PROCEDURAL DUE PROCESS AFTER *GOSS v. LOPEZ*

The fifth and fourteenth amendments to the United States Constitution prohibit the government and its administrative agencies from depriving an individual "of life, liberty, or property, without due process of law."[1] The fundamental purpose of due process is to secure the individual against arbitrary action by government and place him under the protection of the law.[2] Thus, one aspect of the prohibition is to prevent the deprivation of an individual's protected interest without some sort of minimal procedural protection. For example, prior to the withdrawal of welfare benefits, the government must give the recipient timely and adequate notice which details the reasons for the proposed termination, the right to present his own arguments and evidence, and the right to confront and cross-examine any adverse witnesses.[3] The type of hearing required in each instance will be a function of the governmental and the individual interests at stake. In any event, however, some procedure must be afforded, "for it is procedure that marks much of the difference between rule by law and rule by fiat."[4]

The interests protected and the procedures required by the due process clause have been the subject of continual constitutional evolvement. The latest Supreme Court pronouncement in the area is *Goss v. Lopez*.[5] The case arose when nine students temporarily suspended from their high schools during a period of widespread student unrest in the Columbus, Ohio, public school system in February and March of 1971, brought an action against the Columbus Board of Education and various school administrators under section 1983 of the Civil Rights Act.[6] An Ohio statute[7] gave school principals the authority to suspend

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1. U.S. CONST. amends. V, XIV, § 1.
2. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Dent v. West Virginia, 129 U.S. 114, 123 (1889).
3. Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).
4. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).
5. 419 U.S. 565 (1975).
6. 42 U.S.C. § 1983 (1970).
7. OHIO REV. CODE ANN. § 3313.66 (Page 1972) provides in part:

The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of ex-

pupils for a period not exceeding ten days without requiring any hearing. The complaint alleged that this procedure violated the due process clause of the fourteenth amendment by depriving the plaintiffs of their right to an education. The students sought a declaration that the statute was unconstitutional and sought to enjoin the school officials from issuing future suspensions under the statute and to require them to expunge any references to the suspensions from the school records. A three-judge federal district court found the statute in question to be in violation of the due process clause and granted full relief to the plaintiffs.[8]

Following an appeal by the school administrators, the Supreme Court affirmed the lower court's opinion. The five Justices comprising the majority held that the right to a public education provided by Ohio law[9] was a protected property right under the fourteenth amendment which could not be taken away for misconduct without observance of minimum procedural due process requirements.[10] After concluding that "[a] 10-day suspension from school is not *de minimis* . . . and may not be imposed in complete disregard of the Due Process Clause,"[11] the Court held that in this situation due process requires that the student be given oral or written notice of the charges against him, and, if he denies them, an explanation by the school official of the evidence against him, and the opportunity to present his own version of the story.[12] The Court stated that, as a general rule, notice and hearing

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pulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor.

8. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

9. OHIO REV. CODE ANN. § 3313.48 (Page 1972) ("The board of education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."). *See id.* § 3313.64.

10. 419 U.S. at 574. The Supreme Court's treatment of the students' interest in education primarily as a protected property interest contrasts sharply with the district court's assessment that the state-created right to education was a liberty interest protected by the due process clause of the fourteenth amendment. Lopez v. Williams, 372 F. Supp. 1279, 1299-1300 (S.D. Ohio 1973). The district court devoted only a brief footnote, *id.* at 1299 n.16, to the property interest analysis ultimately adopted by the Supreme Court, while the Supreme Court touched sparingly on the issue of harm to the students' liberty interest without reference to the fact that the lower court had actually based its decision on this ground. 419 U.S. at 574-75. It is unclear from the Court's opinion whether the damage to liberty results solely from the act of suspension (damage to student's standing with his fellow pupils and his teacher), or from the charges appearing on the student's record (interference with later opportunities for higher education and employment), or both.

11. 419 U.S. at 576.

12. *Id.* at 581.

should precede the suspension, but agreed with the lower court that in some extreme situations, such as where a student's continued presence poses a danger to persons or property or threatens to disrupt the academic process, prior notice and hearing cannot be insisted upon. In these instances, the Court held, the necessary procedural safeguards "should follow as soon as practicable."[13]

While the *Goss* opinion is worded to confine itself solely to the fact situation faced, that of short-term school suspensions, it is likely to have a broad impact in the administrative law field. *Goldberg v. Kelly*[14] marked the beginning of a due process expansion that extended the hearing requirements into areas of executive or administrative actions which were once the exclusive domain of administrators exercising unchallenged discretion. This expansion was later slowed by Supreme Court decisions which restricted the coverage of the due process clause to those situations where the government threatened to deprive an individual of interests "already acquired in specific benefits,"[15] threatened an individual's good name, or interfered with his freedom to take advantage of employment opportunities.[16] *Goss*, however, has revitalized the expansionary trend by apparently eliminating the floor below which no hearing is required. This Note will explore the probable extent of that revitalization. First, the effects of *Goss* on the scope of the interests protected by the Constitution will be discussed. The procedural safeguards which the Court held necessary under the *Goss* facts will then be examined, and the impact of this holding on the procedures which may be required in other situations will be evaluated.

PROTECTED INTERESTS

The Supreme Court has on numerous occasions repeated the obvious qualification that the requirements of procedural due process apply only to deprivations of "life, liberty, or property" as those terms are used in the fifth and fourteenth amendments.[17] The Court's assessment of the range of interests thus protected within the "liberty" and "property" categories, however, has not always been uniform. At one stage, a distinction was drawn between those governmental benefits

13. *Id.* at 582-83. For a discussion of those situations where the Supreme Court has approved post-deprivation hearings, see note 88 *infra*.

14. 397 U.S. 254 (1970).

15. See notes 24-28 *infra* and accompanying text.

16. See notes 58-59 *infra* and accompanying text.

17. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

characterized as "rights" and those which were mere "privileges."[18] Due process guarantees were held not to apply to deprivations of privileges, on the theory that the state or federal government could deny the benefit altogether. In its more recent decisions, the Court has rejected this "wooden distinction"[19] and expanded the membership of the classes of protected interests. The Court has made it clear that the class of protected property interests extends well beyond actual ownership of real estate and personalty,[20] and the class of protected liberty interests beyond mere freedom from bodily restraint.[21]

Property Interests

In the leading pre-*Goss* decision of *Board of Regents v. Roth*,[22] the Supreme Court, while purporting to reject rigid and formalistic restrictions, placed a definite limit on the range of interests protected within the property classification. The Court began its analysis by explaining that only the nature of the interest at stake was to be examined, and not its weight, in determining whether the requirements of due process would apply at all.[23] In other words, the competing private and governmental interests were not to be balanced in making this initial determination. Apparently aware of the great expansion of protected interests which would result from the unmitigated rejection of this balancing approach, the Court went on to limit membership in the property class itself, stating that the fourteenth amendment procedural protection of property safeguarded the security of only such interests as "a person has

18. The leading case dealing with the right-privilege distinction is Bailey v. Richardson, 182 F.2d 46, 57-58 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (federal employee can be dismissed at will by appointing authority). *See also* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892) (no constitutional right to be policeman). Supreme Court cases adopting this same rationale include Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) (practice of medicine is privilege), and United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (admission of aliens is privilege). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

19. Board of Regents v. Roth, 408 U.S. 564, 571 (1972); *accord*, Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971). The right-privilege distinction and its subsequent erosion are explored in detail in K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 7.12, 7.13 (3d ed. 1972).

20. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972); *see, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits).

21. Board of Regents v. Roth, 408 U.S. 564, 576 (1972); *see, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father entitled to hearing on his fitness as parent in dependency hearing); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (opportunity to practice law).

22. 408 U.S. 564 (1972).

23. *Id.* at 571.

already acquired in specific benefits."[24] Drawing upon prior case law to identify certain attributes of protectable property interests, the Court observed: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation . . . . He must . . . have a legitimate claim of entitlement to it."[25]

The distinction which the Court was attempting to draw between a mere expectancy and a legitimate claim of entitlement is best illustrated by a comparison of *Roth* and its companion case, *Perry v. Sindermann*.[26] In *Roth*, the Court held that a nontenured teacher who had not been rehired following the expiration of his one-year contract had no protected interest in reemployment for the next year. In the absence of a state statute or university rule or policy, the Court concluded, Roth had no legitimate claim to such employment, and therefore the requirements of procedural due process did not apply.[27] In *Perry*, however, although a nontenured teacher was again involved, the Court held that the refusal to rehire the teacher without first affording him a hearing or giving him an explanation may have violated due process guarantees. The teacher in this case, unlike Roth, claimed more than a mere expectancy in reemployment. He claimed instead that a de facto tenure policy arising from rules and understandings officially promulgated by the college gave him a legitimate claim of entitlement to job tenure.[28]

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24. *Id.* at 576. The Court gave a number of examples of prior cases where it had found a benefit safeguarded by procedural due process. *See id.* at 576-77, *citing* Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Slochower v. Board of Educ., 350 U.S. 551 (1956) (public college professor holding office under tenure provisions); Wieman v. Updegraff, 344 U.S. 183 (1952) (college professor and staff members holding office under term contract). The *Roth* Court also made note of Connell v. Higginbotham, 403 U.S. 207 (1971), where the Court held that due process protections extended to a teacher who, though lacking tenure or a formal contract, was hired under a clearly implied promise of continuing employment. 408 U.S. at 576-77.

25. 408 U.S. at 577. *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (discussion and criticism of "entitlement" and "present enjoyment" doctrines).

26. 408 U.S. 593 (1972).

27. 408 U.S. at 578.

28. The plaintiff, Sindermann, had been a teacher in the state college system for ten years, the last four of which were at a junior college under a series of one-year contracts. Although the college lacked an explicit tenure policy, he offered to prove that a teacher with his long period of service had "no less a 'property' interest in continued employment than a formally tenured teacher at other colleges." 408 U.S. at 601. Reliance was placed upon the policies and practices of the junior college as articulated in its *Faculty Guide* in a section entitled "Teacher Tenure" and upon guidelines promulgated by the state board of colleges. The Court agreed that these facts, if proven, would support the inference of an unwritten "common law" of tenure. *Id.* at 602. The case

The Court may have qualified this distinction by its subsequent decision in *Arnett v. Kennedy*.[29] Reasoning from the notion, articulated in *Roth*, that "property interests . . . are created and their dimensions are defined by existing rules or understandings . . . such as state law,"[30] *Arnett* suggested that the source of an otherwise legitimate claim of entitlement might affect its availability. In this case, a nonprobationary federal employee who had been dismissed from his position challenged the dismissal as violative of due process because he had not been afforded a trial-type pre-removal hearing. In holding that the dismissal did not violate due process, a plurality of the Court found that the same law which granted the governmental employee his statutory entitlement to government employment from which he could not be removed without "cause" simultaneously restricted that right by providing the means by which cause was to be determined.[31] Thus, the employee's protectable right to a government job was qualified by the government's right to discharge him for cause according to whatever procedures it established.[32]

In addition to the requirement of a legitimate claim of entitlement, a number of lower courts prior to *Goss* also required a showing that the deprivation was serious before the requirements of procedural due process would apply. Following the Supreme Court's pronouncement in *Goldberg v. Kelly*,[33] the lower courts would extend procedural protection only where the individual had sustained a "grievous loss" or suffered a "serious effect" as a result of governmental action: the "brutal need" test.[34] While some courts did not read *Goldberg* as

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differs substantially from *Roth*, where the teacher, who had been employed by the university for only one year, failed to offer any evidence of a similar state statute or university rule or policy securing his interest in reemployment.

29. 416 U.S. 134 (1974).

30. 408 U.S. at 577.

31. 416 U.S. at 151-52.

32. The plurality opinion noted that where, as in this instance, the grant of a benefit is simultaneously tempered by procedural limitations, the recipient must learn to "take the bitter with the sweet." *Id.* at 154.

33. 397 U.S. 254 (1970).

34. *See, e.g.*, Caulder v. Durham Housing Authority, 433 F.2d 998, 1003 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (termination of low-rent housing tenant's lease); Wright v. Finch, 321 F. Supp. 383, 386 (D.D.C. 1971), *vacated sub nom.* Richardson v. Wright, 405 U.S. 208 (1972) (termination of disability insurance benefits); Java v. California Dep't of Human Resource Dev., 317 F. Supp. 875, 878 (N.D. Cal. 1970), *aff'd*, 402 U.S. 121 (1971) (termination of unemployment insurance benefits). The court in Anderson v. Finch, 322 F. Supp. 195 (N.D. Ohio 1971), *rev'd on other grounds*, 454 F.2d 596 (6th Cir. 1972), was unable to find that plaintiff had suffered any "draconian effect" from denial of Social Security payments and thus rejected her claim for a pre-termination hearing. *See also* United States v. Husband R. (Roach),

actually requiring application of this "brutal need" limitation, they extended the procedural safeguards only after balancing the interests at stake and determining that the deprivation was sufficiently serious to override the government's interest in avoiding evidentiary hearings.[35] Even after the Supreme Court determined in *Roth* that only the nature of the interest at stake should be examined in determining whether due process applies at all, several lower courts still required a showing of seriousness.[36] The approach taken by the First Circuit was typical: "The stake will be sufficiently large to necessitate some due process if the consequences of the challenged actions of the state officials are sufficiently serious to amount to a 'grievous' loss."[37]

In *Goss*, the Supreme Court had little trouble in establishing that the students who had been suspended had legitimate claims of entitlement to a public education. Noting first that local communities were required under Ohio law to provide free education to individuals of school age,[38] the Court held that the state, having chosen to extend this right to an education to such individuals, must recognize their legitimate entitlement to that education as a property interest.[39] The Court also dismissed the school officials' claim that the due process clause would come into play only when the deprivation by the state would result in a "severe detriment or grievous loss" to the individual. Basing its position on prior case law, it stated that

> the length and consequent severity of a deprivation . . . "is not decisive of the basic right" to a hearing of some kind. The Court's view

453 F.2d 1054, 1062-63 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (no hearing required when bus operator denied access to area reserved for franchised bus company); Hahn v. Gottlieb, 430 F.2d 1243, 1247 (1st Cir. 1970) (no hearing prior to FHA approval of rent increase).

35. *See, e.g.*, Coral Gables Convalescent Home, Inc. v. Richardson, 340 F. Supp. 646, 649 (S.D. Fla. 1972) (withholding of Medicare payments to recipient nursing home to recoup amounts claimed overpaid); Wheeler v. Vermont, 335 F. Supp. 856, 861-62 (D. Vt. 1971) (termination of unemployment benefits).

36. *See, e.g.*, Pelisek v. Trevor State Graded School Dist., 371 F. Supp. 1064, 1066 (E.D. Wis. 1974) ("significant interference with his property rights"); Graff v. Nicholl, 370 F. Supp. 974, 981 (N.D. Ill. 1974) ("any significant private interest"). Absent such a finding, the courts were unwilling to apply any procedural safeguards. *See, e.g.*, Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974) (removal of political appointee from state commission); Watson v. Cronin, 384 F. Supp. 652, 658 (D. Colo. 1974) (denial of press card to former felon).

37. Palmigiano v. Baxter, 487 F.2d 1280, 1284 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 908, *on reconsideration*, 510 F.2d 534 (1974), *cert. granted*, 421 U.S. 1010 (1975); *cf.* Pregent v. New Hampshire Dep't of Employment Security, 361 F. Supp. 782 (D.N.H. 1973), *vacated and remanded*, 417 U.S. 903 (1974).

38. OHIO REV. CODE ANN. §§ 3313.48, 3313.64 (Page 1972). See note 9 *supra*.

39. 419 U.S. at 573-74. The Court's approach differed from the district court's analysis of education as a liberty interest. See note 10 *supra*.

> has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.[40]

Unable to view a ten-day suspension from school as a *de minimis* deprivation, the Court required the imposition of procedural safeguards.[41]

Although the analysis used in *Goss* follows logically from the approach developed in the earlier procedural due process cases, the

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40. *Id.* at 576, *citing* Board of Regents v. Roth, 408 U.S. 564, 570 n.8 (1972); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). But see text accompanying notes 48-54 *infra* for a critique of the Court's authorities.

41. 419 U.S. at 576. Mr. Justice Powell, speaking for the four dissenters, sharply disagreed with the majority's interpretation of prior case law. He first contended that the students had no right to an education apart from the entire package of statutory provisions governing education in Ohio. The legislation which established the right to free education, Justice Powell noted, also explicitly authorized a principal to suspend a student for up to ten days. OHIO REV. CODE ANN. §§ 3313.48, 3313.64, 3313.66 (Page 1972). He attempted to distinguish this case from Arnett v. Kennedy, 416 U.S. 134 (1974), where although the three-Justice plurality held that the employee had no constitutionally protected entitlement to continued employment, six Justices disagreed and found that the employee did have such an entitlement. Two of those six Justices, however, including Justice Powell, concurred in the result that no hearing was required on the ground that the post-termination hearing granted the employee, in addition to provisions for reinstatement and back pay, were sufficient to satisfy the requirements of due process.

In *Goss*, Justice Powell sought to distinguish his earlier position in *Arnett* on the basis of the respective legislative views of the statutory property interests involved in the two cases. In *Arnett*, he noted, it had been possible to infer a clear congressional intent to create a substantial property interest from the presence of a statutory requirement of a showing of "cause" before employment could be terminated. In the *Goss* situation, however, he found no evidence that the Ohio legislature had intended to impose a cause requirement on the temporary suspension of students. He therefore refused to infer a legislative concern with the seriousness of the property interest involved comparable to the concern apparent in *Arnett*. He concluded that the *Goss* majority, in impliedly relying on the *Arnett* analogy, had "disregard[ed] the basic structure of Ohio law." 419 U.S. at 587 n.4.

Justice Powell argued in the alternative that even if the students had an unqualified property interest in education, they had not suffered an injury of constitutional dimension. Taking issue with the majority, he interpreted the prior case law as supporting, rather than refuting, the view that "the Due Process Clause applies ouly where a 'severe detriment or a grievous loss' had occurred." *Id.* at 587-88. Justice Powell summarized his position by quoting from Morrissey v. Brewer, 408 U.S. 471 (1972), decided on the same day as *Roth* and *Perry*, in which the Court reiterated its standard for analyzing due process claims:

> "Whether *any* procedural protections are due depends on the extent to which an individual will be 'condemned to suffer *grievous* loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970)." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972) (emphasis supplied).

419 U.S. at 588.

opinion reflects a significant departure from that analysis, both in terms of the requirement of a legitimate claim of entitlement and the need to establish a serious deprivation. To begin with, while the students were clearly "entitled" to an education under state law, the Court's opinion of the nature of the property interest at stake appears inconsistent with the notion articulated in *Arnett* that the source of the entitlement may also qualify its availability. The Ohio statute which created the system of public education also explicitly provided as part of that system the mechanism for internal student discipline which resulted in the suspensions.[42] Relying on the plurality opinion in *Arnett*, the defendant argued that this legislation must be read as a whole, and thus that the entitlement to an education which otherwise existed was qualified by the right of the school authorities to suspend students for disciplinary reasons according to the procedures prescribed in the statute.[43]

The argument fails when scrutinized through the same type of analysis that made six Justices take exception with the plurality's opinion in *Arnett*. Under the plurality's approach, whatever the nature of the individual's statutorily created property interest, that interest can be extinguished, without notice or a hearing, merely by complying with those procedures set forth by the legislature.[44] But the right to procedural due process is conferred by the Constitution, not the legislature. While the legislature may elect not to grant a property interest in the first place, once it does grant such an interest, it may not authorize its deprivation without adherence to the minimal procedural safeguards required by the Constitution.[45] In *Goss*, the Court perceived that once the Ohio legislature extended the right to free education, it could not constitutionally withdraw that right in the absence of appropriate procedural safeguards.

Nevertheless, the *Goss* majority's approach to the question creates difficulty by introducing a new element into the analysis. The Court failed to pay any regard to the legislature's intent in enacting the statute, and judicially mandated the dimension of the interest at stake. In this respect, *Goss* departs from that portion of the analysis adopted by all the Justices in *Arnett*, which included a determination that Congress had intended to confer some type of entitlement on the government employee who claimed the unconstitutional deprivation.[46] While it is

42. OHIO REV. CODE ANN. §§ 3313.48, 3313.64, 3313.66 (Page 1972).
43. 419 U.S. at 573-74.
44. 416 U.S. at 166-67 (Powell, J., concurring).
45. *Id.* at 167.
46. Arnett v. Kennedy, 416 U.S 134, 159-62 (1974) (Rehnquist, J., announcing the

likely that, faced with the alternative of giving education free of all restrictions or providing no benefit at all, the Ohio legislature would have opted for the former, the Court should at least have made the inquiry. The effect of *Goss* may be to promote the discovery in various statutes of property interests which a legislature did not intend to create, with the result that procedural protections will be improperly extended to the recipients of these newly discovered benefits. An immediate impact of *Goss* will undoubtedly be to encourage a trend already evident in the area of publicly subsidized housing, the practice of finding that tenants have a "property" right in such housing and therefore must be afforded trial-type hearings prior to FHA approval of rent increases, despite the fact that Congress arguably did not intend to confer an unqualified right to housing when it enacted the federal housing legislation.[47]

The Court's adoption of the *de minimis* standard also significantly changes the analysis developed in the earlier due process cases. Though claimed to be supported by existing case law, the standard does not have as strong a foundation as the Court suggested. The only prior holding in which outright approval for the standard arguably can be found is *Fuentes v. Shevin*.[48] There, in a footnote,[49] the Court merely quoted from a concurring opinion in its earlier decision in *Sniadach v. Family*

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judgment of the Court, joined by Burger, C.J., and Stewart, J.); *id.* at 166 (Powell, J., joined by Blackmun, J., concurring in part); *id.* at 171-72, 181 (White, J., concurring in part and dissenting in part); *id.* at 206-07, 209 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting). The nine Justices agreed that the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1970), guaranteed a nonprobationary employee continued employment absent "cause"; their disagreement was over the extent of the property right and the type of procedural protection to be afforded.

47. *Compare* Langevin v. Chenango Court, Inc., 447 F.2d 296, 301 (2d Cir. 1971), *and* Hahn v. Gottlieb, 430 F.2d 1243, 1246 (1st Cir. 1970), *with* Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 489-90 (9th Cir. 1974), *and* Marshall v. Lynn, 497 F.2d 643, 645-48 (D.C. Cir. 1973). In *Langevin*, the court refused to find a protected property right, noting that the purpose of the National Housing Act, 12 U.S.C. § 1715*l* (1970), was to promote "the construction of housing by private enterprise," 447 F.2d at 301, *quoting* S. REP. No. 281, 87th Cong., 1st Sess. 3 (1961), and that Congress could not have intended to confer any such right since it "might well kill the goose in 'solicitude for the eggs.'" 447 F.2d at 301, *quoting* Hahn v. Gottlieb, 430 F.2d 1243, 1246 (1st Cir. 1970). Interpreting the same statute, the courts in *Geneva Towers* and *Marshall* found a protected property right to exist and thus required trial-type hearings.

48. 407 U.S. 67 (1972).

49. *Id.* at 90 n.21. Even in *Fuentes*, while the *de minimis* language was hidden within the footnote, the text spoke of invoking the procedural protection of the fourteenth amendment where there was "[a]ny significant taking of property," *id.* at 86, or when a "significant property interest is at stake." *Id.* at 87.

Finance Corp.[50] which stated that if the "deprivation cannot be characterized as *de minimis*, the individual must be accorded the usual requisites of procedural due process: notice and a prior hearing."[51] The *de minimis* standard was not mentioned by the Court again until *Goss*. Neither *Boddie v. Connecticut*[52] nor *Board of Regents v. Roth*,[53] also cited by the *Goss* Court in support of its position,[54] made specific reference to such a standard.

Nevertheless, the adoption of the *de minimis* standard seems to follow logically from the point made in the earlier cases, in particular *Roth*, that it is the *nature* of the interest at stake, and not its *weight*, that determines whether the due process clause applies.[55] By separating the severity of the deprivation from any determination of the applicability of due process, the Court has placed itself in the position of necessarily demanding some procedural safeguards in any instance of measurable deprivation of a protected interest. In this respect, *Goss* merely represents a reaffirmation of the principle set forth in *Roth*.

The problem with this approach, however, is that *Goss* seems to have abandoned any restriction on the applicability of procedural due process. Although the standard is logically rooted in the language of *Roth*, its unqualified adoption reflects a departure from the practice in *Roth* and other pre-*Goss* decisions of limiting the extent of the interests protected within the property classification.[56] Since *Goss* requires no balancing of competing governmental and private interests at the initial stage of determining whether a property right exists, and essentially no limitation on the membership of the property class itself, there appears to be virtually no floor beneath which a hearing need not be provided. As Judge Friendly noted in a recent article, after *Goss* the question is "whether government can do anything to a citizen without affording him 'some kind of hearing.' "[57]

Liberty Interests

Having noted that *Goss* mandates the application of a *de minimis* standard to determine whether a protected property right exists, one

50. 395 U.S. 337 (1969).
51. *Id.* at 342 (Harlan, J., concurring).
52. 401 U.S. 371 (1971).
53. 408 U.S. 564 (1972).
54. See text accompanying note 40 *supra*.
55. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).
56. See text accompanying notes 22-25 *supra*.
57. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1275 (1975).

would suspect that a similar test would apply to liberty interests. The cases prior to *Goss* delineated two situations in which harm to a person's liberty interest requires due process safeguards: (1) where the government has made charges against the individual which might seriously damage his standing and associations within his community, or which threaten his good name, reputation, honor, or integrity,[58] and (2) where the state imposes a stigma or other disability upon the individual that forecloses his freedom to take advantage of future employment opportunities.[59] In either situation there was a requirement, as with the property interest, that the harm to the liberty interest be "serious" before the procedural protections would become applicable.

Despite its decision concerning protected property interests, however, the Court in *Goss* does not seem to have adopted a *de minimis* test for liberty interests. In finding that the suspensions had deprived the

58. Board of Regents v. Roth, 408 U.S. 564, 573 (1972); *see, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting of individual's name as an alcoholic); Wieman v. Updegraff, 344 U.S. 183 (1952) (discharge from public service on disloyalty grounds); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (designation as Communist organization).

However, in Paul v. Davis, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976), a case decided since *Goss*, the Court appears to have retreated from this position. In *Paul* a photograph of the respondent bearing his name was included in a police flyer of "active shoplifters" distributed to area merchants. The respondent had been arrested on a shoplifting charge, but the charge had been dropped. In reinstating the district court's dismissal of the suit, Justice Rehnquist, speaking for the majority, stated that damage to a person's reputation without accompanying damage to a more tangible interest such as employment, does not support a claim cognizable under section 1983. The Court held that the defamation, standing alone, did not deprive respondent of any "liberty" protected by the procedural guarantees of the fourteenth amendment. *Id.* at 4343. The Court reached its decision even though it accepted as true respondent's allegations that dissemination of the flyer would inhibit him from entering stores for fear of being suspected of shoplifting, and would seriously impair his future employment opportunities. *Id.* at 4338.

In a sharply worded dissent, Justice Brennan argued that the majority opinion "water[s] down" precedents which established that a person's interest in his good name and reputation is protected as a "liberty" interest, by now reinterpreting them as limited to "injury to reputation that affects an individual's employment prospects or, as 'a right or status previously recoguized by state law [that the State] distinctly altered or extinguished.'" *Id.* at 4349. The dissent then added that even under this analysis the "active shoplifter" label had affected tangible interests of respondent by seriously impairing his future employment opportunities. *Id.* at 4350.

59. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); *see, e.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (denial of admission to bar because of adverse statements concerning applieant's moral character); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (denial of admission to bar on basis of prior membership in Communist Party); Truax v. Raich, 239 U.S. 33 (1915) (statute limiting aliens' right to work). *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

students of a protected liberty interest, the Court noted that the charges for which the students had been suspended could "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[60] Although it is difficult to tell from the Court's cursory treatment of the issue, this language suggests that the harm to a liberty interest must reach a certain level of seriousness—something greater than a *de minimis* deprivation—before due process protections will apply.

The Court's apparent reluctance to adopt a *de minimis* standard for liberty interests is justifiable. Such a standard might well result in a hearing every time the government takes a position adverse to that of an individual. In the field of civil employment, for example, "[n]early any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament or character."[61] Application of the *de minimis* standard in these instances would arguably require a due process hearing whenever a government employee, perhaps even a probationary employee, is discharged. Furthermore, the adoption of such a standard would seem plainly inconsistent with the Court's most recent procedural due process cases. For instance, *Board of Regents v. Roth*,[62] in which the Court rejected the claim that Roth had suffered damage to a protected liberty interest, is certainly wrongly decided if a *de minimis* standard is applied. Although the Court could

60. 419 U.S. at 574-75. Justice Powell in his dissent did not feel that the students could claim the sufficient reputational injury to require constitutional protections. *Id.* at 589.

The Court might well have followed the lead of the three-judge district court below and decided the case exclusively upon the liberty interest ground, thus avoiding the seemingly more difficult issue of whether the students' interest in public education was a protected property interest. Factual evidence presented by the appellees might have been sufficient to justify a finding of a serious "stigmatizing" effect on the student. Brief for Appellees at 21-22, 34-35. Instead, the Court placed principal reliance on the property interest aspect of the case. See notes 38-41 *supra* and accompanying text.

61. Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975); *accord*, Jenkins v. United States Post Office, 475 F.2d 1256, 1257 (9th Cir.), *cert. denied*, 414 U.S. 866 (1973). The court in *Gray* refused to require a hearing for a dismissed teacher on the ground that the constitutional concern was only with the type of stigma that seriously damages an individual's opportunity to seek employment elsewhere. 520 F.2d at 806. A similar approach was recently adopted by the Tenth Circuit in Weathers v. West Yuma County School Dist., No. 75-1134 (10th Cir. Feb. 25, 1976). The court held that the nonrenewal of a teaching contract and the reasons therefor, if communicated, while likely to make appellant "less attractive" to future employers, were insufficient to establish a liberty interest. *Id.* at 11.

62. 408 U.S. 564 (1972).

find no evidence that Roth's nonretention would have a "substantial adverse effect" on his future employment prospects,[63] it did acknowledge that it would have *some* effect.[64] Under a *de minimis* standard, a sufficient threat of harm would have resulted from the nonretention to require imposition of procedural safeguards.

In sum, the result of the Court's approach in *Goss* is to impose a dual standard for making the determination of whether a protected interest is involved in a procedural due process case. In one sense, this result is understandable: while the unqualified acceptance of a *de minimis* standard for property interests may be open to question, clearly the endorsement of a similar test for liberty interests could not be justified.

WHAT KIND OF HEARING

The *Goss* opinion also invites new questions on the issue of the type of procedures which the due process clause mandates. The Supreme Court has often recognized the need for different kinds of procedures in varying situations or circumstances,[65] since "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[66] The degree of procedural protection required is determined by balancing the importance of the private interest affected by the proposed governmental action against the government's interest in summary adjudication.[67] The application of this principle is well illustrated by the Court's opinion in *Wolff v. McDonnell*.[68] In discussing the type of hearing to be afforded a prison inmate before disciplinary action could be taken, the Court stated that "it is immediately apparent that one cannot automatically apply procedural rules desigued for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very

63. *Id.* at 573-75 & n.13.

64. *Id.* at 573 n.13.

65. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (prison officials required to give inmates prior notice of disciplinary proceedings and "written statement by the factfinders as to the evidence relied on and reasons" for disciplinary decision); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requirements for parole revocation include preliminary inquiry to determine whether there are reasonable grounds to believe parole violation has occurred and, as soon after the parolee's arrest as is reasonable, formal revocation hearing); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare officials are required to provide recipient an evidentiary hearing prior to termination of welfare benefits).

66. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

67. *Id. See generally* Friendly, *supra* note 57.

68. 418 U.S. 539 (1974).

different situation presented by a disciplinary proceeding in a state prison."[69]

Applying this flexible approach in *Goss*, the Court demanded only that the student be given notice of the actions of which he was accused, an explanation of the basis for the accusation, and, as a general rule, an informal hearing held prior to the suspension which would permit the student to offer his version of the events.[70] The Court explicitly stated that a full-fledged, trial-type evidentiary hearing need not be provided, and recognized that to impose even truncated trial proceedings would overwhelm administrative facilities, placing on them costly burdens and complicating the suspension process to a point where its cost would outweigh its utility as a disciplinary tool.[71]

While the Court's failure to demand more stringent protections may reflect a justifiable reluctance to involve the judiciary in the routine management of a public school,[72] it may have provided for "hearings" that are meaningless.[73] There have, of course, been other cases where less than trial-type hearings have been provided, a result which follows naturally from the basic premise that due process is a flexible concept, with the type of procedures required in each instance dependent on striking a balance among the competing interests at stake. Nonetheless, these cases also make it clear that the procedure afforded in every instance must be "meaningful."[74] The rudimentary procedures provided in *Goss*, where the student's only defense would be his own testimony, with no right to confront or cross-examine adverse witnesses, to call his

69. *Id.* at 560.

70. 419 U.S. at 581.

71. *Id.* at 583.

72. *But see* N.Y. Times, Dec. 18, 1975, at 1, col. 1 (South Boston High School placed under direction of court officer).

73. The very limited procedural safeguards mandated by the *Goss* Court were, in some instances, less stringent than those already provided by Ohio law. 419 U.S. at 596 (Powell, J., dissenting). The Ohio statute, OHIO REV. CODE ANN. § 3313.66 (Page 1972), provided for written notification of the suspension to the student's parent or guardian within twenty-four hours of any suspension, including the "reasons therefor." Moreover, an informal procedure at one of the high schools involved provided that, if the misconduct occurred in the presence of a teacher, the teacher would describe the misconduct in writing and would then send the student and the writing to the principal's office. After listening to the student's version of the events, the principal would attempt to resolve the discrepancies in the presence of both teacher and student. If conflict remained, the teacher's version would be accepted. 419 U.S. at 568 n.2.

74. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.; see* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

own witnesses, or to present other evidence,[75] do not appear to meet this requirement.

More importantly, the Court's endorsement of such minimal safeguards threatens to dilute the procedural protection which the due process clause affords in other areas by encouraging the view that this right is not to be taken seriously.[76] In balancing the competing interests to determine what type of hearing is required by the due process clause in a particular case, a court may be tempted to relax the procedural safeguards it imposes below a level it otherwise would have considered the absolute minimum required by due process. If the cost of providing the protections outweighs the incremental increase in the nature of the afforded protection, or if the governmental action causing injury to the individual is viewed as producing more benefit to the general public than harm to the individual, due process could mean very little to a court. Yet it is in precisely these instances where the individual's rights are threatened by actions allegedly for the general good that the individual needs the greatest protection.[77]

The same warning was recently voiced in *Geneva Towers Tenant Organization v. Federated Mortgage Investors*,[78] in which the Ninth

75. 419 U.S. at 581.

76. *See* Schwartz, *Administrative Law Cases During 1974*, 27 AD. L. REV. 113, 125 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1527 (1975). Mr. Justice Harlan in his concurrence in Ker v. California, 374 U.S. 23, 44 (1963), made reference to a similar problem in defining the standards to be applied to state searches and seizures. In that instance, he thought that the Court, by relaxing the fourth amendment in order to avoid unduly fettering the states, would cause an ultimate dilution of the higher standards applicable to the federal government. *Id.* at 45-46. In *Goss*, the Court, by accommodating the school administration's need for summary adjudication, may have spawned a general relaxation of procedural due process safeguards in other areas. *See also* Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967); See v. City of Seattle, 387 U.S. 541 (1967) (Court relaxed probable cause standard to accommodate requirement of warrant prior to administrative search). Various commentators have questioned whether *Camara* and *See* have in fact advanced the protection of individual rights, *see, e.g.*, LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 37, while others have worried about the dilution effect. *See, e.g.*, Comment, *Administrative Inspection Procedures and the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 155, 164-65, 171-72 (1967); 17 BUFFALO L. REV. 914, 924 (1968).

77. This point is graphically illustrated in *Goss*, where the Court accepted administrative costs as a valid justification for withholding greater procedural protection. 419 U.S. at 583. *See also* Friendly, *supra* note 57, at 1276; Note, *Specifying the Procedures Required by Due Process, supra* note 76, at 1527 (criticizes judiciary for employing "interest balancing" doctrine, arguing that use of utilitarian balancing "effectively abandons any limits on total power of government to injure the individual").

78. 504 F.2d 483 (9th Cir. 1974).

Circuit Court of Appeals interpreted the federal Housing Act[79] as expressing a congressional intent to create a protected property interest under the due process clause in favor of tenants of public housing.[80] Some kind of hearing[81] was, therefore, mandated prior to FHA approval and implementation of proposed rent increases. Faced with the prospect of providing hearings for a potentially large class, the court limited the opportunity to be heard: notice was to be given prior to the proposed rent increase, tenants were to be given the opportunity to make written objections, and the FHA was to provide a concise statement of reasons for its actions.[82] The determination of those instances in which the dictates of fairness would require an opportunity for limited oral presentations, including the right to examine and cross-examine witnesses, was left to the full discretion of the hearing officer.[83] Judge Hufstedler, in dissent, challenged these procedures, noting that the court "in the guise of granting due process . . . eviscerates the due process protections that it purports to grant."[84] She further charged the majority with reducing "[t]he great procedural protections of due process . . . to little more than a right to send and receive mail."[85]

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79. 12 U.S.C. § 1715*l* (1970).

80. 504 F.2d at 488-90; *accord*, Thompson v. Washington, 497 F.2d 626, 638-39 (D.C. Cir. 1973); Marshall v. Lynn, 497 F.2d 643, 645-48 (D.C. Cir. 1973); *cf.* Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973) (same result regarding municipally funded housing); Ponce v. Housing Authority, 389 F. Supp. 635, 648-49 (E.D. Cal. 1975) (farm labor housing funded through Farmers Home Administration). *But see* Paulsen v. Coachlight Apartment Co., 507 F.2d 401 (6th Cir. 1974); Langevin v. Chenango Court, Inc., 447 F.2d 296, 301 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1246-49 (1st Cir. 1970); People's Rights Organization v. Bethlehem Associates, 356 F. Supp. 407, 411-13 (E.D. Pa.), *aff'd*, 487 F.2d 1395 (3d Cir. 1973). Criticism of the courts' decisions finding an entitlement to low rents can be found in the first part of Judge Hufstedler's dissent in *Geneva Towers*. 504 F.2d at 493-98.

81. The term "hearing" has been defined by Professor Davis as "any oral proceeding before a tribunal." K. DAVIS, TEXT, *supra* note 19, § 7.01, at 157. This definition has been challenged by Judge Friendly as being too narrow, however, because of its failure to include circumstances where only written materials are presented. Friendly, *supra* note 57, at 1270. Under a broader definition, the type of proceedings provided in *Geneva Towers* and the other housing cases could be classified as hearings.

82. 504 F.2d at 491-92; *accord*, Thompson v. Washington, 497 F.2d 626, 640-41 (D.C. Cir. 1973); *cf.* Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1169-70 (2d Cir. 1973). The Secretary of the Department of Housing and Urban Development, while still disputing the tenants' *constitutional* right to be heard on rent increases, has recently promulgated regulations which give the tenants a statutory right to procedures similar to those provided in *Geneva Towers*, *Thompson*, and *Burr*. 24 C.F.R. §§ 410.71-74 (1975).

83. *See* Thompson v. Washington, 497 F.2d 629, 641 (D.C. Cir. 1973).

84. 504 F.2d at 498 (Hufstedler, J., dissenting).

85. *Id.*

But while *Geneva Towers* extended to tenants less than what Judge Hufstedler labeled the "barest of minimums"[86] in due process safeguards, it does not pose nearly so great a potential for dilution of due process as does *Goss*. To begin with, the safeguards afforded each individual tenant in *Geneva Towers* seem to be much more protective than those afforded the students in *Goss*. In addition, *Geneva Towers*, and cases like it, do not deal with the statutory rights of any individual; the deprivation involved is common to a large group of persons, and there is no fact situation unique to any individual. Thus, these kinds of cases may easily be distinguished on the ground that the common questions involved make it permissible to limit the protection afforded each individual in order to achieve adequate protection for the group. There is a significant difference between the *Geneva Towers*-type case and most due process cases which concern the deprivation of a particular individual's rights. In the latter, government action is taken on the basis of facts different for each person involved, and hence a procedure designed to bring out such facts in each individual case would seem to be essential.[87]

Goss may also have a diluting effect on the general rule established by the earlier decisions that due process requires a hearing of some kind

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86. *Id.* Judge Hufstedler identifies the "barest of minimums" as "not only adequate prior notice but also a meaningful evidentiary hearing with a right to personal appearance and a right to call and to examine witnesses as well as to present documentary evidence." *Id.*

87. Of course, less than full trial-type hearings have been sanctioned by the Court in cases where there has been injury only to a particular individual's rights. But in these cases, the countervailing governmental interests were very different from the administrative convenience interests present in *Gross*. For example, in Wolff v. McDonnell, 418 U.S. 539 (1974), the Court expressed a fear that permitting a prison inmate who faces disciplinary proceedings to call witnesses, present documentary evidence, or confront and cross-examine adverse witnesses might seriously threaten the security of the institution by creating the risk of reprisals against such witnesses or by increasing the potential for disruption. 418 U.S. at 566-69. Similarly, in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), the Court denied a claim for a due process hearing because of the government's need for unfettered control of the internal operations of a national security installation.

In *Cafeteria Workers*, a cafeteria cook for a private concessionaire on a military installation challenged the actions of the base commander, who denied her future access to the base for security reasons. The Court found no violation of due process even though such denial of access was effected without advising the employee of the specific grounds for her exclusion, or providing her with an opportunity to contest the charge. 367 U.S. at 894-99. The case has undergone recent criticism because of its denial of *any* type of hearing. McNeill v. Butz, 480 F.2d 314, 323-25 (4th Cir. 1973). Moreover, because the case was decided under the "balancing of interests" approach to applicability of the due process clause, rather than under the two-step analysis of Goldberg v. Kelly, 397 U.S. 254 (1970), its continued validity is suspect.

prior to the deprivation.[88] Encouraged by the Court's decision to extend only minimal safeguards to the suspended students because of its desire not to impose procedures that would be unduly burdensome to the school's administration, the lower courts may be more willing to accept government arguments concerning the need to protect the public purse or to maintain an orderly functioning system as justification for demanding only post-action hearings.[89]

Several lower courts would find this interpretation of *Goss* entirely consistent with the position they took prior to *Goss* that in the absence of "brutal need," government interests would normally outweigh the individual's claim to a pre-deprivation hearing.[90] Principal reliance for

88. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 88-89 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). Of course, the *Goss* Court's decision also made it clear that "there are recurring situations in which prior notice and hearing cannot be insisted upon." 419 U.S. at 582. Postponement of notice and hearing until after the deprivation has been sanctioned by the Court in cases where summary administrative action was necessary to protect the public from contaminated food, North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); bank failures, Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); and rapidly rising rents, Bowles v. Willingham, 321 U.S. 503 (1944), and prices, Yakus v. United States, 321 U.S. 414 (1944), in wartime. Where there is a great risk of harm to the public, and the infringement of the private interest is less important, the Court will likely allow summary action pending a later hearing. *See* R.A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). The Court has also recognized the need of the government to secure its revenues promptly, Phillips v. Commissioner, 283 U.S. 589 (1931); Cheatham v. United States, 92 U.S. 85 (1875), or to seize property before it is removed from the jurisdiction, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974), so long as adequate opportunity is afforded for later judicial determination.

In a recent case, Justice Brennan listed three criteria used in determining whether the due process clause would permit governmental action prior to a hearing: "where (1) the seizure is necessary to protect an important governmental or public interest, (2) there is a 'special need for very prompt action,' and (3) 'the standards of a narrowly drawn statute' require that an official determine that the particular seizure is both necessary and justified." Laing v. United States, 96 S. Ct. 473, 487 (1976) (Brennan, J., concurring).

89. *See, e.g.*, Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975) (reduction of survivors' benefits paid to deceased's spouse and dependent children); Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975) (suspension of horse owner's and trainer's permits pending investigation of "doping" charges); Haverhill Manor, Inc. v. Commissioner of Pub. Welfare, — Mass. —, 330 N.E.2d 180, *cert. denied*, 96 S. Ct. 277 (1975) (deduction of alleged overpayments for health care benefits from sum owed to nursing home).

90. *See, e.g.*, Brubaker v. Board of Educ., 502 F.2d 973, 988-89 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Davis v. Vandiver, 494 F.2d 830, 832 (5th Cir. 1974); Eley v. Morris, 390 F. Supp. 913, 920 (N.D. Ga. 1975); Russi v. Weinberger, 373 F. Supp. 1349, 1352-53 (E.D. Va. 1974); Torres v. New York State Dep't of Labor, 321 F. Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *adhered to*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd*, 405 U.S. 949 (1972).

this view was placed on the opinion in *Goldberg v. Kelly*,[91] where the Supreme Court, in holding that a pre-deprivation hearing was required before welfare benefits could be terminated, repeatedly emphasized the unique position of the recipient with regard to the seriousness of the deprivation.[92] As long as irreparable injury did not occur, and provisions were made to enable the individual to receive retroactively all benefits to which he was entitled, the courts were willing to uphold administrative procedures which provided for hearings scheduled immediately, or with all feasible speed, after the deprivation.[93]

It should be noted, however, that not all the lower court decisions since *Goss* have adopted this view. In addition to those courts which had followed *Goldberg* prior to *Goss*, there were other courts[94] which had come to the conclusion that prior hearings were mandated by the due process clause in the absence of extraordinary conditions. Emphasis was placed in part on the Supreme Court's opinion in *Fuentes v. Shevin*,[95] where it was noted that "[t]he right to a prior hearing has

91. 397 U.S. 254 (1970). Many of the courts also relied heavily on Arnett v. Kennedy, 416 U.S. 134 (1974), in which the Supreme Court, by a vote of 5-4, upheld the discharge of a nonprobationary federal employee who was not provided with a pretermination hearing. But because of the divided vote, and the fact that none of the five separate opinions filed commanded more than the vote of three Justices, the rationale of the case is unclear and its precedential value is limited.

92. "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets . . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. . . . Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation, not to be wrongfully deprived of assistance . . . ." 397 U.S. at 261, *quoting* Kelly v. Wyman, 294 F. Supp. 893, 899, 900, 901 (S.D.N.Y. 1968) (three-judge district court opinion in the same case).

93. *See* Alsbury v. United States Postal Serv., No. 75-2138 (9th Cir. Mar. 1, 1976); Frost v. Weinberger, 515 F.2d 57, 67-68 (2d Cir. 1975); Russi v. Weinberger, 373 F. Supp. 1349, 1352-53 (E.D. Va. 1974). The Supreme Court seems to have reached the same conclusion in its recent decision in Mathews v. Eldridge, 96 S. Ct. 893 (1976). In assessing what process is due a disabled worker prior to termination of his disability benefit, the Court stated that "substantial weight must be given to the good-faith judgments of the [officials] . . . that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 4233.

94. *See, e.g.*, T.A. Moynahan Properties, Inc. v. Lancaster Village Cooperative, 496 F.2d 1114, 1118 (7th Cir. 1974); Weiss v. Burr, 484 F.2d 973, 985 n.24 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974); Skehan v. Board of Trustees, 358 F. Supp. 430, 434 (E.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975). *But see* Peacock v. Board of Regents, 510 F.2d 1324, 1328 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975) (Ninth Circuit read Supreme Court decisions in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and Arnett v. Kennedy, 416 U.S. 134 (1974), as rejecting any presumption in favor of prior hearing).

95. 407 U.S. 67 (1972).

long been recognized by this Court under the Fourteenth and Fifth Amendments."[96] Acknowledging the flexibility of due process as to the form of the hearing, the Court insisted in *Fuentes* that the hearing be provided *before* the deprivation at issue takes effect. Only in extraordinary cases would the Court permit postponing the hearing until after the event.[97] This latter group of courts—those which followed *Fuentes*—has interpreted *Goss* as supportive of their position.[98] *Goss* has been viewed as standing for the proposition that the relative weight of the deprivation is not one of the factors to be considered in deciding whether a prior hearing is required.[99]

The significance of these cases, however, must be discounted to some extent. In the first place, all have dealt with proceedings to recover overpayment of benefits to individuals under the Social Security Act, and the courts gave substantial weight to the significant rate of reversal of initial administrative determinations that overpayment has occurred and the long delay between the initiation of recoupment and the hearing.[100] Moreover, *Goss* itself noted that "the *timing* and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved,"[101] thus suggesting that due process does not always demand a *prior* hearing.[102]

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96. *Id.* at 82. *See also* Bell v. Burson, 402 U.S. 535, 542 (1971).

97. 407 U.S. at 82.

98. *See, e.g.*, Elliott v. Weinberger, No. 74-1611 (9th Cir. Oct. 1, 1975); Mattern v. Weinberger, 519 F.2d 150 (3d Cir. 1975).

99. *See* Elliott v. Weinberger, No. 74-1611, at 20-21 (9th Cir. Oct. 1, 1975); Mattern v. Weinberger, 519 F.2d 150, 162-63 (3d Cir. 1975). The latter court read *Goss* as "requiring prior hearings whenever the impact is more than *de minimis*." *Id.* at 164.

100. Elliott v. Weinberger, No. 74-1611, at 19-20 (9th Cir. Oct. 1, 1975); Mattern v. Weinberger, 519 F.2d 150, 161 (3d Cir. 1975).

101. 419 U S. at 579 (emphasis added). The court in Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975), quoted this language from *Goss, id.* at 243, when it held that the state's interest in guarding the purity of horse racing, protecting the patrons from fixed races, and ensuring the humane treatment of the animals outweighed an owner's and trainer's right to hearings prior to the suspension of their permits to engage in racing pending investigation of "doping" charges.

102. The same reading of the Constitution comes from cases following Arnett v. Kennedy, 416 U.S. 134 (1974). *See* Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975); McFarland v. United States, 517 F.2d 938 (Ct. Cl. 1975).

In its latest procedural due process decision, the Court, in light of elaborate procedures for pre- and post-termination administrative consideration, post-termination judicial review, and provisions for full retroactive relief if the individual ultimately prevails, rejected a claim that the due process clause requires an evidentiary hearing prior to the termination of Social Security disability payments. Mathews v. Eldridge, 96 S. Ct. 893 (1976). In reversing the Fourth Circuit's decision, the Court seemed to return to the "brutal need" standard when it compared the hardship imposed upon an erroneously terminated disabled worker with that of the welfare recipient in *Goldberg*. *Id.* at 4231.

CONCLUSION

This Note has focused on the ramifications flowing from the Supreme Court's decision in *Goss v. Lopez*.[103] Although the analysis adopted by the Court follows logically from that developed in its earlier procedural due process decisions, that analysis has been advanced in at least three significant respects. First, in making the initial determination whether a protected property interest exists, the intent of the legislature to limit the availability of the entitlement conferred by a particular statute has apparently become irrelevant. Second, the Court's adoption of the *de minimis* standard has virtually eliminated the floor beneath which a hearing need not be provided, at least for deprivations of property rights. Finally, the Court's adoption of such minimal procedural safeguards because of its reluctance to impose procedures that are unduly burdensome on administrators threatens to dilute the protection the due process clause affords in other areas by fostering the view that this right is not to be taken seriously and by encouraging lower courts to accept government justifications for providing only post-action hearings.

Goss will undoubtedly have a substantial impact on how and when an administrator will be required to provide a due process hearing. Beyond this obvious observation, however, it is difficult to foresee "the ultimate frontiers of the new 'thicket.' "[104]

103. 419 U.S. 565 (1975).
104. *Id.* at 597 (Powell, J., dissenting).