1994

Due process rights for private school students : philosophical, legal and educational bases

Harley. Rabinowitz
Loyola University Chicago

LOYOLA UNIVERSITY CHICAGO

DUE PROCESS RIGHTS FOR PRIVATE SCHOOL STUDENTS: PHILOSOPHICAL, LEGAL AND EDUCATIONAL BASES

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE SCHOOL OF EDUCATION
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF EDUCATION

DEPARTMENT OF EDUCATIONAL LEADERSHIP AND POLICY STUDIES

BY

HARLEY RABINOWITZ

CHICAGO, ILLINOIS

JANUARY 1994

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DUE PROCESS RIGHTS FOR PRIVATE SCHOOL STUDENTS: PHILOSOPHICAL, LEGAL AND EDUCATIONAL BASES

This study identified constitutional principles that make the right of "due process" applicable to non-public elementary and secondary school students. Relevant court cases and judicial opinion, in addition to scholarly writings, were reviewed to determine the relevance of these principles to the non-public school student. A legal argument was constructed to show that the constitutional right to the "due process of law" applied to non-public school students as well.

The constitutional right to the "due process of law" is based on a guarantee of the Fourteenth Amendment of the United States Constitution. The Amendment states, ". . .nor shall any state deprive any person of life, liberty, or property, without due process of law." Public schools, considered an arm of the state, are obligated to provide the "due process of law" before depriving a student of the legal right to education. Legal opinion has, heretofore, judged private school students as beyond the grasp of the Fourteenth Amendment because private schools have not been considered an arm of the state.

Five approaches to securing "due process" rights for private school students were presented and analyzed. These approaches sought to show that the constitutional right of

students. Each chapter provided a different approach to overcoming the apparent "state action" requirement of the Fourteenth Amendment. The approaches were: (i) Natural Law and the natural right to fundamental fairness; (ii) the students' "property" and "liberty" rights to education; (iii) the constitutionally "fundamental" right that students have to education; (iv) the "public function" served by private education which would require private schools to follow the same procedures as public schools; (v) a reevaluation of the century-old "state action" requirement. All of these approaches were presented for the purpose of suggesting a legal, philosophical and educational rationale for securing "due process" rights for private school students involved in disciplinary action that suspends them from school.

Both types of constitutional "due process" ("procedural" and "substantive") were identified and applied to private school students.

ACKNOWLEDGMENTS

The writer wishes to thank Dr. Max A. Bailey, who directed this dissertation, for his support and assistance. Dr. Bailey's expressions of encouragement were often the well-placed impetus to complete this project.

Dr. Philip Carlin, the writer's advisor throughout his graduate study, provided wisdom that was welcomed and appreciated. Professor Allen Shoenberger, a recognized legal scholar, provided invaluable suggestions.

The writer also acknowledges the guidance and kindness of Drs. Bruckenstein, Bravmann, and Feuerman: gifted educators with whom he has worked and from whom he has learned. Dr. Renee Rabinowitz was an essential and accessible resource who provided succor and criticism as only a mother can blend. The School Board presidents with whom he has worked have been true to their task.

The Talmud relates that, in the pursuit of scholarship, Rabbi Akiva left his wife and family for many years. When he returned from the academy, with thousands of students, Rabbi Akiva pointed to his wife and told his students, "My knowledge, as well as yours, is attributable to her." What this dissertation represents is attributable to its author's wife, Chana. This work is dedicated to her in inadequate recognition of her love and support, together with our sons Yosef, Mayer, Yehoshua, and Yehuda (positive thinkers!).

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CHAPTER I

INTRODUCTION

The constitutional rights of non-public elementary and secondary school students have not been clearly defined by the courts. While the law relating to public schools has been developing steadily since 1960,[1] there have been relatively few cases relating to non-public schools. Since 1960, the Supreme Court of the United States has recognized certain rights to which public school students are entitled.[2] No case regarding the rights of non-public school students has ever been decided by the United States Supreme Court.

The landmark case of *Dixon v. Alabama* recognized that students at public colleges have rights to the "due process of law." These rights are protected from federal

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[1]Although *Brown v. Board of Education*, 347 U.S. 483 (1954), is considered a landmark decision in the area of public schools, the case that marks the beginning of development of public school law is *Dixon v. Alabama*, 186 F. Supp. 945 (1960), *rev.* at 294 F.2d 150 (5th Cir. 1961), *cert. den.* 368 U.S. 930 (1961).

[2]*Dixon* broke the judicial restraint to decide cases against the institution. *Dixon* awarded procedural due process protection for public school students. Subsequent cases of note are *Tinker v. Des Moines*, 393 U.S. 503 (1969), that awarded free speech to public school students, *Goss v. Lopez*, 419 U.S. 565 (1975), that awarded due process rights to public school students, and *Wood v. Strickland*, 420 U.S. 308 (1975), that awarded damages from a board of education to public school students.

interference by the Fifth Amendment to the United States Constitution[3] and from state constriction by the Fourteenth Amendment.[4] The right to "due process" was brought down to the public high school level, and presumably elementary as well, by *West Virginia Board of Education v. Barnette*,[5] and, subsequently, by *Goss v. Lopez*.[6]

The predominant constitutional reason why the Supreme Court has held that public school students are entitled to "due process" protection is because of the close connection between public schools and the state government. The public schools are financially supported and statutorily mandated by the state. There are state officers who are directly responsible for the effective running of the public schools. Public schools are viewed as an extension of the state.

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[3]*U.S. Constitution*, Amend. V, provides in relevant part: "No person ... shall be deprived of life, liberty, or property without due process of law."

[4]*U.S. Constitution* Amendment XIV, § 1 provides: "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

[5]*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). ("The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures--Boards of Education not excepted.")

[6]*Goss v. Lopez*, 419 U.S. 565 (1975). (Public school students are entitled to constitutional "due process" before being suspended from school.)

Thus, when the Fourteenth Amendment asserts "nor shall any state deprive anyone of life, liberty, or property without the due process of law" the courts have interpreted this clause as including public schools and their students.[7]

The predominant reason why the courts have not applied the constitutional protection of due process to private school students is because of the nature of the connection between the state and the private school. By definition, the private schools are not financially supported by the state, nor is their daily governance controlled by it. The Fourteenth Amendment's limitation to the "state" brought the Supreme Court to recognize over one hundred years ago that there must be a connection to the state government,[8] called "state action," before "due process of law" is required. Although the Supreme Court has not explicitly ruled on this issue, some lower courts, beginning with *Bright v. Isenbarger*[9], have found "state action" lacking in private schools. These courts have refused to impose "due process"

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[7]*See Barnette, id.*; *Goss*, 419 U.S. at 574.

[8]The connection to the state that is necessary is the result of the holding in *United States v. Cruikshank*, 92 U.S. 542 (1875), and in *The Civil Rights Cases*, 109 U.S. 3 (1883) (where the term "state action" was coined).

[9]*Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind., 1970), 445 F.2d 412 (7th Cir. 1971).

requirements on private school administrators.

DESCRIPTION OF THE STUDY

The Problem

The problem that was investigated was the application of constitutional rights to "due process" rights for non-public school students. The argument was developed that private school students are entitled to the same constitutional rights and protections as their public school counterparts. In auguring constitutional rights for private school students, the argument sought to fit within the constructs of constitutional law and jurisprudence, yet overcome the prevailing notion of "state action."

This study took an approach that varied from dominant legal opinion. Most legal practitioners, as evidenced by the approach taken in documented cases, believe that there is insufficient "state action" to muster the Fourteenth Amendment's due process protections to private school students. Several doctoral dissertations have concluded the same.[10]

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[10]*See, e.g.*, Tieken, Al, "The Application of Statutory and Constitutional Due Process Rights to Nonpublic Elementary and Secondary School Students and Teachers," Ed.D. dissertation, Indiana University, 1981, and Shaughnessy, Mary A., "Student and Teacher Rights in the Private School: Legal Considerations for the Private School Administrator," Ph.D. dissertation, Boston University,

This study constructed a new legal argument to earn constitutional "due process" rights for non-public school students. Its various chapters discuss different aspects of the legal argument, each one pointing to the same conclusion of the legality and educational importance of these rights for private school children. Each chapter will show a constitutional connection between non-public school students and "due process" rights. Traditionally, this connection was believed to be non-existent.

The Supreme Court has identified two types of "due process," known as "procedural" and "substantive" due process. "Procedural due process" refers to the procedure to follow; once the proper procedure is followed, the requirement has been fulfilled. "Substantive due process" refers to the constitutional protection of "fundamental" rights that are stated explicitly or implicitly in the Constitution. They may also be part of the culture and heritage of the American people. "Substantive due process" provides that these rights may not be diminished without a compelling justification.

This study analyzing the "due process" rights for non-

1984. Additionally, these authors analyzed the law and underlying theories from a different perspective entirely.

public school students included a determination of whether these students are entitled to "procedural" or "substantive" due process, which will vary, depending on the approach taken. If private school students are entitled to the same "due process" rights as public school students, then they may enjoy only "procedural due process."[11] One goal of this study, however, was to describe the value of providing "substantive due process" for both groups of children.

Definition of Terms

For the purposes of this study, the following definitions were used:

Private School: any school which is not part of the public school system of the state or school district in which it is located. It may be maintained by private individuals or organizations. It may also be referred to as "non-public."

Administrators: anyone responsible for the governance of the school's students and teachers. They are often referred to by such titles as, Principal, Vice Principal, Headmaster, Headmistress, Head.

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[11]*See Goss*, 419 U.S. at 574.

Substantive Due Process: "the constitutional guaranty that no person shall be arbitrarily deprived of life, liberty, or property; the essence of substantive due process is protection from arbitrary unreasonable action," (Black's Law Dictionary 1281 (1979)), or that "all legislation be in furtherance of a legitimate governmental objective." (Gifis's Law Dictionary 146 (1984)). Substantive due process refers to *what* is done, as distinguished from *how* it is done (procedural due process).

Procedural Due Process: *how* the process of depriving someone of life, liberty or property is carried out; *how* it is done. The minimal requirements of constitutional due process are (i) notice of charges, (ii) an opportunity to be heard, and (iii) an impartial tribunal.

Due Process: itself has no fixed meaning. Justice Frankfurter wrote that due process is compounded of history, reason, and the past course of judicial decisions. It

is a delicate process of adjustment involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[12]

Procedural Fairness: is another term for "due process."

"Fundamental" Right: is a right that is explicitly or implicitly guaranteed in the federal or state constitution.

Strict Scrutiny: is a test of constitutional validity of a statute. If a "fundamental" right is affected then the state must show that there is a compelling state interest that validates affecting the "fundamental" right and that no less intrusive means are available to accomplish the same goal.

Property Right: is a generic term which refers to any type of right to specific personal property, tangible or intangible.

Liberty Right: is a right protected by the "Due Process" clauses of the Fifth and

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[12]*See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

Fourteenth Amendments to the U.S. Constitution, including interests created by legislation.

State Action: an action that can be properly construed as that of the state. State action will be found in such cases as when there is meaningful state participation in a particular activity, the state is entwined with the regulation of private conduct, or there has been a delegation of what was traditionally a state function to a private person or institution.

Statute: an act of the legislature, adopted by prescribed means such that it becomes the law. Statutes are enacted in general to promote the public good and welfare. (Gifis, *supra* p.6, at 453).

Public/Private Distinction: A legal distinction to maintain the difference between public institutions and private individuals. The distinction was drawn in response to the Fourteenth Amendment, after the

slaves were freed, to assure the population that the government would not limit or control purely private behavior. The distinction is related to the "state action" doctrine.

Natural Law: includes certain principles of justice which have prevailed since time immemorial. They are the first principles of reason, with their origin in nature itself. Even God cannot change the natural laws. The responsibility to live by natural laws creates "natural rights" for the people.

Positive Law: is man-made law for the purpose of creating an orderly civilized society. It is expected to reflect natural law as much as possible. When man follows positive law he may be on the highest level of perfection according to those who believe that the state is the highest level of perfection, or he may be headed to disaster if the positive law does not have a significant

component of natural law absorbed in it.

Research Methodology

The traditional tools of scholarly research were used as well as those specific to legal research. The primary methodology and terminology used were, with the exception of the chapter on Natural Law, specific to legal research and analysis.

Volumes of *International Dissertation Abstracts* were reviewed manually, as were *The Education Index* and *Index to Legal Periodicals*.

All volumes of *West's Education Reporter* were examined and cases reported were examined for possible relevance. *The Journal of Law and Education* was particularly useful, as were various publications of National Organization on Legal Problems of Education.

Court cases were reviewed from West's *National Reporter System*; *Shepard's Citations* were useful to follow the history of a case.

The chapter on Natural Law called for more traditional educational sources in the disciplines of philosophy, history, and law.

Overview of Remaining Chapters

Chapter II provides an historical background of the

notion of Natural Law. It will be shown that Natural Law remains a part of the American legal system to this day. "Due Process" is one of the natural rights that issues from Natural Law, so that the constitutional requirement of "state action" is not a relevant concern.

Chapter III accepts the notion of "state action," but tries to show that there is significant jurisprudence regarding other constitutionally recognized rights as well. These constitutional rights have a direct bearing on education. These rights are important enough that, taken individually or collectively, they bring with them a requirement for "due process" before the right to education is limited, regardless of the presence of "state action."

Chapter IV deals with the often-debated question of education as a "fundamental right." The United States Supreme Court decided in 1973, by a 5 - 4 vote, that education is not a federally recognized "fundamental right,"[13] but there have been significant developments since that time. Most important has been the recognition by an impressive number of state supreme courts of education's "fundamental" nature. This is especially meaningful because

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[13]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

education is the single most important function of the *state*, such that "fundamentality" may be best shown, and education best served, on the state level. The particular significance for this study of a showing of constitutional "fundamentality" is that the limitation of education for disciplinary reasons will then carry with it a requirement for "due process." This is because constitutionally "fundamental" rights may not be abridged without standing up to "strict scrutiny," which would call for, at a minimum, procedural fairnesses.

The next chapter, Chapter V, discusses the issue of private schools that serve a "public function." This means that, although a close enough nexus between the school and the state may not be found, and a finding of "state action" not forthcoming, the private school may be seen as having the same mission as a public school and accomplishing the same academic and behavioral goals. Thus, the private school may be seen as taking on the character and requirements of the public school. Accordingly, the private school would be required to offer constitutionally mandated "due process" to its students even without a finding of "state action."

Chapter VI deals directly with the "state action"

doctrine. It suggests that the doctrine should be reinterpreted, with its positive qualities maintained. There are even those who suggest doing away with the doctrine entirely, preferring to look at the merits of the two sides rather than their public or private character. The result, for this study, of these changes in the "state action" doctrine would be that private school students would be entitled to "due process" before suffering disciplinary action.

Chapter VII provides a summary of the reasoning and theories pointing to the provision by private school administrators of constitutional procedural fairness to their students. Specific issues and questions to research are provided for further study.

CHAPTER II

NATURAL LAW AND DUE PROCESS RIGHTS

This chapter will present an historical survey of Natural Law, beginning with the early genesis of this concept. It will show that natural law has a well-respected background, spanning the millennia from antiquity until the modern age. Natural law has maintained this respect because its notions of right and propriety are those that are usually accepted. This respect has been articulated in the decisions of various courts. Natural law is a legal doctrine that carries with it certain legal requirements, including the provision of the due process of law. This study will argue that "due process" is a requirement of natural law, applicable to all people and institutions. Indeed, "due process" is applicable to young people as well. It is a right to which students are entitled, regardless of the governance of their school. The existence of "state action" has no bearing on the provision of the student right to fundamental fairness from the perspective of natural law.

The theory of natural law posits that there are certain principles of justice which are entitled to prevail because of their own excellence. "Natural law, abiding and permanent, has existed from the dawn of humanity as an

instinct of the understanding and knowledge of the first principles of reason."[1] Thus, for example, Sophocles (496-406 B.C.) has the heroine of *Antigone* justify her overstepping of the king's law by appealing to a higher law: "The unchangeable, unwritten code of heaven;/ this is not of today and yesterday,/ but this lives forever, having origin/ whence no man knows..."[2]

According to natural law proponents, law has its basis in nature. Humankind has an inborn capacity to know right and wrong, and law -- at its very essence -- rests not upon the arbitrary will of a ruler or upon the decree of a multitude, but upon reason, *i.e.*, upon humankind's use of reason to identify and codify innate ideas. These ideas cannot be abrogated by man, for their author is the "Divine" itself.[3]

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[1]Jacques Maritain, *An Introduction to Philosophy*, trans. E. I. Watkin (NY: Sheed and Ward, 1962), 101.

[2]Sophocles, II *Antigone* 450 - 60.

[3]Cicero, *Laws*, I, xvi, trans. C. W. Keyes, (Cambridge: *Harvard University Press*, 1948), 345 - 47.

THE EARLY CONCEPTS OF NATURAL LAW

In the early periods of civilization, mores and laws were undifferentiated from religious norms,[4] and all mores and laws, therefore, were seen as stemming from God. The social orders under which people lived, which were based on society's mores, could not be changed unless God, perhaps through a prophet, had ordered them changed. Human ordinances that did not reflect natural law lacked moral substance and were not considered legally binding.

The idea of "natural" law is best understood when it is contrasted to another, human, law. Once humans moved away from their narrow view of law as entirely God-given, then they could begin to distinguish between the various types of law. Humans went beyond their narrow view when they used critical reason to look back over history and note the profound changes that had occurred in the realm of law and mores.

As man became aware of the diversity of legal and moral institutions of his people in the course of its history, especially in comparison to earlier generations, he was finally able to discern the distinction between divine and

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[4]Heinrich A. Rommen, *The Natural Law*, trans. Thomas R. Hanley (St. Louis: B. Herder Book Co., 1947), 3-9.

human law. Man concluded that much of law was man-made or human law, appropriate to particular situations and societies. A notion of divine law remained, however, especially as a criterion for the moral value of man-made laws. This distinction has remained to this day.[5]

Early man learned that the standards by which his society's laws were to be judged were found in an eternal immutable law. This law contains certain principles of right and justice which are entitled to prevail "of their own intrinsic excellence...Such principles are made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it...they are eternal and immutable."[6] In relation to such principles, human laws are "...merely a record or transcript, and their enactment an act not of will or power, but one of discovery and declaration.[7]

As humankind developed, so did the notions of natural law. The classical Greek philosophers drew a distinction

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[5]*Id.*

[6]Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Corwin on the Constitution*, ed. Richard Loss, 2 vols. (Ithaca and London: Cornell University Press, 1981), 1:81.

[7]*Id.*

between two conceptions of the natural law which have survived to this day. One conception sees a natural law that focuses on the individual citizen. This citizen freely enters into a contract with the state for social and utilitarian purposes. The state itself and its laws are artificial and arbitrary, of no intrinsic necessity. The other conception sees the state as the path to reach the highest ideals. The citizen is to subordinate himself to the state and its laws. The state's laws, firmly based on nature and natural justice, help the citizen reach his authentic self. Because it is a human value for a person to try to reach a state of perfection, the person is morally bound to follow the state's laws. The notion of God as supreme Lawgiver is ultimately connected with this latter conception. Both of these tendencies are already plainly visible in the first Sophists and in Heraclitus, the forerunner of Plato.

Heraclitus of Ephesus (*cir.* 536 - 470 B.C.), in holding the later conception, opined that there is a fundamental and universal law, not chance, that rules over the world and establishes order. Man's nature, as well as his ethical goal, is to subordinate his individual and social lives to the general law of the universe. This is the primordial

norm of moral being and conduct. Heraclitus believed that all human laws are nurtured by the divine law. Indeed, the laws of men are but attempts to realize the divine law and legislate accordingly, sharing in the eternal intellect. With Heraclitus, the idea of a natural law for the first time emerged as a natural unchangeable law from which all human laws draw their binding force.[8]

The Sophists (Greece, Fifth and Fourth Centuries B.C.), were proponents of the former conception. They believed that the relationship between the individual and the government was created by a social compact. This compact was for utilitarian purposes, with no value intrinsic to the state's laws and statutes themselves. These laws and statutes were accepted by the populace so as to avoid injury. For the perception was that, before these laws were legislated and the agreements entered into, man behaved haphazardly and lawlessly. Now, law was entirely man-made, "Positive," Law. This brought the Sophists to a crisis, wherein their laws seemed to lack any quality of natural morality. They attempted to resolve this crisis by showing that there was due consideration for "natural law." Thus, for example, they believed that "might is right," and that

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[8]*See* Rommen, *The Natural Law*, 5-7.

this is a natural law. Witness the animal kingdom and warring countries, where the stronger animal or country overcomes the enemy. This, they believed, was a natural occurrence and proof for a natural law of "might is right."[9]

Regarding the role of the state, the Sophists started from the freedom of the individual who had to be liberated from the political bonds of the state. Plato (427 - 347 B.C.), in contrast, saw the state and its laws as the indispensable means for realizing the highest ideals of humanity. This followed Plato's notion that there are certain abstract forms or ideas that represent the true quality of the doctrine. It is humankind's responsibility to copy the idealized heavenly version of the idea on Earth. Thus, Plato believed that the laws of this world are entitled to exist only to the extent that they recapitulate the eternal idea. Man, as craftsman and artist, is to copy these heavenly ideas. This is especially the case in the area of law. Humanly-made law may be judged good or bad based on the extent to which it copies the law of heaven. Positive law is legitimate to the extent that it reflects

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[9]These ideas of the Sophists are discussed in George H. Sabine, *A History of Political Theory*, (NY: Henry Holt and Co., 1937), 25-34.

natural law.

Legitimate positive law has its moral basis in natural law. Accordingly, one who follows such a body of positive law would be moral and just. Thus, the state and its laws provide the foundation for the idealized state of man. The state, as great pedagogue of man, helped man realize his perfected form. Plato was optimistic that a person would use natural law to define and delimit positive law. He cherished positive law and the state for its potential to lead man toward the highest ideals. The Sophists, on the other hand, were pessimistic about man's use of positive law, fearing that he would use it for his own corrupt purposes. They disdained positive law and the state that supported it.[10]

Aristotle (384 - 322 B.C.), agreeing with Plato that positive law wishes to reflect natural law, introduced the principle of equity. Human law, because of life's intricate diversities, could not fill all cases. Thus, human judges were to fill in those gaps with equitable solutions. Equity required that the judge decide the case in accordance with justice, as contained in the natural law.

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[10]Plato's views on natural law are presented in Rommen, *The Natural Law*, 11 - 16.

Both Aristotle and Plato said noticeably little about the *content* of natural law. Their main contributions were to define the legal legitimacy of positive (human) law based on the closeness of its connection with natural law, and the moral imperative to realize this closeness.[11]

The Stoics (Greece, c. 350 - 250 B.C.) were individualists, like the Sophists, but they assimilated some of the teachings of Heraclitus, Plato, and Aristotle. Most significantly, the Stoics emphasized how to determine the content of the natural law. They believed that man could have clear perceptions and make correct judgements through rational insights into his essential nature. Man had simply to prevent himself from succumbing to the excesses of his passions to identify the natural law, for they believed that reason and nature were one. Man may discover the content of natural law when he lives in harmony with himself, with rational thought.[12] This is the meaning of Cicero's

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[11]*Id.* 16 - 20.

[12]Now we may understand Cicero's speech regarding natural law: "This, therefore, is a law ... not written, but born with us, which we have not learnt or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made, which we were not trained in, but which is ingrained in us." Cited by Rommen, *The Natural Law*, 23, n. 10. Later, the content of the law of nature included rules touching such areas as marriage and

statement,

> [W]e can perceive the difference between good laws and bad by referring them to no other standard than Nature...For since an intelligence common to us all makes things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue, and dishonourable actions to vice; and only a madman would conclude that these judgments are...not fixed by Nature.[13]

Thus far, we have seen that the basic elements of the doctrine of natural law already existed in antiquity. The issues at the beginning of the Common Era, and still the issues of today, included such themes as: Law is Will (human will and passion initiate the legislation of laws) versus Law is Reason (human reason is used to identify the laws of nature that are innately present); Law is Truth (truth and morality existed before the state was formed, and transcend the state) versus Law is Authority (a function of the state, the state's legislation of laws creates and defines morality). Additionally, the doctrine of an original state of nature also appeared early, especially among the Sophists

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family, good faith, adjustment or weighing of interests, the original freedom and equality of all men, and the right to self-defense. *Id.*, 28.

[13]Cicero, *Laws*, I, xvi. Cicero (106 - 43 B.C.) was the interpreter and transmitter of the Stoic doctrine of natural law.

and the Stoics.[14]

The alternative to natural law is human or positive law. As we saw above, positive law can be a consequence of the doctrine of will or passion. Positive law views law as the codification of man's passions. It sometimes renounces the efforts to know the essences of things and their hierarchy of values. There are no imperatives, no concern for higher values. Positive law may reflect or include natural law, which would give positive law a moral standing. But as positive law moves further away from any natural law

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[14]As for the concept of a Christian natural law that was developing at around this time, Rommen cites a German author, Johannes Messner, who writes that there was little difference between the existing understanding of natural law and the "Christian" understanding of natural law. Messner writes: "[w]hen we speak of a 'Christian' natural law, that does not mean that the natural law knowable by us through reason alone is replaced or amplified by one derived from supernatural revelation, but that our knowledge of its existence, its essence and its content is confirmed and clarified through the guidance of reason by faith." Rommen, *The Natural Law*, 34 - 35, n. 1. Thus, the Church continued to espouse the use of reason to determine the content of natural law, but it was the Church that was to be accepted as the infallible expounder of natural law. Also, the addition of faith into natural law put God as facilitator of the understanding of reason and natural law in society. It is God: supreme reason, unchangeable being and omnipotent will who inscribes rational nature in the hearts of man. *See Id.*, 34-39.

basis it loses its moral rectitude and claim to legitimacy.[15]

[15]*See* John Finnis, *Natural Law and Natural Rights* (Oxford, England: Clarendon Press, 1980), 351-352, who writes that this is a "subordinate theorem" of the theory of natural law.

THE CONTENT OF NATURAL LAW

Natural law had systematically developed as a concept, but its content was still unclear. This was to change with St. Thomas Aquinas (1225 - 74), who presented a description of the content of natural law.

> This is the first precept of law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based upon this; so that all the things which the practical reason naturally apprehends as man's good belong to the precepts of the natural law under the form of things to be done or avoided.[16]

"Good is to be done, evil is to be avoided." This is the maxim by which St. Thomas became known as a major proponent of natural law. St. Thomas also relied on man's reason to determine the specific content of the natural law. If his previous statement was not sufficiently clear, St. Thomas continued, in the same section of his *Summa*, with a more practical statement.

> [M]an has a natural inclination to know the truth about God, and to live in society; and in this respect, whatever pertains to this inclination belongs to the natural law: e.g., to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.[17]

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[16]St. Thomas Aquinas, *Summa theologica*, Ia, IIae, q.94 a.2.

[17]*Id.*

Here, St. Thomas expressed his belief that man can identify the specific content of the natural law by being in touch with his natural inclinations. Thus, for example, the preservation of life and the avoidance of obstacles are part of the natural law. Aquinas would also include the education of offspring ("to shun ignorance") in this group. Educating their young is something which even the animal kingdom does naturally! Other specific ingredients of the natural law include the precepts of the Decalogue.[18]

Later, Hugo Grotius (Holland, 1583 - 1645) was to be hailed as "the father of natural law theory," a title undeserved.[19] Grotius did make an important contribution to the natural law theory in the area of international law. It was Grotius who pointed to the moral necessity of natural law even while at war.[20] In addition, Grotius spoke about using human judgment to determine that which falls under the rubric of natural law. His salient point was that reason determines the content of natural law, but necessity must be

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[18]This is because the Decalogue contains the very intention of God the Lawgiver. *Summa*, *Id.*, q. 100, a.8.

[19]Rommen, *The Natural Law*, 70-74. Earlier authorities, such as Aquinas, seem more deserving of this venerable title.

[20]*Id.*

part of the equation: There is a *moral necessity* to follow the natural law. One is either required to do what reason declares to be good, or one is prohibited from doing what reason declares to be evil.[21] In addition, Grotius taught that bad acts are evil, not because they are intrinsically at variance with God's essence, but because they are forbidden by God.[22] This view of good and evil looked at the further question of *why* God so decreed as beyond human reason.

John Locke (England, 1632 - 1704) taught that the objective of natural law theory was to establish as inalienable the rights of the individual. Once the state has been created, these inalienable rights do not vanish, but are preserved to serve as an ultimate criterion for judging the acts of the government. Locke seemed to put ideals in their proper perspective: The rights of life, liberty, and property make the law, the law does not create them. The rights of the individual are prior, and in them

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[21]Finnis, *Natural Law and Natural Rights* 44, quoting Grotius's *De Jure Belli ac Pacis* I, c. i, sec. 10, paras. 1, 2.

[22]Rommen, *The Natural Law* 72.

originates whatever (governmental) order exists.[23] It was here that the natural law doctrine was transformed from a theory concerning *duties* exclusively, to a theory framed also in terms of *rights*.

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[23] *Id.*, 88-91. See also *Corwin on the Constitution* 1:119-121.

WHY DOES HUMAN LAW INCORPORATE NATURAL LAW?

Until now, we have surveyed the classical background of the theory of natural law. This is an important step in preparation for the inclusion of this doctrine in the philosophical underpinnings that were to make up the nascent American jurisprudence. Natural law is also important of its own merit, and proudly carries its moral imperative in every institution of our society. By way of summary of our odyssey through the teachings of the great philosophers who supported and developed the notion of natural law, we may ask ourselves a question which must arise from our study: Why was natural law formalized and codified within the corpus of positive law? In other words, we may ask why human law sought to incorporate natural law as part of its legislated laws and statutes.

We shall propose five answers to this question of why natural law was included in subsequently legislated positive law.

(i) To provide a connection to God: As we saw above, the natural law was perceived as the law of Paradise. One gains a taste of Paradise, a communion with the divine, when one follows these natural law statutes. Man found a way to formalize and guaranty a touch of heaven as he follows the

mundane laws of this world.

(ii) Positive law that subsumes the natural law also guarantees morality. A legislature that sought to assure that its citizenry would live moral lives would require, by statute, that morality be followed. Also, people whose consciences dictated to them that they should live moral lives would find it easier if they could simply fulfill the dictates of the positive law.

(iii) To give meaning to social institutions: Man is a social being. He seeks to create social institutions for himself and his fellows. The institutions need guidance on what policies to set and what missions to fulfill. Incorporating the natural law and, by extension, natural rights into the social institutions will vouchsafe these moral policies and goals.

(iv) To provide a connection to secular values: One of the basic principles of natural law is "agreements must be kept."[24] In every society one finds certain agreements that are made between people and between institutions and their constituencies. The creation of a legal structure that incorporates the requirement that agreements be kept,

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[24]*See* Thomas Hobbes (England, 1588 - 1679), *Leviathan* (1651). Hobbes was an early proponent of the Positive School.

as well as other principles of natural law, will make certain that these fundamentals of society are fulfilled.

(v) To provide a connection to the self: We learned that the fulfillment of natural law helps people realize their natural states, states uncorrupted by the vicissitudes of daily life. It is, indeed, a noble yet onerous and perplexing accomplishment to realize one's natural and pure state. It is also an accomplishment to be respected and emulated. Some people search for ways to accomplish this goal. By following the positive law which is inclusive of natural law, and we are obliged to fulfill the positive law in any event, we are led through the thicket to that original state of purity and grace.

THE IMMUTABILITY OF NATURAL LAW

It is important and worthwhile to incorporate natural law into human or positive law. This natural law was seen as discernible by humankind so that they might incorporate it into their legal system. Natural law was seen as immutable, not changing. In fact, God had put certain laws into nature, and even He could not change certain natural laws and rights that all people shared and cherished. Grotius believed in this so strongly that he said that even God Himself, having put this law into nature, "could not make twice two anything but four."[25]

If natural law does not change, then several Bible stories raise serious questions regarding this doctrine of immutability. For example, scholars asked how God could ask Abraham to offer his son Isaac on an altar[26] and how God could command Hosea to marry a women who would be promiscuous as his wife.[27]

Various answers were suggested, but none was truly effective. It is, indeed, very difficult to explain why God veered away from His own laws. Alexander of Hales (d. 1245),

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[25]*Corwin on the Constitution* 1:118.

[26]*See* Genesis 22.

[27]*See* Hosea 1.

following the Stoic tradition, explained that we must distinguish between the natural law before the original sin and the natural law after the original sin. The Stoics believed that, had man not sinned, the second Tablet of the Decalogue (*i.e.*, the last seven of the Ten Commandments) would have been unnecessary. It was only after man was in a fallen state, and human and property relations were not well-respected, that man needed the protection of these Commandments.[28] Thus, the question is, perhaps, resolved. The commandments that God apparently abrogated in His own case (against murder and adultery) were post-sin commandments, implemented for man, but not incumbent upon God.[29]

For some, the question was not yet resolved because the goal was to find an *ethical* explanation for actions of the Biblical God that apparently were contrary the natural order. Alexander of Hales was forced to resort to the doctrine of primacy of God's will. God transcends all laws. One cannot possibly ask questions about God's behavior based

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[28]*See* Rommen, *The Natural Law* 42-44.

[29]This was because God maintained His pre-sin perfect status, to speak in human terms.

on His laws, for God's laws do not apply to Him.[30] They are, rather, for people to follow. When people follow God's laws they reach perfection. God, who is already perfect, is not required to follow these laws. Again, the answer remained unsatisfying to some who were searching specifically for an ethical explanation.

St. Thomas Aquinas held that the notions of justice contained in the Decalogue are eternal and unchangeable. At the same time, their specific application to a specific problem may change from time to time. Sometimes this change is by divine authority alone, such as in matters pertaining to divine institutions such as marriage or life and death. Sometimes this change may be done by human authority, in such areas that are part of human jurisdiction.[31] When God appears to dispense with His natural law, He is acting not as Lawgiver, but as Lord and Master, with dominion over human life. Thus, He may instruct His prophets, Abraham and Hosea, to suspend the prohibitions of murder and adultery respectively, in favor of opposite commands. Because human life and the institution of marriage are God's jurisdiction,

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[30]Rommen, *The Natural Law* 44.

[31]St. Thomas Aquinas, *Summa theologica*, Ia IIae, q.100, a.3.

God is "free" to change the applicability of His laws previously stated. This was St. Thomas Aquinas's response to the question of immutability of natural law raised by the particular Bible stories. God the Sovereign could do what God the Lawgiver could not, and without rescinding the natural law.

To sum up our discussion of the question regarding divine dispensation of natural law, let us look through the practical eyes of the educational administrator. At times, an administrator may be tempted to suspend the provision of rights to a student, much as God apparently suspended His natural law when "needed." The review of God's dispensation with natural law yields three comments to indicate that the administrator may not suspend natural law and natural rights.[32] i) We are living in an era after the original sin. The second tablet of the Decalogue, and all of God's justice legislated after the original sin, apply to us today. Natural law must be followed at all times, without abrogation. ii) God legislated His laws to help humankind reach perfection. God may change His laws, for His inherent

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[32]It goes without saying that the administrator should not use the natural law itself, God's word from heaven to us on Earth, as identified by man's rational thought, to justify his actions *viz.*, the suspension of natural law. God surely does not want to be his partner in sin!

perfection puts Him beyond the need for these laws. Humankind, however, has no claim or right to change what is in God's domain for this would detract from our path to perfection. Thus, we are not entitled to learn from God's example; we may not abrogate natural law. iii) God may change His laws when He sees fit. This is because He is God, and retains the quality of Sovereign, in addition to Lawgiver. Humankind does not possess this quality of Sovereign, such that they are not in a position to change God's laws. Natural law must be upheld at all times. Note that in all cases the conclusion is the same. Whatever the underlying explanation, the administrator, as humankind, is obligated to follow the natural law.

NATURAL RIGHTS LEGISLATED INTO LAW: LORD COKE'S INFLUENCE

We have reviewed the conception of classical antiquity that a law of nature is discoverable by human reason. This reason, when uninfluenced by passion, forms the ultimate source and explanation for positive law. Thus, legislators were challenged to use their intuition and reason to legislate laws that corresponded to the natural law at all times. The closeness of this correspondence was the measure of successful legislation.

Natural law is considered to have made its entree into legislation with the Magna Charta, in 1215.[33] Magna Charta Chapter 39 recognized the fundamental right of each person to certain rights, *per legem terrae*, according to the law of the land. Magna Charta does not provide a definition for the phrase "according to the law of the land," but this phrase has been interpreted as a requirement for procedural fairness in the administration of justice.[34] Specifically the procedures included offering the criminal: (i) judgment before execution; (ii) a judgment of peers; and, (iii) that no free man be punished except in accordance with the law of

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[33]Charles G. Haines, *The Revival of Natural Law Concepts* (Cambridge: Harvard University Press, 1930), 166.

[34]*Id.*, 104.

England -- the law of the land.[35]

England continued to refer to the Magna Charta for many years. One of the more important uses of this "Great Charter" was by Lord Edward Coke in *The Case of the College of Physicians*, commonly called *Dr. Bonham's Case*.[36] Lord Coke presided at this trial as Chief Justice of the Common Pleas.[37] His salient point, destined to be debated for many years, was that any law that goes against the common law, or natural law,[38] goes against the Magna Charta's

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[35]*Id.*

[36]*Dr. Bonham's Case*, 8 Co. 114a (C.P. 1610). Dr. Bonham was judged by the (English) Royal College of Physicians to be deficient in his knowledge of medicine and told that he could not practice medicine in London until approval by the Royal College. In addition, Dr. Bonham was fined, with half the fine going to the king, and the other half going to the Royal College. Lord Coke said that the fact that the Royal College's receipt of part of the monies made them not only judges, but also parties in any cases that came before them. Lord Coke then invoked the common law maxim that no man can be a judge in his own case. His decision was that common law controls judgments, and that any judgment that goes against the common law cannot be fulfilled and is immediately void.

[37]Coke claimed the concurrence of Justices Warburton and Daniel, and also the extra-judicial support of Sir Thomas Fleming, Chief Justice of the King's Bench. 8 Co. 117a, 121a.

[38]English common law is to be understood as natural law. "[T]he early common lawyers treat the common law itself as the embodiment of the *jus naturale* in the guise of 'reason'." Theodore F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century*,

requirement of justice according to "the law of the land" and must be considered void.[39] Of course, the kings were not pleased with such a ruling; future judges (who were employed at the behest of the kings) found it difficult to insist on following Lord Coke's ruling.[40] We find, nonetheless, in Blackstone's *Commentaries*, when he discusses "The King's Duties," that, "The principal duty of the king is to govern his people according to law."[41] Blackstone explains the reason for the king's following the law: "for the law maketh the king."[42] This means that the king holds his position only because the law grants it to him. He must, therefore, never put himself above the law. To

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Cambridge, 1922, p. xxiii, cited by Haines, *The Revival of Natural Law Concepts* 28.

[39]Daniel Webster cites Lord Coke (at *Co. Ins.* 46) as interpreting the Magna Charta's "law of the land" as the modern day "due course and process of law." *Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (1819). It should be noted that although Webster quotes the Magna Charta's Chapter "29," it should be corrected to Chapter "39." See *The Guide to American Law* Appendix (St. Paul: West Publishing Co., 1985), 11:250-51 for translated text of Magna Charta.

[40]*See* Theodore F. T. Plucknett, Bonham's Case and Judicial Review, 40 *Harvard Law Review* 30, 52, 59 (1927).

[41]Sir William Blackstone, *Commentaries on the Laws of England*, Vol. 1, ed. Thomas MuCooley (Chicago: Callaghan and Co., 1899) Book I, Chapter 6, Section 234.

[42]*Id.*

ascertain that the king and all subjects understood the proper priorities, Blackstone continues

> that the laws of England are the birthright of the people thereof: and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the... rights and liberties of the people thereof...are ratified and confirmed accordingly.[43]

We have seen that the government is required to follow the natural law. This is a law that preceded the government and granted it its power. Acts that defy the natural law should be considered void. As we have seen, the natural law includes procedural fairness. Thus, it is understood that the various extensions of the government must provide procedural fairness. Further, individuals must also provide procedural fairness. For, although our Constitution speaks explicitly about the state,[44] that is only in relation to the state's governmental responsibilities. These responsibilities reflected the natural law that was in place for many years -- not to the *exclusion* of the individual,

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[43] *Id.*

[44] *Constitution*, amend. XIV § 1: "[N]or shall any *state* deprive any person of life, liberty, or property, without due process of law." (Emphasis added.)

but rather to the *in*clusion of the state. All persons and institutions must assure that procedural fairnesses are followed at all times. This is a law of nature, not a recent requirement of society's institutions.

The tradition of natural law made its way to the American shores in the seventeenth century. In the early years of colonization, with statutes and laws frequently lacking, judges had little else to guide them in the handing down of decisions save their English common law foundation and the precepts of natural justice and law.[45] As positive legal precepts were developed, these precepts got their validity from their conformity to the ideal body of perfect laws demonstrable by reason and part of the common law.[46]

There is an earlier case on record where positive law was found to be void when it conflicted with fundamental

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[45]Haines, *The Revival of Natural Law Concepts*, 52.

[46]Roscoe Pound, "The Theory of Judicial Decision," 36 *Harvard Law Review* 802 (1923). Also, Plucknett, 40 *Harvard Law Review* at 60, writes that the settlers brought their English tradition with them as a start to the development of a new legal system. There are records of the Colonists ordering copies of Coke's works from England. Also, the Colonists had set out in parallel columns their own laws and the "fundamental and common lawes and customes of England" to show that they were keeping as closely as possible to the system of the parent country. 1 *Hutchinson Papers* (Prince Soc. 1865) 197-247, cited by Plucknett, *Id.*

law,[47] but the notion took hold two generations later around the Stamp Act of 1765. The Massachusetts State House in Boston has preserved a statement by Lieutenant-Governor Hutchinson from September, 1765. Hutchinson said, "...our friends to liberty take the advantage of a maxim they find in Lord Coke that an Act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void."[48] Further, Hutchinson specifically called the Stamp Act an "Act of Parliament which deprives the people of their natural rights"[49] and, the "Act of Parliament is against Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void."[50]

The popularity of the concepts of natural law and natural rights increased with the American Revolution. Positive law could not be mustered to legitimize revolution, for human law -- especially that legislated by the ruling

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[47]*Giddings v. Browne*, cited in 2 *Hutchinson Papers* (Prince Soc. 1865) 1-15. Plucknett assures us, "It is a cardinal fact that to the eighteenth-century American the doctrine of a fundamental common law was familiar, and regarded as quite consistent with the common law scheme of things." 40 *Harvard Law Review* at 70.

[48]26 MS. Archives of Massachusetts, ff. 153-54. Quoted by Plucknett 40 *Harvard Law Review* at 61.

[49]*Id.*

[50]*Id.*

party -- obviously prohibited such acts. Some of the great leaders of the American Revolution referred to the natural rights doctrine extensively.[51] They used the doctrine to support the right of rebellion against the arbitrary exercise of governmental powers.

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[51]For example, Haines, *The Revival of Natural Law Concepts*, 54, quotes John Adams (that there are "rights antecedent to all earthly government --Rights, that cannot be repealed or restrained by human laws --Rights, derived from the great Legislator of the Universe." *Works*, ed. C.F. Adams (Boston, 1865), III,449.) and *Journals of the Continental Congress* (Washington: Ford Edition, 1904), I: 67) (where it was asserted that colonial rights were based on "the immutable laws of nature, the principles of the English Constitution and the several charters or compacts").

NATURAL LAW INCORPORATED INTO THE LAW OF THE UNITED STATES

The Declaration of Independence of the United States finally formalized the acceptance of the natural law doctrine as part of the American heritage. It was natural justice to which Jefferson referred when he wrote that men are "endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."[52] This Declaration soon made Coke's doctrine unnecessary.[53] Common rights or common law is a vague concept. Once the Declaration of Independence stated the United States' commitment to natural rights, with specific assurances soon to follow by the Federal Constitution, Coke's doctrine, and its check upon legislative action, was overshadowed.

At the time of the American Revolution, "natural rights were on their way to becoming national rights."[54] Nonetheless, the specific assurances of the Federal Constitution were slow in coming. A brief review of the history of the Bill of Rights and the Fourteenth Amendment is useful.

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[52]*The Declaration of Independence* (U.S. 1776).

[53]Plucknett, 40 *Harv. L.R.* 30, at 68.

[54]*Corwin on the Constitution*, 1:133.

When the United States Constitution was drawn up in 1787 it lacked any statement regarding the rights of the citizens and safeguards against any undue governmental interference. After the Revolutionary War there was great popular demand to define the rights and limits of the new government in the form of a bill of rights. While several states had composed their own bills of rights, none was included in the U.S. Constitution. Ratification of the Constitution by the states lagged until promises were made that a Bill of Rights would be added in the form of amendments to the Constitution.

When the first Congress met in 1789, James Madison presented a bill of rights. Twelve various amendments were proposed, ten of which were accepted. These ten amendments became the Bill of Rights in 1791. Professor Corwin details what had happened over the course of history: "From [Coke's] version of Magna Charta, through the English Declaration and Bill of Rights of 1688 and 1689, to the Bill of Rights of our early American Constitutions the line of descent is direct."[55] The amendment that is particularly relevant for this study is the Fifth Amendment which provides that no person shall "be deprived of life liberty or property

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[55]*Id.*, 117.

without the due process of law."

The Bill of Rights accomplished its goals of defining the rights of the people and safeguarding against undue governmental interference. It related, however, to the federal government only; it offered no protection against the same interference by the states. This problem was overcome after the Civil War, when, in 1868, the Fourteenth Amendment to the United States Constitution was passed.[56] This amendment directed the Federal government to protect the citizens of the states against arbitrary actions of the state governments.

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[56]*U.S. Const.* amend. XIV, §1 states: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..."

EARLY JUDICIAL OPINION REGARDING THE PRESENCE AND POWER OF THE NATURAL RIGHTS DOCTRINE IN UNITED STATES LAW

Earlier in this chapter, the distinction was drawn between natural law and positive law. Natural law comes from man's reason as he tries to determine the ideal law and life that God prefers for humankind. Positive law is on a much lower plane, being of man's invention, though natural law requires positive law to be based on the natural law doctrine. An understanding of the direction that positive law has taken in America is important for this study. A review of the development of positive law will indicate the underlying philosophy of American legal philosophers and legislators. We will also see that institutions and their officers who were thought to be beyond the reach of the United States Constitution are still very much within its grasp.

Once the Fifth Amendment was in place it became necessary to define its constitutional guaranty of the "due process of law." It would not take long for legal opinion to provide that definition. In accordance with the natural rights that he believed were the birthright of all, Daniel Webster demanded "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after

trial."[57]

As to the implied right and responsibility of the judicial branch when the natural rights of an individual were invaded, Justice Green did not require any explicit statements. He used the due process guaranty to affirm his judicial right to override the legislation. He wrote, "Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. 'The common law,' says Lord Coke [8 Coke, 118], 'adjudgeth a statute so far void."[58]

Subsequently, Justice Field, in his dissent in *The Slaughter House Cases*,[59] continued this tradition when he expressed his view of the Fourteenth Amendment. Justice Field held that it was the intention of the Fourteenth Amendment to "protect the citizens of the United States against the deprivation of the common rights by state legislation."[60] When he needed to define these common

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[57]*Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (1819).

[58]*Bank of State v. Cooper*, 2 Yerg. 599, 603 (1831). (This early case was decided in the Supreme Court of Tennessee.)

[59]*The Slaughter House Cases*, 16 Wall. 36, 83 (1872) (Field, J., dissenting).

[60]*Id.*, at 89.

rights, the Justice applied the "theories of the Declaration of Independence and eighteenth-century natural rights."[61]

At one of the first opportunities to explain his views of the nature of "fundamental" rights, Justice Field did so. He believed wholeheartedly that the Declaration of Independence simply declared the rights that the people were entitled to by virtue of their very birth. Justice Field provided a commentary on the words of the Declaration:

> "We hold these truths to be self-evident" -- that is, so plain that their truth is recognized upon their mere statement -- "that all men are endowed" -- not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights" -- that is, rights which cannot be bartered away or given away, or taken away except in punishment of crime -- "and that among these are life, liberty, and the pursuit of happiness, and to secure these" -- not grant them, but secure them -- "governments are instituted among men, deriving their just powers from the consent of the governed."[62]

Even as Justice Field discussed "inalienable rights," he believed that the Fourteenth Amendment did not have the power to interfere with the state's power to do what it

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[61]*Id.*, at 95. Also, see *Id.*, at 104: "The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists ... and was established here."

[62]*Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

believed it needed to do.[63] With time, the prevailing opinion of the Court was reversed. The minority opinions became the majority opinion, perhaps in the wake of the passing of the Fourteenth Amendment. In *Monongahela Navigation Co. v. United States*, Justice Brewer stated that the Fourteenth Amendment was intended to protect "those rights of person and property which by the Declaration of Independence were affirmed to be inalienable rights."[64] And Justice Harlan wrote, "the power of the legislature in these matters in not unlimited."[65]

What was becoming more and more evident and accepted was the notion that the Creator endowed each person with certain rights which neither an individual nor a government may curtail. Among these rights, "due process" or procedural fairness was certainly to be counted. Thus, it is clear that no school administrator should deprive a student of an education, or for that matter of almost anything, without first explaining why and listening to a rebuttal.

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[63]*Id.*, at 31-32.

[64]*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1892).

[65]*Norwood v. Baker*, 172 U.S. 268, 278 (1898).

JUDICIAL DECISIONS THAT PERPETUATE THE NATURAL RIGHTS DOCTRINE

We have seen that the Fifth and Fourteenth Amendments to the U.S. Constitution guarantee due process to all citizens because of its inherent importance. Due process, or procedural fairness, is a natural right to which all are entitled. The doctrine of natural rights and universal entitlement has continued throughout American history into the twentieth century. We shall review several Supreme Court decisions of this century that include the natural rights doctrine, thereby indicating that the doctrine is still very useful and relevant.

Over the years, the Court has confronted the term "due process of law." In *Twining v. New Jersey*[66], the Court said that few phrases of the law are so elusive of exact definition. At the same time, the Court has declined to give a comprehensive definition of "due process of law," preferring that its full meaning be ascertained gradually by "inclusion and exclusion in the course of the decisions of cases as they arise."[67]

The *Twining* Court also discussed certain general

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[66]*Twining v. New Jersey*, 211 U.S. 78 (1908).

[67]*Id.*, at 100.

principles which help in reaching the proper conclusions regarding due process. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, "that the words 'due process of law' are equivalent in meaning to the words 'law of the land' contained in that chapter of Magna Charta which provides that 'no freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"[68] Thus, *Twining* returns our focus to Lord Coke and the time-honored notion of "law of the land." Most significant, and still in use today, is the dictum that we use a "process of inclusion and exclusion" to ascertain the exact parameters of the doctrine of due process.

In seeking to further clarify the doctrine of "due process of law," the *Twining* Court sends us back to the "settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors... and having been acted on by them after the

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[68] *Id.*

settlement of this country."[69]

While the Court has purposely kept unclear the concept of due process of law, it has also continued to recognize the role of natural justice. *Holden v. Hardy*,[70] cited in *Twining*,[71] states, "This court has never attempted to define with precision the words 'due process of law.' It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[72]

In further recognition of the view that natural law preceded positive law, and that the government's role is to reflect natural law in its legislation, the Court has said, "...in a free representative government, nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with

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[69]*Id. Twining*, at 101, indicates that this definition of due process (reviewing the historical usages in England and on these shores) was actually articulated earlier, by Justice Curtis, in *Den ex dem. Murray v. Hoboken Land and Improvement Company*, 18 How. 272, 280 (1856). Justice Matthews recommends the same test in *Hurtado v. California*, 110 U.S. 516, 528 (1884).

[70]*Holden v. Hardy*, 169 U.S. 366 (1898).

[71]*Twining*, 211 U.S. at 102.

[72]*Holden*, 169 U.S. at 389.

their own will..."[73]

Although it was not the majority decision, some Justices of the Supreme Court ruled in *Adamson v. California*[74] that the entire Bill of Rights is incorporated in the Fourteenth Amendment.[75] This means, according to them, that none of the rights listed in the first ten amendments may be restricted without the due process of law. Specific reference was made to the right to due process stated in the Fifth Amendment, noting its inherent natural importance.

Additionally, judges were urged to be mindful of the "historic meaning" of due process,[76] though the Justices refused once again to define the notion completely. Justice Frankfurter remained ambiguous when he stated that the standards of justice to be used by judges "are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopeia. The judicial judgment in applying the Due Process Clause must move within the limits

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[73]*Twining*, 211 U.S. at 106.

[74]*Adamson v. California*, 332 U.S. 46 (1946).

[75]*Id.*, at 68.

[76]*Id.*, at 67.

of accepted notions of justice."[77]

An important difference of approach was discussed by the *Adamson* court. Justice Murphy agreed with Justice Black that the entire Bill of Rights should be carried intact into the first section of the Fourteenth Amendment. At the same time, however, Justice Murphy was not willing to limit the due process clause to the Bill of Rights exclusively. He believed that the Bill of Rights is a "floor" to the rights to which Americans are entitled. Others on the Court believed that the Bill of Rights was the "ceiling" of rights that may be incorporated in the due process clause.[78] In either event, there remains little question that every American is entitled to due process before his rights are curtailed. Again the Supreme Court recognized the natural rights to which we remain entitled and that the Due Process Clause guarantees.

In *Joint Anti-Fascist Refugee Committee v. McGrath*,[79] Justice Frankfurter repeated his recognition of the right to

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[77]*Id.*, at 68.

[78]Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural Law - Due Process' Formula," 16 *University of California at Los Angeles Law Review* 716, 726 (1969).

[79]*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

be heard as a right "basic to our society."[80] He also stated that "fairness can rarely be obtained by secret one-sided determinations of facts decisive of rights."[81] Justice Frankfurter then raised the issue of communal trust of the judicial process. He discussed the importance of generating the feeling in a democratic society that justice is being done,[82] quoting from Daniel Webster, that "In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to

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[80]*Id.*, at 168 (Frankfurter, J., concurring).

[81]*Id.*, at 170.

Lest one suggest that the prevailing winds in England favoring the notion of natural law had changed, Justice Frankfurter cited various English cases as well. *Board of Education v. Rice*, [1911] A.C. 179 is the leading case that emphasized the importance of an opportunity to be heard. There, Lord Loreburn said, "I need not add that...[the Board of Education] must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything...always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." *Id.*, at 82. The Committee on Ministers' Powers reported in 1936 that while in administrative determination, a minister "...ought not to depart from or offend against 'natural justice.' " Three principles of natural justice were stated to be that "a man may not be a judge in his own case," that "no party ought to be condemned unheard," and that "a party is entitled to know the reason for the decision." *Report of Committee on Ministers' Powers*, Cmd. 4060, pp. 75-80. *McGrath*, at 170, n. 17.

[82]*Id.*, at 172.

satisfy the community that right is done."[83] Frankfurter also quoted an opinion of the Lord Chief Justice of England who wrote in a similar vein, "Time and again this court has said that justice must not only be done, but must manifestly be seen to be done."[84]

A similar line of reasoning applies in the case of a disciplinary hearing in a non-public school. First, justice must be done. This can only be accomplished, as Justice Frankfurter reminds us, by assuring the student's natural right to hear the charges against him and rebut those charges. Second, the student, and his guardian parents, should perceive that justice is being done. A school that wants and expects its students to trust its educational and disciplinary system must provide a system that offers the student every opportunity to exonerate himself. This is especially true when the student risks the stigma of expulsion and the specter of limited education.

Justice Douglas's dissent in *Poe v. Ullman*[85] adds his

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[83]*Id.*, n. 19, quoting Daniel Webster, 5 *The Writings and Speeches of Daniel Webster* 163.

[84]*Rex v. Bodmin JJ* [1947] 1 K.B. 321, 325. *See McGrath*, 341 U.S. at 172 (Frankfurter, J., concurring).

[85]*Poe v. Ullman*, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting). This case dealt the significance of an accused criminal who "pleaded the Fifth Amendment" in a state court.

name to the list of those who would use the Fourteenth Amendment to incorporate the entire Bill of Rights. This is because of his belief that the original intent of the Framers of the Constitution was to enshrine certain rights in the Constitution. The rights to be enshrined were those that have been deeply etched in the foundations of America's freedoms[86] and experience has indicated were indispensable to a free society.[87] These rights have also gained content from the emanations of other specific guarantees.[88] All of this constitutes Justice Douglas's view of what is to be included under the rubric of "due process of law." Justice Douglas also remarks that "[t]his has indeed been the view of a full court of nine Justices, though the members who make up the court unfortunately did not sit at the same

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Since the Fifth Amendment is a federal, not state, right, the question was raised whether the Fourteenth Amendment incorporated the Fifth to protect against self-incrimination in a state court.

[86]*See* Justice William J. Brennan Jr., "The Bill of Rights and the States," 36 *New York University Law Review* 761, 776 (1961).

[87]*Poe V. Ullman*, 367 U.S. at 516.

[88]*Id.* at 517, citing *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 460 (1958).

time."[89]

Justice Harlan wrote his own dissenting opinion.[90] He once again points to the origin of due process: Magna Charta's *"per legem terrae."* This doctrine was added to the Constitution to embrace those rights "which are ... fundamental; which belong ...to the citizens of all free governments,[91] for the "purposes of securing which men enter into society."[92]

Justice Harlan also opined that the fact that the Fifth Amendment of the Constitution provided for due process, and this Amendment is subsumed by the Fourteenth Amendment, there must be some discrete meaning to each guaranty of due process. He felt that due process is a discrete concept that subsists as an independent guaranty of life, liberty, and procedural fairness, more general and inclusive than the

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[89]*Id.* Justice Douglas lists the nine as: Justices Bradley, Swayne, Field, Clifford, and Harlan. Also, Brewer, Black, Murphy, Rutledge, and himself. *Poe v. Ullman, Id.* n. 8.

[90]*Poe v. Ullman*, 367 U.S. at 522 (Harlan, J., dissenting).

[91]*Id.* at 541, citing *Corfield v. Coryell*, Fed. Cas. No. 3,230.

[92]*See Calder v. Bull*, 3 Dall. 385, 388 (1798).

specific prohibitions of the Bill of Rights.[93] At the same time, Harlan maintained the Court's hesitation to reduce due process to a formula. He preferred to interpret the Court's decisions as the continuing balancing of demands for respect for the individual and for the liberties and demands of organized society.[94] A tradition was beginning to develop which indicated that due process fit on a continuum of freedom from all arbitrary impositions and purposeless restraints.[95]

We see clearly that many Supreme Court justices have, over the years, pointed to an American tradition for the proffering of due process. Moreover, every institution that is in a superior position over a subordinate individual would seem to fall under the rubric of this offering. Natural justice requires that the institution should make sure that procedural fairnesses are followed to prevent the denigration of the subordinate. This seems to be the acceptable way for balancing the competing demands for self-expression, especially in a private school. On the one hand, the school should be free to exist and be run

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[93]*Poe v. Ullman*, 367 U.S. at 541.

[94]*Id.* at 542.

[95]*Id.* at 543.

according to the private will of its governors. On the other hand, the student also deserves an opportunity for self-expression. If the two values collide, the conflict can be resolved through open, two-sided communication. Allowing specifically for due process in a non-public school serves as a guaranty that the disciplinary action is, indeed, not arbitrary or capricious.

Griswold v. Connecticut[96] raised the question of the fundamental privacy of the marital relationship. This relationship was not recognized by the Bill of Rights explicitly. Justice Goldberg, writing in concurrence, stated that the "liberty" rights guaranteed by the Due Process Clause are "not confined to the specific terms of the Bill of Rights."[97] Justice Goldberg believed that "this Court has never held that the Bill of Rights or the Fourteenth Amendment protect only those rights that the Constitution specifically mentions by name.[98]

One of the significant points of *Griswold* is its study

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[96]*Griswold v. Connecticut*, 381 U.S. 479 (1965). The case discussed the state's right to limit the use of contraception by married couples.

[97]*Id.* at 486.

[98]*Id.* n. 1.

of the Ninth Amendment.[99] The conclusion is drawn that the language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional "fundamental" rights, protected from governmental infringement, which exist alongside those "fundamental" rights specifically mentioned in the first eight amendments.[100] Although the Constitution does not state explicitly what these rights may be, perhaps it is tradition, experience, or the requirements of a free society that may bring other rights to the fore.[101] Whatever these rights may be, and however they are accurately defined, the due process clause is said to include them. Justice Black, in dissent,[102] provides the reader with a long list of cases where the Due Process Clause was used to protect against any abridgement of natural justice.[103] He

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[99]*U.S. Constitution* amend. IX, ratified in 1791, states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[100]*Griswold*, 381 U.S. at 488.

[101]*See Poe*, 367 U.S. at 517 (Douglas, J., dissenting).

[102]*Griswold*, 381 U.S. at 511 (Black, J., dissenting).

[103]These include, for example: The Court may forbid state action which "shocks the conscience," in *Rochin v. California*, 342 U.S. 165, 172 (1952), or goes against the "decencies of civilized conduct," *Id.* at 173, or has "some

concludes with the suggestion that the "clearest, frankest, and briefest explanation of how this due process approach works is...that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can 'not tolerate.'"[104] It is this writer's belief that suspension from a non-public school is certainly within the "catchwords and catch phrases"[105] used by the Supreme Court. Denial of such a time-honored and universal practice as due process should shock our collective conscience. We should protest the disciplinary action that would occur without the provision by the school administrators of the "fundamental" right of due process.

We have seen that the doctrine of natural rights and justice is still very much alive in our judicial

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principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental," in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) or cannot be involved in the "denial of fundamental fairness, shocking to the universal sense of justice," in *Adkins v. Children's Hospital*, 261 U.S. 525, 561 (1923). *See Griswold*, 381 U.S. at 512, n.4 (Black, J., dissenting).

[104]*Griswold, Id.*, citing *Linkletter v. Walker*, 381 U.S. 618, 631 (1964).

[105]*Id.* at 511, n. 4.

culture.[106] This doctrine assures the realization of this study's goal of finding the private school student's right to Due Process. The Due Process Clause has been shown to serve as the constitutional assurance for fundamental fairness that must legally be provided to these students at all times. When a private school student would come before a court claiming disciplinary expulsion without due process, the court would be required to reverse the expulsion. Because of the doctrine of natural law, the court must insist on the provision of due process to all, by all.

Thus far, this study has looked at "due process" rights as the right to procedural fairness. Each student has a natural right to an impartial hearing and an opportunity for rebuttal before being punished. These fairnesses have become known as "*procedural* due process." Since the 1905 decision of *Lochner v. New York*,[107] the United States Supreme Court has recognized the category of "*substantive* due process." This category protects all rights stated

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[106]Justice Stevens, dissenting in *Meachum v. Fano*, 427 U.S. 215, 229 (1975) (Stevens, J., dissenting), reminded us of our commitment to the notion "that all men were endowed by their Creator with liberty as one of the cardinal inalienable rights. It is that basic freedom which the Due Process Clause protects..." *See Id.* at 230.

[107]*Lochner v. New York*, 198 U.S. 45 (1905).

explicitly, or implicitly, by the Constitution against being diminished without a compelling reason.

Where do the protections of the two types of "due process" fit in the doctrine of natural law? In this writer's judgment, the historical development of natural law, from Magna Charta to Lord Coke to the Declaration of Independence to specific judicial decisions point to the natural right of fundamental fairness. Every student is entitled to a hearing in front of objective judges, with the opportunity for rebuttal and perhaps the testimony of witnesses before disciplinary action is imposed upon them. These fundamental fairnesses comprise "procedural due process."

At the same time, "substantive due process" is also part of natural law. The same doctrine of natural law that allows for nullification of legislation that is contrary to natural justice finds expression in the constitutional protections of "substantive due process." Daniel Webster quotes Lord Coke that a law that goes against one's natural rights is immediately void; Blackstone writes that even the King of England must follow the existing law. This overriding power of natural law is included in the modern day notion of "substantive due process." The requirement to

show a compelling reason to allow the limitation of one's natural ("fundamental") rights is the Constitution's equivalent to Lord Coke and Blackstone. Thus, both contemporary aspects of due process, "procedural" and "substantive," include the requirements of natural law.

As school administrators implementing a discipline program, it is more common to face issues of "procedural due process." An administrator who refuses to follow the proper procedures has severely limited the student's natural right. The consequence of this limitation should be nullification of the administrator's decision. Couple the student's natural right to procedural fairness with the natural right to education, to be discussed in the next section of this chapter, and nullification of the disciplinary action is clearly warranted.

As administrators facing the possibility of a student's long-term suspension or expulsion, the larger issue of natural rights to due process in general and education in particular are invoked. Then "substantive due process" is appropriate to show why the needs of the school, and perhaps the student, are fulfilled only with the student's removal from the school responsible for providing the "fundamental" benefit of education.

THE NATURAL RIGHT TO EDUCATION

There remains the natural right to education that must be reviewed. The Due Process Clause, as the "protector" of natural rights should also protect the student's "fundamental" right to education.

Education is a universal value.[108] All human societies educate their young in matters practical (*e.g.*, avoidance of dangers) and also speculative or theoretical (*e.g.*, religion). St. Thomas Aquinas taught that there are several "first" principles and general precepts of natural law. After "human life," he lists the coupling of man and woman and the education of the young.[109] Aquinas is quite clear that education is a natural right of the young. If we couple this natural right to know with Aristotle's teaching, that all people have a desire to know,[110] then it becomes clear that education should be protected, by the tenets of due process and natural law, from limitation.

Further, Aristotle said that the best thing for a

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[108]John Finnis, *Natural Law and Natural Rights*, Oxford, England: Clarendon Press, 1984), 83.

[109]St. Thomas Aquinas, *Summa theologica* I-II q. 94, a. 2c. Aquinas also lists "to shun ignorance" as part of natural inclinations. *Id.*

[110]Aristotle, *Metaphysics*, I, 1: 980a22.

person to know is the highest good in the whole of nature; this is God.[111] The reader will immediately sense the problem: Children have a natural interest to learn, society wants them to learn its ways, and these ways include knowledge of God. If the school accomplishes its most desirable goals, it will be teaching about God to actively involved students who are absorbing the teachings and implementing them in society.

There is no problem with this multiple accomplishment in a private sectarian school. The realization of these goals is often the very reason parents enroll their children in this type of school. They will be pleased to see their children learning about God and living by His word in society. But there is a major problem in the public non-sectarian sector! Thomas Jefferson spoke of the "wall of separation" that must separate between church and state, religion and the government.[112] The public schools cannot constitutionally teach the very educational goals and natural rights of Aristotle and Aquinas.

Accordingly, if a private school takes disciplinary

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[111]*Id.*, I, 2:982b7-8.

[112]Cited in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878), citing 8 *Thomas Jefferson's Works* 113.

action against a student and the student leaves in favor of a public school, then the education the student will receive has changed dramatically. As a public school student he will be deprived of his natural rights to learn about God and live a religious lifestyle. Deprivation of such natural rights should not be done without procedural fairness.

The *Pierce* court held that the religious rearing of their children is a "fundamental" right of parents.[113] For a private school to deprive the parents of this opportunity, and for students to lose their enriched education, may warrant more than simple procedural fairness. The school should seriously consider showing that the student has "earned" this expulsion and that all other, less traumatic, solutions were futile.

Certainly, a public school student could study religious teachings in the privacy of home, thus obviating the spiritual distress of expulsion from a religious school. This is, however, not necessarily the case. The home may not be the best place for this study. As Plato taught, the *polis* (state) is the "great pedagogue." It is, therefore, the state's function to educate the child, not the

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[113]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

parent's.[114] According to Aristotle,[115] it is the *polis* that must ultimately provide whatever is necessary for the full and complete development of the person.[116] It is the school, as the professional extension of society for the education of its young, that is responsible to teach, not the home.[117]

The school, as an extension of society, non-sectarian or sectarian, must teach its society's values.[118] In addition to the knowledge component that the school must

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[114]Plato, *Polis* VIII, I: 1337a23-32.

[115]Cited in Finnis, *Natural Law and Natural Rights*, at closing note on VI.6, p. 160.

[116]This is the underlying reasoning of the doctrine of *parens patriae*, where the state may use its authority and guardianship of the child to assure that he is properly educated. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Gardner v. Hall*, 26 A.2d 799 (1942).

[117]Aristotle's notion of the state's ultimate responsibility to prepare the child for adult citizenhood need not be seen as contradictory to the United States Supreme Court decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that the parents have a natural right to rear their child as they please. *Pierce* is a free exercise of religion decision, indicating that parents may select the school they prefer. But the children must get educated, as the state has an interest in educated citizens who can participate in our form of democracy and be self-reliant and self-sufficient participants in society. This was also the state's argument in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and was accepted by the Court at 221.

[118]absent a contradictory value, as discussed above, such as the separation of Church and State.

impart, it must also teach such social values as mutual respect. Since the best teaching is by example, procedural fairness should be followed so that the student who is being disciplined and his schoolmates learn about respect. The lesson to the students will be clear: Even a student who is being punished deserves to be treated with respect!

There is a further consideration for the school before its personnel expel a student. The school is acting on behalf of the student's political or religious governing board. One of the objectives in the founding of this communal institution was for its members to realize the highest ideals of the "good life." A student whose behavior contradicts those ideals, or who prevents others from realizing their's, is often censured. The board is usually given the right to perform this censure, according to certain guidelines and procedures. The censuring should be done at the level of the "highest ideals."[119] This undoubtedly includes the providing of the "higher order"

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[119]This is especially the case if the censured child is being excluded from membership or participation in the group. Abraham Maslow has written extensively (beginning in the 1950's, with *Motivation and Personality*, New York: Harper and Row, 1954) about the natural need that people feel for belongingness to a group. To affect that natural and basic need of belonging to a group without the protection of procedural fairnesses cannot be countenanced.

right of due process to the affected student.

This chapter surveyed over two thousand years of thinking on the subject of natural law and rights. From the earliest of time, man believed that there are certain laws of nature that must be upheld at all times. Man does not create these laws, but discovers God's laws in nature.

This notion remained in effect even after Positive (human) Law was codified. The balance between positive and natural law was that man is morally bound to follow the natural law for the sake of reaching perfection. Concurrently, good positive law reflects God's idealized version of law and gains legitimacy from its approximation to natural law.

The Magna Charta is seen as the early code of justice that led eventually to our United States Constitution. The Magna Charta requires certain procedural fairnesses that have remained in effect ever since. The Magna Charta also taught, with clarification by Lord Coke, that a law that violates a natural law is automatically void.

The content of natural law has remained vague. In general, man is to use his power of reason to determine the content of natural law. Even in today's jurisprudence, where the natural law is often reflected in the modern "due

process," the Supreme Court has purposely not given a specific delineation of what due process rights entail.

This chapter also reviewed the importance of including natural law in the codification and implementation of positive law. It looked at ways to interpret the apparent changes in natural law that God commanded.

It was determined that natural law is still very much a part of the American legal heritage. This began with the "inalienable rights" clause of the Declaration of Independence and has continued well into our century. Various Supreme Court decisions have renewed America's commitment to the notion of an ideal law and world which is ours to discover.

Special analysis was suggested, showing that the right to education itself is a natural right. This brought us squarely to the contention that disciplinary action in a private school requires procedural fairness before it will be legitimized or accepted by a court of law. In essence, both due process and natural law are natural rights of our personhood. If they must be diminished, natural law requires that basic procedural fairness, such as a hearing and opportunity for rebuttal, be forthcoming. It was also suggested that where the door of education is completely

closed to students, a higher level of "due process" should be required. This level, similar to "substantive due process," would require the school to show that no better option was available to it save expulsion.

As for the claim that the United States Constitution requires that due process be provided only if there is "state action," it was shown that natural law supersedes these constitutional requirements. Thus, the constitutional rights of "due process," that are derived from natural law, apply to public and private school students alike. When the Constitution was formalized, it included natural law in its precepts -- not to the exclusion of the individual, but to the inclusion of the state.

CHAPTER III

PROCEDURAL FAIRNESS IN CASES OF DEPRIVATION OF PROPERTY AND LIBERTY RIGHTS FOR PRIVATE SCHOOL STUDENTS

The Supreme Court of the United States has held that public school students have a constitutional right to due process of law.[1] This decision is based on the language of the Fourteenth Amendment of the United States Constitution: "...[N]or shall any State deprive any person of life, liberty, or property without due process of law." Public schools are considered extensions of the state and, thus, must provide all of the usual constitutional safeguards.[2] Public school students "do not shed their rights at the schoolhouse door."[3]

What is the law regarding the constitutional rights of private school students? This question has never been addressed by the Supreme Court. Lower courts, however, have typically found that constitutional rights do not apply to

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[1]*Goss v. Lopez*, 419 U.S. 565 (1975).

[2]*Id.* at 572.

[3]*Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

non-public school students.[4] This is because of the particular wording of the Fourteenth Amendment: "...Nor shall any *state* deprive any person of life, liberty, or property, without due process of law."[5]

This chapter will address the question of whether constitutional rights that have been accorded public school students are applicable to non-public school students. The decisions in the public school cases as well as various private school cases will be reviewed. In addition, alternate ways of looking at the same legal background will be proposed in an attempt to secure constitutional rights for private school students.

As background for these decisions, we shall review the doctrine of "due process" in the United States Constitution. This study's chapter on Natural Law describes the historical, social and moral aspects of "due process." This chapter deals with its place as a protector of the "property" and "liberty" rights of education.

The concept of "due process of law" appears in the Bill of Rights, specifically in the Fifth Amendment to the United

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[4]The original decision, followed by many state courts, is *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

[5]*U.S. Const.* amend. XIV, § 1. Emphasis added.

States Constitution. There we find, "nor [shall any person] be deprived of life, liberty, or property, without due process of law." As explained in the chapter on Natural Rights, the Fifth Amendment applies only to the federal Government. However, the phrase "due process of law" was later made applicable to state governments by the Fourteenth Amendment, Section One, which states: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

"DUE PROCESS OF LAW" -- A DEFINITION

An accurate and exact definition of "Due Process of Law" has never been provided by the United States Supreme Court. The phrase has been studied, with ongoing attempts at determining a clear definition of its meaning. It is clear that "due process of law" is related to a fundamental fairness that must be provided before the government deprives someone of his property or liberty. The Supreme Court has generally held that "due process" requires that notice and the right to a fair hearing be provided before the deprivation.[6] The Court has preferred to leave "due process" without a fixed meaning, and allow it to expand with jurisprudential attitudes of fundamental fairness.[7] Furthermore, what fairness must be accorded is not specifically mandated. Instead, "considerations of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.[8] Justice Frankfurter recognized the historical and

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[6]*See Frank v. Mangum*, 237 U.S. 309 (1915).

[7]*See Palko v. Connecticut*, 302 U.S. 319 (1937).

[8]*See Goldberg v. Kelley*, 397 U.S. 254, 262-63 (1970).

legal importance of due process, and explained why it has not been defined with precision.

> The requirement of "due process" is not a fair weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness *between man and man*, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[9]

The Justices of the Supreme Court are telling us to define the Due Process Clause by what it does, not by what it is. This is why Justice Frankfurter also wrote, "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the tradition and conscience of the nation as to be ranked

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[9]*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (emphasis added).

as implicit in the concept of ordered liberty."[10]

Justice Frankfurter wrote his comments in the context of Chief Justice Taft's historical note. Chief Justice Taft wrote, "The legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve..."[11]

Chief Justice Taft was relating to the primary concern of the people at the time that the national government was being formed. This concern was that the nascent national government would be unconstrained by common-law principles. The people feared that the federal government might impinge upon liberties in ways that private entities could not, simply by invoking sovereign immunity. Thus, the Bill of Rights was added to the Constitution to formalize what was already common policy for all, including individual persons.

If we, purposely, do not have a clear definition of Due Process of Law, we do, at least have an historical context. This context provides us with some detail of the notion's importance and applicability. When the federal government was required to provide "due process," as stated in

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[10]*Rochin v. California*, 342 U.S. 165 (1952).

[11]*Truax v. Lorrigan*, 257 U.S. 312, 329 (1921).

Amendment V, then we know that this had also been incumbent upon all private individuals as well. For the Bill of Rights did not create new rights. Rather, it codified the rights that had been extant. Thus, Due Process of Law, although a constitutional requirement, was also a person-to-person requirement of equal importance.[12] An historic vision of constitutional rights would require non-governmental schools to provide the same "fundamental" rights guaranteed by the governmental schools.

We know what the Due Process Clause does. It protects essential freedoms and liberties. It may not be clear which rights actually merit a place in the hierarchy of essential freedoms and liberties included in the "Due Process" Clause, but few would disagree that a person is entitled to notice and an opportunity to be heard.[13] We also know that the Due Process Clause protects "fundamental" rights from encroachment, though there may be disagreements regarding which rights may claim "fundamentality." All agree, however, that the rights included in the first eight Amendments to the United States Constitution are

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[12]*Joint Anti-Fascist Refugee Committee*, 341 U.S. at 163.

[13]O'Brien, 3 *Journal of Law and Education* 175, 188 (1974).

"fundamental."[14]

[14]*Adamson* v. *California*, 232 U.S. 46 (1947).

"DUE PROCESS" AND "FUNDAMENTAL" RIGHTS

Experience has taught us that constitutional rights evolve. The United States Supreme Court has defined rights that were not included in the original wording of the Constitution, nor were they necessarily part of the Framers' original intent. In recent years, the Supreme Court has identified and defined what may be considered new rights in such areas as privacy,[15] desegregation,[16] women's rights,[17] and the right to travel.[18]

There are certain rights that were always understood as the basic rights of our society. These rights, often referred to as "fundamental" rights, were shared by each and every resident of the land. The Court did not rely on the common law alone to provide protection for these values considered "fundamental." Rather, it read these "fundamental" rights into the Constitution. Where it was once thought that certain rights were protected from invasion by sources such as the common law, and in no other need of safeguarding, it became clear that those socially

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[15]*Roe v. Wade*, 410 U.S. 113 (1973).

[16]*Brown v. Board of Education*, 347 U.S. 483 (1954).

[17]*Craig v. Boren*, 429 U.S. 190 (1976).

[18]*United States v. Guest*, 383 U.S. 745 (1966).

important rights needed better protection. The Court provided that protection when it judged certain rights to be "fundamental."

"Due process" provides this higher level of protection. The "state action" doctrine has been used to "allow" abuses of certain rights by insulating individuals from the requirements of "due process." These abuses weaken important rights. To buttress the protection that due process rights provide, the "state action" requirement should be removed. This would preserve the original intent of the Framers who were careful to include the "due process" protections in the Bill of Rights.

"Due process" carries a glorious and well-respected past. All residents of the United States are entitled to the fundamental fairness guaranteed by the "Due Process" clause. Thus, we find, "[Due Process] is a rule founded on the first principle of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights."[19] Surely, private school children should be accorded the fairness guaranteed by the

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[19]*Stewart v. Palmer*, 74 N.Y. 183, 190, 30 Am. Rep. 289 (1878).

Constitution itself if not its history and subsequent adjudication. Although the case history may not be available to prove all children's right to due process before sustaining disciplinary action in school, the Fourteenth Amendment should be seen as flexible enough to accommodate such a possibility.

It is true that the literal language of the Fourteenth Amendment would make it seem that providing "due process" rights is the obligation of the state only, to the exclusion of private parties. This is the common interpretation of the Due Process Clause.[20] However, in *United States v. Guest* we find dicta by six justices that Congress can legislate to apply the Fourteenth Amendment restrictions to private parties as well.[21] In accordance with the *Guest* dicta, legal reasoning will be suggested to extend "due process" rights to non-public school students.

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[20]"... Nor shall any *state* deprive any person of liberty or property without the due process of law." *U.S. Const.* amend. XIV, § 1 (emphasis added).

[21]*Guest*, 383 U.S. at 762 (Clark, J., concurring).

STUDENTS' "DUE PROCESS" RIGHTS IN PUBLIC SCHOOLS

Public schools are considered an arm of the state, with very specific requirements applying to them. The theory behind these requirements will be reviewed for its applicability to non-public schools.

As stated earlier, the Fourteenth Amendment of the United States Constitution guarantees due process of law if governmental action interferes with the life, liberty, or property of an individual. This guaranty of due process was extended to juveniles in 1967 when the Supreme Court recognized that minors have the same constitutional rights as adults.[22]

An earlier case, in a lower court, may have been the harbinger of these rights. In *Dixon v. Alabama State Board of Education*, a case involving college students who had been disciplined for participation in a sit-in protest, the United States Court of Appeals for the Fifth Circuit declared:

> The question presented by the pleadings and evidence, and decisive of this appeal, is whether due process requires notice and some opportunity for hearing before students at a tax supported college are expelled for misconduct. We answer that question in the

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[22]*In re Gault*, 387 U.S. 1 (1967).

affirmative...[23]

Thus, the Court of Appeals concluded that college students attending a state university were entitled to the constitutional rights of due process before they could be expelled. The court also discussed what procedure should be expected from the schools in the provision of "due process."[24]

It was not until 1975 that the United States Supreme Court decided a case of due process rights for pre college-aged students. *Goss v. Lopez*[25] is the landmark case in the area of student discipline and expulsions, holding that public school students are entitled to "due process" before being suspended for ten days or less. *Goss v. Lopez* involved students from Columbus, Ohio, who were suspended from their public high schools for up to ten days without a hearing. The students brought a class action suit against their school officials seeking a declaratory judgment that the Ohio statute permitting such suspensions was unconstitutional. A three-judge District Court agreed with

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[23]*Dixon v. Alabama State Board of Education*, 294 F.2d 150, 151 (5th Cir. 1961) *cert. denied*, 368 U.S. 930 (1962).

[24]*Id.* at 159.

[25]*Goss v. Lopez*, 419 U.S. 565 (1975).

the students, declaring that they were denied due process of law when they were suspended without a hearing. The Supreme Court upheld the District Court's finding, and held that (i) Public school students have property and liberty interests that qualify for protection under the Fourteenth Amendment[26] and (ii) Due Process requires, in connection with a suspension of ten days or less, that students be given oral or written notice of the charges against them. If they deny these charges, they must be given an explanation of the evidence against them and an opportunity to present their side.[27] Generally the notice and hearing should precede the suspension. If this is not feasible, as in a case where the student needs to be removed from the school premises immediately, then the hearing should be held as soon as practicable.[28]

The *Goss* case, then, guarantees due process rights for public school students. The courts have not yet recognized the same rights and procedures for private school students. Below, we shall review aspects of this Supreme Court decision in depth to see where the nuances of public and

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[26]*Id.* at 574.

[27]*Id.* at 581.

[28]*Id.* at 582-3.

private education may interface.

As we have seen, the Fourteenth Amendment forbids the state to deprive any person of life, liberty, or property without the due process of law. An important Supreme Court decision gave meaning to "liberty" and "property." The Court stated in *Board of Regents v. Roth*,[29] that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to these benefits."[30] "Property" is protected by the Constitution, but the definition of this "property" comes from existing laws and statutes.

Public education is an excellent example of a "property" right protected by the United States Constitution. The constitution of every state guarantees free public education to its children. Public education thereby, after the *Roth* decision, became a "property" right of the children. When a school seeks to suspend a child from participation in this "property" right, the school, in

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[29]*Board of Regents v. Roth*, 408 U.S. 564 (1972).

[30]*Id.* at 577.

accordance with the Fourteenth Amendment, must provide the child with procedural fairness, or the "due process of law."[31] Because of this property right, the *Goss* Court ruled that, "...[O]n the basis of state law, [these high school students] plainly had legitimate claims of entitlement to a public education."[32] And, these claims could not be withdrawn "on claims of misconduct absent fundamentally fair procedures to determine whether the misconduct had occurred."[33]

The Court viewed education as a "property" right of the students. When a school imposes disciplinary action to limit that property right, it must provide fundamental fairness. The *Goss* Court's decision outlined the content of these procedures.[34] Had the Court decided that education

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[31]A broader reading of *Goss* would indicate that if a state deprives a citizen of the *level* of education to which state law has entitled that citizen, then the state must provide notice and a hearing to explain the deprivation. *See* Allan W. Hubsch, "Education and Self-Government: The Right to Education Under State Law. 18 *Journal of Law and Education* 93, 110 (1989).

[32]*Goss*, 419 U.S. at 573.

[33]*Id.* at 574.

[34]For suspensions from school of ten days or less, the *Goss* Court required that the public school provide the student with: "Oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side

is a "fundamental" right of children, then the errant student would have been entitled to much more. If the *San Antonio v. Rodriguez*[35] decision had been that education was a constitutionally protected "fundamental" right, then the Court would require the school to present a compelling reason why a student should be suspended.[36] This "fundamental" right is a more serious constitutional right, and better protected from abridgement. *Goss* was decided after *Rodriguez*, and the Court was consistent in approach.

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of the story." *Goss*, 419 U.S. at 581.

[35]*San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

[36]The procedure of finding a compelling reason to justify the abridgement of a "fundamental" right is called, in constitutional terms, "substantive due process."

The Fifth Circuit used this procedure in *Debra P. v. Turlington*, 644 F.2d 397, *reh'g denied*, 654 F.2d 1079 (5th Cir., 1981), when it required the state to provide substantive justification for its deprivation of due process. "The due process violation potentially goes deeper than deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair." *Ibid.*, 644 F.2d at 404. The court's requirement was based on the connection between education and "our civil and political institutions."

Thus, even if education may not be found to be a fundamental right under the equal protection clause, it is a fundamental interest under the substantive protections of the due process clause. *See* Hubsch, *Supra* note 163, at 113.

According to *Rodriguez*, education is a "property" right, not a "fundamental" right, so the only protection it needs is "procedural due process."[37]

In addition to concluding that the Due Process Clause of the Fourteenth Amendment protects public school students from the arbitrary deprivation of the property right to an education, the *Goss* Court also held that it forbids the arbitrary deprivation of a student's liberty rights.[38] The Court cited *Wisconsin v. Constantineau*:[39] "'When a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,'[40] the minimal requirements of the Clause must be satisfied."[41] The *Goss* Court found that the "Liberty" right of a person to maintain his good reputation was at stake when charges are brought that would cause his suspension from school. This "Liberty" right, like a

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[37]In these cases, "procedural due process" guarantees only that a fair hearing will be provided the student before the disciplinary action is affected.

[38]"...[N]or shall any State deprive any person of life, *liberty*, or property, without due process of law;..." (Emphasis added.)

[39]*Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

[40]*Id.* at 437.

[41]*Goss*, 419 U.S. at 574.

property right, may not be withdrawn without fundamentally fair procedures. The Court declared that "If sustained and recorded,[42] those charges 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."[43] Thus, public school students are entitled to due process based on their liberty rights as well as their property rights. They have a property right to education, created by the state; they have a liberty right to a good reputation and to a lack of social stigma.[44]

A further reason for the *Goss* Court extending due process rights to these students is that students maintain their rights as persons even within the classroom and school building. As decided in *Tinker v. Des Moines School District*,[45] students do not "shed their constitutional

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[42]Regarding the consequence of inclusion in the student's permanent record and his loss of a "liberty" right, see Note, "Developments -- Academic Freedom" 81 *Harvard Law Review* 1045, 1153-54 (1968).

[43]*Goss*, 419 U.S. at 575.

[44]Regarding the social stigma attached to the expulsion, see Note, *Supra* note 42, at 1138.

[45]*Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

rights" at the schoolhouse door.[46] Additionally, the Supreme Court has required public school districts to follow all constitutional guidelines, recognizing schools to be creations of the state: "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted."[47]

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[46]*Goss*, 419 U.S. at 574 (quoting *Tinker*, 393 U.S. at 506).

[47]*Id.* (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)).

THE APPLICATION OF THE *GOSS* DECISION IN THE PRIVATE SCHOOL

Much of the judicial reasoning in public school cases applies to private school students as well. Justice White, in writing on behalf of the majority in *Goss*, deals with the importance of openness in the disciplinary hearings. Providing a hearing and an opportunity for students to defend themselves are critical, because it is so difficult to ascertain the truth without these hearings. "Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against..."[48]

Quoting Justice Frankfurter in *Anti-Fascist Committee v. McGrath*,[49] Justice White reminds us that "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights..."[50] Further, Frankfurter stated, "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth

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[48]*Id.* at 580.

[49]*Joint Anti-Fascist Refugee Committee*, 341 U.S. 123.

[50]*Id.* at 170.

than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[51]

Justice White was referring to public schools in his *Goss* opinion. What he wrote regarding public schools applies equally to private schools. Private school administrators will want to ascertain the true facts. They may always work in good faith, but this will not remove the possibility of error. The procedures that have helped public school administrators find the truth and punish accordingly will undoubtedly succeed in the private sector as well.

Further, Justice White believes that the extent to which the Court requires the provision of due process rights to students is "...[I]f anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[52]

Here, again, Justice White was speaking of public schools. Justice White may be seen, however, to have chosen an ambiguous expression, "a fair-minded school principal," to extend his remarks to all schools and principals.

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[51]*Goss*, 419 U.S. at 580 (quoting *Joint Anti-Fascist Refugee Committee, Id.*, at 171-172).

[52]*Id.* at 583.

Although Justice White never discussed private schools explicitly, it appears that he would ask, if not demand, of private school principals to be "fair-minded" and "impose [procedural fairness] upon [themselves] in order to avoid unfair suspensions."[53]

There is an additional educational effect that may be accomplished when *all* schools provide procedural fairness. Many private schools boast of their teaching of democratic ideals and American values. An excellent way to teach a concept is to show students how it is expressed in real life. The school personnel, regardless of the school's governmental status, will undoubtedly want to employ due process procedures and avoid unfair suspensions. In this way, the school will have inculcated within its students one of the central ideas of American democracy: due process.

While Justice Powell wrote on behalf of the dissent in Goss[54] because he believed that courts should not involve themselves in the daily operations of the schools, he nonetheless spoke to the importance of education in our society:

> Education in any meaningful sense includes the

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[53] *Id.*

[54] (*Goss v. Lopez* was a 5-4 decision.)

> inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgements of the young, a heavier responsibility falls upon the schools...
>
> The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance of the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned. Mr. Justice Black summed it up:
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> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens." *Tinker*, 393 U.S., at 524 (dissenting opinion).[55]

As educators, Justice Powell contends, it is the administrators responsibility to teach discipline and responsibility-taking. This includes the responsibility to determine the truth when rules are broken. Carefully outlined procedures to determine the truth of an accusation against a student are basic to any disciplinary system; their exclusion would simply represent poor education. Without studying about -- if not experiencing -- due process, students lose the important lessons of citizenship: to be responsible for one's actions, to trust the

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[55]*Goss*, 419 U.S. at 593 (Powell, J., dissenting).

administrators that they will ascertain who was guilty and to what extent, and that students will have a chance to defend themselves. The loss of such important a lesson in citizenship is difficult to replace. The lessons of citizenship are important, regardless of the venue of education. Apparently, Justice Powell would have private school administrators provide due process procedures as part of their curriculum on "taking responsibility."

After *Goss*, it became established that students attending American public schools are entitled to due process before sustaining the punishments of a suspension of ten days or less. (The Court also said that suspensions of longer duration or outright expulsions would warrant further constitutional protections[56].) We have reviewed the reasoning of *Goss* and found it to apply equally to private schools. The conclusion to draw is that private school students are entitled to the same procedural fairness as their public school counterparts.

The *Goss* court found education itself to be both a "property" right[57] and a "liberty" right[58] of public school

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[56]*Id.* at 584.

[57]*Id.* at 573.

[58]*Id.* at 574-75.

students. *Goss* relied on *Board of Regents v. Roth*[59] to conclude that the state statutes regarding compulsory education and each child's entitlement to free education make education a property right. These statutes and entitlements apply to all children. Some children happen to fulfill the compulsory education requirement by attending private schools.[60] Thus, we may say that private schools are in the position of offering their students the fulfillment of their state-guaranteed right to an education. Logic should dictate that this state-guaranteed requirement and attendant right should not be removed or hindered without first providing due process.

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[59]*Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

[60]The right of students to attend private schools was resolved by the Supreme Court long ago, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

PROVIDING "DUE PROCESS" AS A QUID PRO QUO

At least one writer makes a further argument for "due process" rights for private school students based on the state's requirement that children be educated. Because this requirement establishes a right to education,[61] then, arguably, the state must also provide a quid pro quo[62] of quality education and fundamental fairness before this education is limited. It would be unsightly to *require* a child to attend an educational program, only to provide him with a poor quality program. Of course, the program may be judged poor on academic standards or administrative procedures. To deprive the student of this compulsory (if not quality) education without due process would be unacceptable.[63] If the private school happens to be the venue of this statutory fulfillment, then it, mindful of the quid pro quo, should provide due process before a student's

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[61]As seen above in *Goss*, 419 U.S. 565, and *Roth*, 408 U.S. 564.

[62]"[S]omething for something ... that which the party ... is promised in return for something he promises, gives, or does..." Steven H. Gifis, *Law Dictionary*, p. 381, Woodbury, NY: Barron's Educational Series (1984).

[63]Charles M. Masner, 21 *Washburn Law Journal* 555, 568-571 (1982).

expulsion or suspension.[64]

[64]*Id.* at 577-78.

THE STATE'S *PARENS PATRIAE* ROLE IN EDUCATION

Yet another reason applies for recognizing private school students' due process rights. The state is responsible to ensure that its children are educated. This is part of the state's role of *parens patriae,* where the state is considered the ultimate guardian of children.[65] The state considers a child not as absolute property of a parent, but rather a "trust" reposed in a parent by the state.[66] Indeed, it is this reasoning which facilitates state regulations of private schools.[67] Even as the right to private education was recognized, in lieu of state supported and administered schools, the state continues to remain partially responsible for children's education in private schools. If the state is responsible for education, and education (as described in *Goss*) includes the values of citizenship and discipline, then the state should ensure that an expanded notion of due process education is applied to private schools. Thus, when a student brings a suit against a private school for expulsion without a hearing,

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[65]*West Virginia v. Pfizer*, 440 F.2d 1079, 1089 (1971).

[66]*Gardner v. Hall*, 26 A. 2d 799, 809 (1942).

[67]Cynthia Wittmer West, "The State and Sectarian Education: Regulation to Deregulation," 1980 *Duke Law Journal* 812.

the court may reasonably require such a hearing as an aspect of the quality education for which states are legally responsible.

IMPOSING "DUE PROCESS" TO PROTECT THE PARENT'S RIGHT TO DIRECT THE CHILD'S EDUCATION

There is yet another approach to assuring due process rights for private school students. This approach is based on the decisions in *Pierce v. Society of Sisters*[68] and *Board of Regents v. Roth*.[69] The *Pierce* decision focused on parents' "fundamental" right to rear their child according to the tenets of their faith. Private schools are an acceptable alternative in the parents' fulfillment of the compulsory education statutes. *Roth* said that a statute (such as compulsory education) could create a constitutionally recognized property right. Taken together, these cases say that *parents* has a property right to rear their child as appropriate, and to send this child to a private school. Moreover, it is a personal liberty of parents to send their child to the school of their choice.[70] Even if students have no inherent right to attend a certain school, their parents may have a "fundamental" right to send them to that school. This right

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[68]See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[69]*Board of Regents v. Roth*, 408 U.S. 564 (1972).

[70]*Bright v. Isenbarger*, 314 F. Supp. 1382, 1397 (N.D. Ind., 1970).

is based on the parents' "fundamental" right to rear their child as they feel appropriate. As noted above, in the discussion of "substantive due process," "fundamental" rights cannot be abridged without Due Process. Thus, if the private school wishes to curtail this important right of parental prerogative and privacy, it must first establish that its decision is valid, by following due process procedures. The school must provide these procedures before it limits the parents' "fundamental" right.

"DUE PROCESS" AND THE CONTRACTUAL RIGHT TO CONTINUANCE IN THE PRIVATE SCHOOL

Another aspect of students' "property right" to an education comes from contract law. The nature of the relationship between private schools and their students has traditionally been defined as "contractual."[71] Schools present their students with certain publications and guidelines before they register for enrollment. Once they register, they are seen as accepting the terms of enrollment, which are described in schools' handbooks and other publications. Accordingly, the courts will generally uphold the terms of the contract of enrollment.

This contract of enrollment, which defines the extent of the legal relationship between schools and students, may create certain rights for students. This principle was recognized in an early case, decided by a state court. In *Booker v. Grand Rapids Medical College*,[72] the court found that "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed

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[71]*See John B. Stetson University v. Hunt*, 102 So. 637 (1924) and *Samson v. Trustees of Columbia University*, 167 N.Y.S. 202 (1917).

[72]*Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909).

therefrom."[73] Further, the *Booker* court stated, "There is no good reason why the law should not recognize, as growing out of these relations, a right of realtors resting in contract to be continued as students."[74] *Booker* establishes certain rights, of continued enrollment, for the student who has maintained proper tuition payments and academic good standing. Once the student has earned these rights, they should not be limited without the benefit of due process.

Indeed, *Ewing v. Board of Regents of University of Michigan* relied on *Booker* and concluded that a student has a "property interest" in his continuance in his academic program.[75] Thus, a contractual understanding of continued education in the private school rose to a constitutional right, for property interests are mentioned in the United States Constitution. Relying once again on *Roth*, the United States Supreme Court found that "property interests, which may give rise to constitutional protections, are created and defined by existing rules or understandings which stem from

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[73]*Id.*, 156 Mich. at 99, 120 N.W. at 594.

[74]*Id.*, 156 Mich. at 100, 120 N.W. at 589.

[75]*Ewing v. Board of Regents of University of Michigan*, 742 F.2d 913, 915 (1984).

independent sources, such as state law."[76] The Court has also held that these property interests can arise from explicit contractual provisions or "other agreements implied from promisor's words or conduct in light of the surrounding circumstances."[77]

We have seen that, as long as students remain "in good standing" at the school, they have a constitutionally protected property right to continued education. This right is an outgrowth of the implied provision of continuance in the contracts of enrollment. This contractual right, recognized by state law, creates a federal property right. As such, it is clear that this right should not be curtailed without first providing some justification for its curtailment. Procedural fairness should be forthcoming.

This chapter reviewed the right to "due process" of public school students who face disciplinary action. The goal was to see if private school students are entitled to the same constitutional procedures of fairness, even without a finding, in the private school, of "state action."

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[76]*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

[77]*Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

Goss,[78] the leading case in public education, found that public school students are entitled to "due process" rights. This is because public schools are considered extensions of the state, and have the requisite "state action."[79] *Bright*,[80] the leading case in non-public education, found that private school students are not entitled to "due process" for a failure to show "state action."

This chapter undertook the formidable task of overcoming the lack of "state action." Seven approaches were presented to neutralize the claim that private schools lack "state action," and, consequently, have no constitutional protections for their students' rights to "due process." These seven approaches include:

(i) The importance of "due process" in the American tradition. Sources were brought to show the inherent importance of "due process" as well as its instrumental use for protecting other constitutional values and rights.

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[78]*Goss v. Lopez*, 419 U.S. 565 (1975).

[79]Thus, the public schools fulfill the literal requirement of *U.S. Const.* amend. XIV § 1: "...nor shall any *State* deprive any person of life, liberty, or property, without due process of law..." Emphasis added.

[80]*Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

The "Due Process" Clause was shown to be a protector of rights that are themselves incorporated in the Constitution. Justice Frankfurter wrote that, "Due Process of Law is a summarized Constitutional guarantee of respect for those personal immunities which are so rooted in the tradition and conscience of the nation as to be ranked as implicit in the concept of ordered liberty."[81]

The right to "due process" has been viewed by some to be "fundamental." This is a term of constitutional analysis used when referring to a right so basic to our society that it must almost always be provided. If a "fundamental" right must be limited, then it must be shown that there was an overriding and important reason. *U.S. v. Guest* suggests that Congress should apply "due process" rights to private parties as well.[82] This would require all people and private institutions to provide "due process" rights at all times.

(ii) The private school student's constitutional interest in education (as per *Goss*). Even if the students' private education itself is not protected by constitutional protections for lack of "state action," education is still a

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[81]*Rochin v. California*, 342 U.S. 165 (1952).

[82]*United States v. Guest*, 383 U.S. 745 (1966).

fulfillment of "liberty" and "property" rights. These rights are constitutionally protected from limitation, and should not suffer any change without procedural fairness. Following these fairnesses will help to make certain that the administrator's decision was correct and proper. They will teach the student a basic procedure in this country, which teaches good citizenship as well.

Roth[83] indicates that property rights (which are constitutionally protected) can be created by non-constitutional sources, such as state statutes. Statutes in every state create a student's property right to education. It should be irrelevant that the student happens to pursue his state mandated education in a private school, as his property right is protected.

(iii) Students' "liberty" right in education is also protected. This constitutionally recognized right preserves the student's good name and reputation. Because disciplinary action at school often tarnishes a student's reputation, the student is entitled to procedural fairness before the action is implemented.

(iv) The state always maintains an interest in the child's education. This is by virtue of the state's role of

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[83]*Roth*, 408 U.S. 564.

parens patriae. It is this role that allows for state regulation of private schools. The point is that the same allowance for state regulation to ensure quality academics should also be brought as an ensurance by the state that there is quality governance. This quality might be measured, in part, by the existence of procedural fairness rules in the school.

(v) The quid pro quo of education. This approach says that if a state is requiring a student to attend a school, then the school must provide certain procedural fairness in return. The compulsory education statute carries with it an implied statement that the child fulfilling the statute will be provided a quality program in return. Quality includes elementary administrative fairness, regardless of the amount of "state action" in the private school where the student happens to fulfill the statute.

(vi) The parents' property right. The parents have a property right to send their child to a private religious school.[84] If the child is expelled from school, then the parents have lost their ability to fulfill their property right to send their child to the specific school. This property right of the parents should not be diminished

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[84]*See Pierce*, 268 U.S. 510.

without "due process."

(vii) The property right to have contracts fulfilled. This property right looks at the contract of enrollment agreed upon by the school and the student. If the contract calls for "due process" rights, then these rights must be fulfilled. *Ewing*[85] concluded that students have a property right in their continuance in their academic programs. This right is unrelated to "state action" and the school; it focuses on the contractual relationship between the parties. As every property right, it may be removed only after procedural fairnesses have been followed.

In conclusion, it is reasonable and appropriate to apply constitutional protections to a private school student's right of attendance. Although the *prima facie* belief was that, in the absence of "state action," procedural fairness did not apply, we have seen that there are many other constitutionally-related reasons why these fairnesses should be brought to bear.

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[85]*Ewing v. Board of Regents of University of Michigan*, 742 F.2d 913 (1984).

CHAPTER IV

A STUDENT'S "FUNDAMENTAL" RIGHT TO AN EDUCATION AND THE FULFILLMENT OF "DUE PROCESS" REQUIREMENTS

This chapter will address the question of whether education may be considered a "fundamental" right of every student. If we may show that the right to an education is considered a "fundamental interest" in a constitutional sense, then a court will require "strict scrutiny" whenever this right is diminished or abolished.[1] Of course, education is not explicitly included in the United States Constitution as a "fundamental" right. However, in *Shapiro v. Thompson*,[2] the United States Supreme Court concluded that the "fundamental" rights doctrine extends strict equal protection review to rights not necessarily found in the letter of the Constitution. Because "fundamental" status may be extended to rights not explicitly stated in the

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[1]*Shapiro v. Thompson*, 394 U.S. 618, 629-631, 634 (1969). Earlier, Justice Douglas wrote in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1969), "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." It must be noted that the Equal Protection Clause is the second clause of the Fourteenth Amendment, immediately following the Due Process Clause of the same Amendment.

[2]*Shapiro v. Thompson, Id.*

Constitution, we must determine whether education may enter this charmed circle of "fundamental rights."

A finding that the right to an education is "fundamental" means that "substantive due process" rights would apply. "Substantive due process" protects liberties and values explicitly or implicitly included in the Constitution and long a part of the American heritage. This protection would subject the school to "strict scrutiny" of its actions. A long-term suspension or expulsion could only be justified if the school had a compelling and overriding reason for such a serious limitation on the "fundamental" right to an education. The mere reasonableness of a school's decision would not be sufficient justification for serious disciplinary action. Also, a simple showing that the school had followed procedural fairness (also called "procedural due process") would not justify the limitation of the "fundamental" right to education. Understandably, the strict scrutiny of the court will include a review that whatever procedures were followed by the administration were open and fair.

A finding of "fundamentality" for education requires that "substantive due process" norms be followed. This is a very strong statement about the importance of education and

its protection. It is unrelated to the public or private school a student attends. A finding of "fundamentality" will achieve "due process" rights for private (and indeed public) school students without a finding of "state action." Under the court's additional scrutiny, "state action" will be an insignificant factor as the school tries to explain its compelling reasons for limiting the student's "fundamental" right to education.

Our study of the "fundamental" right to education will review the majority and minority opinions of two United States Supreme Court decisions related to this topic. It will also cite numerous state court decisions that have come down in favor of the "fundamentality" of education on a state level. The state level is more appropriate for decisions regarding education because education is a state, not Federal, responsibility. The chapter concludes with a survey of judicial opinion explicitly including education as a "fundamental" right of students, with all the constitutional privileges and protections pertaining thereto.

THE LANDMARK *SAN ANTONIO V. RODRIGUEZ* DECISION

The United States Supreme Court has ruled that education is not a "fundamental" right. This decision was reached in *San Antonio Independent School District v. Rodriguez*.[3] This case tested the constitutional validity of unequal funding of school districts within the state of Texas, and found that this funding plan was constitutionally valid. One of the issues the *Rodriguez* Court discussed in its landmark decision was education as a "fundamental" right. The Court concluded that education was not a "fundamental" right of the student, though the final vote of five justices to four indicates that the justices were almost evenly divided on the question. As a non-"fundamental" interest, any scheme that limits the education of some children must only pass the lenient standard of rationality.[4] This means that the education of some children may be limited (*e.g.*, a student expelled) by the state by the mere showing of rationality and non-capricious decisions. It also means that any laws and statutes in the area of education need not pass any strict standard of review.

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[3]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[4]*Id.* at 98.

The majority opinion in this decision was based in part on administrative considerations. One factor prompting the Court to deny the "fundamental" status of education was the perception that local property tax finance systems would not pass muster under "strict" scrutiny.[5] The Justices feared that classifying education as "fundamental" would lead to invalidation across the country of all interdistrict disparities in per pupil expenditures. Requiring "strict scrutiny" of per-pupil expenditures might also invalidate virtually all systems of local budget control. Of course, this budgetary argument does not deal with the substantive question of education as a "fundamental" right. Instead, it seems to indicate that the Court might have been prepared to recognize this "fundamentality," were it not for the vexing problem of interdistrict disparities.

The *Rodriguez* decision, focused on interdistrict budgetary disparities, related to the Equal Protection Clause of the Fourteenth Amendment.[6] One might think that the Equal Protection Clause is unrelated to the Due Process Clause. This is not the case. Two important points are

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[5]*Id.* at 16, 17 and n.41.

[6]*U.S. Const.* amend. XIV, § 1 states: "...[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws..."

explained at the end of Chapter V: (i) The analysis that applies to one clause of an amendment applies to other clauses of the same amendment. Both "due process" and "equal protection" are clauses of the Fourteenth Amendment. (ii) Once someone attempts to diminish a constitutional right, special protections must be mustered to nullify the attempts. The protection against limitation of one constitutional right will be applied equally to other constitutional rights. Jurisprudentially, there is no significant difference between Equal Protection and Due Process analyses. This is discussed further in the section on analysis of *Rodriguez*.

JUSTICE MARSHALL'S IMPORTANT DISSENT

Our road to the "fundamentality" of education would seem to have reached a dead end with the Supreme Court's decision in *Rodriguez*. Justice Marshall's dissent[7] shows us an alternate path which raises other important issues deserving of our renewed attention. The majority had claimed that "fundamental" rights must be stated explicitly in the Constitution. They wrote, "fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself."[8] Justice Marshall fervently disagreed with this contention. He cites the Court's findings of "fundamental interests" in cases regarding interstate travel,[9] procreation,[10] and the right to vote in a state election.[11] In all of these cases, the rights delimited were not stated explicitly in the Constitution, yet the Supreme Court found them to be "fundamental"

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[7]*Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

[8]*See Rodriguez*, 411 U.S. at 99.

[9]*Shapiro*, 394 U.S. at 634.

[10]*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[11]*Reynolds v. Sims*, 377 U.S. 533 (1964).

interests nonetheless. Justice Marshall concludes from these disparate cases that the question of finding a "fundamental" interest is not a textual one per se'. Rather, the question must be resolved based on the quality of the issue. He wrote

> The task in every case should be to determine the extent to which Constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific Constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interests becomes more "fundamental" and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[12]

Further, Justice Marshall bids us to pay close attention to cases where "discrimination against important individual interests with Constitutional implications and against particularly disadvantaged or powerless classes is involved."[13] Such an approach seemed to be, according to Justice Marshall, "a part of the guarantees of our Constitution and of the historic experiences with oppression and discrimination against discrete, powerless minorities

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[12]*Rodriguez*, 411 U.S. at 102-103 (Marshall, J., dissenting).

[13]*Id.* at 109.

which underlie that document."[14]

The constitutional importance of education forced Justice Marshall to see education as a "fundamental" interest of the student. "[T]he fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic Constitutional values."[15]

As support for his claim that education is a "fundamental" right in our American society, Justice Marshall cites what he calls "this Court's most famous statement on the subject:"

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

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[14]*Id.* It would appear to this author that a student relative to the school may be compared to a powerless minority relative to the government. Hence, the same requirement and consideration should apply.

[15]*Rodriguez*, 411 U.S. at 111.

environment...[16]

Further, the Court has recognized that "[p]roviding public schools ranks at the very apex of the functions of a state."[17] Indeed, "[n]o other state function is so uniformly recognized as an essential element of our society's well-being."[18]

Justice Marshall's opinion was clearly in line with Justice Frank Murphy's dissenting opinion in *Adamson v. California*.[19] Justice Murphy opined that other "fundamental" rights, in addition to the specific guarantees of the Constitution, must also be protected. For Justice Murphy, the Bill of Rights was just a constitutional floor.[20]

Subsequently, Justice William O. Douglas adopted Justice Murphy's view in *Poe v. Ullman*,[21] in his dissenting opinion. Justice Douglas wrote, "Though I believe that 'due

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[16]*Id.* at 111-112, quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

[17]*Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

[18]*Rodriguez*, 411 U.S. at 112.

[19]*Adamson v. California*, 332 U.S. 46, 123 (1947) (Murphy, J., dissenting).

[20]*Id.* at 124.

[21]*Poe v. Ullman*, 367 U.S. 497 (1961).

process' as used in the Fourteenth Amendment includes all of the eight amendments, I do not think it is restricted or confined to them ... "Liberty" is a conception that sometimes gains content from the emanations of other specific guarantees ... or from experience with the requirements of a free society."[22] Justice Douglas buttressed his argument in a footnote, quoting from a lecture delivered by Justice Owen J. Roberts, "Due process follows the advancing standards of a free society as to what is deemed reasonable and right."[23]

We have seen that there is judicial justification for extending "due process" rights beyond the specifically stated rights of the Constitution. In great measure, however, Justice Marshall preferred to base his opinion (that education is a "fundamental" interest) on the instrumental importance of education. The *Yoder* court had clearly articulated the importance of education regardless of its venue, public or private school. Education is so essential that the *Yoder* Court had said "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political

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[22]*Id.* at 516-17 (Douglas, J., dissenting).

[23]*Id.* at 518, n.9.

system...," and that "education prepares individuals to be self-reliant and self-sufficient participants in society."[24]

Thus, we find a "substantial relationship which education bears to guarantees of our Constitution."[25] Justice Marshall found that education is necessary for a child to participate fully in the "marketplace of ideas"[26] and fully exercise his First Amendment rights of free speech and association.[27] Indeed, it is education that opens up the child to the cultural experiences that are central to being an American. Education is "the dominant factor affecting political consciousness and participation."[28]

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[24]*Yoder*, 406 U.S. at 221.

[25]*Rodriguez*, 411 U.S. at 112.

[26]*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

[27]*Rodriguez*, 411 U.S. at 113.

[28]*Id.* at 113.

AN ANALYSIS OF *RODRIGUEZ*

A theoretical response to Justice Marshall's arguments is that he pointed only to the importance of a minimum of public education. Perhaps Justice Marshall viewed education as "fundamental" only until it is provided according to whatever minimal level is proffered at a public school. Justice Marshall, however, does not accept minimalist levels. In an important footnote, Justice Marshall deals with the Court's suggestion that the children are getting sufficient education (in minimally funded public schools) for them to enjoy the benefits of constitutional rights. This would remove any requirements for stricter scrutiny in education. He writes, "There is ... no limit to the amount of free speech, or political participation that the Constitution guarantees. ... It is thus of little benefit to an individual ... to have "enough" education if those around him have more than "enough."[29]

Certain cases, such as *Rodriguez*, may appear relevant

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[29]*Id.* at 113, note 72 (Marshall, J., dissenting). Note that Justice Marshall seems to be including education as a member of the first amendment family of values. This inclusion would again warrant strict scrutiny before the right to education is limited. *See* Frank I. Goodman, "De Facto School Segregation: A Constitutional and Empirical Analysis," 60 *California Law Review* 275, 350-51 (March, 1972).

only to the Equal Protection Clause of the Fourteenth Amendment and not the Due Process Clause. These cases include situations where there is either unequal funding between school districts or some other disparity between groups. They are, however, not *necessarily* to be viewed only as questions affecting this Equal Protection Clause. This was discussed earlier in this chapter, in the section on the *San Antonio v. Rodriguez* decision.

We may also view Equal Protection cases as questions affecting the Due Process Clause. Firstly, as education becomes a "liberty" or "property" right,[30] its abridgement may impinge on the Due Process Clause of the Amendment.[31] Secondly, the Due Process Clause deals with the denial of rights, while the Equal Protection Clause deals with the discrimination that prevents the realization of a right. Those who are denied the right to an education due to administrative fiat do not suffer from the fact that others

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[30]*See Board of Regents v. Roth*, 408 U.S. 564 (1972). The "liberty" and "property" rights to education were discussed in Chapter III above.

[31]"Due process and equal protection grounds are also interchangeable in situations ... where denial of some public benefit places collateral burdens on an independently protected constitutional liberty." Frank I. Goodman, "De Facto School Segregation," 60 *California Law Review* 275, 355, n. 273 (1972).

receive it; it is the deprivation, not the discrimination, which carries the sting."[32] Thus, it is really the Due Process Clause, not the Equal Protection Clause, that is at issue. An analysis that wins education rights for the poor or disadvantaged, such as Justice Marshall suggested, may be considered part of a Due Process analysis.

Moreover, we should not allow administrative decisions to stand in the way of principled thought. If education has a place within the charmed circle of "fundamental" rights, as apparently some were willing to concede in concept,[33] then it must be included. Side issues, such as implementation or budgetary considerations, must be pushed aside in favor of the proper and principled conclusions. This is a logical conclusion as well as an extension of the substantive "due process" requirement for a compelling reason to limit a "fundamental" right.

If the Court were to accept Justice Marshall's opinion today that education is a "fundamental" right of every school child,[34] it would thereby grant "substantive due

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[32]*Id.* at 359.

[33]*Rodriguez,* 411 U.S. at 16, 17 and n.41.

[34](mindful that the original decision was based on a 5 to 4 vote of the Justices)

process" rights to all children, regardless of their school of attendance. This is because, as a "fundamental" interest, *Shapiro v. Thompson*[35] and other cases require the courts to review the limiting of this interest with "strict scrutiny." This means that public and private schools alike, may not significantly suspend or expel a student without first offering a compelling reason why the student's rights should be limited. Absent such an offer, there must be serious doubt whether any school, public or private, may expel a student.

Another reason discussed in the legal literature for considering education to be a "fundamental interest" is today's vision of what should be acceptable in a utopian view of the United States. We want everyone to be educated, to participate in our cultural values, and to be gainfully employed. Thus, we find commentators who refer to the unlisted "fundamental" rights: "[s]ome classifications although far from irrational [are] nonetheless unconstitutional because they produce inequities that are unacceptable in this generation's idealization of

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[35]*Shapiro*, 394 U.S. at 634.

America."[36] It is education that will overcome these inequities, thus, education should be considered "fundamental."

This approach to "fundamentality" is, obviously, not limited to the specific wording of the Constitution, nor is it overly concerned with the Framers' intent. Rather, this approach looks to modern day interpretation of the Constitution to give it contemporary meaning and relevance. Considering the growing attention to the inherent and instrumental importance of education, we should use recent judicial decisions -- combined with the need to breathe new life and vision into the Constitution -- to protect education as a "fundamental right."

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[36]Kenneth L. Karst and Howard W. Horowitz, "*Reitman v. Mulkey*: A Telophase of Substantive Equal Protection." 1967 *Supreme Court Review* 39.

THE NEW ERA OF "HEIGHTENED SCRUTINY" AFTER *PLYLER V. DOE*

As noted above, the United States Supreme Court found that education is not a "fundamental" right under the federal Constitution.[37] Since that decision, however, another case, *Plyler v. Doe* was decided. Some commentators believe that the *Plyler* decision marked the end of the *Rodriguez* holding.

Plyler v. Doe[38] was another five-to-four decision of the United States Supreme Court. The case involved the children of illegal aliens in this country who claimed they were entitled to free public education. The State of Texas claimed that they were not required to provide free education to illegal residents. The Court decided that the Fourteenth Amendment forbids the State of Texas to "deny the undocumented school-age children the free public education that it provides to children who are citizens of the United States or who are legally admitted aliens."[39] For, "[i]f the state is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, the denial must be justified by

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[37]*Rodriguez*, 411 U.S. 1.

[38]*Plyler v. Doe*, 457 U.S. 202 (1982).

[39]*Id.* at 205.

a showing that it furthers some substantial state interest. No such showing was made here."[40] In addition, the Court said, "[d]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause."[41]

Justice Marshall, this time in the majority, wrote a concurring opinion referring to his dissent in *San Antonio v. Rodriguez*. He wrote quite explicitly, "I continue to believe that an individual's interest in education is fundamental..."[42]

Justice Marshall's main point in his concurrence was that the *Plyler* decision finally adopted a "sliding scale" test for unconstitutionality under the Equal Protection Clause. This was the same "sliding scale" that he had suggested in *San Antonio v. Rodriguez*[43] and *Dandridge v. Williams*.[44] The sliding scale looked at three levels or

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[40]*Id.* at 230.

[41]*Id.* at 222.

[42]*Id.* at 230.

[43]*Rodriguez*, 411 U.S. at 98-110, 124-30.

[44]*Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). One commentator has distinguished the issues raised in *Dandridge* from the issue of education. *Dandridge* deals with "economics and social welfare," which may be governed by conventional equal

"tiers" of scrutiny by courts studying suspect classifications. These three tiers include (1) "strict scrutiny" for state action burdening "fundamental" rights; (2) "heightened scrutiny" for quasi-suspect classifications; and (3) "rationality" for all the rest.[45]

The *Plyler* Court used the middle-tier test for the first time in a case regarding education. It used "heightened scrutiny" because of the nature of the classification, alien children, but also because of the interest affected by the classification. This interest is, clearly, education. Thus, we see that the right to an education deserves "heightened scrutiny." In addition, the fact that must be noted: *Rodriguez* (the decision that

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protection standards. Education, on the other hand, deals with knowledge -- not nourishment of the body, but of the mind -- and should follow a higher standard of equity. *See* Goodman, *supra* note 247, at 347-350.

[45]It was actually *Craig v. Boren*, 419 U.S. 190 (1976), that introduced a middle tier classification under the equal protection clause. "Strict scrutiny" applied to suspect statutory classifications and state action burdening fundamental rights. "Heightened scrutiny" applied to quasi-suspect state classifications. "Rationality" applied to all the rest. *Plyler* purported to apply the middle-tier test because of the nature of the classification and the interest affected by the classification. *Plyler*, 457 U.S. at 230 (Marshall, J., concurring). The "state action" requirement may be fulfilled either through the "public function" theory or through a new understanding of the "state action" requirement. These are discussed *infra*, in Chapters V and VI, respectively.

education is not a "fundamental" right) was mentioned in each of the five opinions filed in *Plyler*, "although everyone except Justice Marshall came to bury it, not to praise it."[46]

Specifically, the *Plyler* Court conceded that education was not a "fundamental" right, "[b]ut neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[47] Indeed, in creating a middle tier (of "heightened scrutiny," situated between "strict scrutiny" and "mere reasonableness") *Plyler* accomplished what *Rodriguez* had not. For *Rodriguez* gave us only two tiers of judicial review of state action, and refused to allow education into the upper tier of "strict scrutiny." Now that *Plyler* has created a middle tier, and included education in this level of "heightened scrutiny," we have made an important stride forward for education rights. Because education has been recognized as deserving of "heightened scrutiny" the decision of *Rodriguez* "is now a constitutional relic whose only significance is its holding;

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[46]Dennis J. Hutchinson, "More Substantive Equal Protection? A Note on *Plyler v. Doe*," 1982 *The Supreme Court Review* 170.

[47]*Plyler* 457 U.S. at 221.

as a doctrine, it is irrelevant."[48]

The *Plyler* decision discussed the original intent of the Framers of the Fourteenth Amendment. The decision quoted Senator Howard, the floor manager of the Amendment in the United States Senate. Senator Howard said that the Fourteenth Amendment, "if adopted by the states, [will] forever disable every one of them from passing laws trenching upon those "fundamental" rights and privileges which pertain to citizens of the United States..."[49] *Plyler* then decided that illegal aliens' children are entitled to an education, based on the Fourteenth Amendment. This must, at a minimum, hint at the Court's belief that education is some kind of a "fundamental" right, protected by the Fourteenth Amendment. For, if not, why discuss the "original intent" of the Amendment drafters, and then conclude that the Amendment pertains?

Education, even if not a *"fundamental"* right, is surely of "heightened" interest to the student. Indeed, one commentator concluded from the *Plyler* decision that

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[48]Hutchinson, *supra* note 262, at 192.

[49]*Plyler*, 457 U.S. at 215.

education is "*almost* a fundamental right."[50] The *Plyler* Court's decision states, "Education has a fundamental role in maintaining the fabric of our society."[51] Accordingly, if the student's claim to an education, even that offered by a private school, is limited by suspension or expulsion, he is entitled to the protections of "substantive due process." Considering the inherent good of knowledge, as well as the instrumental value of education for the student and society at large, these protections are important to provide before a constitutionally-recognized "fundamental" right is diminished.

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[50]Ronna G. Schneider, "The 1982 State Action Trilogy," 60 *Notre Dame Law Review* 1150, 1155 (1985). (Emphasis added.)

[51]*Plyler*, 457 U.S. at 221.

EDUCATION AS A "FUNDAMENTAL" RIGHT IN STATE CONSTITUTIONS

Were one to try to resolve the question of education as a "fundamental" right, he would be forced to concede that the decision in *San Antonio v. Rodriguez*[52] has never formally been reversed by the Supreme Court. This, despite the theoretical arguments presented above. The *Rodriguez* Court concluded that education is not a "fundamental" right of students. Thus, litigants have been better advised to seek redress for denials of education benefits elsewhere, without reliance on a claim of "fundamentality." Specifically, litigants have relied extensively on education clauses in state constitutions.

For the purpose of this study, we shall review some relevant education law decisions of several states. While the Supreme Court has not reversed *Rodriguez*, so as to consider education rights as "fundamental," the courts of several states have been more understanding. These courts have concluded that their state constitutions do include education as a "fundamental" right. Accordingly, we may judge education to be in a unique category of "fundamental" right within various states, while not on a Federal level. As "fundamental," state education rights deserve close or

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[52]*Rodriguez*, 411 U.S. 1.

"heightened" scrutiny before they are abridged within the state.[53] In this way, we have garnered support for students who seek fundamental fairness before being expelled or suspended from even their non-public schools.

Moreover, if more states view education rights as "fundamental," then the chances increase dramatically that the Federal courts will begin to see education in the same way. The states' decisions may cause the United States Supreme Court to rethink its *Rodriguez* decision.

Ultimately, it may be of little consequence that the Federal court does not view education as a "fundamental" right of the United States Constitution. Education is a state responsibility and right.[54] Indeed, the existence of strong state rights to education provided a persuasive reason for the Supreme Court's denial of *federal* guarantees to education.[55] Further, every state constitution contains an education clause.[56] As a state responsibility, it is

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[53]The notion of "heightened scrutiny" for education, as discussed above, is developed at length in *Rodriguez*, *Id.*, based on *Shapiro*, 394 U.S. 618.

[54]*Rodriguez*, 411 U.S. at 35.

[55]*Id.* at 45-54.

[56]"Developments -- State Constitutions," 95 *Harvard Law Review* 1324, 1446 (1982).

the individual state which must decide the "fundamentality" of each right it proffers. Those states that consider education to be a "fundamental" right require "substantive due process" rights for all students; those states that do not yet consider education to be a "fundamental" right might require only "procedural due process rights." At a minimum, "procedural due process" rights should be applicable in all states before a school suspension of less than ten days.[57] This is due to the inherent and instrumental importance of education, as discussed above.

We shall cite various states where education was judged by the local judiciary to be a "fundamental" right of students. These decisions were reached after *San Antonio v. Rodriguez* was decided by the United States Supreme Court in 1973 and indicate the various states' interpretation of their own constitutions. Specifically, because these decisions indicate that education is a "fundamental" interest, strict scrutiny and procedural fairness (due process) must be followed before education may be limited.

The Connecticut Supreme Court issued a landmark

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[57]This was the Supreme Court's decision in the public school case of *Goss v. Lopez*, 419 U.S. 565 (1975).

decision in *Horton v. Meskill*.[58] There, the court held that education is a "fundamental" right under the Connecticut state constitution.[59] And, "any infringement of ...[it] must be strictly scrutinized."[60] To buttress their holding, the Connecticut court also found that education was sufficiently important to society to be classed as a "fundamental" right even without referring to the text of its state constitution.[61] Judge Bogdanski, in his concurring opinion, articulated the "fundamentality" of education:

> I would add further that the right of our children to an education is a matter of right not only because our state constitution declares it as such, but because education is the very essence and foundation of a civilized culture: it is the cohesive element that binds the fabric of society together. In a real sense, it is as necessary to a civilized society as food or shelter are to an individual. It is our fundamental legacy to the youth of our state to enable them to acquire knowledge and possess the ability to reason: for it is the ability to reason that separates man from all other forms of life.[62]

The Connecticut Supreme Court recognized that it was

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[58]*Horton v. Meskill*, 376 A.2d 359 (1977).

[59]*Id.* at 372-73.

[60]*Id.* at 373.

[61]*Id.*

[62]*Id.* at 377.

breaking with the United States Supreme Court in its *Horton v. Meskill* decision. Too, the state supreme court considered the United States Supreme Court decisions defining "fundamental" rights "to be afforded respectful consideration."[63] This case, however was different. For the U.S. Supreme Court decisions were to be considered by the Connecticut courts "only when they provide no less individual protection than is guaranteed by Connecticut law."[64]

In the State of Missouri, the Missouri Supreme Court decided *Concerned Parents v. Caruthersville School District*.[65] Here, the school district was charging a small registration fee for students. The school district justified the charge for economic reasons, claiming that it was a negligible amount for each individual family. The court rejected the district's claim, relying on the United States Supreme Court decision that poll taxes unconstitutionally infringe upon the "fundamental" right to

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[63]*Id.* at 359.

[64]*Id.*

[65]*Concerned Parents v. Caruthersville School District*, 548 S.W.2d 554 (Mo. 1977) (en banc).

vote.[66] The Missouri court found that, even though the district's system waived payments for the poor, it operated like a poll tax. Further, because education, like voting, was "fundamental" under the state constitution,[67] the same analysis as in *Harper* applied. No one could now be charged a registration fee. More importantly, education had been made an integral part of voting, thereby gaining for education the status of a "fundamental" right.

In New Jersey, the state's Supreme Court found that rights to a free education were explicit in the state constitution[68] and a "fundamental" right.[69] This *Levine* decision, reached in 1980, was based on education being a predicate to democratic government.[70] Subsequently, the

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[66]*Id.* at 562-63, quoting *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 n.2 (1966).

[67]Education is an integral part of the right to vote. A citizen cannot be expected to make meaningful choices in the voting booth if he has not made himself aware of the issues. He makes himself aware of the issues by reading the literature prepared by the candidates and the media. Hence, literacy and critical thinking are seen as instrumental in the fulfillment of the fundamental right of voting. Other courts have also accepted this reasoning, as discussed below.

[68]*Levine v. New Jersey Dep't of Insts. and Agencies*, 418 A.2d 229, 241-42 (1980).

[69]*Id.* at 242.

[70]*Id.* at 237.

New Jersey Supreme Court heard *Robinson v. Cahill*.[71] This case was the first post-*Rodriguez* decision to overturn a state's system of financing public education.

The issues of the *Robinson* case, regarding the inter-district unequal state's support of its schools, were similar to those of *Rodriguez*, and the *Robinson* court was fully aware of its departure from the *Rodriguez* precedent. The *Robinson* decision was based on the court's interpretation of its state constitution which promised "equal educational opportunity"[72] and it upheld the plaintiffs' objections to property tax finance.[73] Regarding "equal educational opportunity," which is an extension of the constitutional assurance of "equal

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[71]*Robinson v. Cahill*, 303 A.2d 273, *supplemented*, 306 A.2d 65, *cert. denied*, 414 U.S. 976 (1973), *and modified on reh'g*, 351 A.2d 713, *cert. denied*, 423 U.S. 913 (1975).

[72]The New Jersey State Constitution's wording of "equal educational opportunity" raised the question of "equal protection." ("Equal protection" is a Federal law and the subject of the second clause of the Fourteenth Amendment.) New Jersey has its own "equal protection" clause in its state constitution. The judges felt that the state may be more demanding than the Federal courts in interpreting its own "equal protection" clause. These judges recognized that the U.S. Supreme Court has other considerations to weigh, such as the unnecessarily harsh effect its decisions may have on all fifty states, some of which were in no need of a major change in law and policy. *Robinson*, 303 A.2d at 282.

[73]*Id.* at 295-98.

protection," the *Robinson* court made a reference to Natural Law in a significant footnote:

> The concept of equal protection antedates the Fourteenth Amendment. It is implicit in a democratic form of government. The Declaration of Independence proclaimed that "All men are created equal," which must mean equality at the hands of government. There inheres in the Due Process Clause of the Fifth Amendment a guarantee of equal protection.[74]

The *Robinson* court also argued that the United States Supreme Court's textually oriented approach to finding "fundamental" rights, as used in *San Antonio v. Rodriguez*,[75] was not useful as a matter of federal law. They wrote:

> But we have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez*, that a right is "fundamental" if it is explicitly or implicitly guaranteed in the Constitution is immediately vulnerable...And if a right is somehow found to be "fundamental," there remains the question as to what state interest is "compelling" and there, too, we find little, if any, light...Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification.[76]

This *Robinson* dictum points to the non-usefulness of

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[74]*Id.* at 277, n.1, quoting *Shapiro*, 394 U.S. at 641-42.

[75]*Rodriguez*, 411 U.S. 1.

[76]*Robinson*, 303 A.2d at 282.

the *Rodriguez* text-based test of "fundamentality," and prefers an individualized decision by the court in each case. This dictum has been applied by courts in Oregon,[77] Ohio,[78] Idaho,[79] and Georgia.[80] In all cases, the question at bar was the legality of the school finance plan between districts within the respective states.

Interestingly, all of these states have similar requirements regarding education in their respective state constitutions. New Jersey requires a "thorough and efficient system of public schooling;"[81] Oregon requires a "uniform and general system of common schools;"[82] Ohio requires a "thorough and efficient system of common schools;"[83] Idaho requires a "uniform system of private

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[77]*Olsen v. State ex rel. Johnson*, 554 P.2d 139, 144-45 (1976).

[78]*Board of Education v. Walter*, 390 N.E.2d 813, 818-19 (1979), *cert. denied*, 444 U.S. 1015 (1980).

[79]*Thompson v. Engelking*, 537 P.2d 635, 644-45 (1975), quoting *Robinson*, 303 A.2d at 282.

[80]*McDaniel v. Thomas*, 285 S.E.2d 156, 166-67 (1981), quoting *Robinson*, 303 A.2d at 284.

[81]*Robinson*, 303 A.2d at 276.

[82]*Olsen*, 554 P.2d at 140.

[83]*Walter*, 390 N.E.2d at 816.

schools;"[84] and Georgia requires that the state government provide an "adequate education."[85] In all of these cases, the respective courts chose to follow the recommendation of *Robinson*.

We find, for example, that the *Olsen* decision was not at peace with *Rodriguez*, because it apparently felt, in line with *Serrano*,[86] that education should be considered a "fundamental" right. At the same time, the *Olsen* court did not want to go against the subsequent United States Supreme Court decision in *Rodriguez*, which apparently reversed *Serrano*, deciding that education was *not* a "fundamental" right. Instead, *Olsen* elected to cite *Robinson* and resolve the matter with an alternate line of reasoning.

Thus, we find several courts who have decided cases in direct opposition to *Rodriguez*, finding that education may be considered a "fundamental" right within their state. Further, we have other courts who have expressed serious doubts about the holding in *Rodriguez* (that education is not to be considered a "fundamental" right). The implication for this study is that, in recent years, after *Rodriguez*,

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[84]*Thompson*, 537 P.2d at 636.

[85]*McDaniel*, 285 S.E.2d at 157.

[86]*Serrano v. Priest*, 487 P.2d 1241 (1971).

education has made great strides toward being considered a "fundamental" right. The *Rodriguez* knot appears more and more to be coming undone.

JUDICIAL DECISIONS FAVORING THE "FUNDAMENTAL" STATUS OF EDUCATION

There is important and explicit judicial opinion in opposition to *Rodriguez*. This is helpful in our goal of overcoming the Supreme Court's *Rodriguez* decision and showing education to be a "fundamental" right. In Ohio, Justice Locher of the state Supreme Court, writing in dissent, found that his state should consider educational opportunity as a "fundamental" interest. This is because of (i) the wording of the Ohio Constitution;[87] (ii) the nexus to the right to participate in the electoral process and the rights of free speech and association; and (iii) as the foundation to success and realization of the American dream.[88] As a "fundamental" interest, education deserved strict scrutiny before it is affected.[89]

In Mississippi, the state Supreme Court found that, although there is no Federally created "fundamental" right to education, there is such a right within the state. They wrote that the "right to a minimally adequate public

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[87]"The general assembly ... will secure a thorough and efficient system of common schools..." *Ohio Const.* art. VI.

[88]*Walter*, 390 N.E.2d at 827.

[89]*Id.*

education created and entailed by the laws of this state is one we can only label fundamental."[90]

A number of state courts have criticized *Rodriguez*[91] because of its holding regarding the "fundamentality" question. These courts did not necessarily look at their own state constitutions. Instead, they commented on what they perceived as flawed reasoning by the United States Supreme Court. These courts believe that the connection between education and political participation is sufficient to render education a "fundamental" right. They reasoned that one cannot fulfill his civic responsibility as a voter without an education. A voter is responsible to read and study the issues in an election before casting his ballot. Accordingly, education is necessary to assure a learned and well-read voting public who fulfill their constitutional rights to the fullest.

The California Supreme Court, for example, has argued "that the *Rodriguez* majority had considerable difficulty accommodating its new [textually oriented] approach to certain of its prior decisions, especially in the area of

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[90]*Clinton Mun. Sep. School District v. Byrd*, 477 So.2d 237 (Miss. 1985).

[91]*Rodriguez*, 411 U.S. 1.

fundamental rights."[92] This *Serrano* court held that "education is a unique influence on a child's development as a citizen and his participation in political and community life."[93] The conclusion was, therefore, forced, that "the distinctive and priceless function of education in our society warrants, indeed compels, our treatment of it as a "fundamental interest."[94] Accordingly, the State of California would continue to apply strict scrutiny to laws impinging "on those individual rights and liberties which lie at the core of our free and representative form of government."[95]

Similarly, a West Virginia court has written, "[O]ur research ... indicates an embarrassing abundance of authority and reason by which the [*Rodriguez*] majority might have decided that education is a fundamental right of every American."[96]

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[92]*Serrano*, 557 P.2d 929, 951 n.44 (1976).

[93]*Serrano*, 487 P.2d at 1256.

[94]*Id.* at 1258.

[95]*Id.* 557 P.2d at 952.

[96]*Pauley v. Kelly*, 255 S.E.2d 859, 863 n.5 (W. Va. 1979).

In an Opinion of the Justices,[97] the New Hampshire Supreme Court never mentioned the state constitution's education clause. It did incorporate Justice Marshall's dissent into its analysis of state law,[98] ruling against *San Antonio v. Rodriguez*. Specifically, the decision was that, although *Rodriguez* might authorize a failure to provide the minimal education necessary to facilitate the rights of suffrage and free speech, the state constitution clearly would not.[99]

Judges in Colorado also spoke against *San Antonio v. Rodriguez*. The issue of interdistrict financial inequities was raised again, and decided like *Rodriguez*. Nonetheless, Justices Dubofsky and Lohr[100] agreed, in dissent, that they would "subject all aspects of school financing to an enhanced level of scrutiny based on the favored status explicitly accorded education in this state."[101] The case concluded with a finding that the rights to vote and

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[97]*Opinion of the Justices*, 387 A.2d 333 (1978).

[98]*Id.* at 335-36.

[99]*Id.* at 335.

[100]*Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1032 (en banc., 1982), (Lohr, J., dissenting).

[101]*Id.* at 1030 (Dubofsky, J., dissenting).

petition the government, both guaranteed in the state constitution, generated a "fundamental" state constitutional right to equal educational opportunity.[102] As a "fundamental" right, education was entitled to "heightened scrutiny." This decision was independent of *Rodriguez* and based on the Colorado court's ability to interpret equal protection rights under the Colorado constitution differently from the United States Supreme Court's analysis under the United States Constitution.[103] Under Colorado's heightened scrutiny, the state's school finance scheme would fail.[104]

The State of Washington recognized the importance of education for "promoting a free society, intelligent and effective participation in an open political system, and preparation for the exercise of First Amendment rights."[105] The Washington state court analyzed education to be a constitutional right, arising from the constitutionally imposed duty of the state to educate its youth, and

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[102]*Id.*

[103]*Id.*

[104]*Id.* n. 1.

[105]*Seattle School District No. 1 of King County v. State of Washington*, 585 P.2d 71, 94 (1978).

requiring heightened scrutiny before this education may be abridged.[106]

The State of Wyoming has also found that education for its children is a matter of "fundamental" interest. As such, education has earned the category of "strict scrutiny" by the courts before it may be limited to the child living in Wyoming.[107]

The education clause in the state constitution of Montana presents an interesting study of judicial interpretation. We may also use judicial opinion as expressed in Montana to better understand the core issues involved in determining whether the right to an education is to be viewed as "fundamental" in a particular state.

The Montana state Constitution states

> It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state....The legislature shall provide a basic system of free quality public elementary and secondary schools.[108]

Montana's Constitution clearly requires the state to

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[106]*Id.* at 91.

[107]*Washakie County School District No. One v. Herschler*, 606 P.2d 310, 333 (1980).

[108]*MT Const.* art. X, § 1 (1972).

provide each citizen with quality education. This requirement is based, in part, on the time-honored *McNair* decision,[109] which defined education as "the totality of the qualities acquired through individual instruction and social training, which further happiness, efficiency and [the] capacity for social service."[110] Although the court fell short of recognizing the right to education as "fundamental", it did call for a quality education to be provided for all children, "one which meets contemporary needs and produces capable, well-informed citizens."[111]

Similarly, Montana's Constitution also guarantees "equality of educational opportunity." This guarantee may be seen as an extension of the state's equal protection clause.[112]

The question of whether Montana guaranteed education as a "fundamental" right was raised in *State ex rel. Bartmess v. Board of Trustees*.[113] As part of their analysis of the

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[109]*McNair v. School District No. 1*, 288 P. 188 (1930).

[110]*Id.* at 190.

[111]*Id.*

[112]*MT Const.* art. II, § 4 (1972).

[113]*State ex rel. Bartmess v. Board of Trustees*, 726 P.2d 801 (1986).

case, the Montana Supreme Court found two possible reasons why a right might be considered "fundamental." In Montana, a right is "fundamental" (i) if it is found within Montana's Declaration of Rights, or (ii) if it is a right without which other constitutionally guaranteed rights would have little meaning.[114] The court concluded that "various aspects of education under our Montana Constitution could be considered "fundamental,"[115] but the court did not identify these aspects. The *Bartmess* court was quite aware of the *San Antonio v. Rodriguez*[116] decision, but read the language of its own Montana state constitution as indicating a different result.[117] The relevant words of Montana's Constitution are the state's requirement to provide for the realization of "the full educational potential of each person."[118] This court was willing to differ with the United States Supreme Court's *Rodriguez* decision and adopt

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[114]*Id.* at 802.

[115]*Id.* at 804.

[116]*San Antonio v. Rodriguez*, 411 U.S. 1 (1973). (Education is not a "fundamental" right under the United States Constitution.)

[117]*Bartmess*, 726 P.2d at 804. (The right to certain aspects of education are fundamental.)

[118]*MT Const.* art. II, § 1 (1972).

its own analysis of education, if "independent state grounds exist for developing expanded rights under our state constitution."[119]

At least one commentator would have Montana take that leap into rendering all of education a "fundamental right."[120] This is because of the explicit wording in the state constitution mentioned above. In addition, education is necessary "for individuals to exercise other constitutionally guaranteed rights...such as the fundamental right to vote."[121] Further, Montana's wording is no different than the Wisconsin Constitution's wording, where education was found to be a "fundamental" right.[122] Also, the Montana framers' intent (which is still readily analyzed because of the recency of the Montana state constitution)

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[119]*Bartmess*, 726 P.2d at 806 (Morrison, J., concurring).

[120]Lori Anne Harper, "Classroom v. Courtroom: Is the Right to Education Fundamental?" 51 *Montana Law Review* 509 (1990).

[121]*Id.* at 522.

[122]In Wisconsin, the language of the state constitution ("equal opportunity for education") was interpreted by the Wisconsin Supreme Court to mean that education is a fundamental right in that state. *See Buse v. Smith*, 247 N.W.2d 141 (1976). The language in the Montana constitution ("equality of educational opportunity") is similar enough to also be considered an indication of the fundamentality of the education right. *See* Harper, 51 *Montana Law Review* at 522.

indicates clearly that they wanted education to be considered a "fundamental" right. The *Constitutional Convention Transcripts* include: "Education occupies a place of cardinal importance in the public realm...Because of the overriding importance of education, this committee recognizes the awesome task of providing the appropriate Constitutional provisions necessary to protect and nurture the public educational system."[123] All of this would seem to indicate that education may be considered a "fundamental" right in Montana. If it is not considered a "fundamental" right, then it must certainly be considered worthy of middle-tier scrutiny, as clearly articulated in *Bartmess*.[124]

This chapter studied the question of "fundamentality" of a child's right to education. If the education right can be considered "fundamental," then any limitation of it would be subjected to the "strict scrutiny" of the courts. In disciplinary cases of expulsion or suspension, the court's

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[123]Harper, *Id.* at 522, quoting *II Montana Constitutional Convention Transcripts* 721 (1972).

[124]"We conclude that the only standard of constitutional review which allows a careful balancing of these competing interests [relating to the fundamentality of extra-curricular activities] is the middle-tier analysis." *Bartmess*, 726 P.2d at 804.

"strict scrutiny" would include ascertaining that the school had substantial overriding reasons to limit a constitutional right so crucial for success. The school would be required to provide "substantive due process." The less important "state action" requirement would be set aside in favor of the "fundamental" right to education that deserves the highest level of protection available.

The Supreme Court of the United States found that education was not a "fundamental" right.[125] Since that split decision of five justices to four, many lower courts and legal scholars have tended to side with Justice Marshall's dissent. They have found in favor of granting "fundamental" status to education. These courts often took note of the *Rodriguez* decision, but chose to disagree with it. Their reasons focus on the instrumentality and societal importance of education. Some have tried to counter the Court's arguments with their own constitutional text-based legal reasoning.

In the subsequent decision of *Plyler v. Doe*,[126] the Supreme Court seemed to moderate its previous position regarding the "fundamentality" of education. *Plyler* held

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[125]*Rodriguez*, 411 U.S. 1.

[126]*Plyler v. Doe*, 457 U.S. 202 (1982).

that education was important enough to society and the individual child to warrant the middle-tiered or "heightened" scrutiny. This level of judicial scrutiny would still require that "substantive due process" be fulfilled.

We have gathered significant judicial decisions and scholarly commentary to put education squarely in the circle of "fundamental" rights. These are rights that cannot be abrogated without compelling reason. The "fundamental" right to education applies to the student, not the school. It bespeaks the knowledge and culture necessary to succeed, to make the American dream into a reality. It provides the background necessary to make informed decisions in the voting booth and everyday life. The "fundamentality" of education is a jewel in the crown of American life. The constitutional right of "substantive due process" must be followed even in private schools where "state action" may not be found.

CHAPTER V

THE "PUBLIC FUNCTION" THEORY AND PRIVATE SCHOOL STUDENTS' RIGHTS

As noted above, the literal wording of Section I of the United States Constitution, Amendment XIV,[1] suggests that the due process requirement applies only to actions of the state and not those of individuals. This was the narrow interpretation given in *United States v. Cruikshank*,[2] where the Due Process Clause was interpreted in a way that would last for over one hundred years. Chief Justice Waite stated, "The fourteenth amendment prohibits a state from depriving any person life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen against another."[3] Eight year later, Justice Bradley followed the same reasoning in the *Civil Rights Cases*.[4] There Justice Bradley wrote explicitly: "[It] is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject

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[1](Amend. XIV was added to the Constitution in 1868.)

[2]*United States v. Cruikshank*, 92 U.S. 542 (1875).

[3]*Id.* at 554-55.

[4]*Civil Rights Cases*, 109 U.S. 3 (1883).

matter of the amendment."[5] It is here that the term "state action" was born.

The "state action" requirement of the Constitution is the Court's way of saying that the Constitution applies only to the government. The Constitution limits governmental activities and not those of private parties. In general terms, this is true, almost by definition. Indeed, most people applaud this traditional approach lest the police peer into each home and arrest people out of their own living rooms. One author described the importance of the "state action" doctrine as the constitutional guarantee that the Court will not tell me who I may invite to a dinner party in my home.[6] The "state action" doctrine says that, as long as a private citizen is not acting on behalf of the state, he is free to engage in discriminatory or otherwise free behaviors at will.

There is a second approach to the "state action" analysis. This approach focuses on the "public" qualities of the private enterprise. If there are enough indicia of public, specifically state, involvement in a private

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[5]*Id.* at 11.

[6]Charles L. Black, Jr. "Foreword: 'State Action,' Equal Protection, and California's Proposition 14." 81 *Harvard Law Review* 69 (1967).

enterprise, then this enterprise may be said to be public. State involvement may be seen by its financial support or its delegation of an important state service. State involvement may also be found when a private person or a group perform an essential service which might otherwise be included in the state's panoply of activities. The private performer is seen as providing a "public function."

Where does the private school fit? Is it a private or public institution? On the one hand, the private school is, by definition, not a state school. As such, it need not follow the same strictures and dictates of the state schools. On the other hand, this private school is serving the public. It is fulfilling, in alternative fashion, a similar educational mission. Attendance by its students at the private school fulfills the state's compulsory education statute. Does this make the private school similar enough to the public school to require its fulfillment of the public school mandates?

If we succeed at showing that private schools are similar to public schools, and that this brings private schools to the door of constitutional requirements, then we have won "due process" rights for private school students. Just as public school children are entitled to "due process"

before disciplinary action, so would be their private school counterparts.

With the "public function" theory we may circumvent the entire issue of "state action." The prevailing judicial opinion is that private schools usually lack "state action" unless the state has paid for the educational program or had input in its implementation.[7] The school may, nonetheless, be required to fulfill the same requirements, even without "state action," if the school is judged to be a public institution. As a public institution it is wholly appropriate that society expect the school to follow the same guidelines it has set for other public institutions. Once the private school is considered a public institution, the question of how directly related it is to the state should move toward irrelevance.

This chapter uses judicial decisions and scholarly commentary to review the background of the "public function" doctrine. The similarities between this background, as discussed in the related legal opinions, and private schools should point to the appropriateness of this doctrine in private schools as well. The "state action" question will

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[7]*Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

have been eliminated, and "due process" requirements will have been made applicable to private school students.

Once we apply the "public function" doctrine to private schools and require "due process" rights for their students, then the question is what procedure should follow. It appears that private schools would be required to provide the same "due process" to their students as public schools provide theirs. This is "procedural due process," requiring in suspension cases of ten days or less, "oral or written notice of the charges against [the student], and if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[8]

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[8]*Goss v. Lopez*, 419 U.S. 565, 581 (1975).

JUDICIAL DECISIONS REGARDING THE "PUBLIC FUNCTION" DOCTRINE

Beginning in the 1940's, the Supreme Court began to expand the boundaries of the state action doctrine. In *Marsh v. Alabama*, the Court presented the new concept of "public function."[9] Mr. Marsh was accused of trespassing in the town of Chickasaw, Alabama, when he distributed religious literature in the town without permission. The town of Chickasaw was owned by the Gulf Shipbuilding Corporation. Gulf claimed that, because the town belonged completely to them, Marsh was trespassing on private property, and that he had no right to distribute his literature. They argued that "the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests."[10] The Court rejected this argument and found in favor of Marsh.[11] Justice Black raised the issue of private facilities serving a larger public in his majority opinion. He wrote

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do

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[9]*Marsh v. Alabama*, 326 U.S. 501 (1946).

[10]*Id.* at 506.

[11]*Id.* at 510.

> his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[12]

Twenty year later, a similar case came before the Court.[13] Part of a trust established by Senator Bacon established a park in Macon, Georgia. The trust provided that the park, Baconsfield, was to be used by whites only. Sensitive to the issues of racial discrimination involved in fulfillment of this trust, the city resigned as trustee and appointed a private trustee instead. Thus, there was now a private park with racial restrictions. The Court found that the Fourteenth Amendment's prohibition of discrimination applied even in a private park. Justice Douglas, writing for the majority, explained that the public function theory of *Marsh v. Alabama*[14] was applicable in this case. Justice Douglas saw the nature of a park as similar to a fire department or police department that traditionally serves

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[12]*Id.* at 506.

[13]*Evans v. Newton,* 382 U.S. 296 (1966).

[14]*Marsh v. Alabama*, 326 U.S. 501 (1946).

the community.[15] The park is clearly in the public domain and must avoid all conduct proscribed by the Fourteenth Amendment.[16] "The predominant character and purpose of this park are municipal."[17]

Interestingly, Justice Harlan, in his dissent,[18] discusses the obvious conclusions from the *Evans* decision. Justice Harlan believes that *Evans* forces one to conclude that the "public function" notion applies to private schools. He stated

> Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives to those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly, depending on the size and character of the institution.[19]

Justice Harlan continued, "I find it difficult... to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts [that the

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[15]*Evans*, 382 U.S. at 301.

[16]*Id.* at 302.

[17]*Id.*

[18]*Evans*, 382 U.S. at 315 (Harlan, J., dissenting).

[19]*Id.* at 321.

Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements]...while making of every college entrance rejection letter a potential Fourteenth Amendment question."[20] Justice Harlan's opinion was in dissent, and the Court never applied his reasoning to private schools. This notwithstanding, Justice Harlan's opinion states clearly that elementary and secondary schools serve a public function. This public function would require the fulfillment of constitutional guarantees.

The 1970's brought two cases before the Supreme Court demanding decisions in the area of "public function." Both of them have significant implications for the public function of private education. The first case, *Jackson v. Metropolitan Edison Co.*,[21] seems to have dealt a death blow

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[20]*Id.* at 322. From a perspective of student rights, this decision is not very helpful. For the Court did not seek to stop the offensive behavior of segregation. Instead, it sought to disengage the State from participation in the offensive act. For the cause of increased liberty rights for all, students as well as park attendees might be better served by the Court clarifying the full extent of the rights of privacy and freedom. Then, we would know how to respond to one of the underlying issues of this study: the conflicting values of private institutions and individual rights.

[21]*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

to the public function of private schools, though only in its majority opinion. The case involved Catherine Jackson, whose electrical service had been curtailed by Metropolitan Edison Co. for alleged nonpayment for her electric service. Metropolitan Edison held a certificate of public convenience from the Pennsylvania Public Utilities Commission empowering it to deliver electricity to a specific service area.[22] Ms. Jackson now claimed that the company had curtailed her service without proper notice and due process.[23] She further claimed that Metropolitan Edison was serving a "public function" in the delivery of electricity and was, therefore, required to follow procedural due process requirements.[24] Justice Rehnquist stated that the inquiry in this case must be "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[25] Previously, the Court had required only that the activity in question

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[22]*Id.* at 346.

[23]*Id.* at 347.

[24]*Id.* at 348.

[25]*Id.* at 351, quoting *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163, 176 (1972).

had to be one traditionally performed by a state entity. Now, the *Jackson* Court was requiring that the function must be one which not only had been traditionally but also *exclusively* performed by the state.[26] The *Jackson* Court[27] judged that there was not a close enough nexus between the actions of the state and those of the private utility company for a finding of "public function."[28]

Justice Marshall, writing in dissent, proposed a less

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[26]*Id.* at 353.

[27]Justice Rehnquist, writing for the Court, wrote the following dicta regarding the Public Function theory and schools:

> It is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools, yet we stated in *Evans v. Newton*, 382 U. S. 296, 300 (1966):
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> > The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems.

Jackson v. Metropolitan Edison Co., 419 U. S. at 354 n.9. This dicta was interpreted as the Supreme Court's rejection of the public function theory as applied to education in *Berrios v. Inter American University*, 535 F2d 1330 (CA1 Puerto Rico 1976).

[28]*Jackson, Id.* 419 U.S. at 358-359.

rigid standard to find "state action."[29] He held that state approval alone of a challenged conduct might warrant a finding of "state action." He wrote that in previous cases "the Court suggested that if the State's regulation had in any way fostered or encouraged racial discrimination, a state action finding might have been justified."[30] Further, Justice Marshall wrote

> [I agree] that it requires more than a finding that a particular business is 'affected with the public interest' before constitutional burdens can be imposed on that business. But when the activity in question is of such public importance that the state invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the state has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body.[31]

Thus, Justice Marshall notes that if a state has identified a service that is important for it to provide and a private institution provides it too, then the private institution must follow the same requirements as the state. This kept alive the notion that private schools serve a public function. The state has identified education as an

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[29]*Jackson*, 419 U. S. at 369 (Marshall, J., dissenting).

[30]*Id.* at 369 n.2.

[31]*Id.* at 372.

important service for it to provide, though it allows private schools to act as its surrogate. Were the private schools not available, the state would provide educational services to these students. It follows, then, that according to Justice Marshall, the private schools must provide the same rights provided by their public school counterparts.

The second case involving "public function" is *Flagg Bros., Inc. v. Brooks*.[32] Here, Flagg Brothers, Inc., a warehouseman, proposed to sell Brook's stored goods to satisfy a warehouseman's lien. Mrs. Brooks had claimed that the sale of her goods was "state action" because it was being done under the Uniform Commercial Code and was a power "traditionally exclusively reserved to the State."[33] Further, she claimed that "the resolution of private disputes is a traditional function of civil government."[34] Justice Rehnquist noted that many functions were traditionally performed by governments, but they were not necessarily "exclusively reserved to the State."[35]

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[32]*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

[33]*Id.* at 157.

[34]*Id.*

[35]*Id.* at 158.

Further, the proposed sale by Flagg Bros. was not the only means of resolving a purely private dispute, so that the exclusivity aspect was missing.

In *Flagg Bros.*, the Supreme Court failed to use the "public function" theory to require a private warehouse to fulfill the governmental requirement of "due process." The decision in the case notwithstanding, the Court stated, "We would be remiss if we did not note that there are a number of state...functions ...which have been administered with a greater degree of exclusivity by States... Among these are such functions as *education*..."[36] Thus, even when findings of public function were limited by the Court, education was perceived as one of the instances in which a finding of "public function" would be appropriate.

Justice Stevens, writing in the *Flagg Bros.* dissent, disagrees with majority's requirement of "exclusivity" before an action is considered a state function. Justice Stevens, joined by Justices White and Marshall, held that a state function can be found even when a private body performs an action not reserved exclusively for the state.[37] He contends that this was the conclusion of *Evans*

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[36]*Id.* at 163. Emphasis added.

[37]*Id.* at 172-3 (Stevens, J., dissenting).

v. Newton,[38] "and is not even adhered to by the Court in this case."[39] Most importantly for the purpose of this study, Justice Stevens cited the majority's dicta regarding education. The majority opinion recognized the "wide range of functions that are typically considered sovereign functions, such as education..."[40]

Justice Stevens pointed to the fact that education is a typical governmental function that is often undertaken by private parties. Perhaps the most significant statement of Justice Stevens' dissent in *Flagg Bros.* was, "[I]t is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions."[41] Further, Justice Stevens dissents from the majority opinion that "state action" should be found only when the state has ceded one of its exclusive powers to a private party.[42] Justice Stevens is troubled by this description of "state action" because it "does not even attempt to reflect the

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[38]*Evans*, 382 U.S. 296. (A private school serves a public function and may not discriminate between groups.)

[39]*Flagg Bros.*, 436 U.S. at 173.

[40]*Id.* n.10.

[41]*Id.* at 178.

[42]*Id.*

concerns of the Due Process Clause, for the state-action doctrine is, after all, merely one aspect of this broad constitutional protection."[43] There is little doubt that Justice Stevens would consider private education as serving a public function. If so, all the rights of public school students should logically be granted to private school students.

Professor Lawrence Tribe concluded that, under the Court's public function test in *Flagg Bros.*, it is a "virtual impossibility [to suggest] criteria to determine what is and what is not [an] inherently governmental [function]."[44] Professor Jesse Choper takes Professor Tribe's statement of confusion this one step further. He asks, rhetorically perhaps, whether a private school would be considered as serving a public function if it is the only school in the community serving the educational needs of the community's children. This school is performing a function traditionally *exclusively* reserved to the state. Professor Choper suggests that the private school's function of providing public education gives this particular private

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[43] *Id.*

[44] Laurence H. Tribe, *American Constitutional Law*, (Mineola, NY: Foundation Press) 1979 Supplement 108, n.91.

school monopoly power in the community. In this case, the school should be held to the constitutional responsibilities of the state.[45] We may ask, rhetorically as well, how far away a private school in a large community is from serving the same function of educating at least some of their children. Should not the private school be held to the same constitutional requirements as the state?

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[45]Jesse H. Choper, "Thoughts on State Action: The 'Government Function' and 'Power Theory' Approaches." 1979 *Washington University Law Quarterly* 757, 778.

THE "STATE ACTION" TRILOGY AND "PUBLIC FUNCTION"

The decade of the 1980's brought three important "state action" cases before the Supreme Court. This trilogy of cases, *Blum v. Yaretsky*,[46] *Rendell-Baker v. Kohn*,[47] and *Lugar v. Edmondson Oil Co.*[48] were all decided in the Summer of 1982. We shall review each of these cases for their relevance to the "public function" aspect of private education and their importance for ascribing "due process" rights to private school students.

Blum v. Yaretsky dealt with nursing home patients whose stays in these homes were decided by the home without offering the patients any notice or opportunity for a hearing. Because the stay was paid for by the state (of New York), through its Medicaid system, the patients claimed that "state action" was present and, therefore, that they should have the opportunity to be heard before any decisions were reached, regarding their discharges or transfers. The nursing home responded that theirs was a private program, in spite of the many state laws that regulated their activities.

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[46]*Blum v. Yaretsky*, 457 U.S. 991 (1982).

[47]*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[48]*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

The Supreme Court agreed with the nursing homes, finding that state regulations alone do not make a nursing home into an arm of the state.[49] The Court relied on the *Jackson* ruling, that "state action" will not be found until "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[50] Thus, the patients could not hold the state liable for the nursing home's actions.

The *Blum* Court also indicated when a state may be held responsible for a private decision. Normally, the state will be held responsible when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.[51] As *Flagg Bros*[52] and *Jackson*[53] teach, mere approval of or acquiescence to the actions of a private party are not sufficient to justify holding the state

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[49]*Blum*, 457 U.S. at 1003.

[50]*Id.* at 1004, quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[51]*Id.* at 1004.

[52]*Flagg Bros.*, 436 U. S. at 164-165.

[53]*Jackson*, 419 U.S. at 357.

responsible for those actions under the terms of the Fourteenth Amendment.

Further, a finding of "state action" under the "public function" doctrine requires that the private entity has exercised powers that are traditionally the exclusive prerogative of the state.[54] Justice Rehnquist found that nursing homes do not perform such a function, as neither the statutes nor the state constitution mandated the provision of medical care. He further stated, "Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public."[55]

The majority opinion would seem to close the door on the notion that private school education might be considered "state action." Rarely would the state be so "closely involved" in or give "significant encouragement" to a day-to-day decision of a private school that it would be held responsible for the decision. Nonetheless, Justice Brennan, joined in dissent by Justice Marshall, seemed to leave the

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[54]See *Id.* at 353, and *Flagg Bros.*, 436 U.S. at 157-161.

[55]*Blum*, 457 U.S. at 1012.

door ajar. He wrote

> In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully [is] rendered more, not less important...[I]n deciding whether "state action" is present in actions performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken.[56]

We might reach a clearer conclusion regarding the Court's view of non-public schools from a case dealing more directly with this issue. *Rendell-Baker v. Kohn*[57] was the second "state action" case of the trilogy decided during the Summer 1982 term. Here, certain teachers had been dismissed from a private school, allegedly for speaking publicly against the school. Although the school was private, it received funding from Massachusetts under contract to provide Special Education services.[58] The teachers claimed that, because of its unique funding situation, the school was required to provide them with "due process" as a "state

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[56]*Id.* at 1012 - 1013.

[57]*Rendell-Baker*, 457 U.S. 830.

[58]*Id.* at 832.

actor."[59]

After examining all of the alleged indicia of "state action," Justice Burger concluded that the school was not required to provide its teachers with federal constitutional guarantees. The Chief Justice emphasized that "state action" can be found only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State."[60]

Similarly, the Chief Justice found that "the school's receipt of public funds does not make the ... decisions acts of the state."[61] Further, Justice Burger added, "The school, like the nursing homes,[62] is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in

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[59]*Id.* at 834.

[60]*Id.* at 840.

[61]*Id.*

[62]*See Blum*, 457 U.S. 991.

performing public contracts."[63]

The teachers also claimed that the extensive state regulation of their school made the school's actions those of the state. Justice Burger, however, rejected this argument as well. He wrote, "[H]ere the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, ... the various regulators showed relatively little interest in the school's personnel matters."[64]

As for the "public function" argument, that the private school was doing the work of the state in its stead, the Chief Justice was not impressed. He cited the *Jackson*[65] criterion that the private party's action was to be the *exclusive* prerogative of the state before a finding of public function would be reached. "There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. [While state law] demonstrates that the State intends to provide services for such students at public expense, that legislative policy choice in no way makes

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[63]*Rendell-Baker*, 457 U.S. at 841.

[64]*Id.* at 841-42.

[65]*Jackson*, 419 U.S. at 353.

these services the exclusive province of the State."[66] The majority opinion did not find private education to be the fulfillment of a "public function" and, hence, an act of the state.

Once again, Justice Marshall dissented. He maintained that this holding "simply could not be justified."[67] Justice Marshall pointed to the heavy state funding of the school as well as the regulation of the school by the State of Massachusetts . Surely, he observed, this was a case of very close nexus between the school and the state government.[68] Moreover, he wrote, the fact that "the school is providing a substitute for public education"[69]

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[66]*Rendell-Baker*, 457 U.S. at 842.

[67]*Rendell-Baker*, 457 U.S. at 844 (Marshall, J., dissenting).

[68]*Id.* at 849.

[69]Justice Marshall, in his dissent, was clearly concerned that the state might use private contractors to circumvent the laws that applied "only" to the State. This was not the first time that there was concern about using the private domain to circumvent public statutes. For example, in as early a case as *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Court upheld private restrictive covenants that prevented the sales of homes by white sellers to black buyers. The Court failed to find a Constitutional issue, judging these covenants to be private actions, and not falling within the strictures of the Fourteenth Amendment. *Id.*, at 330. The *Corrigan* decision was subsequently reversed by the Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

seemed to be "an important indicium of state action."[70] Further, he wrote, "I would conclude that the actions challenged here were under color of state law, even if I believed that the sole basis for state action was the fact that the school was providing [statutorily mandated] services."[71]

In addition, Justice Marshall objected to the comparison of the school to other contractors. "Although shipbuilders and dambuilders, like the school, may be dependent on government funds, they are not so closely supervised by the government. And unlike most private contractors, the school is performing a statutory duty of the State."[72] Justice Marshall also stated that a finding of state action may be justified, even if the state has not traditionally and exclusively performed a function. Such a finding is justified when "a private entity is performing a vital public function and other factors are present which show "a close connection with the state."[73]

Justice Marshall further critiqued the majority's

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[70]*Rendell-Baker*, 457 U.S. at 851.

[71]*Id.*

[72]*Id.*

[73]*Id.* at 849.

decision because it focused on the "empty formalism" of the categories of "state action" and "under color of law."[74] This formalism that Justice Marshall decried is a type of legal analysis that starts with legal categories and tries to fit facts into these categories. Justice Marshall appeared to be advocating a more realistic view of legal analysis that would state policy choices clearly and openly, rather than masking them in formalistic legal definitions and rules. With respect to "state action," it should be possible to explore the policy rationales for and against a finding of "state action" in each case. In *Rendell-Baker v. Kohn*, Justice Marshall's dissent focused on his view that there were enough indicators of "state action" to warrant such a finding regardless of how well the facts fit into the formalistic category ("coercive power," "significant encouragement," "exclusive prerogative of the state"). Justice Marshall, albeit in dissent, sees private education as a "public function." Accordingly, private educators must provide their students with the same rights enjoyed by the students of public education. Private school students are entitled to the full panoply of "due process" rights granted to public school students.

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[74]*Id.* at 852.

The *Rendell-Baker* decision related directly to teachers of private institution. Regarding the teachers, the Court found, in the majority opinion, that the private school was not required to provide the usual constitutional safeguards that public school teachers enjoy. What would be the case, however, if the plaintiffs were students? There is judicial opinion to the effect that the "public function" argument is much stronger if students were the plaintiffs. "The 'public function' concept is strongest...when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party."[75] It appears that the ruling of *Rendell-Baker*, relating to faculty at a private school, is not conclusive regarding students in the same institution. Students in a private school that is publicly funded have a stronger claim than their teachers for due process rights.

Additionally, some see the compulsory education statutes as an agent for imposing the state within the school. After all, students are required by law to attend school; each state has compulsory education statutes. In taking disciplinary action, the school is using authority over the student, authority that is derived from state law.

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[75]*Rendell-Baker v. Kohn*, 641 F.2d 14, 26 (1981).

It is clear, then, that the school is a state actor, acting under "color of law," and must consider itself limited by constitutional constraints.[76]

The third case of the "state action" trilogy was *Lugar v. Edmondson*.[77] Interestingly, Justice Rehnquist and Chief Justice Burger, the authors of the majority opinions in *Blum* and *Rendell-Baker*, were in the dissent in *Lugar*.[78] This case uses the approach to public function that emphasizes enough state involvement in private activities to make the apparent private action into a public function. The case arose when Edmondson sued to collect a debt from Lugar, the operator of a truck stop. Ancillary to that action, Edmondson sought prejudgment attachment of some of Lugar's property for fear that Lugar might sell off this property in order to avoid paying his creditors. The attachment was

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[76]*Milonas v. Williams*, 691 F.2d 931, 940 (1982).

[77]*Lugar v. Edmondson*, 457 U.S. 922 (1982).

[78]Chief Justice Burger and Justice Powell wrote separate dissenting opinions in which they said that the Court was expanding "state action" beyond its proper boundaries. They did not believe that a finding of "state action" was valid just because a state official was involved in an essentially private action. *Id.* 457 U.S. at 943 (Burger, C.J., dissenting). Justice Powell added that he was opposed to ensnaring someone (Edmondson) who believed he was acting in strict accordance with the law. *Id.* 457 U.S. at 945-46 (Powell, J., dissenting).

affected by a state clerk and the county sheriff. Lugar continued to own his property, though the property was now sequestered. About one month later, a hearing was held to determine the propriety of the attachment, only to discover that there were no real grounds for it. At this point, Lugar sued Edmondson and its president, alleging that the attachment deprived him of his property and was done without due process of law. This deprivation was clearly done "under color of law," similar to "state action."[79] The Supreme Court, in a five to four decision, ruled that Lugar's claim was justified and the action could be attributed to the state.

Writing for the majority, Justice White delineated a two-part test for "fair attribution" of an act to the state. First, in order for an act to be considered "state action," the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.[80] Second, the party charged with the

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[79]The similarity between the concepts of "state action" and "under color of law" was discussed in *United States v. Price*, 383 U.S. 787, 794, n.7 (1966), where it was resolved that the legal analysis is the same for both concepts.

[80]*Lugar*, 457 U.S. at 937.

deprivation must be a person who may fairly be said to be a state actor.[81] This person may be a state official or someone else whose actions are chargeable to the state. The Court's imposition of this test was necessary, according to the Court, so that private parties not "face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."[82]

Justice White explained that this two-part test appears like one when a state official is involved. However, when a private party is involved, the second part of the test prevents us from reaching a decision of "state action" even when a state statute is involved. Thus, Edmondson's use of state officials to sequester Lugar's property warranted a decision of "state action." This was not the case in *Flagg Bros.*[83] (where there was no finding of "state action") because their lien was executed without the intervention of a state official.

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[81] *Id.* at 939.

[82] *Id.* at 937.

[83] *Flagg Bros.*, 436 U.S. 149.

LEGAL THINKING SINCE THE "STATE ACTION" TRILOGY

The *Lugar* two-part test is not helpful in our quest to ensure student rights in private schools. Its progeny, however, may help us accomplish this goal. The *Lugar* test was relied upon in the recent New York case of *Albert v. Carovano*.[84] Here, twelve Hamilton College students were suspended for participation in a "sit in" against this private college's rules. These rules had been instituted pursuant to New York State education law. This law mandated that colleges adopt rules for the maintenance of public order. Now that the rules were being enforced, the students claimed that they were done so "under color of state law" and that the state was involved. Since these students were involved in a state-required disciplinary action, they claimed that they were entitled to due process rights which they never received.

Carovano is noteworthy because of its different decisions of the trial and two appellate courts. The United States District Court dismissed the case for the students' failure to show action "under color of state law."[85] Then,

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[84]*Albert v. Carovano*, 824 F.2d 1333 (2d. Cir.), *modified* 839 F.2d 871 (2d Cir. 1987), *rev'd and vacated*, 851 F.2d 561 (2d Cir. 1988) (en banc).

[85]*Carovano*, 824 F.2d at 1334.

the Court of Appeals for the Second Circuit overturned the district court's decision, and remanded the case for a determination of facts,[86] citing *Coleman v. Wagner College*.[87] If the facts were to show that the students had been deprived of a constitutionally-protected right, then as a matter of law, the college had acted "under color of state law" and that the students were entitled to "due process."[88] By citing *Coleman*, the appeals court was stating that the first part of the *Lugar* test was satisfied if the district court agreed with the students' claim that the New York State law was intended to be and actually was applied as "a command to colleges to adopt a particular system of regulation of conduct on campuses."[89]

Proceeding to the second part of the *Lugar* test, the court held that the college could fairly be considered a state actor under a "state compulsion" theory.[90] The court believed that the state's regulations were intended to

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[86]*Id.*

[87]*Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

[88]*Carovano*, 824 F.2d at 1338.

[89]*Id.* at 1341.

[90]*Id.*

encourage, if not require colleges to take a strong stand against campus unrest.[91] This encouragement, which was more than mere approval or acquiescence, seemed enough to show that the state was involved in the expulsion decision.[92] This encouragement would involve the state in the school, and make the private college's activities into a public function. This would require that the school afford its students the rights of public college students.

In 1988, on rehearing en banc, the Court of Appeals reversed itself.[93] The court found that the college's suspension of the students did not constitute "state action." This reversal was because *Blum*[94] had been decided by the United States Supreme Court in the meantime. If the *Blum* court had not found "state action," and there was far more state involvement there, then *Carovano* needed reversal.[95] The Court of Appeals did not believe that there was coercion by the state to mete out any particular

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[91]*Id.*

[92]*Id.*

[93]*Albert v. Carovano*, 851 F.2d 561, 563 (2d Cir. 1988) (en banc).

[94]*Blum*, 457 U.S. 991.

[95]*Albert v. Carovano*, 824 F.2d 1333 (2d Cir. 1987), *vacated*, 851 F.2d 561, 570 (2d Cir. 1988).

punishment, and the state could not be considered responsible for the actions of the college.[96] The private Hamilton College was not viewed as serving a public function of educating the state's students.

Judge Oakes dissented because he considered the *Lugar* test to have been fulfilled.[97] The first prong of the *Lugar* test is whether the deprivation is caused by a state policy.[98] Judge Oakes felt that the disciplinary policy had clearly been narrowly tailored to address school discipline, in fulfillment of the New York State mandate. The second prong of the *Lugar* test is whether the defendant can be called a state actor.[99] Here, the school was not exercising its professional judgement on the best way to discipline its students. Rather, it was implementing a specific disciplinary program that the state had coerced it to adopt. Thus, Judge Oakes argued that the school was acting on behalf of the state, as required by *Lugar*, and

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[96]*Carovano*, 851 F.2d at 571.

[97]*Carovano*, 851 F.2d at 574 (Oakes, J., dissenting).

[98]*See Lugar*, 457 U.S. at 937.

[99]*Id.*

that *Blum* should not have been relied upon in this case.[100] Although the decisions in *Rendell-Baker* and *Blum* diminish the opportunities for a finding of "state action," the *Lugar* test demonstrates that the Supreme Court may be willing to use the doctrine of "public function" to find "state action" under certain circumstances. In spite of the various decisions against finding "state action," the notion remains alive today.

For the purposes of this study, it should be noted that throughout the various *Carovano* decisions, the courts applied different "state action" tests, with little agreement about which aspects of the case were important. This is not surprising, considering that the Supreme Court has failed to agree on a dispositive "state action" test even after the 1982 State Action Trilogy.[101] There is still much confusion over the nature and scope of the "state action" doctrine and what constitutes "state action" in

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[100]It should be noted that the only question remaining, according to Judge Oakes' dissent, was whether there was a widespread and reasonable belief that schools were required by the State to enforce the particular New York State rule. If there was such a belief, then "state action" was applicable and a trial on the merits of *Carovano* would have been appropriate. *See Carovano*, 851 F.2d at 577.

[101]*Lugar*, 457 U.S. 922; *Rendell-Baker*, 457 U.S. 830; and *Blum*, 457 U.S. 991.

private schools. The United States Supreme Court has not articulated a clear position on the topic. It is hoped that the lack of a clear position will not prevent private school students from receiving the procedural fairness to which they would be entitled if "state action" were found. The following of procedural fairness would undoubtedly prevent potential serious educational and psychological harm to the student.

Some legal scholars have suggested that various specific concrete indicia should be used to determine if the private school is acting on behalf of the state. They would look at state funding and state regulation of private schools to indicate that these schools are closely aligned with the state to make them the state's extended arm. The position advanced in this study is that, as arms of the state, the actions of these schools would be considered the private sector's serving a "public function," and a finding of "state action" would be in order. Students at these schools should be able to demand "due process," just as their public school counterparts do.

SCHNEIDER'S CRITERIA FOR FINDING A "PUBLIC FUNCTION"

Professor Ronna Schneider, in discussing the "State Action Trilogy," would maintain that the issue is not whether state funding and regulation of an otherwise private institution constituted a sufficient nexus to render that institution's actions state action.[102] Rather, "[T]he focus of the inquiry should [be] upon the statutory delegation and the precise nature of the task delegated."[103] And, if the state is statutorily required to provide a service and it delegates this service to a private provider, then an illogical result may result: "The more effectively the state distances itself from the performance of its statutory obligations, the less likely that the intended beneficiary of that obligation will receive the constitutional protections the state would have been required to give it if the state had provided the service directly."[104] In other words, the state could privatize the performance of its duties and relieve itself of the responsibility of acting within constitutional

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[102]Ronna G. Schneider, "The 1982 State Action Trilogy" 60 *Notre Dame Law Review* 1150 (1985).

[103]*Id.* at 1163.

[104]*Id.* at 1164.

limits. The state should not be allowed to do indirectly what would be impermissible if done directly. Similarly, if the state action analysis focuses solely on the extent of state involvement, the private entity performing the state's obligation can also evade the limitations of the Fourteenth Amendment. Thus, an action based on the guarantee of the Fourteenth Amendment could not be brought against either the state or the private actor. According to Professor Schneider, this is unacceptable. Ways must be found that recognize the public role and responsibility of private institutions.

Professor Schneider proposes four criteria to establish "state action" within private institutions.[105] 1) The state has a legislative or constitutional mandate to provide a particular service; 2) The state delegates to the private entity the provision of that service which the state would otherwise be obligated to perform itself; 3) The activity is one which is traditionally, although not exclusively, performed by the state. Schneider believes that only these kinds of activities generate a reasonable public expectation that constitutional limits should apply. When there is a reasonable expectation that constitutional limits should

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[105] *Id.* at 1167.

apply, because of the similarity of the private activity to that of the state's, then constitutional limits, such as due process, should apply. She writes explicitly: *"Education is an excellent example of this kind of activity."*[106]

The reason Schneider believes that "[e]ducation is an excellent example of this kind of activity" is because of its fit into her criteria. 1) It is the state that is mandated to provide education. 2) A private alternative is available, but if the private school alternative does not provide it, then the standard public school must do so. 3) Statistically, from its very inception, the public school has taught the greater majority of the nation's children.

Schneider's fourth criterion to establish "state action" is that the person complaining of the constitutional violation must be the intended beneficiary of the delegated activity. "State action" (or "public function") exists only when the private entity's actions are directed at those whom the state intended to benefit from these services. In the case of education, "state action" exists when the non-public school's actions are directed at the students. Indeed, this is part of the "nexus" argument of *Rendell-Baker*:[107] that

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[106]*Id.* at 1168. Emphasis added.

[107]*Rendell-Baker*, 457 U.S. at 843-44.

the state's involvement centered on the students, and not on the employees of the school.

The underlying premise of these criteria of "public function" is that the state cannot delegate to a private entity the obligation to perform certain services or tasks without also delegating the responsibility to act within the parameters of the Constitution.[108] It is clear that private schools fall within the rubric of private entities that should follow the parameters of the Constitution. Accordingly, in spite of certain "public function" decisions by the Court, non-public school students should have the same constitutional rights as public school students (specifically in the area of fundamental fairness), regardless of the school's apparently "private" genesis. This providing of constitutional rights recognizes the private school's inherently public service to the community. Considering that the students fulfill their compulsory education requirements in a private school and that public schools would be obligated to provide education to these students absent the private schools, it is clear that private schools fulfill an important educational mission in the community. As direct recipients of the private school's

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[108]Schneider, 60 *Notre Dame Law Review* at 1170.

alternative education, students who would otherwise be the responsibility of the state, should benefit from the same rights as public school students.

JUDICIAL DECISIONS REGARDING THE "PUBLIC FUNCTION" DOCTRINE AND NON-PUBLIC EDUCATION

We shall now review various Supreme Court and lower courts decisions, as well as legal opinions regarding the "Public Function" theory in the area of non-public education.

As stated above, there are two approaches to the "public function" analysis. In the first, the analysis focuses on whether the private enterprise in question is sufficiently public to be considered "state action." "State action" may be found when the private enterprise performs services that are delegated to it by the state or when these services are so essential that in their absence the state would perform them. In the second approach, the analysis focuses on the nature of the activity. If the activity is affected with a public interest, then a finding of "state action" is appropriate.

According to the first approach, we will easily find private education as serving a "public function." Every state has compulsory education laws. The state has always seen education as its major responsibility. Private schools provide the same or similar service, thus relinquishing the state of its responsibility toward private school students.

The provision of public education is clearly an act of the state government; private education is clearly the fulfillment of a "public function."

Two important Supreme Court decisions, *Pierce v. Society of Sisters*[109] and *Wisconsin v. Yoder*,[110] help us understand the Court's view of the centrality of education to the states and its delivery to the citizens. *Pierce v. Society of Sisters* recognized the legitimacy of private education as an option for parents in the rearing of their children.[111] No longer were parents required to send their children to the public schools. Parents have a "fundamental" right to rear their children as they prefer; the choice of schools is one way that parents express that preference. *Wisconsin v. Yoder*[112] found that the state is justified in requiring a certain level of basic education, even as it approved the "fundamental" right of parents to select the proper education for their children.[113] As long as a basic level of education is provided, the private

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[109]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[110]*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[111]*Pierce*, 268 U.S. 510.

[112]*Yoder*, 406 U.S. 205.

[113]*Id.* at 233.

schools are considered to have fulfilled the state's legitimate requirement for an educated citizenry. Clearly the private school is fulfilling a service that is in the public's interest. Its educational services proffered should be considered a "public function."

We have seen that the "public function" notion properly includes activities by a private body of a kind which must be performed by the government if that private body fails to perform them. Private education is such an activity. Were any private school to close, the public schools would be required to provide for the education of the disenfranchised students. We have also found that the notion of "public function" applies when the action of a private body is affected with an important public interest. Education is at the apex of the state's responsibilities. As *parens patriae*, the state must assure an educated citizenry. This analysis leads us to the conclusion that private education is a "public function." As one author concluded, "education and justice--the two chief activities of state and local governments--would be 'governmental functions' *par excellence*, and justice on campus, *a fortiori*, would be a "governmental function" and therefore subject to

constitutional requirements."[114] To limit education, because of its great value to the student and society, even in a non-public setting, should only be justified when all procedural fairnesses were fulfilled.[115]

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[114]Note, "Judicial Review of Expulsions," 72 *Yale Law Journal* 1362, 1385, n.126 (1963).

[115]*Id.* at 1385.

LOWER COURT DECISIONS ON EDUCATION AS A "PUBLIC FUNCTION"

Perhaps the most significant statements in the area of "Public Function," as it applies to education, are found in *Guillory v. Administrators of Tulane University*.[116] There, Judge Skelly Wright wrote:

> At the outset, one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only sure foundation...of freedom, without which no republic can maintain itself in strength, institutions of learning are not things of purely private concern.[117] Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in place of the state. Does it not follow that they stand in the state's shoes?[118]

It is important to note that, although *Guillory* was later reversed, Judge Wright's comments on education as a "public function" were not repudiated.[119]

Another major statement on the relevance of the "Public Function" theory to education was made in *Belk v. Chancellor*

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[116]*Guillory v. Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La.), *judgment vacated & new trial ordered*, 207 F. Supp. 554, *aff'd per curiam*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962).

[117]*Id.* 203 F. Supp. 857.

[118]*Id.* at 859.

[119]See *Guillory v. Administrators of Tulane University*, 306 F.2d 489.

of Washington University.[120] The *Belk* court began by quoting *Greene v. Howard University*:[121] "The amenability to constitutional commands of what was once widely assumed to be purely private activity is a fluid and developing[122] concept."[123] *Belk* then continues with a clear statement that private education should be considered a "public function."

> It is the opinion of this court that the acts of a private university can constitute "state action" when said university is denying to its students their right to participate in the educational process. Education is a public function...The private university's performance of a public function could render its actions subject to constitutional restraints.[124]

Belk recognized that *Guillory* was concerned with racial

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[120]*Belk v. Chancellor of Washington University*, 336 F. Supp. 45 (1970).

[121]*Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969).

[122]Professor Van Alstyne makes an important comment regarding *Greene v. Howard University*: "Essentially no procedural due process was required in *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.C.C. 1967), on the theory that the university was private and not subject to the fifth or fourteenth amendments. The case is surely in error; even before hearing an appeal on the merits, the court of appeals ordered temporary reinstatement of the students." William W. Van Alstyne, "The Student As University Resident," 45 *Denver Law Journal* 582, 594, n.32 (1968).

[123]*Greene*, 412 F.2d at 1132, n.2.

[124]*Belk*, 336 F.Supp. at 48.

discrimination, though it likened the acts of private administrators in a university to other cases the Supreme Court had decided. These included cases regarding the actions of private persons who governed the company town in *Marsh*[125] or who ran the streetcar and bus service in *Public Utilities*.[126] The Supreme Court concluded that the best way to measure state involvement is through the inductive process of "sifting facts and weighing circumstances."[127] The *Belk* decision followed the Court's advise and found that private universities serve a "public function." The *Belk* decision concludes with a quote from *Brown v. Board of Education*,[128] "Today, more than ever before, the area of education is a matter of greatest public concern and interest."[129]

Isaacs v. Board of Trustees of Temple University,

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[125]*Marsh v. Alabama*, 326 U.S. 501 (1946).

[126]*Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952).

[127]*See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

[128]*Brown v. Board of Education*, 347 U.S. 483 (1954).

[129]*Id.* at 493.

Etc.[130] concluded that, because a finding of "public function" means that there is "state action," nonpublic schools would certainly be included as "state action." As the *Isaacs* court found, "State action would be present in the operation of every non-public school, for example, because education is surely a state function.[131]

Another indication of "state action" may be gleaned from *Buckton v. National Collegiate Athletic Association.*[132] There, the court found a substantial likelihood that "state action" would be found on the part of Boston University. The *Buckton* court relied on the view that the university, though a private institution, clearly performed functions governmental in nature such as providing higher education to and exercising substantial dominion over its students.

Moreover, the holding in *Braden v. University of Pittsburgh*[133] points to the blurring of clear definitions of "state action." There, the court said, "The difficulties

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[130]*Isaacs v. Board of Trustees of Temple University, Etc.*, 385 F. Supp. 473 (1974).

[131]*Id.* at 486.

[132]*Buckton v. NCAA*, 366 F. Supp. 1152 (DC Mass 1973).

[133]*Braden v. University of Pittsburgh*, 552 F.2d 948 (1977).

of drawing a line between the state and private action are by now well-recognized. This is so because the realms of the government and the private sector are not as clearly defined as they were during the epoch in which the Fourteenth and Fifteenth Amendments were adopted."[134]

A Note discusses the fact that the public universities in the United States do not meet the total need for higher education in this country.[135] In fact, the community relies heavily on the educational services provided by private universities. And, "in the absence of a readily available alternative to a private higher education there is no way of lessening the impact of unreasonable restraints imposed by the private schools except by direct intervention in their affairs."[136] Thus, it appears wholly appropriate for courts to review the actions of the private schools, as they do for public schools, to assure that no capricious decisions of expulsion are made.

It appears to this writer that the courts should be willing to review the disciplinary decisions affecting

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[134]*Id.* at 956.

[135]Note, "Developments In The Law -- Academic Freedom," *81 Harvard Law Review* 1041 (1968).

[136]*Id.* at 1156.

youngsters attending private elementary and secondary schools as well. Approximately ten percent of all American children attend private schools. It appears that the government relies on many of its children being educated in the private domain. Certainly, it is at a significant savings to them that these children are educated off the public doles. This would appear to put education squarely in the area of a public function. Further, with the abysmal national achievement tests scores of many public schools, there is little alternative quality education available to students who are expelled from their private schools. At a minimum, private schools should be judged as fulfilling a "public function" and, thus, in the public service. Private schools should be considered public in their requirements for treating their students in ways similar to the public schools. The following of procedural fairness is surely in order.

THE IDENTICAL ANALYSIS FOR "EQUAL PROTECTION" AND "DUE PROCESS" PROTECTIONS

An important question remains to be asked regarding "state action" and "public function" cases. In many cases where "public function" or "state action" were found, the case involved discrimination and the "equal protection" clause. The "equal protection" clause refers to the second clause of the Fourteenth Amendment to the United States Constitution: "... Nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." The question is whether the decisions regarding the "equal protection" clause of the Fourteenth Amendment apply to due process cases of the same Amendment.

The answer to this question was provided in *Cohen v. Illinois Institute of Technology*.[137] There, it was decided that the decisions based on the "equal protection" clause apply to the "due process" clause as well. Additionally, the state action analysis which applies to equal protection claims applies also to due process claims.[138]

This *Cohen v. IIT* decision follows *Isaacs v. Bd. of*

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[137]*Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (1975).

[138]*Id.* at 822-23.

Trustees of Temple University, Etc.[139] In *Isaacs*, the court wrote that a finding of "state action" in cases that do not include racial discrimination may be just as plausible as a finding of "state action" where there is racial discrimination. Invocation of the Fourteenth Amendment's "equal protection" clause because of racial discrimination should not be the sole reason for a finding of "state action." The court's analysis rests on the fact that "it is difficult, and perhaps impossible, to arrange federal constitutional rights in an ascending hierarchy of value.

It is clear from both the *Cohen* and *Isaacs* decisions that any deprivation of such a right, whether to the equal protection of the law as guaranteed by the Fourteenth Amendment or to the freedoms of speech and association as guaranteed by the First Amendment, is a matter of extreme importance to the person who suffers the deprivation."[140] Certainly, then, whatever deprivations would be disallowed because of one clause of the Fourteenth Amendment would also be disallowed under another clause of the same Amendment.

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[139]*Isaacs v. Board of Trustees of Temple University, Etc.*, 385 F. Supp. 473, n.11 (1974).

[140]*Id.*

Accordingly, findings of "public function" or "state action" that will reverse racial discrimination within a private school will also have application to due process rights within the same school.

It is not difficult to construct an argument that private schools do serve this "public function." A finding that a private school serves a "public function" means that the administration of these schools must allow their students the same procedural fairness as in the public schools.

Assuring procedural fairness is a wise educational decision. This is a measure of fairness that most people expect. It also shows a keen sense of justice by the administrators who are advocating on behalf of the students and providing them with every conceivable benefit. Fulfilling procedural fairness also shows a respect for the importance of education and the severe consequences of its limitation. The children deserve the fairness of "due process" procedures.

We have moved from *Marsh v. Alabama*,[141] that institutions that serve the public take on public-like

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[141]*Marsh v. Alabama*, 326 U. S. 501 (1946).

responsibilities, to Justice Harlan in *Evans v. Newton*,[142] that schools serve a "public function," to Justice Marshall's dissent in *Jackson v. Metropolitan Edison Co.*,[143] that anything the state would do were it not for the private institution must be considered "serving a public function." We have seen education called a "public function" in both the majority and minority opinions of *Flagg Bros Inc. v. Brooks*.[144] It can easily be read into dissents of Justices Brennen in *Blum v. Yaretsky*[145] and Marshall in *Rendell-Baker*.[146] It has been stated explicitly by such lower courts as *Guillory*,[147] *Belk*,[148] *Greene*,[149] and *Isaacs*.[150] Various legal commentators have

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[142]*Evans v. Newton*, 382 U.S. 296 (1966).

[143]*Jackson v. Metropolitan Edison Co.*, 419 U.S. 365, 369 (1974) (Marshall, J., dissenting).

[144]*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

[145]*Blum v. Yaretsky*, 457 U.S. 991 (1982).

[146]*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[147]*Guillory v. Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La. 1962).

[148]*Belk v. Chancellor of Washington University*, 336 F. Supp. 45 (1970).

[149]*Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969).

pointed to the importance of finding private education to be a "public function." Students are entitled to the constitutional rights that pursue in the wake of such a finding.[151]

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[150]*Isaacs v. Board of Trustees of Temple University, Etc.*, 385 F. Supp. 473 (1974).

[151]In a case not directly related to education, it was stated: "Society's administration has become so complex that private organizations are in a position of performing governmental functions and in the discharge of such function may be subject to the constitutional requirements of using fair and equal procedures." *Ryan v. Hofstra University*, 324 N. Y. S. 2d 964, 978 (1971), quoting *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963).

CHAPTER VI

THE "STATE ACTION" DOCTRINE AND "DUE PROCESS" RIGHTS IN NON-PUBLIC SCHOOLS

The Constitution of the United States has been perceived as a document controlling the relationship between the government and the residents of the United States. It is often appreciated for the limits that it sets on the actions of the Federal and local governments. For example, the Fourteenth Amendment provides that the state may not limit its residents' rights of "life, liberty, or property without the due process of law." This guarantee of "due process of law" has been interpreted to apply only to actions of the government. The government may not deprive a resident of these benefits without the "due process of law;" an individual is not obligated to consider providing "due process of law" whatsoever.

The requirement for the government's providing the "due process of law" is based on the wording of the first clause of the Fourteenth Amendment.[1] Ever since the *Civil*

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[1]*U.S. Const.* amend. XIV, § 1, states in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Rights Cases,[2] this requirement has become known as "state action." In any situation where the state is directly involved, or even an extension of the state is involved, there will be a finding of "state action." These bodies are required to provide for the "due process of law" before they limit life, liberty, or property rights. As state institutions that are financially supported and administered by the state, public schools are considered extensions of the state. The public school's actions are, therefore, "state action." Public schools must provide due process rights to their students before meting out serious punishment.[3]

Regarding non-public schools, prevailing legal opinion has been that the actions of these schools are not considered "state action."[4] It follows, therefore, that non-public school students on the verge of disciplinary action are not constitutionally entitled to due process and

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[2]*Civil Rights Cases*, 109 U.S. 3 (1883).

[3]*Goss v. Lopez*, 419 U.S. 565 (1975).

[4]*Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

fundamental fairness.[5] This conclusion is not the sole possible conclusion, nor is it necessarily accurate. This chapter will review the substance of the "state action" requirement. It will also discuss the wisdom of limiting due process rights to public institutions. It will conclude

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[5]An interesting case that came before Judge H. Friendly was *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970). Here, New York had required public and private colleges within the State to adopt and enforce regulations for the maintenance of public order on college property. Several students at this private college had taken over the office of a college official during a sit-in and refused to end this occupation. The students were expelled, allegedly without due process. The students brought suit because of their expulsion without due process. They lost their original suit due a finding of insufficient state involvement. The Court of Appeals set aside the lower court's dismissal. The Court of Appeals held that, although the school was with a religious denomination and almost entirely supported by private funds, because the State had required that there be a policy regarding campus unrest, the State may now be perceived to be closely involved in the implementation of these specific policies. This would be a finding of "state action." The case was remanded for a further hearing at which the students might prove whether there was a meaningful state intrusion in the disciplinary policies of this private college. Judge Friendly, in concurrence, found "state action" in this case as he believed that the common citizen would not distinguish between public colleges and private colleges in New York. *Id.* at 1127 (Friendly, J., concurring). Judge Friendly further stated that he advocates a two-tiered analysis for a finding of "state action" in Fourteenth Amendment questions. Where there is racial discrimination he would require a lesser showing of state involvement to constitute "state action." It would appear that the same lower standard necessary to show "state action" should apply to § 1 of the same Fourteenth Amendment, thus gaining due process rights for "private" school students.

with suggestions for a new understanding of the "state action" requirement of the Fourteenth Amendment.

The single most important reason for concluding that private school students are not entitled to due process rights is because of the absence of "state action." However, it has become more and more difficult to provide an accurate and clear definition of "state action."[6] An unclear definition of this difficult concept will limit its usefulness for any legal purposes.

In an attempt to better define the "state action" doctrine, we shall review where a finding of "state action" has been appropriate. A private school that serves in lieu of a public school is considered serving a public function. "Public function" is an alternate way of requiring the same protections covered by "state action." The "public function" doctrine is discussed in Chapter V above.

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[6]In attempting to define "state action" in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court stated that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.*, at 722. One legal scholar compared this elusive definition of "state action" to Justice Stewart's famous "I know it when I see it" standard for judging obscenity (*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)) mainly in the comparative precision of the latter. (*See* Brest, "State Action and Liberal Theory, 130 *University of Pennsylvania Law Review* 1296, 1325 (1982)).

There are several other ways of finding "state action" as well. Firstly, should a private school possess a "symbiotic relationship" with the government or be a "joint participant" in the challenged conduct, then a finding of state action would be warranted.[7] Secondly, even if no single factor may constitute a finding of "state action," a combination of several factors may paint a picture of a "symbiotic relationship" between the state and the private institution.[8] Thirdly, if there exists a "close nexus" between the government and the particular challenged conduct, then "state action" may be present.[9] All these approaches try to clarify the nature of the relationship between the state and the private institution. Where the state is closely involved in the administration, decision-making, or finances of the private institution, courts will often find "state action."

Once there is a finding of "state action," it remains

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[7]*See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

[8]*Sament v. Hahnemann Medical College and Hospital*, 413 F. Supp. 434 (1976). *See also Rackin v. University of Pennsylvania*, 386 F. Supp. 992 (1972).

[9]*See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

to determine which "due process" is applicable, "procedural" or "substantive." "Procedural due process" looks only at the procedure to be followed, requiring a level of fairness. Typically the procedure is for a hearing of the charges and an opportunity for rebuttal. An objective tribunal may be offered as well. "Substantive due process" looks at the substance of the right that is being diminished. If it is a right that deserves extra protection, then the offending party must provide a compelling reason to overcome the protection. Examples of such rights include "fundamental" rights and rights that have gained importance for historical or social reasons. While studying the applicability of "due process" rights to private school children it will be noted whether the result would be "procedural" or "substantive due process" rights.

THE "POSITIVISTS," THE "STATE ACTION" DOCTRINE, AND THE PUBLIC/PRIVATE DISTINCTION

We have seen that there are several ways for a finding of "state action" to issue. We shall now review why the requirements for "state action" have persisted. Why does the Fourteenth Amendment require the involvement of the states, or "state action," before it is said to apply? Professor Paul Brest opines that the doctrine of "state action" is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors.[10] As the theory goes, the actions of the state would be circumscribed by the limitations of the Constitution while the actions of the private party would not. This distinction is an important one. It respects the limitations on government that are appropriate for a constitution to provide. It also keeps the government out of the personal and private lives of the people.

From a staunchly positivist perspective, however, such a theory is on tenuous ground. Positivists do not have a concept of natural law. Instead, they believe that every right of a citizen is only what is provided by the state and

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[10]Paul Brest, "State Action and Liberal Theory," 130 *University of Pennsylvania Law Review* 1296 (1982).

affirmatively decided to be part of the state's panoply of rights. As such, every right becomes an act of the state, *i.e.* "state action." Even those rights only passively accepted by the state will be considered by the Positivists as "state action." Furthermore, "since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, Positivism potentially implicates the state in every "private" action not prohibited by law."[11] Thus, according to the Positivists, a "state action" doctrine to limit governmental actions does not exist. They view every action as either actively legislated or passively approved by the state. According to the "staunch" positivists every action by both public institutions and private individuals is "state action."

In *Flagg Bros. v. Brooks*[12] Justice Rehnquist wrote a long footnote in which he recognized the danger inherent in Positivism and disavowed its broadest implications. In discussing the law regarding property interests of a private person in his own possessions, Justice Rehnquist states that these laws are not to be considered "state authorization of

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[11]*Id.* at 1301.

[12]*Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

private breach[es] of the peace."[13] His reasoning is that "[i]t would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a state, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law."[14] Thus, Justice Rehnquist holds that the state is not involved (*viz.*, there is no "state action") if it merely "consents" to an action. Instead, according to Justice Rehnquist, there will be a finding of "state action" only when the state's action directly causes the breach in question.

Professor Brest's response to Justice Rehnquist's positivism and view of "state action" is that it rejects a substantive, normative theory of rights.[15] Justice Rehnquist seems to look only at the "person" directly responsible for the act. If the state is this "person," then the act is considered "state action;" if the individual is this "person," then the act is not considered "state

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[13]*Id.* at 160, n.9.

[14]*Id.* n.10.

[15]Brest, 130 *Univ. of Penn. L.Rev.* at 1302.

action." Professor Brest would prefer to look at the substance of the litigation. He looks at the competing rights at stake between the two litigants, the state and the person. Brest would resolve the questions of the competing sides by balancing a possible abuse of power on the one hand and the protection of individual autonomy on the other. Similar balancing would be done to determine which level of "due process" would be appropriate, depending on the issues at stake.

In addition, Brest objects to Justice Rehnquist's view of positivism because it renders the public/private distinction "at best meaningless and at worst a vehicle for manipulating outcomes to suit the Justices distribute tastes."[16] We had said above that the reason for a "state action" requirement was to preserve the public/private distinction. This distinction emphasizes the control put appropriately on government and the freedom allowed the individual. But, if according to Justice Rehnquist the public/private distinction is rendered an empty distinction, because it looks only at the "person" doing the action rather than its legitimacy, then the distinction serves no purpose and should be eliminated. It is then reasonable to

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[16] *Id.*

say that if it was eliminated, there need not be any requirement for "state action" before a private person's acts would be reversed. In other words, private action would not be eliminated from constitutional control as there would be no "state action" instrument to eliminate it. All action, state *and* individual, would be required to fulfill constitutional guidelines. The result, for our purposes, would be that private schools would not be considered private. They would no longer be beyond the scope of the Fourteenth Amendment; due process requirements would apply to private schools as well. Whatever "due process" rights are available to public school students should be immediately assumed by private school students. Without a finding of "fundamental" right, the only "due process" rights available to public school students are procedural.[17]

Let us take a closer look at the Positivist school. Justice Rehnquist recognized what he called "the danger of unyielding positivism."[18] His solution, as noted above,

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[17]*See Goss v. Lopez*, 419 U.S. 565 (1975), for a delineation of what procedural rights are due public school students.

[18]*Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.9 (1978) (Rehnquist, J., dissenting).

was to find "state action" only when the state directly caused the breach in question. We also saw that some Positivists would say that since it is only the state that can provide, or fail to provide, "due process of law," it would be more appropriate to say that a state "deprives a person of life, liberty, or property without due process of law"[19] when it permits him to be deprived of liberty without suitable legal redress in the government's courts.[20] That is, the state has an *affirmative duty* to protect its citizens from deprivation at the hands of other individuals. Positivists hold that every law or judicial decision is an affirmative act. They would picture this situation: The injured party comes to court for protection or help. If the court decides that there is no "state action," it will refuse to provide that protection or help. The court has made an affirmative statement that it will not help. This statement by the court is itself "state action!" The court's decision of non-action also implicitly sanctions the private infringement of rights. The state has breached its duty to ensure that "due process" will be followed;

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[19]*U.S. Const.* amend. XIV, § 1.

[20]Kenneth L. Karst and Howard W. Horowitz, "*Reitman v. Mulkey*: A Telophase of Substantive Equal Protection," 1967 *Supreme Court Review* 39, 55.

"state action" is now present.[21]

According to this view, if the state allows a private school student to be suspended or expelled from the school without due process, it has not fulfilled its affirmative duty of protecting an individual from the hands of other private parties. "State action" would be found to be present when the court decided not to help the grieved student. Once there is "state action," then the requirements of the Fourteenth Amendment must be followed. Because there was no "due process" offered the student, the decision of the private school might not stand for lack of fulfillment of the requirements of the Fourteenth Amendment.[22]

The basis for the discussion regarding positive law and a finding of "state action" is based historically upon the portentous Supreme Court decision of *Shelley v. Kraemer*.[23]

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[21]This extension of Positivist thought is presented by Nerken, "A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the *Civil Rights Cases* and State Action Theory," 12 *Harvard Civil Rights and Civil Liberties Law Review* 297, 298 (1977).

[22]*See* Frank I. Goodman, "Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone." 130 *University of Pennsylvania Law Review* 1331, 1344 (1982).

[23]*Shelley v. Kraemer*, 334 U.S. 1 (1948).

This case involved a restrictive covenant that had been signed by a group of neighbors in St. Louis, Missouri. These neighbors had agreed not to sell their homes to Negroes. One neighbor, however, breached the agreement and sold his house to Mr. Shelley, a Negro. The owners of the other houses brought suit to prevent Mr. Shelley from taking possession of his new home. The state courts had granted the relief requested, but the United States Supreme Court reversed unanimously, with three justices[24] not participating.

The opinion of the Court was written by Chief Justice Fred M. Vinson. The Chief Justice agreed with the neighbors that the Fourteenth Amendment applies only to states, and not private persons. Accordingly, private persons remain free to discriminate against others in ways that the states may not, *e.g.*, by color or race. Moreover, the restrictive covenant entered into by the neighbors does not violate any constitutional prohibition per se'.[25] However, by

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[24]Justices Reed, Jackson, and Rutledge disqualified themselves from sitting on this case because they themselves had signed racially restrictive covenants.

[25]This statement by the *Shelley* Court, 334 U.S. at 13, upheld the earlier *Corrigan v. Buckley*, 271 U.S. 323 (1926) decision that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." The *Shelley* Court accepted the legality of

enforcing a discriminatory restrictive covenant against Mr. Shelley, the Court would be participating in a discriminatory act. The Court reasoned as follows: The right to buy or sell property is clearly protected by the Fourteenth Amendment from discriminatory state action. Therefore, the state cannot restrict a Negro's right to property on account of his race. The state cannot do this by statute or by actions of its courts. For the courts to be engaged in such a restriction would be to use the "full coercive power of government to deny ... on the grounds of race or color ... the enjoyment of property rights..."[26] Such a judicial act would surely be "state action". Therefore, for the Court to uphold the restrictive covenant, even though it was entered into legally, would be "state action" and illegal discrimination.[27]

Read in its broadest interpretation, *Shelley* would appear to make every private case into a governmental one. Any private act that would later be upheld or retracted by a

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entering into a discriminatory covenant, because this is a private act and beyond the scope of the Fourteenth amendment, but it refused to enforce such a private arrangement.

[26]*Shelley*, 334 U.S. at 19.

[27]*Id.* at 20-21.

court could then be seen as "state action."[28] Thus, constitutional requirements would seem to apply not only to the state but to all acts of private parties.

There was another consideration, explained Chief Justice Vinson, in the *Shelley* Court's decision: The property from which the owner threatened exclusion (a home) was peculiarly necessary to the lives of other citizens; and the conditions the owner imposed were that citizens abandon significant exercise of constitutional rights (to nondiscrimination in housing).[29] Regarding this study's topic of fundamental fairness for non-public school students, we must note: Certainly, a family having no place to live is a problem. But it is also a problem if they have no place suitable to educate their children. In addition, the right to choose the proper school for a child's upbringing is a family's "fundamental" right.[30] For a private school to exclude a child may leave the child

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[28]As one author wrote, [All state court enforcement of common-law principles constitutes "state action," because in each case] "the state must choose whom to vindicate and the vindication of either party is 'state action.'" See Thomas G. Quinn, "State Action: A Pathology and a Proposed Cure," 64 *California Law Review* 146, 160 (1976).

[29]*Shelley*, 334 U.S. at 13.

[30]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

without a suitable school in which to be educated and also deprive parents of their "fundamental" right to have the child educated in the school of their choice. It would appear, in light of *Shelley*, that it is wholly appropriate to find for "state action" in private school cases of expulsion. If it can be shown that a "fundamental" right is at stake, such as the religious upbringing of the child, the parent may force the school to provide a compelling reason why it must expel the child. This is an example of "substantive due process" being provided by the private school. If there is no "fundamental" right at stake, then the private school would be required to simply provide procedural fairness.

In subsequent decisions, the Court limited the expansion of *Shelley*, though it never reversed its original decision. The *Shelley* decision was the logical conclusion of the Positivist argument. The opinion pointed out that, on the basis of a Positivist position, the doctrine of "state action" turns every private act into a public one, and is meaningless. This is because every judicial decision will always be considered "state action." Thus, a court's decision should not be based on whether the private person acted as a government officer. Rather, a court's decision

should be based on the merits of the case. *Shelley* was significant as a breach in the wall of "state action." There was no longer a clean distinction to be made between public and private acts.

MAINTAINING THE PUBLIC/PRIVATE DISTINCTION WITHOUT RELIANCE ON THE "STATE ACTION" DOCTRINE

The distinction of public/private in the area of "state action" appears to be an important distinction to make and maintain. People of all political and ideological colors are concerned with the expansion of the "state action" concept and how this expansion will limit their private lives. Professor Charles L. Black Jr. addressed this concern as long ago as 1967.[31] His remarks should allay any concerns that might come with the blurring of this distinction. He points to the legitimate concern that the Fourteenth Amendment should not intrude into our private lives. The public/private distinction will remain. At the same time, however, he believes that an expansion of due process rights to private institutions will not cause such intrusion into our private lives. Even if the "state action" doctrine were expanded to include every form of state fostering, enforcement, and even toleration (of discrimination proscribed by the Fourteenth Amendment), this does not mean that the Fourteenth Amendment will regulate

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[31]Charles L. Black, Jr. "Foreword: 'State Action,' Equal Protection, and California's Proposition 14," 81 *Harvard Law Review* 69 (1967).

the "genuinely private concerns of man."[32] These concerns will never be affected.

As Professor Black wrote so eloquently,

> No suit is of record in which the prayer was for a mandatory injunction that a dinner invitation issue. The leading cases in the Court ... have been and will certainly continue to be cases where the problem is in the public life of the community -- in the prevailing policies of restaurants, in the structuring of neighborhoods, in the calling for books at the loan-desk, in the casual swimming of strangers past one another in some large pool, in the shouting of "fore!" down the fairway...Law deals abundantly with the character of neighborhoods, with the obligation of restaurants to serve, with the management of public parks, with the conduct of common carriers, with picketing and parades, with schools. Law does not, in our legal culture, commonly deal with dinner invitations and the choice of children's back-yard playmates.[33]

This is the crucial point. Who does or does not receive a dinner invitation to my home and who will be allowed to play with my children in the our backyard will never be the stuff of litigation.[34] Our legal system concerns itself instead with the "private" life which is really the public life of the community. These concerns, of the private institutions which serve the public, are to be

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[32]*Id.* at 100.

[33]*Id.* at 102.

[34]*Id.*

judged for their applicability to the Fourteenth Amendment.

Let us apply Professor Black's ideas to the non-public school. The private school is a private institution which serves the public. The private school is much more akin to a communal body than to my own living room. By expanding the doctrine of "state action" to include these communal institutions, we do no damage to the privacy of my living room. I shall always be free to include or exclude people at will. What we do accomplish with this expansion of "state action" is to expand, in a positive way, the basic tenets of fundamental fairness. If a "fundamental" interest is at stake, such as a private school that is racially discriminatory, then "substantive due process" rights would require even more protection of the affected interest.

But we must be careful. Even if we were to view non-public schools as "public institutions" for the purpose of the Fourteenth Amendment, the public/private distinction should not be entirely abolished within the education realm. Consider religious schools. Such schools must be viewed as within the private domain because of their religious nature. To judicially view a religiously oriented school as a "public" institution brings us to the question of "excessive

entanglement"[35] between the church and state. The First Amendment of the U.S. Constitution requires that private schools not be financially supported or statutorily regulated by the state so that they not be considered governmental institutions.[36] Thus, it is important to maintain this public/private distinction to a certain degree even in public-oriented private institutions.

Returning to *Shelley*, it is important to note that the Court has rarely followed the thinking of that time. This would indicate that the holding might be considered an anomaly, but *Shelley* is still considered good law, and has never been overturned. In addition, scholars have applauded the *Shelley* decision, although some have challenged legal analysts "to show that sturdier foundations for the opinion can be laid."[37] Professor Louis Henkin has been particularly concerned about what might be called the "see-saw problem"[38] that could result from the *Shelley* decision.

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[35]*See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[36]*See Jackson v. Statler*, 496 F.2d 623 (1974).

[37]Louis Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 *University of Pennsylvania Law Review* 473, 474 (1962).

[38]The "see-saw problem" is this author's characterization, not Professor Henkin's.

Every time a person's (the violator's) freedom to violate a constitutional right is upheld, then the victim's liberty to be free of such violations is sacrificed.[39] In each case when a question of "state action" arises, both the freedom of the violator and the liberty of the victim are at stake. No matter how a court decides, someone's liberty will be expanded and someone's liberty will be restricted.

Recall that *Lugar v. Edmondson Oil Co.*[40] concluded that the "state action" doctrine as applied to private parties was useful to preserve "an area of individual freedom by limiting the reach of federal law and full judicial power."[41] But to say that "state action" preserves an area of individual freedom is to look at only one side of the see-saw! If the "state action" doctrine is used to prevent judicial interference with a private actor, then the usual result is that the victor's freedom to violate the Constitution is seen as more important than the individual's rights that are infringed. Such a result should make one shudder. On the other hand, if the "victim's" rights were upheld, and the institution severely

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[39]Henkin, 110 *Univ. of Penn. L. Rev.* at 487.

[40]*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

[41]*Id.* at 936.

limited by constitutional requirements, then the state may be imposing itself too much in the private sector. The history of the Constitution requires sensitivity to maintaining a "private domain" free of constitutional strictures.

The better approach to resolving the respective rights of each side is, as stated above, to set aside the "state action" doctrine and look at the merits of each case. The court should ask in each individual case "Whose liberty is to be maintained, that of the 'violator' or that of the 'victim'?" and respond accordingly. This is not to suggest that the court must halt all private infringements of constitutional rights, thereby eliminating the public/private distinction. Rather, it does suggest that, in each instance, the court should determine whether the "violator's" freedom provides an adequate basis for permitting the infringing activity.[42]

Regarding our goal of achieving constitutional rights for non-public school students on the verge of suspension or expulsion: While at first blush it would seem that there is no way to overcome the "state action" requirement adhered to

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[42]This approach is suggested by Edwin Chemerinsky, "Rethinking State Action," 80 *Northwestern University Law Review* 503, 538 (1985).

by the United States Supreme Court, it is reasonable to take a different approach, albeit not the prevailing one in most judicial decisions. This approach suggests that we set aside the "state action" doctrine and weigh the competing merits of each side, that of the administration and that of the student. It would enable us to provide students with a "fundamental" right to "due process" before they are suspended. At the same time, this approach would accept the school's right to administer its affairs as it sees fit. It would be the court's responsibility to "weigh and sift" the values at stake and reach a decision. The school officials would make a much better demonstration of thoughtfulness and equity if they could show the court that had they provided the disciplined student with procedural fairness similar to that offered the public school student.[43] In this way, the private school will have fulfilled (at a minimum) the spirit of the Fourteenth Amendment, without hiding behind the transparent veil of no "state action," in a feeble attempt to avoid procedural fairness.

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[43]See *Goss v. Lopez*, 419 U.S. 565 (1975).

REMOVING THE "STATE ACTION" REQUIREMENT IN SCHOOLS FOR THE SAKE OF THE CHILD

Religious schools may be regulated by statute, their students may be bussed and serviced in various ways (*e.g.*, the "Child Benefit Theory" of *Everson v. Board of Education*[44]) without their becoming "public" schools. It follows, then, that one may ask if it is possible for a sectarian religious school to remain "private" even as it takes on other characteristics and requirements similar to those of the state schools. This study seeks to show that such a "hybrid" is possible, and indeed, appropriate. Because of the "public" nature and function of the "private" schools, the "public" requirements may be the lesson of the "Child Benefit" Theory:[45] That the child is entitled to certain desiderata from the state government even when he is affiliated with a private school. The governmental character of the school the child attends is irrelevant, as it is the student who is being served, not the school. Considering the "fundamental" constitutional right of "due process" and our willingness to provide benefits to the

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[44]*Everson v. Board of Education*, 330 U.S. 1 (1947).

[45]This theory was first advanced in *Everson, Id.* to allow certain state funding, not to the religious school directly, but to the children.

children, regardless of their school, the provision of "due process"[46], in disciplinary cases would be a logical continuation of the "Child Benefit" theory.

There are other issues to be considered as one steps close to the border between the private and public domains in education. Maintaining the public/private distinction, respecting the privacy of the private school, means that these schools are not required to conform to the same standards and operations of public schools. Maintaining this privacy is to be applauded as it accommodates the divergent goals and objectives of the non-public school.[47] At the same time, even with divergent goals, it would seem that every school -- public and private -- has a goal of teaching respect for the individual student. There is no better way to teach this respect than to show it in practice. "An institution which professes to prepare youth for life in a democracy might wisely give them an example of

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[46]That "Due Process" is a fundamental right has been resolved since *Lochner v. New York*, 198 U.S. 45 (1905), and reaffirmed in the more modern cases of *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). It is discussed at length in Chapters II and III above.

[47]*See* Donald A. Erickson, "Freedom's Two Educational Imperatives: A Proposal," in *Public Controls for Nonpublic Schools*, ed. Donald A. Erickson (Chicago: University of Chicago Press, 1969), 159.

fair play when it is conducting its own affairs."[48] Accordingly, even without imposing constitutional requirements binding private schools to the regulations of public schools, the private schools should provide for procedural fairness. This is good educational practice, and can be followed without blurring the public/private distinction.

Another issue inherent in the pubic/private distinction is public financial support of non-public schools. This support must be accepted with great forethought. Many private schools need and seek governmental help to meet their financial obligations. But many also question the wisdom of spending taxpayers' monies on nonpublic schools. The issue gains even greater significance when the taxpayers' monies are spent for religious private schools, raising the issue of separation of church and state.

The "child benefit theory" provides at least a partial answer to this question. The theory concludes that it is permissible for government to support the achievement of secular objectives, even in church institutions. According to this theory, it is not the church or its school that is

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[48]Zachariah Chafee, Jr., "The Internal Affairs of Associations Not for Profit," 43 *Harvard Law Review* 993, 1027 (1903).

benefitting, but rather the child. The child is being provided with bus transportation to and from school; the child is reading from secular texts provided by the state. No sectarian goal of the sectarian school is fostered or enhanced by the state expenditure.

Let us take this "child benefit" theory a step further. If the government may contribute to the achievement of *secular* objectives, then the government is, to some extent, required to supervise that these objectives are being fulfilled. Once the government is already in the school, it should be able to insist that students are provided with procedural fairness before they are suspended or expelled from the school. The government is not breaking into the inner chambers of the private school. It is simply requiring that students be afforded elemental educational essentials. Just as *Yoder*[49] recognized the state's right to require the fulfillment of certain minimal education, as well as safety and zoning regulations,[50] so should the

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[49]*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[50]William J. Sanders, while commissioner of education of the state of Connecticut, went so far as to propose that it was legal for states to require that private schools provide qualified teachers, adequate libraries and laboratories, and programs that fulfill the stated goals of the school. William J. Sanders, "Regulation of Nonpublic Schools as Seen by a State Commissioner," *Public Controls*

state be allowed to require the provision of "due process." We must remain vigilant not to implicate the state unnecessarily in the school's governance, for this would make the private school no longer private. Imposing procedures for fundamental fairness before the traumatic steps of suspension or expulsion does not overstep the limit of state involvement. There appears to be no serious problem of excessive state regulation.

The question of whether Fourteenth Amendment norms can be applied at all in private schools was resolved in the affirmative by *Cooper v. Aaron*.[51] The case was one of discrimination against blacks, and dealt with the "Equal Protection" Clause of the Amendment. The *Cooper* Court found that state support of segregated schools through any arrangement, management, funds or property cannot be squared with the demands of the "Equal Protection" Clause.[52] Private schools that receive government support cannot go against the "Equal Protection" Clause. By extension, any private school that receives government support, even for

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for Nonpublic Schools, Erickson, ed., *supra* note 540, at 177. Sanders' ideas, printed in 1969, are commonly implemented today.

[51]*Cooper v. Aaron*, 358 U.S. 1 (1958).

[52]*Id.* at 4.

secular purposes, must follow all the guidelines of the Fourteenth Amendment, including the "Due Process" Clause. What is true about the second clause of the Amendment should be true about the first clause as well.[53] Accordingly, non-public school students should be afforded "due process" guarantees.

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[53]This is the explicit holding in *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (1975). *Cohen* follows *Isaacs v. Board of Trustees of Temple University, Etc.*, 385 F. Supp. 473, n.11 (1974). These cases are discussed in greater detail in Chapter V.

PROVIDING "DUE PROCESS" WITHOUT "STATE ACTION"

A question arises: What if there was no "state action" doctrine -- would "due process" still have to be provided? The answer, without a doubt, is "yes." "Due process" is a "fundamental" right to which every citizen of the United States is entitled.[54] As a "fundamental" right, any abridgement must stand up to "strict scrutiny" by the court before the abridgement will be upheld.[55] While governmental abridgement of a right may be more severe than private abridgement (given the size and power of the government) we should, nonetheless, also review the acts of private parties. In this way, we may ascertain that the infringements are minor or sufficiently justified. "If one sees the Court's role as protecting fundamental values, then there is no reason why such rights should be safeguarded from only governmental action. Nothing in the definition of those values or in the rationale for their protection explains why protection is limited to government

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[54]*U.S. Const.* amend. V, made applicable to the states by amend. XIV in 1868.

[55]*See, Wo v. Hopkins*, 118 U.S. 356 (1885), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *See also* the more modern day case of *Griswold v. Connecticut*, 381 U.S. 479 (1965).

conduct."[56] The courts are there to protect our rights from abridgement, especially in cases of "fundamental" rights. If the courts protect us from private abridgement, and there is no reason inherent to the rights to prevent this, then why have a "state action" doctrine? The conclusion that necessarily follows is that, in protecting the private citizen from breaches of "fundamental" rights, the "state action" doctrine has become anachronistic.

This is perhaps the unarticulated conclusion of *Franz v. United States*.[57] There, the court held that the U.S. Constitution should be viewed as a code of social morals, not just of governmental conduct. Included in these morals are individual rights that no entity, public or private, could infringe without a compelling justification. This conclusion of *Franz* makes sense because the "Constitution was designed to embody and celebrate values and to inculcate the proper acceptance of them, as much as to compel governments to abide by them."[58] It is clear, according to some judicial opinions, that constitutional values are meant

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[56]Chemerinsky, 80 *NW L. Rev.* at 535.

[57]*Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983).

[58]*Id.* at 594, n.45.

to be kept by all of society's institutions, both public and private. Surely, this should be the case in schools that are teaching the very Constitution itself and a general approach to life and moral values. In order to do so, non-public schools should provide their students with the "due process" rights guaranteed by the Constitution they are trying to teach.

THE "POWER FACTOR" OF PRIVATE INSTITUTIONS

AND FINDING "STATE ACTION"

Prevailing judicial opinion today, especially after *Burton v. Wilmington Parking Authority*[59] and subsequent "state action" decisions such as *Reitman v. Mulkey*,[60] *Moose Lodge No. 107 v. Irvis*,[61] *Jackson v. Metropolitan Edison*

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[59]*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. Here, there was a finding of "state action" based on the "symbiotic relationship" between the private enterprise, a restaurant, and the state, which owned the parking garage in which the restaurant was housed.

[60]*Reitman v. Mulkey*, 387 U.S. 369 (1967). The question here was whether California's Proposition 14, stating that the State will not limit individuals' rights to enter into restrictive covenants for the sale of property, was constitutional. The Court found that it was not constitutional as it "encouraged" racial discrimination. The Court explained that, although there is no exact definition for a finding of invidious (offensively unfair) discrimination, the Court must carefully assess the potential impact of official action in determining whether the State has significantly involved itself with this discrimination.

[61]*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Racial discrimination was disallowed at a private club based on "state action," because the State of Pennsylvania provided the club with a liquor license. The Court said that even state regulation will not necessarily turn a private club into a state entity so that "state action" could be found. Rather, the relevant criterion for a finding of "state action" is the State's significant involvement with invidious discrimination.

Co.,[62] and *Flagg Bros. v. Brooks*[63] indicate that the "state action" doctrine is, at a minimum, not very useful. This is because cases testing Fourteenth Amendment rights for an individual against a private institution, must show that the state was directly involved in requiring the specific point of contention. This is rarely possible. The requirement for "state action" has seemingly put Fourteenth Amendment benefits beyond the reach of most children attending private schools. The original decision in *Civil Rights Cases*,[64] that the Fourteenth Amendment applied only to "state action," has gone through many reviews and revisions.

The "state action" doctrine is apparently putting "due

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[62]*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The private utilities company turned off Mrs. Jackson's electricity for her failure to pay her bills. She claimed that the electricity was turned off due to her race. The Court found in the utility's favor, rejecting the "public function" argument and finding no "state action" (despite the state regulation of the private utilities company). In addition, the Court found that the state was not involved in the fostering or encouraging of racial discrimination.

[63]*Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). This case dealt mostly with the "public function" argument, though it also touched on "state action" to limit it once again. Here the Court said, "A state is responsible for the act of a private party when the State, by its law, has compelled the act." The decision also pointed out that the Court has never held that a State's mere acquiescence in a private action converts that action into that of the State.

[64]*Civil Rights Cases*, 109 U.S. 3, 11-19 (1883).

process" rights beyond the reach of private school children at the same time that we are finding increasingly blurred lines dividing public from private action. These blurred lines indicate that excluding private action from common public controls is unwise. Further, the large number of private institutions indicates that there is a great amount of private power; this power is having a profound effect on individuals and their rights. This power should be controlled in ways similar to those that society has, over the years, imposed on public power. The growth of private power should put private institutions within reach of the Fourteenth Amendment.

Let us take a closer look at the two litigants in a private school situation: the school and the student. The school itself, although essentially "private," is open to most students seeking enrollment. The school, in its role of overseer and "controller" of student behavior, determines the rules and regulations that will affect the individual student's life as a student. As long ago as 1927, Professor Morris Cohen analyzed the power of the "boss" or land owner over his "subjects." Cohen wrote, "Private property is a form of power, not unlike the power of a sovereign over its

subjects."[65] By extension, school officials may also be said to have "sovereign" power over student "subjects." Administrators often set the school rules, control schedules, punish by recess- and after-school detention, and there is little students may do to overcome this control of their school lives. Accordingly, even though we are discussing private schools, school officials take on the role of government-in-miniature. They must be held responsible to conduct themselves in ways similar to other "sovereigns." This would include the assurance to the students (the "subjects") that they will provide with "due process." Students should not be excluded ("banished from the kingdom") without an explanation of the causes of their banishment.

Officials and organizations in positions of power over underlings must be extremely careful in the exertion of their power. This is especially the case where there are limited alternatives for employment or education if the underlings wish to avoid this power. This was Justice Bradley's concern in *The Civil Rights Cases*[66]. Justice

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[65]Morris Cohen, "Property and Sovereignty," 13 *Cornell Law Quarterly* 8 (1927).

[66]*Civil Rights Cases*, 109 U.S. 3.

Bradley looked at the particularly vital nature of the services offered by railroads and public accommodations. Concurrently, he looked at the resultant power over the public enjoyed by the owners of these facilities. All this resulted in a finding of these "private" properties (the railroads and private accommodations) being declared "affected with a public interest." Because of the importance of the service provided as well as the concomitant power that this provision included, Justice Bradley, for the Court, ruled that the public facilities were subject to state regulation.

Private schools provide an important and high quality service in the form of education. Concurrently, their officials wield much power over the beneficiaries of this service, the students. This status of power, coupled with the importance of the service provided, indicate that the private schools should be considered "affected with a public interest" and subject to the same requirements as other "public interests." Fundamental fairness should be offered.

Further, in *Munn v. Illinois*[67], the Court upheld state laws regulating the operation of grain transporting railroads and the operation of warehouses and grain

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[67]*Munn v. Illinois*, 94 U.S. 113 (1877).

elevators. The Court declared that "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[68] The underlying reason for this is that the public stands in a position of inequality with monopolies of public service.

Such is the case with education as well. The school is essentially a communal institution. Parents and families in the community have an interest in the school and its vitality. Even though the school may have started as a private institution, it quickly grows into an integral part of the community as more parents enroll their children. In addition, it may be the only school in the area that provides quality education. As a community organization, the school gains a new role and new responsibilities. It should follow the same rules that apply to other public institutions. These rules include fundamental fairness.

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[68] *Id.* at 126.

SCHOLARLY OPINION IN FAVOR OF SETTING ASIDE THE "STATE ACTION" REQUIREMENT, AND THE PUBLIC/PRIVATE DISTINCTION

We have seen that the courts have been quite respectful of the traditional *Civil Rights Cases*[69] decision that "due process" requirements apply only when the state is closely or directly involved in the limitation of "life, liberty, or property."[70] The doctrine has, however, not fared well among legal commentators. Several legal scholars have advocated deserting the "state action" doctrine in favor of a merit-oriented approach.[71] Over the last quarter century, we have begun to see the "state action" doctrine being pronounced as "'unsatisfactory' as a guide."[72] Further, the "state action" doctrine, although attempting to provide a single approach to respond to the myriad cases

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[69]*Civil Rights Cases*, 109 U.S. 3.

[70]"Life, liberty, and property" are guaranteed to all American residents by the *U.S. Const.* amends. V and XIV. The finding by the U.S. Supreme Court that "state action" is required in order for these guarantees to be in effect is in *The Civil Rights Cases*, *Id.* at 11 - 19.

[71]This approach, as discussed above, looks to the values and merits at stake, rather than the "person" performing the alleged activity. It offers the private person protection from abridgement of important rights by other private persons or institutions.

[72]William W. Van Alstyne and Kenneth L. Karst, *State Action*, 14 Stanford Law Review 3, 58 (1961).

before the courts, has been rather unsuccessful. The search for this approach has fulfilled Holmes' prophecy: "Certainty generally is illusion, and repose is not the destiny of man."[73] Man, in search of a legal doctrine that will provide certainty, adopted "state action." This is a nice category, but it has not accomplished its goal.

The "state action" requirement, as part of the pubic/private distinction, may, in part, be due to a compromise or an easing-into of the notion of equal rights for the newly freed slaves.[74] "By finding in the *Civil Rights Cases* that the Fourteenth Amendment would not allow the federal government to prohibit private discrimination, the Court assured that as a nation we would forbear punishing such violations, allowing enforcement of private civil rights violations, unless and until state action was found. Thus did the vision of private liberty to violate civil rights under the label "private action" become part of the Court's dogma as it entered the *Lochner*[75] era.[76] It

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[73]*Id.*

[74]Ira Nerken, "A New Deal for the Protection of Fourteenth Amendment Rights," 12 *Harvard Civil Rights-Civil Liberties Law Review* 297 (1977).

[75]The *Lochner* Era began in 1905 with the *Lochner v. New York*, 198 U.S. 45 (1905), decision. *Lochner* struck down New York's maximum hours laws for bakers. More historically

must be noted that today, more than a century after the *Civil Rights Cases*, our country should be perceived as having grown beyond its earlier mentality. If the private/public distinction was originally articulated to ease the American people into an acceptance of nascent Negro rights, then this distinction should no longer be necessary. It is time to look at the substance of the violation, not its place within the outdated legalistic construct of "state action."

Professor Howard Horowitz is another legal commentator who pointed to the ineffectual use of the "state action" doctrine. His claim is that state action always enfolds private action, that there is no reality of pure private action as the state always attributes some legal significance to private action. As soon as the state attributes legal significance, then their attribution alone has already connected the act to the state. In essence,

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significant, was the Court's use of the Fourteenth Amendment's perceived "substantive due process" clause to protect economic and property rights. The Court spent thirty years engaged in "Lochnerizing," *i.e.*, scrutinizing economic regulations and often striking them down, based on "substantive due process" protections of the Fourteenth Amendment. Now, people could enter in almost any agreement both parties found acceptable.

[76]Nerken, 12 *Harvard Civil Rights - Civil Liberties Law Review* at 327-28.

then, every act is "state action." Horowitz recommends that instead of the question of the general absence or presence of "state action," we should rather ask about the constitutionality of the "state action" that is always present.[77]

Subsequently, Professor Jerre Williams noted our entry into a new era. He wrote, "We have entered the time of the twilight of state action; the sun is setting on the concept of state action as a test for determining the constitutional protection of individuals."[78] Williams' suggested that the real issue was "the merits of accommodating the interests, not one in the nature of a formula which is irrelevant to the interests involved."[79]

Professor Charles Black suggested that we abandon the "state action" doctrine completely. He believes that "The field is a conceptual disaster area; most constructive suggestions come down, one way or another, to the suggestion that all attention shift from the inquiry after "state

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[77]Howard W. Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment," 30 *Southern California Law Review* 208 (1957).

[78]Jerre Williams, "The Twilight of State Action," 41 *Texas Law Review* 347, 382, 389 (1963).

[79]*Id.* at 389.

action" to some other inquiry altogether."[80]

Harvard's Professor Duncan Kennedy, discussed the public/private distinction. He does not view the public and private domains as two distinct absolutes. Rather, he suggests putting the two domains on a continuum. "People who believe in continua tend to explain how they go about deciding what legal response is appropriate for a given institution by listing factors that "cut" one way or the other or must be balanced."[81] The practical significance of this, according to Kennedy, is that the public/private distinction is no longer good as a legal argument, for the distinction may "land" elsewhere on the continuum in the next case.[82] Ultimately, the public/private distinction fails "as a description, as an explanation, or as a justification of anything."[83] It should be abandoned for lack of certainty or clarity.

What we may conclude from Professors Van Alstyne and

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[80]Charles L. Black, "Foreword: 'State Action,' Equal Protection, and California's Proposition 14," 81 *Harvard Law Review* 69, 95 (1967).

[81]Duncan Kennedy, "The Stages of Decline of the Public/Private Distinction," 130 *University of Pennsylvania Law Review* 1349, 1353 (1982).

[82]*Id.* at 1354.

[83]*Id.* at 1357.

Karst, Horowitz, Williams, Black, and Kennedy is that the continuation of the public/private distinction is no longer meaningful if it ever has been. The distinction calls for legal decisions based on the structural considerations that focus only on the governance or ownership of the school. Students attending schools governed by the public authorities are in the public domain and considered involved in "state action." These students are entitled to all the rights guaranteed by the United States Constitution.[84] Students attending schools governed by private parties are in the private domain and, heretofore, not considered involved in "state action." These students have been found not entitled to the rights guaranteed by our Constitution.[85] Our legal system and people would be better served if we looked at the *substance* and *merits* of each argument.

In the area of private schools, *Powe v. Miles* is a leading case. Its holding indicates how unhelpful the "state action" doctrine has become. Some students were suspended without "due process" for demonstrating on the

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[84]*Goss v. Lopez*, 419 U.S. 565 (1975).

[85]*Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

campus of a private university. This university consisted of three private colleges and one college under contract with and substantially subsidized by the state. The court found "state action" with respect to the "contract" college students, but no "state action" for the private college students This, although the suspensions were made by the same university officials for participation in the same demonstration.[86] This holding brings us to an important conclusion: "That the "state action" doctrine of the Fourteenth Amendment is too narrow a yardstick to measure the requisite degree of fair play essential in the legal relationship between students and universities, public or private."[87]

We should decide the applicability of governmental requirements such as "due process" based on the rights affected rather than the public or private nature of the institutional charters. Thus, private school students would gain the rights to "due process" before facing serious

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[86]*Powe v. Miles*, 407 F.2d 73 (1968).

[87]Sally Furay, "Legal Relationships Between the Student and Private Colleges or Universities." 7 *San Diego Law Review* #2, pp. 246, 247 (1970).

disciplinary action.[88] Although obviously in the private domain, these students would have the same rights as their public school compatriots. The Fourteenth Amendment would no longer require, above all, a finding of "state action." The rights that the Fourteenth Amendment guarantees, specifically the "due process" rights of Clause I, would now apply to all Americans regardless of the schools they happen to attend.

This chapter reviewed the requirement for "state action" before the Fourteenth Amendment's guarantee of "due process" will go into effect. "State action" has come to mean that not only is the government involved in the financial support or governance of private institutions, but that it was directly involved in the particular incident of complaint.

The "state action" requirement has persisted since the post-Civil War period. This persistence is usually attributed to its value at maintaining the distinction between public and private acts. This distinction prevents

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[88]These rights would include the rights elucidated in *Goss v. Lopez* for suspensions of ten days or less: "Oral or written notice of the charges, an explanation of the evidence the authorities have, and an opportunity to present his side of the story." *Goss*, 419 U.S. at 581. Longer suspensions or expulsions may require more formal procedures. *Id.* at 584.

the government from insinuating itself in uniquely private situations. The reasoning was that government could not control personal actions or limit personal freedoms because, in the absence of a connection between government and the act, government regulations do not apply.

It has been suggested that the "state action" doctrine is no longer useful. Today, the focus is not the legalistic question of whether private institutions are connected with the state. Instead, the focus is on the merit of the claim. In the case of "due process," for example, no one wants to lose a right to which they are entitled or expect to continue enjoying, such as education, without procedural fairness being provided. "Due process" rights are considered too "fundamental" to our society to have them discounted for lack of "state action." A value such as education is also considered too precious to have diminished without procedural fairness. If "due process" and education are considered "fundamental," they will require even more judicial scrutiny before they are affected.

Also, private institutions wield power over their clientele in ways similar to public institutions. Indeed, public and private institutions function in such similar ways that it is often difficult to differentiate between the

two. It is appropriate to apply the requirements of public-governmental institutions upon such private institutions as private schools that serve a community of disparate individuals.

Additionally, the doctrine of "state action" is itself unclear. The Positivists may show that the doctrine itself admits of no clear definition and doctrinally cannot be imposed without inherent problems. It is an imprecise and unnecessary doctrine.

The original benefit of the doctrine, the proper distinction between public and private affairs, can be resolved in other, more useful ways. No one is suggesting that, with the demise of the "state action" doctrine, courts will require an individual to host racially integrated dinner parties under the threat of a legal suit for racial discrimination. What has traditionally been considered staunchly private will remain private. What commentators have recommended is that legal doctrines must respond to society. The lines between public and private institutions are now blurred. The private institutions that service so many people have taken on the qualities of public institutions. Let private institutions that function like public institutions respect their clientele in ways that

public institutions have been mandated to provide for many years.

CHAPTER VII

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to identify constitutional principles that would warrant the provision of "due process" for non-public school students. The philosophical, legal and educational bases of these principles were examined.

Relevant Supreme Court cases, federal appellate court rulings, and federal district court decisions were reviewed to ascertain the application of due process rights to non-public school students. Additionally, the writings of various legal scholars were reviewed to determine the current state of legal thinking regarding possible changes and revisions in current judicial interpretations.

The significance of "state action" was reviewed. The "state action" doctrine is based on the Supreme Court's interpretation of the Fourteenth Amendment, "nor shall any *state* deprive any person of life, liberty, or property, without due process of law."[1] The Supreme Court interpreted the Due Process Clause to refer only to acts of

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[1]*U.S. Const.* amend. XIV, § 1. (Emphasis added.)

the state, and not to proscribe acts of private parties.[2]

In the area of education, the Supreme Court recognized the "state action" inherent in public schools when it decided that public school students were entitled to procedural due process before suffering a suspension of ten days or less.[3] The question remains what the Supreme Court would decide regarding the public character of the private school. On the one hand, the school is private and beyond the scope of constitutional law.[4] On the other hand, the school services the community as a public institution. This study reviewed what an enlightened Supreme Court might decide when faced with a similar situation as *Goss*, but in the private sector.

Five approaches to securing "due process" rights for private school students were presented and analyzed. They included: (i) natural law and the natural right to fundamental fairness; (ii) the students' property and liberty rights to education; (iii) the constitutionally "fundamental" right that students have to education; (iv)

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[2]*The Civil Rights Cases*, 109 U.S. 3 (1883).

[3]*Goss v. Lopez*, 419 U.S. 565 (1975).

[4]*See Bright v. Isenbarger*, 314 F.Supp. 1382 (N.D. Ind. 1970), 445 F.2d 412 (7th Cir. 1971).

the public function served by private education which should require private schools to follow the same procedures as public schools; (v) a reevaluation of the century-old "state action" requirement. All of these approaches were presented for the purpose of suggesting a legal, philosophical and educational rationale for securing "due process" rights for private school students involved in disciplinary action that suspends them from school.

In addition to "procedural due process" which looks at procedural fairness, the Supreme Court has required a second form of "due process," called "substantive due process."[5] This form looks at constitutionally protected "fundamental" rights and, for the sake of protection of these rights, requires a higher level of justification before their abridgement. Once the rationale for securing "due process" rights for private school students was presented, a discussion ensued regarding which form of "due process" was appropriate.

Natural Law and Natural Rights

The doctrine of Natural Law posits that there are certain laws that have always been part of nature that must

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[5]*See Lochner v. New York*, 198 U.S. 45 (1905), and its progeny.

be identified, by man's power of reason, and followed. These laws, in addition to man-made positive law, form the corpus of law today. Man follows these laws because of the moral weight of the natural law or because of the social compact he makes with society to ensure lawfulness and order.

Positive law is morally legitimate only when it incorporates natural law. The closer the positive law's approximation to natural law, the more legitimate it is. Thus, governments and institutions are morally bound to include natural rights in their laws and procedures.

Procedural fairness is an example of a natural right which became codified in positive law. Starting with the Magna Charta, proceeding to the Laws of England and eventually to the United States Constitution, "due process" has always been one of those natural rights that is incorporated in governmental lists of citizen rights.

The constitutional requirement of "due process" is directed at the government because the Constitution is a document of citizens' rights and governments' responsibilities. This, however, does not free the private person from following the moral code that preceded and precipitated its inclusion in the Constitution. Indeed, the

fact that "due process" was included in the Constitution is an indication of its moral imperative and rightness. From the perspective of moral behavior, the Constitution was not meant to exclude private individuals and institutions, but to include governmental agencies.

The doctrine of natural rights was included in the Declaration of Independence with the "inalienable rights" clause.[6] Since that time, the doctrine found its way into the Fourteenth Amendment of the United States Constitution[7] and various Supreme Court decisions.[8]

The right to receive "Due Process" is a "natural" right.[9] The right to education was shown to be a "natural" right as well. This means that (constitutionally recognized) morality requires that education be preserved

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[6]"[T]hat [all men] are endowed by their Creator with certain inalienable Rights" *The Declaration of Independence* para. 2 (U.S. 1776).

[7]"[N]or shall any State deprive any person of life, liberty, or property, without due process of law" *U.S. Const.* amend. XIV, § 1.

[8]*See, e.g., Dartmouth College v. Woodward,* 4 Wheat. 518 (1819); *The Slaughter House Cases*, 16 Wall. 36, 83 (1872) (Field, J., dissenting); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1851) (Frankfurter, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting); and *Griswold v. Connecticut*, 381 U.S. 479, 511 (1964) (Black, J., dissenting).

[9]*Lochner*, 198 U.S. 45.

for all students, regardless of the governmental nature of their school. It also means that students may not be deprived of their education without procedural fairness. The constitutional requirement of "state action" is simply irrelevant in the area of "natural" rights.

Legal scholars often debate the question of "What process is due?" At a minimum, the deprivation of education warrants "procedural due process." This means that an administrator, before subjecting a student to a disciplinary suspension of ten days of less, must give the student "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[10]

Education, though not yet recognized as a "fundamental" right,[11] carries tremendous inherent importance. It was shown to be a natural right of children to accumulate knowledge. Another natural right is to worship God according to one's conscience, and to raise children accordingly. When we combine the natural right to an

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[10]*Goss v. Lopez*, 419 U.S. 565, 581 (1975).

[11]*San Antonio v. Rodriguez*, 411 U.S. 1 (1973), *but see Plyler v. Doe*, 457 U.S. 202 (1982).

education and to a religious upbringing, sectarian schools take on additional importance. This importance may raise private religious education to a constitutional level, gaining for it even more significance. The deprivation of religious education may hinder the First Amendment guarantees of the "free exercise of religion."[12] Accordingly, disciplinary suspensions or expulsions may be subject to greater protections. These protections, called "substantive due process" rights, would require the school to explain why it had no choice but to impose such a serious punishment on the student. The same "substantive due process" would be appropriate if education is identified as a "fundamental" natural right.

Students' "Property" and "Liberty" Rights and "Due Process"

The Supreme Court has never defined "due process" with precision. The concept has purposely been kept vague so that it may fit different times and places as it guarantees fairness.[13] It has always been seen as an important protection against the unfair limitation of rights that are

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[12]"Congress shall make no law ... prohibiting the free exercise [of religion];" *U.S. Const.* amend. I, § 1.

[13]*Joint Anti-Fascist Refugee Committee*, 341 U.S. at 162-63.

rooted in our nation's conscience.[14] One of those rights is education. The fact that the educational institution providing the education happens to be private is of little concern for the Supreme Court has suggested that "due process" should be imposed by Congress on private institutions as well.[15]

The precise definition of "due process" may vary from time to time, but the existence of these rights is guaranteed by the Constitution's Fourteenth Amendment. After the decision of *Board of Regents v. Roth*,[16] that property rights are created by state statutes and constitutional guarantees, children now have a "property" right to education. This right stems from state constitutions that guarantee free public education and state compulsory education statutes. This property right cannot be limited without procedural fairness procedures. It was argued that these property rights are part of the student's rights and should be respected in all schools, even in the absence of "state action." The same protections apply to the "liberty"

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[14]*Rochin v. California*, 342 U.S. 165 (1952).

[15]*United States v. Guest*, 383 U.S. 745 (1966).

[16]*Board of Regents v. Roth*, 408 U.S. 564 (1972).

right of maintaining a student's reputation from sullying.[17]

Other approaches were suggested to earn private school students the same "due process" guarantees as their public school counterparts. One approach looks at the state's role in education. As *parens patriae*, the state may require a certain level of performance in the private school's provision of education. It is not unreasonable for the state to also insist that the school administration's approach to students be fair, to the inclusion of "procedural due process."

Another approach suggests that, as a *quid pro quo* for requiring students to attend school (*i.e.*, compulsory education statutes), the administration must provide quality education. This quality includes, in part, procedural fairness when a student is being disciplined by exclusion.

In addition to the student's right to education, the parents have a right to send their child to private, especially religious, schools.[18] If the student is suspended without "due process," then the parents have lost their right unfairly. It is clear that "due process" should

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[17]*Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

[18]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

be provided.

An additional "property" right protected by the Constitution's Fourteenth Amendment is that contracts should be fulfilled. Implicit in a contract is the understanding that students in good standing will be allowed to continue from year to year until completion of the academic program. Thus, there is a "property" right in continuance. When this "property" right is not fulfilled, such as when a student is suspended or expelled for disciplinary reasons, the school must provide a hearing to explain its reasoning.[19]

In summation, it was shown that students have various claims to "property" and "liberty" rights in the area of education. All of these are focused more on the individual student or parent, and only indirectly related to the presence of "state action." Accordingly, the requirement for "state action" is a side issue and of little significance to the larger picture of rights that students should enjoy.

Education as a "Fundamental" Right

A right is classified "fundamental" when it is either stated explicitly in the United States Constitution, or is inferred to be one of the Constitution's protected rights.

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[19]*Ewing v. Board of Regents*, 742 F.2d 913 (1984).

Once a right is "fundamental," anyone seeking to diminish it is required to respond to "strict scrutiny" by the courts. They will be required to provide an overriding reason for the diminution of the important right at stake. If they cannot provide this reason, one that sets the individual's right aside, then the act of diminution will be disallowed. If the right to education may be seen as "fundamental," then it will not be allowed to be diminished without procedural fairnesses being invoked. Further, the administrators will be required to explain why they have no alternative but the particular exclusion being imposed.

The United States Supreme Court has ruled that education is not a "fundamental" right.[20] Justice Marshall, writing in dissent, provided an adequate rationale for judging education to be "fundamental."[21] He looked at the "unique status accorded public education in our society, and the close relationship between education and some of our most basic Constitutional values."[22] Justice Marshall felt that education is necessary for the child to adjust to the

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[20]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[21]*Id.* at 70 (Marshall, J., dissenting).

[22]*Id.*

environment, to feel at home in our culture, and to prepare for later professional training. He also believed that the other guarantees of the Constitution are meaningless without the requisite education. For example, there is a constitutional right to vote for elected officials, but this right cannot be adequately fulfilled if the voter cannot read the literature and make an intelligent choice between the candidates.

Justice Marshall was in the majority in *Plyler v. Doe*,[23] when education was judged to require "heightened" scrutiny. This middle-tiered scrutiny, between "strict scrutiny" and "rationality," requires that the school district provide "a showing that [the limitation of education] furthers some substantial state interest."[24] This is a difficult showing to make. According to some, the *Plyler* decision made the non-"fundamentality" gleaned from *Rodriguez* now irrelevant.[25]

A significant number of state courts have ruled that the right to education, if not "fundamental" on a federal

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[23]*Plyler v. Doe*, 457 U.S. 202 (1982).

[24]*Id.* at 230.

[25]*See* Dennis J. Hutchinson, "More Substantive Equal Protection? A Note on *Plyler v. Doe*," 1982 *Supreme Court Review* 170, 192.

level, is so on a state level. Beginning with *Horton v. Meskill*,[26] the Connecticut Supreme Court seemed to favor Justice Marshall's reasoning in *Rodriguez*, and ruled that education is a "fundamental" right in its state. Other states followed Connecticut's example, often disagreeing explicitly with the rationale of the *Rodriguez* Court, in addition to finding their own local reasons for the "fundamentality" of education rights.

The "heightened scrutiny" that is appropriate for any limitation of the right to education stems, in part, from the inherent and instrumental values of education. These values are not connected to the governance of the school. Accordingly, the requirement for "state action" plays no role in this case. We may conclude that "due process" rights must be maintained for all students, of public and private schools alike.

The "Public Function" Theory

When a private institution performs an essential service usually performed by the state, the private institution is said to be performing a "public function." A private school, despite its private governance, functions very much like a public school. Its students fulfill the

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[26]*Horton v. Meskill*, 376 A.2d 359 (1977).

state's compulsory education requirements;[27] its educational mission is very similar to that of state schools.

The "public function" theory is a form of "state action." This means that private institutions would be considered acting on behalf of the state even without the state governing their every act. The Fourteenth Amendment would then be applied to private schools.

This study traced the development of the "public function" theory from its genesis to contemporary times. The "public function" theory began in the 1940's with a United States Supreme Court decision regarding a "private" company town which had prevented the distribution of religious literature.[28] The majority opinion stated that private facilities that serve a larger public were required

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[27]Indeed, part of the strength of the private school's disciplinary power is its authority to expel students. Once a student is expelled, the compulsory education statutes require the student to attend a public school. To avoid this result, mindful of the state's compulsory education statute, the student might be more behaviorally cooperative. Moreover, education has been seen as one of the most important state functions. The state has an overriding interest in an educated citizenry. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). The imposition of the state into private schools is obvious; the conclusion that the private school is doing the work of the state is justified.

[28]*Marsh v. Alabama*, 326 U.S. 501 (1946).

to fulfill the constitutional requirements of state-owned facilities.[29]

A similar decision was handed down regarding a "private" park that served a "public function" such that it was disallowed from discriminating on racial grounds.[30] In this case, Justice Harlan stated explicitly that private schools serve a "public function,"[31] and that the Fourteenth Amendment applies to them.[32]

In *Jackson v. Metropolitan Edison Co.*, Justice Marshall applied the "public function" quality to any private service that is important for the state to provide, yet is also provided by private institutions. In these situations Justice Marshall required private institutions to follow the same requirements as states.[33]

Subsequently, the Supreme Court, in a majority opinion, stated explicitly that education was one of those functions "which have been administered with a greater degree of

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[29]*Id.* at 506.

[30]*Evans v. Newton*, 383 U.S. 296 (1966).

[31]*Id.* at 315 (Harlan, J., dissenting).

[32]*Id.* at 322.

[33]*Jackson v. Metropolitan Edison Co.*, 419 U.S. 365, 372 (1974) (Marshall, J., dissenting).

exclusivity by States."[34]

In a later case, Justice Marshall reiterated that he considered private education to serve a "public function."[35] He also stated that education is different from other services done by private contractors which might be considered "public function" cases.[36] Education is unique because of its "vital public function."[37] Additionally, Justice Marshall wanted to avoid a state's freeing itself of Fourteenth Amendment guidelines by privatizing traditionally public services.[38] This particular concern was also expressed by Professor Schneider, with the solution being that ways be found to recognize the public role and responsibility of private institutions.[39] There is judicial opinion that the courts

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[34]*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[35]*Rendell-Baker v. Kohn*, 457 U.S. 830, 851 (1982) (Marshall, J., dissenting).

[36]*Id.*

[37]*Id.* at 849.

[38]*Id.* at 851.

[39]Ronna G. Schneider, "The 1982 State Action Trilogy," 60 *Notre Dame Law Review* 1150, 1164 (1985). Professor Schneider, writing regarding private activities that should be required to follow Fourteenth Amendment requirements, states: "[e]ducation is an excellent example of this kind of

would be even more willing to consider education a "public function" if the rights of the *students* were at stake.[40]

Other judicial opinion in favor of viewing private education as a "public function" can be found in lower courts. The *Guillory* court wrote, "Clearly, the administrators of a private [school] are performing a public function."[41] The *Belk* court wrote, "Education is a public function."[42]The *Isaacs* court wrote, "State action would be present in the operation of every non-public school ... because education is surely a state function."[43]

Thus, there is sufficient judicial and scholarly opinion to conclude that private schools provide an important "public function." In this role, private schools are considered acting on behalf of the state with the "due process" requirements of the Fourteenth Amendment applying. Specifically, the private schools should be required to

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activity." *Id.* at 1168.

[40]*Rendell-Baker*, 641 F.2d at 26.

[41]*Guillory v. Administrators of Tulane University*, 203 F. Supp. 855, 859 (E.D. La. 1962).

[42]*Belk v. Chancellor of Washington University*, 336 F.Supp. 45, 48 (1970).

[43]*Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473, 486 (1974).

follow the same "procedural due process" guidelines as public schools.[44]

Reevaluating "State Action"

Finally, this study confronted the "state action" notion for its relevance to non-public schools. If "state action" can be discarded for lack of relevance to modern-day jurisprudence, then Fourteenth Amendment guidelines can be brought to bear upon private schools. In this way, private school students would be entitled to "due process."

According to the Positivists, it is an easy task to discard the notion of "state action" due to its inherent ambivalence. Positivists believe that citizen's rights are assigned or allowed by the state. They believe that only those rights agreed to by the state exist. Every state act that allows a right, either actively or passively, may be considered "state action."[45] Thus, the entire concept of

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[44]These are described in detail in *Goss v. Lopez*, 419 U.S. at 581.

[45]Perhaps the lead case for the Positivists is *Shelley v. Kraemer*, where the Court said that "state action" would be involved if a court upholds a private contract entered into by private parties. Although the Court recognized a private group's right to enter into such agreements, it could not judicially uphold discriminatory agreements. *Shelley* broke the wall of "state action," blurring the clear distinction of what is a private act and what is a public one. The Positivists had their case on which to rely. *See Shelley v. Kraemer*, 334 U.S. 1(1948), overturning *Corrigan*

"state action" is contrived and not useful.[46]

While some legal scholars have written that the "state action" notion is not useful and should be discarded, it should be noted that the notion serves an important function. "State action" prevents the government from creeping into a person's private domain. It preserves the "public/private distinction."[47] It is not suggested that private homes should become imbued with a public character. The Constitution was not written for private homes and should not be applied to them. But, when a private institution such as a school takes on a public character and goes beyond the norm for public institutions, then one must question whether these schools are truly free of these important and ennobling constitutional norms.[48] The significant point is that one may maintain the "public/private distinction" while abandoning "state

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v. *Buckley*, 271 U.S. 323 (1926) (private discriminatory agreements are beyond the arm of the law for lack of "state action").

[46]Paul Brest, "State Action and Liberal Theory," 130 *University of Pennsylvania Law Review* 1296 (1982).

[47]*Id.* at 1302.

[48]Charles Black, "Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 *Harvard Law Review* 69, 95 (1967).

action."

One may abandon the "state action" requirement by looking at the substance of the claim. When claims are made against private institutions, courts should look at the *content* of the claim, not the *person* of the claim. In this way, a state fulfills its responsibility to protect a citizen from deprivation at the hands of another.[49] Concurrently, the competing rights of private persons and institutions can be weighed fairly. The state will not always be the violator of fundamental fairness and the individual, the victim, with no legal redress for lack of "state action." "State action" would not be invoked to keep the courts away from reaching an equitable resolution of "private" litigation. Private school students would then be entitled to "due process" rights as guaranteed by the Fourteenth Amendment.

Other approaches were described to show the interest and connection between the state and private schools. In this way, the presence of "state action" is evident, and the Fourteenth Amendment protections would apply. One approach applied the Child Benefit theory to the "state action"

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[49]*See* Kenneth L. Karst and Howard W. Horowitz, "*Reitman v. Mulkey*: A Telophase of Substantive Equal Protection," 1967 *Supreme Court Review* 39, 55.

notion. This theory allows states to provide certain benefits to children in religious schools without confronting the constitutionally mandated separation of Church and State.[50] Another benefit that could be brought to the children within this theory is that of fundamental fairness. Just as the state provides busing for students to religious schools, it was shown that the state may demand that these schools provide their students with "due process." Further, the Supreme Court has ruled that the state may require an acceptable level of quality education;[51] it follows that it may require the school to follow certain norms of dignity. These norms include "due process." Also, just as education prepares students for their future role as wage earners, and the state has legitimate controls over all education, including private, so should education prepare students for proper citizenship. A key tile in the American mosaic of citizenship is fundamental fairness. Inasmuch as experience is the best teacher, the best way to learn fairness is to experience it in school. Accordingly, it seems wholly within the state's right to demand of private schools to provide "due process"

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[50]*See Everson v. Board of Education*, 330 U.S. 1 (1947).

[51]*See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

for their students before imposing disciplinary action. This is most appropriate for private schools that teach the Constitution itself, and that aspire to teach patriotism and respect for the American way.

Another attempt at showing the presence of "state action" even in private schools is the close comparison between states and schools. Just as states control the lives of their citizens, so do schools control their students. The same protections afforded citizens to prevent the state from taking advantage of them should be afforded private school children as well. The power invested in the state that was restrained by the Constitution is similar to the power of the school over its students. The school, public or private, should follow the same requirements for fairness as the state.

The conclusion to draw from this chapter is that the "state action" notion is not clear, nor does it guide us toward legal certainty. It should, therefore, be abandoned in favor of merit-based decisions that balance legitimate private concerns. Once this abandonment is accomplished, there is no doctrine to prevent us from applying the constitutional right to "due process" in non-public schools. All students would benefit equally and identically from the

right to fundamental fairness before being deprived of the great benefit of education.

Recommendations for Further Research

There are several additional approaches to inaugurating "due process" in private schools that should be researched in depth. This study researched constitutional theories, *i.e.*, theories affecting the constitutional right to "due process" and the requirement for "state action." Another study is needed to research non-constitutional theories that might bring the entitlement for "due process" to the private school student's door.

1. Fiduciary Rights Theory: A fiduciary relationship is one in which there is a confidence and trust between two parties. If one party reasonably reposes confidence in the fidelity and integrity of another, a fiduciary relation exists. If confidence is lacking, but one party dominates another, then, too, a fiduciary relation may be present.[52]

The nature of the relationship assumes that the fiduciary can succeed in exercising undue selfish influence over the entrusting party. This influence is sufficient reason for courts to impose special standards of conduct on

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[52]*Higgins v. Chicago Title and Trust Co.*, 312 Ill. 11, 143 N.E. 482, 484 (1924).

the fiduciary. The fiduciary has the burden of proving the validity, fairness, and reasonableness of any transaction involving the subject matter of the confidence.[53]

All of these elements appear present in the student-school relation. It is an act of confidence and trust for the student to be placed under the tutelage of the school. The value of the school experience is a direct result of the conscientiousness and faithful performance of school officials. The examination process discloses the students' levels of knowledge as they repose confidence in the teachers' abilities to interpret the evaluations and plan appropriate educational programs.

Professor Seavy described the relationship between students and their schools as fiduciary. "Since schools exist primarily for the education of their students, it is obvious that ... administrators act in a fiduciary capacity with reference to the students."[54] Accordingly, the burden is upon the school officials to prove that they have dealt fairly and reasonably with the students. School administrators, regardless of the public/private nature of

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[53]*Johnson v. Mansfield Hardwood Lumber Co.*, 159 F. Supp. 104, 118-19 n.9 (W.D. La. 1958).

[54]Warren Seavy, "Dismissal of Students: Due Process," 70 *Harvard Law Review* 1406 (1957).

the school, should show that they followed procedural fairness.

2. Contract Theory: The relationship between private schools and their students is generally seen as based on contract law.[55] Most contracts represent the mutual and voluntary undertakings of parties operating in a commercial setting. School contracts, on the other hand, are usually one-sided in favor of the school. From the student's perspective, these contracts may be seen as "adhesion contracts."[56] A study should be conducted on using the significant difference in power as a basis for creating special rights for students. Perhaps the school has certain obligations to follow procedural fairness, accept upon itself the burden of proof, and construe ambiguities in the student's favor.

3. Implied Condition of the Contract Theory: This theory suggests that there are certain procedures that have developed to the point of becoming the "standard of the

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[55]*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[56]An adhesion contract is "a contract that is so restrictive of one side, while so non-restrictive of another, that doubts arise as to its representation as a voluntary and uncoerced agreement." *Gifis's Law Dictionary* 12 (1984).

industry." As such, they may be required of all schools, private and public, regardless of where and how they began. Procedural fairness may be one of these standards. If so, private school parents may presume that this standard will be fulfilled as part of the contract between the family and the school. Moreover, the entire legal distinction between public and private schools may be unknown or insignificant to the parents and students. They may expect the same freedoms and rights on private campuses as they would enjoy on public ones.[57] The legal significance of these parental- and student-implied rights and expectations should be studied further. Procedural fairness may be seen as required in private schools.

4. A Comparison to Other Countries: This study's historical review of the development of governmental "due process" began in England with the Magna Charta. It would be interesting to study the Laws of England to learn what procedural rights have developed in that country that affect private individuals and institutions. Perhaps we should glean from the English jurisprudential experience once again.

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[57]*See* Note, "Developments -- Academic Freedom," 81 *Harvard Law Review* 1045, 1151 (1968).

In addition, it would be enlightening to see what private rights are being accorded in the newly-developing democratic countries. As the countries of the former Soviet Union develop their own constitutions and statements of rights, what are they guaranteeing their private citizens and institutions? Is there something to be gained from their legal analyses that is meaningful for us?

In addition to an inquiry into theories that would muster procedural fairness for private school students, other questions emerge from the current work that are worthy of study.

5. What are the particularly religious values that are part of the milieu of religious private schools? Would these values support or suppress the acceptance of procedural fairness within the religious school? Are religious school administrators more or less willing to incorporate procedural fairnesses in their schools? How does this willingness differ from that of principals in secular private schools? Are there significant differences in implementation of procedural fairnesses based on ideological differences within the various religious denominations?

6. What do the parents feel regarding the

incorporation of procedural fairnesses within the private school's discipline code? Do they prefer a liberal, student-centered code, or are they more concerned with providing their administrators with free reign of the students and unquestioned authority? Is there a difference in parent feeling based on the perceived authoritarian nature of the denomination? Do parents of girls differ from parents of boys? Is there a significant difference in response between ethnic groups? Are parents of "recidivists" (students who have faced disciplinary action several times and are quite familiar with "the system") more likely to prefer new, more fair procedures?

7. After procedural fairness has been incorporated in a school, it would be useful to study several claims made by this study. For example, are the students learning and appreciating civic responsibility on a higher level? Have they learned from the experiences of procedural fairness? Is there a heightened awareness of self-control and accepting of personal responsibility for oneself? Are there less hostile and violent acts as a result of greater administrative fairness than before and in comparable schools? Do the answers to these questions change as more "due process" is provided?

8. Is there greater satisfaction in private schools that provide "due process" than schools that do not? Is the school climate significantly different? Are the parents more satisfied with the discipline in the school with the inclusion of procedural fairness?

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VITA

The author, Harley Aaron (Chanina) Rabinowitz, was born in Detroit, Michigan.

His elementary, secondary, collegiate and professional educations were completed in Chicago, Illinois. Three interim years of study were spent in Israel. He received a Bachelor of Hebrew Letters, and was ordained as a rabbi, in 1976 at Hebrew Theological College, Skokie, Illinois.

After moving to St. Louis, to teach at Epstein Hebrew Academy, the author entered St. Louis University, from which he received a Master of Arts in Education, in 1979.

Rabbi Rabinowitz returned to Illinois that year to assume the assistant principalship of Hillel Torah North Suburban Day School in Skokie. Subsequently, he was appointed Principal of Seattle (Washington) Hebrew Academy (1985-87) and of North Shore Hebrew Academy, Great Neck, New York.

The author has served as chairman of several committees of the National Conference of Yeshiva Principals, as well as participating on the Convention Committees of the National Society for Hebrew Day Schools and Educators Council of America.

APPROVAL SHEET

The dissertation submitted by Harley Rabinowitz has been read and approved by the following committee:

Dr. Max A. Bailey, Director
Associate Professor, Educational Leadership and Policy Studies,
Loyola University Chicago

Dr. Philip M. Carlin
Associate Professor, Educational Leadership and Policy Studies,
Loyola University Chicago

Professor Allen E. Shoenberger
Professor
School of Law
Loyola University Chicago

The final copies have been examined by the director of the dissertation and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the dissertation is now given final approval by the Committee with reference to content and form.

This dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Education.

December 7, 1993
Date

Max A Bailey
Director's Signature