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Regretting *Roth*? Why and How the Supreme Court Could Deprive Tenured Public Teachers of Due Process Rights in Employment

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Regretting *Roth*? Why and How the Supreme Court Could Deprive Tenured Public Teachers of Due Process Rights in Employment

*Karl D. Camillucci**

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INTRODUCTION

Two recent trends on a likely collision course could dramatically alter the employment relationship between public school districts and public school teachers. Depending on one's point of view, that change would strip public school teachers of due process protection or grant school districts important flexibility to better manage America's failing schools.

First, over the last few years, many state legislatures have adopted statutory schemes tying public teachers' employment to performance evaluation ratings based largely on measures of student academic achievement, such as test scores.¹ Second, over the last two decades, the United States Supreme Court has signaled dissatisfaction with its current approach to identifying property interests entitled to protection by the Due Process Clause of the Fourteenth Amendment,² and has also placed new limits on the extent of public employees' constitutional rights.³ Disputes between teachers and school districts over employment decisions governed by performance-based employment regimes could give the Court an opportunity, should it wish to take it, to reverse four decades of precedent recognizing a protected property interest in tenured public school teachers' employment.⁴

This Article explores how that provocative result could come about. Part I reviews the Court's prevailing analysis of public employees' property interest in employment rooted in *Board of Regents of State*

1. See *infra* Part III.A–F (describing public teacher statutory evaluation schemes in Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma).

2. See *Sandin v. Conner*, 515 U.S. 472, 477–84 (1995); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–67 (2005).

3. See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008) (equal protection); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (speech). See also Ryan Keith Meyer, *The United States Supreme Court Eliminates the "Class-of-One" Equal Protection Claim in Public Employment*, 48 WASHBURN L.J. 529, 529–30 (2009).

4. This Article focuses on public teachers' due process rights in employment, but the trends and analysis described herein could affect the due process rights of many other public employees.

Colleges v. Roth and *Perry v. Sindermann*.⁵ Under the “*Roth/Perry* approach,” the Court determines whether an independent source of authority constrains official discretion to remove a public employee, such that the employee has a legitimate claim of entitlement to employment that is protected by due process.

Part II analyzes four relatively recent Supreme Court cases. Two of these cases show the Court’s discomfort with the *Roth/Perry* approach, suggest an alternative framework for determining the presence of a protected interest—the “atypical and significant hardship framework”—and offer possible factors that could be used to implement that framework—the “incidental benefit” and “intended benefit” factors.⁶ The other two cases express the Court’s increasingly narrow view of public employees’ constitutional rights.⁷ All four cases emphasize two themes that could be instrumental to formulating a new analysis of public employment as property for due process purposes: (1) deference to government officials; and (2) a focus on the intended scope of claimed constitutional protection.

Part III surveys new performance-based statutory schemes governing public teachers’ employment in Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma. Part IV then shows how the *Roth/Perry* approach would apply to these statutory schemes, and why the Court could abandon that analysis in favor of the atypical and significant hardship framework. Finally, Part V tests how the atypical and significant hardship framework could be applied in the public teacher employment context. Part V also shows how the intended benefit factor, rather than the incidental benefit factor, could be used to implement the atypical and significant hardship test. This Article contends that tenured teachers in the six states analyzed herein would not have a protected interest in employment if the Court applied the intended benefit factor to these statutory schemes. Accordingly, abandoning the *Roth/Perry* approach in favor of the atypical and significant hardship framework could shatter forty years of settled law recognizing tenured teachers’ due process rights.

5. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

6. See *infra* Part II.A.1–2 (discussing *Sandin v. Conner* and *Town of Castle Rock v. Gonzales*). As will be discussed, the incidental benefit factor would not afford due process protection to any interest that arises merely as an incident to the provision of a traditional government service, while the intended benefit factor would only recognize such protection if state officials intended to confer a right or benefit on a regulated person.

7. See *infra* Part II.B.1–2 (discussing *Garcetti v. Ceballos* and *Engquist v. Oregon Department of Agriculture*).

I. PREVAILING LAW: THE *ROTH/PERRY* APPROACHA. *Before Roth and Perry*

The Fifth and Fourteenth Amendments of the United States Constitution provide that the government may not deprive a person of “life, liberty, or property, without due process of law.”⁸ Accordingly, a threshold question when a party asserts a due process violation is whether the deprived interest is “liberty” or “property.”⁹ The government may not deprive a person of an interest protected by due process without first giving the person an opportunity for a hearing.¹⁰ The amount of required pre-deprivation process depends on balancing the individual’s and government’s interests and increases to the extent that the balance tips in favor of the individual.¹¹ Whether an interest is “property” is relevant when a government entity gives something to a person, such as public assistance or a job, and subsequently takes it away.¹²

The Court’s approach to determining whether a property interest is protected by due process has changed over time. Before *Roth* and *Perry*, the Court protected interests that it deemed were “rights” rather than “privileges.”¹³ For instance, in *Goldberg v. Kelly*, the Court held that a public assistance recipient had a protected interest in continued benefits.¹⁴ The Court asserted that deprivation of public assistance “involves state action that adjudicates important *rights*.”¹⁵ In the Court’s view, the parties could not frame public assistance as a

8. U.S. CONST. amend. V; *id.* amend. XIV, § 1. The Fifth Amendment describes the legal obligation of the federal government to afford its citizens due process, while the Fourteenth Amendment, ratified in 1868, uses the same language as the Fifth Amendment to ensure that states provide due process to their residents.

9. *See, e.g., Roth*, 408 U.S. at 570–71.

10. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

11. *See id.* at 333–35. Specifically, a court must consider three factors to determine the extent of pre-deprivation process due to an individual: (1) the private interest affected by the government’s action; (2) the risk of erroneous deprivation of that interest and the likely added protection of additional procedure; and (3) the government’s interest, including the government function at issue and the burden imposed on the government by providing additional process. *Id.* at 335.

12. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (public employment).

13. *See Goldberg*, 397 U.S. at 261–62. *See also* Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHNS. L. REV. 797, 799–801 (2007) (discussing due process rights of public employees).

14. *Goldberg*, 397 U.S. at 261–62.

15. *Id.* (emphasis added).

“privilege.”¹⁶ Therefore, the government could not terminate public assistance without due process.¹⁷ Six years later, however, the Court in *Roth* and *Perry* expressly rejected continued use of the right versus privilege test and set forth a new analysis to determine whether a government-provided interest is “property” protected by due process.¹⁸

B. Setting the Standard: Board of Regents of State Colleges v. Roth

Roth replaced the standardless right versus privilege test with a new approach that recognized a protected property interest when state or local laws, rules, or policies gave a regulated person a legitimate claim of entitlement to a government-provided interest.¹⁹ In *Roth*, the Court held that a public university professor did not have a protected property interest in employment.²⁰ The professor had a one-year appointment at a state university.²¹ The university did not rehire the professor after the appointment expired and did not provide him with an opportunity to challenge the decision.²² The professor sued, claiming that the university violated his due process rights.²³ The Court explained that “property” is broader than ownership of real estate, chattels or money in the due process context.²⁴ While broad, protected “property” did not include merely an “abstract need or desire” for, or a “unilateral expectation” of, a given interest.²⁵ Rather, a person must have a “legitimate claim of entitlement” to an interest, reliance upon which “must not be arbitrarily undermined,” to receive due process protection.²⁶

The Court also explained that protected interests arose from “existing rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits.”²⁷ But, the Constitution did not supply those rules or understandings.²⁸ Instead, an “independent source such as state law” determined whether a person had a legitimate claim of entitlement to an interest.²⁹

16. *Id.* at 262.

17. *Id.*

18. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

19. *Id.* at 577.

20. *Id.* at 578.

21. *Id.* at 566.

22. *Id.*

23. *Id.* at 568–69.

24. *See id.* at 571–72.

25. *Id.* at 577.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* To support its new mode of analysis, the Court reframed *Goldberg*, stating that the

The Court applied this framework to the independent sources of authority available in *Roth*: state statutes, the professor's appointment letter, and administrative rules.³⁰ Although Wisconsin statutes provided that professors who worked four continuous years acquired tenure, which entitles professors to continued employment absent just cause, the statutes did not address rehiring of nontenured professors with annual appointments.³¹ The professor's appointment letter stated that employment was for one year and did not promise renewal.³² Accordingly, the Court concluded that Wisconsin state universities had "unfettered discretion" to rehire nontenured professors on one-year contracts.³³ Those professors were "entitled to nothing" other than a one-year appointment.³⁴ Therefore, the nontenured professor in *Roth* did not have a property interest in employment protected by procedural due process.³⁵

C. *Elaborating the Standard: Perry v. Sindermann*

Perry, decided the same day as *Roth* using the same analysis, held that tenured public professors, who cannot be dismissed except for cause, have a property interest in employment protected by due process.³⁶ Additionally, professors without formal tenure nevertheless could have de facto tenure if state officials fostered an understanding of job security through informal sources of authority.³⁷

In *Perry*, a Texas state college did not rehire a professor on a one-year employment contract and did not give the professor an opportunity for a hearing.³⁸ Unlike *Roth*, the professor had worked at the same state college under four consecutive one-year contracts.³⁹ Immediately

plaintiff had had a protected interest in public assistance benefits because she had a claim of entitlement rooted in the state statute setting forth eligibility criteria. *Roth*, 408 U.S. at 577. However, the Court's reasoning in *Roth* was a departure from *Goldberg's* right versus privilege analysis. See *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970).

30. See *Roth*, 408 U.S. at 566–67, 578.

31. *Id.* at 566–67.

32. *Id.* at 578.

33. *Id.* at 567.

34. *Id.* at 566.

35. *Id.* at 578. *Roth* implied that tenured state university professors had a property interest in employment because under state law they were "entitled to continued employment 'during efficiency and good behavior.'" *Id.* at 566. The Court's emphasis on the absence of statutory, contractual, or administrative requirements to rehire the nontenured professor suggested that the presence of just-cause provisions would create a legitimate claim of entitlement to employment protected by procedural due process. See *id.* at 566–68.

36. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

37. *Id.* at 600–02.

38. *Id.* at 595.

39. *Id.* at 594.

before, he had worked at two other Texas state colleges for six consecutive years.⁴⁰ Yet, the professor did not have tenure because the college lacked a tenure system.⁴¹

The professor's nontenured status was "highly relevant" to, but not dispositive of, his due process claim.⁴² Referring to *Roth*, the Court stated: "[T]he Constitution does not require the opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show . . . that he had a 'property' interest in continued employment, *despite* the lack of tenure."⁴³ The professor's allegations in *Perry* that the college's faculty guide and the university system's policy guidelines created a de facto tenure program were sufficient to create a "genuine issue as to his interest in continued employment."⁴⁴ The Court reversed summary judgment against the professor because "the existence of rules and understandings, promulgated and fostered by state officials, . . . may justify [the professor's] legitimate claim of entitlement to continued employment absent 'sufficient cause.'"⁴⁵

The Court drew an analogy between the use of informal sources to find implied contracts between an employer and employee and to find implied tenure.⁴⁶ Workplaces could have "an unwritten 'common law'" that employees will receive job security equivalent to formal tenure.⁴⁷ The Court's due process analysis hinged primarily on "mutually explicit understandings that support [an employee's] claim of entitlement to the benefit."⁴⁸

D. "Discretion Formulation" of the Roth/Perry Approach

Many courts have employed a heuristic to apply the *Roth/Perry* test: whether a source of authority gives government officials discretion to deprive a person of an interest.⁴⁹ This "discretion formulation" likely

40. *Id.*

41. *Id.* at 596, 599.

42. *Id.* at 599.

43. *Id.* (emphasis added).

44. *Id.* at 599–600.

45. *Id.* at 602–03.

46. *Id.* at 602.

47. *Id.*

48. *Id.* at 601.

49. *See, e.g.,* *Bishop v. Wood*, 426 U.S. 341, 345 (1976) (finding that because a state court construed state law to provide no guarantee of employment to a police officer, the police department had discretion to terminate the police officer, who had no property interest in his job); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (stating that "to have a property interest in a benefit" a person must "have a legitimate claim of entitlement to it" and that "our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"). *Gonzales* suggests that the Court is ready to depart from the

arises from language in *Roth*—the professor did not have a legitimate claim of entitlement to employment because state officials had “unfettered discretion” not to hire him.⁵⁰ If a government employer has discretion to remove an employee, then the employee cannot plausibly claim entitlement to employment. Until recently, the Court used a similar analysis to determine the presence of a protected liberty interest when prisoners claimed due process violations.⁵¹

II. REGRET AND RETRENCHMENT

Although good law for over forty years, the Court showed discomfort with the *Roth/Perry* approach in *Sandin v. Conner*⁵² and *Town of Castle Rock v. Gonzales*.⁵³ *Conner* effectively overruled use of the discretion formulation in the prisoner/liberty context, paving the way for a similar move in the public employment/property context. *Gonzales* assumed an analytic posture at loggerheads with the *Roth/Perry* approach, failed faithfully to apply it, and imposed novel requirements for finding a protected property interest. Both cases showed great deference to government employers and analyzed whether the asserted interest fell within the intended scope of due process protection. *Conner* and *Gonzales* also furnish rationales for abandoning the *Roth/Perry* analysis in favor of the atypical and significant hardship test, and offer two possible factors to implement the atypical and significant hardship framework—the incidental and intended benefits factors.

The Court also recently limited public employees’ speech and equal protection rights in *Garcetti v. Ceballos*⁵⁴ and *Engquist v. Oregon*.⁵⁵ *Ceballos* and *Engquist* demonstrate the Court’s growing tendency to narrow public employees’ constitutional rights based on deference to government employers and a limited view of the intended scope of constitutional rights. Accordingly, *Ceballos* and *Engquist* further support the likelihood that the Court will change its analysis of property for due process purposes, even (or perhaps especially) if doing so could diminish public teachers’ due process rights.

Roth/Perry approach and provides a partial basis for a potential new mode of analysis to determine the presence of a protected property interest. However, the Court purported to apply the *Roth/Perry* analysis in *Gonzales* and properly recited its standards.

50. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 567 (1972).

51. See, e.g., Ky. Dep’t. of Corrections v. Thompson, 490 U.S. 454, 462–63 (1989) (holding that prisoners had no protected interest in visitation rights because regulation did not restrict official discretion to grant or deny visitation).

52. 515 U.S. 472 (1995).

53. 545 U.S. 748 (2005).

54. 547 U.S. 410 (2006).

55. 553 U.S. 591 (2008).

A. *Seeds of Regret: Dissatisfaction with Roth/Perry in Due Process Cases*

1. *Sandin v. Conner*

In *Conner*, the Court expressly departed from precedent when it held that a state prisoner did not have a liberty interest protected by due process.⁵⁶ A prison adjustment committee had found the prisoner guilty of misconduct and sentenced him to solitary confinement, refusing the prisoner's request to call witnesses at a disciplinary hearing.⁵⁷ The prisoner claimed that the committee deprived him of liberty without due process.⁵⁸ The Court disagreed, stating that it would "*reexamine the circumstances* under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause."⁵⁹

The Court's decision broke with a line of cases beginning in 1974, two years after *Roth* and *Perry*, that, similar to the discretion formulation, found a protected liberty interest when regulations constrained official discretion to deprive inmates of liberty.⁶⁰ The Court expressed three reasons for abandoning that methodology.⁶¹ First, the discretion formulation encouraged prisoners to find regulations stated in mandatory terms to support claims of entitlement, even when those regulations were not intended to confer rights on prisoners.⁶² Second, the discretion formulation gave state officials an incentive to avoid creating protected interests by crafting regulations that gave officials excessive discretion, which enhanced the risk of inconsistent and unfair treatment of inmates.⁶³ Third, the discretion formulation drew federal courts into the mechanics of prison

56. *Conner*, 515 U.S. at 487.

57. *Id.* at 475–76.

58. *Id.* at 476.

59. *Id.* at 474 (emphasis added).

60. *Id.* at 477–84.

61. *See id.* at 481–84. The Court noted, however, that "technically" it need not overrule any prior holdings. *Id.* at 484 n.5. According to the Court, *Conner* would not change the result in one case because the plaintiff was given all of the process required by the Constitution, and therefore the Court did not need to reach the question of whether a protected liberty interest existed. *Id.* With respect to two other cases, the Court stated that it had found no liberty interest using the discretion formulation, implying that the outcomes in those cases would have been the same under the discretion formulation and the standard adopted in *Conner*. *See id.* The Court did not explain why it assumed that the standard adopted in *Conner* could not lead to finding a protected liberty interest, thereby overruling prior cases. This lack of explanation implies that, compared to the discretion formulation, the *Conner* standard would capture a more limited range of interests entitled to due process protection as "liberty."

62. *Id.* at 481–82. Put differently, the liberty interest fell outside the intended scope of the regulation's protection. *See id.*

63. *Id.* at 482.

management, which harmed judicial economy and showed too little deference to state and local officials.⁶⁴ Two of the Court's concerns—that a claimed interest could fall outside the intended scope of protection and that courts show deference to state and local officials—are also significant factors in *Gonzales*,⁶⁵ as well as *Ceballos* and *Engquist*,⁶⁶ suggesting that those factors could play an important role in a possible new approach to determining public employees' due process rights.

The Court reverted to the approach it had used in liberty cases before the *Roth/Perry* discretion formulation: a regulation creates an interest protected by due process when it “imposes atypical and significant hardship” with respect to “the ordinary incidents of prison life.”⁶⁷ The Court concluded that the regulation providing for solitary confinement did not impose an atypical and significant hardship on the prisoner because solitary confinement was not much harsher than general prison conditions.⁶⁸

The *Conner* approach departs from the *Roth/Perry* approach because it does not inquire whether a person has a legitimate claim of entitlement to an interest. The *Conner* approach ignores expectancy or reliance and focuses solely on whether the regulation's deprivation imposes atypical and significant hardship.⁶⁹ In other words, the atypical and significant hardship framework tests whether a regulation that deprives a person of an interest imposes an excessive burden on that person in the totality of circumstances. The *Conner* approach is problematic, however, because it requires subjective decisions about the nature and extent of hardship.⁷⁰ The Court did not identify any standards to determine when a regulation is harsh enough to trigger due process protection.⁷¹ Accordingly, the incidental and intended benefit factors, as discussed in Part V, are needed to implement the atypical and significant hardship framework.

Conner's atypical and significant hardship test is not limited to the prisoner/liberty context. Justice Breyer attempted to distinguish the property and liberty contexts, arguing that the *Roth/Perry* methodology protects reliance on an entitlement, whereas analysis of official

64. *Id.*

65. *See infra* Part II.A.2 (discussing *Gonzales*).

66. *See infra* Part II.B.1–2 (discussing *Ceballos* and *Engquist*).

67. *Id.* at 483–84.

68. *Id.* at 485–86.

69. *See id.*

70. *See id.* at 496 (Breyer, J., dissenting).

71. *See id.* at 483–84 (majority opinion).

discretion in the prisoner/liberty context assures appropriate “absence of government restraint . . . that we call freedom.”⁷² However, he also acknowledged that a restraint on official discretion to impair prisoner liberty suggests “that the inmate will have thought that he himself, through control of his own behavior, could have avoided the deprivation” and therefore could “have believed that (in the absence of his misbehavior) the restraint fell outside the ‘sentence imposed’ upon him.”⁷³ Thus, Justice Breyer inadvertently proved that analyzing official discretion in the prisoner/liberty context protected prisoners’ reliance interests, just as the discretion formulation protects public employees’ reliance on employment.

Because the purposes behind evaluating official discretion in the liberty and property contexts are similar, the logic behind abandoning that analysis in the liberty context could be imported to the property context. The Court could worry about recognizing due process rights in public teachers’ employment when state officials did not intend to confer rights on public teachers, encouraging grants of excessive official discretion that could be abused and judicial meddling in local governmental affairs. Moreover, *Conner*’s atypical and significant hardship framework could be used to determine whether, in the totality of the circumstances, a regulation’s deprivation of public teachers’ employment is sufficiently burdensome to trigger due process protection.

2. *Town of Castle Rock v. Gonzales*

Gonzales further undermined the continued viability of the *Roth/Perry* approach. In *Gonzales*, the Court held that a woman did not have a property interest in enforcement of a restraining order against her husband.⁷⁴ Early in the opinion, the Court assumed an analytic posture fundamentally inconsistent with the *Roth/Perry* approach:

We will not, of course, defer to the Tenth Circuit on the ultimate issue: whether what Colorado law has given respondent constitutes a property interest for purposes of the Fourteenth Amendment. *That determination, despite its state-law underpinnings, is ultimately one of federal constitutional law.* “Although the underlying substantive interest is created by ‘an independent source such as state law,’ *federal constitutional law determines whether that interest rises to the level of*

72. *Id.* at 498 (Breyer, J., dissenting).

73. *Id.*

74. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

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a 'legitimate claim of entitlement' protected by the Due Process Clause."⁷⁵

The Court acknowledged that state law created an "underlying substantive interest," but it declared that federal constitutional law decided whether that interest was protected by due process. This statement is a departure from *Roth*, which did not distinguish between substantive and constitutional interests. *Roth* expressly stated that protected property interests are defined by independent sources of authority, such as state law, rather than the Constitution.⁷⁶

Consistent with that salvo, the Court paid lip service to, but did not faithfully apply, the *Roth/Perry* discretion formulation. Colorado law provided that a police officer "shall use every reasonable means to enforce a restraining order" and "shall arrest, or . . . seek a warrant for the arrest of a restrained person" when the officer has probable cause to believe that a restrained person has violated a restraining order.⁷⁷ These provisions cabin officers' discretion to decline enforcement.⁷⁸ However, the Court did "not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory" because of a long history deferring to police officers' discretion to make enforcement decisions.⁷⁹ Accordingly, the Court held that the plaintiff did not have a protected interest in enforcement of the restraining order, notwithstanding the constraint on discretion in Colorado's statute.⁸⁰ Similar to *Conner*, as well as *Ceballos* and *Engquist*,⁸¹ the Court's decision reflected a belief that the claimed interest did not fall within the intended scope of constitutional protection and did not show appropriate deference to local officials.

Other aspects of *Gonzales* also show discomfort with the *Roth/Perry* approach. While the Court likely wished to avoid transforming police

75. *Id.* at 756–57 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)) (emphasis added).

76. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). See also Joel A. Hugenberger, Note, *Redefining Property under the Due Process: Town of Castle Rock v. Gonzales and the Demise of the Positive Law Approach*, 47 B.C. L. REV. 773, 802 (2006). Moreover, the Court's reliance on *Memphis Light* was misguided. *Id.* There, the Court found that the Constitution can give rise to a property interest protected by procedural due process if state law does not. *Id.* However, *Memphis Light* does not support the proposition that when state law defines a property interest, the Constitution can preempt state law and strip the state-created interest of protection. *Id.*

77. *Gonzales*, 408 U.S. at 758–59.

78. Hugenberger, *supra* note 76, at 798–99.

79. *Gonzales*, 408 U.S. at 760.

80. *Id.* at 766.

81. See *infra* Part II.B.1–2 (discussing *Ceballos* and *Engquist*).

protection into a fundamental right,⁸² it could have limited its holding to the context of police enforcement to avoid undercutting *Roth*. Moreover, *Gonzales* “reveals a deep skepticism of non-traditional forms of property.”⁸³ The Court, in claiming that the enforcement of a restraining order “would not . . . resemble any traditional conception of property,”⁸⁴ showed an attitude at loggerheads with *Roth*’s broad conception of property.⁸⁵ Instead of limiting its holding, the Court dismissively marginalized an interest in a restraining order as “nontraditional” property,⁸⁶ which also marginalized the *Roth/Perry* approach.

Furthermore, the Court set forth two novel criteria for finding a protected property interest, creating additional tension with the *Roth/Perry* approach.⁸⁷ First, a protected property interest must have “some ascertainable monetary value.”⁸⁸ Second, such an interest must not be merely incidental to the provision of a traditional government service.⁸⁹ According to the Court, the right to enforcement of a restraining order met neither criterion⁹⁰—a holding that underscores its departure from *Roth*’s broad view of protected property.

As Parts IV and V demonstrate, the Court could invoke rationales from *Conner* and *Gonzales* to justify discarding the *Roth/Perry* approach. Moreover, it could derive the incidental benefit and intended benefit factors from *Gonzales* and *Conner*, respectively, as possible ways to implement *Conner*’s atypical and significant hardship framework in the property context. In *Gonzales*, the Court stated that due process does not protect interests that arise as a mere incident to the provision of a traditional government service.⁹¹ Under the incidental benefit factor, deprivation of an interest that is merely incidental to a traditional government service would not impose an atypical and significant hardship on a due process claimant. In *Conner*, the prisoner did not have a protected liberty interest because the regulation that

82. Hugenberger, *supra* note 76, at 801. Hugenberger believes that risk was limited. *See id.*

83. *Id.*

84. *Gonzales*, 545 U.S. at 766.

85. *Roth* defined “property” to include everything on a continuum from “real estate, chattels or money” up to, but not including, an “abstract need or desire” for, or a “unilateral expectation” of, an interest. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572, 577 (1972).

86. *See Gonzales*, 545 U.S. at 766 (“Such a right would not, of course, resemble any traditional conception of property.”).

87. *See id.* at 766–67.

88. *Id.* at 766.

89. *Id.* at 767. The Court’s use of this criterion is the basis for this Article’s proposed incidental benefit factor, discussed *infra* Part V.

90. *See id.* at 766–67.

91. *See id.*

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created the interest was “not designed to confer rights on inmates.”⁹² Under the intended benefit factor, deprivation of an interest that was not intended to convey a benefit or right on the claimant would not impose an atypical and significant hardship. Although the incidental benefit factor is not consistent with the Court’s due process tradition in the public employment context, application of the intended benefit factor would strip tenured public teachers of a protected property interest in employment.

*B. Signs of Retrenchment: Restricting Public Employees’
Constitutional Rights*

Parallel to the Court’s trend away from the *Roth/Perry* approach, the Court also has limited public employees’ constitutional rights in *Garcetti v. Ceballos*⁹³ and *Engquist v. Oregon*,⁹⁴ perhaps foreshadowing a comparable limitation on public teachers’ due process rights. Though not the focus of this Article, *Ceballos* and *Engquist* reflect themes found in *Conner* and *Gonzales*: a narrow view of the intended scope of constitutional rights and great deference to the interests of government employers. Additionally, *Ceballos* and *Engquist* produced novel results that could pave the way for similar innovation in the procedural due process context.

1. Speech: *Garcetti v. Ceballos*

In *Ceballos*, the Court invoked themes reminiscent of *Conner* and *Gonzales* to restrict public employees’ free speech rights. The Court used its traditional two-part analysis to determine whether a government employer’s restriction on speech violated a public employee’s First Amendment rights: (1) whether the public employee spoke as a citizen on a matter of public concern; and (2) if so, whether the employee’s First Amendment interest outweighed the government’s interest as employer.⁹⁵ The *Ceballos* Court held that the First Amendment did not protect speech uttered by an assistant district attorney when he expressed concerns to his supervisor about an affidavit used to obtain a search warrant.⁹⁶ Echoing *Conner* and *Gonzales*, the Court’s new categorical rule reflected an assumption that the First Amendment was not intended to protect public employees’ speech uttered during the course of employment: “when public employees make statements

92. *Sandin v. Conner*, 515 U.S. 472, 481–82 (1995).

93. 547 U.S. 410 (2006) (free speech).

94. 553 U.S. 591 (2008) (equal protection).

95. *Ceballos*, 547 U.S. at 418.

96. *Id.* at 420–21.

pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹⁷ Restricting such speech did not constrain any First Amendment right that a public employee would have as a citizen, which, the Court suggested, was the type of interest that the First Amendment was intended to protect.⁹⁸

Also consistent with *Conner* and *Gonzales*, limiting public employees’ speech uttered pursuant to official duties was a legitimate exercise of an employer’s prerogative to manage the workplace.⁹⁹ Subjecting such speech to the same scrutiny as citizen speech on matters of public concern would require judges to oversee government affairs “to a degree inconsistent with sound principles of federalism and separation of powers.”¹⁰⁰ The Court’s emphasis on the intended scope of constitutional protection and deference to local government officials to narrow the constitutional rights at issue in *Conner*, *Gonzales*, and *Ceballos* suggests that the same themes could play a significant role in a future case redefining due process property rights in public employment.

2. Equal Protection: *Engquist v. Oregon Department of Agriculture*

In *Engquist*, the Court again demonstrated a narrow view of public employees’ constitutional rights and broad deference to government employers by holding that public employees categorically could not bring “class-of-one” equal protection claims.¹⁰¹ A former government employee, whose state position was eliminated, alleged under a class-of-one theory that she was dismissed arbitrarily and with malicious intent.¹⁰² Generally, equal protection claims allege that a government actor arbitrarily treated members of a class differently than similarly situated people.¹⁰³ However, the Court has recognized that an individual can claim a class-of-one equal protection violation when a

97. *Id.* at 421. The Court was sharply divided over this new rule, yet the majority’s reasoning was rooted in the Court’s two-step First Amendment balancing tradition. The Court held in step one that employee speech made pursuant to job duties per se does not involve a matter of public concern. Technically, the Court did not need to reach the second step, but the Court nevertheless balanced the assistant district attorney’s interest in speech and the government’s interest in management, finding in the government’s favor. Accordingly, the Court’s analysis was consistent with its First Amendment tradition in public employment cases, even if the majority’s categorical rule was novel and controversial.

98. *Id.* at 421–22.

99. *Id.*

100. *Id.* at 423.

101. *Engquist v. Or. Dep’t. of Agric.*, 553 U.S. 591, 594 (2008).

102. *Engquist*, 553 U.S. at 595.

103. Meyer, *supra* note 3, at 530.

government entity intentionally and without a rational basis treats the individual differently than similarly situated people.¹⁰⁴ The Court had not suggested that the class-of-one theory was limited.¹⁰⁵

Nevertheless, the Court rejected Engquist's claim.¹⁰⁶ The Court stated two principles that reflected its focus on the intended scope of constitutional protection and deference to government employers—further affirming the importance of the common principles in *Conner*, *Gonzales*, and *Ceballos*, and perhaps foreshadowing a break from the *Roth/Perry* approach.

First, although government employees do not lose their constitutional rights when they accept their positions, *those rights must be balanced against the realities of the employment context*. Second, in striking the appropriate balance, we consider *whether the asserted employee right implicates the basic concerns of the relevant constitutional provision*, or whether the claimed right can more readily give way to the requirements of the government as employer.¹⁰⁷

The Court concluded that class-of-one claims were “a poor fit for the public employment context,”¹⁰⁸ in part because the Equal Protection Clause was not intended to protect individual public employees.¹⁰⁹ Moreover, the Court found that the “government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.”¹¹⁰ In *Engquist*, government employers engaged in “discretionary

104. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Olech sued the Village of Willowbrook for violation of her equal protection rights because the Village demanded that Olech provide a thirty-three-foot easement on her property in exchange for connection to the Village water supply, but only sought fifteen-foot easements from other similarly situated residents. *Id.* at 563.

105. See *id.* (“[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure *every person within the State’s jurisdiction* against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) (emphasis added))). One commentator has argued that *Olech’s* holding recognizing class-of-one claims “was not a change in the law” but instead was “a reminder of what had always been a valid cause of action under the Equal Protection Clause.” Matthew C. Juneau, *Surgery or Butchery? Engquist v. Oregon, Class-of-one Equal Protection, and the Shift to Categorical Treatment of Public Employees’ Constitutional Claims*, 70 LA. L. REV. 313, 320 (2009). Indeed, before *Engquist*, seven U.S. Circuit Courts of Appeals permitted class-of-one claims by public employees. See Meyer, *supra* note 3, at 530. The Ninth Circuit held in *Engquist*, however, that a public employee could not bring a class-of-one claim, which created a circuit split before the Court took the case. *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 992–96 (9th Cir. 2007), *aff’d*, 553 U.S. 591 (2008).

106. *Engquist*, 553 U.S. at 594.

107. *Id.* at 600 (emphasis added).

108. *Id.* at 605.

109. *Id.* at 607.

110. *Id.* at 599. However, the Court did not cite *Ceballos* for this proposition.

decisionmaking” that necessarily resulted in treating similar people differently.¹¹¹ Because those decisions were “subjective and individualized,”¹¹² however, deference to the government’s interest in efficient management favored barring class-of-one claims by public employees.¹¹³

Thus, similar to *Conner*, *Ceballos*, and *Gonzales*, the Court found that Engquist’s interest was not within the intended scope of protection afforded by the Equal Protection Clause and showed great deference to government employers. The Court could invoke similar themes to justify adopting an alternative analysis to the *Roth/Perry* approach in the context of public teachers’ due process rights.

3. Implications: Common Trend, Separate Traditions

Ceballos and *Engquist* show that the seeds of regret in *Conner* and *Gonzales* are consistent with the Court’s trend to limit public employees’ constitutional rights based on a narrow construction of the intended scope of constitutional protections and deference to government employers. Some commentators have argued that the Court could or should draw on *Ceballos* and *Engquist* to adopt a categorical rule to deny public employees a protected property interest in employment, but they overlook the different precedential traditions governing speech, class-of-one, and procedural due process claims.¹¹⁴

111. *Id.* at 603. The plaintiff in *Engquist* alleged that she was singled out for adverse treatment as compared to other similarly situated employees in her agency due to her supervisor’s and coworkers’ animosity toward her. *Id.* at 595.

112. *Id.* at 604. The Court assumed that at-will employment was the default rule in the public employment context unless legislation provided otherwise. *Id.* at 606. The class-of-one theory, according to the Court, was inconsistent with at-will employment. *Id.* Although the Court acknowledged that many governments modified at-will employment to some form of just-cause employment, that choice was a “legislative grace.” *Id.* at 607. Because many government employment schemes retained at-will employment for some workers and not others, permitting class-of-one equal protection claims in the public employment context could upset those comprehensive regimes by giving at-will employees a remedy against arbitrary dismissal. *Id.*

113. *See id.* (“Government offices could not function if every employment decision became a constitutional matter.” (internal quotation marks and citation omitted)).

114. Garry observes historical parallels between the growth of public employees’ First Amendment and due process rights after the 1950s. He argues that the Court “corrected” expansion of First Amendment rights in *Ceballos* and should do the same with respect to due process rights; thus, the Court should adopt the citizen/public employee distinction in the due process context. *See* Garry, *supra* note 13, at 807. However, historical parallels do not explain why reasoning rooted in the Court’s First Amendment tradition should be used in due process cases. The citizen/employee distinction is consistent with First Amendment tradition, the first prong of which asked whether public employees spoke as citizens on matters of public concern. By contrast, the due process tradition never has considered the status or role of a public employee. Although *Gonzales* suggests that the Court wishes to narrow the range of interests protected by due process, drawing on due process precedent, not First Amendment precedent, would be a more persuasive rationale for doing so.

Whereas the Court denied protection to public employee speech in *Ceballos* based on its First Amendment balancing tradition and adopted similar reasoning in *Engquist* due to the absence of any class-of-one tradition,¹¹⁵ procedural due process rights are governed by an independent tradition that does not support a per se rule denying public employees a protected interest in employment.¹¹⁶ Rather than draw on First Amendment and class-of-one cases, the Court could fashion a more persuasive justification for abandoning the *Roth/Perry* approach and developing an alternative mode of analysis from its due process tradition. Part V shows that the Court could develop a new approach to determining the presence of a protected property interest that is rooted in due process precedent. Accordingly, the Court could address its concerns with the *Roth/Perry* approach without making arbitrary analogies to the traditions governing other constitutional rights, such as free speech and equal protection.

Juneau also argues that *Engquist*'s categorical rule could be used to deny public employees due process protection. Juneau, *supra* note 105, at 348–50. According to Juneau, *Engquist* sought to prevent federal judicial involvement in a deluge of public employee claims, and the Court could categorically deny public employees a protected interest in employment for a similar reason. Although the Court has qualms about meddling with government employers' decisions, that is not a persuasive basis for adopting a citizen/employee dichotomy in due process cases. The Court's effort in *Engquist* to show that the public employee/citizen distinction had support in due process precedent was misleading and unfounded. The Court cited *Bishop v. Wood* for the proposition that the Due Process Clause does not guarantee public employees protection from dismissal. *Engquist*, 553 U.S. at 599 (citing *Bishop v. Wood*, 426 U.S. 341, 350 (1976)). That statement, though accurate, does not show that public employment categorically is not protected property. In any context, due process only guarantees an opportunity for a hearing. Neither *Bishop* nor *Engquist* suggests that public employees categorically have no right to due process. *See id.* at 595. The Court could more persuasively address concerns about deference in due process cases by developing an alternative framework for identifying a protected interest that is grounded in due process tradition.

115. *Engquist* relied mostly on First Amendment cases to distinguish class-of-one claims brought by public employees and citizens, and to limit use of the class-of-one theory by the former. Meyer, *supra* note 3, at 556–57. However, even in the class-of-one context, where no tradition comparable to the procedural due process tradition existed, the Court's analogy to First Amendment cases has been criticized because the government's power to regulate employee speech is more closely related to its legitimate interest in efficient operations than its power arbitrarily to treat individual public employees differently than similarly-situated peers. *See id.* at 556–60.

116. The due process tradition governing the identification of protected interests in public employment does not balance the interests of public employees and government employers or look to whether a person's status is "public employee" or "citizen." Rather, it examines the nature of a person's asserted interest, namely whether an independent source of authority creates a legitimate claim of entitlement to that interest. *See supra* Part I.B–C.

III. SELECT STATE PERFORMANCE-BASED PUBLIC TEACHER EMPLOYMENT STATUTES

Parallel to the Court's evolving view of interests protected by due process and public employees' constitutional rights, many states have adopted statutory schemes governing public teacher employment that link employment decisions to teachers' performance evaluation ratings.¹¹⁷ Measures of a teacher's performance must be based in large part on the performance of his or her students on standardized tests—the goal being to reward and retain teachers who contribute to student academic growth and remove teachers who do not. Challenging that principle is difficult. However, many teachers worry that too closely linking teacher performance to student performance unfairly holds teachers responsible for factors influencing student achievement beyond teachers' control. Perhaps because of this concern, states have devised varied formulas for evaluating teacher performance that incorporate both student test scores and other factors, such as teachers' preparation and pedagogical methods.

Disputes between public school teachers and school districts over adverse employment decisions made pursuant to new state regimes could give the Court an opportunity to reevaluate whether tenured public teachers' employment is protected by due process. This Part summarizes the important features of performance-based schemes in six states: Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma. Together, these states offer geographic and topographic diversity, as well as an array of strategies to link teacher performance to employment. Evaluating the statutes in these states conveys a sense of how legislatures representing different parts of the country have sought to implement performance-based systems governing public teachers' employment.

A. *Illinois*

In Illinois, every school district must evaluate probationary teachers annually and tenured teachers biennially.¹¹⁸ However, a tenured teacher who receives ratings of “needs improvement” or

117. The federal government's Race to the Top Initiative encouraged states to develop such performance-based regimes. *See generally* Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 75 Fed. Reg. 68, 18171 (Apr. 9, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-04-09/pdf/2010-8176.pdf>. The Department of Education conditioned large grants on the development and implementation of systems to evaluate teacher performance and inform employment decisions. *Id.*

118. 105 ILL. COMP. STAT. ANN. 5/24A-5(1)–(2) (West 2012).

“unsatisfactory” must be evaluated in the following year.¹¹⁹ All teachers in Illinois must be rated as “excellent,” “proficient,” “needs improvement,” or “unsatisfactory.”¹²⁰ District evaluations must include student growth data as “a significant factor” in rating teacher performance.¹²¹

Performance evaluation ratings affect teachers’ employment status. For instance, they determine the length of time a probationary teacher must work before attaining tenure status.¹²² Once teachers become tenured, performance evaluation ratings can lead to dismissal for just cause or on the basis of performance.¹²³ If a tenured teacher receives a “needs improvement” performance rating, then the evaluator must create a “professional development plan” designed to improve the teacher’s performance.¹²⁴ Similarly, if a tenured teacher receives an “unsatisfactory” rating and the evaluator deems the teacher’s deficits remediable, then the evaluator must develop a ninety-day “remediation plan,” upon which the evaluator will reevaluate the teacher.¹²⁵ If the teacher receives a remediation plan rating of “needs improvement” or “unsatisfactory,” the evaluator may recommend dismissal of the teacher.¹²⁶ Even if a tenured teacher obtains a remediation plan rating of “proficient” or better, a school may dismiss the teacher without another remediation plan if that teacher subsequently receives an “unsatisfactory” rating within the next three years.¹²⁷ Additionally, a school district may dismiss a teacher without providing a remediation plan for “deficiencies which are deemed irreparable.”¹²⁸ Therefore, although remediation plans often give tenured teachers an extra layer of protection against dismissal on the basis of performance ratings, evaluators may avoid use of remediation plans by deeming a teacher’s deficiencies irreparable.¹²⁹

Performance evaluation ratings also determine the order in which tenured teachers may be laid off and influence which tenured teachers

119. *Id.* § 5/24A-5(2).

120. *Id.* § 5/24A-5(e).

121. *Id.* § 5/24A-5(c).

122. *See id.* §§ 5/24-11(d)(1)–(3), 5/34-84.

123. *Id.* §§ 5/34-85(a), 5/10-22.4.

124. *Id.* § 5/24A-5(h).

125. *Id.* § 5/24A-5(i).

126. *Id.* §§ 5/24A-5(m), 5/24-16.5(b).

127. *Id.* § 5/24A-5(n).

128. *Id.* *See also id.* § 5/24A-5(i).

129. However, when a school district brings immediate dismissal proceedings against a tenured teacher for deficiencies deemed irreparable, the dismissal process appears to give the teacher an opportunity to correct deficiencies that in fact are remediable before those “causes” become “charges” that form the basis of dismissal. *See id.* § 5/24-12(d)(1).

are recalled. Categories of teachers with the worst performance evaluation ratings must be laid off before those with the best ratings.¹³⁰ Additionally, when a school district fills any vacancies, performance evaluation ratings must be considered, and length of service may not be considered except as a tie breaker.¹³¹ However, teachers are given a role in shaping layoff and recall procedures, in part to prevent pretextual dismissal of teachers with long terms of service.¹³²

B. Michigan

In Michigan, teachers must be evaluated at least once at the end of each year.¹³³ Teachers can be rated “highly effective,” “effective,” “minimally effective,” or “ineffective.”¹³⁴ By the 2015–2016 school year, at least fifty percent of a teacher’s evaluation must be based on student growth assessment data from the prior three years.¹³⁵ Michigan’s scheme expressly states that the purpose of its performance evaluation system is to inform decisions about whether teachers are effective, need professional development, should receive tenure, or should be removed.¹³⁶ Every evaluation must include teacher performance goals and recommended training,¹³⁷ and the scheme includes measures to help teachers who receive low ratings.¹³⁸

As in other states, Michigan performance evaluation ratings influence teachers’ employment status and job security. Probationary teachers’ ratings affect the length of their probationary period and whether they will receive tenure status.¹³⁹ Tenured teachers may only be dismissed for “a reason that is not arbitrary or capricious.”¹⁴⁰ Tenured teachers who receive an ineffective rating must show progress toward personal development goals during a 180-day period.¹⁴¹ Although the statute does not expressly state that failure to do so is sufficient cause for dismissal, the scheme does not provide for any other adverse consequence for failure to meet individual development goals.¹⁴²

130. *Id.* § 5/24-12(b).

131. *Id.* § 5/24-1.5.

132. *Id.* § 5/24-12(c).

133. MICH. COMP. LAWS ANN. § 380.1249(2)(a) (West 2011).

134. *Id.* § 380.1249(1)(c).

135. *Id.*; *id.* § 380.1249(2)(a)(ii).

136. *See id.* § 380.1249(1)(d).

137. *Id.* § 380.1249(2)(a)(iii).

138. *Id.*

139. *See id.* § 38.83b(1)–(2).

140. *Id.* § 38.101(1).

141. *Id.* § 38.93.

142. *See id.* §§ 38.101, 380.1249(2)(h).

Accordingly, a single “ineffective” rating and failure to attain individual development goals would be grounds for dismissal. Further, a school district must dismiss the teacher if he or she is rated “ineffective” for three consecutive years.¹⁴³

C. Colorado

All public teachers in Colorado are evaluated against performance standards established by the state board and adopted by the general assembly.¹⁴⁴ At least fifty percent of a teacher’s rating must be determined by the academic growth of the teacher’s students.¹⁴⁵ The legislature identified five purposes for Colorado’s evaluation system: (1) establishing a foundation to improve instruction, (2) improving administration of curricula, (3) measuring and documenting teacher performance for dismissal purposes, (4) measuring teacher professional growth and development, and (5) measuring teacher effectiveness.¹⁴⁶

Similar to other states, a tenured teacher’s performance evaluation rating can lead to dismissal. Tenured teachers may be dismissed only for cause, which includes “unsatisfactory performance.”¹⁴⁷ If a tenured teacher receives an “ineffective” rating, the teacher may be given a remediation plan.¹⁴⁸ If the teacher’s next evaluation rating is “ineffective,” then the evaluator may either suggest additional measures to improve the teacher’s performance or recommend dismissal.¹⁴⁹

Colorado’s performance evaluation system also influences the likelihood that a tenured teacher will be selected to teach at a given school. Principals must consent to the assignment of a teacher to the principal’s school.¹⁵⁰ If no principal consents to the placement of a teacher at a school after the longer of twelve months or two “hiring cycles,” then the school district must place the teacher on unpaid leave.¹⁵¹ However, tenured teachers on unpaid leave who received an “effective” rating on their most recent evaluation are given priority to interview for open teaching positions.¹⁵²

143. *Id.* § 380.1249(2)(h).

144. COLO. REV. STAT. ANN. § 22-9-106(1) (West, Westlaw through Ch. 2 of First Reg. Sess. Gen. Assembly (2013)).

145. *Id.* § 22-9-106(1)(e)(II).

146. *Id.* § 22-9-106(1)(d)(I)–(V).

147. *Id.* § 22-63-301.

148. *Id.* § 22-9-106(4.5)(b).

149. *Id.*

150. *Id.* § 22-63-202(2)(c.5)(I).

151. *Id.* § 22-63-202(2)(c.5)(IV).

152. *Id.* § 22-63-202(2)(c.5)(III)(A).

D. Idaho

Idaho also requires annual evaluations for its public teachers.¹⁵³ Similar to Colorado and Michigan, fifty percent of the total evaluation must be based on “objective measures of growth in student achievement.”¹⁵⁴ Idaho’s statute is less specific than those in other states, perhaps because it authorizes the state board to promulgate procedures to implement the performance evaluation system.¹⁵⁵ Unlike Michigan and Colorado, Idaho’s scheme does not expressly state the purpose of performance evaluations.

The effect of Idaho’s scheme on public teachers’ interest in employment depends on the teacher’s particular contract. Idaho school districts may not enter into renewable contracts that lead to the “vesting of tenure” or “continued expectations of employment or property rights in an employment relationship.”¹⁵⁶ However, “renewable contract status” is “grandfathered” for teachers who achieved that status prior to January 31, 2011.¹⁵⁷ Although school districts must renew the contracts of teachers with renewable contract status after each school year,¹⁵⁸ the state board may put a teacher with renewable contract status on probation for “unsatisfactory performance.”¹⁵⁹ If the teacher’s performance remains unsatisfactory, the board may decide not to renew the renewable contract.¹⁶⁰ Additionally, upon renewal the board may reduce a teacher’s contract term or salary.¹⁶¹ The board’s authority not to renew renewable contracts on the basis of performance and to alter their essential terms undermines traditional tenure protections.

Furthermore, Idaho school districts must employ teachers on “Category A” or “Category B” contracts.¹⁶² Category A contracts are one-year contracts for teachers in the first three years of employment;¹⁶³ Category B contracts are two-year contracts that the board may offer to teachers after three years of continuous employment with the same district.¹⁶⁴ Though school districts need not renew Category A or B

153. See IDAHO CODE § 33-514(4) (2012), available at <http://www.legislature.idaho.gov/idstat/Title33/T33.htm> (current through 2012 legislative session).

154. *Id.*

155. See *id.* § 33-514–33-515.

156. *Id.* § 33-515(1).

157. *Id.*

158. *Id.* § 33-515(2).

159. *Id.* § 33-515(5).

160. *Id.*

161. *Id.* § 33-515(7).

162. See *id.* § 33-514(2)(a)–(b).

163. *Id.* § 33-514(2)(a).

164. *Id.* § 33-514(2)(b).

contracts, they must not make renewal decisions until completing teachers' annual performance evaluations.¹⁶⁵ While teachers with Category B contracts may request "informal review" of a decision not to renew their contract,¹⁶⁶ "no new employment contract between a school district and a certificated employee shall result in the vesting of tenure, continued expectations of employment or property rights in an employment relationship."¹⁶⁷

The Board also may dismiss teachers during a contract term for conduct that is grounds for revoking a teaching certificate, which is similar to conduct commonly enumerated in just-cause dismissal provisions, such as gross negligence and incompetence.¹⁶⁸ This dismissal power expressly applies to teachers with grandfathered renewable contracts.¹⁶⁹ Therefore, poor performance ratings can be the basis for dismissal of all teachers.

E. Florida

Florida teachers can receive ratings of "highly effective," "effective," "needs improvement," or "unsatisfactory."¹⁷⁰ The purpose of the system is to increase "student learning growth by improving the quality of instructional . . . services in the public schools."¹⁷¹ To that end, at least fifty percent of teacher evaluations must be based on student learning growth as demonstrated by student test scores over the prior three years.¹⁷²

Performance evaluation ratings greatly influence the hiring and contract renewal of teachers in Florida. Florida's scheme eschews traditional tenure: all teachers who complete a probationary period (other than some grandfathered teachers) receive one-year contracts that district school boards may renew annually.¹⁷³ A district school board may not offer or renew a one-year contract unless: (1) a teacher has been recommended by the district superintendent and approved by the district board based on the teacher's performance evaluation; and (2) a teacher has not received two consecutive annual performance ratings of "unsatisfactory," two annual ratings of "unsatisfactory" within the prior three years, or three consecutive ratings of "needs improvement" or a

165. *Id.* § 33-514(2)(a)–(b).

166. *Id.* § 33-514(2)(b).

167. *Id.* § 33-515(1).

168. *Id.* §§ 33-513(5), 33-1208(1)–(2).

169. *Id.* § 33-515(6).

170. FLORIDA STAT ANN. § 1012.34(2)(e) (West, Westlaw through 2012 Sess.).

171. *Id.* § 1012.34(2)(1)(a).

172. *Id.* § 1012.34(3)(a)(1), 1012.34(3)(a)(1)(a).

173. *Id.* §§ 1012.33(3)–(4), 1012.335(2)(b)–(c).

combination of “needs improvement” and “unsatisfactory.”¹⁷⁴ Moreover, a single “unsatisfactory” rating can result in nonrenewal if a teacher does not correct his or her performance within ninety days.¹⁷⁵ Thus, performance ratings can preclude hiring and renewal of teachers.

A teacher’s performance rating also can lead to removal during a contract term. All contracts must provide for just-cause dismissal, which includes two consecutive ratings of “unsatisfactory,” two ratings of “unsatisfactory” within a three-year period, or three consecutive ratings of “needs improvement,” or a combination of “needs improvement” and “unsatisfactory.”¹⁷⁶ Additionally, teachers with the lowest performance ratings are laid off first during layoff periods.¹⁷⁷ Performance evaluation ratings play an influential, if not determining, role in nearly every context in which a teacher could face an adverse employment decision.

Florida’s scheme includes vague provisions that could permit teachers to improve their skills and avoid removal for poor performance ratings. By leaving the details to local school districts, this scheme makes the effectiveness of any professional development difficult to evaluate. The evaluation system must “provide appropriate instruments, procedures and criteria for continuous quality improvement of the professional skills of instructional personnel.”¹⁷⁸ Teachers with “unsatisfactory” ratings must receive suggestions for improvement and assistance to correct performance problems before an evaluator may recommend dismissal.¹⁷⁹ Finally, teachers have some role in determining performance standards: the education commissioner must consult with experts and stakeholders, including teachers, about the criteria used to determine performance levels.¹⁸⁰

F. Oklahoma

Oklahoma requires school districts to evaluate probationary teachers biannually and tenured teachers annually.¹⁸¹ The purpose of the evaluation system is to “provide feedback to improve student learning and outcomes.”¹⁸² Teachers can receive the following ratings: “superior,” “highly effective,” “effective,” “needs improvement,” or

174. *Id.* §§ 1012.335(2)(b)–(c), 1012.33(3)(a)–(b).

175. *Id.* § 1012.34(4)(b)(2).

176. *Id.* § 1012.33(1)(a).

177. *Id.* § 1012.33(5).

178. *Id.* § 1012.34(2)(b).

179. *Id.* § 1012.34(4)(a), (b)(2).

180. *Id.* § 1012.34(2)(e).

181. OKLA. STAT. ANN. tit. 70, § 6-101.10(A)(4)–(5) (West, Westlaw through 2012 Sess.).

182. *Id.* § 6-101.16(B)(2).

“ineffective.”¹⁸³ Thirty-five percent of each rating must be based on quantitative data of student academic growth; fifteen percent must be based on quantitative data of other academic measures;¹⁸⁴ and the other half of each rating must be based on qualitative factors correlated to student performance.¹⁸⁵

Probationary teachers’ ratings determine the length of the probationary period preceding tenure status.¹⁸⁶ Additionally, if a probationary teacher does not receive a minimum specified combination of ratings over a four-year period, the teacher will not receive tenure status unless a principal petitions the superintendent.¹⁸⁷ A probationary teacher who does not receive tenure after four years or who receives two consecutive “ineffective” ratings must be dismissed.¹⁸⁸

Tenured teachers—who can be dismissed only for enumerated reasons, including “instructional ineffectiveness”¹⁸⁹—can be removed based on performance ratings in two ways. First, tenured teachers must be dismissed or must not have their contracts renewed after receiving two consecutive “ineffective” ratings, three consecutive “needs improvement” ratings or lower, or an average rating over a five-year period of less than “effective.”¹⁹⁰ Second, administrators have discretion to seek removal if they detect “poor performance or conduct that the administrator believes may lead to a recommendation” for dismissal or nonrenewal.¹⁹¹

However, Oklahoma’s performance evaluation process includes some features designed to help teachers achieve higher ratings and avoid removal. Performance evaluations must include remediation plans and “instructional coaching” for teachers who receive “needs improvement” or “ineffective” ratings.¹⁹² Additionally, school administrators must make a “reasonable effort” to help teachers improve and must give the teacher “reasonable time” (not to exceed two months) to make improvements.¹⁹³ If a teacher fails to improve, then the administrator must make a recommendation to dismiss the teacher.¹⁹⁴

183. *Id.* § 6-101.16(B)(1).

184. *Id.* § 6-101.16(B)(4)(a).

185. *Id.* § 6-101.16(B)(4)(b), (B)(5).

186. *See id.* § 6-101.3(4)(b)(1)–(2).

187. *Id.* § 6-101.3(4)(b)(3).

188. *Id.* § 6-101.22(D)(1)–(2).

189. *Id.* § 6-101.22(A).

190. *Id.* § 6-101.22(C)(1)–(3).

191. *Id.*; § 6-101.24(C).

192. *Id.* § 6-101.16(B)(3).

193. *Id.* § 6-101.24(A).

194. *Id.*

G. Statutory Features Relevant to Intended Benefit Factor

Certain characteristics of the state schemes described above are particularly relevant to Part V's intended benefit factor analysis. In all states, teachers can only be removed for cause, not at will. Additionally, most states offer teachers professional development opportunities that, to varying extents, enhance teachers' skills and afford a measure of job security. Illinois gives teachers a role in shaping the layoff and recall process. Colorado's scheme permits de facto dismissal of teachers by allowing principals to refuse teacher assignments. Idaho teachers with grandfathered renewable contracts have a diluted right to renewal of those contracts, yet the Idaho legislature expressly stated its intent not to confer due process rights on teachers. Most importantly, all states make student performance a significant, if not primary, factor in teachers' performance evaluation ratings.

IV. ESTABLISHING, AND JUSTIFYING DEPARTURE FROM, THE BASELINE

Conner and *Gonzales* show that the Court is moving away from the *Roth/Perry* approach, and demonstrate the Court's parallel trend of limiting public employees' constitutional rights. This Part shows that the Court could draw on *Conner* and *Gonzales* to develop a new approach to evaluating public teachers' interest in employment and thereby limit their due process rights.

First, this Part examines how the *Roth/Perry* approach would apply to the state performance-based public teacher employment schemes in Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma. That analysis provides a baseline to understand how the Court's possible new approach could shatter the prevailing understanding of tenured public teachers' due process rights. Next, this Part explores three rationales derived from *Conner* and *Gonzales* that could justify abandoning the *Roth/Perry* framework: (1) the *Roth/Perry* approach wastes judicial resources and undermines proper deference to state and local officials; (2) the discretion formulation encourages laws and regulations that do not treat people uniformly and fairly; and (3) federal constitutional law, not state law, should determine whether an interest is entitled to due process protection.

A. *The Baseline: Teachers' Procedural Due Process Rights under Roth/Perry*

The *Roth/Perry* approach examines independent sources of authority,

such as state law, to determine whether an individual has a legitimate claim of entitlement to an interest.¹⁹⁵ If a court finds that a source of authority constrains official discretion to deprive a person of an interest, then the person is entitled to due process.¹⁹⁶ However, if a government official has discretion to deprive a person of an interest, then the person is not entitled to due process.¹⁹⁷

To apply the *Roth/Perry* approach to tenured teachers' employment interest under the statutory schemes in Illinois, Michigan, Colorado, Florida, Idaho, and Oklahoma, a court would identify any provisions that could give rise to a legitimate claim of entitlement to employment and determine whether officials have discretion to deprive tenured public teachers of employment. The subsequent Subsections examine just-cause dismissal provisions in all six states, as well as other dismissal and renewal provisions in Idaho and Florida. Under the *Roth/Perry* approach, tenured public teachers in all six states have a protected interest in employment with respect to dismissal. Tenured teachers in Illinois, Michigan, Colorado, and Oklahoma also have a protected interest in contract renewal. Tenured teachers in Idaho only have a weak protected interest in renewal, entitling them to less robust process before dismissal. Florida public teachers have no interest in renewal and no corresponding due process protection against contract nonrenewal.

1. Just-Cause Dismissal Provisions

In *Roth*, a professor at a public college did not have a protected property interest in employment because no independent source of authority limited his dismissal or nonrenewal to just cause.¹⁹⁸ The professor had no legitimate claim of entitlement to employment that gave him a property interest in contract renewal because the professor's employment could be terminated at the college's discretion.¹⁹⁹ By contrast, in *Perry*, a teacher's manual and policy guidelines suggested that professors employed for a minimum number of years would not be deprived of employment except for cause.²⁰⁰ Accordingly, the professor in *Perry* may have had a property interest in contract renewal. Therefore, under the *Roth/Perry* analysis, if an independent source of authority generally limits removal of a public teacher to just cause, the

195. *See supra* Part I.B–C.

196. *See supra* Part I.B–C.

197. *See supra* Part I.D.

198. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972).

199. *Id.*

200. *Perry v. Sindermann*, 408 U.S. 593, 600–01 (1972).

teacher has a protected property interest in employment with regard to dismissal and nonrenewal.

Statutory schemes in Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma each limit dismissal of tenured teachers to just cause. All of these provisions limit official discretion to terminate the employment of tenured teachers absent certain grounds.²⁰¹ Accordingly, under the *Roth/Perry* approach, teachers in all six states have a legitimate claim of entitlement to employment with respect to dismissal within a contract term, and teachers in all states but Idaho and Florida have an equivalent protected interest in contract renewal. To that extent, the new statutory schemes do nothing to reduce tenured teachers' right to due process under the *Roth/Perry* approach.²⁰²

2. Dismissal vs. Renewal: Idaho and Florida

The schemes in Idaho and Florida distinguish between a school district's authority to dismiss a teacher during a contract term and to not renew a teacher's contract upon expiration. Under the *Roth/Perry* approach, teachers in Idaho have a lesser property interest in employment with respect to contract renewal than dismissal, which in turn entitles those teachers to less robust due process protection. Teachers in Florida have no property interest in renewal, which gives them no due process right to challenge nonrenewal of a contract.

201. Schemes that make performance ratings a possible basis for just-cause dismissal and remove seniority as a criterion relevant to certain employment decisions may be perceived as weakening the protection given to teachers, thereby reducing the extent to which those teachers have a legitimate claim of entitlement to employment. As applied to teachers who have seniority but who do not receive good performance evaluation ratings, performance-based schemes may not assure secure employment, especially compared to regimes that favor senior teachers. However, that is irrelevant to the *Roth/Perry* analysis of whether an independent source of authority creates a protected interest in employment. The six schemes discussed in this Article have just-cause dismissal provisions that conceptually are no different than the just-cause dismissal provisions at issue in *Roth* and *Perry*: they limit official discretion to dismiss teachers. Although many of the new schemes have added performance ratings as a basis for dismissal, they still do not give officials greater discretion to dismiss teachers. In fact, adding performance as a basis for dismissal may cabin official discretion more than the vague epithets often used to describe "just cause," such as "neglect of duty." Accordingly, for the purpose of *Roth/Perry* analysis, dismissal provisions that define "cause" to include "performance" constrain official discretion to dismiss teachers and therefore give rise to a protected property interest in employment.

202. However, in states such as Florida, where teachers must have one-year contracts that district school boards have discretion to renew each year, procedural due process protection triggered by dismissal during a contract term is less significant. A school district effectively can remove a teacher without implicating procedural due process safeguards by waiting for a teacher's contract to expire and then opting not to renew it. See *infra* Part IV.A.2.ii. See also *infra* Part IV.A.2.i (discussion of discretionary renewal in Idaho).

i. Idaho

Although an Idaho school board may dismiss a teacher during a contract term solely for cause,²⁰³ it has discretion not to renew a teacher working under a Category A or B contract, provided that no decision about renewal may be made until after a teacher's performance evaluation is complete.²⁰⁴ This condition implies that a school board must take into account a teacher's performance rating before making a renewal decision. Otherwise, the provision conditioning contract renewal decisions on the completion of a teacher's performance evaluation would be superfluous. Although the statute does not state what performance ratings would prevent a school board from deciding not to renew a teacher's contract,²⁰⁵ the implied constraint at minimum must preclude a school board from not renewing the contract of a teacher who received the highest possible rating. Therefore, Idaho's scheme impliedly constrains official discretion and creates some property interest in employment relating to renewal of Category A and B contracts, albeit a weaker interest than teachers' interest in employment for dismissal purposes. Accordingly, under the *Roth/Perry* approach, teachers with Category A or B contracts whose contracts are not renewed are entitled to an opportunity for a hearing. The extent of that hearing, however, depends on balancing teachers' interest in employment against the government's interest in administering the schools.²⁰⁶

The Idaho Code attempts to withhold any property interest in renewal of Category A or B contracts, but that effort is ineffective under the *Roth/Perry* approach. Under Idaho law, no property rights attach to Category A and B contracts and employees have no right to formal review of a board's decision not to renew such contracts.²⁰⁷ However, in *Cleveland Board of Education v. Loudermill*, the U.S. Supreme Court held that "[p]roperty' cannot be defined by the procedures provided for its deprivation."²⁰⁸ In *Loudermill*, a school board argued that the statutory procedures governing termination of employment could

203. IDAHO CODE § 33-513(5) (2012), available at <http://www.legislature.idaho.gov/idstat/Title33/T33.htm> (current through 2012 legislative session); *id.* § 33-1208(1)–(2).

204. *Id.* § 33-514(2)(a)–(b).

205. *See id.*

206. Here, the constraint on official discretion is implied and the scope of that constraint may be narrow. Therefore, an individual teacher's property interest in employment would be relatively weak. By comparison, the government's interest in effectively managing its school system is strong. Accordingly, Idaho teachers probably would not be entitled to a robust pre-deprivation hearing in the contract nonrenewal context.

207. *Id.*

208. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

narrow the scope of a school security guard's property interest in employment, which substantively only could be terminated for just cause.²⁰⁹ The Court rejected that reasoning because the Due Process Clause's protection of property "would be reduced to a mere tautology" if "[t]he categories of substance and procedure are distinct."²¹⁰ Once a statute creates a substantive property interest in employment by limiting dismissal to cause, then procedural provisions cannot limit the extent of due process required by the Constitution.²¹¹ Accordingly, Idaho's provision purporting to prohibit teachers from challenging nonrenewal of a contract cannot deprive teachers of due process rights arising from their substantive property interest in employment, which derives from the implied constraint on official discretion not to renew Category A and B contracts.

The Idaho Code also seeks to withhold a property interest by labeling teachers' interest in contract renewal as "not property."²¹² Some scholars believe that state legislatures may label an interest as "not property" for procedural due process purposes.²¹³ However, permitting states to withhold a property interest in employment solely by resort to labels is inconsistent with *Loudermill*'s command that the hallmark of the *Roth/Perry* analysis is whether an independent source of authority creates a substantive interest in employment by constraining official discretion.²¹⁴ Furthermore, labeling an interest in contract renewal as "not property" contradicts the Court's pronouncement in *Gonzales* that "although the underlying substantive interest is created by an independent source, such as state law, *federal constitutional law* determines whether the interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause."²¹⁵ Following this

209. *Id.* at 540.

210. *Id.* at 541.

211. *Id.*

212. See IDAHO CODE § 33-514(2)(a) (2012), available at <http://www.legislature.idaho.gov/idstat/Title33/T33.htm> (current through 2012 legislative session) ("No property rights shall attach to a category A contract . . ."); *id.* § 33-514(2)(b) ("No property rights shall attach to a category B contract . . .").

213. See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1091-92 (1984) ("As *Bishop v. Wood* made clear, federal requirements could be negated if state law were interpreted to have created no property rights. . . . Thus, as long as the Court insists that due process protection requires a property interest and that state law is the only standard for property, it is virtually committed to accepting the state's control over the content of due process protection." (internal citation omitted)).

214. *Loudermill*, 470 U.S. at 541.

215. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005) (emphasis added) (internal quotation marks omitted). Although this Article argues that *Gonzales* signals a shift away from the *Roth/Perry* analysis and supplies a factor that could be used by the Court to introduce a new mode of analysis for determining the presence of a protected property interest, *Gonzales* did not

logic, Idaho cannot create a substantive property interest in contract renewal and simultaneously declare that teachers have no property interest in contract renewal without usurping the Court's role to decide whether the substantive interest is "property" entitled to due process protection.²¹⁶

In contrast to teachers with Category A or B contracts, Idaho teachers with grandfathered renewable contracts have a statutory "right" to contract renewal,²¹⁷ which confers a more definite claim of entitlement to employment for renewal purposes. However, Idaho's statutory scheme also gives a school board discretion to renew such contracts at lower pay rates and for shorter terms.²¹⁸ As a result, any "right to renewal" is of uncertain value, which undercuts the reliance interest of teachers with renewable contract status. Thus, under the *Roth/Perry* approach, while teachers on renewable contracts have some property interest in employment for the purpose of contract renewal, the Idaho Code reduces the intensity of that interest, which may reduce the amount of process due upon nonrenewal.

ii. Florida

Florida's scheme denies teachers any protected property interest in employment for purposes of contract renewal. Teachers who have completed a probationary period and meet certain criteria may be given annual contracts.²¹⁹ Although a district school board must have just cause to dismiss a teacher during an annual contract term,²²⁰ it may choose not to grant or renew annual contracts for any reason.²²¹ Accordingly, district school boards have discretion to deprive teachers of employment through nonrenewal.²²² Thus, Florida teachers with annual contracts have neither a property interest in contract renewal nor a right to due process before nonrenewal.

overrule *Roth* or *Perry* and purported to apply the *Roth/Perry* analysis. Accordingly, any effort to evaluate whether, under the *Roth/Perry* analysis, the Idaho Code creates a property interest in employment with regard to the renewal of teacher contracts must not ignore the dicta in *Gonzales*.

216. *See id.*

217. IDAHO CODE § 33-515(2).

218. *Id.* § 33-515(3).

219. FLA. STAT. ANN. § 1012.335(c)(2) (West 2011).

220. *Id.* § 1012.335(4).

221. *Id.* § 1012.335(1)(a).

222. Indeed, Florida's scheme only limits local school boards' discretion to renew, as opposed to not renew, a teacher's contract. A district school board may not renew an annual contract unless the district superintendent supports the teacher's candidacy and the teacher received certain combinations of performance ratings over the course of the immediate prior two- or three-year period. *Id.* §§ 1012.33(3)(a)–(b), 1012.335(2)(b)–(c).

B. Justifying a Departure from Roth/Perry: Three Regrets (Rationales)

Under the *Roth/Perry* approach, tenured teachers in all six states examined in this Article have a protected property interest in employment with respect to dismissal.²²³ Tenured teachers in five of these states, excluding Idaho, also would have a protected interest in employment with regard to contract renewal.²²⁴ However, in *Conner* and *Gonzales* the Court signaled an inclination to depart from the *Roth/Perry* analysis;²²⁵ the Court sounded similar themes in the course of restricting public employees' speech and equal protection rights in *Ceballos* and *Engquist*, respectively.²²⁶ *Conner* and *Gonzales* offer three rationales that the Court could use to discard the *Roth/Perry* analysis in the context of public teachers' due process claims.

1. *Roth/Perry* Is Not Properly Deferential to State and Local Officials

In *Conner*, the Court discarded an analysis similar to the *Roth/Perry* approach and reverted to its prior method of determining the presence of a protected interest in the prisoner/liberty context: whether a regulation causing deprivation of that interest imposed an "atypical and significant hardship" on the regulated person.²²⁷ In part, the Court was concerned that scrutiny of prison regulations for any constraints on official discretion did not show "appropriate deference to state officials trying to manage a volatile environment."²²⁸ The *Gonzales* Court showed a similar concern when it deferred to police officers' historic enforcement discretion, notwithstanding statutory constraints on officers' discretion to make enforcement decisions.²²⁹

The Court's reasoning in *Conner* can be exported from the prisoner/liberty context. The purpose behind the official discretion analysis in the liberty and property contexts is similar: to protect reliance on an interest subject to deprivation by the government.²³⁰ Moreover, the Court's reluctance in *Conner* to second-guess prison officials in the liberty context is equally applicable to government employers in the property context. The discretion formulation requires courts to stand in the shoes of government employers to determine whether their actions were subject to, and complied with, any

223. See *supra* Part III.A–F.

224. See *supra* Part IV.A.2.i (discussing discretionary renewal in Idaho).

225. See *supra* Part II.A.1–2.

226. See *supra* Part II.B.1–2.

227. *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995).

228. *Id.* at 482.

229. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–58 (2005).

230. *Conner*, 515 U.S. at 497–98.

constraints on discretion. Accordingly, applying the *Roth/Perry* approach in the public employment context shows little deference to state and local officials who, like the prison officials in *Conner*, are responsible for managing large facilities serving many people, often under difficult circumstances. Considering also the Court's deference to government employers in *Ceballos* and *Engquist*, concern about deference could be a contributing factor that persuades the Court to replace the *Roth/Perry* analysis with another method for determining the presence of a protected interest in the property/public employment context.

2. *Roth/Perry* Encourages Regulations that Treat People Unequally and Unfairly

In *Conner*, the Court expressed a second qualm with the *Roth/Perry* approach that also could be invoked in the public employment context: it creates a perverse incentive to vest excessive discretion in state and local officials who might use that discretion to treat regulated persons unfairly.²³¹ In part because of this possible influence on regulations defining the authority of prison officials, the Court stopped using the discretion formulation in the prisoner/liberty context and reverted to the atypical and significant hardship framework.²³²

The Court's rationale in *Conner* also can be used to justify discarding the *Roth/Perry* approach in the employment of public teachers. As discussed, *Conner* need not be limited to the prisoner/liberty context.²³³ Moreover, although the Court in *Conner* cited no evidence that state prison officials in fact received excessive discretion due to the Court's use of the discretion formulation,²³⁴ some state public teacher employment schemes contain evidence that the *Roth/Perry* approach actually influenced legislative decisions about how: (1) to regulate public teachers' employment generally; and (2) to grant education officials discretion to impede public teachers' due process rights in employment. Therefore, the perverse influence of the discretion formulation could prompt the Court to replace the *Roth/Perry* approach with the atypical and significant hardship standard in the public teacher employment context, just as it did in the prisoner/liberty context.

i. Evidence of *Roth/Perry*'s General Influence on State Legislatures

The *Roth/Perry* approach likely influenced schemes governing

231. *Conner*, 515 U.S. at 482.

232. *Id.* at 482–84.

233. *See supra* Part II.A.1 (summarizing *Conner*).

234. *See id.* at 482.

teacher employment in Oklahoma, Idaho, and Colorado. For instance, the Oklahoma legislature believed that the *Roth/Perry* approach required the state to provide due process to “career teachers” before termination.²³⁵ One provision states that teachers “*shall be entitled to all rights guaranteed under the circumstances by the United States Constitution.*”²³⁶ Another provision defines “career teacher pretermination hearing” in part as an opportunity “to ensure that the career teacher is afforded the *essential pretermination due process requirements* of notice and an opportunity to respond.”²³⁷ Although the Oklahoma legislature did not respond to the *Roth/Perry* approach by expanding official discretion over teachers’ employment, the *Roth/Perry* approach clearly influenced the provision requiring due process for “career teachers” who have a legitimate claim of entitlement to employment.

Additionally, the Colorado legislature wished to limit the number of teachers who could claim due process rights in employment under the *Roth/Perry* approach. A requirement that school districts give probationary teachers the reasons for contract nonrenewal does “not create any property right or contract right, express or implied.”²³⁸ The Colorado legislature apparently worried that providing reasons for nonrenewal could be construed as a constraint on official discretion not to renew a contract, thereby creating a protected property interest in employment.

The Idaho Code demonstrates even greater trepidation that teachers could be entitled to procedural due process under the *Roth/Perry* approach. Idaho’s scheme expressly attempts to disclaim that Category A and B teachers have no property interest in employment and therefore have no due process rights.²³⁹ Idaho legislators sought to preclude application of the *Roth/Perry* approach and thereby reduce the number of due process claims.²⁴⁰

235. See OKLA. STAT. tit. 70, § 6-101.3(6) (West, Westlaw through 2012 Sess.) (effective July 1, 2012); *id.* § 70-6-101.26(A).

236. *Id.* at § 70-6-101.26(A) (emphasis added).

237. *Id.* at § 6-101.3(6) (emphasis added).

238. COLO. REV. STAT. ANN. § 22-63-203(4)(b)(II) (West, Westlaw through Ch. 2 of First Reg. Sess. Gen. Assembly (2013)). However, such statements disclaiming no property right are inconsistent with the Court’s pronouncement in *Gonzales* that federal constitutional law determines whether a substantive interest created by state law merits procedural due process protection. See *supra* Part II.A.2.

239. IDAHO CODE §§ 33-514(2)(a)–(b), 33-515(1) (2012), available at <http://www.legislature.idaho.gov/idstat/Title33/T33.htm> (current through 2012 legislative session).

240. As discussed, under the *Roth/Perry* approach, Idaho legislators may not have been successful in their effort to limit teachers’ property interest in employment and corresponding procedural due process rights. However, as will be discussed, if the Court were to apply the

ii. Evidence that *Roth/Perry* Induced Legislators to Grant Official Discretion

The *Roth/Perry* analysis also may have induced the Colorado legislature to expand official discretion over decisions that have an effect equivalent to dismissal. Principals have discretion to reject teachers nominated to fill vacant positions.²⁴¹ After the longer of twelve months or two “hiring cycles,” school districts must place teachers who are rejected on unpaid leave.²⁴² The practical result of a principal’s discretion to reject placement of a teacher can be similar to dismissal.²⁴³

Because a principal’s rejection of a teacher does not necessarily deprive that teacher of employment,²⁴⁴ rejection may not trigger a due process issue. However, if rejection leads to unpaid leave and effectively deprives a teacher of employment, the teacher does not have a protected property interest in school placement because principals have discretion to reject teacher placements. Consistent with the Court’s concern in *Conner*, nothing prevents a principal from exercising this discretion unfairly. The Court could conclude that the *Roth/Perry* approach encouraged granting excessive discretion to Colorado principals to avoid creating due process rights. To remove that perverse incentive, the Court could decide to replace the *Roth/Perry* approach with *Conner*’s atypical and significant hardship standard.

Similarly, the Court could find that the *Roth/Perry* approach caused Idaho legislators to provide local officials with excessive discretion to avoid creating due process rights. Teachers with grandfathered renewable contracts have a right to contract renewal,²⁴⁵ but school district boards have discretion to reduce the salary and duration of a renewed contract.²⁴⁶ Although reducing the salary or term of a contract is not necessarily equivalent to nonrenewal, such actions deprive teachers of economic value. Moreover, significant reduction in salary could force a teacher not to accept a renewal offer, effectively giving the board discretion to remove teachers. Because the board has discretion to reduce salaries, teachers could not claim a protected

intended benefit factor to determine the presence of a protected property interest in employment, teachers in all states examined in this Article other than Illinois would not be entitled to procedural due process protection of employment. See *infra* Part V.

241. See COLO. REV. STAT. ANN. § 22-63-202(2)(c.5)(I).

242. *Id.* § 22-63-202(2)(c.5)(IV).

243. See *id.*

244. See *id.* §§ 22-63-202(2)(c.5)(III)(A), 22-63-202(2)(c.5)(IV).

245. IDAHO CODE § 33-515(2).

246. *Id.* § 33-515(3).

property interest in compensation. Accordingly, the Court could find that the *Roth/Perry* approach induced the Idaho legislature to grant excessive official discretion over renewal decisions for the purpose of preventing teachers from having due process rights. For that reason, the Court could set aside the *Roth/Perry* analysis.

In sum, the Court's primary concern in *Conner*—that a focus on official discretion created a perverse incentive to give state and local officials excessive discretion for the purpose of avoiding the creation of due process rights—is at least as valid in the public teacher employment context as it is in the prison context. The Court reasonably could find that it should abandon the *Roth/Perry* approach to eliminate that incentive.

3. *Roth/Perry* Undercuts the Primacy of Federal Constitutional Law

In *Gonzales*, the Court justified its holding that state law did not create a protected property interest in enforcement of a restraining order in part by announcing that federal constitutional law, not state law, determines whether the Due Process Clause protects a property interest.²⁴⁷ That novel idea is inconsistent with *Roth* and *Perry*, which held that state law creates substantive property interests protected by procedural due process.²⁴⁸

The Court could use the primacy of federal constitutional law as another reason to replace the *Roth/Perry* approach with the atypical and significant hardship standard. *Gonzales* presented an atypical fact pattern, but the Court did not limit its decision to the facts at issue.²⁴⁹ Moreover, *Gonzales* showed discomfort with a broad conception of property that suggests unease with the *Roth/Perry* approach generally.²⁵⁰ Therefore, the principle that the Constitution determines whether an interest created by state law is protected by due process could be invoked by the Court to discard the *Roth/Perry* approach in the public employment context.

The *Gonzales* rationale also positions the Court to apply the atypical and significant hardship framework. If federal constitutional law decides whether an interest created by state law is protected, then the question of whether a person has a legitimate claim of entitlement under the *Roth/Perry* approach is irrelevant.²⁵¹ The Court would need a way

247. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–57 (2005).

248. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). *See also* Hugenberger, *supra* note 76, at 801.

249. *See Gonzales*, 545 U.S. at 756–57.

250. *See* Hugenberger, *supra* note 76, at 800–01.

251. The Court in *Gonzales* avoided the claimant's legitimate claim of entitlement to police

to decide whether federal constitutional law recognizes due process protection,²⁵² and the atypical and significant hardship framework could furnish that method.

V. A NEW APPROACH AND A NEW REALITY: SHATTERING ASSUMPTIONS ABOUT TEACHERS' DUE PROCESS RIGHTS

Conner suggested an analytic framework that could replace the *Roth/Perry* approach in cases involving property interests under the Due Process Clause: whether an independent source of authority that deprives a regulated party of a property interest imposes an atypical and significant hardship on that party.²⁵³ Additionally, *Conner* and *Gonzales* suggested two factors—the intended benefit factor and incidental benefit factor, respectively—that could be used to implement the atypical and significant hardship framework.²⁵⁴ The Court could use these factors to assert the primacy of federal constitutional law in determining the presence of a protected property interest in tenured teacher employment.

Although the incidental benefit factor is inconsistent with the Court's procedural due process tradition in the public employment setting, if the Court applied the intended benefit factor to the circumstances of teachers working under performance-based employment schemes in Illinois, Michigan, Colorado, Idaho, Florida, and Oklahoma, tenured public teachers in these states would not have a protected property interest in employment.

A. *An Alternative to Roth/Perry: "Atypical and Significant Hardship"*

In *Conner*, the Court abandoned an analysis similar to the *Roth/Perry* approach in the prisoner/liberty context and instead focused on whether a regulation "impose[d] atypical and significant hardship . . . in relation to the ordinary incidents of prison life."²⁵⁵

Conner's framework may be used when a party claims a protected property interest. Admittedly, prison regulations differ from statutes governing public teachers' employment. Prison regulations impair

protection by declaring that state law did not actually require police officers to enforce restraining orders, notwithstanding the plain language of the statute. *Gonzales*, 545 U.S. at 765–66.

252. Perhaps sensing that need, the Court used two novel factors in *Gonzales*: (1) a protected property interest must have a monetary value; and (2) a protected property interest must not be incidental to the provision of a traditional government service. *Gonzales*, 545 U.S. at 766–67. However, neither of those factors is relevant to the Court's possible new approach in the public teacher employment setting.

253. See *supra* Part II.A.1.

254. For a discussion of these factors, see *infra* Part V.B.1–2.

255. *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

prisoners' actual liberty, which the Due Process Clause expressly protects. By contrast, employment statutes implicate the Due Process Clause less directly because public employment only sometimes is "property." *Roth* synthesized the Court's prior holdings and fashioned a mode of analysis to determine when an interest in public employment was "property," but the idea that due process sometimes should protect public employment was not novel.²⁵⁶

Thus, *Conner's* atypical and significant hardship framework is a possible alternative to the *Roth/Perry* approach in the property/public employment context. The atypical and significant hardship framework recognizes a protected liberty interest when a regulation excessively burdens an individual's liberty interest with respect to the totality of the circumstances. Similarly, the Court could inquire whether a state statute authorizing removal of tenured public teachers burdens teachers' interest in employment so excessively in the totality of circumstances that it triggers due process protection.

Application of this framework would rely on subjective judgments. From a teacher's perspective, a statute that provides for dismissal or nonrenewal on the basis of performance evaluation ratings—founded substantially on student test scores influenced in part by factors beyond the teacher's control—could impose an atypical and significant hardship on the teacher's employment interest. That is to say, the most dedicated and well-prepared teachers could have difficulty improving student test scores. Accordingly, making those scores a significant factor in job security could impose an excessive burden. Conversely, school

256. Even before *Roth* the Court recognized that public employment could be "property" for due process purposes, especially when dismissal was "arbitrary." See, e.g., *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576–77 (1972) (citing *Slochower v. Bd. of Educ.*, 350 U.S. 551, 559 (1955)) (holding that although a tenured professor at a public college may not have a constitutional right to his job, his discharge for invoking his Fifth Amendment right not to incriminate himself in response to questions about his affiliation with the Communist Party, without inquiry into professor's fitness as employee, violated the Due Process Clause's protection against "arbitrary action"); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (holding that dismissal of public employees for failure to take a loyalty oath was an "assertion of arbitrary power" that violated the Due Process Clause because the oath did not distinguish between innocent and knowing association with organizations on Attorney General's list)). Although *Slochower* and *Wieman* could be viewed as anomalous attempts by the Court to protect employees from becoming victims of the "red scare," both decisions recognized that public employees had an interest in employment sufficient to protect them from "arbitrary" dismissal. *Wieman*, 344 U.S. at 191; *Slochower*, 350 U.S. at 559. Moreover, *Roth* broadened application of those cases to public employment generally by recognizing the principle that public employees have an interest that "proscrib[es] summary dismissal from public employment without hearing or inquiry required by due process." *Roth*, 408 U.S. at 577 (quoting *Connell v. Higginbotham*, 403 U.S. 207, 208 (1970)). Ironically, those early cases' protection of public employees from arbitrary adverse decisions greatly resembles the class-of-one claim in *Engquist*, which the Court held was incompatible with the public employment setting. See *id.* at 576–77.

administrators might believe that the state's interest in improving student outcomes and reducing administrative costs justifies using student test scores to evaluate teachers. Additionally, they could show that in most settings, employment is at will, and employers evaluate employees according to standards developed solely by employers. By contrast, under all of the statutory schemes discussed in this Article, public teachers retain some job security and, under most of those schemes, teachers have a degree of input during the performance evaluation process. From this perspective, linking public teachers' employment to performance evaluation ratings does not impose atypical and significant hardship.

Balancing the subjective perspectives of teachers and education officials in a fair and principled manner is an inherent difficulty of the atypical and significant hardship framework. To mitigate this problem, the Court could use the incidental benefit and intended benefit factors to focus on specific facts relevant to whether regulations permitting removal based on performance are excessively burdensome. These factors also would allow the Court to eliminate the *Roth/Perry* approach's perverse incentives, show greater deference to state and local officials, and assert the primacy of federal constitutional law.

B. Implementation: The Incidental Benefit and Intended Benefit Factors

The incidental benefit and intended benefit factors are two possible ways to implement the atypical and significant hardship framework. The incidental benefit factor is inconsistent with the Court's due process tradition in the public employment context and therefore is not applicable to public teachers' due process rights in employment. The intended benefit factor, however, is a viable method to determine the presence of a protected property interest in the public employment setting. If the Court adopted the intended benefit factor, tenured public teachers in all states would not have a protected property interest in, or a right to due process before removal from, employment.

1. Overview: Incidental Benefit Factor

In *Gonzales*, the Court stated that an individual's government-provided interest is not protected if it is merely incidental to the provision of traditional government services.²⁵⁷ The Court held that a woman did not have a property interest in enforcement of a restraining order in part because any benefit from enforcement was merely

257. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–67 (2005).

incidental to the government's provision of police services.²⁵⁸ Accordingly, the woman could not claim a due process violation when the police did not enforce the restraining order, even though a statute appeared to mandate enforcement and the woman did not receive an opportunity for a hearing.²⁵⁹

The Court could derive the incidental benefit factor in the public employment context from its analysis in *Gonzales*, which would examine whether an interest created by a source of authority is merely incidental to the provision of a traditional government service. By definition, deprivation of an interest that arises as a mere incident to the government's provision of a traditional service does not impose an excessive burden. "Incident" means "something dependent upon, appertaining to or subordinate to, or accompanying something of greater or principal importance, something arising or resulting from something else of greater or principal importance."²⁶⁰ Similarly, "incidental" means "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose."²⁶¹ Therefore, an incidental benefit arising from the provision of a traditional government service is secondary to, and of lesser importance than, that service.

Although an incidental benefit may itself be important (the plaintiff in *Gonzales* no doubt valued enforcement of the restraining order), it never can be more important than the principal government service. For that reason, the public's interest in a government service must have priority over an individual's interest in an incidental benefit. Therefore, deprivation of an incidental benefit cannot impose an atypical and significant hardship on an individual for due process purposes. This logic could help explain the harsh result in *Gonzales*. The public interest in vesting enforcement discretion in police officers outweighs an individual's incidental interest in enforcement. Therefore, in light of the totality of the circumstances, the police department's failure to enforce the restraining order did not impose an excessive burden on the plaintiff for due process purposes, even though the woman endured severe personal hardship. Accordingly, the woman's interest in enforcement was not protected by procedural due process.

The incidental benefit factor addresses many of the concerns the

258. *Id.* at 767.

259. *Id.*

260. BLACK'S LAW DICTIONARY 762 (6th ed. 1994) (emphasis added).

261. *Id.* (emphasis added).

Court expressed in *Conner* about the *Roth/Perry* analysis.²⁶² First, the incidental benefit factor would be less likely than the *Roth/Perry* approach to protect an interest when state officials did not primarily intend to confer a benefit on a regulated party because barring protection of incidental benefits would preclude protection of many unintended benefits. Second, the incidental benefit factor would not require close scrutiny of independent sources of authority, thereby conserving judicial resources and showing greater deference to state and local officials. Third, because the incidental benefit factor does not focus on official discretion, it would not encourage rules that give excessive discretion to administrators. Finally, the incidental benefit factor would facilitate the Court's exercise of constitutional judgment as to whether an interest is entitled to procedural due process protection by providing a standard to determine whether a source of authority imposes an atypical and significant hardship.

Because the incidental benefit factor responds to the Court's criticisms of the *Roth/Perry* approach, it could be a way to determine whether a property interest is protected by due process.

2. Overview: Intended Benefit Factor

The intended benefit factor derives from *Conner*.²⁶³ In *Conner*, a prison regulation did not create a liberty interest in protection from solitary confinement in part because the "regulation [was] *primarily designed* to guide correctional officials in the administration of a prison [and was] not designed to confer rights on inmates."²⁶⁴ Thus, an important factor in the Court's conclusion that the prisoner did not have a liberty interest was that state officials did not primarily intend to benefit prisoners by requiring a finding of guilt based on substantial evidence in disciplinary hearings.²⁶⁵ The intended benefit factor would inquire whether officials who crafted a source of authority primarily intended to confer a right or benefit on a regulated individual or class of people. If so, then the Due Process Clause would protect the regulated parties' interest; if not, then the regulated parties would not be entitled to due process before government deprivation of that interest.

Although the *Conner* Court did not articulate a relationship between official intent and the atypical and significant hardship standard, one can infer such a connection. On the one hand, if state officials in *Conner* had primarily intended to benefit prisoners by protecting them

262. See *supra* Part IV.B.

263. *Sandin v. Conner*, 515 U.S. 472, 481–82 (1995).

264. *Id.* (emphasis added).

265. See *id.*

from solitary confinement, then “in relation to the ordinary incidents of prison life,” deprivation of that protection would be an atypical and significant hardship. On the other hand, if (as the Court found) state officials primarily intended the regulation to guide prison administration, then solitary confinement is consistent with the experience of prison life and consequently not an excessive burden. Therefore, determining whether officials primarily intended to confer a benefit on a person claiming a protected interest could be a factor used to decide whether deprivation of that interest imposes an atypical and significant hardship.

The intended benefit factor effectively responds to the Court’s concerns about the *Roth/Perry* approach. First, by definition, the intended benefit factor would not require due process when officials did not intend to confer a benefit on an individual. Second, the intended benefit factor would show greater deference to state officials by enforcing their intent. Third, focusing on official intent instead of discretion would not create a perverse incentive to give state and local officials excessive discretion.²⁶⁶ Rather, the intended benefit factor would encourage officials to express their intent when crafting statutes or regulations, which in turn would give all parties notice of the presence or absence of a protected interest. Such notice would reduce uncertainty and disputes about constitutional protection. Finally, the intended benefit factor is a way to channel the Court’s prerogative to determine whether federal constitutional law protects an interest.

Therefore, the Court could consider whether states primarily intended to confer a benefit on public teachers by linking teachers’ employment to performance measures based largely on student achievement.

C. Application of Intended Benefit and Incidental Benefit Factors

This Section applies the incidental benefit and intended benefit factors to the six state schemes examined in this Article. While the incidental benefit factor is inconsistent with the Court’s due process

266. One could argue that a focus on intent merely would shift discretion and the potential for unfair decisions from local officials to judges. Admittedly, judicial inquiries into legislative intent are not purely objective and can be manipulated. However, courts have institutional experience construing a drafter’s intent in statutes and other documents. Settled principles of interpretation guide courts’ analysis. Without maligning local officials or exaggerating judges’ virtue, it is fair to say that judges are more likely to exercise discretion responsibly. Additionally, local officials’ discretion over regulated parties is different than judicial discretion to interpret legislative intent because legislatures are in a better position than regulated parties to protect themselves from abusive or erroneous exercise of discretion. If the Court began to apply the intended benefit factor, legislatures could enact statutory schemes with substantive terms that clearly define intended beneficiaries.

tradition in the public employment setting, application of the intended benefit factor would deny tenured public teachers of a protected property interest in employment.

1. Incidental Benefit Factor: Inconsistent with Due Process Tradition

The Court could use the incidental benefit factor to determine whether an independent source of authority imposes an atypical and significant hardship on public teachers' interest in employment. In *Gonzales*, the Court found no protected property interest in enforcement of a restraining order because such enforcement is merely incidental to the provision of a traditional government service.²⁶⁷ Like policing, public education is a traditional government service, and like enforcement of a restraining order, the employment of teachers is merely incidental to educating children. Based on the Court's reasoning in *Gonzales*, public teachers' interest in employment is not protected by due process.

However, the incidental benefit factor would preclude nearly all public employees who perform functions "that government actors have always performed"²⁶⁸ from claiming a protected property interest in employment, which is inconsistent with the Court's due process tradition in the public employment context. The incidental benefit factor is tantamount to a categorical rule against due process protection of public employment, but the Court never has categorically denied public employees such protection. Moreover, the incidental benefit factor reflects a balancing of the government's interest and the individual's interest, which also is inconsistent with the Court's due process tradition in the public employment context. Unlike the Court's First Amendment tradition governing public employees,²⁶⁹ the Court's procedural due process tradition has not relied on balancing. Rather, the Court has attempted to define the nature of an interest and its value to the person seeking protection, including by examining whether an interest is a right or a privilege,²⁷⁰ is something to which a person has a legitimate claim of entitlement,²⁷¹ or is something that, if deprived, would impose on a person an atypical and significant hardship.²⁷² Although the incidental benefit factor may appear to characterize the relative value of an interest by deeming it "incidental," or secondary, by

267. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–68 (2005).

268. *Id.* at 766–67.

269. *See supra* notes 96–97 and accompanying text.

270. *See supra* notes 13–16 and accompanying text.

271. *See supra* Part I.B–C (summarizing *Roth* and *Perry*).

272. *See supra* notes 67–71 (explaining *Conner's* atypical and significant hardship test).

reference to a traditional government service, in effect the incidental benefit factor categorically would preclude due process protection of public employment without attempting to evaluate the nature and importance of the interest itself. Accordingly, the incidental benefit factor is inconsistent with the Court's due process tradition in the public employment context and is not a viable method to implement the atypical and significant hardship framework in the context of public teachers' employment.

2. Intended Benefit Factor: The Demise of Teachers' Due Process Rights

Rather than adopting the incidental benefit factor analysis, the Court could apply *Conner's* intended benefit factor in the public employment context. To determine whether statutory performance-based employment schemes impose an atypical and significant hardship on tenured public teachers' interest in employment, the Court would determine whether the legislature primarily intended to confer a benefit on teachers.²⁷³ If the Court were to focus on individual statutory provisions, such as those limiting the grounds for dismissal of tenured teachers in all six states examined herein, it could find a primary intent to benefit tenured teachers. However, application of the intended benefit factor to a single provision is inconsistent with the atypical and significant hardship framework, which is based on the totality of the circumstances.²⁷⁴ Any examination of legislative intent should encompass the entire statutory scheme.²⁷⁵ Accordingly, the following Subsections evaluate whether each state's laws demonstrate that the legislature primarily intended to benefit tenured public teachers.

In sum, all of the schemes examined in this Article show that the legislature primarily intended to benefit *students*, not teachers. This conclusion is rooted in a common feature of those schemes: teacher

273. This analysis focuses on statutory evidence of primary intent to confer a benefit or right on public teachers. A court could examine other sources to infer intent to confer a benefit on teachers, such as regulations promulgated pursuant to authorizing legislation. At the time this Article was researched and drafted, regulations to implement state statutory schemes were in varying stages of development. Moreover, within a state, regulations could differ among school districts. Therefore, for illustrative purposes, a statutory analysis permits the most comprehensive and expedient comparative analysis of application of the intended benefit factor.

274. See *Sandin v. Conner*, 515 U.S. 472, 484–87 (1995).

275. For example, in *Conner*, the Court decided that a prison regulation did not give rise to a procedural due process right after evaluating the conditions imposed on a prisoner as a result of the totality of applicable rules and regulations. *Id.* at 485–87. The Court found that the regulation did not impose an atypical and significant hardship because, in the context of applicable prison regulations, the hardship imposed by the regulation at issue was not so severe as to deprive the prisoner of liberty for due process purposes. *Id.*

performance evaluations that are based in large part on the learning growth or achievement of students. Although some state provisions benefit teachers by providing professional development opportunities intended to improve teachers' skills and enhance job security, these benefits are not ends in themselves. Rather, they are means to achieve the primary purpose of benefitting students by improving student performance. Because none of the schemes primarily intend to benefit tenured teachers, dismissal of public teachers based on performance evaluations would not impose an atypical and significant hardship on those teachers, and they would not have a property interest in employment protected by due process.

i. Illinois

Of the six states examined in this Article, the primary intent of Illinois' scheme is the most ambiguous. Beyond Illinois' just-cause dismissal provision,²⁷⁶ several provisions suggest the legislature's intent to benefit teachers. Illinois provides relatively robust professional development opportunities to teachers who receive poor performance evaluation ratings. A teacher who receives a "needs improvement" rating must receive a professional development plan within thirty days.²⁷⁷ Similarly, a teacher who receives an "unsatisfactory" rating must be given a remediation plan within thirty days if the evaluator deems the teacher's deficiencies remediable.²⁷⁸ Professional development and remediation plans give teachers a blueprint to improve their skills²⁷⁹ and also can protect teachers from removal based on an "unsatisfactory" rating.²⁸⁰ Those professional development opportunities clearly are intended to benefit teachers.

Unlike most other states, the Illinois legislature also sought to protect teachers by giving them a role in the layoff and recall process. Every school district must create a committee of school board members and teachers to oversee layoff and recall procedures and to assure that teachers with seniority are not targeted unfairly for layoffs.²⁸¹ The committee has the power to adjust the groupings of teachers used to determine the order of layoffs and recalls.²⁸² Therefore, although layoff and recall priorities are determined largely by performance evaluation

276. See 105 ILL. COMP. STAT. ANN. 5/34-85(a), 10-22.4 (West 2012).

277. *Id.* § 5/24A-5(h).

278. *Id.* § 5/24A-5(i).

279. See *id.* § 5/24A-5(h)-(i).

280. See *id.* § 5/24A-5(m).

281. *Id.* § 5/24-12(c).

282. *Id.*

ratings,²⁸³ the Illinois legislature also intended to protect teachers from pretextual layoffs.²⁸⁴

These intended benefits to teachers, however, are offset by the composition of teachers' performance evaluation ratings, which shows that the Illinois legislature designed its scheme primarily to benefit students. The Illinois scheme requires that measures of student growth be a "significant factor in the rating of a teacher's performance."²⁸⁵ Mandating that student growth be a significant factor in teachers' evaluations reframes the scheme's professional development opportunities as a means to accomplish an end other than enhancing teachers' skills and protecting teachers from removal: improving student outcomes. In context, professional development is valuable only to the extent that it benefits students by improving student test scores.

Still, as compared to other states, Illinois' regime is favorable to teachers. Other states require that at least fifty percent of teachers' evaluations be based on student growth or performance. By contrast, "significant factor" is a vague term that permits Illinois school districts to decide how much weight to give to student growth, which does not preclude making student growth less than fifty percent of a teacher's evaluation. A performance evaluation scheme that provides professional development opportunities and gives majority weight to factors other than student performance—such as qualitative assessments of teachers' preparation, classroom management, and pedagogy—could be construed as demonstrating a primary intent to benefit teachers. Yet, in the totality of the circumstances, making student outcomes a "significant factor" in teachers' performance evaluations is sufficient to show that the primary purpose of the evaluation scheme is to benefit students, and that any benefit to teachers is merely a means to that end.

Furthermore, school officials may dismiss teachers on the basis of performance without developing a remediation plan when a teacher has irreparable deficiencies.²⁸⁶ Evaluators decide whether deficiencies are "irreparable" and therefore have the power to remove teachers with poor performance ratings without providing a remediation plan.²⁸⁷ That power erodes the professional development and job security benefit of remediation plans and shows that the legislature intended to give evaluators the power to accomplish the primary goal of improving

283. *Id.* § 5/24 12(b).

284. *See id.* § 5/24-12(c).

285. *Id.* § 5/24A-5(c).

286. *Id.* § 5/24A-5(n).

287. *See id.*

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student growth without the unintended consequence of protecting teachers with irremediable deficiencies.

Making student test scores a significant factor in teacher evaluations is part of an effort to hold teachers accountable for objective educational outputs, not merely the quality of inputs. Students, not teachers, are the primary intended beneficiaries of the Illinois scheme. Therefore, removing tenured teachers on the basis of performance pursuant to that scheme would not impose an atypical and significant hardship on teachers that would trigger due process protection of employment.

ii. Michigan

Although Michigan's scheme includes several provisions that benefit teachers, the totality of the circumstances shows that the Michigan legislature primarily intended to benefit students, such that removal of teachers based upon performance evaluation ratings would not impose an atypical and significant hardship.

Some provisions protect teachers from removal and provide opportunities for teachers to improve their skills. Similar to just-cause dismissal provisions in other states, Michigan prohibits arbitrary and capricious dismissal of teachers,²⁸⁸ which offers relative job security compared to at-will employment. Additionally, Michigan provides teachers with robust professional development opportunities to enhance their skills and protect them from adverse employment decisions.²⁸⁹ Indeed, Michigan's scheme aims to assure that teachers "are given ample opportunities for improvement."²⁹⁰ Evaluations should be used to retain and cultivate teachers, including by "providing relevant coaching, instruction support, or professional development."²⁹¹ Although evaluations also should be used to remove ineffective tenured teachers, such removal should occur only after teachers "have had ample opportunities to improve."²⁹²

Accordingly, evaluations should provide "timely and constructive feedback."²⁹³ To this end, annual year-end evaluations must include specific performance goals, developed in consultation with teachers, designed to improve effectiveness.²⁹⁴ Evaluations also must

288. MICH. COMP. LAWS ANN. § 38.101 (West 2011).

289. *Id.* § 380.1249(1)(a)–(d).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* § 380.1249(2)(a)(iii).

recommend training.²⁹⁵ Teachers who receive “minimally effective” or “ineffective” ratings must receive an “individualized development plan,” also developed with the teacher.²⁹⁶ Such teachers also must receive a mid-year evaluation based on that plan which sets performance goals for the remainder of the school year, recommends additional training, and results in a written improvement plan “to assist the teacher to improve his or her rating.”²⁹⁷ Michigan further encourages school districts to provide mentors or coaches to teachers who receive “ineffective” or “minimally effective” ratings.²⁹⁸ Collectively, these provisions show the strongest commitment of any state examined in this Article to helping teachers develop professionally and avoid dismissal on the basis of performance, which weighs strongly in favor of finding that the Michigan legislature intended to benefit teachers.

However, Michigan makes student achievement the predominant basis for teachers’ performance ratings, which shows that Michigan’s commitment to professional development is primarily intended to benefit students. The relative significance of data on student achievement starts at twenty-five percent of a teacher’s rating during the 2013–2014 school year and increases to fifty percent during and after the 2015–2016 school year.²⁹⁹ This phased process may be intended to protect teachers from any adverse effects of the evaluation system’s initial implementation. Nevertheless, by choosing to make student achievement fifty percent of the measure of teacher performance, the legislature demonstrated that evaluating and enhancing teachers’ skills primarily is a means to help students.

Michigan’s layoff and recall provisions further reveal that students, not teachers, are the primary intended beneficiaries of teacher performance evaluations. Layoffs and recalls must be based on “retaining effective teachers” and must assure that teachers with “ineffective” ratings do not get preference over those with higher ratings.³⁰⁰ The majority basis for layoff and recall decisions must be individual teacher performance, which is determined predominantly by evidence of student growth.³⁰¹ Michigan’s layoff and recall provisions further demonstrate that the state’s performance evaluation system,

295. *Id.*

296. *Id.* § 380.1249(2)(b)(i)–(iii).

297. *Id.*

298. *Id.*

299. *Id.* § 380.1249(2)(a)(i).

300. *Id.* § 380.1248(1)(b).

301. *Id.* § 380.1248(1)(b)(i)(A)–(D).

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including professional development opportunities, is designed primarily to benefit students. Accordingly, depriving tenured teachers of employment would not impose an atypical and significant hardship on teachers giving rise to an interest in employment protected by due process.

iii. Colorado

Although Colorado's scheme includes provisions more favorable to teachers as compared to the schemes in Illinois and Michigan, other provisions show that the legislature intended primarily to benefit students rather than teachers. Like other states, Colorado's just-cause dismissal provision gives teachers job security compared to at-will employment.³⁰² The Colorado scheme also gives teachers some protection in the event of layoffs by requiring school districts to include teachers in policymaking related to layoff decisions.³⁰³ Additionally, one express purpose of Colorado's performance evaluation system is to measure teachers' professional growth and development.³⁰⁴ The legislature created a "council for educator effectiveness" to give teachers "meaningful opportunity" to improve performance and share "effective practices" with other teachers.³⁰⁵ All evaluations must include an "improvement plan" that recommends how to enhance performance, including through education and training.³⁰⁶ Teachers who receive "ineffective" ratings may be given a remediation plan and the opportunity to improve their rating.³⁰⁷ These provisions augment teachers' skills and protect them from removal based upon performance.

However, other Colorado provisions provide context that shows that the legislature primarily intended to benefit students. Another purpose of the council for educator effectiveness is to assure that at least fifty percent of teacher evaluations are based on measures of student academic growth.³⁰⁸ Another provision independently requires that student academic growth make up fifty percent of teachers' ratings.³⁰⁹ Moreover, the goal of teachers' evaluations is to "improve[e] student academic growth."³¹⁰ Accordingly, Colorado's professional

302. COLO. REV. STAT. ANN. § 22-63-301 (West, Westlaw through Ch. 2 of First Reg. Sess. Gen. Assembly (2013)).

303. *Id.* § 22-63-202(2)(c.5)(III)(B).

304. *Id.* § 22-9-106(1)(d).

305. *Id.* § 22-9-105.5(2)(c).

306. *Id.* § 22-9-106(3)(a)-(b).

307. *Id.* § 22-9-106(4.5)(b).

308. *Id.* § 22-9-105.5(2)(c).

309. *Id.* § 22-9-106(1)(e)(II).

310. *Id.* § 22-9-105.5(3)(a).

development measures ultimately and primarily are intended to benefit students.

Other Colorado provisions further undercut any argument that the legislature primarily intended to benefit teachers. One provision bars the use of seniority to determine whom to layoff, except as a tie breaker and only if doing so “*is in the best interest of the students* enrolled in the school district.”³¹¹ More significantly, principals may refuse to fill job vacancies with even well-qualified applicants, showing that providing teachers job security was not the primary intent of Colorado’s scheme.³¹² Although rejected teachers who have an “effective rating” are placed in a “priority hiring pool,”³¹³ even those teachers are placed on unpaid leave after the longer of twelve months or two hiring cycles.³¹⁴ Therefore, although teachers technically can be dismissed only for just cause, including poor performance, principals can bar even highly rated teachers from active service and relegate them to an unpaid status that is similar to unemployment. This power undercuts teachers’ real job security and calls into question whether the legislature intended to confer any such benefit at all. As a result, deprivation of tenured teachers’ employment pursuant to Colorado’s scheme does not impose an atypical and significant hardship that triggers procedural due process rights.

iv. Idaho

Compared to Illinois, Michigan, and Colorado, few Idaho provisions could be construed as conferring a benefit on teachers. As in other states, teachers may not be suspended or dismissed at will,³¹⁵ which gives teachers a measure of job security during a contract term. Additionally, teachers with grandfathered tenure status have a right to contract renewal,³¹⁶ but the benefit of that right is diluted by the board of trustees’ unilateral power to change the salary and duration of a renewable contract.³¹⁷ Although these provisions give teachers some job security, they do not show strong legislative intent to benefit teachers.

311. *Id.* § 22-63-202(2)(c.5)(IV) (emphasis added).

312. *See id.* § 22-63-202(2)(c.5)(I).

313. *See id.* § 22-63-202(2)(c.5)(III)(A) (“Any active nonprobationary teacher who was deemed effective during the prior school year and has not secured a mutual consent placement shall be a member of a priority hiring pool . . .”).

314. *Id.* § 22-63-202(2)(c.5)(IV).

315. IDAHO CODE § 33-513(5) (2012), available at <http://www.legislature.idaho.gov/idstat/Title33/T33.htm> (current through 2012 legislative session).

316. *Id.* § 33-515(2).

317. *Id.* § 33-515(3).

More glaringly, the legislature attempted to deny teachers procedural due process protection by expressly disclaiming any property interest in teachers' employment. Under the intended benefit factor analysis, these disclaimers are clear evidence of legislative intent.³¹⁸ Although a federal court, not the state, ultimately has the power to determine whether federal constitutional law recognizes a protected interest,³¹⁹ the intended benefit factor seeks to honor legislative intent. Idaho's disclaimers are highly relevant to application of the intended benefit factor. Absent countervailing substantive evidence of legislative intent primarily to confer a benefit on teachers, the Idaho legislature's express disclaimer of any protected property interest is sufficient to find that the legislature did not primarily intend to benefit teachers.

Moreover, the substance of Idaho's scheme shows that the legislature primarily intended to benefit students. Teacher performance ratings in Idaho must be at least fifty percent based on "objective measures of growth in student achievement."³²⁰ Idaho's predominant focus on student achievement demonstrates that evaluating and improving teacher performance primarily is a means to improve students' educational growth. This student-focused mentality, combined with Idaho's express intent not to give teachers a protected property interest in employment, shows that the legislature primarily intended to benefit students, not teachers. Thus, depriving tenured teachers of employment based upon performance would not impose an atypical and significant hardship on teachers that would give rise to a protected interest in employment.

v. Florida

The totality of the circumstances demonstrates that the Florida legislature primarily intended its scheme governing public teacher employment to benefit students. Nevertheless, some provisions benefit teachers. Like the other states analyzed in this Article, Florida's scheme limits dismissal of teachers to "just cause,"³²¹ which gives Florida

318. Whereas under the *Roth/Perry* approach, such disclaimers may not be effective to prevent creation of a property interest. One of the Court's chief complaints in *Conner* about the *Roth/Perry* approach was the possibility that an independent source of authority inadvertently could create a property interest in a benefit, even when a state did not intend to confer that benefit on the regulated party. See *Sandin v. Conner*, 515 U.S. 472, 481–82 (1995). Application of the *Roth/Perry* approach to the Idaho scheme could lead to just that disfavored result. By contrast, application of the intended benefit factor would avoid that result, which further supports the conclusion that the Court could abandon the *Roth/Perry* analysis and use the intended benefit factor to determine the presence of due process rights in the public employment context.

319. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–57 (2005).

320. IDAHO CODE § 33-514(4).

321. FLA. STAT. ANN. § 1012.335(4) (West 2011).

teachers job security during the term of their employment contract. Additionally, certain provisions give teachers modest professional development benefits. School districts should provide “appropriate” professional development opportunities, and must provide recommendations and support to teachers who receive poor ratings to help improve performance.³²² Florida’s scheme also involves teachers in the process of forming evaluation standards.³²³ These provisions grant benefits that enhance teachers’ professional skills and job security.

However, compared to Illinois and Michigan in particular, Florida’s professional development provisions are vague, leaving the details to local school districts that may not implement effective professional development programs.³²⁴ Moreover, Florida’s emphasis on teacher assistance and support is comparatively modest. Therefore, although Florida’s regime includes professional development that may benefit teachers, Florida’s commitment to professional development is relatively weak.

Other provisions strongly suggest that the Florida legislature primarily intended to benefit students, not teachers. Florida’s scheme evaluates teacher performance “*for the purpose of increasing student learning growth* by improving the quality of instructional, administrative, and supervisory services.”³²⁵ Florida makes explicit that teacher enrichment is a means to benefit students, not a free-standing goal that primarily benefits teachers (whereas this provision can only be inferred from other states’ regimes). This relationship between enhancing instruction and improving student learning growth recurs throughout Florida’s scheme. Moreover, the evaluation system must support effective instruction, student learning growth, and include a process for monitoring and evaluating the effectiveness of the system in carrying out its goals.³²⁶

Other provisions also show that Florida’s scheme was not primarily intended to benefit teachers. Similar to Michigan, Colorado, and Idaho, at least fifty percent of teacher evaluations must be based on student learning growth.³²⁷ Also, all teachers hired after July 1, 2011, must initially receive one-year contracts.³²⁸ Although teachers in Florida

322. *Id.* § 1012.34(2)(b).

323. *Id.* § 1012.34(2)(e).

324. *Id.* § 1012.34(2)(b).

325. *Id.* § 1012.34(1)(a) (emphasis added).

326. *Id.* § 1012.34(2)(a), (h).

327. *Id.* § 1012.34(3)(a)(1). If less than three years of data about students is available, the percentage may be reduced to not less than forty percent. *Id.* § 1012.34(3)(a)(1)(a).

328. *Id.* § 1012.335(2)(c).

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may not be dismissed during a contract term without just cause, renewal of annual contracts depends on a district superintendent's recommendation and satisfaction of performance-based conditions.³²⁹ Moreover, the school board need not renew a teacher's contract even if the teacher receives a recommendation and qualifying performance ratings.³³⁰ As a result, Florida teachers have little job security, which strongly suggests that teachers are not the primary intended beneficiary of Florida's performance-evaluation scheme. Finally, in the event of layoffs, school employees must be retained based on "educational program needs" and performance evaluations, with lowest-performing employees released first.³³¹ This provision focuses on how best to meet the educational needs of students.

The totality of the circumstances shows that the legislature did not intend its scheme primarily to benefit teachers. Consequently, depriving teachers of employment pursuant to that scheme would not impose an atypical and significant hardship that would give teachers due process rights in employment.

vi. Oklahoma

Oklahoma's regime decisively demonstrates that the legislature's primary purpose was to benefit students, not teachers. Nevertheless, the scheme contains some evidence of intent to benefit teachers. For one, Oklahoma's just-cause provision limits the circumstances under which teachers may be dismissed and therefore gives teachers relative job security compared to at-will employment. Additionally, Oklahoma gives teachers means to enhance their professional skills. Similar to Illinois, Michigan, and Colorado, Oklahoma incorporates remediation plans and instructional coaching into the performance evaluation process and requires administrators to make a reasonable effort to assist teachers to improve their ratings within a reasonable time.³³² These provisions tend to support the inference that the legislature intended to confer benefits on teachers.

The Oklahoma scheme also demonstrates the legislature's desire to comply with federal due process requirements based on the current *Roth/Perry* standard. These provisions, however, are not evidence of legislative intent to benefit teachers. Before removal, tenured teachers must receive notice of their right to a hearing, where "the teacher shall be entitled to all rights *guaranteed under the circumstances by the*

329. *Id.*

330. *See id.*

331. *Id.* § 1012.33(5).

332. OKLA. STAT. ANN. tit. 70, § 6-101.16(B)(3) (West, Westlaw through 2012 Sess.).

United States Constitution and the Constitution of Oklahoma.”³³³ The purpose of such hearings is to ensure “the essential pretermination due process requirements of notice and an opportunity to respond.”³³⁴ While these provisions recognize constitutional protection “guaranteed to teachers *under the circumstances*,”³³⁵ they do not purport to create any independent substantive benefit. Therefore, these requirements are not relevant to application of the intended benefit factor, which inquires into the legislature’s intent to benefit teachers, not the legislature’s understanding of tenured teachers’ due process rights under the *Roth/Perry* approach.³³⁶

Elsewhere, the Oklahoma scheme makes student academic performance the top priority, thus clearly demonstrating a primary intent to benefit students rather than teachers. The performance evaluation system’s purpose is to “provide feedback *to improve student learning and outcomes*.”³³⁷ The required composition of teachers’ performance ratings corroborates that purpose. Half of a teacher’s performance rating must be based on quantitative factors: thirty-five percent of the rating must be based on “student academic growth” data, and fifteen percent must be based on “other academic measurements.”³³⁸ The other half of each rating must be based on qualitative components, including “observable and measurable classroom practices *that are correlated to student performance success*.”³³⁹ Thus, unlike the other states discussed in this Article, in which student academic growth or achievement must be fifty percent or less of a teacher’s performance rating, in Oklahoma nearly all of a teacher’s performance rating is correlated to student outcomes. This feature unambiguously demonstrates a primary intent to benefit students, not teachers.

As a result, removing tenured teachers for poor performance would not be an atypical and significant hardship that would give teachers an interest in employment protected by due process.

333. *Id.* § 70-6-101.26(A) (emphasis added).

334. *Id.* § 6-101.3(6) (eff. July 1, 2012).

335. *Id.* § 70-6-101.26(A) (emphasis added).

336. The Oklahoma legislature could not have intended its recognition of tenured teachers’ procedural due process rights under the *Roth/Perry* approach to confer any due process right on teachers. It would have known that whether teachers have a protected interest in employment is not determined by the process to which teachers are entitled. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

337. OKLA. STAT. ANN. tit. 70, § 6-101.16(B)(2) (emphasis added).

338. *Id.* § 6-101.16(B)(4)(a).

339. *Id.* § 6-101.16(B)(5) (emphasis added).

CONCLUSION

Conner and *Gonzales* clearly indicate the Court's dissatisfaction with the *Roth/Perry* approach. The question for the Court is how it can address concerns about the *Roth/Perry* method in the context of public teachers' employment interest without departing from its due process tradition and diminishing its institutional integrity. The categorical rules depriving public employees of speech and class-of-one equal protection rights in *Ceballos* and *Engquist*, respectively, if imported to the due process setting, would suffer from that deficiency. Fortunately for the Court, it can draw upon *Conner* to develop an alternative framework to the *Roth/Perry* approach that has roots in the Court's due process tradition: the atypical and significant hardship standard implemented by the intended benefit factor. In short, the Court can address the flaws it has perceived after forty years of experience with the *Roth/Perry* approach without exposing itself to accusations that it has divined a new rule from the ether.

Although the atypical and significant hardship framework and intended benefit factor have roots in due process precedent, departure from the *Roth/Perry* approach nevertheless would likely provoke an uproar. Application of the intended benefit factor would have a profound effect on tenured public teachers in many states. In all six states examined in this Article, tenured public teachers would lose due process protection of employment. As more states adopt performance-based schemes governing employment of public teachers, it is reasonable to predict that tenured public teachers in the vast majority of states would suffer the same fate. As recent events in Wisconsin demonstrate, at least some state officials may wish to strip public teachers of statutory and contractual protections that arose in part from the widespread belief following *Roth* and *Perry* that tenured public teachers have a constitutional right to due process before removal.³⁴⁰ State fiscal crises could further encourage state officials to reduce the amount of process afforded to public teachers, thereby reducing administrative costs. Adoption of the atypical and significant hardship standard and intended benefit factor would permit such officials to eliminate procedural protections provided by statute and contract. In such an event, tenured public teachers, and perhaps other public employees, would have no constitutional backstop to protect their

340. See Peter Whoriskey & Dan Balz, *Wisconsin Gov. Scott Walker's Victory Deals Blow to Unions*, WASH. POST (June 6, 2012), http://articles.washingtonpost.com/2012-06-06/business/35459755_1_unions-collective-bargaining-rights-rights-for-state-workers. See also Tom Cohen, *Walker's Victory Could Bring More Efforts to Weaken Public Unions*, CNN (June 6, 2012), <http://www.cnn.com/2012/06/06/politics/wisconsin-recall-unions/index.html>.

interest in employment.

In light of this possibility, assuming that tenured public teachers wish to retain a protected interest in employment, teacher unions should negotiate for provisions in state legislative schemes that demonstrate legislative intent primarily to benefit teachers. From unions' perspective, less than fifty percent of teachers' evaluation ratings should be based on measures of student achievement. Additionally, union leaders should assure that teachers retain just-cause dismissal provisions and other mechanisms that give teachers job security. Finally, unions should seek robust professional development and support opportunities, especially for teachers who receive low performance ratings, that not only help teachers to improve their skills but also insert extra layers of protection between a low rating and an adverse employment decision.

State legislatures, on the other hand, first must decide whether they wish to deprive public teachers of due process protection. Some state legislatures, such as those in Idaho and Florida, clearly wish to do so. Cynically, one might assume that all legislatures do, if only to reduce the administrative costs of providing teachers with the opportunity for a hearing. Some legislatures, however, may not wish to leave teachers unprotected for political or policy reasons. Some legislators are closely aligned with teachers; others may wish to retain due process protection as a benefit to help induce talented individuals to accept relatively low-paying teaching jobs.

Legislatures that wish to deny teachers due process protection should ensure that their legislative scheme is replete with evidence of a primary intent to benefit *students*, not teachers. The most effective way to do this is to base teachers' performance ratings largely on student test scores. Official statements of intent also would be relevant evidence under the intended benefit factor analysis. Legislatures that wish to preserve teachers' due process rights should do the opposite.

The Court's adoption of the intended benefit factor undoubtedly would harm many tenured teachers because they would lose a previously possessed constitutional right. The unanswered question is whether that harm will be offset by any gains in student achievement brought about by the widespread use of performance-based employment schemes. That question may take many years to answer. The net social gain or loss resulting from the convergence of the intended benefit factor and performance-based public teacher employment schemes will not be known for some time, if ever.