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Constitutional Law - Fourteenth Amendment - Due Process - School Suspensions

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may erode an evinced legislative policy favoring the family unit.[51] Finally, the court's failure to search into the actual effect of these agreements contradicts the well established, well considered judicial policy of carefully guarding the family from unwarranted state intrusions.

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS—SCHOOL SUSPENSIONS— The Supreme Court of the United States has held that a public school student threatened with suspension of ten days or less is, absent danger or emergency, entitled to prior notification and a rudimentary hearing.

Goss v. Lopez, 419 U.S. 565 (1975).

Pursuant to Ohio law,[1] Dwight Lopez and eight other students from various high schools of the Columbus, Ohio public school system were summarily suspended for periods of up to ten days[2] for disciplinary reasons.[3] Prior to their suspensions, the students had been neither granted a hearing nor notified of the charges against them. The students filed a class action suit against the Columbus Board of Education and certain administrators of the school system,[4] seeking a declaration that the Ohio statute authorizing the

51. PA. STAT. ANN. tit. 11, § 50-101(b)(1) (Supp. 1975); PA. STAT. ANN. tit. 62, § 2305 (1968).

1. OHIO REV. CODE ANN. § 3313.66 (Page 1972) provided that authorized school officials could suspend pupils for not more than ten days. The only statutory procedural requirements were notification to the parent or guardian and the clerk of the board of education within twenty-four hours after the suspension.

2. The statute allowed a school authority to expel a student upon notification to the parent or guardian within twenty-four hours. The term of expulsion could not extend beyond the current semester. The pupil, parent or guardian could appeal the expulsion to the board of education; there was no statutory right to appeal a suspension. *Id.*

3. The suspensions occurred during a period of widespread unrest in the Columbus school system. Several of the students had participated in disruptive demonstrations on school premises during regular class hours. One student had physically attacked a police officer and had been suspended immediately. Another was arrested at a demonstration at a high school other than the one in which she was enrolled; she was notified of her suspension on the following day before she went to school. Goss v. Lopez, 419 U.S. 565, 570-71 (1975).

4. Plaintiffs brought the action under provisions of the Civil Rights Act which provide:

suspensions violated the due process clause of the fourteenth amendment; they requested an injunction against future disciplinary sanctions based on the statute and expunction of all references to the suspensions from their records. The United States District Court for the Southern District of Ohio[5] held that the state-created right to education was a protected "liberty" under the due process clause, which required that suspensions be preceded by a hearing and notice reasonably calculated to inform the student of the charges against him.[6] The school administrators appealed to the United States Supreme Court.[7]

In a 5-4 decision,[8] the Court held that Ohio law, which entitled residents to free public schooling, created the right to an education;[9] this right was a "property" and a "liberty" interest[10] protected by the due process clause.[11] Appellants had claimed that school exclusions were not protected by the due process clause because there was no constitutional right to an education at public expense[12] and that,

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

42 U.S.C. § 1983 (1970).

5. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973). Jurisdiction was based on 28 U.S.C. § 1343(3) (1970) (federal district courts have original jurisdiction of civil action commenced by any person to redress a deprivation of a constitutional right, privilege or immunity under color of state law); *id.* §§ 2201, 2202 (declaratory judgments and relief therefrom); *id.* § 2281 (proceeding for injunction against enforcement of state statute requires a three-judge federal district court).

6. The references to the students' suspensions were ordered expunged from their records. 372 F. Supp. at 1302.

7. The Supreme Court had jurisdiction over the appeal pursuant to 28 U.S.C. § 1253 (1970) (direct appeals from decisions of three-judge courts).

8. Goss v. Lopez, 419 U.S. 565 (1975). Justice White, speaking for Justices Marshall, Stewart, Brennan and Douglas, wrote the majority opinion. Justice Powell dissented, joined by Chief Justice Burger, Justice Blackmun and Justice Rehnquist.

9. OHIO REV. CODE ANN. §§ 3313.48, .64 (Page 1972) requires that the board of education of each city, exempted village, local and joint vocational school district shall provide a free education for Ohio residents between the ages of six and twenty-one.

10. When a person's good name, reputation or integrity have been maligned by the actions of some governmental body, the minimal requirements of procedural due process must be satisfied. The Court felt suspension without a prior hearing impaired a liberty interest within the protection of the fourteenth amendment in light of the attendant damage to the student's future employment prospects and reputation and standing with teachers and peers. 419 U.S. at 574-75.

11. U.S. CONST. amend. XIV, § 1 states: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

12. Appellants referred to San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35

if there were a protected interest, there had been no violation of the due process clause because appellees had not suffered "severe detriment" or "grievous loss."[13] The Court felt both positions misstated the issue. Property interests protected by the due process clause were not usually granted in the Constitution itself, but were created in independent sources such as state statutes. In this case, the students had legitimate claims of entitlement to a public education on the basis of the Ohio statute which required compulsory attendance of all school age children.[14] Once extended by the state, the right could not be withdrawn because of misconduct unless fundamentally fair proceedings established that misconduct had actually occurred.[15]

The Court rejected the "severe detriment-grievous loss" measure of the applicability of the due process clause. The length and consequent severity of a deprivation would be relevant in determining the type of procedure which would satisfy due process requirements. In determining whether the clause applied at all, however, the *nature*

(1973), where the Court stated that education was not among the rights afforded explicit or implicit protection by the Constitution. Brief for Appellant at 6, 7, Goss v. Lopez, 419 U.S. 565 (1975). The Court conceded in *Goss* that Ohio was not constitutionally obliged to establish and maintain a public school system. 419 U.S. at 574.

While the Constitution does not compel a state to provide free education to its residents, it has long been recognized that education is vitally important. In Brown v. Board of Educ., 347 U.S. 483 (1954), a fourteenth amendment equal protection case, the Court characterized education as perhaps the most important function of state and local governments and held that once the state decides to provide education to its residents it must be made available to all on equal terms. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

13. Brief for Appellant at 18.

14. 419 U.S. at 573. The Court analogized the students' entitlement to an education to a recent line of cases finding property rights arising from claims of entitlement to certain benefits that had been conferred by state statutes: Wolff v. McDonnell, 418 U.S. 539 (1974) (official cancellation of prisoners' good-time credits accumulated under state law requires due process protections although a prisoner has no constitutional right to such credits); Arnett v. Kennedy, 416 U.S. 134 (1974) (state employees who under state law have claims of entitlement to continued employment absent sufficient cause may demand due process protections before being discharged); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process applicable to parole revocations although a parolee has no constitutional right to that status); Connell v. Higginbotham, 403 U.S. 207 (1971) (dismissal of public employees requires due process protections); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients having legitimate claims of entitlement to welfare benefits may demand due process protections).

15. 419 U.S. at 574. Virtually all states and United States territories have similar statutes entitling their residents to an education at public expense. *See, e.g.*, CAL. EDUC. CODE § 12101 (West 1969); N.Y. EDUC. LAW § 3202 (McKinney 1970); PA. STAT. ANN. tit. 24, § 13-1302 (1967).

of the interest at stake controlled.[16] Since the statutory entitlement to a public education was in the nature of a property right, it was protected by the due process clause. There was no need to show severe loss; the only quantitative limitation on the applicability of the due process clause when property interests were involved was that the deprivation not be trivial or de minimis.[17] The Court found that neither the property interest in educational benefits temporarily denied nor the liberty interest in the students' standing and reputation was so insubstantial that the requirements of due process could be ignored.[18] The Court concluded that the lack of necessary procedural safeguards rendered the Ohio statute unconstitutional.[19]

After determining that due process safeguards were required, the Court weighed the necessity of suspensions as a tool to ensure orderly administration of the schools against the impact that such suspensions have on the students' liberty and property interests. Acknowledging the need for flexibility in fashioning the appropriate procedures,[20] the Court outlined the minimum requirements which due process imposed on suspension proceedings.[21] Before a suspension of ten days or less may be imposed, a student must be given oral or written notice of the charges against him. If he denies those charges, the suspending authority must explain the evidence supporting the charges and give the student an opportunity to present a defense.[22] This hearing need not be formal; the requirement can be met by an informal discussion between disciplinarian and student immediately prior to the suspension.[23]

The Court was aware of the potential burden that its decision might have on the efficient functioning of the school system,[24] and

16. 419 U.S. at 575-76.
17. *Id.* at 576. *See* BLACK'S LAW DICTIONARY 482 (4th ed. 1951).
18. 419 U.S. at 576.
19. *Id.*
20. *Id.* at 578, *citing* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).
21. 419 U.S. at 581.
22. *Id.*
23. *Id.* at 582.
24. *Id.* at 583. An amicus brief filed by the Children's Defense Fund of Washington pointed out the frequent and increasing occurences of disciplinary suspensions in the American public school system. The brief indicated that at least ten percent of a representative sampling of junior and senior students had been suspended one or more times in the 1972-73 school year. This conclusion, based on empirical data obtained from the Office of Civil Rights of the Department of Health, Education and Welfare, was considered a conservative estimate. 419 U.S. at 592 n.10 (Powell, J., dissenting). The majority decision did not specifically refer to these surveys, but the extensive use of suspension as a regular disciplinary tool seems to

to alleviate future difficulties it indicated what due process did not require in most cases. When the student's presence poses a "continuing danger" to persons or school property or an ongoing threat to academic tranquility, the student may be removed from school immediately without the procedural requirements, provided the necessary notice and hearing follow as soon as practicable.[25] Absent unusual circumstances, suspension proceedings should not simulate trials; a student need not be given the opportunity to secure counsel, to face and cross-examine adverse witnesses, or to call his own witnesses.[26]

The dissent agreed that the right or entitlement to an education as created by Ohio law would be protected by the due process clause in a proper case;[27] Justice Powell felt, however, that this was not such a case. Although the Ohio statute created the right to a free education, it conditioned that right with certain disciplinary regulations. Students received only a qualified right to public schooling,[28] which was subject to the rules and procedures provided in the statute. Justice Powell further agreed with appellants that even if a protected interest existed, due process requirements did not apply because there was no showing that the students' interests had been seriously infringed.[29]

Justice Powell particularly feared *Goss* would have serious and undesirable ramifications in the public school systems. He felt the majority's decision encouraged increasing reliance upon the judiciary to resolve routine school problems which were the responsibility of school boards and school officials.[30] He stressed the gravity of the discipline problem in the public schools[31] and considered discipline, free of frustrating formalities, integral to the student-teacher relationship and the child's social education.[32] He observed that the procedures imposed by the majority were actually less stringent

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have influenced its decision not to require more formal procedures. *See id.* at 583.

25. *Id.* at 582-83.

26. *Id.* at 583. The Court addressed itself solely to short suspensions—those not exceeding ten days—and indicated that longer suspensions, expulsions, and possibly short suspensions in unusual situations might require more than the rudimentary procedures imposed in cases like *Goss*. *Id.* at 584.

27. *Id.* at 586 (Powell, J., dissenting).

28. *Id.*, *citing* Board of Regents v. Roth, 408 U.S. 564 (1972).

29. 419 U.S. at 588-89 (Powell, J., dissenting).

30. *Id.* at 594.

31. *Id.* at 592.

32. *Id.* at 593, 594.

than those prescribed by the Ohio statute.[33] He was also disturbed that as a result of *Goss* efficient school administration would be burdened by demands for procedural safeguards for the multitude of discretionary decisions made in the educational process.[34]

In cases dealing with school disciplinary procedures, it has been generally conceded that permanent deprivations of the right to receive an education require due process safeguards. *Dixon v. Board of Education*[35] held that college students facing expulsion from a tax-supported institution were entitled to certain minimum procedural protections. Since *Dixon*, lower courts have consistently required that tax-supported institutions, including secondary schools, observe those requirements prior to a student's expulsion.[36] Where the removal from school is temporary, as with suspensions, the lower court decisions have differed.[37] Generally, however, the courts have responded to the issue of the validity of the procedures by which a student has been suspended by examining the seriousness of the suspension itself.[38]

According to the *Goss* Court, emphasis on the severity of the discipline alone is improper. In determining whether procedural due process is required, the threshold inquiry is not the weight of the deprivation but the nature of the interest affected.[39] The question is whether the nature of the interest is one within the contemplation

33. *Id.* at 595-96.

34. *Id.* at 597, 599.

35. 294 F.2d 150 (5th Cir.), *cert. denied*, 363 U.S. 930 (1961).

36. *See* 419 U.S. at 576-77 n.8.

37. *Id. Compare* Mills v. Board of Educ. 348 F. Supp. 866 (D.D.C. 1972) (due process must be afforded for any suspension in excess of two days), *with* Hernandez v. School Dist. Number One, 315 F. Supp. 289 (D. Colo. 1970) (due process requirements inapplicable to suspensions of twenty-five days).

38. *See, e.g.*, Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971) (the seriousness of the penalty imposed determines whether or not the procedures used in imposing it were valid). Expulsions are at one end of the disciplinary spectrum (due process requirements applicable) and minor penalties such as detention are at the other (no need to comply with due process protections). Suspensions are somewhere in between, and it is not readily apparent on which side of the due process line they fall. *See, e.g.*, Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (due process not required where penalty mild); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (court focused on magnitude of the penalty imposed); Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211 (M.D. Fla. 1970), *rev'd per curiam*, 443 F.2d 1350 (5th Cir. 1971) (due process required for suspensions for a substantial period of time); Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969), *supplementary opinion*, 333 F. Supp. 1149 (S.D. Tex. 1971) (where severe discipline is contemplated due process is required); R.R. v. Board of Educ., 109 N.J. Super. 337, 263 A.2d 180 (1970) (due process required prior to imposition of serious sanctions).

39. 419 U.S. at 575-76,

of the "liberty" or "property" language of the fourteenth amendment.[40] However, if the interest is within the language of the fourteenth amendment, the weight of the deprivation is relevant to the issue of whether due process is required to a limited extent because the due process clause does not apply unless the weight of the deprivation goes beyond some constitutional minimum. Courts have measured this minimum differently, according to the nature of the interest affected. A deprivation of liberty generally requires compliance with the due process clause if it subjects a person to a severe detriment or a grievous loss.[41] When property interests have been infringed, less substantial deprivations will render due process protections applicable.[42] Hence the designation of a right as "liberty" or "property" determines the standard by which the deprivation will be measured for due process purposes.[43]

The fourteenth amendment does not require different treatment of property and liberty interests. Historically, the two interests were considered of equal importance.[44] It is not clear why different minimum deprivation measures have developed, though one reason may have been the different characteristics of the interests: property interests are usually tangible, and when property has been taken a court can see visible evidence of deprivation. Liberty interests, however, are not as clearly seen or easily quantified. This obvious difference may explain why courts have demanded more proof when a claimant has alleged a liberty deprivation.

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40. For example, in Morrissey v. Brewer, 408 U.S. 471 (1972), two Iowa convicts alleged they had been denied due process because their paroles had been revoked without a hearing. To determine if due process requirements were necessary, the court examined the nature of the interest in continued freedom from confinement. They concluded the parolee's interest was within the contemplation of the "liberty" language of the fourteenth amendment and worthy of its protection.

41. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (seriously damaging teacher's reputation and standing); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (grievous loss of convict's liberty interests in parole rights). *See also* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

42. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975).

43. *Compare* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (question whether individual deserves procedural protections when liberty interest has been infringed depends on extent to which he has suffered grievous loss), *with* Bell v. Burson, 402 U.S. 535, 539 (1971) (continued possession of a driver's license may be essential to livelihood and suspension of license adjudicates "important interests" which may not be taken without due process).

44. For example, in Coppage v. Kansas, 236 U.S. 1 (1915), the Court said property and liberty interests were coexistent human rights equally protected by the fourteenth amendment.

Although the lower courts have rarely paused to designate the specific nature of the right to an education,[45] the few cases that have done so classified the interest in education created by state statutes as a protected liberty[46] and employed the severe detriment-grievous loss standard. The cases that did not define the nature of the interest also focused on the seriousness of the sanctions imposed: where the consequences of the penalties were found severe upon an evaluation of the facts in the particular setting, due process violations were held to have occurred.[47]

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45. *See, e.g.*, Williams v. School Bd., 441 F.2d 299 (5th Cir. 1971), in which the court extolled the virtues of public education in today's society without defining the nature of the right. Similarly, Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) stressed the social, economic, and psychological value and importance of receiving an education without categorizing its nature as liberty or property. *See also* Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969), *supplementary opinion*, 333 F. Supp. 1149 (S.D. Tex. 1971).

46. *See, e.g.*, Madera v. Board of Educ., 386 F. 2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (disciplinary proceedings can result in loss of liberty to a child); Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973) (education is a protected liberty); Vail v. Board of Educ., 354 F. Supp. 592 (D.N.H. 1973) (liberty denotes the right of an individual to acquire useful knowledge).

An early classification of education as a liberty interest occurred in Meyer v. Nebraska, 262 U.S. 390 (1923). A state law prohibiting under penalty the teaching of foreign languages to children below the ninth grade level was held unconstitutional as applied to an instructor who had taught German to a ten-year-old. The Court stated that the liberty guaranteed by the fourteenth amendment included without doubt the right to acquire useful knowledge, a right they characterized as "of supreme importance." *Id.* at 400.

Education was implicitly treated as a liberty interest in Dixon v. Board of Educ., 294 F.2d 150, 157 (5th Cir. 1961), where the court said: "It requires no argument to demonstrate that education is vital and . . . basic to civilized society."

47. *See, e.g.*, Williams v. School Bd., 441 F.2d 299 (5th Cir. 1971) (a penalty "of this magnitude" cannot be imposed without due process); Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969) (due process is required where severe discipline is contemplated); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969) (since expulsions carry a lifetime stigma, due process must be provided).

The determination of the seriousness of the deprivation is made from the facts of the particular case. The Court could have affirmed the district court's decision in *Goss* on the basis of its finding that serious deprivations of the students' liberty interest had occurred. The district court was presented with evidence establishing the harmful psychological effects of suspension from school that might be sustained by the average student. These effects were as follows:

1. The suspension is a blow to the student's self-esteem.
2. The student feels powerless and helpless.
3. The student views school authorities and teachers with resentment, suspicion and fear.
4. The student learns withdrawal as a mode of problem solving.
5. The student has little perception of the reasons for the suspension. He does not know what offending act he committed.

In *Goss*, the Court characterized the right to an education provided by Ohio law as both a property and a liberty interest, and found due process requirements were applicable because the deprivation of the property interest was not de minimis. It is not clear how the Court measured the deprivation of the students' liberty interest in their standing and reputations.[48] The liberty standard, however, is apparently irrelevant once it is shown that the invasion of the property interest is not de minimis. In determining whether due process has been violated by disciplinary action in a public school, courts need not inquire into the seriousness of the detriment to the student's liberty interest in an education; they need only ask if the deprivation was trivial. Suspension from school may not be a severe detriment, but neither is it a trivial deprivation of property. Thus, the Court may have expanded due process coverage in the context of education by imposing the de minimis test of due process applicability, which requires a lesser degree of proof of loss.

Categorizing the right to education as a property interest appears consistent with precedent. As the Court stated in *Board of Regents v. Roth*,[49] property interests are not created by the Constitution; they are created and their dimensions defined by independent sources such as state laws.[50] This does not mean that a state may grant *conditional* property rights that can be revoked without adherence to due process safeguards. A plurality of the Court determined in *Arnett v. Kennedy*[51] that the state may define what is a property right but, once this has been done, the Constitution defines whether due process applies and what it requires.[52] Greater proce-

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6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a troublemaker in the future.

Lopez v. Williams, 372 F. Supp. 1279, 1292 (S.D. Ohio 1973). A student's suspension may cause his family and neighbors to brand him a troublemaker as well. Ultimately, repeated suspensions may result in academic failure. Norval Goss, Director of Pupil Personnel of the Columbus public school system, testified at trial that students received zeros for work missed during a suspension and any absence from school could have negative educational effects. *Id.*

48. The Court stated that neither the property interest nor the liberty interest involved in *Goss* was "so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses." 419 U.S. at 576.

49. 408 U.S. 564 (1972).

50. *Id.* at 577.

51. 416 U.S. 155 (1974) (Powell, J., joined by Blackmun, J., concurring; White, J., concurring in part and dissenting in part; Marshall, J., joined by Douglas and Brennan, J.J., dissenting).

52. *Id.* at 185 (White, J., concurring in part and dissenting in part).

dural protection may be required by the due process clause than was afforded by the state statute.[53]

Adoption of the de minimis standard as the test for due process violations concerning deprivations of the property interest in education uses de minimis in a context different from that in which it has evolved. When the concept was announced in *Sniadach v. Family Finance Corp.*,[54] the Court clearly was concerned with deprivations of a "specialized type of property," *i.e.*, property essential to day-to-day living.[55] Initially, *Sniadach* was thought to have established a new constitutional doctrine that any taking, temporary or final,

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53. Prior to *Roth* and *Arnett*, states were often permitted to grant benefits and privileges to their residents subject to conditions which provided for termination of those benefits without regard to due process procedures. For example, in Tracy v. Ginzberg, 205 U.S. 170 (1907), a liquor licensee whose license had been terminated insisted he had been denied due process. The Supreme Court held that his expectation was the board's creation, and was therefore subject to limitations which the board imposed. Thus, state statutes creating benefits that were not fundamental rights expressed in the Constitution were permitted to qualify those benefits with conditions subsequent. If the condition occurred, the state could terminate the benefit without the necessity of complying with fourteenth amendment procedural requirements. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951) (public employment is a privilege, not a right, and procedural due process is therefore inapplicable).

The distinction between constitutionally protected rights and state created privileges and benefits has recently been discarded. In Goldberg v. Kelly, 397 U.S. 254 (1970), it was argued that welfare benefits were a matter of statutory entitlement for persons qualified to receive them. The Court recognized that the termination of those benefits involved state action adjudicating important rights, and that a challenge to the procedures used to terminate those benefits could not be answered by an argument that public assistance benefits were a "privilege" and not a "right." *Id.* at 262. *Accord*, Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).

Board of Regents v. Roth, 408 U.S. 564 (1972), firmly laid to rest any lingering notion that a distinction between privileges and rights exists for constitutional purposes. *Id.* at 571. However, certain language in *Roth* was misleading, as it appeared to say states could continue to place restrictions on both "benefits" and "rights." *Id.* at 577. *See* 5 CONN. L. REV. 685, 695 (1973). In Arnett v. Kennedy, 416 U.S. 155 (1974), a majority of the justices rejected this interpretation of *Roth*, since it would amount to nothing more than a return, in different form, to the discredited distinction between rights and privileges. *Id.* at 211 (Marshall, J., dissenting). *Accord*, Mondell v. Mayor & City Council, 378 F. Supp. 219, 222 (D. Md. 1974). The four dissenters in *Goss*, however, appear to be reviving the distinction in their discussion of the states' right to qualify a privilege once it has been granted. *See* 419 U.S. at 586-87.

54. 395 U.S. 337, 342 (1969) (Harlan, J., concurring). In *Sniadach*, a debtor's wages were garnished under the Wisconsin Garnishment Act, WIS. STAT. ANN. §§ 267.02(1)(a)1, .05(1), .07(1) (Supp. 1969), without notice or prior hearing. The Supreme Court held the Wisconsin garnishment procedure deprived the debtor of her property without due process.

55. *See* Comment, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . In Our Economic System,"* 66 NW. U.L. REV. 502, 506 (1971) [hereinafter cited as *Expanding Protection*].

of property essential to everyday living required fourteenth amendment protection.[56] The Court specifically rejected this interpretation in *Fuentes v. Shevin*,[57] implying that the de minimis limitation applied to any significant taking.[58] When the entitlement to public education created by the state was categorized by the *Goss* Court as a property right, de minimis was arguably an appropriate standard for measuring the deprivation. Yet *Fuentes* and *Sniadach* both involved outright seizures of tangible property. It seems equally arguable that the de minimis standard, though not limited solely to "specialized property-basic necessities" situations, was meant to be confined to instances where physical property has been confiscated.[59]

Clearly, the classification of an entitlement to education as a property interest has significantly expanded the potential scope of due process protection in public schools. In so enlarging the boundaries of due process, the Court seemed influenced by several landmark decisions[60] which stressed the vital significance of education

56. *Id.* at 505. *See* 22 CASE W. RES. L. REV. 342 (1971).

57. 407 U.S. 67 (1972). *Fuentes* involved seizure of some household items (including a stove, stereo, bed, and table) under Florida and Pennsylvania prejudgment replevin statutes which did not provide notice or an opportunity to be heard prior to the taking. The statutes were declared invalid for lack of fourteenth amendment safeguards. The Court explained that courts adjudicating due process rights could not make their own critical evaluations of the property deprived and protect only items which they determine are "necessary." *Id.* at 90. De minimis, as applied in *Sniadach*, was mentioned in a footnote. *Id.* n.21.

58. *Id.* at 86.

59. *See* Laprease v. Raymours Furn. Co., 315 F. Supp. 716 (N.D.N.Y. 1970), which expanded "specialized property" to include all household chattels. The court found seizure of ordinary household items without a prior hearing created a hardship which was not de minimis. *See generally Expanding Protection, supra* note 55; 22 CASE W. RES. L. REV. 342 (1971).

In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the scope of *Fuentes* appeared severely limited. *Mitchell* allowed temporary takings of property without prior hearing under a writ of sequestration pursuant to Louisiana law. According to Justice Powell, *Fuentes* had swept too far in requiring an adversary hearing prior to any deprivation of tangible property, no matter how brief the deprivation or how slight the value of the property. *Id.* at 623 (Powell, J., concurring). It appears from North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), however, that *Fuentes* has been resurrected; the Court held that prior hearing and notification were necessary in temporary deprivations of use and possession of property. *Id.* at 605-06, *citing* Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

60. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) ("[i]t can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (board of education must perform its delicate functions within the limits of the Bill of Rights if it is to educate the young for citizenship). It is well established that the constitutional rights of students must be preserved. *See* Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

in our society and the importance of protecting the constitutional rights of participants in the educational process.[61]

In *Epperson v. Arkansas*,[62] a unanimous Court held that courts usually will not and cannot intervene in the resolution of daily conflicts in the school systems which do not sharply implicate basic constitutional values.[63] Justice Powell thought *Epperson* precluded judicial interference with suspension procedures.[64] *Epperson* also stated, however, that " '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[65] While the interest of the state in efficient administration of the school system is an important and legitimate concern, the child's procedural rights cannot be compromised in favor of the exigencies of smooth operation.[66]

Just how far due process can be imposed on the functioning of school systems is an open question. From a literal interpretation of the de minimis standard, the due process clause might now be applicable to numerous decisions by school authorities that have until now been considered totally discretionary. The decisions to pass, fail, or promote a student, to exclude a pupil from participation in extracurricular athletics, or to place a child in a vocational rather than a college preparatory course may now be within the ambit of due process protections.[67] The effects of these decisions are not trivial or de minimis, and *Goss* implies that some procedural safeguards may be necessary to protect the interests of the students involved. As Justice Powell suggests, a broad application of the de minimis standard by the lower courts might well result in allegations of due process violations in areas traditionally governed autonomously by school authorities.[68]

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61. 419 U.S. at 574.

62. 393 U.S. 97 (1968).

63. *Id.* at 104.

64. 419 U.S. at 590 (Powell, J., dissenting).

65. 393 U.S. at 104, *quoting* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

66. *See* DeJesus v. Penberthy, 344 F. Supp. 70, 74 (D. Conn. 1972); Comment, *The Procedural Rights of Public School Children in Suspension—Placement Proceedings*, 41 TEMP. L.Q. 349, 352 n.10 (1968).

67. 419 U.S. at 598 (Powell, J., dissenting).

68. *Id.* at 599. In Dallam v. Cumberland Valley School Dist., 391 F. Supp. 358 (M.D. Pa. 1975), a student had been declared ineligible to participate in interscholastic athletics for one year following his transfer to the Cumberland Valley school district. This decision had been

made pursuant to a Pennsylvania Interscholastic Athletic Association regulation. The plaintiff argued that the right to participate in interscholastic athletics was a protected property right because it was an educational "benefit" which, according to *Goss*, could not be taken without procedural safeguards. The district court in *Dallam* found language in the *Goss* opinion which indicated that due process was not to apply to every separate aspect and incident of education. It decided that *Goss* was limited to actions like suspensions or expulsions that "totally exclude" the student from the educational process. "The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution." *Id.* at 361-62.

It is debatable whether the majority in *Goss* meant to confine their ruling as interpreted in *Dallam*. However, the language in *Goss* regarding "total exclusions from the educational process for more than a trivial period," 419 U.S. at 576, provides an opportunity for lower courts to refuse to review decisions in areas of school discretion other than expulsions and suspensions. Courts in other districts might isolate the de minimis language and apply *Goss* to all school decisions that are not trivial, regardless of whether the decision totally excludes the student. *See, e.g.*, Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972), decided prior to *Goss*. In *Davis*, a student was denied participation in interscholastic athletics because a Fremont City board of education regulation excluded married pupils from school-sponsored extracurricular activities. The court held the school regulation invalid because participation in extracurricular activities was "in the best modern thinking, an integral and complementary part of the total school program." *Id.* at 301, *citing* Brown v. Board of Educ., 347 U.S. 483 (1954).

It seems possible that a period of lower court confusion will follow in an attempt to define the boundaries of *Goss*. If a conflict in interpretations arises, an explication of the dimensions of *Goss* by the Supreme Court may become necessary.