissal without "publicization," whatever that means in the real world. But as Justice Rehnquist indicates in footnote 1, it may be that publicization is inevitably "on the cards" for an academic deprivation. At any rate, since the Court in the very next breath -- p. 6 -- finds it unnecessary to decide whether there was any property interest here, it is also unnecessary to hint broadly that there was none.

January 19, 1978

No. 76-695 Curators v. Horowitz

Dear Bill:

In taking a quick look at your opinion (which I will in all probability join), I wonder whether you have not elevated the type of "hearing" required by Goss?

As your footnote 2 states, all that Byron's opinion required was an "informal give and take" - which, as I pointed out in dissent, probably was less than the Ohio statute required or than was customarily afforded pupils.

As I suppose I also think that being "flunked out" of a graduate school is far more serious than being suspended for 24 hours, I would be inclined to accord a good deal more formality than a single exchange of viewpoints with an academic dean. I enclose some language that might be used as a substitute for several of the sentences on page 7. This is pretty rough, and if you accept the essence of it perhaps some other language changes would be necessary.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

I think your suggested language change makes a necessary and important point. I also think it calls for emphasis on the opinion of the repeated meetings Horowitz had with the Dean, to show that she in fact got more than a perfunctory Goss-type "hearing." Bob

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 20, 1978

Re: 76-695 - Board of Curators v. Horowitz

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 20, 1978

Re: No. 76-695, Board of Curators v. Horowitz

Dear Bill,

While I agree with the result reached in your opinion, I believe that the opinion sweeps too broadly. By any standard, Ms. Horowitz received adequate process. Hence we need not decide here whether it is appropriate (or even possible) to distinguish between the disciplinary and the academic contexts and to accord less due process protection in the latter context.

I plan to concur in the judgment and in due course will circulate an opinion along the above lines.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

It is necessary to distinguish between the disciplinary and academic contexts in order to reach this result. If you are willing to view this as "disciplinary," she may be entitled to produce witnesses and cross-examine because of the severe penalty. Hence, this case — which seems to be on the borderline anyway — has to be called more academic than disciplinary.

I spoke with Phil Spector about this problem (which had troubled me, too, as I indicated

(See Back (over)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 23, 1978

RE: No. 76-695 Board of Curators v. Horowitz

Dear Bill:

I share Thurgood's reservation and will await his opinion.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 23, 1978

Re: No. 76-695 - Board of Curators v. Horowitz

Dear Thurgood:

Thank you for your note of January 20th, indicating that you will circulate a separate opinion concurring on narrower grounds. In drafting the opinion, I felt we could not simply say as you say in shorthand form in your note that "by any standard, Ms. Horowitz received adequate process" without going into some detail as to the reasoning which led us to that conclusion. Thus my effort to discuss some of the facts and legal principles which I thought justified the result which we all agree should be reached.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 23, 1978

Re: Board of Curators of the University of Missouri v. Charlotte Horowitz, #76-695

Dear Bill,

I shall await Thurgood's concurrence.

Sincerely,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 24, 1978

Re: 76-695 - Curators v. Horowitz

Dear Bill:

The change suggested by Lewis is fine with me.

Respectfully,

Mr. Justice Rehnquist

Copies to Mr. Justice Stewart
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 24, 1978

Re: No. 76-695 - Curators v. Horowitz

Dear Lewis:

I submitted your draft language in Rider A attached to your letter to me dated today verbatim to Potter and John, who had already joined the presently circulating draft. They have each said they have no objection to its substitution for the present text, and therefore I have sent to the printer a second draft in which your language will appear verbatim on page 7 as a substitute for the two sentences which presently begin "The Court of Appeals apparently concluded . . ." and end with the citation to Cafeteria Workers. The following sentence in the present draft, in order to accommodate your language, would then read:

> "This difference calls for far less stringent procedural requirements in the case of an academic dismissal. 3/"

The footnote reference would be to existing footnote 3 on page 8 of the presently circulating draft.

Needless to say, I have done this on the assumption that with this proposed change you will join the revised draft.

Sincerely,

Bill

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 25, 1978

Re: 76-695 - Board of Curators of Univ. of Missouri v. Horowitz

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to Conference

January 26, 1978

No. 76-695 Board of Curators v. Horowitz

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 30, 1978

Re: No. 76-695 - Board of Curators v. Horowitz

Dear Bill:

For the moment, at least, I shall await Thurgood's concurrence.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob DATE: 2/6/78

RE: Justice Marshall's concurrence in Horowitz, 76-695

I think Justice Marshall does some damage to WHR's opinion for the Court, primarily because of WHR's refusal -- which we have discussed before -- to include any of the wealth of facts that indicate precisely how much process Horowitz actually got. TM's recounting of those facts makes it appear as though WHR went out of his way to hide them, so that this opininn could stand for a broader proposition than it has to.

Coupled with this "hidden ball play" is the lingering intimation that less process is required for an academic dismissal than was required in Goss. WHR adopted your suggested language on this point, but he did it in such a way that pp. 7-8 still indicate that the Goss-type give-and-take is more than the Due Process Clause requires in the case of a permanent academic dismissal.

The rest of Justice Marshall's opinion, as you can tell from my marginalia, struck me as less persuasive.

If it is not too late, it might be in the interest of a sound Court opinion to remonstrate with WHR over the inclusion of a narrative tracking TM's pp. 2-3. This should be followed by the conclusion that no matter how much process is due in

the context of a permanent academic dismissal -- vis-a-vis Goss -- this was clearly more than enough. Note that it would still be necessary to distinguish academic from disciplinary dismissals, since otherwise a more formal, adversary hearing would seem to be called for. This is the point TM glosses over.

add in Note

Thus, a suggestion along these lines would not deprive WHR of the opportunity to establish some distinction between academic and disciplinary dismissals, which is all he seems concerned about now. It would make his opinion much more persuasive and less open to misinterpretation by the lower courts.

T. M. chartyn W.H.R. for
deciding an issue not
P.T presented - 3, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 10 FEB 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-695

Board of Curators of the University of Missouri et al., Petitioners, v. Charlotte Horowitz. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[February —, 1978]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court that, "[a]ssuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires." *Ante*, at 6. I cannot join the Court's opinion, however, because it contains dictum suggesting that respondent was entitled to even less procedural protection than she received. I also differ from the Court in its assumption that characterization of the reasons for a dismissal as "academic" or "disciplinary" is relevant to resolution of the question of what procedures are required by the Due Process Clause. Finally, I disagree with the Court's decision not to remand to the Court of Appeals for consideration of respondent's substantive due process claim.

I

We held in *Goss* v. *Lopez*, 419 U. S. 565 (1975), that

> "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." *Id.*, at 581.

There is no question that respondent received these protections, and more.[1]

According to the stipulation of facts filed in the District Court, respondent had a "discussion" with the dean of the medical school in mid-1972, at the close of her first year in school, during which she was notified of her unsatisfactory performance.[2] The dean testified that he explained the nature of her problems to respondent twice at this meeting, so that she would fully understand them.[3] A letter from the dean followed shortly thereafter, in which respondent was advised that she was being placed on probation because of, *inter alia*, "a major deficiency" in her "relationships with others," and her failure to "keep . . . to established schedules" and "attend . . . carefully to personal appearance."[4] The dean again met with respondent in October 1972 "to call attention in a direct and supportive way to the fact that her performance was not then strong."[5]

In January 1973, there was still another meeting between respondent and the dean, who was accompanied by respondent's docent and the chairman of the Council on Evaluation. Respondent was there notified of the Council's recommendation that she not graduate and that she be dropped from school unless there was "radical improvement" in her "clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism."[6] A letter from the dean again

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[1] It is necessary to recount the facts underlying this conclusion in some detail, because the Court's opinion does not provide the relevant facts with regard to the notice and opportunity to reply given to respondent.

[2] App. 15. It is likely that respondent was less formally notified of these deficiencies several months earlier, in March 1972. See *id.*, at 100–101 (testimony of respondent's docent).

[3] *Id.*, at 146.

[4] *Id.*, at 15–16.

[5] *Id.*, at 147.

[6] *Id.*, at 18.

followed the meeting; the letter summarized respondent's problem areas and noted that they had been discussed with her "several times." [7]

These meetings and letters plainly gave respondent all that *Goss* requires: several notices and explanations, and at least three opportunities "to present [her] side of the story." 419 U. S., at 581. I do not read the Court's opinion to disagree with this conclusion. Hence I do not understand why the Court indicates that even the "informal give-and-take" mandated by *Goss*, *id.*, at 584, need not have been provided here. See *ante*, at 7–8, 11–12. This case simply provides no legitimate opportunity to consider whether "far less stringent procedural requirements," *id.*, at 7–8, than those required in *Goss* are appropriate in other school contexts. While I disagree with the Court's conclusion that "far less" is adequate, as discussed *infra*, it is equally disturbing that the Court decides an issue not presented by the case before us. As Mr. Justice Brandeis warned over 40 years ago, the "'great gravity and delicacy'" of our task in constitutional cases should cause us to "'shrink'" from "'anticipat[ing] a question of constitutional law in advance of the necessity of deciding it,'" and from "'formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA*, 297 U. S. 288, 345–347 (1936) (concurring opinion).

II

In view of the Court's dictum to the effect that even the minimum procedures required in *Goss* need not have been provided to respondent, I feel compelled to comment on the extent of procedural protection mandated here. I do so within a framework largely ignored by the Court, a framework derived from our traditional approach to these problems. According to our prior decisions, as summarized in *Mathews* v.

[7] *Id.*, at 182–183.

Eldridge, 424 U. S. 319 (1976), three factors are of principal relevance in determining what process is due:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

As the Court recognizes, the "private interest" involved here is a weighty one: "the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss*." *Ante*, at 8 n. 3. One example of the loss suffered by respondent is contained in the stipulation of facts: respondent had a job offer from the psychiatry department of another university to begin work in September 1973; the offer was contingent on her receiving the M. D. degree.[8] In summary, as the Court of Appeals noted:

> "The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F. 2d 1317, 1321 (CA8 1976).

As Judge Friendly has written in a related context, when the State seeks "to deprive a person of a way of life to which [s]he has devoted years of preparation and on which [s]he . . . ha[s] come to rely," it should be required first to provide a "high level of procedural protection."[9]

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[8] *Id.*, at 16.

[9] Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296-1297 (1975) (revocation of professional licenses).

Neither of the other two factors mentioned in *Mathews* justifies moving from a high level to the lower level of protection involved in *Goss*. There was at least some risk of error inherent in the evidence on which the dean relied in his meetings with and letters to respondent; faculty evaluations of such matters as personal hygiene and patient and peer rapport are neither as "sharply focused" nor as "easily documented" as was, *e. g.*, the disability determination involved in *Mathews*, 424 U. S., at 343. See *Goss* v. *Lopez*, *supra*, 419 U. S., at 580 (when decisionmaker "act[s] on the reports and advice of others . . . [t]he risk of error is not at all trivial").[10]

Nor can it be said that the university had any greater interest in summary proceedings here than did the school in *Goss*. Certainly the allegedly disruptive and disobedient students involved there, see *id.*, at 569–571, posed more of an immediate threat to orderly school administration than did respondent. As we noted in *Goss*, moreover, "it disserves . . . the interest of the State if [the student's] suspension is in fact unwarranted." *Id.*, at 579.[11] Under these circumstances—with respondent having much more at stake than did the students in *Goss*, the administration at best having no more at stake, and the meetings between respondent and the dean leaving some possibility of erroneous dismissal—I believe that respondent was entitled to more procedural protection than is

[10] The inquiry about risk of error cannot be separated from the first inquiry about the private interest at stake:

"The degree of risk of error deemed acceptable . . . is related to the seriousness of the consequences for the individual if an erroneous decision is made. . . . When . . . serious consequences are involved, procedures that substantially reduce the risk of error at low or no cost to the public are mandated by the due process clause." *Buck* v. *Board of Education*, 553 F. 2d 315, 323 (CA2 1977) (Oakes, J., dissenting), petition for cert. pending, No. 77–555.

[11] The statements and letters of the medical school dean reflect a genuine concern that respondent not be wrongfully dismissed. See App. 147–150, 180–183, 185–187.

provided by "informal give-and-take" before the school could dismiss her.

The contours of the additional procedural protection to which respondent was entitled need not be defined in terms of the traditional adversarial system so familiar to lawyers and judges. See *Mathews* v. *Eldridge*, *supra*, 424 U. S., at 348. We have emphasized many times that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961); see, *e. g.*, *ante*, at 7; *Goss* v. *Lopez*, *supra*, 419 U. S., at 578. In other words, what process is due will vary "according to specific factual contexts." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960); see, *e. g.*, *Mathews* v. *Eldridge*, *supra*, 424 U. S., at 334; *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972); *Bell* v. *Burson*, 402 U. S. 535, 540 (1971). See also *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162-163 (1951) (Frankfurter, J., concurring).

In the instant factual context the "appeal" provided to respondent, see *ante*, at 3, served the same purposes as, and in some respects may have been better than, a formal hearing. In establishing the procedure under which respondent was evaluated separately by seven physicians who had had little or no previous contact with her, it appears that the medical school placed emphasis on obtaining "a fair and neutral and impartial assessment."[12] In order to evaluate respondent, each of the seven physicians spent approximately one half-day observing her as she performed various clinical duties and then submitted a report on her performance to the dean.[13] It is difficult to imagine a better procedure for determining whether the school's allegations against respondent had any

[12] *Id.*, at 150 (testimony of dean); see *id.*, at 185, 187, 208, 210 (letters to respondent and seven physicians).

[13] See *id.*, at 190-207.

substance to them.[14] Cf. *Mathews* v. *Eldridge*, *supra*, 424 U. S., at 337–338, 344 (use of independent physician to examine disability applicant and report to decisionmaker). I therefore believe that the appeal procedure utilized by respondent, together with her earlier notices from and meetings with the dean, provided respondent with as much procedural protection as the Due Process Clause requires.[15]

III

The analysis in Parts I and II of this opinion illustrates that resolution of this case under our traditional approach does not turn on whether the dismissal of respondent is characterized as one for "academic" or "disciplinary" reasons. In my view, the effort to apply such labels does little to advance the due process inquiry, as is indicated by examination of the facts of this case.

The minutes of the meeting at which it was first decided that respondent should not graduate contain the following:

"This issue is *not one of academic achievement*, but of

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[14] Respondent appears to argue that her sex and her religion were underlying reasons for her dismissal and that a hearing would have helped to resolve the "factual dispute" between her and the school on these issues. Brief for Respondent, at 30, see *id.*, at 51–52. See also *ante*, at 13 n. 7. But the only express grounds for respondent's dismissal related to deficiencies in personal hygiene, patient rapport, and the like; and, as a matter of procedural due process, respondent was entitled to no more than a forum to contest the factual underpinnings of these grounds. The appeal procedure here gave respondent such a forum—an opportunity to demonstrate that the school's charges were untrue.

[15] Like a hearing, the appeal procedure and the meetings

"represent[ed] . . . a valued human interaction in which the affected person experience[d] at least the satisfaction of participating in the decision that vitally concern[ed] her . . . . [T]hese rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one." L. Tribe, American Constitutional Law § 10-7, at 503 (1977) (emphasis in original).

performance, relationship to people and ability to communicate." App. 218 (emphasis added).

By the customary measures of academic progress, moreover, no deficiency was apparent at the time that the authorities decided respondent could not graduate; prior to this time, according to the stipulation of facts, respondent had received "credit" and "satisfactory grades" in all of her courses, including clinical courses.[16]

It may nevertheless be true, as the Court implies, *ante*, at 12 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be "a good medical doctor." Whether these inadequacies can be termed "pure academic reasons," as the Court calls them, *ibid.*, is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct, just as the students in *Goss* were suspended because of their conduct.[17]

The Court makes much of decisions from state and lower federal courts to support its point that "dismissals for academic . . . cause do not necessitate a hearing." *Ante*, at 9. The decisions on which the Court relies, however, plainly

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[16] App. 12. Respondent later received "no credit" for her emergency room rotation, the only course in which her grade was less than satisfactory. *Ibid.* This grade was not recorded, according to the District Court, until after the decision had been made that respondent could not graduate. *Id.*, at 31. When the Coordinating Committee made this decision, moreover, it apparently had not seen any evaluation of respondent's emergency room performance. See *id.*, at 229 (minutes of Coordinating Committee meeting).

[17] Only one of the reasons voiced by the school for deciding not to graduate respondent had any arguable nonconduct aspects, and that reason, "clinical competence," was plainly related to perceived deficiencies in respondent's personal hygiene and relationships with colleagues and patients. See *id.*, at 219. See also *id.*, at 181, 182–183, 210.

use the term "academic" in a much narrower sense than does the Court, distinguishing "academic" dismissals from ones based on "misconduct" and holding that, when a student is dismissed for failing grades, a hearing would serve no purpose.[18] These cases may be viewed as consistent with our statement in *Mathews* v. *Eldridge* that "the probable value . . . of additional . . . procedural safeguards" is a factor relevant to the due process inquiry. 424 U. S., at 335, quoted at p. 4, *supra*; see 424 U. S., at 343–347. But they provide little assistance in resolving cases like the present one, where the dismissal is based not on failing grades but on conduct-related considerations.[19]

In such cases a talismanic reliance on labels should not be a substitute for sensitive consideration of the procedures required by due process.[20] When the facts disputed are of a

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[18] See *Maharongsanan* v. *Hall*, 529 F. 2d 448, 450 (CA5 1976); *Gaspar* v. *Bruton*, 513 F. 2d 843, 849–851 (CA10 1975); *Mustell* v. *Rose*, 282 Ala. 358, 367, 211 So. 2d 489, 497–498, cert. denied, 393 U. S. 939 (1968); *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 19–20, 22–23, 102 N. E. 1095, 1096–1097 (1913).

[19] See *Brookins* v. *Bonnell*, 362 F. Supp. 379, 383 (ED Pa. 1973):

"This case is not the traditional disciplinary situation where a student violates the law or a school regulation by actively engaging in prohibited activities. Plaintiff has allegedly failed to act and comply with school regulations for admission and class attendance by passively ignoring these regulations. These alleged failures do not constitute misconduct in the sense that plaintiff is subject to disciplinary procedures. They do constitute misconduct in the sense that plaintiff was required to do something. Plaintiff contends that he did comply with the requirements. Like the traditional disciplinary case, the determination of whether plaintiff did or did not comply with the school regulations is a question of fact. Most importantly, in determining this factual question reference is not made to a standard of achievement in an esoteric academic field. Scholastic standards are not involved, but rather disputed facts concerning whether plaintiff did or did not comply with certain school regulations. These issues adapt themselves readily to determination by a fair and impartial 'due process' hearing."

[20] The Court's reliance on labels, moreover, may give those school

type susceptible to determination by third parties, as the allegations about respondent plainly were, see *ante*, at 12–13, n. 6, there is no more reason to deny all procedural protection to one who will suffer a serious loss than there was in *Goss* v. *Lopez*, and indeed there may be good reason to provide even more protection, as discussed in Part II, *supra*. A court's characterization of the reasons for a student's dismissal adds nothing to the effort to find procedures that are fair to the student and the school, and that promote the elusive goal of determining the truth in a manner consistent with both individual dignity and society's limited resources.

IV

While I agree with the Court that respondent received adequate procedural due process, I cannot join the Court's judgment because it is based on resolution of an issue never reached by the Court of Appeals. That court, taking a properly limited view of its role in constitutional cases, refused to offer dictum on respondent's substantive due process claim when it decided the case on procedural due process grounds. See 538 F. 2d, at 1321 n. 5, quoted *ante*, at 13. Petitioner therefore presented to us only questions relating to the procedural issue. Petition for Certiorari, at 2. Our normal course in such a case is to reverse on the questions decided below and presented in the petition, and then to remand to the Court of Appeals for consideration of any remaining issues.

Rather than taking this course, the Court here decides on its own that the record will not support a substantive due process claim, thereby "agree[ing]" with the District Court. *Ante*, at 13. I would allow the Court of Appeals to provide the first

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administrators who are reluctant to accord due process to their students an excuse for not doing so. See generally Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting, 28 Stan. L. Rev. 841 (1976).

level of appellate review on this question. Not only would a remand give us the benefit of the lower court's thoughts,[21] it would also allow us to maintain consistency with our own Rule 23.1 (c), which states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." By bypassing the courts of appeals on questions of this nature, we do no service to those courts that refuse to speculate in dictum on a wide range of issues and instead follow the more prudential, preferred course of avoiding decision—particularly constitutional decision—until

not presented

[21] It would be useful, for example, to have more careful assessments of whether the school followed its own rules in dismissing respondent and of what the legal consequences should be if it did not. The Court states that it "disagree[s] with both respondent's factual and legal contentions." *Ante*, at 13 n. 8. It then asserts that "the record clearly shows" compliance with the rules, *ibid.*, but it provides neither elaboration of this conclusion nor discussion of the specific ways in which respondent contends that the rules were not followed, Brief for Respondent, at 42–46, contentions accompanied by citations to the same record that the Court finds so "clear." The statement of the District Court quoted by the Court, *ante*, at 14 n. 6, is not inconsistent on its face with respondent's claim that the rules were not followed, nor is there anything about the context of the statement to indicate that it was addressed to this claim, see App. 45.

Review by the Court of Appeals would clarify these factual issues, which rarely warrant the expenditure of this Court's time. If the Court's view of the record is correct, however, then I do not understand why the Court goes on to comment on the legal consequences of a state of facts that the Court has just said does not exist. Like other aspects of the Court's opinion, discussed *supra*, the legal comments on this issue are nothing more than confusing dictum. It is true, as the Court notes, *ante*, at 14 n. 8, that the decision from this Court cited by respondent was not expressly grounded in the Due Process Clause. *Service* v. *Dulles*, 354 U. S. 363 (1957). But that fact, which amounts to the only legal analysis offered by the Court on this question, hardly answers respondent's point that some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest.

"'absolutely necessary'" to resolution of a case. *Ashwander* v. *TVA*, *supra*, 297 U. S., at 347 (Brandeis, J., concurring).

I would reverse the judgment of the Court of Appeals and remand for further proceedings.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

1st PRINTED DRAFT Recirculated: 2/13/78

SUPREME COURT OF THE UNITED STATES

No. 76-695

Board of Curators of the University of Missouri et al., Petitioners, *v.* Charlotte Horowitz. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

This makes a good deal of sense

[February —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

The Court's opinion, and that of MR. JUSTICE MARSHALL, together demonstrate conclusively that, assuming the existence of a liberty or property interest, respondent received all the procedural process that was due her under the Fourteenth Amendment. That, for me, disposes of this appeal, and compels the reversal of the judgment of the Court of Appeals.

I find it unnecessary, therefore, to indulge in the arguments and counterarguments contained in the two opinions as to the extent or type of procedural protection that the Fourteenth Amendment requires in the graduate school-dismissal situation. Similarly, I also find it unnecessary to choose between the arguments as to whether respondent's dismissal was for academic or disciplinary reasons (or, indeed, whether such a distinction is relevant). I do agree with MR. JUSTICE MARSHALL, however, that we should leave to the District Court and to the Court of Appeals in the first instance the resolution of respondent's substantive due process claim and of any other claim presented to, but not decided by, those courts.

Accordingly, I, too, would reverse the judgment of the Court of Appeals and remand the case for further proceedings.

February 16, 1978

No. 76-695 Board of Curators v. Horowitz

Dear Bill:

Here is a proposed concurring opinion that I am thinking about circulating as a response, primarily, to Thurgood's opinion.

His view of the case is that respondent "was dismissed largely because of her conduct", and not because of academic shortcomings. This is wholly at variance with the facts as found by the District Court, but - absent a specific rebuttal - readers of our opinions (especially critics of the Court) may well accept Thurgood's conclusion.

I take it that up to now you have thought no response was necessary. I agree that a thoughtful reading of your opinion makes clear that the dismissal was academic. But it is not "head to head", or as fully documented, as the type of response to Thurgood that I have drafted.

If you wish to incorporate the essence of my draft into your opinion, I would be more than happy for you to do so. I would think, however, that it would require a good deal more revision than adding a footnote or two. What do you think?

Sincerely,

Mr. Justice Rehnquist

lfp/ss

No. 76-695 BOARD OF CURATORS v. HOROWITZ

MR. JUSTICE POWELL, concurring.

I join the Court's opinion because I read it as upholding the District Court's view that respondent was dismissed for academic deficiencies rather than for unsatisfactory personal conduct, and that in these circumstances she was accorded due process.

In the numerous meetings and discussions respondent had with her teachers and advisers, see Opinion of Mr. Justice Marshall, post at 2-3, culminating in the special clinical examination administered by seven physicians, Opinion of the Court, ante at 3, respondent was warned of her clinical deficiencies and given every opportunity to demonstrate improvement or question the evaluations.[1] The primary focus of these discussions and examinations was on respondent's competency as a physician.

Mr. Justice Marshall nevertheless states that respondent's dismissal was based "largely" on "her conduct":

> "It may nevertheless be true, as the Court implies, ante, at 12 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be 'a good medical doctor.' Whether these inadequacies can be termed 'pure academic reasons,' as the Court calls them, ibid., is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct, just as the students in Goss were suspended because of their conduct." Post, at 8 (emphasis added).

This conclusion is explicitly contrary to the District Court's undisturbed findings of fact. In one sense, the term "conduct" could be used to embrace a poor academic performance as well as unsatistactory personal conduct. But I do not understand Mr. Justice Marshall to use the term in that undifferentiated sense.[2] His opinion likens the dismissal of respondent to the suspension of the students in Goss for personal misbehavior. There is evidence that respondent's personal conduct may have been viewed as eccentric, but - quite unlike the suspensions in Goss - respondent's dismissal was not based on her personal behavior.[3]

The findings of the District Court conclusively show that respondent was dismissed for failure to meet the academic standards of the medical school. The court, after reviewing the evidence in some detail, concluded:

> "The evidence presented in this case totally failed to establish that plaintiff [respondent] was expelled for any reason other than the quality of her work." (App. 44) 4/

It is well to bear in mind that respondent was attending a medical school where competency in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum.[5] Evaluation of her performance in the

former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

Because it is clear from the findings of fact by the District Court that respondent was dismissed solely on academic grounds, and because the standards of procedural due process were abundantly met before dismissal occurred,[6] I join the Court's opinion.

FOOTNOTES

1. As a safeguard against erroneous judgement, and at respondent's request (App. 36), the Medical School submitted the question of respondent's clinical competency to a panel of "seven experienced physicians". Panel members were requested "to provide a careful, detailed, and thorough assessment of [respondent's] abilities at this time." (App. 36). The Dean's letter to respondent of March 15, 1973, advised her quite specifically of the "general topic[s] in the curriculum about which we are asking [the panel] to evaluate your performance. . . ." (App. 37). Each member of the examining panel was requested to "evaluate the extent of [respondent's] mastery of relevant concepts, knowledge, skills and competency to function as a physician." (App. 37). The examinations by members of the panel were conducted separately. Two of the doctors recommended that respondent be graduated (although one added that "she would not qualify to intern at the hospital where he worked"). (App. 40). Each of the other five doctors submitted negative recommendations, although they varied as to whether respondent should be dropped from school immediately. Ibid.

2. Indeed, in view of Mr. Justice Marshall's apparent conclusion that respondent was dismissed because of some objectively determinable conduct, it is difficult to understand his conclusion that the special examination administered by the seven practicing physicians "may have been better than[] a formal hearing." Post, at 6. That examination did not purport to determine whether, in the past, respondent had engaged in conduct that would warrant dismissal. Respondent apparently was not called upon to argue that she had not done certain things in the past. There were no facts found on that point. Nor did the doctors who administered the examination address themselves to respondent's conduct at the time, apart from her ability to perform the clinical tasks physicians must master. Mr. Justice Marshall says that this evaluation tested the "truth" of the assertions that respondent could not function as a doctor. Post at 7, n. 14. This is a tacit recognition that the issue was an academic one, rather than one limited to whether respondent simply engaged in improper conduct.

3. There was concern on the part of the faculty as to respondent's personal hygiene, but the District Court made clear that this was not the cause for her dismissal:

> With regard to plaintiff's physical appearance, this in and of itself did not cause plaintiff to be evaluated any differently than any of the other students; however, plaintiff's unkempt appearance and condition were much cause for concern with both faculty and students, and this was brought to her attention on numerous occasions; but she was not treated in any manner than any other student with similar deficiencies would have been treated." (App. 45).

4. The District Court also found:

> "Considering all of the evidence presented, the Court finds that the grading and evaluating system of the medical school was applied fairly and reasonably to plaintiff, but plaintiff did not satisfy the requirements of the medical school to graduate from the medical school in June 1973." (App. 45)

5. Dr. William Sirridge was the faculty member assigned to respondent as her "chief docent" (faculty adviser). A portion of his testimony was summarized by the District Court As follows:

> "He [Dr. Sirridge] emphasized that plaintiff's [respondent's] problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M.D. degree. He further testified that plaintiff cannot perform many of the necessary basic skills required of a practicing physician; . . . ." (App. 35).

6. I agree with the Court that university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. In terms of the process that "is due", there is a significant distinction between a dismissal for academic reasons and dismissal for improper conduct.

No. 76-695 BOARD OF CURATORS v. HOROWITZ

MR. JUSTICE POWELL, concurring.

I join the Court's opinion because I read it as upholding the District Court's view that respondent was dismissed for academic deficiencies rather than for unsatisfactory personal conduct, and that in these circumstances she was accorded due process.

In the numerous meetings and discussions respondent had with her teachers and advisers, see Opinion of Mr. Justice Marshall, post at 2-3, culminating in the special clinical examination administered by seven physicians, Opinion of the Court, ante at 3, respondent was warned of her clinical deficiencies and given every opportunity to demonstrate improvement or question the evaluations.[1] The primary focus of these discussions and examinations was on respondent's competency as a physician.

Mr. Justice Marshall nevertheless states that respondent's dismissal was based "largely" on "her conduct":

> "It may nevertheless be true, as the Court implies, ante, at 12 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be 'a good medical doctor.' Whether these inadequacies can be termed 'pure academic reasons,' as the Court calls them, ibid., is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct, just as the students in Goss were suspended because of their conduct." Post, at 8 (emphasis added).

This conclusion is explicitly contrary to the District Court's undisturbed findings of fact. In one sense, the term "conduct" could be used to embrace a poor academic performance as well as unsatistactory personal conduct. But I do not understand Mr. Justice Marshall to use the term in that undifferentiated sense.[2] His opinion likens the dismissal of respondent to the suspension of the students in Goss for personal misbehavior. There is evidence that respondent's personal conduct may have been viewed as eccentric, but - quite unlike the suspensions in Goss - respondent's dismissal was not based on her personal behavior.[3]

The findings of the District Court conclusively show that respondent was dismissed for failure to meet the academic standards of the medical school. The court, after reviewing the evidence in some detail, concluded:

> "The evidence presented in this case totally failed to establish that plaintiff [respondent] was expelled for any reason other than the quality of her work." (App. 44) 4/

It is well to bear in mind that respondent was attending a medical school where competency in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum.[5] Evaluation of her performance in the

former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

Because it is clear from the findings of fact by the District Court that respondent was dismissed solely on academic grounds, and because the standards of procedural due process were abundantly met before dismissal occurred,[6] I join the Court's opinion.

FOOTNOTES

1. As a safeguard against erroneous judgement, and at respondent's request (App. 36), the Medical School submitted the question of respondent's clinical competency to a panel of "seven experienced physicians". Panel members were requested "to provide a careful, detailed, and thorough assessment of [respondent's] abilities at this time." (App. 36). The Dean's letter to respondent of March 15, 1973, advised her quite specifically of the "general topic[s] in the curriculum about which we are asking [the panel] to evaluate your performance. . . ." (App. 37). Each member of the examining panel was requested to "evaluate the extent of [respondent's] mastery of relevant concepts, knowledge, skills and competency to function as a physician." (App. 37). The examinations by members of the panel were conducted separately. Two of the doctors recommended that respondent be graduated (although one added that "she would not qualify to intern at the hospital where he worked"). (App. 40). Each of the other five doctors submitted negative recommendations, although they varied as to whether respondent should be dropped from school immediately. Ibid.

2. Indeed, in view of Mr. Justice Marshall's apparent conclusion that respondent was dismissed because of some objectively determinable conduct, it is difficult to understand his conclusion that the special examination administered by the seven practicing physicians "may have been better than[] a formal hearing." Post, at 6. That examination did not purport to determine whether, in the past, respondent had engaged in conduct that would warrant dismissal. Respondent apparently was not called upon to argue that she had not done certain things in the past. There were no facts found on that point. Nor did the doctors who administered the examination address themselves to respondent's conduct at the time, apart from her ability to perform the clinical tasks physicians must master. Mr. Justice Marshall says that this evaluation tested the "truth" of the assertions that respondent could not function as a doctor. Post at 7, n. 14. This is a tacit recognition that the issue was an academic one, rather than one limited to whether respondent simply engaged in improper conduct.

3. There was concern on the part of the faculty as to respondent's personal hygiene, but the District Court made clear that this was not the cause for her dismissal:

> With regard to plaintiff's physical appearance, this in and of itself did not cause plaintiff to be evaluated any differently than any of the other students; however, plaintiff's unkempt appearance and condition were much cause for concern with both faculty and students, and this was brought to her attention on numerous occasions; but she was not treated in any manner than any other student with similar deficiencies would have been treated." (App. 45).

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> "Considering all of the evidence presented, the Court finds that the grading and evaluating system of the medical school was applied fairly and reasonably to plaintiff, but plaintiff did not satisfy the requirements of the medical school to graduate from the medical school in June 1973." (App. 45)

5. Dr. William Sirridge was the faculty member assigned to respondent as her "chief docent" (faculty adviser). A portion of his testimony was summarized by the District Court As follows:

> "He [Dr. Sirridge] emphasized that plaintiff's [respondent's] problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M.D. degree. He further testified that plaintiff cannot perform many of the necessary basic skills required of a practicing physician; . . . ." (App. 35).

6. I agree with the Court that university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. In terms of the process that "is due", there is a significant distinction between a dismissal for academic reasons and dismissal for improper conduct.

MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob DATE: 2/17/78

RE: Justice Rehnquist's Response to Your Horowitz Draft

Sally showed me Justice Rehnquist's letter, which came into Chambers shortly after you left for Conference. I can hardly express the shock it gave me. (Judge Hunter used to invoke a "desk drawer, one day" rule: put the letter you have just written in indignation in your desk for a day and wait to cool off. Unfortunately, it's hard to wait for a day around here.) I had always thought that the genius of the common law was that it announced principles through the vehicle of cases which turned on their individual facts, permitting like cases to be treated alike and different ones differently. Now we are scolded by Justice Rehnquist that this is no longer the case. This Court is to conceal the facts intentionally, to announce the broadest principle possible so that other cases cannot be distinguished. I must say that I suspected that this is what WHR was up to, but I finding it incredible that he would admit such a motive candidly and on paper.

There were nine votes to reverse precisely because of the facts of this case, not some broad principle which must stand unaltered for all time. Indeed, the case was taken on plenary review only because the Court felt that on the strong facts here, it was not necessary to address, as WHR did in his

proposed per curiam last Term, the property question. Now we are told that the facts don't count after all.

Having been told that the author of the Court opinion hopes it will be read precisely as we feared, I think it is incumbent upon you to do what WHR hopes you will not do: put a gloss on the Court opinion. He has declared that in his view, a Goss-type give-and-take is more than due process requires even when the interest at stake is permanent dismissal from the school; that is what he hopes the opinion will be read to say. Whether or not one believes that is correct (I do not, and you have indicated that you do not, either), on the facts of this case there simply is no reason to say it. I do not see why WHR should be permitted to reshape reality to suit the principle he wishes to announce. Your concurrence in Branzburg had a similar restraining effect; indeed, it is read as the opinion for the Court in that case.

In light of WHR's professed belief that the opinion will be read as holding that even a bare minimum Goss-type hearing is not required in these circumstances, I suggest adding the following footnote to your concurrence at the end of the first paragraph:

> I do not join the opinion of the Court insofar as it implies that students permanently dismissed for academic reasons are not entitled to an "informal give-and-take" such as that required in Goss v. Lopez, 419 U.S. 656 (1975). Permanent dismissal from an institution of higher learning is a far more serious loss than that inflicted through the 10-day suspension from a public high school imposed in Goss. It is unnecessary in this

case, however, to specify the minimum procedurual protections that must accompany an academic dismissal, As the opinion of Mr. Justice Marshall makes clear, post at 2-3, respondent received received far more than the minimum.

This will not put a "gloss" on the opinion; instead, it will indicate the proper ratio decidendi of the case. Your opinion will have to serve as the opinion of the Court, since WHR is unwilling to write one. As the fifth vote, I think you must do something along these lines.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

I talked to Bill + advised I'd leave my concurrence "as is".
L.F.P.

February 17, 1978

Re: No. 76-695 Board of Curators v. Horowitz

Dear Lewis:

Thank you for your letter of February 16, attaching a proposed concurring opinion in the above case. I disagree with nothing contained in your concurrence, but as you say the full thrust of what you want to say could not be picked up by simply adding two or three footnotes to my present Court opinion.

This leaves me with the choice of substantially altering the structure of my present opinion, or having you join it as is but file the concurrence attached in your letter of February 16. For several reasons, I think I prefer the latter course. We have a five man majority, which I always regard as somewhat fragile, and one is never sure when substantial changes are made in such a Court opinion whether there might be a temptation on the part of some other member of the majority either to bolt or to suggest additions or changes of his own. In addition, by dealing less with Thurgood's detailed factual assertions than your concurrence does, I think we have in the Court opinion a good vehicle for putting some perspective on Goss v. Lopez, in which I joined your dissent, indicating that the necessity of a hearing is directed to the situation where there is a dispute about a factual occurrence.

Ah!

The more the Court opinion responds to Thurgood's factual controversies, the more easy it becomes to distinguish in future cases, and the more easy it is for judges who might want to read it narrowly to limit the concept of "academic dismissal" as opposed to dismissal for conduct. I realize there is nothing in your concurrence that would expressly support such a limitation, but with one hundred odd new federal judges about to be appointed,

several dozen of them at the Court of Appeals level, I think we can be sure that they will be arguing in their conferences about the meaning of our cases just as we do. To the extent that the Court opinion gives the impression that minor factual variations are relevant to its basic point, I think it is a stronger opinion and less easy to distinguish for that reason.

Because of this consideration, the only suggestion I would urge upon you in connection with the concurrence is that you omit the language from the first sentence "because I read it as upholding the District Court's view that respondent was dismissed for academic deficiencies". The Court opinion presently says that in so many words see e.g., page 11: "Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing." When a concurring opinion opens with the language "because I read it as . . ." it necessarily gives the intimation that there is some language in the Court's opinion or perhaps some part of its holding that the author of the separate concurrence does not agree with. I would rather try to meet any objections that you may have to my opinion squarely on those grounds, if they exist. But, as I say, reading your concurrence, I do not disagree with any part of it, and therefore I suspect you do not disagree with my opinion for the Court. If I am right in these assumptions, I think it would help the view of the Constitution which we both believe to be correct if you would simply break the first sentence of your draft concurrence into two sentences, with the first one reading "I join the Court's opinion.", and the second one beginning "Respondent was dismissed for academic deficiencies rather than for unsatisfactory personal conduct, etc." This would certainly preserve all your meaning, and yet avoid the implication that you feel it necessary to put your own gloss upon the Court's opinion. If I am wrong in this conclusion, and you do wish to put your own gloss on my opinion, obviously this suggestion will be less than satisfactory to you.

Should you wish to talk about this any more, I will be available at any time and place.

Sincerely,

Bill

Mr. Justice Powell

Pp. 7-9 (added in reply to memo concurring opn)

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 23 FEB 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-695

Board of Curators of the University of Missouri et al., Petitioners, *v.* Charlotte Horowitz. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[February —, 1978]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court that, "[a]ssuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires." *Ante*, at 6. I cannot join the Court's opinion, however, because it contains dictum suggesting that respondent was entitled to even less procedural protection than she received. I also differ from the Court in its assumption that characterization of the reasons for a dismissal as "academic" or "disciplinary" is relevant to resolution of the question of what procedures are required by the Due Process Clause. Finally, I disagree with the Court's decision not to remand to the Court of Appeals for consideration of respondent's substantive due process claim.

I

We held in *Goss* v. *Lopez*, 419 U. S. 565 (1975), that

> "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." *Id.*, at 581.

There is no question that respondent received these protections, and more.[1]

According to the stipulation of facts filed in the District Court, respondent had a "discussion" with the dean of the medical school in mid-1972, at the close of her first year in school, during which she was notified of her unsatisfactory performance.[2] The dean testified that he explained the nature of her problems to respondent twice at this meeting, so that she would fully understand them.[3] A letter from the dean followed shortly thereafter, in which respondent was advised that she was being placed on probation because of, *inter alia*, "a major deficiency" in her "relationships with others," and her failure to "keep . . . to established schedules" and "attend . . . carefully to personal appearance."[4] The dean again met with respondent in October 1972 "to call attention in a direct and supportive way to the fact that her performance was not then strong."[5]

In January 1973, there was still another meeting between respondent and the dean, who was accompanied by respondent's docent and the chairman of the Council on Evaluation. Respondent was there notified of the Council's recommendation that she not graduate and that she be dropped from school unless there was "radical improvement" in her "clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism."[6] A letter from the dean again

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[1] It is necessary to recount the facts underlying this conclusion in some detail, because the Court's opinion does not provide the relevant facts with regard to the notice and opportunity to reply given to respondent.

[2] App. 15. It is likely that respondent was less formally notified of these deficiencies several months earlier, in March 1972. See *id.*, at 100–101 (testimony of respondent's docent).

[3] *Id.*, at 146.

[4] *Id.*, at 15–16.

[5] *Id.*, at 147.

[6] *Id.*, at 18.

followed the meeting; the letter summarized respondent's problem areas and noted that they had been discussed with her "several times." [7]

These meetings and letters plainly gave respondent all that *Goss* requires: several notices and explanations, and at least three opportunities "to present [her] side of the story." 419 U. S., at 581. I do not read the Court's opinion to disagree with this conclusion. Hence I do not understand why the Court indicates that even the "informal give-and-take" mandated by *Goss, id.*, at 584, need not have been provided here. See *ante*, at 7–8, 11–12. This case simply provides no legitimate opportunity to consider whether "far less stringent procedural requirements," *id.*, at 7–8, than those required in *Goss* are appropriate in other school contexts. While I disagree with the Court's conclusion that "far less" is adequate, as discussed *infra*, it is equally disturbing that the Court decides an issue not presented by the case before us. As Mr. Justice Brandeis warned over 40 years ago, the " 'great gravity and delicacy' " of our task in constitutional cases should cause us to " 'shrink' " from " 'anticipat[ing] a question of constitutional law in advance of the necessity of deciding it,' " and from " 'formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander* v. *TVA*, 297 U. S. 288, 345–347 (1936) (concurring opinion).

II

In view of the Court's dictum to the effect that even the minimum procedures required in *Goss* need not have been provided to respondent, I feel compelled to comment on the extent of procedural protection mandated here. I do so within a framework largely ignored by the Court, a framework derived from our traditional approach to these problems. According to our prior decisions, as summarized in *Mathews* v.

[7] *Id.*, at 182–183.

Eldridge, 424 U. S. 319 (1976), three factors are of principal relevance in determining what process is due:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.,* at 335.

As the Court recognizes, the "private interest" involved here is a weighty one: "the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss.*" *Ante,* at 8 n. 3. One example of the loss suffered by respondent is contained in the stipulation of facts: respondent had a job offer from the psychiatry department of another university to begin work in September 1973; the offer was contingent on her receiving the M. D. degree.[8] In summary, as the Court of Appeals noted:

> "The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F. 2d 1317, 1321 (CA8 1976).

As Judge Friendly has written in a related context, when the State seeks "to deprive a person of a way of life to which [s]he has devoted years of preparation and on which [s]he . . . ha[s] come to rely," it should be required first to provide a "high level of procedural protection."[9]

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[8] *Id.,* at 16.

[9] Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296–1297 (1975) (revocation of professional licenses).

Neither of the other two factors mentioned in *Mathews* justifies moving from a high level to the lower level of protection involved in *Goss*. There was at least some risk of error inherent in the evidence on which the dean relied in his meetings with and letters to respondent; faculty evaluations of such matters as personal hygiene and patient and peer rapport are neither as "sharply focused" nor as "easily documented" as was, *e. g.*, the disability determination involved in *Mathews*, 424 U. S., at 343. See *Goss* v. *Lopez*, *supra*, 419 U. S., at 580 (when decisionmaker "act[s] on the reports and advice of others . . . [t]he risk of error is not at all trivial").[10]

Nor can it be said that the university had any greater interest in summary proceedings here than did the school in *Goss*. Certainly the allegedly disruptive and disobedient students involved there, see *id.*, at 569–571, posed more of an immediate threat to orderly school administration than did respondent. As we noted in *Goss*, moreover, "it disserves . . . the interest of the State if [the student's] suspension is in fact unwarranted." *Id.*, at 579.[11] Under these circumstances—with respondent having much more at stake than did the students in *Goss*, the administration at best having no more at stake, and the meetings between respondent and the dean leaving some possibility of erroneous dismissal—I believe that respondent was entitled to more procedural protection than is provided by "informal give-and-take" before the school could dismiss her.

The contours of the additional procedural protection to which respondent was entitled need not be defined in terms

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[10] The inquiry about risk of error cannot be separated from the first inquiry about the private interest at stake. The more serious the consequences for the individual, the smaller the risk of error that will be acceptable.

[11] The statements and letters of the medical school dean reflect a genuine concern that respondent not be wrongfully dismissed. See App. 147–150, 180–183, 185–187.

of the traditional adversarial system so familiar to lawyers and judges. See *Mathews* v. *Eldridge, supra,* 424 U. S., at 348. We have emphasized many times that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); see, *e. g., ante,* at 7; *Goss* v. *Lopez, supra,* 419 U. S., at 578. In other words, what process is due will vary "according to specific factual contexts." *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960); see, *e. g., Mathews* v. *Eldridge, supra,* 424 U. S., at 334; *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972); *Bell* v. *Burson,* 402 U. S. 535, 540 (1971). See also *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162–163 (1951) (Frankfurter, J., concurring).

In the instant factual context the "appeal" provided to respondent, see *ante,* at 3, served the same purposes as, and in some respects may have been better than, a formal hearing. In establishing the procedure under which respondent was evaluated separately by seven physicians who had had little or no previous contact with her, it appears that the medical school placed emphasis on obtaining "a fair and neutral and impartial assessment." [12] In order to evaluate respondent, each of the seven physicians spent approximately one half-day observing her as she performed various clinical duties and then submitted a report on her performance to the dean.[13] It is difficult to imagine a better procedure for determining whether the school's allegations against respondent had any substance to them.[14] Cf. *Mathews* v. *Eldridge, supra,* 424

[12] *Id.,* at 150 (testimony of dean); see *id.,* at 185, 187, 208, 210 (letters to respondent and seven physicians).

[13] See *id.,* at 190–207.

[14] Respondent appears to argue that her sex and her religion were underlying reasons for her dismissal and that a hearing would have helped to resolve the "factual dispute" between her and the school on these issues. Brief for Respondent, at 30; see *id.,* at 51–52. See also *ante,* at 13 n. 7. But the only express grounds for respondent's dismissal related to deficien-

U. S., at 337–338, 344 (use of independent physician to examine disability applicant and report to decisionmaker). I therefore believe that the appeal procedure utilized by respondent, together with her earlier notices from and meetings with the dean, provided respondent with as much procedural protection as the Due Process Clause requires.[15]

III

The analysis in Parts I and II of this opinion illustrates that resolution of this case under our traditional approach does not turn on whether the dismissal of respondent is characterized as one for "academic" or "disciplinary" reasons. In my view, the effort to apply such labels does little to advance the due process inquiry, as is indicated by examination of the facts of this case.

The minutes of the meeting at which it was first decided that respondent should not graduate contain the following:

> "This issue is *not one of academic achievement,* but of performance, relationship to people and ability to communicate." App. 218 (emphasis added).

By the customary measures of academic progress, moreover, no deficiency was apparent at the time that the authorities decided respondent could not graduate; prior to this time,

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cies in personal hygiene, patient rapport, and the like, and, as a matter of procedural due process, respondent was entitled to no more than a forum to contest the factual underpinnings of these grounds. The appeal procedure here gave respondent such a forum—an opportunity to demonstrate that the school's charges were "unfair or mistaken," *Gass* v. *Lopez,* 419 U. S. 565, 581 (1975).

[15] Like a hearing, the appeal procedure and the meetings

"represent[ed] . . . a valued human interaction in which the affected person experience[d] at least the satisfaction of participating in the decision that vitally concern[ed] her . . . . [T]hese rights to interchange express the elementary idea that to be a *person,* rather than a *thing,* is at least to be *consulted* about what is done with one." L. Tribe, American Constitutional Law § 10–7, at 503 (1977) (emphasis in original).

according to the stipulation of facts, respondent had received "credit" and "satisfactory grades" in all of her courses, including clinical courses.[16]

It may nevertheless be true, as the Court implies, *ante*, at 12 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be "a good medical doctor." Whether these inadequacies can be termed "pure academic reasons," as the Court calls them, *ibid.*, is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct,[17] just as the students in *Goss* were suspended because of their conduct.[18]

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[16] App. 12. Respondent later received "no credit" for her emergency room rotation, the only course in which her grade was less than satisfactory. *Ibid.* This grade was not recorded, according to the District Court, until after the decision had been made that respondent could not graduate. *Id.*, at 31. When the Coordinating Committee made this decision, moreover, it apparently had not seen any evaluation of respondent's emergency room performance. See *id.*, at 229 (minutes of Coordinating Committee meeting).

[17] Only one of the reasons voiced by the school for deciding not to graduate respondent had any arguable nonconduct aspects, and that reason, "clinical competence," was plainly related to perceived deficiencies in respondent's personal hygiene and relationships with colleagues and patients. See *id.*, at 219. See also *id.*, at 181, 182–183, 210.

[18] The futility of trying to draw a workable distinction between "academic" and "disciplinary" dismissals is further illustrated by my Brother POWELL's concurring opinion. The opinion states that the conclusion in text *supra*, "is explicitly contrary to the District Court's undisturbed findings of fact," *ante*, at 2, but it cites no District Court finding indicating that respondent's dismissal was based on other than conduct-related considerations. No such finding exists.

The District Court's statement that respondent was dismissed because of "the quality of her work," quoted *id.*, at 3, like statements to the effect that the dismissal was "solely on academic grounds," *id.*, at 4, is ultimately irrelevant to the due process inquiry. It provides no informa-

The Court makes much of decisions from state and lower federal courts to support its point that "dismissals for academic . . . cause do not necessitate a hearing." *Ante,* at 9. The decisions on which the Court relies, however, plainly use the term "academic" in a much narrower sense than does the Court, distinguishing "academic" dismissals from ones based on "misconduct" and holding that, when a student is dismissed for failing grades, a hearing would serve no purpose.[19] These cases may be viewed as consistent with

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tion on the critical question whether "the facts disputed are of a type susceptible to determination by third parties." *Infra,* at 10. Nor does the District Court's finding that "the grading and evaluating system of the medical school was applied fairly," quoted *ante,* at 3 n. 4, advance resolution of this case, especially in view of the fact, noted *supra,* that respondent's grades in clinical courses, as in all other course, were satisfactory when the decision was made that she could not graduate. This fact further indicates, contrary to MR. JUSTICE POWELL's intimation, *ante,* at 3–4, that the school found the deficiencies in respondent's clinical performance to be different from the deficiencies that lead to unsatisfactory grades in more traditional scholastic subjects.

MR. JUSTICE POWELL is correct, of course, in suggesting that the kind of conduct here involved is different from that involved in *Goss* v. *Lopez, supra. Ante,* at 2–3, and n. 2. The question facing the medical school authorities was not solely whether respondent had misbehaved in the past, but rather whether her past, present, and likely future conduct indicated that she would not be "a good medical doctor," *ante,* at 12 n. 6 (opinion of the Court). The appeal procedure of the school was well suited to aid in resolution of this question, since it involved "observation of her skills and techniques in actual conditions of practice," *ante,* at 4 (POWELL, J., concurring). It matters not at all whether the result of such observation is labeled "an 'academic' judgment," *ibid.,* so long as it is recognized that the school authorities, having an efficient procedure available to determine whether their decision to dismiss respondent was "unfair or mistaken," *Goss* v. *Lopez, supra,* 419 U. S., at 581, were constitutionally required to give respondent a chance to invoke the procedure, as they did, before depriving her of a substantial liberty or property interest.

[19] See *Mahavongsanan* v. *Hall,* 529 F. 2d 448, 450 (CA5 1976); *Gaspar* v. *Bruton,* 513 F. 2d 843, 849–851 (CA10 1975); *Mustell* v. *Rose,* 282 Ala. 358, 367, 211 So. 2d 489, 497–498, cert. denied, 393 U. S. 939 (1968);

our statement in *Mathews* v. *Eldridge* that "the probable value . . . of additional . . . procedural safeguards" is a factor relevant to the due process inquiry. 424 U. S., at 335, quoted at p. 4, *supra;* see 424 U. S., at 343–347. But they provide little assistance in resolving cases like the present one, where the dismissal is based not on failing grades but on conduct-related considerations.[20]

In such cases a talismanic reliance on labels should not be a substitute for sensitive consideration of the procedures required by due process.[21] When the facts disputed are of a type susceptible to determination by third parties, as the allegations about respondent plainly were, see *ante*, at 12–13, n. 6, there is no more reason to deny all procedural protection to one who will suffer a serious loss than there was in *Goss* v.

Barnard v. *Inhabitants of Shelburne*, 216 Mass. 19, 19–20, 22–23, 102 N. E. 1095, 1096–1097 (1913).

[20] See *Brookins* v. *Bonnell*, 362 F. Supp. 379, 383 (ED Pa. 1973):

"This case is not the traditional disciplinary situation where a student violates the law or a school regulation by actively engaging in prohibited activities. Plaintiff has allegedly failed to act and comply with school regulations for admission and class attendance by passively ignoring these regulations. These alleged failures do not constitute misconduct in the sense that plaintiff is subject to disciplinary procedures. They do constitute misconduct in the sense that plaintiff was required to do something. Plaintiff contends that he did comply with the requirements. Like the traditional disciplinary case, the determination of whether plaintiff did or did not comply with the school regulations is a question of fact. Most importantly, in determining this factual question reference is not made to a standard of achievement in an esoteric academic field. Scholastic standards are not involved, but rather disputed facts concerning whether plaintiff did or did not comply with certain school regulations. These issues adapt themselves readily to determination by a fair and impartial 'due process' hearing."

[21] The Court's reliance on labels, moreover, may give those school administrators who are reluctant to accord due process to their students an excuse for not doing so. See generally Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting, 28 Stan. L. Rev. 841 (1976).

Lopez, and indeed there may be good reason to provide even more protection, as discussed in Part II, *supra*. A court's characterization of the reasons for a student's dismissal adds nothing to the effort to find procedures that are fair to the student and the school, and that promote the elusive goal of determining the truth in a manner consistent with both individual dignity and society's limited resources.

IV

While I agree with the Court that respondent received adequate procedural due process, I cannot join the Court's judgment because it is based on resolution of an issue never reached by the Court of Appeals. That court, taking a properly limited view of its role in constitutional cases, refused to offer dictum on respondent's substantive due process claim when it decided the case on procedural due process grounds. See 538 F. 2d, at 1321 n. 5, quoted *ante*, at 13. Petitioner therefore presented to us only questions relating to the procedural issue. Petition for Certiorari, at 2. Our normal course in such a case is to reverse on the questions decided below and presented in the petition, and then to remand to the Court of Appeals for consideration of any remaining issues.

Rather than taking this course, the Court here decides on its own that the record will not support a substantive due process claim, thereby "agree[ing]" with the District Court. *Ante*, at 13. I would allow the Court of Appeals to provide the first level of appellate review on this question. Not only would a remand give us the benefit of the lower court's thoughts,[22] it

[22] It would be useful, for example, to have more careful assessments of whether the school followed its own rules in dismissing respondent and of what the legal consequences should be if it did not. The Court states that it "disagree[s] with both respondent's factual and legal contentions." *Ante*, at 13 n. 8. It then asserts that "the record clearly shows" compliance with the rules, *ibid.*, but it provides neither elaboration of this conclusion nor discussion of the specific ways in which respondent contends that the rules were not followed, Brief for Respondent, at 42–46, conten-

would also allow us to maintain consistency with our own Rule 23.1 (c), which states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." By bypassing the courts of appeals on questions of this nature, we do no service to those courts that refuse to speculate in dictum on a wide range of issues and instead follow the more prudential, preferred course of avoiding decision—particularly constitutional decision—until " 'absolutely necessary' " to resolution of a case. *Ashwander* v. *TVA*, *supra*, 297 U. S., at 347 (Brandeis, J., concurring).

I would reverse the judgment of the Court of Appeals and remand for further proceedings.

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tions accompanied by citations to the same record that the Court finds so "clear." The statement of the District Court quoted by the Court, *ante*, at 14 n. 6, is not inconsistent on its face with respondent's claim that the rules were not followed, nor is there anything about the context of the statement to indicate that it was addressed to this claim, see App. 45.

Review by the Court of Appeals would clarify these factual issues, which rarely warrant the expenditure of this Court's time. If the Court's view of the record is correct, however, then I do not understand why the Court goes on to comment on the legal consequences of a state of facts that the Court has just said does not exist. Like other aspects of the Court's opinion, discussed *supra*, the legal comments on this issue are nothing more than confusing dictum. It is true, as the Court notes, *ante*, at 14 n. 8, that the decision from this Court cited by respondent was not expressly grounded in the Due Process Clause. *Service* v. *Dulles*, 354 U. S. 363 (1957). But that fact, which amounts to the only legal analysis offered by the Court on this question, hardly answers respondent's point that some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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February 24, 1978

No. 76-695 Board of Curators v. Horowitz

MEMORANDUM TO THE CONFERENCE:

In view of Thurgood's circulation yesterday afternoon, I am adding the enclosed footnote to my concurring opinion.

I have delivered it to the printer this morning.

L.F.P.

L.F.P., Jr.

New footnote 5, end of runover paragraph, p.4:

MR. JUSTICE MARSHALL insists that calling this an academic judgment is an exercise in futility. Post, at 8 n.18. As the Court points out, however, the distinction between dismissals for academic deficiency and dismissal for misconduct may be decisive as to the process that is due. Ante, at 11. A decision relating to the misconduct of a student requires a factual determination whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause. An academic judgment also involves this type of objectively determinable fact -- e.g., whether the student gave certain answers on an examination. But the critical decision requires a subjective, expert evaluation as to whether that performance satisfies some predetermined standard of academic competence. That standard, in turn, is set by a similarly expert judgment. These evaluations, which go far beyond questions of mere "conduct," are not susceptible to the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct. Thus, the conclusion that a particular dismissal is academic -- that it entails these expert evaluations -- is likely to have controlling significance in determining how much and what sort of process is due.

2/24/78 76-695 Curators v. Horowitz

New footnote 6.

University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. Contrary to the suggestion of MR. JUSTICE MARSHALL, post, at 9 n. 18, the fact that a particular procedure is possible or available does not mean that it is required under the Due Process Clause. Goss v. Lopez, 419 U.S. 565 (1975), simply does not speak to that point.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-695

Board of Curators of the University of Missouri et al., Petitioners, v. Charlotte Horowitz.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[February —, 1978]

MR. JUSTICE POWELL, concurring.

I join the Court's opinion because I read it as upholding the District Court's view that respondent was dismissed for academic deficiencies rather than for unsatisfactory personal conduct, and that in these circumstances she was accorded due process.

In the numerous meetings and discussions respondent had with her teachers and advisers, see opinion of MR. JUSTICE MARSHALL, *post*, at 2-3, culminating in the special clinical examination administered by seven physicians, opinion of the Court, *ante*, at 3, respondent was warned of her clinical deficiencies and given every opportunity to demonstrate improvement or question the evaluations. The primary focus

[1] As a safeguard against erroneous judgment, and at respondent's request (App. 36), the Medical School submitted the question of respondent's clinical competency to a panel of "seven experienced physicians." Panel members were requested "to provide a careful, detailed, and thorough assessment of [respondent's] abilities at this time." (App. 36). The Dean's letter to respondent of March 15, 1973 advised her quite specifically of the "general topic[s] in the curriculum about which we are asking [the panel] to evaluate your performance. . . ." (App. 37). Each member of the examining panel was requested to "evaluate the extent of [respondent's] mastery of relevant concepts, knowledge, skills and competency to function as a physician." (App. 37). The examinations by members of the panel were conducted separately. Two of the doctors recommended that re-

of these discussions and examinations was on respondent's competency as a physician.

MR. JUSTICE MARSHALL nevertheless states that respondent's dismissal was based "largely" on "her conduct":

> "It may nevertheless be true, as the Court implies, *ante*, at 12 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be 'a good medical doctor.' Whether these inadequacies can be termed 'pure academic reasons,' as the Court calls them, *ibid.*, is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. *The relevant point is that respondent was dismissed largely because of her conduct, just as the students in Goss were suspended because of their conduct.*" *Post*, at 8 (emphasis added).

This conclusion is explicitly contrary to the District Court's undisturbed findings of fact. In one sense, the term "conduct" could be used to embrace a poor academic performance as well as unsatisfactory personal conduct. But I do not understand MR. JUSTICE MARSHALL to use the term in that undifferentiated sense.[2] His opinion likens the dismissal of respondent

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spondent be graduated (although one added that "she would not qualify to intern at the hospital where he worked"). (App. 40). Each of the other five doctors submitted negative recommendations, although they varied as to whether respondent should be dropped from school immediately. *Ibid.*

[2] Indeed, in view of MR. JUSTICE MARSHALL's apparent conclusion that respondent was dismissed because of some objectively determinable conduct, it is difficult to understand his conclusion that the special examination administered by the seven practicing physicians "may have been better than[] a formal hearing." *Post*, at 6. That examination did not purport to determine whether, in the past, respondent had engaged in conduct that would warrant dismissal. Respondent apparently was not called upon to argue that she had not done certain things in the past. There were no facts found on that point. Nor did the doctors who administered the examination address themselves to respondent's conduct at the time, *apart*

to the suspension of the students in *Goss* for personal misbehavior. There is evidence that respondent's personal conduct may have been viewed as eccentric, but—quite unlike the suspensions in *Goss*—respondent's dismissal was not based on her personal behavior.[3]

The findings of the District Court conclusively shows that respondent was dismissed for failure to meet the academic standards of the medical school. The court, after reviewing the evidence in some detail, concluded:

> "The evidence presented in this case totally failed to establish that plaintiff [respondent] was expelled for any reason other than the quality of her work." (App. 44).[4]

It is well to bear in mind that respondent was attending a medical school where competency in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as defi-

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from her ability to perform the clinical tasks physicians must master. MR. JUSTICE MARSHALL says that this evaluation tested the "truth" of the assertions that respondent could not function as a doctor. *Post*, at 7 n. 14. This is a tacit recognition that the issue was an academic one, rather than one limited to whether respondent simply engaged in improper conduct.

[3] There was concern on the part of the faculty as to respondent's personal hygiene, but the District Court made clear that this was not the cause for her dismissal:

With regard to plaintiff's physical appearance, this in and of itself did not cause plaintiff to be evaluated any differently than any of the other students; however, plaintiff's unkempt appearance and condition were much cause for concern with both faculty and students, and this was brought to her attention on numerous occasions; but she was not treated in any manner than any other student with similar deficiencies would have been treated." (App. 45)

[4] The District Court also found:

"Considering all of the evidence presented, the Court finds that the grading and evaluating system of the medical school was applied fairly and reasonably to plaintiff, but plaintiff did not satisfy the requirements of the medical school to graduate from the medical school in June 1973." (App. 45).

cient in her clinical work as she was proficient in the "book-learning" portion of the curriculum.[5] Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

Because it is clear from the findings of fact by the District Court that respondent was dismissed solely on academic grounds, and because the standards of procedural due process were abundantly met before dismissal occurred,[6] I join the Court's opinion.

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[5] Dr. William Sirridge was the faculty member assigned to respondent as her "chief docent" (faculty adviser). A portion of his testimony was summarized by the District Court as follows:

"He [Dr. Sirridge] emphasized that plaintiff's [respondent's] problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M. D. degree. He further testified that plaintiff cannot perform many of the necessary basic skills required of a practicing physician; . . . ." (App. 35).

[6] I agree with the Court that university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. In terms of the process that "is due," there is a significant distinction between a dismissal for academic reasons and dismissal for improper conduct.

3, 4

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–695

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THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
							11/12/77	
Join WHR 1/25/78	await conference 1/23/78	Join WHR 1/19/78	await conference 1/23/78	1st draft concurring in part + dissenting in part 2/6/78	await Conference 1/30/78	Join WHR 1/26/78	1st draft 1/19/78	Join WHR 1/20/78
	~~Join~~ Join HAB 2/10/78		Concurring opinion 2nd draft 2/15/78	2nd draft 2/10/78	typed draft 2/9/78	1st draft 2/21/78	2nd draft 2/26/78	
				3rd draft 2/15/78	1st draft 2/13/78	2nd draft 2/24/78		
				76-695 Board v. Howoritz				