Michigan Law Review

Volume 60 | Issue 4

1962

Constitutional Law - Due Process - Expulsion of Student fro m State-Operated College Without Notice or Hearing

James A. McDermott
University of Michigan Law School

RECENT DECISIONS

CONSTITUTIONAL LAW — DUE PROCESS — EXPULSION OF STUDENT FROM STATE-OPERATED COLLEGE WITHOUT NOTICE OR HEARING — A substantial number of students at the Alabama State College for Negroes had been participating in peaceful demonstrations protesting racial segregation. The president of the college advised the students to return to their studies which were disrupted by these demonstrations, and personally warned three of the plaintiffs to discontinue their participation in the demonstrations. Nonetheless, further demonstrations ensued in which the plaintiffs took part. The State Board of Education then voted to expel the plaintiffs who were allegedly the leaders of the organization responsible for the demonstrations. The notices of expulsion mailed to the plaintiffs stated no reason for the action taken and at no time were the plaintiffs provided with an opportunity to appear before the Board.[1] Upon the plaintiffs' suit to enjoin the Board from obstructing their right to attend the college, the district court upheld the expulsions and denied injunctive relief.[2] On appeal, *held*, reversed, one judge dissenting. Due process requires that notice and some opportunity for a hearing be given before students at a state-operated college can be expelled for misconduct. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

The conduct of a state administrative agency acting wholly within the domain of state interest is insulated from federal judicial review.[3] Public education is generally conceded to be a matter reserved for state administrative control.[4] In consequence, it has been held that a federal court is not a competent tribunal in which to seek review of administrative action resulting in the expulsion of a student from a state university.[5] But the weight of authority holds that the insulation from federal judicial review is ineffectual where such administrative action transgresses a right protected by the federal due process clause.[6] However, before a complainant

1 Principal case at 152-55; see also the lower court's review of the facts, Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 947-49 (M.D. Ala. 1960).

2 Dixon v. Alabama State Bd. of Educ., *supra* note 1.

3 See Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

4 See Steier v. New York State Educ. Comm'r, 271 F.2d 13, 18 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960); Bush v. Orleans Parish School Bd., 188 F. Supp. 916, 929 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961); State *ex rel.* Steinle v. Faust, 55 Ohio App. 370, 376, 9 N.E.2d 912, 914 (1937). Concomitantly, the state is the source of the privilege of attending a state-operated university. See Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261 (1934).

5 Steier v. New York State Educ. Comm'r, 271 F.2d 13, 16-18 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960).

6 See Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 258 (1934); Steier v. New York State Educ. Comm'r, *supra* note 6, at 21 (concurring opinion); Webb v. State Univ., 120 F. Supp. 554, 558-59 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954).

may properly invoke the due process clause he must demonstrate that he has been deprived of "life, liberty, or property" by the state.[7] While the court in the principal case found that such a deprivation had occurred, its opinion does not disclose the basis of the finding.[8]

Clearly the expulsion of the plaintiffs by the Board constituted state action.[9] The difficult problem in the principal case was posed by the lower court when it asserted that "the right to attend a public college or university is not in and of itself a constitutional right."[10] This position, in presupposing that the meanings of "right" and "life, liberty, or property" are coterminous, ignores the possibility that a student, once he has matriculated, may acquire an interest in continuing his education at a state university. The student's interest is best described as a privilege, for it is acquired not as a matter of "right" but as a matter of discretion on the part of the state. And the Supreme Court has recognized that some privileges, once granted by the government, may not constitutionally be revoked without compliance with due process of law, even where the recipient cannot be said to have had initially the abstract "right" to the enjoyment of the privilege.[11] Thus, the proper question in determining whether an expelled student is entitled to the protection of the due process clause is whether the privilege granted to him is included within the meaning of the phrase "life, liberty, or property."

On two occasions the Supreme Court has reviewed the claim of a student that his expulsion from a state university resulted in a denial of due process.[12] In both cases the Court found the state interest sufficient to justify expulsion and it did not rule on the question of whether the student's privilege was encompassed within the meaning of "life, liberty, or property."[13] But, because the Court in each case stressed the point that

7 See Pickus v. Board of Educ., 9 Ill. 2d 599, 606, 138 N.E.2d 532, 536 (1956); Port of Tacoma v. Parosa, 52 Wash. 2d 181, 193, 324 P.2d 438, 445 (1958).

8 The court stated: "The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing." Principal case at 157. This, at most, states a conclusion. No explanation was offered as to why this "right" was properly includible within the scope of either "liberty" or "property" as used in the due process clause.

9 See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

10 Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960).

11 This principle is best exemplified in the area of governmental employment. See, *e.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961); Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). *But see* Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951), where the court stated, "due process of law is not applicable unless one is being deprived of something to which he has a right." See generally Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 222-80 (1956).

12 Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); Waugh v. Trustees of the Univ. of Miss., 237 U.S. 589 (1915).

13 The Court explicitly declined to rule on this point, *id.* at 597.

the student was subject to a paramount governmental interest in the exercise of his privilege, it might be inferred that the Court felt it was displacing a constitutionally protected, albeit limited, interest. A limitation of this interest may appropriately be construed as an impairment of the student's "liberty."[14] "Liberty" is not limited to mere freedom from physical restraint.[15] Positively, it involves a conception of freedom of individual endeavor as secured by restraints on unwarranted state interference.[16] If it is agreed that a person has an inherent freedom to pursue knowledge and that a formal education, while not essential to this objective, is intimately associated with its effective accomplishment, then the revocation of the privilege of acquiring an education may be regarded as an interference with the student's liberty in his pursuit of knowledge.

This reasoning appears to be compatible with the thinking of the Supreme Court. "Liberty" has repeatedly been said to acknowledge the right of a person "to be free in the enjoyment of all his faculties. . . ."[17] It includes the "right to acquire useful knowledge."[18] The Court has expressed the belief that the freedom "to inquire, to study and to evaluate, to gain new maturity and understanding . . ." is essential to the preservation of our civilization.[19] It has even been suggested that the freedom to pursue knowledge is as sacrosanct as the freedom to enjoy one's religious belief.[20] These postulates have recently found tacit approval in the case

14 While it is improbable that the privilege of acquiring an education would be construed as a "property" right, there is some authority for such a construction. See State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943), in which the court stated in dictum that the right to study—as well as to practice—medicine was a "property" right protected by the due process clause. While the right to practice a profession had been recognized as a "property" right protected by the due process clause, the court did not explain why the extension of the "property" concept to the preparation for professional practice, as distinguished from the practice itself, was warranted. But, even assuming this extension was proper, the further enlargement of it to include non-professional undergraduate study would appear to be tenuous, although not infeasible.

15 See, *e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). See generally Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 183 (1945); Shattuck, *The True Meaning of the Term Liberty*, 4 HARV. L. REV. 365 (1891).

16 See, *e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Meyer v. Nebraska, *supra* note 15, at 399-400; Coppage v. Kansas, 236 U.S. 1, 18 (1915). See generally Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U.L.Q. 497 (1942); Warran, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

17 See, *e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

18 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

19 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

20 "[I]n the eye of the law the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured

of *Bolling v. Sharpe*[21] where the Court held the racial segregation of Negro school-children in the District of Columbia to constitute an arbitrary deprivation of their liberty. The reason given for the holding was that "Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[22] If the school child's privilege of acquiring an education free from improper governmental restraint is held to constitute a civil "liberty," then, by analogy, the corresponding privilege of a student at an advanced level in a state university should similarly be recognized. If such a conclusion is accepted, then the due process clause is properly applicable to the Board's action in the principal case.

It remains, then, to determine what procedural limitations on the dismissal process are necessary to satisfy "due process of law." The Supreme Court has held that where a state administrative agency renders an adjudication depriving a person of a constitutionally protected interest, unless compelling circumstances dictate otherwise, due process requires that notice and some opportunity for a hearing be provided.[23] Since it is unlikely that, on the facts of the principal case, the state interest asserted greatly outweighs the private interest impaired, it appears that the court's requirement that a hearing be held is proper.[24] The particular procedure sug-

by the fundamental law." Mr. Justice Harlan, dissenting in Berea College v. Kentucky, 211 U.S. 45, 68 (1908).

21 347 U.S. 497 (1954). This case was a companion to Brown v. Board of Educ., 347 U.S. 483 (1954). Since the fifth amendment does not contain the "equal protection" clause found in the fourteenth amendment, the Court chose to decide the question on the basis of a deprivation of "liberty." With certain qualifications not here material, the meanings of the due process clauses of the fifth and fourteenth amendments are coextensive. See Hibben v. Smith, 191 U.S. 310, 325 (1903); French v. Barber Asphalt Paving Co., 181 U.S. 324, 329 (1901). Therefore it is proper to turn to the fifth amendment interpretations of "liberty" to ascertain its meaning as used in the fourteenth amendment.

22 347 U.S. at 499-500.

23 See, *e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956); Dohany v. Rogers, 281 U.S. 362, 369 (1930); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707-11 (1884). *Cf.* Cafeteria Workers v. McElroy, 367 U.S. 886, 900-01 (1961); Greene v. McElroy, 360 U.S. 474, 508 (1959); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143, 161-62, 175-78 (1951) (concurring opinions).

24 A distinction should be drawn between the Board's role in the adjudication of disputed facts and its function in formulating policy for the administration of state colleges. If the decision in the principal case is construed to mean that a hearing is required for the purpose of contesting the evidence upon which the expulsion order is to be based, the requirement of procedural regularity is warranted. The court's opinion does suggest that only factual determinations were contemplated. See principal case at 155. But, if the decision calls for a hearing upon the reason for expulsion a more difficult problem is presented. In general, a hearing is not required upon administrative decisions as to policy matters. See, *e.g.*, Bragg v. Weaver, 251 U.S. 57, 58-59 (1919); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). See generally Davis, *supra* note 11, at 194-222. Certainly a determination by the Board that peaceful demonstrations protesting racial segregation are sufficiently inimical to the college's

gested by the court in the principal case[25] is in accord with the authority on this subject. While a formal trial is unnecessary, the matter should be determined by a disinterested and unbiased tribunal.[26] The student should be given notice of the specific charges and grounds, which, if proved, would justify his expulsion.[27] While the student should be provided with the names of the witnesses testifying against him, together with an oral or written report of the facts to which each witness testifies,[28] the weight of authority is against permitting him to cross-examine them.[29] Finally, the student should be allowed to present evidence in his favor or to offer a justification for his alleged misconduct.[30] While these requirements do not contravene the power of decision itself, they do provide the student with some guarantee against an arbitrary or capricious dismissal. Certainly the restrictions thus imposed upon the school authorities are not unduly burdensome when the resulting injury to the student through expulsion is considered.

James A. McDermott

welfare to justify expulsion would be more legislative than adjudicative in character. There is reason to doubt, therefore, that the plaintiffs should be entitled to a hearing to contest the propriety or desirability of the policy decision upon which their expulsion rests.

25 Principal case at 158-59.

26 *Cf.* Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 157 (Cir. Ct. Cuyahoga County 1901).

27 State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 216, 263 Pac. 433, 436, *cert. denied*, 277 U.S. 591 (1928); Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77, 82 (1887); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942), *cert. denied*, 319 U.S. 748 (1943).

28 See Commonwealth *ex rel.* Hill v. McCauley, *supra* note 27; State *ex rel.* Sherman v. Hyman, *supra* note 27, at 110, 171 S.W.2d at 826.

29 See People *ex rel.* Bluett v. University of Ill., 10 Ill. App. 2d 207, 210, 134 N.E.2d 635, 637 (1956); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 216, 263 Pac. 433, 436, *cert. denied*, 277 U.S. 581 (1928); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 110, 171 S.W.2d 822, 826 (1942), *cert. denied*, 319 U.S. 748 (1943). *Contra*, Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77, 82 (1887).

30 See State *ex rel.* Ingersoll v. Clapp, *supra* note 29, at 216, 263 Pac. at 436; Commonwealth *ex rel.* Hill v. McCauley, *supra* note 29, at 82; State *ex rel.* Sherman v. Hyman, *supra* note 29, at 110, 171 S.W.2d at 826. But *cf.* People *ex rel.* Bluett v. University of Ill., *supra* note 29, at 211, 134 N.E.2d at 637.