OLD MR. KROUPA HAD A FARM, EIEIO: ESTABLISHING A LIBERTY INTEREST IN 4-H PARTICIPATION IN *KROUPA V. NIELSEN*, 731 F.3D 813 (8TH CIR. 2013)

Steven A. Rodgers*

I. INTRODUCTION

Imagine your child has become very successful in a single sport or activity during their high school years. They have bypassed other opportunities in order to fully focus on the one extracurricular activity. You have fully supported them because you believe their success in the activity will lead to success later in life, whether that means a college scholarship or improved career opportunities. Now, imagine that they have been suspended from the activity and are being labeled a cheat by the community. This is the situation that Greg Kroupa was confronted with when his daughter ("B.K.") was suspended from 4-H participation after winning the South Dakota State Fair.[1]

At a minimum you would expect a chance to confront the accusers and a chance to clear the child's name right? The reality is you might not get that chance, depending on the activity in question. Courts rarely extend due process protection to high school interscholastic sports.[2] However, there may be a property right if the underlying claim involves a state action involving discrimination based on race or disability.[3] The Supreme Court has established that students have a protected interest in the education process, which requires a school to give them a hearing before suspending them.[4] The Court has held, however, that education is not a fundamental right entitled to strict scrutiny under the Equal Protection Clause.[5]

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* Steven Rodgers is a third-year law student at Southern Illinois University School of Law, expecting his Juris Doctor in May 2016. He would like to thank his faculty advisor, Professor Steven Macias, for his helpful feedback throughout the writing process. He would also like to thank his parents, Paul and Ruth Rodgers, for their unconditional love and support.

1. Kroupa v. Nielsen, 731 F.3d 813 (8th Cir. 2013).
2. Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, VA. SPORTS & ENT. L.J. 1, 16 (2005) (listing several cases denying due process protection to students in regards to high school sports).
3. *Id.* at 18.
4. Goss v. Lopez, 419 U.S. 565, 574 (1975).
5. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) ("[I]t follows that the Court concludes that public education is not constitutionally guaranteed.") (Marshall, J., dissenting).

While there is a substantial amount of precedent discussing extracurricular sports and the Due Process Clause, there is much less regarding other extracurricular activities. Nationally, eighty-three percent of all children age six to seventeen participated in at least one extracurricular activity.[6] 4-H is the nation's largest youth development and empowerment organization, reaching more than six million youths.[7] 4-H participation falls somewhere on the continuum between the entire educational process, which receives full due process protection, and high school athletics, which have not been given any protection.

In *Kroupa v. Nielsen*, the Eighth Circuit Court of Appeals decided whether participation in the 4-H organization, and its competitions, was a sufficient right or status under state law to be protected by the Due Process Clause.[8] This Note will argue that, in *Kroupa v. Nielsen*, the United States Court of Appeals for the Eighth Circuit was correct in holding that 4-H participation is a sufficient right or status under the Due Process Clause. Whether participation in 4-H is a protected right or status under the Constitution may have a substantial effect on numerous other activities. Courts struggle with the balance between giving educators, coaches, and volunteers the ability to maintain discipline of the programs they are in charge of, and the need for some protection from arbitrary punishments imposed upon minors.

Section II of this Note will discuss procedural due process rights in general, as they relate to one's reputation, and how courts have applied due process analysis to extracurricular activities. Section III will discuss the factual background in *Kroupa v. Nielsen*, along with the majority and dissenting opinions. Section IV will argue that the Eighth Circuit's decision was correct because it did not depart from prior precedent, as well as identify a proper test to apply in future cases.

II. LEGAL BACKGROUND

To succeed in a claim under 42 U.S.C. § 1983,[9] a plaintiff must prove that the alleged conduct was (1) committed by a person acting under color of state law and that (2) they were deprived of a right secured by the

6. Jennifer E. Macomber, *Children's Environment and Behavior: Participation in Extracurricular Activities*, URB. INST. (Jan. 1, 1999), http://www.urban.org/publications/900869.html.

7. NATIONAL 4-H COUNCIL, http://www.4-h.org/ (last visited Sept. 25, 2014).

8. Kroupa v. Nielsen, 731 F.3d 813, 819 (8th Cir. 2013).

9. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

Constitution.[10] This section explores both elements of a § 1983 claim, while focusing primarily on what rights are secured by the Constitution. First, this section will analyze the first requirement of a § 1983 claim, that the conduct complained of was committed by a person under the color of state law.[11] Second, this section will contain a brief overview of procedural due process rights. Third, this section will discuss the effect damage to one's reputation can have on the due process analysis. Finally, this section will discuss the history of treatment given to various extracurricular activities under the Due Process Clause.

A. What Constitutes a Person Acting Under Color of State Law?

The first inquiry that must be made in a § 1983 claim is "whether the conduct complained of was committed by a person acting under color of state law."[12] This requirement ensures that liability only attaches when individuals act "who carry a badge of authority of a State and represent it in some capacity."[13] The "under color of state law" requirement can thus be defined as a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[14] Ultimately, the state action requirement preserves individual freedom by limiting the scope of the federal judiciary and allows private actors the freedom to ignore the Constitution.[15]

In *Rendell-Baker v. Kohn*, the Supreme Court held that the director of a private school, which received virtually all of its funding from the government, was not acting under the color of state law when he fired multiple employees without a hearing.[16] The Court was also persuaded by the fact that the decisions to discharge the employees were not compelled by any state regulation, even though there was extensive state regulation over the school generally.[17] Finally, the Court said that it is not enough that the school served a public function, but rather the function must be "traditionally the *exclusive* prerogative of the State."[18]

The typical state-action case occurs when "a private party has taken the decisive step that caused the harm to the plaintiff, and the question is

10. Parratt v. Taylor, 451 U.S. 527, 535 (1981).
11. *Id.*
12. *Id.*
13. Monroe v. Pape, 365 U.S. 167, 172 (1961).
14. United States v. Classic, 313 U.S. 299, 326 (1941).
15. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 524 (4th ed. 2011) (adding historically "it was thought that the common law completely safeguarded personal liberties from private infringements").
16. Rendell-Baker v. Kohn, 457 U.S. 830, 834, 840 (1982) (noting the school received 90% of its funding in one year and 99% in another).
17. *Id.* at 842.
18. *Id.* (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).

whether the State was sufficiently involved to treat that decisive conduct as state action."[19] In *National Collegiate Athletic Association v. Tarkanian*, a Division I basketball coach brought a due process claim against the National Collegiate Athletic Association (NCAA) when he was fired by the University of Nevada-Las Vegas (UNLV) after an NCAA investigation found thirty-eight violations of NCAA rules, ten of which involved Jerry Tarkanian.[20] After the investigation, the NCAA ordered UNLV to show cause as to why it should not impose further penalties if UNLV did not sever all ties with Tarkanian.[21] The Court reasoned that while UNLV was certainly a state actor when it fired Tarkanian, the NCAA was not because UNLV retained the right to withdraw from the NCAA and establish its own standards.[22] Moreover, UNLV had not delegated any power to the NCAA to take action against any university employee and the NCAA enjoyed no governmental powers during its investigation.[23]

Similarly, the Supreme Court has held that the United States Olympic Committee was not an agent of the government even though Congress granted it a corporate charter, assisted it in obtaining funding, and regulated it through federal law.[24] The Court in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee* added that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions."[25] Ultimately, the government is only liable for a private decision "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 [government]."[26]

Once it is established that the defendant is in fact a state actor, the analysis shifts to whether the alleged right is protected under the Due Process Clause.[27] The next Section will provide an overview of what is required by the Supreme Court to establish a protected property or liberty interest.

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19. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).
20. *Id.* at 181.
21. *Id.*
22. *Id.*
23. *Id.* at 194–97.
24. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543–46 (1987).
25. *Id.* at 544.
26. *Id.* at 546; *but see* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394–95, 399 (1995) (holding "that where, as here, the Government creates a corporation [Amtrak] by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment").
27. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

B. Overview of Procedural Due Process Rights

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[28] Procedural due process "imposes constraints on governmental decisions" before depriving a person of a liberty or property interest under the Due Process Clause.[29] Determining whether a right exists, or whether the right is protected by procedural due process has befuddled even expert practitioners.[30] The Supreme Court has described the words "liberty" and "property" as "broad and majestic terms."[31] Furthermore, the Court has established that great concepts such as "due process of law, liberty, and property were purposely left to gather meaning from experience."[32]

Thus, while there is not an exact standard for what rights are protected, the Court has indicated that there must be "some level of guarantee."[33] To have a property interest in a benefit, an individual must have a "legitimate claim of entitlement to it," not merely an "abstract need or desire for it."[34] Such entitlements are not created by the Constitution, but rather are generated by an independent source such as state law.[35] In *Board of Regents of State Colleges v. Roth*, the Court held a teacher had no property right in re-employment for the next year because nothing in his contract, University policy, or statute provided for it.[36]

The Court seemed to restrict the *Roth* test in 2005 in the case of *Town of Castle Rock v. Gonzales*, albeit in the context of claiming a property interest in police protection.[37] Jessica Gonzales had a restraining order entered against her husband, which she sought to have enforced after her husband took their three children from the yard without notice.[38] She called the police and, when they arrived, showed them a copy of the

28. U.S. CONST. amend. XIV, § 1.
29. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).
30. *See* JAMES S. BURLING, THE CHALLENGE OF DUE PROCESS, 1983, AND PROPERTY RIGHTS, AMERICAN LAW INSTITUTE (2007) (a discussion during oral arguments at the Supreme Court included the following dialogue: "J. O'CONNOR: Are you arguing substantive due process or procedural due process? . . . MR. MONTGOMERY: Your Honor, if a label must be placed it would have to be substantive due process but as we have pointed out in our briefs, the values that we seek to protect here are largely procedural values. The interest in notice, in understanding the consequences of one's actions. It is procedural in that sense, I suppose in the way that the void for vagueness doctrine is procedural.").
31. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).
32. Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949).
33. BURLING, *supra* note 30 (2007).
34. *Roth*, 408 U.S. at 571.
35. *Id.*
36. *Id.* at 578.
37. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).
38. *Id.* at 753.

restraining order.[39] The police said there was nothing they could do, and for her to call back if the children did not return in a few hours.[40] She finally spoke to her husband, who said he had the children at an amusement park in Denver.[41] The cops continued to refuse assistance until the husband finally showed up to the police station at 3:20 a.m., with the three girls murdered in the back seat.[42] The Court held that Gonzales did not have a property interest in police enforcement of the restraining order because traditionally police are given discretion to grant or deny the request.[43]

Ultimately, an individual claiming a protected right must have more than a unilateral expectation of it.[44] Instead, there must be some independent source, such as state law, that gives them an entitlement to the claimed interest.[45]

C. Damage to One's Reputation as a Basis for Establishing a Property Interest

While it has been established that reputational injury alone will not warrant due process protection, it is still a fundamental part of many courts' analysis in determining what rights are protected under the Fourteenth Amendment.[46] For example, the Eighth Circuit Court of Appeals has held that individuals have a liberty interest in their reputation when an employer levels accusations against them that are "so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges."[47] In *Winegar v. Des Moines Independent Community School District*, the court reasoned that charges of unjustified child abuse were sufficient to constitute a liberty interest in a teacher's reputation when coupled with the teacher's property interest in ongoing employment, even though the teacher was transferred to an equivalent position at another school.[48] Thus, while reputation cannot be a stand-alone basis for a protected interest, it can provide additional support to another protected interest.[49]

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 754.
43. *Id.* at 752, 768 (even though there was language on the restraining order directed at police officers stating "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER").
44. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).
45. *Id.*; *see e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (discussing welfare benefits as "a matter of statutory entitlement for persons qualified to receive them").
46. Kroupa v. Nielsen, 731 F.3d 813, 818 (8th Cir. 2013).
47. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 899 (8th Cir. 1994) (adding "requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like").
48. *Id.*
49. *Kroupa*, 731 F.3d at 818.

In 1971, the Supreme Court decided *Wisconsin v. Constantineau*, the first case to deal with reputational injury as a property interest.[50] This case opened up what seemed to be a very inclusive right in one's reputation.[51] The case analyzed a Wisconsin statute that allowed certain officials to forbid the sale or gift of alcohol to individuals labeled excessive drinkers by posting the individual at all retail liquor outlets.[52] The Hartford Chief of Police posted a notice at all retail liquor outlets banning Norma Constantineau from purchasing intoxicating beverages for one year.[53] The Court held that before a person can be exposed to "embarrassment and ridicule" based on someone acting pursuant to state law, the individual involved must be given notice of the intent to post and an opportunity to present their side of the matter.[54]

Five years later, in 1976, the Supreme Court narrowed the scope of due process protection for reputational harm caused by state officials.[55] In *Paul v. Davis*, the Court established the current standard that damage to one's reputation alone, absent some more "tangible interest," is not sufficient to invoke the protection of the Due Process Clause.[56] The case involved a decision by the Louisville Chief of Police to publish and distribute a flyer to 800 merchants that contained the photograph and name of all persons arrested for shoplifting during the year.[57] Respondent Davis was one of the individuals listed, even though he had pled not guilty to the shoplifting charge and his guilt or innocence had yet to be determined.[58] The Court held that Davis had no legally protected interest in his reputation alone, distinguishing *Constantineau* on the basis that there was not only damage to her reputation, but also a deprivation of a right recognized by the state, the right to buy alcohol.[59]

Ultimately, a plaintiff relying in part on a reputational injury to establish a protected interest must also be entitled to a more tangible interest.[60] The next section will discuss the types of interests most similar

50. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971).
51. *Id.* at 437 ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").
52. *Id.* at 434 n.2, 435 (quoting WIS. STAT. § 176.26 (1967)) (authorized officials include "the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county").
53. *Id.* at 435.
54. *Id.* at 436.
55. *See* Paul v. Davis, 424 U.S. 693 (1976).
56. *Id.* at 701.
57. *Id.* at 695.
58. *Id.* at 695–96.
59. *Id.* at 708–09.
60. Kroupa v. Nielsen, 731 F.3d 813, 818 (8th Cir. 2013).

to 4-H participation, and how courts have dealt with them in regards to the Due Process Clause.

D. Property and Liberty Interests in the Context of Extracurricular Activities

Because reputational harm alone is not enough to invoke protection under the Due Process Clause, a plaintiff must establish some more "tangible interest" that is provided by an independent source.[61] In *Kroupa*, the alleged interest was participation in the 4-H program and its various competitions.[62] This Section will analyze how courts have treated various extracurricular activities that bear resemblance to the 4-H program.

Courts seldom find a property interest when it comes to participation in interscholastic high school sports.[63] This is because a student's interest in participating for one year in an interscholastic sport amounts to a "mere expectation," rather than a constitutionally protected right.[64] In 1972, however, there was a trend towards acknowledging a protected interest in a high school student's athletic participation.[65] The court in *Behagen v. Intercollegiate Conference of Faculty Representatives* thought extending this protection to college sports was an easy call because there was the potential for great economic rewards.[66] The Eighth Circuit expressly reserved the issue five years later, noting that two other circuits had taken the position that participation in college athletics was not protected by the Due Process Clause.[67] The trend recognized in *Behagen* did not follow the expected path, however, and recent courts have held that the interest of college students in participating in intercollegiate athletics is not constitutionally protected.[68] It is worth noting, however, that these recent college cases have dealt with a school's decision to cut entire teams, and not a school's decision to suspend an individual player.[69]

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61. *Paul*, 424 U.S. at 701.
62. *Kroupa*, 731 F.3d at 819.
63. Heckman, *supra* note 2, at 16.
64. Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980).
65. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972); *see* Kelley v. Metro. Cty. Bd. Of Educ., 293 F. Supp. 485, 492 (M.D. Tenn. 1968) ("[T]he right to engage in secondary school athletics, is of such significance and worth as to require that the proceedings which resulted in the one year suspension conform to the standards of due process.").
66. *Id.* at 604.
67. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 366 n.22 (8th Cir. 1977).
68. *See* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 109 (4th Cir. 2010); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002).
69. *See* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 109 (4th Cir. 2010) (James Madison University planned to cut ten varsity sports teams); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002) (Miami University planned to disband its wrestling, soccer, and tennis clubs).

The lack of a liberty or property interest has extended to other high school activities as well.[70] In *Poling v. Murphy*, a student was disqualified from student council elections for disparaging comments he made about the school administration during his campaign speech.[71] The court held that the disqualification was not a violation of the student's due process rights because participation in student council elections was only a privilege.[72] The Sixth Circuit reasoned that participation in the elections was no different from the interscholastic sports that had previously not been granted due process protection because both amounted to no more than "a mere expectation rather than a constitutionally protected claim of entitlement."[73]

Similarly, the Tenth Circuit has held that the right to take advanced placements classes is not protected under the Due Process Clause.[74] In *Seamons v. Snow*, the court reasoned that each component of the educational process did not create a property interest, relying on circuit precedent establishing that state entities were left with a large level of discretion in overseeing athletics and other activities.[75] Ultimately, while students have a protected interest in the educational process as a whole, there is no liberty or property interest in each individual component.[76] The rationale of the courts holding that there is no protected interest in interscholastic athletics was summed up in *Mazevski v. Horseheads Central School District*, when the court stated:

> If the rule were otherwise, every disgruntled student (or, more likely, disgruntled parent) who believed she should not have been dropped from the pep squad, or who believed he should not have been benched for missing a team meeting, or who challenged his failure to be selected to take advance placement courses, could commence an action in federal court to challenge the decision of the school's administrators. This should not be. Discomfiture over such school-yard decisions does not warrant relief in federal court. To hold otherwise, is contrary to sound legal

70. Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989).
71. *Id.*
72. *Id.* (expressly stating there is no difference between student council and interscholastic athletics, even though the student council president was awarded a $100 scholarship). The Sixth Circuit relied on the distinction between a privilege and right even though the Supreme Court has cautioned against using that distinction in due process analysis. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) ("The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'").
73. *Poling*, 872 F.2d at 764 (quoting Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980)).
74. Seamons v. Snow, 84 F.3d 1226, 1235 (10th Cir. 1996).
75. *Id.* (citing Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976)).
76. Mazevski v. Horseheads Cent. Sch. Dist., 950 F. Supp. 69, 72 (W.D.N.Y. 1997) (student had no liberty or property interest in participating in the marching band).

> reasoning, invites disruption of the educational process and has scant pedological value.[77]

The United States District Court for the Southern District of Ohio has similarly held that the right to assist one's children in presenting an animal at a county fair does not rise to the level of a liberty or property interest protected by procedural due process.[78] In *Farmer v. Pike County Agricultural Society*, three members of a family were banned from participating in livestock competitions at the Pike County Fair after one of their horses tested positive for a banned diuretic.[79] The defendant in the case was an agricultural society organized pursuant to Ohio Revenue Code Chapter 1711.[80] In rejecting the plaintiff's analogy to the right to attend public school, the court noted that "the Due Process Clause of the Fourteenth Amendment does not protect against every perceived unfairness visited upon a person by the state."[81] On the other hand, at least one court has said individuals have a liberty interest in attending a county fair.[82]

Outside of concluding that students have a protected interest in the entire educational process, courts have been reluctant to extend due process protection to any individual component.[83] This result stems from only a handful of circuit court cases from the 1970's and 1980's.[84] In *Walsh v. Louisiana High School Athletic Association*, the challenge was to a transfer rule which barred participation in high school sports for one year for any student who attended a high school that was not within their home district.[85] The Fifth Circuit never indicated whether it was conducting procedural or substantive due process analysis, but it would seem that the challenge was substantive because the plaintiffs sought to have the rule invalidated as opposed to requesting a hearing to dispute how the rule was applied in each of their cases.[86] Similarly, in *Albach v. Odle*, the Tenth

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77. *Id.* at 73.
78. Farmer v. Pike Cnty. Agric. Soc'y, 411 F. Supp. 2d 838, 843 (S.D. Ohio 2005).
79. *Id.* at 840.
80. *Id.*
81. *Id.* at 842.
82. Marchand v. Grant Cnty., No. CV–07–182–RHW, 2009 WL 2998184, at *5 (E.D. Wash. Sept. 15, 2009) ("Plaintiff has a liberty interest in attending the Grant County Fair that requires procedural due process.").
83. Heckman, *supra* note 2, at 16.
84. *See* Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980); Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).
85. Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 155 (5th Cir. 1980) ("[H]ome districts are the geographical areas designated as the attendance zones for the public high schools by the local school boards of the State of Louisiana."). The rule was promulgated "in an effort to discourage or eliminate the recruitment of promising young athletes upon graduation from elementary or junior high schools." *Id.* at 154.
86. *Id.* ("The plaintiffs alleged in their complaint that the existence and enforcement of the LHSAA's student transfer rule unduly burdened their first amendment right to the free exercise of religion

Circuit dismissed a challenge to a New Mexico athletic association's transfer rule on the grounds that participation in high school sports was not protected under the Due Process Clause.[87]

While courts have been reluctant to extend procedural due process protection to high school extracurricular activities, the governing principles are not quite clear.[88] The next Section will lay out the facts in *Kroupa v. Nielsen* as well as the analysis done by both the majority and dissenting opinions.

III. EXPOSITION OF THE CASE

Greg Kroupa sought a preliminary injunction to prevent 4-H officials from enforcing a suspension they had issued against his daughter, B.K.[89] In determining whether a preliminary injunction was proper, the following factors were considered: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[90] While all of these issues were discussed, the "threshold issue" was whether participation in the 4-H program is a sufficient right or status under state law to be protected by the Due Process Clause.[91]

A. Facts and Procedural Posture

Greg Kroupa, B.K.'s father, testified that his family is in the business of breeding, raising, and showing livestock in South Dakota.[92] Fifteen-year-old B.K. was a successful participant in the 4-H program, having won upwards of $20,000 from various livestock shows.[93] B.K. testified she planned on using the money for college and stopped participating in other sports to devote her time to 4-H.[94] She intended to pursue a career in agriculture and eventually take over the family farm.[95] In April 2011, B.K.

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and deprived them of their fourteenth amendment right of equal protection . . . [as well as an] additional claim based on a denial of the plaintiffs' fourteenth amendment right to due process.").

87. Albach v. Odle, 531 F.2d 983, 984 (10th Cir. 1976).
88. Kroupa v. Nielsen, 731 F.3d 813, 820 (8th Cir. 2013).
89. *Id.* at 815.
90. *Id.* at 818 (quoting Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981)).
91. *Id.* at 819.
92. *Id.* at 816.
93. *Id.*
94. *Id.*
95. *Id.*

raised a swine named Moe.[96] Moe won reserve grand honors[97] at the South Dakota State Fair.[98]

After the fair, B.K. was accused by members of the 4-H community of showing a pig other than Moe.[99] The brief for the 4-H officials tells a story of long-standing issues with the Kroupa family.[100] After an investigation, the Assistant Director of 4-H Youth Development, Peter Nielsen, sent B.K. a notice that she would be suspended from further participating in 4-H exhibition programs.[101] Specifically, they found that she showed a pig other than Moe at the South Dakota State Fair, and that she had showed her South Dakota State Fair entry at the Missouri State Fair.[102] The allegations were adamantly contested by B.K. and Mr. Kroupa.[103] The Kroupas were told that there would be no chance to appeal the decision.[104] Greg Kroupa, as guardian ad litem, sought injunctive relief under 42 U.S.C. § 1983.[105] The district court granted the injunctive relief on the grounds that B.K. was denied her constitutional right to procedural due process.[106]

B. Majority Opinion

The majority starts by acknowledging the complete lack of process that was afforded in the suspension process.[107] The Court then states that B.K.'s predominant injury is the harm to her reputation because she was publicly banned from the 4-H program for cheating.[108] While acknowledging the reputational harm alone would not be sufficient for due

96. *Id.*
97. SDSU EXTENSION, *2014 South Dakota State Fair 4-H Division Handbook*, at 24 (available at http://igrow.org/up/resources/01-4001-2014.pdf) ("The two highest scoring individuals in each species will be recognized with Champion and Reserve Champion awards, respectively.").
98. *Kroupa*, 731 F.3d at 816.
99. *Id.* ("[S]everal members of B.K.'s 4–H club accused her of cheating, claiming the pig she showed at the State Fair was not Moe . . . [t]he repeated messages and emails were so abusive and distressing that B.K. deleted her Facebook page and complained to her parents.").
100. Brief for the Appellant at 8–9, Kroupa v. Nielsen, 731 F.3d 813 (8th Cir. 2013) (No. 12-2843) ("Unfortunately, the Kroupa family has a history of being prohibited from participating in livestock competitions. In 2005 or 2006 Mr. Kroupa was personally banned or restricted from showing livestock in the Western Stock Show in Rapid City. Additionally, in Jerauld County, South Dakota, Mr. Kroupa's son tried to show a heifer in the market division but was prohibited from doing so because he had not satisfied the ownership requirement.").
101. *Kroupa*, 731 F.3d at 817.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 815.
106. *Id.*
107. *Id.* ("Giving no notice or opportunity to be heard, a secret committee of the South Dakota State University ("SDSU") Cooperative Extension Service barred B.K., a 15-year-old member of the South Dakota 4-H program, from further showing livestock at 4-H exhibitions.")
108. *Id.* at 818.

process protection, it could provide the "requisite stigma" in determining whether B.K. had a protected liberty interest.[109] The Court ultimately concluded that 4-H participation is a sufficient right or status under state law to be protected under the Fourteenth Amendment.[110]

The Court based its decision in large part on 4-H's "statutory purpose and federal funding," and the program's availability to all South Dakota children.[111] Also, the Court noted that the ban deprived B.K. of participating in an important part of her education and career development, while also allowing her to obtain significant personal income.[112] The Court later clarified its position regarding the effect of the prize money, however, stating the "state-created status" is more than the possibility of winning prize money.[113] It differentiates the 4-H program from other high school activities by saying 4-H is career-oriented and more analogous to high level college athletics.[114] In reaching this conclusion, the Court noted that the analogy between other high school activities and 4-H is not "apt and the governing principles far from clear."[115] The lone case supporting the proposition that college students have a liberty or property interest in college athletics was a 1972 district court case involving Division I basketball players.[116] The Court concluded that "[a]lthough the issue is not free from doubt, on this record the district court did not abuse its discretion in concluding that B.K. has a fair chance of proving that defendants published a defamatory ruling that deprived B.K. of a right or status conferred by state law."[117]

C. Dissent's Reasoning

Circuit Judge Bye's dissent relied on a large base of precedent that holds participation in interscholastic activities is not constitutionally protected.[118] One of the principal differences recognized by the majority, the ability to win prize money through 4-H competitions, was not persuasive because many high school athletes are competing for scholarships.[119] Further, the dissent found no difference between the 4-H

109. *Id.* at 819 n.3.
110. *Id.* at 819.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 820.
115. *Id.*
116. *Id.*
117. *Id.* at 819.
118. *Id.* at 822–23 (Bye, J., dissenting) (citing three different circuit courts holding that there is no protected liberty or property interest in participating in cheerleading and interscholastic athletics generally).
119. *Id.* at 823.

program and other career-oriented programs that have not been provided due process protection.[120] Judge Bye criticized the majority for relying on a single 1972 district court case, which involved the suspension of Division I basketball players at the University of Minnesota.[121] Not only is the analogy unclear between high level college athletics and 4-H participation, but the trend among the circuits has been that college students do not have a protected liberty or property interest in intercollegiate athletics.[122] Finally, the dissent distinguished a case which the majority relied on, *Goss v. Lopez*, because the case only established that students have a property interest in the entire education process, not every individual component.[123] The dissent concluded that B.K. would only be entitled to due process if she had been excluded from the entire educational process.[124]

IV. ANALYSIS

The Eighth Circuit Court of Appeals was correct in holding that participation in the local 4-H program, and its competitions, is a sufficient right or status established by state law. There are multiple differences between this case and the previous cases establishing that students do not have protected interests in their extracurricular activities. First, unlike nearly all of the students in previous cases where courts have held they have no protected interest, B.K. received absolutely no process before she was suspended from 4-H participation.[125] Second, the intercollegiate athletics cases have predominantly regarded entire teams being cut or put on probation, and not individuals being arbitrarily suspended.[126] Third, the 4-H program is run outside of the normal school setting, which lessens the public interest in allowing educators to make discretionary decisions in the name of efficiency. Finally, B.K.'s right to participate in 4-H competitions may be amplified because it was not only taken away, but was done so in a way that put her reputation in question. This Section will analyze why the Eighth Circuit Court of Appeals correctly found a protected right or status in 4-H participation, and how that result does not necessarily conflict with the large number of decisions holding that participation in high school athletics is not protected.

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120. *Id.* (citing three different circuit opinions holding that there is no protected interest in creating a jazz club, taking advanced placement courses, or participating in student council elections).
121. *Id.*
122. *Id.* (citing three circuit court opinions holding that there is no legally protected interest in intercollegiate athletics).
123. *Id.* at 824.
124. *Id.*
125. *Id.* at 815.
126. *See* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 109 (4th Cir. 2010); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002).

A. Analyzing Liberty and Property Interests Under a Totality of the Circumstances

The Eighth Circuit Court of Appeals became the first federal court of appeals to extend protection under the Due Process Clause to a high school level extracurricular activity. In doing so, it potentially opened up a number of additional interests that may be protected by the Due Process Clause. The question then becomes, is requiring some minimal level of due process to high school students such a bad thing? Generally, a court would only need to require notice of the charges and a chance for the student to present their side of the story. Setting a standard that some process is due before suspending an individual from participation in a particular activity could ultimately limit lawsuits. State officials will understand that they must offer an opportunity to be heard, and that process alone should help prevent individuals from being arbitrarily dismissed from activities. Individuals will understand that once they receive a hearing, along with a meaningful chance to dispute the allegations, the due process requirement is satisfied.

Outside of the conversation between Nielsen and Mr. Kroupa, B.K. was offered no chance to defend herself against the allegations.[127] This complete lack of process is likely the reason why the Eighth Circuit felt it necessary to hold that 4-H participation is a sufficient right or status under state law. In that sense, the Eighth Circuit's opinion might not be as far of a departure from prior precedent as it seems on its face.

For example, after summarily dismissing the student's liberty interest claim in regards to student council elections, the Sixth Circuit Court of Appeals in *Poling* said "[w]e see nothing improper, moreover, in the process through which Dean's disqualification was effected."[128] Although the student was disqualified from participation before a hearing, he and his father were promptly given a two-hour meeting with the principal and a teacher three days before the election.[129] Two more meetings were held prior to the elections, and the superintendent encouraged the Polings to appeal their decision to the school board if they were still unsatisfied.[130] The Sixth Circuit concluded their analysis by stating that "the Due Process Clause would have required nothing more than this even if a deprivation of some constitutionally protected liberty or property interest had been established."[131] While the court was quick to dismiss the interest under

127. *Kroupa*, 731 F.3d at 816–17.
128. Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989).
129 *Id.*
130. *Id.*
131. *Id.*

these circumstances, it is not clear that the same result would have been reached if no process had occurred.

Similarly, while the court in *Farmer* established that there was no protected interest in assisting one's child in a livestock competition, they went on to state "it is not as though no process occurred."[132] The three family members were given a hearing in front of the Ohio Department of Agriculture, where at least one of the individuals was represented by counsel.[133] The court concluded that under "these circumstances" it seems unlikely that the father's interest in assisting his son during the upcoming fair rises to the level of a liberty interest protected by the Due Process Clause.[134]

In this respect, the Eighth Circuit's opinion mirrors the approach taken by these two courts. While it did not expressly state that the two factors, interest at stake and process given, are reliant on each other, the Court started its opinion with exactly what it sees as the level of process that B.K. was afforded.[135] If the two factors were completely independent, then it would not have been necessary for the Court to discuss what process had been afforded B.K. The result the Eighth Circuit reached makes sense when you view how the two factors played out in this case. B.K. was offered no reasonable chance to defend herself, unlike the plaintiffs in *Poling* and *Farmer*.[136] Therefore, one key factor in the analysis is whether the individual claiming a liberty or property interest was given any process at all.

Of course, the starting point in the analysis is what South Dakota state law provided. As the Eighth Circuit noted, 4-H is a program run through the South Dakota State University's Board of Regents, and is "open to all South Dakota children interested in a career in agriculture, subject to reasonable, non-discriminatory terms."[137] Also, unlike other high school activities, 4-H is open to all children between the ages of eight and eighteen.[138] This case is also easily distinguishable from *Gonzales* because it does not involve police action. There is no indication 4-H officials traditionally have discretion to decide who is allowed to participate in 4-H. Instead, 4-H seems to be a program available to all South Dakota youths, which is much closer to the welfare benefits in *Goldberg* that were guaranteed by the state.

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132. Farmer v. Pike Cty. Agric. Soc'y, 411 F. Supp. 2d 838, 843 (S.D. Ohio 2005).
133. *Id.*
134. *Id.*
135. Kroupa v. Nielsen, 731 F.3d 813, 815 (8th Cir. 2013).
136. *Id.* at 820 ("[W]ithout question she was not afforded even minimal procedural due process protection. Indeed, she was afforded *no process at all.*") (emphasis in original).
137. *Id.* at 819.
138. B.K. *ex rel.* Kroupa v. Nielsen, No. CIV. 12-4046-KES, 2013 WL 6669403, at *8 n.2 (D.S.D. Dec. 18, 2013).

Another way *Kroupa v. Nielsen* can be distinguished from many of the cases holding that students have no protected interest in interscholastic sports is the scope. For example, all three of the collegiate cases cited by the dissent involved entire teams, and not individuals being punished.[139] In *Colorado Seminary v. NCAA*, the Tenth Circuit held that students had no protected interest in intercollegiate athletics when the NCAA placed the school's hockey team on a two-year probation with no opportunity to play in the postseason.[140] Similarly, in *Equity in Athletics, Inc. v. Department of Education*, the Fourth Circuit held that students had no protected interest in intercollegiate athletics when James Madison cut ten sports teams in order to pursue gender proportionality in its athletic programs.[141] Finally, in *Miami University Wrestling Club v. Miami University*, the Sixth Circuit held that there was no protected interest in intercollegiate athletics in the context of the University disbanding the wrestling, tennis, and soccer clubs.[142] While each of the cases stood for the proposition that students do not have a protected right in intercollegiate athletics, it is unclear if the result would be the same if a single player was suspended by the university without a hearing.

Finally, none of the concerns indicated in *Mazevski* are implicated here. B.K. is not complaining because she was not selected to a team or a particular class. Instead, she is simply seeking to participate in an activity that is very important to her. One of the key differences between someone being denied a chance to compete based on a lack of skill and a denial to participate because of cheating is the lasting effect. For example, many college applications require students to disclose if they have ever been found to have committed a disciplinary violation.[143] To require a student to admit to cheating when they never even had the chance to dispute the allegations could have a devastating effect on their entrance into higher education.

The better view is to look at a couple of major factors in these cases. First, a court should look to see who is claiming that their right has been violated. If it is an entire team or club, there is unlikely to be a liberty or property interest. Schools must be able to maintain their budgets and have flexibility to comply with gender protection statutes. If, on the other hand,

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139. *See* Colo. Seminary v. NCAA, 570 F.2d 320, 321 (10th Cir. 1978); Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 97 (4th Cir. 2011); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002).

140. Colo. Seminary v. NCAA, 570 F.2d 320, 321 (10th Cir. 1978).

141. Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 97 (4th Cir. 2011).

142. Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002).

143. Cristiana Quinn, *College Admissions: The High School Cheating Epidemic*, GO LOCAL PROV (Mar. 26, 2012), http://www.golocalprov.com/lifestyle/college-admissions-the-high-school-cheating-epidemic/. ("You must sign a statement on the Common Application that asks if you ever been found responsible for a disciplinary violation at any educational institution.").

the alleged deprivation is being claimed by a single individual, then the court should proceed in its analysis. Some due process should be provided when individuals are punished because there is the chance the decision was made arbitrarily. For example, in this case, it appears from Nielsen's brief that the 4-H representatives did not think very highly of the Kroupa family.[144] Both parties have completely different stories and it would be very unfortunate if B.K. was suspended because of her father's bad reputation. In cases where a hearing has already been provided, along with a chance to dispute the allegations, then courts do not need to go any further. A minimal level of due process is sufficient in regards to a student's interest in any particular extracurricular activity. There is no sufficient policy reason to deny individuals at least the minimum due process before depriving them of their chance to participate in activities that have such a substantial impact on their future.

B. State Actor Analysis

The Eighth Circuit spent no time analyzing the first requirement, which is the "conduct complained of was committed by a person acting under color of state law."[145] This is an important point to analyze because many organizations look like state actors on their face, but are really not in reality. For example, the Sixth Circuit held that the Ohio High School Athletic Association was not a state actor even though the organization promulgated and enforced bylaws for all member schools in Ohio.[146] For the alleged deprivation of a protected interest in this case to even garner the protection of the Due Process Clause, Nielsen must have been acting pursuant to state law.

The Cooperative Extension System, which is the type of 4-H program at issue here, "is a partnership of the National Institute of Food and Agriculture (NIFA) within the U.S. Department of Agriculture (USDA), the 110 land-grant universities and more than 3,000 county offices across the nation."[147] 7 U.S.C. § 342 establishes the cooperative agricultural extension network, which "shall consist of the development of practical

144. Brief for the Appellant at 8–9, Kroupa v. Nielsen, 731 F.3d 813 (8th Cir. 2013) (No. 12-2843) ("Unfortunately, the Kroupa family has a history of being prohibited from participating in livestock competitions. In 2005 or 2006 Mr. Kroupa was personally banned or restricted from showing livestock in the Western Stock Show in Rapid City. Additionally, in Jerauld County, South Dakota, Mr. Kroupa's son tried to show a heifer in the market division but was prohibited from doing so because he had not satisfied the ownership requirement.")

145. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

146. Burrows by Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122, 125 (6th Cir. 1989) (comparing OHSAA to the NCAA and rejecting the public function exception by stating "it is clear that OHSAA, like the NCAA, does not perform a 'function traditionally exclusively reserved to the state.'").

147. NATIONAL 4-H COUNCIL, http://www.4-h.org/about/4-h-history/ (last visited Oct. 25, 2014).

applications of research knowledge and giving of instruction and practical demonstrations of existing or improved practices or technologies in agriculture."[148] "Youth development and agricultural education, including 4-H clubs" are included in the food and agricultural sciences, which receive federal funding.[149]

The South Dakota statute recognizing receipt of funding provides "the Board of Regents is authorized and directed to maintain at South Dakota State University an extension department."[150] South Dakota's Attorney General has stated "[t]he South Dakota Cooperative Extension Service operates under the direction of the South Dakota State University."[151] The district court in this case concluded that "4–H is a state program facilitated by SDSU and overseen by the Board of Regents."[152]

The district court went through some analysis in concluding that Nielsen is a state employee, noting that his mailing, email, and website addresses all list South Dakota State University.[153] While Nielsen's tax information was not submitted, Geppert, the Brule County Extension Representative, submitted his W-2 forms which stated South Dakota State University was his employer.[154] Nielsen actually argued that he was a state employee in order to gain sovereign immunity regarding the claim for monetary damages.[155] Thus, the 4-H program in this case can be distinguished from the NCAA and Olympic Committee because it is directly run by the state, instead of through a private entity.

V. CONCLUSION

The Eighth Circuit Court of Appeals was correct in holding that participation in the local 4-H program, and its competitions, is a sufficient right or status established by state law. There are multiple differences between this case and prior cases establishing that students do not have protected interests in their extracurricular activities. First, unlike nearly all of the students in previous cases where courts have held they have no protected interest, B.K. received absolutely no process before she was suspended from 4-H participation.[156] Second, the intercollegiate athletics

148. 7 U.S.C. § 342 (2012).
149. 7 U.S.C. § 3103 (2012).
150. S.D. CODIFIED LAWS § 13-54-1 (2011).
151. *Re: Federal Law Implications of Budget Cuts to the South Dakota Cooperative Extension Service*, S.D. Atty's Gen. Op. No. 11-03 (June 17, 2011), 2011 WL 2685583.
152. B.K. *ex rel.* Kroupa v. 4-H, 877 F. Supp. 2d 804, 814 (D.S.D. 2012).
153. *Id.*
154. *Id.*
155. *Id.* ("Because Nielson and Geppert are employed by SDSU and SDSU is entitled to sovereign immunity, Nielson and Geppert are also entitled to sovereign immunity regarding B.K.'s claim for monetary damages against them in their official capacities.").
156. Kroupa v. Nielsen, 731 F.3d 813, 815 (8th Cir. 2013).

cases have predominantly been in regards to entire teams being cut or put on probation, and not individuals being arbitrarily suspended.[157] Third, the 4-H program is run outside of the normal school setting, which lessens the public interest in allowing educators to make discretionary decisions in the name of efficiency. Finally, B.K. was accused of cheating which could have a lasting effect on her reputation and career choice.[158]

Providing some minimal level of due process to high school age students will not overburden government actors. Instead, establishing procedures to follow when suspending individuals from activities, such as 4-H, will ultimately lead to less litigation over what rights are protected and what level of process is required. Students deserve some chance to dispute the allegations prior to having such important interests taken away from them. This is especially so, as in B.K.'s situation, when a government employee levels accusations of cheating that will affect the student for a significant period of time.

157. *See* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 109 (4th Cir. 2010); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002).

158. *Kroupa*, 731 F.3d at 817.