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Constitutional Law—THE RIGHTS OF AN UNTENURED TEACHER TO PROCEDURAL DUE PROCESS PRIOR TO DISMISSAL—*Roth v. Board of Regents*, 408 U.S. 564 (1972).

In the last decade, the federal courts, led by the Supreme Court, have emphasized the equal protection clause of the fourteenth amendment as a basis for an employee's right to procedural due process prior to dismissal from public employment.¹ The Supreme Court has declared that any governmental action to deprive a person of an interest, even a privilege-type interest, is arbitrary and capricious if not applied with universal evenhandedness.² This holding would seem to entitle almost any teacher summarily dismissed to procedural due process.³

However, in the recent case of *Board of Regents v. Roth*,⁴ the Supreme Court reversed a decision of the Seventh Circuit that ordered David Roth, an untenured teacher in the Wisconsin school system, be accorded minimal

¹ See generally Davis, *The Requirement of a Trial Type Hearing*, 70 HARV. L. REV. 193, 233-43 (1956), for a comprehensive discussion of the various procedures used in dismissal actions. See also Coan, *Dismissal of California Probationary Teachers*, 15 HASTINGS L. J. 284 (1964) (state statutory procedure for dismissal analyzed); Comment, *Dismissals of Public-School Employees in Texas—Suggestions for a More Effective Administrative Process*, 44 TEXAS L. REV. 1309 (1966).

² See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). This decision, manifesting an early trend in favor of the equal protection approach, noted that the generalization that no right to public employment exists, does not logically imply "[t]hat constitutional protection does [not] extend to a public servant whose exclusion . . . is patently arbitrary or discriminatory." The culmination of this trend is exemplified by *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) in which the Court held that welfare benefits could not be arbitrarily removed without procedural due process, and in *Slochower v. Board of Educ.*, 350 U.S. 551, 555 (1956) in which the Court noted that "[t]o state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, non-discriminatory terms laid down by the proper authorities" (teacher in *Slochower* was *tenured*). For a case applying the reasoning to an *untenured* teacher (of only two months employment) consult *Connell v. Higginbotham*, 403 U.S. 207 (1972) (per curiam).

It has been noted that most decisions following this broad equal protection reasoning also include other reasoning that allows their analysis under other circumventions of the Privilege Doctrine. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1455 n. 47 (1968).

³ For an effective and exhaustive analysis of the development of the law in this area, see generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12, at 455 (1958); Frakt, *Non Tenure Teachers and the Constitution*, 18 KAN. L. REV. 27 (1969); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L. J. 841, 858 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?*, 37 GEO. WASH. L. REV. 409 (1968).

⁴ 40 U.S.L.W. 5079 (June 29, 1972) (5-3 decision) (Douglas, Marshall, Brennan, J. J. dissenting) (Powell, J. did not participate) *rev'g* 446 F. 2d 806 (7th Cir. 1971).

procedural due process in connection with his dismissal from that system. Roth was dismissed without notice of the reasons or a hearing on the merits of the board's decision. Writing for the majority, Justice Stewart relied on the so-called Privilege Doctrine, which, under a literal reading of the fourteenth amendment, asserts that public employment is a privilege rather than a protectable right.⁵

In attempting to circumvent the Privilege Doctrine, the courts have sought to find a protectable interest such as a substantive constitutional right. Where a factual analysis indicates the violation of a substantive constitutional right, some courts have required procedural protection.⁶ Still other courts have required protection prior to dismissal in cases where an employee has been forced to waive a constitutional right as a condition of public employment.⁷ Numerous courts have sought to erode the doctrine by finding a protectable quasi-constitutional interest of liberty or property. Likewise, an expectancy of continuing employment,⁸ the expenses, time and effort consumed in

⁵ Applying the doctrine to public employment in 1892, Justice Holmes noted that "[There is] no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). For a recent application of the doctrine, see *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1951), *aff'd*, 341 U.S. 918 (1951).

⁶ This is accomplished by reviewing the sufficiency of the evidence to determine whether a legitimate basis for the official action exists. Where no basis exists, and a substantive constitutional right violation is probable, these courts have required procedural due process protection. Justice Douglas, concurring in *Thorpe v. Housing Authority*, 386 U.S. 670, 678-79 (1967) noted that, "[t]he recipient of a government benefit . . . cannot be made to forfeit the benefit because he exercises a constitutional right." See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966); *Gouge v. Joint School Dist.*, 310 F. Supp. 984, 991 (W.D. Wisc. 1970); *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969); *Williams v. Sumter School Dist.*, 255 F. Supp. 397, 403 (D.S.C. 1966).

Some courts have held that a mere allegation of substantive constitutional violation is sufficient to entitle a terminated employee to procedural due process. *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970).

⁷ *Dixon v. Board of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). This case clearly demonstrates the requirement of relinquishment of procedural due process rights as a condition *precedent* to a public benefit. Prior to entering a state university, a student was forced to sign a statement specifying that his attendance at the university was a privilege rather than a right protectable by procedural due process. See generally O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

⁸ Some courts require only a unilateral expectancy of continuing employment, i.e., the employee's subjective, perhaps even unwarranted anticipation of continuing employment. *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971); *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970); *Bomar v. Keyes*, 162 F.2d 136 (2nd Cir. 1947). *Contra*, *Freeman*

career preparation or relocation, and other expenses incidental to dismissal,⁹ have been deemed sufficient interests in property to warrant protection. In considering rights to liberty, the courts have focused on the right to contract for future employment. Where dismissal pins a "badge of infamy" on an employee, diminishing his professional reputation,¹⁰ or where an employer admonishes potential employers not to hire his former employee,¹¹ these courts have found the resulting reduction sufficient to require procedural due process protection before dismissal.¹²

The opinion of the majority in *Roth* encompasses the entire development of the law in this area. Initially denouncing the Privilege Doctrine in formalized, rigid form, the Court refuses to abandon it entirely in favor of a non-literal reading of the fourteenth amendment. Although the Court declares that a protectable interest of liberty or property must be found,¹³ one cannot easily determine the exact nature of this interest by a reading of the Court's opinion.

Recognizing that welfare benefits have been held a protectable property right in *Goldberg v. Kelley*,¹⁴ and agreeing with that holding, the Court fails to note the factual parallel between those benefits and the salary of an untenured teacher. Both originate as government privileges and provide

v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir. 1969); *Jones v. Hopper*, 410 F.2d 1323, 1328-29 (10th Cir. 1969). Other courts have sought evidence indicating that the terminated employee's characterization of the existing relationship and reliance thereon was reasonable. (The absence of a tenure system or acts by the employer inducing reliance exemplify this.) This *de facto* tenure has been held a protectable interest. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969).

⁹ See, e.g., *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1184 (1st Cir. 1970).

¹⁰ See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959) (security clearance revoked); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1956) (license to practice law withheld); *Joint Anti-fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). *But cf. Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (employee denied procedural due process after alternative government employment had been secured).

¹¹ *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966). In this case a doctor charged with racial bias was prohibited from practicing in one particular hospital. Officials of that hospital warned other area hospitals not to allow the doctor to practice at their hospitals. The resulting impairment of reputation and future employability was found to be a protectable interest in *liberty*.

¹² The courts, seeking to circumvent the Privilege Doctrine by finding these protectable interests, often balance the private interest of the dismissed employee against the public interest. See Reich, *The New Property*, 73 YALE L. REV. 733, 774 (1964), which is critical of this balancing. *Contra*, *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961). "[The decision of the court must depend upon] . . . an appropriate weighing of the interests involved."

¹³ *Board of Regents v. Roth*, 40 U.S.L.W. 5079, 5080 (U.S. June 29, 1972).

¹⁴ 397 U.S. 254 (1970).

life's basic necessities, yet the Court declares a teacher's source of subsistence a non-protectable interest.¹⁵

Additionally, unilateral expectancy of continued employment, an interest deemed protectable by other courts,¹⁶ is also rejected. The Court implies that such an expectancy, if not bilateral, is an unreasonable characterization of the relationship existing between employer and employee. Roth, an employee with only one year of employment in the system, was said to have unreasonably relied on renewal of his contract. Unfortunately, the Court fails to present a conclusive test to determine at what point, before obtaining tenure, a teacher has an interest that is procedurally protectable.¹⁷

Furthermore, in the principal case, the Court refuses to recognize termination of an untenured employee without reasons as a hindrance to future employability, and thus a violation of a right to liberty. The Court states definitively that a damaging charge must be made by the school administration, or that the administration must actively seek to inhibit a former employee's future career efforts before a right has been violated.¹⁸ The Court denies that any stigma on Roth results from his summary dismissal.¹⁹

¹⁵ 40 U.S.L.W. at 5081 n. 10. The Court takes note of due process protection afforded in *Goldberg*, but states that "certain boundaries" have been observed regarding protectable interests of *liberty* and *property*. The analogy between welfare subsistence payment and a teacher's salary is denied simply, by the Court's silent implication that an untenured teacher's salary rights fall outside these boundaries.

¹⁶ See note 8 *supra*.

¹⁷ The companion case to *Roth*, *Perry v. Sindermann*, 40 U.S.L.W. 5087 (U.S. June 29, 1972) (8-0 decision) (Powell, J. did not participate) offers little help. The Court held that Sindermann's twelve year service *might* have constituted a protectable interest. The Court accepted Sindermann's assertion that, in the absence of any tenure system, he had reasonably relied on the policy promulgated by the administration in the ODESSA COLLEGE FACULTY GUIDE:

Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and superiors, and as long as he is happy in his work. *Id.* at 5089.

Additionally, the Court noted Sindermann's reliance on guidelines established by the Coordinating Board of the Texas College and University System, which provided that after seven years, a teacher has some form of job tenure. Thus, it is impossible to conclude from this holding that a mere increase in length of service without any of the elements of de facto tenure will be held a protectable property interest. See note 8 *supra*.

¹⁸ 40 U.S.L.W. at 5081.

¹⁹ The majority opinion ignores the highly sensitive and specialized nature of the teaching profession, and the effect that a dismissal without reasons can have on any such vocational career. *Accord*, *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955) (seaman refused security clearance). The teaching profession is a highly competitive job field. In such a sensitive profession, potential employers will almost certainly be anxious to exclude any questionable applicant. Moreover, in such a competitive market situation,

Moreover, the Court refuses to acknowledge even collaterally the violation of a substantive constitutional right alleged by Roth. Agreeing with Roth that such a violation entitles any former employee to procedural due process, the Court nevertheless concludes that the matter should be adjudicated by a trial court.²⁰ Such an adjudication would have the effect of rendering the issue of procedural due process moot. Thus, if the teacher prevails, he has no need for procedural due process on the administrative level, and if he loses, he has no basis on which it may awarded.

Therefore, the *Roth* decision apparently rejects the recent trend of the Court and retreats instead to circumvention of the Privilege Doctrine, thereby requiring a protectable interest before due process is mandatory. Although one may conclude that a more stringent criteria is established relative to the existence of such protectable interest, the Court is not definitive, and leaves to the lower courts and attorneys to speculate at what point such an interest exists.²¹ Justice Burger, in a concurring opinion in *Perry v. Sinderman*,²² states that the relationship between a teacher and his school board is essentially a matter of state concern to be determined in state legislatures. From this one may infer the desire of the Court to avoid usurpation of the state legislative function, and even a preference of allowing the states to conduct their own affairs. Therefore, it is apparent that while no definitive test for a right protectable under the fourteenth amendment emerges in this decision, the Court's majority rejects the broad equal protection argument, and future terminated untenured teachers may well petition a Court unsympathetic to their cry for procedural due process where none has been afforded by the state.

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these employers can afford to exclude a teacher previously dismissed without reasons. Even assuming that a terminated teacher encounters a sympathetic interviewing employer, such an employer will be hindered in hiring effectively without full knowledge of the circumstances of the applicant's dismissal. *See also*, *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1182-87 (1st Cir. 1970).

²⁰ 40 U.S.L.W. at 5082.

²¹ 1 Davis, *ADMINISTRATIVE LAW TREATISE* § 7.20, at 508 (1958). An inquiry is made into the desirability of a conclusive, definitive test for a protectable interest.

²² 40 U.S.L.W. 5086; 5090 (U.S. June 29, 1972). (8-0 decision) (Powell, J. did not participate).