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The Constitutional Rights of Teachers and Professors

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THE CONSTITUTIONAL RIGHTS OF TEACHERS AND PROFESSORS†

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In 1926, a young Tennessee biology teacher, John Thomas Scopes, was charged with "teach[ing] in the public schools . . . a certain theory that denied the story of the divine creation of man, as taught in the Bible, and teach[ing] instead thereof that man had descended from a lower order of animals,"[1] all in violation of a Tennessee criminal statute.[2] Broadcast over radio and widely covered

† This article does not attempt to review substantial sources of legal protection teachers and professors may hold under state statutes, administrative codes, collective bargaining agreements, or the common law of contracts. Neither does it review the substantial influence of accrediting associations and professional associations in the development of standards, the effective use of their good offices to secure institutional compliance with those standards, and the use of their resources to secure redress in individual cases. These are, in fact, substantial sources of quasi-legal protection. In the past academic year alone, the American Association of University Professors acted on nearly 750 complaints. For a brief description of current case work by the AAUP, see Committee A on Academic Freedom and Tenure, *Report 1969-1970*, 56 A.A.U.P. BULL. 153 (1970); B. Davis, *Principles and Cases: The Mediative Work of the AAUP*, in *id.* at 169. Increasingly, the National Education Association has added to the professional services available to aggrieved teachers.

Confined to a discussion of constitutional norms, this article also makes no effort to review the complex tests distinguishing schools and colleges still regarded as sufficiently "private" that they may not be uniformly bound by the Bill of Rights, the fourteenth amendment, or federal statutes based solely on the power of Congress to implement these provisions of the Constitution. For further consideration of this closely related subject, see O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970); Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970). For a bibliography of material in this area, see *Project—Procedural Due Process and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763, 808.

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An abridged version of this article will appear in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE (Dorsen ed. 1970).

1. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

2. Acts of 1925, ch. 27, § 1, [1925] Tenn. Laws 50, *as amended*, TENN. CODE ANN. § 49-1922 (1966 Replacement) (repealed 1967).

by national reporters including the redoubtable H.L. Mencken, the trial pitted William Jennings Bryan as special counsel for the state against the formidable skills of Clarence Darrow and Arthur Garfield Hays. While the courtroom drama of the Scopes Monkey Trial is familiar to many, hardly anyone remembers that Scopes was convicted and fined $100, that he immediately dropped out of teaching, and soon thereafter moved to another state.

On appeal to the Tennessee Supreme Court, counsel for Scopes raised two claims of constitutional significance. Contending first that the underlying statute offended the religious establishment clause of the state constitution,[3] they also argued that the anti-evolution statute, as applied, violated the fourteenth amendment to the United States Constitution by abridging Scopes' liberty to teach the subject of biology freely, according to his own best professional understanding. Again, however, the immediate outcome was a libertarian disaster.

The Tennessee Supreme Court observed that the criminal statute did not forbid either Scopes or anyone else to express his personal or professional views about the Bible, evolution, or any other subject when he did so merely as a private citizen acting on his own time, outside the environment of a public school classroom. It pointed out, moreover, that the statute had no application to private schools and to private teachers who were wholly at liberty to utilize their freedom of contract, their property, and their professional skills to provide whatever latitude of teaching freedom they desired. Conceding that the state might be constitutionally restricted from unlimited control over such private arrangements,[4] the court held that the fourteenth amendment had no similar relevance to statutes limited to on-the-job duties of *public* employees.[5] Scopes had not been compelled to teach in the public schools; the conditions on which the opportunity was made available to him were freely disclosed in advance, and he need not have accepted the job if for any reason he found the terms distasteful. Moreover, the court reasoned, having subsequently resolved that he could no longer conscientiously perform his duties, he

3. TENN. CONST. art. I, § 3.

4. The United States Supreme Court had recently taken a similar position in invalidating two state laws as applied to private school teachers and private schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law required parents to enroll children in a public school, forbidding enrollment in a private school); Meyer v. Nebraska, 262 U.S. 390 (1922) (law forbade the teaching of german in *any* school to children below the eighth grade).

5. 154 Tenn. at 109-10, 289 S.W. at 365-66.

was free to give notice and to resign without recrimination by the state or inquiry into his reasons. So long as he worked for the state, however, he had no right to disregard the public will manifest in the criminal law applicable to his responsibilities within the public employment relationship. Indeed, in the view of the Tennessee Supreme Court, the fourteenth amendment to the Constitution did not apply at all:

> [Scopes] had no right or privilege to serve the state except upon such terms as the state prescribed.
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> . . . .
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> The statute before us . . . is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform. *In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States.*[6]

If the Tennessee court had noticed a paragraph in an opinion of the Supreme Court of the United States issued only six months earlier, it might not have treated teacher Scopes' claim so lightly. While the case before the Supreme Court in *Frost Trucking Co. v. Railroad Commission*[7] had been wholly different and less dramatic on its facts, dealing merely with the regulation of trucks on state-owned public highways, the general character of the overall constitutional issue was very similar in both cases. In *Frost* the Supreme Court assumed that no one had a constitutional right to force a state to construct public roads and that the plaintiff trucking company would have had no recourse had it been unable to haul goods at all for lack of such state-provided roads. The Court then considered whether these facts necessarily implied that the state could arbitrarily attach whatever conditions it wished upon the use of its roads on the claim that any permitted use would be a mere "privilege" that the state was free to withhold entirely:

> The naked question which we have to determine, therefore, is whether the state may impose [an] unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so.[8]

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6. *Id.* at 111-12, 289 S.W. at 364-65 (emphasis added). Although the court ultimately reversed Scopes' conviction on the ground that the trial judge—in levying the $100 fine against Scopes—had improperly exercised a power reserved to the jury under the state constitution, it noted that since Scopes "is no longer in the service of the state . . . , [w]e see nothing to be gained by prolonging the life of this bizarre case." *Id.* at 121, 289 S.W. at 367.

7. 271 U.S. 583 (1926).

8. *Id.* at 592-93.

Concluding that governmental control—unrestrained by *any* limitation of the fourteenth amendment—over the use of state-owned roads was a far more menacing power than a more limited prerogative simply to decide whether to have such roads at all, the Court concluded that the proprietary position of the state did not immunize it from the fourteenth amendment:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[9]

In 1968, forty-one years after the celebrated trial of John Thomas Scopes and after a long series of other cases applying this doctrine of unconstitutional conditions,[10] the Supreme Court corrected the

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9. *Id.* at 593-94. *See also* Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921). "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much as part of free speech as the right to use our tongues." *Id.* at 437 (Holmes, J., dissenting).

10. For a discussion and examination of the doctrine, *see* R. O'NEIL, THE PRICE OF DEPENDENCY: CIVIL LIBERTIES IN THE WELFARE STATE (1970); French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Oppenheim, *Unconstitutional Conditions and State Powers*, 26 MICH. L. REV. 176 (1927); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). Leading cases within the past two decades expressly applying the doctrine include Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (hearing required prior to termination of welfare benefits); Tiuker v. Des Moines School Dist., 393 U.S. 503, 506 (1969) (public school student's first amendment rights protected); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (right of teacher in public school to criticize the board of education upheld); Thorpe v. Housing Authority, 386 US. 670, 678 (1967) (tenant in public housing may not be evicted without being informed of the reasons for the eviction and given an opportunity to respond to the charges); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (state may not force police officers to forego their privilege against self-incrimination in connection with investigation of alleged misconduct); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (faculty members at public university may not be compelled to surrender all first amendment rights); Baggett v. Bullitt, 377 U.S. 360, 379-80 (1964) (first amendment freedom of state employees including teachers protected); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (state may not abridge unemployment compensation recipient's free exercise of religion); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (requirement that notary public declare his

Tennessee court's abandonment of the rights of teachers under the Constitution. Reviewing a nearly identical Arkansas statute forbidding both the teaching of a theory that mankind ascended or descended from a lower order of animals and the use in the public schools of any textbook teaching such a theory,[11] the Court concluded that the statute was unconstitutional as a law respecting an establishment of religion foreclosed to the state by the due process clause of the fourteenth amendment: "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[12] In response to Arkansas' claim that it was not restricted by the fourteenth amendment in the operation of its own schools or in its relations with its own employee-teachers, the Court simply noted that "it is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees."[13]

In essence, the Constitution had assimilated the simple truth of Alexander Hamilton's observation that "[a] power over a man's subsistence amounts to a power over his will."[14] That sort of power must yield to the Bill of Rights. As a consequence, teachers and professors are not bereft of constitutional protection against governmental threats of dismissal on grounds which are otherwise violative of their substantive constitutional rights. Rather, "[t]o state that a person does not have a constitutional right to government employment is only to say that he must comply with *reasonable*, lawful, *and nondiscriminatory* terms laid down by the proper authorities."[15] In the particular determination of what constitutes

belief in the existence of God violates the first amendment); Speiser v. Randall, 357 U.S. 513, 518 (1958) (first amendment rights of taxpayers protected); Slochower v. Board of Educ., 350 U.S. 551, 555 (1956) (summary dismissal of city school teacher who invoked the privilege against self-incrimination before legislative investigating committee prohibited); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (public employee protected against arbitrary and discriminatory action by the state).

11. ARK. STAT. ANN. §§ 80-1627, 1628 (1960 Replacement) *codifying* Act No. 1, § 1, [1929] Ark. Acts 50.

12. Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

13. *Id.*

14. THE FEDERALIST No. 79, at 235 (Fairfield ed. 1966) (A. Hamilton).

15. Slochower v. Board of Educ., 350 U.S. 551, 555 (1956) (emphasis added). The reference to "nondiscriminatory" terms of public employment, incidentally, discloses a second principal source of substantive constitutional protection: the equal protection clause of the fourteenth

"reasonable" conditions, moreover, the trend of the last decade has been increasingly to resolve doubtful cases in favor of the teacher because of additional considerations of public interest identified with his professional security. It is outrageous enough that political conformity not justified by compelling exigencies of the moment or by the unique nature of a particular public office should be demanded of any group of employees, private or public, by threats to their jobs,[16] but the public consequences may be doubly unfortunate if such conditions could be imposed on teachers:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole . . . . The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of [constitutional] limitations upon State and National power.[17]

The drive of the judicial process has, as a consequence, severely restricted the use of political litmus tests for teaching eligibility and checked the tendency of school boards and legislatures to police the extramural political utterances and private lives of teachers through threats to their jobs. Specifically, political disclaimer oaths, bans on membership in feared or hated political organizations or unions, discharge for extramural[18] criticism, and dismissal or revocation of

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amendment. Protection from arbitrary, invidious, or discriminatory distinctions between those considered eligible for teaching and those ineligible to teach proceeds from the assurance of equal protection wholly irrespective of whether the opportunity to teach in public institutions is one of privilege rather than one of right: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952). *See also* Trister v. University of Miss., 420 F.2d 499 (5th Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

16. For other discussions of the rights of public employees, see Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964); O'Neil, *Public Employment, Antiwar Protest and Preinduction Review*, 17 U.C.L.A.L. REV. 1028 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751 (1969); Comment, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?*, 37 GEO. WASH. L. REV. 409 (1968); Note, *The Public Employee and Political Activity*, 3 SUFFOLK L. REV. 380 (1969).

17. Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

18. The phrase "extramural" is used figuratively in reference to statements made outside of the employment relationship and not merely to statements made outside the walls of the campus. It is perfectly clear that the place where the statement is made, whether on or off campus, is not *per se* determinative of the question whether the teacher is speaking as a private citizen, albeit one whose views may presumably be informed by his profession and his association with an academic institution.

teaching certificates for private behavior not specifically shown to affect the teacher's professional competency, his intramural working relationships, or his classroom integrity gradually have all been rolled back by judicial decree.[19]

An excellent case law survey of teachers' and professors' substantive constitutional rights appears elsewhere and need not be imitated here.[20] In passing, however, certain of the better settled propositions merit restatement:

1. Membership *per se* in political organizations, not excluding the Communist Party, or economic organizations such as labor unions is not a permissible ground for terminating teachers or disqualifying applicants to the profession. Arguably, moreover, not even active and knowing membership including some degree of personal sympathy for the illegal objectives of the group may be sufficient, short of some concrete act in furtherance of an illegal objective inconsistent with one's lawful obligations as a teacher.[21]

2. Correspondingly, disclaimer oaths requiring that one forswear activities or associations he is otherwise constitutionally privileged to pursue as a private citizen are beyond the constitutional pale. In all likelihood, the state may go no further than to require that one be willing to affirm a general commitment to uphold the Constitution and faithfully to perform the duties of the position he holds.[22]

3. While neither the first amendment nor the fifth amendment

19. *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964) (disclaimer oaths and affidavits). *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968) (extramural criticism of the school board protected by the first amendment); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (labor union membership protected); McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970) (state university may not constitutionally reject teacher's employment application on the basis of his declared homosexuality); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (teacher's private homosexual conduct not affecting his performance on the job does not justify revocation of his teaching certificate); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1968) (public school teacher may not be transferred out of the school for wearing a well-trimmed beard in defiance of the principal's ban).

20. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

21. *See* cases cited in note 19 *supra*. *See also* United States v. Robel, 389 U.S. 258 (1967). In *Robel*, the Court stressed the fact that the employee did not occupy a sensitive position, citing Cole v. Young, 351 U.S. 536 (1956). For additional cases holding that union membership cannot be forbidden, see Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); American Fed'n of State, County & Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); Atkins v. Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

22. Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo.), *aff'd per curiam*, 397 U.S. 317 (1970). *See also* Israel, *Elfbrandt v. Russell—The Demise of the Oath?*, 1966 SUP. CT. REV. 193.

entitles a teacher to withhold information when his employer has questioned his competence or professional integrity on the basis of reasonably specific and creditable allegations of impropriety related to his job, information elicited under such circumstances by a public employer may not be utilized for purposes of criminal prosecution, and vague or general fishing expeditions on mere suspicion are not permissible.[23]

Two areas which remain most controversial are the degree of protected extramural utterances, especially those utterances that may be critical of the school or university itself, and the degree of a teacher's freedom within his own classroom. A review of two recent Supreme Court decisions may indicate the dimensions of the problems.

In *Pickering v. Board of Education*,[24] the Supreme Court reversed the determination of a county board of education which concluded, after conducting a full hearing, that the newspaper publication of a local teacher's letter—critical of the way in which the board had handled proposals to raise new revenue for schools and factually false in certain respects—was *per se* sufficiently harmful to the operation of the schools to warrant the teacher's dismissal. The board also took the position that the teacher, by virtue of his public employment, "has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, *if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.*"[25] In this respect, the board seemed to stand on high ground. Even the 1940 Statement of Principles of Academic Freedom and Tenure, promulgated by the American Association of University Professors and endorsed by more than sixty national educational associations, appears to lay this degree of constraint at least upon those who teach at the college or university level:

> As a man of learning and an educational officer, [the college or university teacher] should remember that the public may judge his profession and his

23. *See, e.g.*, Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); Slochower v. Board of Educ., 350 U.S. 551 (1956); Murray v. Blatchford, 307 F. Supp. 1038 (D.R.I. 1969); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

24. 391 U.S. 563 (1968).

25. *Id.* at 568-69 (emphasis added).

> institution by his utterances. Hence he should at *all* times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.[26]

Nevertheless, the Supreme Court disagreed with the board's dismissal of Martin Pickering on constitutional grounds: in the absence of specific evidence that Pickering's letter had in fact adversely affected the operation of the schools, a factually unsupported presumption of harm *per se* could not be used to override the teacher's first amendment freedom of speech. Responding to the claim that the teacher owed the board a duty of loyalty to avoid public disparagement of its judgment on the operation of the schools, the Court observed:

> [T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[27]

Thus, even on matters of educational policy where the ultimate employer has exercised a proper prerogative in asserting a public position of its own, the attenuated employment relation of the teacher several times removed from the board may not be used to imply a rigid oath of fealty, forswearing all right to extramural dissent—at least on issues immediately determined at the polls. Moreover, while accuracy and moderation may be desirable standards for a teacher to cultivate when moved to enter such dissent, they are not conclusive. Where the teacher's dissent concerns an issue which is not so intimately associated with his customary duties that his opinion will gain remarkable public influence from his presumed access to special facts, and where he makes no claim of greater skill or knowledge

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26. Republished in AAUP POLICY DOCUMENTS AND REPORTS 2 (Sept. 1969) (emphasis added). *But see Committee A Statement on Extramural Utterances*, *id.* at 11: "Extramural utterances rarely bear upon the faculty member's fitness for his position."

27. 391 U.S. at 571-72. *See also* Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot*, 402 F.2d 515 (5th Cir. 1968) (student newspaper editor dismissed from public university for publishing in another newspaper his disagreement with college president on the proper regulation of guest speakers entitled to reinstatement on first amendment grounds).

associated with his job and neither seeks to trade upon his employment relation nor represents that he speaks other than as a private citizen,[28] the board may not insist upon the same exacting standards of accuracy and professionalism to which the teacher may be held accountable in his performance of work properly within the employment relationship itself. Where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication by [the] teacher,"[29] the threat to a teacher's livelihood for mere carelessness in extramural utterance is constitutionally incompatible with the first amendment protection of free and unhindered debate on matters of public importance.

While the *Pickering* decision thus marks an extremely important step in defining the substantive rights of teachers, the Court's careful balancing and weighing of competing interests permits further refinements as additional cases arise.[30] For instance, dicta in *Pickering* quite clearly indicate that a teacher may not publicly ventilate whatever thoughts he harbors, however deeply felt his need to do so, with indifference to certain enforceable constraints specifically associated with his position as an employee. In this respect, it is instructive to note certain facts which were *not* involved in *Pickering* to indicate the effect their presence might have on the outcome of other cases:

1. None of the information publicized in Pickering's letter drew upon facts that he learned solely as a consequence of his employment. Had it done so, the result might have been different: the extramural release of information acquired under specific conditions of confidentiality might provide a sufficient basis for dismissal on the claim that the ability of one's administrative superiors and colleagues to exhibit a degree of frankness essential to the operation of the school would be impaired if they were forced to operate under the risk that

28. Pickering signed his letter only with his name. 391 U.S. at 578.

29. *Id.* at 574.

30. For recent applications of *Pickering*, see Muller v. Conlisk, 429 F.2d 901 (7th Cir 1970); Roberts v. Lake Central School Corp., 317 F. Supp. 63 (N.D. Ind. 1970); McGee v. Richmond Unified School Dist., 306 F. Supp. 1052 (N.D. Cal. 1969); Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210 (Ct. App. 1970). *See also* Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969); Turner v. Kennedy, 332 F.2d 304, 306-07 (D.C. Cir.) (dissenting opinion), *cert. denied*, 379 U.S. 901 (1964); Rosenberg v. Allen, 258 F. Supp. 511 (S.D.N.Y. 1966); Swaaley v. United States, 376 F.2d 857 (Ct. Cl. 1967); Watts v. Seward School Bd., 421 P.2d 586 (Alas. 1967), *vacated per curiam*, 391 U.S. 592 (1968), *judgment reinstated*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970); Belshaw v. City of Berkeley, 246 Cal. App. 2d 493, 54 Cal. Rptr. 727 (1966). Board of Trustees v. Owens, 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962).

every memorandum, proposal, policy, or conversation could become a subject of instant public notice at the whim of disaffected individuals within the institution.

Should the outcome be different, however, if the information released in a deliberate breach of confidence pertained to a subject that school authorities were falsely representing to the public, that involved an undisclosed policy of the school which was itself illegal, or that was clearly a matter which, viewed objectively, was reasonably subject to the influence of public judgment and review concerning the operation of the school? *Pickering* is so heavily qualified by the Court that it provides no easy answer; neither do recent developments in companion areas of the law—administrative law and libel—uniformly point in one direction. The first amendment may require, however, that an institution which seeks to discipline a teacher for the unauthorized disclosure of information acquired solely in the course of his employment may do so only pursuant to clear and specific rules respecting confidentiality; such rules must likely be of narrow compass and serve a compelling institutional interest in order to provide substantial justification for the constraints of confidentiality.[31] Possibly the outcome may even depend upon the retrospective *ad hoc* public importance of the disclosure itself—whether it truthfully brought to light a matter of serious institutional impropriety which would have gone unattended but for the very breach of confidence involved in the employee's conduct, assuming of course that the employee had first attempted to raise the issue intramurally by whatever means the institution provided.[32] The public interest served by vindication of the employee's freedom to speak out under these circumstances may outweigh whatever marginal tendency the result has to inhibit utter frankness in the normal operation of the school. Indeed, it is arguable that such "frankness" or "secrecy" should be discouraged in any case in order to decrease the institution's temptation knowingly to pursue improper or illegal internal policies which it would hope to screen from public view by some customary *in terrorem* reliance on rules of in-house confidentiality.

2. The criticism of board policy explicit in Pickering's letter

31. *See* Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968), *modified on reconsideration*, D.C. Cir. No. 20,812, August 23, 1968 (adjustments in light of *Pickering*).

32. *See* Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

transcended any purely work-related grievance of his own and did not seek some premature advantage of public leverage in the redress of a personal complaint. Thus, since its subject bore directly on an issue currently before the electorate—consideration of a proposed tax increase to be used for educational purposes—the letter served a central function of the first amendment; moreover, its publication had no tendency to undermine established procedures for the orderly and efficient review of individual, work-related complaints. These factors may be instructive in two regards. The avoidance of disruption to intramural efficiency may support an employment requirement that teachers forbear from ignoring established channels for the review and redress of work-related grievances and institutional policy and similarly forbear from bringing outside pressure to bear upon the operation of those institutional processes. Simultaneously, however, the failure of an institution to provide adequate internal mechanisms for the fair and orderly review of an employee's request to be heard on work-related matters, at least to the extent that these matters reflect on the overall institutional quality or policies of substantial public interest, may entitle him to bring the matter to public attention without unreasonable apprehension that such conduct will imperil his job. Specifically, the public interest to be served in protecting a teacher's freedom to speak in protest and his own right to petition for redress or grievances[33] must be weighed against the adequacy of institutional channels in determining whether efficiency in administration fairly requires greater circumspection in his public utterances.

3. The *Pickering* case did not involve the public airing of disagreements between Martin Pickering and anyone with whom he was *closely* associated as a working colleague or subordinate. Indeed, the Court explicitly left open the possibility that a teacher could be dismissed for publishing a letter so critical of those in immediate supervisory contact with him that, whatever its truth, it would necessarily lead to intolerable personal relations in the future, impairing the efficient operation of the school and requiring that one of the employees be transferred or terminated: "Appellant's employment relationships with the Board and, to a somewhat lesser

33. *See* Turner v. Kennedy, 332 F.2d 304 (D.C. Cir.), *cert. denied*, 379 U.S. 90 (1964); Jackson v. United States, 428 F.2d 844 (Ct. Cl. 1970); Klein v. Civil Serv. Comm'n, 260 Iowa 1147, 152 N.W.2d 195 (1967).

extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[34] The point is clear. As one who would "rather be right than be President" must also be prepared to relinquish his post in the President's cabinet as the price of publicly airing his differences with the President, teachers in equivalent positions of immediate subordinate responsibility cannot expect that the first amendment will secure their position against a loss of personal confidence which may follow from their public ventilation of every difference in opinion or policy judgment between them and their immediate superiors. As schools and universities grow in size, independence and specialization of employment functions, and impersonalism in working relations, however, it is doubtful whether this observation about *Pickering* should properly apply to many situations.

4. Perhaps the most troublesome qualification on this seminal case results from the Court's great stress upon the fact that the letter, albeit partly inaccurate, was entirely without public impact and was "greeted . . . with massive apathy and total disbelief."[35] Moreover, the Court continued, the inaccuracies involved only items of trivial detail not pertaining to matters upon which the public would presume that Pickering had special access or information; he was, at worst, merely careless without knowingly or recklessly misrepresenting anything. At the same time, the Court did imply that were a teacher's extramural, inaccurate utterances made knowingly or with cavalier disregard for their truth or falsehood, their publication might "call into question his fitness to perform his duties in the classroom" and serve as some "evidence of the teacher's general competence, or lack thereof"[36] even though they still had no effect and were not concerned with a subject within the teacher's special skills or range of information.

As a logical exercise, the Court's concession is not without appeal: one who is reckless with the truth in *any* respect may indeed invite

34. 391 U.S. at 570. *See* Lefcourt v. Legal Aid Soc'y, 312 F. Supp. 1105 (S.D.N.Y. 1970); *see also* Jones v. Battles, 315 F. Supp. (D. Conn. 1970). In *Lefcourt*, the court approved the dismissal of a legal aid attorney whose criticism of his superiors had a "definite impact on the internal operation of the Society" and threatened the "confidence and close working relationship" necessary to the effective operation of the Society. *Id.* at 1112-13.

35. 391 U.S. at 570.

36. *Id.* at 573.

some question concerning the degree of care and preparation he employs in his professional calling. As a matter of common experience, however, the proposition is almost certainly unsound: while preserving the most rigorous personal standards within their professional specialty, teachers, like others, may occasionally be foolish almost beyond belief outside the area of their one particular discipline. Beyond this, moreover, if one must fear that even his extramural utterances on political matters wholly unrelated to his work can be seized upon as the pretext for questioning his entire professional competence and standing, his freedom of speech will surely be chilled and his teaching against the greater prerogatives of other private citizens gravely disadvantaged. In addition, elemental considerations of political realism suggest that even reckless inaccuracy in extramural expression is in fact unlikely to occasion any inquiry into the teacher's classroom competence *unless the point of the expression offends those with power to press the inquisition.* Precisely because the Court's suggested standard is too susceptible to abuse and misapplication for purposes of retaliatory dismissal, it should not be allowed at all.

Whatever the shortcomings of the *Pickering* decision, it does provide a firm first step in defining the protected boundaries of a teacher's freedom of extramural expression. Unfortunately, however, the guidelines are less clear in the only noteworthy decision to date respecting the scope of academic freedom within the classroom itself and the extent to which the Constitution will protect teaching freedom—the prerogative of the teacher to teach his subject according to his best professional understanding. The decision is *Epperson v. Arkansas*[37] in which the Supreme Court, discerning no reason for a statutory prohibition on the consideration of evolutionary theory in any state-supported educational institution beyond the legislature's desire to accommodate distinctly religious interests, condemned the statute as a violation of the religious establishment clause of the first amendment. The decision is not entirely satisfactory even on its own terms, since the Court has seldom upset a law because of misgivings about the motives of those who enacted it; rather, the Court has sustained the law if it possibly serves any permissible objective.[38] And,

37. 393 U.S. 97 (1968).

38. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382-86 (1968). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383.

For an extremely able treatment of the role of legislative motivation in constitutional law, see

as Mr. Justice Black observed in his concurring opinion, the prohibition may have been adopted merely to remove a subject of endlessly disruptive controversy from further consideration within the public schools,[39] an arguably permissible objective.

More importantly, however, the decision placed no reliance upon any constitutional claim of the individual biology teacher to some personal degree of academic freedom in the presentation of the subject she had been employed to teach. To the contrary, at several points individual Justices broadly implied that no constitutional support exists for such a claim in the face of the power of the state to designate the content of state-supported curricula. Thus, Mr. Justice Black declared:

> [T]here is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools.
>
> . . . .
>
> I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . .
>
> I question whether . . . "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him. . . . [I]t is doubtful that, sitting in Washington, [this Court] can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.[40]

The difficulty, however, is not stated with complete fairness when presented in such broad dilemmatic terms. One may readily concede that the contending preferences of teachers, students, parents, and the members of an elected board of education must necessarily be distilled into overall curricular decisions by some group with ultimate responsibility; among these groups, authority to make such decisions logically devolves upon the more democratically accountable board or, as a general reeourse, upon the legislature. They, at least, are subject to the orderly and formal check of the electoral process, the informal influences of various groups including P.T.A.s, student organizations, professional education associations and teacher

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Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

39. 393 U.S. at 112-13.

40. *Id.* at 112-14.

unions, and the admonitions of the federal Constitution such as the establishment clause of the first amendment. Moreover, the school classroom and, albeit to a distinctly lesser extent, the university classroom are not at all free and voluntary forums in which the remunerated teacher may appropriately assert the same full measure of his own freedom of speech available to him as a citizen in private life. Students compelled by law to attend classes constitute a wholly captive audience neither free to depart if offended by, or in disagreement with, the teacher's utterances nor free even genuinely to offer dissenting views against the presumed authority of the teacher, armed with his command of sanctions over classroom decorum, the awarding of grades, and the dispensing of personal recommendations. The teacher receives a salary for his hired service; he is employed for a specific task; and he is insulated within his classroom even from the immediate competition of different views held by others equally steeped in the same academic discipline. Indeed, the use of his classroom by a teacher or professor deliberately to proselytize for a personal cause or knowingly to emphasize only that selection of data best conforming to his own personal biases is far beyond the license granted by the freedom of speech and furnishes precisely the just occasion to question his fitness to teach.[41]

If these considerations are sufficient to forbid the teacher to impose his own orthodoxy upon his students, however, they apply with equal force when the prescription for biased treatment of a given subject or the mandate to use the classroom as an instrument of ideological proselytism is fashioned by a legislature or a school board instead—a legislature or school board that so rigidly determines the exact and preselected details of each course that in fact it employs the teacher as a mere meehanical instrument of its impermissible design. For instance, it may be relatively unimportant that Commager's high school text on American history is uniformly purchased in bulk and prescribed as the basic text in high school civics in lieu of a similar text by Jones or Smith unless its particular selection *plus* detailed proscriptions of any classroom reference to other texts, other impressions, and other historical ideas cumulatively combine to describe a process of unfree education and academic indoctrination.

41. *See, e.g.*, Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969); *In re* Charles James, N.Y. Comm'r of Educ. No. 1895 (Sept. 23, 1970) (dismissal upheld for repeated use of classroom by teacher to interject his personal views on a political issue unrelated to the regular subject matter).

Indeed, arbitrary restrictions on alternative sources of information or opinion, resulting not from understandable budgetary constraints or the restraints upon the time available for study by teachers and students, are precisely what the first amendment disallows. Against a school board decree requiring the inculcation of one theory and forbidding mention or examination of another, for instance, a mere taxpayer should have standing to contest his compelled financial support for the propagation of ideas to which he is opposed: "[I] can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support . . . ideologies or causes that they are against."[42] Against a state law provision that a student might be disciplined for consulting any source of education save that prescribed in regimented detail, the student could also succeed on a first amendment claim. "In our system students may not be regarded as the closed-circuit recipients of only that which the State chooses to communicate."[43] Correspondingly, neither must teachers or professors endure similarly arbitrary restrictions in the course of their own inquiries or *upon their own communicated classroom references*. One may not, as a condition of his employment, be made an implement of governmental practices which are themselves violative of the first amendment. Accordingly, a teacher violating a statutory restriction forbidding reference to, or consideration of, a source of opinion or information otherwise within the proper compass of his subject should be as much shielded by the first amendment from prosecution or dismissal as a social worker refusing to conduct a midnight search forbidden to the state by the fourth amendment.[44] Concurring in *Epperson*, Mr. Justice Stewart more nearly recognized the presence of important first amendment issues beyond the valid but limited reach of the religious establishment clause:

> It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment. . . .[45]

42. Lathrop v. Donohue, 367 U.S. 820, 873 (1961) (Black, J., dissenting).

43. Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).

44. *Cf.* Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). *See also* R. O'NEIL, *supra* note 9, at 81-83.

45. 393 U.S. at 116.

In one of the last of the political litmus-test cases, the Court quite appropriately recalled the rhetoric of Judge Learned Hand: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[46] Within the very classrooms where the nation's future leaders are trained, no robust exchange at all would be possible if the State were constitutionally free to select just one view of any given subject and to instruct its teachers to avoid mention or consideration of any other. Consistent with the constitutional sense of Judge Hand's declaration, therefore, it must simply follow that no teacher or professor may be subjected to dismissal for refusing to yield to such an authoritarian demand. It is a pity that the Court in *Epperson* declined the opportunity more specifically to reaffirm the point.[47]

PRETERMINATION PROCEDURAL DUE PROCESS

"The history of liberty," Mr. Justice Frankfurter once observed, "has largely been the history of observance of procedural safeguards."[48] The point is especially well taken with respect to teachers: assuming that a given teacher's employment may not be terminated or discontinued on grounds offensive to the Bill of Rights, in theory, the difficulty of ascertaining the basis of a termination decision and of securing redress after the fact will—to the extent of the difficulty—effectively nullify the substantive protection itself.

Suppose, for instance, that a public school teacher on annual contract simply fails to receive any notice that his teaching contract is being renewed for the coming year. Or suppose that an assistant

46. Keyishian v. Board of Regents, 385 U.S. 589, 603(1968).

47. At least three federal courts have recently extended constitutional protection to classroom assignment and discussion prerogatives of a teacher's academic freedom. *See* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969). *See also* Parker v. Board of Educ., 237 F. Supp. 222 (D. Md.), *aff'd*, 348 F.2d 464, *cert. denied*, 382 U.S. 1030 (1965); R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 386-87 (1955):

> By *Lehrfreiheit* [the German term for academic freedom], the German educator meant two things. He meant that the university professor was free to examine bodies of evidence and to report his findings in lecture or published form—that he enjoyed freedom of teaching and freedom of inquiry . . . . In addition, *Lehrfreiheit* . . . also denoted the paucity of administrative rules within the teaching situation: the absence of a prescribed syllabus . . . .

48. McNabb v. Unted States, 318 U.S. 332, 347 (1943).

professor in a state college receives notice that his three-year contract is not being renewed and, upon inquiry, is advised that it is contrary to institutional practice to provide a statement of reasons under such circumstances. Or suppose that a full professor in a state whose legislature has neither adopted a tenure system nor even delegated authority to the state regents to provide one receives notice in midyear that his service will terminate the following June. In each case, the teacher may believe that one of the reasons significantly contributing to his termination involved a standard forbidden by the Bill of Rights such as a response to a protected extramural utterance or retaliation for a disfavored political affiliation. Alternatively, he may vaguely suspect that false gossip of his private life or groundless rumors about his teaching, factors which he is convinced were utterly without foundation, contributed to the decision. Or again, he may simply be genuinely puzzled about the reasons for his dismissal. In the absence of procedural safeguards antecedent to the effective date of his termination, the substantive protection he presumably enjoys may be altogether lost.

If he is possessed of extraordinary fortitude, he may in these straits retain private counsel to file suit in a state or federal court, alleging that the action taken against him was based on certain constitutionally prohibited grounds. Then, he may seek to invoke the court's assistance for discovery purposes, more definitely to ascertain the reasons and evidence leading to his termination, and thereafter attempt to prove at his own expense the infringement of his substantive constitutional or statutory rights. On that basis, he may eventually recover damages, be reinstated by court order, or at least secure the useful judicial declaration that the institution, rather than he, was at fault.[49]

In view of the practical difficulties of litigation, however, it is not surprising that there have been vastly fewer such successful cases than, for instance, the number of cases which the American Association of University Professors' annual cascade of investigative reports have considered meritorious in point of fact. Faculty members are not litigious by nature, the costs of formal controversy are high and usually must be borne personally, the burden of proof—often exceedingly difficult to carry—falls upon the plaintiff-teacher, and the

49. The appropriate federal statutes for a federal action alleging violation of constitutional rights in this situation are 28 U.S.C. §§ 1331, 1343(3), 1343(4) (1964) and 42 U.S.C. §§ 1983, 1985(3) (1964).

ordinary case may not reach judgment for months or even years after the plaintiff has been separated from his job. In addition, the teacher must face the practical recognition that the extralegal hazards of such litigation are themselves quite great: to sue and to lose establishes a public record against oneself as a teacher and may further prejudice one's chances for employment or advancement. To sue and to win will not permit one actually to resume teaching at the institution in most instances, and it will almost certainly spread upon the public record whatever evidence of the plaintiff's shortcomings the defending institution can muster—thereby warning other institutions which may be chary of seemingly irascible professors who sue their employer and "launder their linen" in public places.

Without question, therefore, the effective protection of the substantive constitutional rights of teachers and professors may critically depend upon the availability of pretermination procedural due process. Post-termination judicial remedies for teachers, like post-suspension remedies for students[50] or post-eviction remedies for tenants,[51] are often simply too little and too late. Indeed, by analogy to these other areas of remedial concern, the courts have gradually recognized a separate constitutional right to pretermination procedural due process.

The source of a teacher's constitutional right to pretermination procedural due process may be found in a variety of places. The most obvious location is the necessary procedural implication of each and every substantive constitutional right which government is forbidden to deny or to abridge even when it acts as an employer. To the extent that the first amendment forbids a public institution to terminate a teacher's employment because of some extramural utterance, for instance, the amendment itself may necessarily establish some degree of entitlement to the protection of an effective pretermination procedure sufficient to arrest the substantive violation *before* it can take hold. To the extent that the institution need not state a reason for its decision to terminate, and post-termination judical proceedings necessarily prove to be grossly inadequate as a deterrent or corrective of a first amendment violation concealed in the institution's decision, the first amendment itself implicitly affords the right to a

50. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930(1961) (public university students may not be indefinitely suspended in the absence of pretermination procedural due process).

51. *See* Thorpe v. Housing Authority, 386 U.S. 670 (1967) (per curiam).

pretermination hearing or at least to some right of efficacious intramural or administrative review sufficient to assure the timely protection of freedom of speech. Similarly, to the extent that the equal protection clause protects a teacher from termination on grounds which are "patently arbitrary or discriminatory," adequate protection from such a denial of substantive equal protection requires a right of access to a degree and form of pretermination procedural due process essential to determine and to abate the substantive violation. The point is straightforward and reasonably self-evident. Were the courts to continue to declare on the one hand that the teacher has a substantive freedom from discriminatory termination decisions and yet, on the other hand, deny that he is entitled to the minimum procedural due process essential to the effective and timely vindication of that freedom, the law would indeed be cruelly cynical: "Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection?"[52]

Once provided by law, moreover, a second source of substantive rights may also imply a degree of constitutional entitlement to whatever form of procedural due process is essential to their protection as well—rights affirmatively established by statute, administrative order, or the common law. Where the state has chosen to protect one's status beyond the minimum required by the Bill of Rights by providing, for example, that teaching contracts shall be renewed or continued except on certain specified grounds such as incompetence, medical disability, or insubordination, one's statutory right to continued employment may imply an entitlement to whatever degree of procedural due process is essential to insure the protection of that statutory right.[53]

A third basis for an independent constitutional requirement of procedural due process may exist when the proposed action of the government would do more than terminate the individual and would, in addition, inflict an injury on some aspect of his personal liberty of

52. Cafeteria Workers v. McElroy, 367 U.S. 886, 900 (1961) (Brennan, J., dissenting).

53. "[Appellant] is entitled to have procedural due process observed in the protection of these substantive rights even though substantive due process would not compel the rights to be given." United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 544 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953). *See also* Goldberg v. Kelly, 97 U.S. 254 (1970); Greene v. McElroy, 360 U.S. 474 (1959); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951); Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961).

which he may not be deprived without due process. Thus, where institutional conduct injurious to the teacher's personal standing apart from the loss of his job—for example, dismissal on published grounds of racial bigotry—accompanies termination, the teacher's right to protection of his personal reputation entitles him to the observance of procedural due process as a precondition to governmental deprivation of that aspect of his personal liberty. "[W]henever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds *nor without a procedure calculated to determine whether legitimate grounds do exist.*"[54] In an entirely complementary fashion, where government induces a private person to commit himself and to establish a dependency subject only to a given number of express and implied risks which the individual assumes, a subsequent decision to terminate him on other bases disadvantages him beyond this loss of his job as such; indeed, it leaves him far worse off than had he not been induced to accept government employment in the first instance. Termination does not leave one's economic situation as it was in the absence of the original employment opportunity:

> Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.
>
> . . . .
>
> We need not resort to [a] colorful term such as "stigma" to characterize the consequences of such governmental action, for labels may blur the issues.
>
> . . . .
>
> Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such *right*; but that cannot mean that the government can act arbitrarily, either substantively *or procedurally*, against a person or that such person is not entitled to challenge the processes and the evidence *before* he is officially declared ineligible . . . .[55]

Again, therefore, a government employee's "right" not to be economically disadvantaged by government on grounds other than those propery expressed or implied in response to governmental

54. Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966) (emphasis added). *See also* K. DAVIS, ADMINISTRATIVE LAW CASES 154-55 (1965).

55. Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (emphasis added) (opinion by Burger, holding that an interpretation of the Administrative Procedure Act favorable to the claimant made it unnecessary to decide whether the Constitution itself required some pretermination adjudicative due process).

inducement may necessarily imply a modicum of procedural due process essential to protect that right.

Finally, an independent right to procedural due process may be found in the accumulating judicial recognition that one's status in the public sector is *itself* a form of "liberty" or "property" which, while subject to forfeiture as any other aspect of liberty pursuant to strict procedural safeguards, nevertheless is an interest not to be divested without adequate procedural safeguards to minimize unreasonable risks of error or prejudice.[56] Since 1961, for instance, the federal courts have taken the position that a student receiving a state subsidized education for which he performs no productive service in return[57] may not be dismissed from college absent a high degree of pretermination procedural due process. Eschewing the word-loaded dilemma of characterizing a student's status as one of "right" or "privilege" for the purpose of determining the minimum procedure to which he is entitled under the fourteenth amendment before his status may be altered, one court has observed:

> Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth.[58]

While there is no equivalent case law support developing the *extent* of pretermination procedural due process for teachers, their commensurate entitlement should be self-evident. "[W]ith respect to the right to procedural due process, the protection to be afforded a professor can hardly be less than that afforded a student, and probably should be greater."[59]

Emphasis of these preliminary points on the just claim of teachers to pretermination procedural due process has been essential simply because of the paucity of cases. Practically all of the successful

56. For a discussion of the property theory of defeasible interests in the public sector, see Reich, *Individual Rights and Social Welfare, The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (favorably noted by Mr. Justice Brennan in Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970)); Reich, *The New Property*, 73 YALE L.J. 733 (1964). For a brief description of the liberty theory of defeasible interests in the public sector, see *Developments in the Law—Academic Freedom*, *supra* note 20, at 1081.

57. Maintenance of grades and observance of rules are continuing conditions of his attendance but hardly the bargained-for economic exchange of a contract.

58. Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

59. Lafferty v. Carter, 310 F. Supp. 465, 470 (W.D. Wis. 1970).

litigation by teachers has been limited solely to establishing protection from certain *grounds* of termination—nonrenewal, nonrehiring, or nonhiring. Because the post-injury judicial processes are massively inadequate to avoid the use of such grounds in fact, however, the tentative elaboration of pretermination procedural due process for teachers now appears to be at least equally critical in the evolving law of teachers' rights.

While the Supreme Court has not yet held unequivocally that either a tenured professor or a probationary public school teacher is entitled to any degree of constitutionally-compelled pretermination procedural due process, recognition of the proposition appears reasonably certain. In 1956, the Court's dictum in reversing the summary termination of a tenured public university professor noted the absence of any orderly inquiry into his continuing fitness or competence to hold his job and declared that "the summary dismissal of appellant violates due process of law."[60] In 1970, the Court cited the same case for the proposition that "*procedural* due process must be afforded" one who faces discharge from public employment.[61] The central thesis appears nearly to have won the day, and the critical, remaining issue involves a determination of the extent and form of procedural due process on a case-by-case basis.

Two principal considerations should be borne in mind in the particular elaboration of pretermination procedural due process for teachers. The first is that the right to procedural due process does not contemplate a single, frozen, stylized method of trial-type procedure irrespective of the subject in controversy or the gravity of the outcome. The second consideration, a corollary to the first, is that the particular degree and form of procedural due process constitutionally required in a given situation is determined by means of a juducial "cost-benefit" analysis which weighs the predicament of the individual against the costs to society in moving only with required ponderous formality. While certain requirements—notice and, to a lesser extent, an opportunity to be heard—are fairly characteristic of most constitutionally-compelled proceedings, the configuration of most other procedural rights is determined by a complex of particular cost-benefit concerns. A rather full panoply of particular procedural rights might, for instance, include all of the following:

60. Slochower v. Board of Educ., 350 U.S. 551, 559 (1956).

61. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (emphasis added).

1. Terminal action may not be taken other than pursuant to regularly established rules or standards which have been made available to the employee and which are reasonably precise and clear.

2. Proceedings to terminate the employee must be preceded by specific notice of charges providing a statement of facts sufficient to warrant the action contemplated. Adequate time must be provided to enable the employee to prepare for the ensuing hearing, and a list of witnesses plus access to other evidence proposed for introduction at the hearing must be made available to him on request.

3. The hearing must be held before an impartial trier of fact, the outcome of the hearing determined solely on the basis of material placed in evidence in the course of the hearing, and a record must be made of the proceedings.

4. The employee may be represented by counsel present during the proceedings; the employer must provide notice that counsel will be furnished upon request in the event the employee is unable to retain counsel.

5. The employee is entitled to know the evidence offered against him, to confront adverse witnesses, to conduct cross-examination either personally or through counsel, to offer evidence and witnesses in his own behalf, and to testify in his own behalf or decline to do so within the privilege against self-incrimination.

6. The teacher may appeal an adverse decision by briefs and oral argument, based on the record, with the scope of review *de novo* on alleged errors of law (that is, an incorrect interpretation of the allegedly infringed rule) and limited on findings of fact to determine whether they are supported by substantial evidence in the record considered as a whole.

In fact, however, probably no instance of teacher termination would activate all of these possible procedural rights as a matter of constitutional law, and the particular combination of any two or more of them will vary in an extraordinary fashion depending upon a number of considerations:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[62]

62. Hannah v. Larche, 363 U.S. 420, 442 (1960). *See also id.* at 487-88 (Frankfurter, J., concurring).

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.
>
> . . . .
>
> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[63]

Without question; however, the degree of pretermination procedural due process to which a public employee is entitled is most heavily influenced in favor of the employee by the degree of total hardship which may ensue as a consequence of that termination. Where the hardship may be great, the need for procedural safeguards against the risks of error and prejudice is correspondingly high.

In *Greene v. McElroy*,[64] for instance, the Court noted that revocation of a security clearance without a full hearing had effectively deprived an aeronautical engineer of the opportunity to pursue his long-established career not only with the particular private manufacturer who discharged him solely as consequence of the government's action[65] but with virtually all other employers offering jobs at his skill level. As a result of the government's action, Greene was forced to take other work at a greatly reduced skill level and at one-fourth of his former pay. Considerably influenced by constitutional considerations, the Supreme Court held that the security clearance revocation based on statements by unidentified informants, depriving the employee of "the traditional procedural safeguards of confrontation and cross-examination,"[66] was not authorized by federal statute.[67] The case is especially instructive, since the Court was obliged to balance the employee's need for information against the government's interest not only in national security but in the protection of confidential sources who might be unwilling to provide critical information should disclosure of their names and testimony be required.

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63. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (concurring opinion).

64. 360 U.S. 474 (1959).

65. The employer discharged the engineer because his access to classified information, foreclosed by the government's action, was essential to the performance of his job.

66. 360 U.S. at 493.

67. *Id.* at 508. *See also* Parker v. Lester, 227 F.2d 708, 720 (9th Cir. 1955).

In contrast, the Court's five-to-four decision three years later in *Cafeteria Workers v. McElroy*[68] upheld exclusion of a short-order cook from the cafeteria of a gun factory upon the Commandant's unilateral decision, without any notice or hearing, that the employee failed to meet security requirements. Noting that the employee had already secured equivalent employment elsewhere, that the exclusion had not affected equivalent employment opportunities in general, and that the basis of the decision implied little stigma,[69] a slim majority held that neither notice nor an opportunity to be heard was constitutionally required.

The great weight of the "hardship" factor in the rationing of procedural due process is also well illustrated in several recent Supreme Court decisions outside the employment field. In *Goldberg v. Kelly*,[70] the Court held unconstitutional the termination of welfare benefits prior to an evidentiary hearing which was otherwise elaborately provided following termination. Noting the critical consequences of termination to the person left totally destitute, the Court concluded that despite the potentially high costs to government—loss of money to recipients who would be judgment proof against recovery of payments illegally received, administrative burdens and costs of providing a hearing, and the tendency to ignore ineligible recipients rather than undergo the nuisance of pretermination hearings—procedural due process would require "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[71]

In *Sniadach v. Family Finance Corp.*,[72] the Court held that the requirements of procedural due process command that a wage earner receive notice and an opportunity to be heard in court *prior* to the freezing of one-half of her wages attached by an alleged creditor, even though the employer simply intended to hold the attached wages subject to the order of the court following the later full trial of the creditor's claim. The hardship to the wage earner in the loss of even

68. 367 U.S. 886 (1961).

69. "[T]he Superintendant may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge." *Id.* at 899.

70. 397 U.S. 254 (1970).

71. *Id.* at 267-68.

72. 395 U.S. 337 (1969).

one-half of her means of support, plus the coercive effect of the freeze to force a settlement without contesting the creditor's claim in an ensuing hearing, were grave enough consequences to require notice and an opportunity to be heard in court in advance.

In *In re Gault*,[73] the state's considerable interest in preserving the informal and nonadversary nature of juvenile delinquency proceedings was subordinated to the needs of the threatened youngster who, were he found delinquent, could be incarcerated for years. Thus, the Court determined that the juvenile's right to procedural due process required specific notice of alleged particular misconduct, representation by counsel, adversary proceedings in court, and the availability of the privilege against self-incrimination—all as essential constitutional requirements to avoid "unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[74]

In *Jenkens v. McKeithen*,[75] a state criminal investigatory commission, without any prosecuting or formal sanctioning power but with authority to determine and publish its official opinion concerning the guilt of those charged with criminal misconduct, was required "to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations of those rights"[76] as well as the right to present his own position personally and through witnesses. The public stigma to a person under investigation was itself virtually enough to activate fair substantial procedural rights on behalf of the individual.[77]

These cases clearly suggest that the hardships to the individual which provide a partial measure of the degree of antecedent procedural due process to which he is entitled necessarily embrace not only the loss of his particular status immediately placed in jeopardy by the employer—such as his job—but also the probable impact on his opportunities elsewhere and the larger repercussions to his reputation as well.

In the teaching field, moreover, significant public interests allied with the teacher's interests further tip the balance in favor of

73. 387 U.S. 1 (1967).
74. *Id.* at 19-20.
75. 395 U.S. 411 (1969).
76. *Id.* at 429.
77. *Cf.* Hannah v. Larche, 363 U.S. 420 (1960).

pretermination procedural safeguards.[78] It is, in fact, a false view of the matter to suppose that the proper balance is merely one of weighing the needs of the individual against the needs of society—a balance which would nearly always assure from the outset that the individual's interest would weigh more lightly. While the Supreme Court has not yet given a separate constitutional status to academic freedom as such,[79] it has nevertheless repeatedly emphasized that the protection of individual teachers is critical to protect the *public* interest in teaching, research, investigation, publication, and education itself and that procedural due process for teachers is critical to the *public* stake in intellectual pluralism and the advancement of knowledge. As a consequence, the balance to be struck in apportioning requirements of procedural due process is not one of choosing between the needs and rights of the individual and those of the state, but between certain proper concerns of the state and certain very substantial public interests directly served by protecting those who teach from arbitrary decisions:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.

78. Mr. Justice Black's dissenting opinion in Barenblatt v. United States, 360 U.S. 109, 134 (1959), is especially instructive on this point. In *Barenblatt*, the majority sustained the conviction of a former graduate student who had refused to answer the questions of a congressional investigative committee concerning his present or past Communist affiliations, thereby violating a federal statute which made it a misdemeanor for a witness before such a committee to refuse to answer any question pertinent to the inquiry. Disclaiming the majority's balancing of the petitioner's freedom of speech against the government's right to "preserve itself," Mr. Justice Black asserted that "laws directly abridging First Amendment freedoms can[not] be justified by a congressional or judicial balancing process." *Id.* at 141. Moreover, he continued:

> But even assuming . . . that some balancing is proper . . . I feel that the Court after stating the test ignores it completely. . . . [I]t completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves . . . . This result . . . is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country's welfare. It is these interests of society, rather than Barenblatt's own right to silence, which . . . the Court should put on the balance against the demands of the Government . . . . *Id.* at 144.

79. *See* Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3; Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447 (1963). For other selected writing on academic freedom and tenure, *see* C. BYSE & L. JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION (1959); R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); R. KIRK, ACADEMIC FREEDOM (1955); R. MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753 (1955); *Symposium, Academic Freedom*, 28 LAW & CONTEMP. PROB. 429 *et seq.* (1963).

> That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[80]

We may therefore reasonably expect that the courts will acknowledge constitutionally compelled pretermination procedural rights of teachers with at least as much generosity as in the case of other public employees. A federal district court recently held that a 59-year-old university maintenance mechanic with fourteen years of service could not be dismissed for allegedly assaulting his supervisor and threatening others without "advance written notice [of specific charges] with the opportunity to respond either in writing or by an informal appearance,"[81] even though he was otherwise assured of an elaborate post-termination process of administrative review. One may readily suppose that pretermination notice and opportunity to be heard are at least equally required procedural requisites for professors at the same university. Similarly, since a federal court of appeals has recently held that a part-time attending physician may not be dismissed from a municipal hospital and stigmatized by an allegation of racism in the absence of a "full hearing" preceded by a reasonably precise and specific written statement of reasons for the proposed action,[82] termination of a teacher on alleged grounds similarly detrimental to his career and reputation may surely require at least the same extent of pretermination procedural due process.

Within the past year, several federal court decisions have fulfilled specific prophecies of a professorial right to pretermination procedural due process. They have done so, moreover, where the teachers were merely probationary appointees, early in their careers, on short-term contracts, and termination occurred simply from notice of nonrenewal furnished well in advance of the end of the term.

In *Roth v. Board of Regents*,[83] an assistant professor on a one-

80. Keyishian v. Board of Regents, 385 U.S. 580, 603 (1968) (emphasis added). *See also* Shelton v. Tucker, 364 U.S. 479, 487 (1961); Sweezy v. New Hampshire, 354 U.S. 234, 261-63 (1957); Wieman v. Updegraff, 344 U.S. 183, 196-98 (1952).

81. Olson v. Regents, 301 F. Supp. 1356, 1361 (D. Minn. 1969).

82. Birnbaum v. Trussell, 371 F.2d 672, 679 (2d Cir. 1966).

83. 310 F. Supp. 972 (W.D. Wis. 1970). *Accord*, Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

year contract, without tenure and in his first year of teaching, was notified by the state university president five months before the end of the academic year that his employment contract would not be renewed. In spite of the teacher's youth, his slight dependency on his job in the very first year, the absence of any published ground stigmatizing his reputation or character, the absence of evidence specifically indicating grave personal hardship in finding employment elsewhere, the fact that the contract was only for one year and was simply not renewed rather than being terminated during the term, the obvious needs of the institution to reserve discretion in judging the performance and excellence of probationary appointees before committing itself to tenure, and the institution's concern that the ordeal of elaborate procedures in mere nonrenewal cases might well force upon it a system of instant tenure with the cost to society of insulating mediocrity, the court concluded that pretermination procedural due process would require the following minimum rights:

1. A statement of the reasons why the university intends not to retain him, to be furnished upon his request;

2. Notice of a hearing at which he may respond to the stated reasons, to be provided upon his request:

> At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[84]

Within three weeks of *Roth*, a federal district court in Alabama held that several instructors given notice of nonrenewal well before the

84. *Id.* at 980. *But see* Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (opinion by Mr. Justice Brennan): "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis, if as a matter of internal policy it could stand to do so." *Id.* at 16. It is clear, moreover, that the courts will continue to allow the utmost latitude with respect to what constitutes a "not inappropriate" basis for failure to renew a probationary teacher. For instance, a reasonable desire to upgrade the quality of a given department by bringing in new faculty members with greater experience or credentials may be sufficient reason to terminate a probationary instructor upon fair notice of nonrenewal; it is not at all necessary that the decision of nonrenewal reflect a judgment that the instructor's performance of his teaching duties was inadequate in any respect. *See* Fluker v. Alabama State Bd. of Educ., ___ F. Supp. ___ (M.D. Ala. 1970). The tentative advances in the enlargement of pretermination procedural due process ought not be seen as a threat to institutional autonomy in the formulation of substantive standards.

end of the expiration of their second one-year contracts had "not been accorded procedural due process" and were entitled to "formal notice and specification of the charges and a hearing" before termination by nonrenewal could become effective.[85]

Almost simultaneously, the same Wisconsin federal district court that decided the *Roth* case also reinstated several tenured and non-tenured state university professors who were merely suspended with full pay, but excluded from the campus, because the institution regarded the teachers' continuing presence during highly disruptive campus events as an immediate danger. No notice was furnished to explain the way in which their presence allegedly contributed to the danger, however. Neither was any preliminary hearing provided prior to the suspension nor assured at the earliest practical time following such interim suspension, assuming that emergency circumstances made even a preliminary prior hearing impractical.[86]

More instructive than the fact that the courts in these cases specifically based the result on the teachers' constitutional right to procedural due process, or the fact that each represents an extension of the form of that due process beyond anything hitherto recognized in comparable circumstances in any other court, is the particular weighing process which was employed. In *Roth*, by far the most elaborate of the several cases, the court noted the following items which weighed in favor of the claim for notice, statement of reasons on request, and an opportunity for hearing:

1. Of 442 non-tenured teachers at the university, only four were given notice that contracts would not be offered them for 1969-70. Thus, the technical consideration that the employee was merely on a one-year contract and altogether lacked tenure simply was not conclusive of the real situation. Where customary practice indicates, as it did in *Roth*, that continued employment is ordinarily to be expected and nonrenewal is extraordinary (less than one percent of probationary employees did not receive contracts for the following year), the alleged need of the university employer for complete freedom of summary termination will be tested according to the reality of the situation rather than the legal form. The point for public school teachers on annual contract where, however, nonrenewal is equally exceptional is a valuable one. Indeed, where nonrenewal is

85. Fluker v. Alabama State Bd. of Educ., ___ F. Supp. ___ (M.D. Ala. 1970).
86. Laferty v. Carter, 310 F. Supp. 465 (W.D. Wis. 1970).

otherwise a relatively rare event, the administrative burden of furnishing a written statement of reasons and an opportunity to be heard on request cannot be onerous. Similarly, the very fact that nonrenewal may be *known* to be a rare event in the practices of the particular institution makes the act of nonrenewal in a given case a much more severe judgment than otherwise and one which is correspondingly more likely to affect a teacher's opportunities elsewhere as well. As a consequence one is entitled to a fuller measure of pretermination procedural due process.

2. The nonrenewal arose during political controversy on campus; indeed, the terminated teacher separately alleged that the decision not to renew was in retaliation for expressions he claimed were protected by the first amendment. The court was quick to discern that the theoretical constitutional protection of such a substantive right could readily be subverted in the absence of some minimal pretermination procedure: "Substantive constitutional protection for a university professor against non-retention is useless without procedural safeguards."[87] Thus, the prophylactic value of pretermination procedures under the circumstances was reasonably essential not merely to protect the teacher's economic and reputational interests but his substantive constitutional interests as well.

3. The job impact on the teacher in his prospects for relocating elsewhere was more substantial than in the *Cafeteria Workers* case, involving potential exclusion from many, not just one, places of employment; the public interest in his protection was greater, given the public benefits flowing from the protection of academic freedom; the custom of authoritarian operation of universities is nowhere near as firm or habitual as that of military installations; and the governmental reason for acting and withholding the basis so to act—national security—is without qualitative counterpart on behalf of the university.[88]

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87. 310 F. Supp. at 979-80.

88. The reasoning and basic pretermination procedural guarantees developed in *Roth* were applied four days later by the same court in behalf of two public school teachers whose annual contracts had not been renewed:

> [A] teacher in a public elementary or secondary school is entitled to a statement of the reasons for considering nonrenewal, a notice of a hearing at which the teacher can respond to the stated reasons, and the actual holding of such a hearing if the teacher appears at the specified time and place. A necessary corollary to this proposition—not stated in the opinion in *Roth*—is that the Board's ultimate decision may not rest on a

Moreover, substantial educational support is accruing for the emerging judicial view that the reasonable protection of institutional discretion to evaluate its probationary academic staff does not require the perpetuation of wholly summary and unreviewable powers of nonrenewal or termination. In the majority of colleges and universities, the authority to make these decisions is delegated in the first instance to the senior faculty of each department. Even so, the American Association of University Professors, which tends to draw a high proportion of its members from the senior faculty ranks and is very much influenced by considerations of quality control, has recently proposed procedural standards virtually equivalent to those set down in *Roth*.[89] As courts may appropriately defer in otherwise doubtful cases to the judgment of those closest to the firing line of education, professional recommendations such as these may themselves contribute to the formation of the constitutional norm.

EPILOGUE: IS IT A *Constitution* WHICH THE COURTS HAVE BEEN EXPOUNDING?

The formulation of degrees of pretermination procedural due process immediately responsive to the very particular facts of each case does, as previously suggested, accurately reflect the Supreme Court's method of constitutional analysis of such matters. Initially, moreover, it seems entirely proper that constitutional courts should lay heavy emphasis upon the special facts actually present in each case in determining what due process may require under the particular circumstances. The duty of the court is, after all, only to answer on the case that grants it the authority to speak at all. It is rather for legislatures or rule-making administrative agencies to provide justice by larger categories—justice wholesale—through the enactment of broad rules more or less inclusive of only roughly similar activity.

basis of which the teacher was never notified, nor may it rest on a basis to which the teacher had no fair opportunity to respond.

Gouge v. Joint School Dist. 310 F. Supp. 984 (W.D. Wis. 1970). *See also* Orr v. Trinter, Civ. Act. No. 70-163 (S.D. Ohio 1970); Domenicone v. School Comm., R.I. Comm'r of Educ. No. ___ (May 20, 1970). *Compare* Thaw v. Board of Pub. Instruction, No. 29488 (5th Cir. Sept. 22, 1970) (public school teacher on probation without expectancy of renewal and not alleging interference with a substantive constitutional right is not entitled to a pretermination hearing); Shirck v. Thomas, 315 F. Supp. 1124 (S.D. Ill. 1970); Drown v. Portsmouth School Dist., No. ___ (D.N.H. June 1) (unreported), *appeal pending*, No. 7667 (1st Cir. 1970).

89. *See Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, 56 A.A.U.P. BULL. 21 (1970).

Article III courts have a different and more limited function: to decide particular cases, avoiding broad and premature pronouncements beyond the exigencies of the case, and to secure constitutional justice at retail in response more exactly to each individual situation.

It is difficult to complain, therefore, that the very close contextual application of varying degrees of procedural due process illustrated by the Supreme Court's decisions in *Greene* and in *Cafeteria Workers* may in fact be a little too precious, that the technique tends to make intellectual sport of differences bordering on picayune detail, or that something about its basic style does not fit the construction of a constitution. Certainly the decisions do not represent an unprincipled brand of ad hoc constitutionalism. They are not at all ad hoc in the pejorative sense of representing whimsical changes of constitutional values, for there was in fact commendable continuity in the selection of values to be considered and in the relative weight assigned to each value. Rather, the decisions are ad hoc only in the desirable sense that particular differences of fact quite properly affected the merit of the petitioners' claims that each had been denied due process. The relevance and weight of the effect of termination upon the career of the employee, for instance, remained the same in measuring the requisite degree of pretermination procedural due process in the two cases; it was simply the lesser degree of hardship *in fact* which may have spelled the difference in the particular outcome of each case.

To suggest alternatively that it is unseemly for the Supreme Court serially to review a careful, albeit lengthy, list of cost-benefit due process considerations against the facts of each particular case, moreover, creates the risk of being identified as a critic who would favor a more wooden, careless, and anti-intellectual standard of constitutional review—a standard which ignores close factual distinctions of obvious importance to the more thoughtful mind, squeezing actually dissimilar situations into the pretense of sameness and summarily dispensing justice in a grand manner but with very little heed for the particular consequenees. Something more than an appreciation for the easier aesthetics of categorical constitutionalism is surely required to make the case that the Court's current technique suffers some inadequacy.

Nevertheless, something is disturbing about the current mode of procedural due process analysis which operates with such everlasting Frankfurterian fine-grained finesse that one wonders whether it is, in fact, a *constitution* which is being expounded. That the judge-made

common law of torts should yield different results on the basis of slight factual nuances, perceptively seen and wisely distinguished by a common law court, is probably not distressing to other judges, to lawyers, or to clients and laymen with the patience to understand. It is simply less believable, however, that even the vague and general written standards fixed in the Constitution either contemplate or require a technique of judicial needlepoint that turns the applied definition of "due process" upon the problematical ramifications of each discrete factual complex in which the claim is raised. While we do not blanch at the thought that a common law court may resolve an issue of proximate cause differently in two cases upon a close examination of the manner in which seven, eight, or nine elements were exactly involved in the particular accident, the assumption that the Constitution contemplates similarly molecular judicial activity in the administration of any of *its* provisions is more nearly incredible.

If in *Cafeteria Workers*, for instance, Rachael Brawner had not been swiftly placed in a nearly identical job through the effort of her union, should the Court have concluded that her summary discharge *was* lacking in procedural due process, requiring her reinstatement pending some fuller procedure? If in *Roth*, on the other hand, the university had been able to show that Roth had secured an equivalent position elsewhere by the time the case came on for argument, would it then be clear in retrospect that procedural due process had *not* been disregarded in the peremptory manner of his termination by the university? Or if the percentage of those nontenured faculty members routinely not renewed at the Oshkosh branch of the University of Wisconsin had been 20 percent, rather than 1 percent or 5, 12, or 18 percent, would the practice of summary nonrenewal be *un*offensive to the fourteenth amendment? To raise these annoying possibilities is not merely to ply a bothersome style of pedagogy which shows an overly sensitive appreciation for the possible limitations of a given case; it is, rather, to suggest the ground for acute discomfort that fundamental law, *constitutional* law, can credibly permit such nuances of slight distinction to affect the outcome of particular cases.

Several very high and eminently practical costs are connected, moreover, with a technique of constitutional interpretation which measures the application of a given clause according to the exquisite particularity of a large assortment of factual variables in each discrete case. Some of these are well illustrated by the difficulties which the Supreme Court encountered in employing this same style of

constitutional analysis to the constitutional right to counsel at the trial stage of a felony prosecution. In *Betts v. Brady*,[90] the Court did not hold that appointment of counsel was never required as a matter of due process but merely that the risks of error and prejudice were not sufficient on the facts of the particular case to make failure to appoint counsel fatal to the constitutionality of the trial. The outcome of other cases, the Court implied, could depend upon the specific involvement of many facts—the age of the accused, his experience with the criminal process, his degree of formal education, the complexity of the charge, the character of the legal issues, the gravity of the offense, and so forth.[91] The rigor of the analysis assumed an unrealistic degree of specialized learning in the nuances of due process on the part of state trial judges, however, and the same assumption was made concerning counsel responsible to insure the preparation of a record adequate for review by appellate courts. The Supreme Court itself was repeatedly petitioned to review a swelling number of cases, more-or-less alike, with each decision expending the scarce resources of the Court but yielding a result of extremely limited value beyond the resolution of the immediate case. A number of probably erroneous convictions remained untouched, moreover, due to the sheer incapacity of the system to examine them with the required degree of exacting scrutiny. The factorial complexity of the "proper" due process test may well have produced substantial instances of individual injustice.

To be sure, this byproduct of closely-reasoned, closely-limited due process decisions would be largely avoided were public bodies to shape their rules to be categorically overinclusive of the exact constitutional requirements declared by the Court. For instance, had each state responded to *Betts v. Brady* by providing that counsel would automatically be appointed upon request of an indigent involving criminal proceedings above the grade of petty offense, the generosity of the legislative response would have eased the problems of clients, lawyers, trial courts, appellate courts, and the Supreme Court. Thus it may be fair to suggest that the fault was not necessarily with the Court's style of particularity of constitutional analysis, but with the grudging character of legislative and administrative response. In similar fashion, congestion, confusion, and endless post-*Roth*

90. 316 U.S. 455 (1942).
91. *See id.* at 462, 472.

litigation may readily be avoided if universities would now move to provide a general rule that anyone whose contract is not renewed shall receive several months advance notice, a written statement in explanation upon request, and an adequate opportunity for informal review upon request prior to the effective date of the notice. The constitutionally overinclusive generosity of these new rules might provide a practical and desirable response to the problem.

However, recent history itself indicates that public bodies seldom respond in this fashion, least of all when they are hostile to the substance even of the courts' closely limited decisions. Disagreeing with the judicial decision and believing that it works an unrealistic hardship upon themselves and upon their view of the public interest, legislative and administrative agencies may predictably resist its gratuitous extension by any action of their own. Indeed, the technique of constitutional interpretation employed by the courts may itself contribute to this phenomenon; after all, didn't the Court itself say—or at least imply—that a slight difference in the facts would have made it plain that due process does not require, and that preponderant public interests might be disserved by, overly protective procedural standards that are expensive to society and inessential to fundamental fairness? If slight changes of factual circumstances are sufficient to make a constitutional difference, ought they not be equally important as a matter of sound administrative policy as well? In short, may it not be true that the technique of closely fact-limited constitutional analysis as distinct from a somewhat more categorical assessment itself invites the problems of closely-limited legislative and administrative response?

These conjectures aside, the original point remains: a constitutional description of procedural due process in which the requirement for each item of procedural regularity critically depends upon a piecemeal review of a vast assortment of adjudicative facts actually established in each individual case fundamentally detracts from the common need to know what the Constitution requires and from the common desire that the Constitution speak with greater majesty.

It is clear, moreover, that needlepoint analyses are not inherent in constitutional review. In *Gideon v. Wainwright*,[92] the Supreme Court abandoned the "truer"—more elaborate and specifically fact-

92. 372 U.S. 335 (1963).

oriented—approach it had attempted to pursue after *Betts v. Brady*, signalling that it would no longer presume to know what differences in age, education, and simplicity of issues might theoretically contribute to the constitutional requirement of appointed counsel. Rather, it weighed the issues on broader facts, categorically concluding with the blunter proposition that due process requires appointment of counsel as an indispensable step to the integrity of the proceedings. The decision in one sense, to be sure, rested on a less intellectual approach than that used in *Betts v. Brady*. Applied retrospectively, it may even have resulted in the reversal of some convictions where the absence of counsel was not in fact prejudicial. It may also have operated further to increase the cost of administering criminal justice, even as it left other issues still unclear[93] and failed by any means to insure fairness to the accused.[94] But it would be utterly unreasonable to insist that *Gideon* would constitute an end of the general matter; it was merely a new beginning.

The departure taken in *Gideon* does, moreover, warrant specific comment if only to note its essential divergence in judicial technique from the still continuing, multiple fact emphasis in due process cases including the administrative termination of public employees. The two lines of approach have gone along, side by side, with little notice taken of the gradual divergence in basic technique. As the federal courts gradually gain a greater fund of experience and confidence in the constitutional review of public employment cases, however, it is entirely possible that the need will be seen to resolve these cases too in broader terms and larger categories of similarity. On balance, it is a prospect that deserves encouragement.

93. For example, at what point in the process must counsel be offered? With what grade o offense?

94. Indifferent lawyers, attracted only by the small public fee in the case, would come forward to go through the motions of representation as required by *Gideon*.